



---

Spring 3-1-1953

**Domestic Relations-Jurisdiction Of Court Other Than Of Domicile  
Of Child To Redetermine Custody As Between Divorced Parents.  
[Oregon]**

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Family Law Commons](#)

---

**Recommended Citation**

*Domestic Relations-Jurisdiction Of Court Other Than Of Domicile Of Child To Redetermine Custody As Between Divorced Parents. [Oregon]*, 10 Wash. & Lee L. Rev. 52 (1953).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol10/iss1/7>

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

## CASE COMMENTS

## DAMAGES—POWER OF COURT TO ALLOW DEFENDANT TO AVOID NEW TRIAL BY PAYING PLAINTIFF MORE THAN INADEQUATE DAMAGES VERDICT. [California]

The practice of remittitur, under which courts have power to refuse defendant's request for a new trial on grounds of excessiveness of damages awarded if plaintiff will consent to waive a part of the award which the court regards as excessive,<sup>1</sup> has long been regarded as an established part of American law,<sup>2</sup> as used both in trial courts<sup>3</sup> and appellate courts.<sup>4</sup> Except in a very few jurisdictions,<sup>5</sup> the remittitur power does not authorize the court to decrease damage awards over plaintiff's protest or without plaintiff's knowledge.<sup>6</sup> The argument has been raised that remittitur amounts to a denial of defendant's right to trial by jury, in that he is not allowed to have a second trial in which a jury can determine the proper amount of damages.<sup>7</sup> How-

<sup>1</sup>See *Holbrook v. J. J. Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339 at 342 (1911) for an excellent explanation of the origin and meaning of remittitur; *McCormick, Damages* (1935) § 19; Note (1934) 44 Yale L. J. 318; 39 Am. Jur., New Trial § 210.

<sup>2</sup>Remittitur is approximately as old as new trials for excessive damages, Justice Story having recognized remittitur as a substitute for a new trial as early as 1822 in *Blunt v. Little*, the same case in which he observed that the practice of granting of new trials on the ground of excessive damages had only recently become established. *Blunt v. Little*, 3 Mason 102, 3 Fed. Cas. 760 (1822).

<sup>3</sup>*Arkansas Valley Land & Cattle Co., Ltd. v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854 (1889); *Davis v. Southern Pac. Co.*, 98 Cal. 13, 32 Pac. 646 (1893); *Duaine v. Gulf Refining Co.*, 285 Pa. 81, 131 Atl. 654 (1926) (practice of remittitur is to be encouraged); 25 C. J. S., Damages § 201.

<sup>4</sup>*Becker Bros. v. United States*, 7 F. (2d) 3 (C. C. A. 2d, 1925); *Sandy v. Lake Street Elevated R. Co.*, 235 Ill. 194, 85 N. E. 300 (1908); *Brohammer v. Lager*, 194 S. W. 1072, 1073 (Mo. 1917) ("The power of the circuit court or of the appellate court to order a remittitur of a verdict may be said to be now well established in our jurisprudence."); *Alabama Great Southern R. Co. v. Roberts*, 113 Tenn. 488, 82 S. W. 314 (1904); *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10 (1905); 15 Am. Jur., Damages § 205.

<sup>5</sup>The power to require remittitur without plaintiff's consent has been justified on the grounds that it is not an abuse of trial court's discretion if the reduction is reasonable. *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S. W. (2d) 650 (1941); *Ticknor v. Seattle-Renton Stage Line*, 139 Wash. 354, 247 Pac. 1 (1926).

<sup>6</sup>*Becker Bros. v. United States*, 7 F. (2d) 3 (C. C. A. 2d, 1925); *Rasmussen v. National Tea Co.*, 304 Ill. App. 353, 26 N. E. (2d) 523 (1940); *Simpson v. Miller*, 97 Mont. 328, 34 P. (2d) 528 (1934); 25 C. J. S., Damages § 201. See *Somerville v. New York, N. H. & H. R. Co.*, 285 Mass. 539, 189 N. E. 592, 593 (1934).

<sup>7</sup>*Arkansas Valley Land & Cattle Co., Ltd., v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854 (1889); *Davis v. Southern Pac. Co.*, 98 Cal. 13, 32 Pac. 646 (1893); *Alter v. Shearwood*, 114 Ohio St. 560, 151 N. E. 667 (1926); *Texas & New Orleans Ry. Co. v. Syfan*, 91 Tex. 562, 44 S. W. 1064 (1898).

ever, this contention has been met with the answer that even in deciding whether to grant or to deny a new trial "the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive,"<sup>8</sup> and since the same determination is exercised in remittitur, remittitur is analogous to the power of denying a new trial. On this basis, the constitutionality of the practice has been upheld overwhelmingly.<sup>9</sup> Moreover, it is argued that the defendant is not prejudiced by the operation of the remittitur power, because the judgment entered is for a less amount than a jury has already found against him.<sup>10</sup> Although remittitur is not as strongly upheld in cases in which the verdict has been for unliquidated damages, the power is generally held to extend even to such a situation.<sup>11</sup>

Additur would seem to be merely the converse manifestation of the same power of the courts to vary a clearly improper damages award, since there is clearly no difference in principle between the two practices.<sup>12</sup> Logically, if courts can refuse to grant a new trial for defendant if plaintiff will remit part of an excessively high award, they can refuse to grant a new trial for plaintiff if defendant will agree to add to an unreasonably low award.<sup>13</sup> Plaintiff may argue that he is denied a constitutional right to a second trial in which a jury could set a prop-

<sup>8</sup>Arkansas Valley Land & Cattle Co., Ltd. v. Mann, 130 U. S. 69, 73, 9 S. Ct. 458, 459, 32 L. ed. 854, 855. (1889).

<sup>9</sup>In Texas & New Orleans Ry. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064, 1066 (1898) the court compared remittitur's constitutionality with that of granting or denying a new trial and declared: "To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint." Also Arkansas Valley Land & Cattle Co., Ltd. v. Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854 (1889); Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646 (1893) (citing many decisions directly in point); Alter v. Shearwood, 114 Ohio St. 560, 151 N. E. 667 (1926).

<sup>10</sup>See Schiedt v. Dimick, 70 F. (2d) 558, 561 (C. C. A. 1st, 1934).

<sup>11</sup>Detzur v. B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948 (1899); Puutio v. Roman, 79 Mont. 226, 255 Pac. 730 (1927); Miles v. Fall River County, 50 S. D. 240, 209 N. W. 360 (1926).

<sup>12</sup>McCormick, Damages (1935) § 19.

<sup>13</sup>In Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243 (1917) the court after referring to the established validity of remittitur, observed: "It would seem to follow, by parity of reasoning, that when a new trial is granted because the damages are inadequate, the court may impose like terms, that is, terms to the effect that, if the defeated party will pay a certain sum greater than that awarded by the verdict, the rule will be discharged, subject, doubtless, to the power of an appellate court to vacate any such terms when they appear to be an abuse of discretion."

erly high award, but this contention seems no stronger than defendant's corresponding argument in a remittitur case.

However, in the recent California case of *Dorsey v. Barba*,<sup>14</sup> when the trial court attempted the use of additur to avoid needless future litigation, it suffered a reversal at the hands of the California Supreme Court. An action had been brought to recover for personal injuries sustained by plaintiffs in an automobile accident. The jury returned a verdict against defendant, operator of the automobile which collided with the plaintiff's automobile, and judgment was entered accordingly. Plaintiffs moved for a new trial on the ground that the verdicts were erroneous in failing to allow damages for pain and disfigurement caused by the injuries, but the trial court denied the motion on the condition that defendant consent to an increase of the amount of damages in a sum the court deemed proper. Defendant consenting, the modified judgment was entered. On plaintiffs' appeal the Supreme Court of California, with one Justice dissenting, held that in a case involving unliquidated damages, the denial of a new trial on condition of defendant's increasing the amount of an inadequate award abridged plaintiffs' right to trial by jury. It was reasoned that final determination of a fact by a jury was necessary to fulfill the constitutional right of jury trial, and that, though plaintiff was apparently benefited by the trial court's action, he would actually be prejudiced if a second jury would have given him a still larger award. The admission was made that "there may be no real distinction between the powers to increase and decrease an award of damages;"<sup>15</sup> but after observing that the power of remittitur was too firmly entrenched in the state to be questioned, the court declared that it was not bound to follow one practice merely because of the validity of the other.

The principal decision relied strongly upon the case of *Dimick v. Schiedt*,<sup>16</sup> in which the Supreme Court of the United States held that the allowance of additur deprived the plaintiff of his right to trial by jury guaranteed by the Seventh Amendment of the Federal Constitution,<sup>17</sup> because no such power as additur was included in English common law to which the Seventh Amendment referred. Moreover, in

---

<sup>14</sup>38 Cal. (2d) 350, 240 P. (2d) 604 (1952).

<sup>15</sup>*Dorsey v. Barba*, 38 Cal. (2d) 350, 240 P. (2d) 604, 609 (1952).

<sup>16</sup>293 U. S. 474, 55 S. Ct. 296, 79 L. ed. 603, 95 A. L. R. 1150 (1935).

<sup>17</sup>"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

distinguishing between remittitur and additur, the Supreme Court reasoned that in remittitur the defendant is not prejudiced because the judgment finally entered is for a less amount than a jury has already assessed against him, whereas in additur, although plaintiff would recover more than the amount of the jury's award, he is nevertheless denied the right to have a jury pass on the amount of his actual damages as provided for by English common law.<sup>18</sup> This reasoning seems illogical because in either case one party is required to submit to the judge's altering of the amount of damages set by the jury. The Supreme Court's argument implies that it is less important for the defendant to have a jury set the amount of damages he must pay than for plaintiff to have a jury set the amount of damages he will receive. This adverse federal decision does not necessarily apply to cases arising under normal state constitutional provisions, because the Seventh Amendment is not binding upon the states,<sup>19</sup> and the Supreme Court's interpretation of the Seventh Amendment guarantee is not controlling on the state courts on the issue of whether additur violates the common law rights guaranteed by state constitutional provisions concerning the right of jury trial.<sup>20</sup>

The decisions of state courts manifest three divergent opinions in regard to additur. A few courts appear to deny the validity of additur in any circumstances.<sup>21</sup> In Pennsylvania additur is not allowed, although remittitur is, because additur would give the option of the new trial to the negligent, losing defendant.<sup>22</sup> Though the court was passing on an unliquidated damages case when it laid down this rule, the reasoning employed would apply to liquidated damages cases also. In Missouri, invalid additur and valid remittitur are distinguished on the ground that in a remittitur case the modified judgment stands for a part of the actual jury verdict, while in an additur case it would

---

<sup>18</sup>*Dimick v. Schiedt*, 293 U. S. 474, 55 S. Ct. 296, 79 L. ed. 603, 95 A. L. R. 1150 (1935).

<sup>19</sup>*Walker v. Sauvient*, 92 U. S. 90, 23 L. ed. 678 (1875); *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436 (1877); *Penton v. State*, 194 Ark. 503, 109 S. W. (2d) 131 (1937); *Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N. E. (2d) 657 (1937).

<sup>20</sup>*Hawkins v. Bleakly*, 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1916); *Darden v. State*, 80 Ark. 295, 97 S. W. 449 (1906); *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861 (1908); *People v. Fisher*, 340 Ill. 250, 172 N. E. 722 (1930); *Frenckiewicz v. Dowd*, 291 Mass. 95, 195 N. E. 927 (1935).

<sup>21</sup>*Burdict v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 27 S. W. 453 (1894); *Lemon v. Campbell*, 136 Pa. Super. 370, 7 A. (2d) 643 (1939).

<sup>22</sup>*Lemon v. Campbell*, 136 Pa. Super. 370, 7 A. (2d) 643 (1939) (citing many cases in that jurisdiction).

add something never within the terms of the verdict.<sup>23</sup> In a great majority of the jurisdictions where the question has been decided, additur has been allowed to some extent.<sup>24</sup> In one group of courts the practice is recognized only in cases in which the damages are liquidated,<sup>25</sup> on the reasoning that it is within the trial court's discretion to raise an obviously inadequate verdict only where it is a clear case of error by the jury and where proper damages can be readily ascertained. In another group of courts additur is allowed in liquidated or unliquidated damages cases on reasoning similar to that generally employed to justify the remittitur practice.<sup>26</sup> For example, in *Markota v. East Ohio Gas Co.*, a judge of the Ohio Supreme Court, after stating his disregard for the *Dimick* case, demonstrated that the arguments for the constitutionality of remittitur could be equally applied to additur, and concluded that to uphold remittitur and strike down additur "necessarily leads to the absurd conclusion that a plaintiff has a greater right to a jury verdict, determining the amount of his damages, than does a defendant."<sup>27</sup>

---

<sup>23</sup>See *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 27 S. W. 453, 458 (1894) (citing many cases in that jurisdiction); *King v. Kansas City Life Ins. Co.*, 350 Mo. 75, 164 S. W. (2d) 458 (1942).

<sup>24</sup>*Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935); *Rudnick v. Jacobs*, 9 Harrison 169, 197 Atl. 381 (Del. 1938); *E. Tris Napier Co. v. Gloss*, 150 Ga. 561, 104 S. E. 230 (1920); *Carr v. Miner*, 42 Ill. 179 (1866); *Smith v. Ellyson*, 137 Iowa 391, 115 N. W. 40 (1908); *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N. E. 593 (1923); *Ford v. Minneapolis St. Ry. Co.*, 98 Minn. 96, 107 N. W. 817 (1906); *Gaffney v. Illingsworth*, 90 N. J. L. 490, 101 Atl. 243 (1917); *Steel v. Johnson*, 9 Wash. (2d) 347, 115 P. (2d) 145 (1941) (statutory); *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N. W. 795 (1915).

<sup>25</sup>*Kraas v. American Bakeries Co.*, 231 Ala. 278, 164 So. 565 (1935); *Rudnick v. Jacobs*, 9 Harrison 169, 197 Atl. 381 (Del. 1938); *E. Tris Napier Co. v. Gloss*, 150 Ga. 561, 104 S. E. 230 (1920); *Carr v. Miner*, 42 Ill. 179 (1866); *Smith v. Ellyson*, 137 Iowa 391, 115 N. W. 40 (1908); *Clark v. Henshaw Motor Co.*, 246 Mass. 386, 140 N. E. 593 (1923).

<sup>26</sup>*Gaffney v. Illingsworth*, 90 N. J. L. 490, 101 Atl. 243 (1917); *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284, 151 N. W. 795 (1915). See *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 97 N. E. (2d) 13, 17-19 (1951). In California it was held, as late as 1941, that additur was permissible, that it was established law in that state, and that there was no essential difference to be found between additur and remittitur. *Blackmore v. Brennan*, 43 Cal. App. (2d) 280, 110 P. (2d) 723 (1941). In the principal case, the court purported to distinguish this decision. *Dorsey v. Barba*, 38 Cal. (2d) 350, 240 P. (2d) 604 at 608, n.2 (1952). In Washington, additur is provided for by statute where the amount of damages fixed by the jury must have been the result of passion or prejudice. *Steel v. Johnson*, 9 Wash. (2d) 347, 115 P. (2d) 145 (1941). Minnesota adds the reasoning that the trial court may in proper use of its discretion do justice by use of additur where the jury has failed to do it. *Ford v. Minneapolis St. Ry. Co.*, 98 Minn. 96, 107 N. W. 817 (1906).

<sup>27</sup>*Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 97 N. E. (2d) 13, 19 (1951).

In ignoring the sound arguments and the majority authority supporting additur, the principal case perhaps confirms the opinion stated in 1947 that the "authority of the Supreme Court . . . has had at least a discouraging effect on attempts to impose additur on a plaintiff claiming unliquidated damages"<sup>28</sup>—this, despite the fact that the *Dimick* case was a five to four decision in which a convincing dissent was entered by Chief Justice Hughes and Justices Stone, Brandeis, and Cardozo.<sup>29</sup>

The dissent's view in the principal case is preferable because of the logical similarity between additur and remittitur, and because it would give affect to the "generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury . . ." <sup>30</sup> It seems sound to regard additur as a further logical step in the growth of the law relating to the correction of erroneous damages verdicts, and there is no merit in distinguishing between the validity of remittitur and additur merely because one became established in the law earlier than the other.

RICHARD A. DENNY, JR.

DOMESTIC RELATIONS—JURISDICTION OF COURT OTHER THAN OF DOMICILE OF CHILD TO REDETERMINE CUSTODY AS BETWEEN DIVORCED PARENTS. [Oregon]

The complexities of the problem of what court has jurisdiction to determine custody of children, subsequent to a divorce decree which has initially awarded custody to one of the parents, are dramatized by the recent Oregon case of *Lorenz v. Royer*.<sup>1</sup> The parents and minor children had all been domiciled in Indiana at the time of the divorce proceedings there. The wife was awarded custody by the Indiana court,

<sup>28</sup>Note (1947) 61 Harv. L. Rev. 113, 115.

<sup>29</sup>*Dimick v. Schiedt*, 293 U. S. 474, 488, 55 S. Ct. 296, 301, 79 L. ed. 603, 612, 95 A. L. R. 1150, 1158 (1935).

<sup>30</sup>Dissent in *Dimick v. Schiedt*, 293 U. S. 474, 490, 55 S. Ct. 296, 302, 79 L. ed. 603, 613, 95 A. L. R. 1150, 1159 (1935). See dissent of Justice Traynor in *Dorsey v. Barba*, 38 Cal. (2d) 350, 240 P. (2d) 604, 615 (1952): "[Remittitur] has been utilized in innumerable cases to avoid, for both the parties and the courts, the expense and delay of repetitious litigation. In the field of inadequate verdicts, additur can be of similar value." And at 613: "By their motion for new trial . . . plaintiffs in effect appealed to the conscience of the court. They cannot complain that the court, viewing all the equities of the case, has selected a more expeditious and less costly method of remedying the alleged injustice of the verdict."

<sup>1</sup>241 P. (2d) 142 (Ore. 1952).

but a few months after the divorce, while the children were visiting their paternal grandparents in Illinois, the husband took them to Oregon, his new domicile, without the wife's consent. This removal of the children occurred in 1945, and after subsequent marriages by both parties, the wife in 1950 instituted habeas corpus proceedings in the Oregon courts to regain custody of the children. Plaintiff had learned three years earlier where the children were, but she was not then financially able to attempt to secure their return. The trial court awarded custody to the father on the finding that the welfare of the children would thereby be best served, but the Supreme Court of Oregon reversed that ruling, declaring that the Oregon courts had no jurisdiction to award custody of the children. The Supreme Court asserted that the question of jurisdiction must here be regarded as paramount even to the welfare of the children,<sup>2</sup> and it reasoned that the jurisdiction of the divorce court over the custody of minor children, as the court of the domicile of the children, was a continuing jurisdiction, binding on the parties until modified or set aside. The court further stated that the trial court's decree constituted an improper change of the children's domicile, because where parents are separated by judicial decree or divorce, the minor's domicile follows that of the parent to whose custody it has been awarded; and the children could not change that domicile themselves, nor could the change be accomplished by anyone else other than the custodian-parent. It was admitted in dictum that should the children become domiciled in another state by action of the custodian, the decree of a court of the first state regarding custody of the children would not be binding.<sup>3</sup> However, since the jurisdiction of the court of domicile was deemed exclusive, the Oregon court concluded that the decree of the Indiana court must be given full faith and credit under the United States Constitution and recognized as a final adjudication until modified by that court or until the children ceased to have their domicile in that state.<sup>4</sup>

---

<sup>2</sup>"On the trial of this case, as shown by the record, the able trial judge assumed that this proceeding was equitable in nature, and that the paramount issue before the court was the welfare of these children as is usually the case in such proceedings. . . . However, the remedy by habeas corpus is available to test the legality of the custody of a child in certain circumstances where the question of jurisdiction, rather than the welfare of the child, is of primary importance." 241 P. (2d) 142, 147 (Ore. 1952).

<sup>3</sup>See *Lorenz v. Royer*, 241 P. (2d) 142, 150 (Ore. 1952).

<sup>4</sup>Cases following the view of the principal case are numerous and represent the weight of judicial authority: *Dorman v. Friendly*, 146 Fla. 732, 1 S. (2d) 734 (1941); *McDonald v. Short*, 190 Ind. 338, 130 N. E. 536 (1921); *Jones v. McCloud*,



Apart from matters of legal theory, practical considerations such as are reflected in the principal case raise doubt as to the desirability of accepting as an inexorable rule the principle of exclusive jurisdiction in the court of the children's domicile. Here two children, ages two and four, were taken to live in Oregon with their father, and after all connection with their former home had been severed for nearly seven years, the Oregon court deems the courts of that state powerless even to look into the question of custody. Therefore, the children, now aged about eight and ten, will return to their mother whom they no longer know, although they have been well established in the home of their father and step-mother who are conceded to be people of good character and of sufficient means to afford the children an excellent home.<sup>5</sup> As a result of the decision, the ties of friendship, habits of life and developing mental attitudes of young children must be abruptly interrupted, and a new pattern of existence in strange surroundings must be established for them.

Recognizing that such hardships may frequently arise from the operation of the rule that the original forum alone can modify the original award, a number of courts have taken the position that even where there has been no subsequent change of domicile, the state of residence has sufficient interest in the children's welfare to have authority to modify custody arrangements as circumstances may require.<sup>6</sup> Under this view the welfare of the children becomes controlling, and it seems clear to them that this consideration should be paramount to the fictional concept of the children's domicile.<sup>7</sup> Certainly the courts of residency ordinarily will have a more immediate source of knowledge of current local conditions to draw upon, and such courts may well be better equipped to decide questions involving the interests of the child in subsequent litigation.<sup>8</sup> Judge Cardozo, speaking on a parallel issue

---

<sup>5</sup>19 Wash. (2d) 314, 142 P. (2d) 397 (1943). See also *Minor*, Conflict of Laws (1901) § 96; Restatement, Conflict of Laws (1934) § 117, 148; Beale, *The Status of the Child and the Conflict of Laws* (1933) 1 U. of Chi. L. Rev. 13, 22.

<sup>6</sup>*Lorenz v. Royer*, 241 P. (2d) 142 at 146 (Ore. 1952).

<sup>7</sup>*Helton v. Crawley*, 241 Iowa 296, 41 N. W. (2d) 60 at 73 (1950); *Sheehy v. Sheehy*, 88 N. H. 223, 186 Atl. 1, 107 A. L. R. 635 (1936). See also 171 Am. Jur., *Divorce and Separation* § 688; Stumberg, *The Status of Children in the Conflict of Laws* (1940) 8 U. of Chi. L. Rev. 42.

<sup>8</sup>*Goldsmith v. Salkey*, 131 Tex. 139, 112 S. W. (2d) 165 (1938).

<sup>9</sup>*Sampsell v. Superior Court of Los Angeles County*, 32 Cal. (2d) 763, 197 P. (2d) 739 (1948); *Sheehy v. Sheehy*, 88 N. H. 223, 186 Atl. 1 (1936); *Kenner v. Kenner*, 139 Tenn. 211 201 S. W. 779 (1918). See also Stumberg, *Conflict of Laws* (2d ed. 1951) 327. Cf. *State v. Scott*, 30 N. H. 274 (1855) on the issue of the field of inquiry as to desires of children. Included within this field are the desires of the child and the weight to be given to such desires according to age, experience, etc. The

for the New York court, has declared: "The jurisdiction of a state to regulate the custody of the infants found within its territory does not depend upon domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless . . . For this, the residence of the child suffices, though the domicile be elsewhere."<sup>9</sup>

Some courts agree that the welfare of the children may be best protected in the place of actual living, but contend that there is no reason why the other states with interests in the children's status should not also have jurisdiction over custody controversies.<sup>10</sup> Such concurrent jurisdiction would satisfy the theory applied in the principal case that the court of domicile has a continuing jurisdiction which is never lost. While it is obvious that concurrent jurisdiction might lead to conflicting decrees regarding the same children, a California court has sought to discount this danger, observing that: "The courts of one state may determine that the other state has a more substantial interest in the child and leave the matter to be settled there. On the other hand, if the jurisdiction of one state has been exercised over the child, there is no reason why, if the welfare of the particular child is a matter of real concern to the courts of another state, those courts may not also have jurisdiction, which might be exercised in the interest of the child . . ."<sup>11</sup> Such solution to the problem is unrealistic if it fails to consider the conflicting results that might arise from decrees of sister courts. One could imagine a possible decision of the Oregon courts in the *Lorenz* case awarding custody to the father, and the Indiana court's subsequent desire to enforce its original decree awarding custody to the mother; for if the children were living in Oregon and domiciled in Indiana, the courts of both states having jurisdiction over

---

child's views may be determined by personal inquiry, private or public, or through a committee appointed by the court. The court of the state of residence with its knowledge of local conditions and with the closest contact with the needed witnesses would seem to be best equipped to arrive at a proper result in reference to practice of employing investigators also. See *Brown v. Jewell*, 86 N. H. 190, 191, 165 Atl. 713, 714 (1933); Note (1940) 53 Harv. L. Rev. 1024, as to powers conferred by statute and extent of equity court's jurisdiction without statute.

<sup>9</sup>*Finlay v. Finlay*, 240 N. Y. 429, 431, 148 N. E. 624, 625 (1925). In this case a non-resident husband sought a decree in the New York courts granting custody and control for fixed periods of his two sons. There had been no demand for divorce or separation between the parents, and the decree was denied on procedural grounds, the court saying that except when adjudged as incident to divorce or separation, custody is to be regulated by habeas corpus or petition to the chancellor. Here the prayer was dismissed without prejudice to proceed by proper remedy.

<sup>10</sup>*Goldsmith v. Salkey*, 131 Tex. 139, 112 S. W. (2d) 165 (1938).

<sup>11</sup>*Sampsel v. Superior Court of Los Angeles County*, 32 Cal. (2d) 763, 197 P. (2d) 739, 750 (1948).

their custody, determinations might be so conflicting as to defeat the interests of the children as well as completely to confuse the respective courts and put them in hopeless competition with each other.

Other shortcomings of the residence theory may have discouraged the Oregon court from taking jurisdiction. As apparently happened in the principal case, the non-custodian parent may abduct the children from the state of their domicile and establish residence elsewhere. If the accomplished fact of new residence is all that is necessary to make possible a redetermination of the custody issue, the disappointed parent might frequently be tempted to violate the decree of the divorce court in order to get the children settled in another state.<sup>12</sup> And the more cleverly he could conceal the location of the children, the greater the chance he would have to maintain such duration of residence in the new state as might persuade its courts to decide that the children should not be moved back to their earlier domicile. Certainly such wrongful action should be weighed in the determination of whether the parent seeking to change the legal custody is of sufficiently good character to rear the children. However, other sanctions than refusal to reaward custody are available to deter abductions of the children. The divorce court could hold child-stealers in contempt,<sup>13</sup> and some statutes and judicial decisions have labelled the parent-abductors kidnapers subject to criminal punishment.<sup>14</sup> It may be doubted that the danger of encouraging abductions in some instances is sufficiently acute to justify an absolute denial in all cases of the right of the courts of the state of the present residence to determine custody.<sup>15</sup>

The effect of the Full Faith and Credit Clause of the Federal Constitution and the legal concept of *res judicata* is frequently inserted into these controversies. *Res judicata* has to do with the finality of a decision within the same jurisdiction,<sup>16</sup> and the Full Faith and Credit Clause requires the recognition of the judgment in a sister state, thus affording it the same effect outside the state of its issuance as *res judicata* gives it within that state.<sup>17</sup> Those courts, like Oregon's, which follow the domicile rule contend that if the original decree fixing the custody was rendered according to the laws of the state, by a court having competent jurisdiction, such judgment must be given full faith

---

<sup>12</sup>See Note (1940) 53 Harv. L. Rev. 1024, 1028.

<sup>13</sup>Burns v. Shapley, 16 Ala. App. 297, 77 So. 447 (1917).

<sup>14</sup>Lee v. People, 53 Colo. 507, 127 Pac. 1023 (1912).

<sup>15</sup>Larson v. Larson, 190 Minn. 489, 252 N. W. 329 (1934); Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598 (1920).

<sup>16</sup>50 C. J. S. 141.

<sup>17</sup>50 C. J. S. 492, 493.

and credit in other states as long as circumstances remain substantially the same.<sup>18</sup> It is mandatory to follow the extrastate judgment as a constitutional requirement. Those courts following the residence theory hold that although the judgment is *res judicata* in the state where rendered, it is not necessarily binding on the courts of a sister state where the children may be subsequently found.<sup>19</sup> These latter courts contend the concept of *res judicata* applies only to the judgment on facts then before the court;<sup>20</sup> new facts arising subsequent to a judgment can reopen litigation concerning the decree, for custody decrees are not final,<sup>21</sup> except as to matters before the court when the decree was entered.<sup>22</sup> Still other courts embracing this theory have said the rights are purely personal and so are not entitled to full faith and credit.<sup>23</sup>

The United States Supreme Court expressed its opinion on this aspect of the problem in its 1947 decision of *Halvey v. Halvey*.<sup>24</sup> The Florida court had granted Mrs. Halvey a divorce and permanent custody of the child, and she brought habeas corpus proceedings in the New York Supreme Court challenging the legality of her former husband's detention of the child. The New York court ordered that the child's custody remain with the mother, but modified the Florida decree by giving the father rights to visit and to keep the child during stipulated periods each year. The Appellate Division and Court of Appeals affirmed,<sup>25</sup> and the Supreme Court of the United States took the case on the constitutional issue of full faith and credit. Justice Douglas, writing for the Court, declared that "the custody decree was not irrevocable and unchangeable,"<sup>26</sup> and that, "So far as the Full

<sup>18</sup>*Morrill v. Morrill*, 83 Conn. 479, 77 Atl. 1 (1910); *Wilson v. Elliott*, 96 Tex. 472, 73 S. W. 946 (1903); *Mullins v. Mullins*, 26 Wash. (2d) 419, 174 P. (2d) 790 (1946).

<sup>19</sup>*Seeley v. Seeley*, 30 App. Cas. (D. C.) 191, 12 Ann. Cas. 1058 (1907); *Anthony v. Tarpley*, 45 Cal. App. 72, 187 Pac. 779 (1920); *Avery v. Avery*, 33 Kan. 1, 5 Pac. 418 (1885).

<sup>20</sup>*Halvey v. Halvey*, 330 U. S. 610, 67 S. Ct. 903, 91 L. ed. 1133 (1947).

<sup>21</sup>*Ashley v. Wendover*, 113 Ore. 43, 231 Pac. 153 (1924).

<sup>22</sup>Note (1934) 29 Ill. L. Rev. 104, 107.

<sup>23</sup>*Avery v. Avery*, 33 Kan. 1, 5 Pac. 418, 422 (1885). But see *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26 (1938), where a Virginia court's finding on residence and jurisdiction status concerning a marital domicile was enforceable in courts of the District of Columbia.

<sup>24</sup>330 U. S. 610, 67 S. Ct. 903, 91 L. ed. 1133 (1947).

<sup>25</sup>The Supreme Court, Appellate Division, affirmed without opinion, *Ex parte Halvey*, 269 App. Div. 1019, 59 N. Y. S. (2d) 396 (1945). The Court of Appeals affirmed in a *per curiam* opinion, *Halvey v. Halvey*, 295 N. Y. 836, 66 N. E. (2d) 851 (1946).

<sup>26</sup>*Halvey v. Halvey*, 330 U. S. 610, 612, 67 S. Ct. 903, 905, 91 L. ed. 1133, 1135 (1947).

Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do."<sup>27</sup> Custody decrees of Florida courts are not *res judicata* either in Florida or elsewhere, except as to the facts before the court at the time of the judgment, and "it is clear that the State of the forum has a least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."<sup>28</sup> Justice Frankfurter in a concurring opinion stated: "The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities . . . [In] judgments affecting domestic relations technical questions of 'finality' as to [custody] seem to me irrelevant in deciding the respect to be accorded by a State to a valid prior judgment touching [custody] rendered by another State."<sup>29</sup> Justice Rutledge, also concurring, implied that the controlling consideration was the best interests of the children even in the formulation of federal policies of full faith and credit.<sup>30</sup>

Thus, in weighing the practical advantages of the residence doctrine against the legal theory of the domicile rule, it must be recognized that the cases dealing with the extraterritorial effect of the custody provision of a divorce decree are in conflict, and no rigid standard exists as to the degree of independence that may be exercised in modifying a foreign custody decree. Though no one policy can be laid down to satisfy every set of facts, practical solutions which benefit the child should not be subordinated to the technicalities of the domicile doctrine. If valid changes of circumstances arise in the state of subsequent residence, the courts of such state may be the better forum to rule on the interests of the child. If circumstances do not warrant modification by a sister state, the original decree should be binding. So, too, though sufficient changes of circumstances may exist, if the residence theory would lead to disobedience of court orders and flagrant law violation, the state of rendition should be recognized as the sole state of jurisdiction. If the husband is allowed to invoke the jurisdiction of the new state by abducting the children and establishing a new residence, then it would follow that the wife, by re-abducting the children, and taking them to yet another state, could place the

---

<sup>27</sup>330 U. S. 610, 614, 67 S. Ct. 903, 906, 91 L. ed. 1133, 1136 (1947).

<sup>28</sup>330 U. S. 610, 615, 67 S. Ct. 903, 906, 91 L. ed. 1133, 1136 (1947).

<sup>29</sup>330 U. S. 610, 616, 67 S. Ct. 903, 907, 91 L. ed. 1133, 1137 (1947).

<sup>30</sup>330 U. S. 610, 620, 67 S. Ct. 903, 909, 91 L. ed. 1133, 1139 (1947). Justice Rutledge stated: "I agree that technical notions of finality applied generally to other types of judgment for such purposes have no proper strict applications to these decrees."

controversy under the jurisdiction of a court more sympathetic to her. Though the welfare of the children is a primary concern in custody cases, the rights of the custodian-parent must also be safeguarded against infringement by the unlawful acts of the other parent. Where the removal to another state was contrary to an order of the original state, the policy against disregarding judicial decrees should prevent the subsequent state's taking action except to enforce the original decree, at least to the extent the original forum itself would enforce it.<sup>31</sup> Such considerations may well explain the Oregon court's refusal to recognize the need for re-examining the original custody award in the *Lorenz* decision.

D. HENRY NORTHINGTON

INSURANCE—LIABILITY OF INSURANCE COMPANY FOR FAILURE TO ACT PROMPTLY ON APPLICATION FOR LIFE INSURANCE POLICY. [North Dakota]

Since an offer creates no duty of acceptance,<sup>1</sup> an offeree, in failing to act on the offer made to him, generally incurs no liability for any loss which the offeror may suffer as a result of not obtaining the benefits of the desired contract. However, because the insurance business is so closely related to the public interest, the failure of an insurance company to act on an application for a policy by either issuing the policy or rejecting the application within a reasonable time gives rise to special considerations which may justify holding the company liable in damages where the loss sought to be insured against occurred after a reasonable time had elapsed.<sup>2</sup>

Such a situation confronted the Supreme Court of North Dakota in the recent case of *Mann v. Policyholders' National Life Ins. Co.*<sup>3</sup> On April 4, 1949, plaintiff's husband had applied for a \$2,500 life insurance policy and received a receipt for the first premium; but at

---

<sup>31</sup>See Note (1940) 53 Harv. L. Rev. 1024, 1027.

<sup>1</sup>1 Corbin, Contracts (1950) 21.

<sup>2</sup>It has been suggested that where the applicant does not pay a premium or give a binding promise to pay a premium when he makes the application, he does not make an offer but only invites the insurance company to make an offer. Patterson, Essentials of Insurance Law (1935) 53. Under this view plaintiff's position is weakened. 12 Am. Jur., Contracts § 28. The discussion in this comment will be directed, therefore, to the case where the applicant did pay the first premium when he applied for the policy.

<sup>3</sup>51 N. W. (2d) 853 (N. D. 1952).

the time of his death, three months later, the company had neither issued the policy nor notified him of the acceptance or rejection of his application. Plaintiff brought an action for \$2,500 damages, alleging that defendant company had a duty either to accept or reject the application within a reasonable time and was negligent in not doing so, thereby becoming liable for the amount of the policy when the applicant died. Defendant asserted that there could be no liability for negligence in failing to act upon an application for insurance because such a liability would deny defendant the right to contract, in violation of the State and Federal Constitutions. Furthermore, a clause in the application stipulated that no liability would accrue unless and until there was an acceptance of the application and a delivery of the policy by defendant.<sup>4</sup>

Plaintiff had obtained a judgment for the full amount sought in the trial court, and on appeal the Supreme Court affirmed, predicating defendant's liability on the fact that the insurance business is affected with a public interest and is therefore subject to reasonable regulation by the state. Also, defendant did business under a franchise granted by the state, which made the company in the conduct of its business subject to rules laid down by the legislature as interpreted by the Supreme Court.<sup>5</sup> The duty to act promptly was held not to impair the right of defendant to contract or not as it chose; it only required the company to do one or the other within a reasonable time. The provision in the application that no liability would be incurred by the insurer until it delivered the policy to the applicant was said to affect only any alleged contract liability, and since this action was based on liability in tort, the provision had no effect.

A review of the case authority on this problem reveals a wide divergence of views among different courts, with a majority of the courts which have considered the problem having favored liability,<sup>6</sup> and a

---

<sup>4</sup>Whether the law of the state where the application was made or the law of the state where the insurer's home office was located was controlling, and whether the applicant was contributorily negligent, were collateral issues in the case, decided in favor of plaintiff.

<sup>5</sup>But there was no statute involved. The court was therefore not interpreting; it was making a rule itself.

<sup>6</sup>Alabama, Colorado, Idaho, Iowa, Kansas, Nebraska, North Carolina, North Dakota, Oklahoma, Washington, and Wisconsin have favored liability. *Lewis v. Brotherhood of Locomotive Firemen and Enginemen*, 220 Ala. 270, 124 So. 889 (1929); *De Ford v. New York Life Ins. Co.*, 75 Colo. 146, 224 Pac. 1049 (1924); *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 174 Pac. 1009 (1918); *Duffy v. Bankers' Life Ass'n*, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913); *Cloyd v. Republic Mut. Fire Ins. Co.*, 137 Kan. 869, 22 P. (2d) 431 (1933); *Strand v. Bankers' Life Ins.*

minority having set forth a contrary view in some very emphatic opinions.<sup>7</sup>

Although in these cases the policies which would have established a contractual relation have not been issued, some courts have based liability on a contract theory. The idea that silence beyond a reasonable time constitutes acceptance has been employed as a means of placing a contractual duty on the insurance company,<sup>8</sup> although the general rule is clearly that where an offeree neither accepts nor rejects the offer within a reasonable time the offer is considered to have been declined.<sup>9</sup> The rationale for the general rule is that the offeree has not in fact consented, and there is normally no understanding between the insurer and an applicant for insurance to the effect that silence will indicate acceptance.<sup>10</sup> The fact that the offer in the insurance cases is solicited by the offeree detracts somewhat from the applicability of the general rule, which is partially designed to protect people against unsolicited offers;<sup>11</sup> but this fact alone does not justify the creation of

Co., 115 Neb. 357, 213 N. W. 349 (1927); *Fox v. Volunteer State Life Ins. Co.*, 185 N. C. 121, 116 S. E. 266 (1923); *Bekken v. Equitable Life Assur. Soc.*, 70 N. D. 122, 293 N. W. 200 (1940); *State Farm Life Ins. Co. v. Barbe*, 187 Okla. 22, 100 P. (2d) 866 (1940); *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 378, 232 Pac. 346 (1925); *Kukuska v. Home Mut. Hail-Tornado Ins. Co.*, 204 Wis. 166, 235 N. W. 403 (1931). But cf. *Moon v. Central States Fire Ins. Co.*, 138 Kan. 83, 23 P. (2d) 444 (1933), where liability was denied because applicant had frequent opportunities to inquire about the application but did not do so.

<sup>7</sup>*Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 (W. D. Mo. 1933); *American Ins. Co. v. School Dist.*, 182 Ark. 158, 30 S. W. (2d) 217 (1930); *Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 165 Atl. 686 (1933); *Metropolitan Life Ins. Co. v. Brady*, 95 Ind. App. 564, 174 N. E. 99 (1930); *Savage v. Prudential Ins. Co.*, 154 Miss. 89, 121 So. 487 (1929); *Zayc v. John Hancock Mut. Life Ins. Co.*, 338 Pa. 426, 13 A. (2d) 34 (1940); *Thornton v. Nat. Council Junior Order United American Mechanics*, 110 W. Va. 412, 158 S. E. 507 (1931). Illinois, Minnesota, and Texas also deny liability. *Miller v. Illinois Life Ins. Co.*, 255 Ill. App. 586 (1930); *Tjepkes v. State Farmers' Mut. Ins. Co.*, 193 Minn. 505, 259 N. W. 2 (1935); *American Life Ins. Co. v. Nabors*, 124 Tex. Civ. App. 221, 76 S. W. (2d) 497 (1934).

<sup>8</sup>*Cloyd v. Republic Mut. Fire Ins. Co.*, 137 Kan. 869, 22 P. (2d) 431 (1933); *Preferred Accident Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986 (1899).

<sup>9</sup>1 Williston, *Contracts* (Rev. ed. 1936) §§ 50A, 54; 17 C. J. S., *Contracts* § 51b; 12 Am. Jur., *Contracts* § 40. The weight of authority is clearly contrary to the view that silence beyond a reasonable time amounts to an acceptance. *Metropolitan Life Ins. Co. v. Brady*, 95 Ind. App. 564, 174 N. E. 99 (1930); *Ross v. New York Life Ins. Co.*, 124 N. C. 395, 32 S. E. 733 (1899); *Royal Ins. Co. v. Beatty*, 118 Pa. St. 6, 12 Atl. 607 (1888); *Insurance Co. v. Johnson*, 23 Pa. 72 (1854); *Brink v. Merchants' & Farmers' United Mut. Ins. Ass'n*, 17 S. D. 235, 95 N. W. 929 (1903); *Raymond v. National Life Ins. Co.*, 40 Wyo. 1, 273 Pac. 667 (1929).

<sup>10</sup>*Savage v. Prudential Ins. Co.*, 154 Miss. 89, 121 So. 487 (1929); *Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N. W. 349 (1927); *Brink v. Merchants' & Farmers' United Mut. Ins. Ass'n*, 17 S. D. 235, 95 N. W. 929 (1903).

<sup>11</sup>*Patterson, Essentials of Insurance Law* (1935) 55.



a completely fictitious acceptance upon which to base a contractual obligation. Certainly a provision in the application such as was included in the *Mann* case, that no liability will accrue until the application is accepted and the policy delivered to the applicant,<sup>12</sup> ought to make this theory inappropriate.<sup>13</sup>

Where the applicant paid a premium when he made application for the policy, many courts have seen that fact as supporting liability—i.e., they have felt that an applicant should not have to pay over a premium for insurance protection unless he is in fact insured.<sup>14</sup> But the applicant paid the premium in advance knowing that it would not buy insurance for the current period unless the company accepted the application. None of the courts make clear, and it is not seen why the fact that the applicant paid in advance rather than later should make the company liable although the application was not accepted, when the understanding between the parties was contrary.<sup>15</sup>

Some of the courts have based the liability on a theory of implied

---

<sup>12</sup>Applications for insurance now generally contain this provision. Prosser, *Delay in Acting on an Application for Insurance* (1935) 3 U. of Chi. L. Rev. 39, 46.

<sup>13</sup>Liability based on any contract theory would seem to be rendered very dubious by the presence of this clause in the application. *Metropolitan Life Ins. Co. v. Brady*, 95 Ind. App. 564, 174 N. E. 99 (1930).

<sup>14</sup>*De Ford v. New York Life Ins. Co.*, 75 Colo. 146, 224 Pac. 1049 (1924); *Duffy v. Bankers' Life Ass'n*, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913). The courts commonly make it appear that liability results from the fact that the company upon issuance of the policy dated it as of the day application was made. But the language of the courts suggests that they are really concerned not with the dating back, which only has the effect of making premiums due for the interim between the date of the application and the date of the issuance of the policy, but rather with the fact that a premium was paid over along with the application. "Policies . . . ordinarily are dated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premium without incurring risk." *Duffy v. Bankers' Life Ass'n*, 160 Iowa 19, 139 N. W. 1087, 1090, 46 L. R. A. (N. S.) 25, 30 (1913). The insurer might pursue its present policy by dating back upon issuance and charging the applicant premiums retroactively to the date of the application. It appears probable that the courts would not predicate liability upon this circumstance.

<sup>15</sup>No case has been found where the court relied on the paying over of a premium along with the application as the main basis for recovery, although an Indiana court, in *Metropolitan Life Ins. Co. v. Brady*, 95 Ind. App. 564, 174 N. E. 99 (1930), in denying liability saw the fact that no premium was paid when application was made as distinguishing the case at bar from several cases cited by plaintiff in which liability was imposed. The point is generally thrown in as a make-weight argument, often where the action is based on a tort theory. Taken to its logical conclusion, this view would seem to make the company liable regardless of whether a reasonable time for action had elapsed.

agreement or quasi-contract.<sup>16</sup> "By the soliciting, making and receiving of the application, the parties had entered into some kind of a consensual relationship."<sup>17</sup> Certainly the applicant would usually hope for prompt action. But the company was not bound to act promptly on a basis of *implied contract*, unless from its conduct the company created the appearance that it agreed to act promptly.<sup>18</sup> Usually the conduct of the company does not justify that inference.<sup>19</sup> As for *quasi-contract*, to say that there was a quasi contractual duty only states a conclusion; it does not offer an explanation of the source of the duty.<sup>20</sup> To be valid, the conclusion must find support in some fact which warrants imposing a duty to act irrespective of the company's intentions.<sup>21</sup>

The liability of the insurer is more often based on tort principles. Under this theory, the courts generally attach great significance to the facts that the insurance business is affected with a public interest,<sup>22</sup> and that insurance companies carry on their business under authority of a public franchise.<sup>23</sup> These facts are utilized in an attempt to rationalize out of the state's police power the insurance company's unusual duty to act. It is declared that the company may be required to act because it is subject to the regulatory power of the legislature.<sup>24</sup> But

<sup>16</sup>De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 Pac. 1049 (1924); Fox v. Volunteer State Life Ins. Co., 185 N. C. 121, 116 S. E. 266 (1923); Columbian Nat. Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 255 (1923); Dyer v. Missouri State Life Ins. Co., 132 Wash. 378, 232 Pac. 346 (1925); Kukuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 235 N. W. 403 (1931).

<sup>17</sup>Kukuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 235 N. W. 403, 405 (1931). The nebulous quality of the term "some kind of a consensual relationship" indicates the real difficulty the courts have had in basing liability on implied or quasi-contract.

<sup>18</sup>Restatement, Contracts (1932) § 5.

<sup>19</sup>"The suggestion that the insurer or the agent promises to act promptly ignores actuality. No such agreement is made expressly, nor can the intention to make one be implied." Funk, The Duty of an Insurer to Act Promptly on Applications (1927) 75 U. of Pa. L. Rev. 207, 224.

<sup>20</sup>Of course the courts actually are offering an explanation of the source of a quasi-contractual duty when they work out a theory of liability in tort, which is discussed *infra*.

<sup>21</sup>Corbin, Contracts (1950) § 19.

<sup>22</sup>Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913); Strand v. Bankers' Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (1927); Bekken v. Equitable Life Assur. Soc., 70 N. D. 122, 293 N. W. 200 (1940); Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151, 27 A. L. R. 444 (1922).

<sup>23</sup>Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25 (1913); Strand v. Bankers' Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (1927); Columbian Nat. Life Ins. Co. v. Lemmons, 96 Okla. 228, 222 Pac. 225 (1923); Security Ins. Co. v. Cameron, 85 Okla. 171, 205 Pac. 151, 27 A. L. R. 444 (1922).

<sup>24</sup>Bekken v. Equitable Life Assur. Soc., 70 N. D. 122, 293 N. W. 200 (1940).

it does not follow that the *courts* can regulate the companies where the legislature has not. The public-interest and public-franchise arguments should properly be directed to the power of the legislature, which exercises the police power, to impose a liability which the courts themselves seek to impose.<sup>25</sup>

It has been held that where a premium is paid with the application, the premium is held in trust by the company, and failure to act on the application within a reasonable time is a breach of the trust.<sup>26</sup> Since this view assumes an implied agreement between the parties as to the conditions on which the money was received by the company, it is clearly a rephrasing, for the purpose of a recovery in tort, of the view that there was an implied contract that the company would act within a reasonable time. The different words employed do not make the theory any more persuasive. And it is not shown why the trustee's obligation should involve anything more than the return of the premium.<sup>27</sup>

Some courts believe that the company's liability stems from the fact that control of the transaction, once the application was made, was in the company's hands.<sup>28</sup> This view seems to be concerned with considerations of fair play and morality, which do not normally warrant the imposition of such a liability;<sup>29</sup> and the insurer-offeree's duty to act has not been extended to the many other types of situations in which an offeree normally stands in a superior position during contract negotiations.<sup>30</sup>

---

<sup>25</sup>"State regulation of insurance companies has its basis in the police power and by no means in the public interest with which the insurance business is affected. The fact of public interest is not the source of that power, it but affects the locus of the boundry line limiting its exercise. And the police power is exclusively to be exercised by the Legislature, never by the judicial branch of government." *Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914, 918 (W. D. Mo. 1933).

<sup>26</sup>*Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N. W. 349 (1927).

<sup>27</sup>*Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 (W. D. Mo. 1933); Prosser, *Delay in Acting on an Application for Insurance* (1935) 3 U. of Chi. L. Rev. 39, 55.

<sup>28</sup>"Can the insurer, having pre-empted the field, retain control of the situation and the applicant's funds indefinitely?" quoted with approval from *Kukuska v. Home Mut. Hail-Tornado Ins. Co.*, 204 Wis. 166, 235 N. W. 403 (1931), a hail insurance case, in *Bekken v. Equitable Life Assur. Soc.*, 70 N. D. 122, 293 N. W. 200, 213 (1940), which involved life insurance, where the danger of loss is typically much less immediate.

<sup>29</sup>*Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 (W. D. Mo. 1933).

<sup>30</sup>E.g., negotiations for a loan from a bank, see *Savage v. Prudential Ins. Co.*, 154 Miss. 89, 121 So. 487, 489 (1929); negotiations for employment, see *Thornton v. Nat. Council Junior Order United American Mechanics*, 110 W. Va. 412, 158 S. E. 507, 508 (1931).

Thus, none of the grounds on which tort liability has been based gives rise to a legal—as distinct from a moral—duty to act within a reasonable time.<sup>31</sup> The arguments for tort liability establish only that if the legislature should pass a statute imposing liability upon insurance companies for losses resulting from their inaction beyond a reasonable time, that statute would be a proper exercise of the police power.<sup>32</sup>

Although the several grounds for liability propounded by the courts when lumped together give the appearance of plausibility, upon thorough examination they are not persuasive. The fallacy of the logic in the *Mann* case points up the error in imposition of liability by the courts. The North Dakota court relied on a United States Supreme Court case<sup>33</sup> in which the legislature had by statute required that an insurance company notify the applicant for hail insurance of the acceptance or rejection of his application within twenty-four hours or be liable in the event of loss.<sup>34</sup> The court in the *Mann* case quoted

---

<sup>31</sup>It has been suggested that the tort test for determining whether there was negligence, utility of conduct v. magnitude of risk, should be applied to the type of fact situation under discussion, and that it clearly indicates liability for negligence in not taking action. Note (1942) 46 Dick. L. Rev. 205. If that test is to be applied here, the courts will then have to consider, of course, many factors bearing on the magnitude of risk the age of the applicant, his medical history and that of his family, the nature of the applicant's occupation, etc. in the case of life insurance—in order to determine what the foreseeable risk is. Liability would not result automatically. But if this tort test is to be used to determine whether the insurance company had a duty to act on an offer for a contract, why should not the same test be applied to the offeree's conduct in all contract negotiations? It would seem that this test should not be applied peculiarly to the offeree in this particular context unless something unique in the negotiations for an insurance policy justifies it. To justify the use of the test here, the courts must then resort to those grounds, discussed above, which have already been used as the basis for imposing liability.

<sup>32</sup>Since tort liability requires a legal duty, failure to comply with the duty, and an injury which is the proximate result of such failure [Bohlen, *Studies in the Law of Torts* (1926) 33], the question must arise whether plaintiff's loss was the proximate result of defendant's failure to act within a reasonable time. If the insurance company had a legal duty to act within a reasonable time, then as soon as the time became unreasonable the applicant had a duty to avoid the consequences of the company's negligence by making application for equivalent insurance elsewhere. *Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 (W. D. Mo. 1933); Note (1934) 32 Mich. L. Rev. 395. Plaintiff's loss will be the proximate result of the company's failure to act on the application within a reasonable time, therefore, only if it occurred in the interim between the moment when the defendant company's inaction had extended beyond a reasonable time and the date when another insurance company would have had a reasonable time in which to act on the application it received.

<sup>33</sup>*National Union Fire Ins. Co. v. Wanberg*, 260 U. S. 71, 43 S. Ct. 32, 67 L. ed. 136 (1922).

<sup>34</sup>N. D. Laws (1913) c. 177, No. 1; *Comp Laws Ann.* (1913) § 4902.

the arguments which the Supreme Court had used to uphold the constitutionality of this statute—i.e., the public-interest and public-franchise arguments—in support of the court's right to impose such liability in the absence of any statute. Both cases arose in the same state, and the hail insurance statute was in effect when the *Mann* case came up. The legislature had not extended the duty to act to types of insurance other than hail insurance.<sup>35</sup> Yet what the legislature had been allowed to do under the police power, the court contended it could do itself, and for the same reasons.<sup>36</sup>

Some of the courts have been disturbed by the fact that the parties did not deal on terms of equality.<sup>37</sup> Hesitant to impose hardship on plaintiffs in these cases, the courts have grounded their own right to impose on insurers a duty to act on reasons which are of tortured artificiality or which suggest only that the legislature could impose that duty. It is submitted that the courts holding the company liable have found a duty where no legal duty existed, and that the imposition of liability in the absence of statutory authority constitutes unwarranted judicial legislation.<sup>38</sup>

DONALD S. LATOURETTE

LABOR LAW—APPLICATION OF UNLAWFUL PURPOSE DOCTRINE TO SUSTAIN  
INJUNCTION AGAINST PICKETING IN SUPPORT OF BREACH OF EMPLOY-  
MENT CONTRACT. [Arkansas]

A controversial judicial limitation on the activities of labor unions is the unlawful purpose doctrine, under which the courts test the legality of union conduct. Early American courts had held coercive labor activity illegal by invoking the criminal conspiracy doctrine,<sup>1</sup> but in 1842 in *Commonwealth v. Hunt*<sup>2</sup> the Massachusetts court refused to

---

<sup>35</sup>The fact that the legislature required insurers to act on an application within a reasonable time only in the case of hail insurance might well give rise to the presumption that it did not want insurers to have that duty where other kinds of insurance were applied for. *Weatherby v. Aetna Ins. Co.*, 11 N. J. Misc. 435, 167 Atl. 877 (1933).

<sup>36</sup> See note 5, *supra*.

<sup>37</sup> See note 28, *supra*.

<sup>38</sup>*Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 165 Atl. 686 (1933); *Schliep v. Commercial Casualty Ins. Co.*, 191 Minn. 479, 254 N.W. 618 (1934); Note (1933) 32 Mich. L. Rev. 395; see also *Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 at 917 (W. D. Mo. 1933).

<sup>1</sup>*People v. Fisher*, 14 Wend. 10 (N. Y. 1835); *People v. Melvin*, 2 Wheeler Crim. Cas. 262 (N. Y. 1810).

<sup>2</sup>4 Metc. 111 (Mass. 1842).

apply that rule, holding instead that a labor union was not in itself criminal, as it conceivably could have a socially desirable purpose. Though the criminal conspiracy concept was not immediately abrogated by the *Hunt* case,<sup>3</sup> it did gradually fall into disuse and was eventually superseded by the prima facie tort concept.<sup>4</sup> Under this approach, any concerted labor interference with an existing relationship between employer and employee was actionable *unless justified*.<sup>5</sup> The decisive questions before the courts following the prima facie tort theory thus centered around "justification."<sup>6</sup> The famous *Trilogy* cases<sup>7</sup> refined the concept by limiting its application to concerted activity and moreover by asserting that the legality of the purpose of the labor conduct is the measure of what constituted justification. Out of this latter test the unlawful purpose doctrine came into being.<sup>8</sup>

The courts have applied two divergent interpretations of the unlawful purpose doctrine. By one view, if in the opinion of the court the result is "objectionable"<sup>9</sup> because (1) the end is socially undesirable<sup>10</sup> or (2) the end does not constitute a proper labor objective even though it may be socially desirable,<sup>11</sup> then the conduct that would lead to such result is enjoined. This view turns upon the effects that labor activity would have upon society generally, with the courts enunciating public policy of the state.

<sup>3</sup>Gregory, *Labor and the Law* (2d ed. 1949) 29. In *Regina v. Bunn*, 12 Cox C. C. 316 (1872), strikers were found guilty of criminal conspiracy because they struck collectively in breach of individual employment contracts which required notice of quitting. And even as late as 1917 the Supreme Court in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 299 at 253, 38 S. Ct. 65 at 73, 62 L. ed. 260 at 277 (1917) intimated that the general legality of the labor unions was still an open question, with the determination depending upon the particular facts of each case.

<sup>4</sup>A more effective procedural method than the criminal conspiracy prosecution for combating organized labor activity was adopted in the form of injunctions from courts of equity.

<sup>5</sup>*Aikens v. Wisconsin*, 195 U. S. 194, 25 S. Ct. 3, 49 L. ed. 154 (1904); *White Mountain Freezer Co. v. Murphy*, 78 N. H. 398, 101 Atl. 357 (1917).

<sup>6</sup>For discussion of "justification" see 1 Teller, *Labor Disputes and Collective Bargaining* (1949) § 74.

<sup>7</sup>*Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, [1891] 23 Q. B. 598; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495.

<sup>8</sup>Gregory, *Labor and the Law* (2d ed. 1949) 50. See 31 Am. Jur., *Labor* § 230.

<sup>9</sup>"Objectionable" in this sense means an activity which tends to disturb the economic balance created by the unfettered operation of the theory of supply and demand.

<sup>10</sup>*Haverhill Strand Theatre, Inc. v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918) (unlawful purpose to coerce employer, who desired one organist, into hiring five musicians).

<sup>11</sup>*De Minico v. Craig*, 207 Mass. 593, 94 N. E. 317 (1911) (unlawful purpose to strike to get rid of two undesirable foremen).

Under the other view, if the result of labor activity is prohibited by statute, then the conduct becomes enjoined under the unlawful purpose doctrine. Thus, a labor objective has been held unlawful because it would compel the employer to violate a criminal statute,<sup>12</sup> or to act contrary to the public policy of the state as proclaimed by the legislature,<sup>13</sup> or to commit an act designated by statute as an unfair labor practice,<sup>14</sup> or to violate a statutory obligation to perform its function as a common carrier.<sup>15</sup> The latter decision indicates that it is not necessary that the statute prohibit the conduct itself, if it prohibits the result that the conduct would effectuate.

Essentially, the difference between the social desirability view and the statutory violation view is in the test of the purpose: Under the former view the courts employ their own ideas of social desirability and policy, whereas under the latter view the courts are guided by the legislature.

In *Lion Oil Co. v. Marsh*<sup>16</sup> the Arkansas Supreme Court has recently demonstrated the facility with which the social desirability view of the unlawful purpose doctrine can be employed to impose drastic restrictions on labor union activities. A one-year employment agreement had been negotiated between the union and the oil company with provision for termination at the end of the year upon a sixty-day written notice. The union allegedly violated the contract by its failure to give proper notice before setting up its picket line.<sup>17</sup> An injunction prohibiting the picketing was issued by a county court and was upheld on the ground that the failure to give written notice and to wait for sixty days was a breach of the contract, and that the picketing which

---

<sup>12</sup>*Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834 (1949) (anti-trade restraint statute, violation of which is punishable by fine and imprisonment or both).

<sup>13</sup>*Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. ed. 1045 (1950) (statute prohibiting coercion by employer of his employee's choice of a bargaining representative, violation of which is enjoined).

<sup>14</sup>*Park & Telford Import Corp. v. International Brotherhood of Teamsters*, 27 Cal. (2d) 599, 165 P. (2d) 891, 162 A. L. R. 1426 (1946) (statute condemned employer's recognizing group which did not represent majority of employees in preference to group which did represent the majority).

<sup>15</sup>*Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union*, 31 Cal. (2d) 441, 189 P. (2d) 277 (1948) (obligation of railroad to serve the public on pain of sanctions imposed by law for nonperformance of such duty).

<sup>16</sup>249 S. W. (2d) 569 (Ark. 1952).

<sup>17</sup>Statutes in Minnesota [Minn. Acts (1939) c. 440, § 11 (a)] and Wisconsin [Wis. Laws (1939) c. 57, § 111.06 (2c)] declare strikes in violation of the terms of collective bargaining agreements to be unfair labor practices and as such subject to cease and desist orders (Wisconsin) and liability for suits for damages (Minnesota).

supported the breach of the contract was in furtherance of an unlawful purpose. Thus, the court has ruled that if the activity creates civil liability, it is enjoined even though the legislature had not made it illegal to breach an employment agreement.

In reaching this conclusion the majority relied upon the previous decision of the court in *Self v. Taylor*,<sup>18</sup> in which picketing had been enjoined. However, the picketing in the *Self* case had for its purpose the effectuation of a closed shop, an objective which was specifically prohibited by the state constitution<sup>19</sup> and by state statutes.<sup>20</sup> Therefore, the majority, in applying the social desirability views of unlawful purpose, invoked as precedent a case which exemplifies the statutory violation view. The view of the majority is more closely analogous to that of *Florsheim Shoe Store v. Retail Salesmen's Union*<sup>21</sup> where the New York court, in the face of a statute prohibiting the issuance of injunctions in "labor disputes,"<sup>22</sup> determined that the union's activity was for an unlawful purpose because it was in violation of an existing employment contract, and therefore enjoined peaceful picketing that arose from a conflict between two unions over the election of one of them as a bargaining agent.

A number of other state courts have assumed the authority to determine, on the basis of their own concepts of social desirability, whether union action involves an illegal purpose.<sup>23</sup> And the unlawful purpose doctrine has received perhaps its most expanded ramification when recently some courts have applied it to limit the use of the *Thornhill v. Alabama*<sup>24</sup> doctrine—that peaceful picketing is a

<sup>18</sup>217 Ark. 953, 235 S. W. (2d) 45 (1950).

<sup>19</sup>Ark. Const. (1874) Amend. 34-1.

<sup>20</sup>Ark. Stat. (1947) § 81-201.

<sup>21</sup>288 N. Y. 188, 42 N. E. (2d) 480 (1942).

<sup>22</sup>N. Y. Civil Practice Act § 876a. The court avoided the affect of the anti-injunction act by holding that there was no labor dispute within the meaning of the act.

<sup>23</sup>*Shop 'N Save v. Retail Food Clerks Union*, 2 C. C. H. Lab. Cas. 747 (Cal. Super. Ct., Los Angeles County, (1940) (picketing held unlawful and subject to injunction because it was conducted in furtherance of an "outlaw" strike resulting from a conspiracy on the part of the union members to breach collective bargaining agreements and called in violation of arbitration clauses in the bargaining contracts); *Haverhill Strand Theatre Inc. v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918) (injunction upheld against musicians' union which had attempted to provide additional work for its members by requiring prospective employer to hire extra, unneeded musicians in order to get the services of a desired organist); *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941) (injunction issued to prevent a musicians' union from impeding scientific progress by picketing against use of canned music).

<sup>24</sup>310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).



constitutionally guaranteed form of free speech—as a justification for a union's picket.<sup>25</sup>

Two of the dissenting Justices in the *Lion Oil* case argued that no breach of contract had occurred; the other Justice took the position that even if the failure to give the termination notice did constitute a breach of contract, there was no wrongdoing involved which justified the invoking of the unlawful purpose doctrine. It is clear that the latter judge accepted the statutory violation view of unlawful purpose by arguing that since the breaching of a contract was not punishable by criminal prosecution, the picketing in furtherance of the breaching was not for such an unlawful purpose as to be enjoined. This judge, in rejecting the use of the term "wrongful" to mean "unlawful" in questionable labor objective controversies,<sup>26</sup> is supported by the pronouncements of the California courts in regard to whether peaceful picketing for the purpose of inducing a breach of contract or in violation of a contract is enjoined. A lower California court in *Lichtenberger-Ferguson Co. v. International Jewelry Workers Union*<sup>27</sup> held that picketing, if peaceful and honest, could not be enjoined even if conducted to support a strike which was in violation of a union

---

<sup>25</sup>An early deviation from the *Thornhill v. Alabama* doctrine was the Supreme Court decision in *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834 (1949) that picketing would not be immune from injunctive process if the purpose of the activity was to compel the employer to violate a criminal statute, and later in the *Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. ed. 1045 (1950) if the employer be forced to violate a non-criminal statute. The employer was not forced to violate any statute in *International Brotherhood of Teamsters v. Hanke*, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995 (1950), but a union objective which would cause a man to give up his self-employed garage and used-car lot in the interests of unionization was held by the Supreme Court of Washington, 33 Wash. (2d) 646, 207 P. (2d) 206 (1949), and affirmed by the United States Supreme Court, to be so socially undesirable that an injunction was issued despite the fact that the picketing was peaceful and allegedly protected by the constitution right of free speech. In one of the most recent cases on the subject of free speech doctrine, the Supreme Court in *Hughes v. Superior Court*, 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950) upheld a California court injunction, 32 Cal. (2d) 850, 198 P. (2d) 885 (1948), of a union's peaceful picketing to compel the employer to employ a proportionate number of Negro workers as there were Negro customers of the employer's store. The California court held that peaceful picketing doctrine was not available to the union as a defense because the purpose of the picketing was not the pursuance of a proper labor objective since the picketing would, in the mind of the court, tend to promote rather than abolish racial discrimination. The *Hughes* case would seem to be the clearest case of judicial legislation in the field of unlawful purpose.

<sup>26</sup>*Lion Oil Co. v. Marsh*, 249 S. W. (2d) 569 at 575 (1952).

<sup>27</sup>20 L. R. M. 2785 (Cal. Super Ct., Los Angeles County, 1946). *Shop 'N Save v. Retail Food Clerks Union*, 2 C. C. H. Lab. Cas. 747 (Cal. Super. Ct., Los Angeles County, 1940) represents an earlier inconsistent decision. See note 23, *supra*.

contract, while the Supreme Court of California has declared that "The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer."<sup>28</sup>

When the issue of the controversy is the right of an employer to obtain an injunction against peaceful picketing, the Norris-LaGuardia Act<sup>29</sup> has rendered both views of the unlawful purpose doctrine meaningless in the federal courts.<sup>30</sup> Instead of determining the basis for issuance of the injunction in terms of the legality of the purpose, the federal courts, under this Act, can issue the injunction only if the labor activity is not within the list of acts sanctioned in Section 4 of the statute.<sup>31</sup> Thus, in *Wilson and Co. v. Birl*<sup>32</sup> injunctive relief was denied because a peaceful picket to compel a closed shop was deemed to be within Section 4, though in the absence of an anti-injunction statute such an objective would possibly be the basis for restraint upon the ground of unlawful purpose.<sup>33</sup>

One of the foremost authorities in the labor law field has recently declared that to extend the doctrine of unlawful purpose as the majority of the court did in the *Lion Oil* case, constitutes a step toward the undesirable situation in which the judiciary will feel free to use the unlawful purpose doctrine as a convenient tool to strike down labor activity personally objectionable to it.<sup>34</sup> Former Justice Leflar of the Arkansas Supreme Court<sup>35</sup> vigorously concurred with that point of view when, in the dissenting opinion in *Self v. Taylor*, he warned:

<sup>28</sup>*Imperial Ice Co. v. Rossier*, 18 Cal. (2d) 33, 112 P. (2d) 631, 632 (1941).

<sup>29</sup>47 Stat. 70 (1932), 29 U. S. C. A. § 101 (1947).

<sup>30</sup>*Wilson & Co. v. Birl*, 27 F. Supp. 915, 917 (E. D. Pa. 1939).

<sup>31</sup>If the labor activity is not within the list of acts sanctioned in Section 4, the court will issue injunctive relief upon the finding of the enumerated facts in Section 7.

<sup>32</sup>27 F. Supp. 915 (E. D. Pa. 1939).

<sup>33</sup>See *Self v. Taylor*, 217 Ark. 953, 235 S. W. (2d) 45, 50 (1950). Some state courts, interpreting legislation modeled after the Norris-LaGuardia Act, have held in accord with the *Wilson* case that union self-help methods which breach collective bargaining disputes are "labor disputes" and are not enjoined. Accord: *Bulkin v. Sacks*, 31 Pa. D. & C. 291 (1938). Contra: *Greater City Master Plumbers Ass'n. Inc. v. Kahme*, 6 N. Y. Supp. (2d) 589 (1937).

<sup>34</sup>Gregory, *Labor and the Law* (2d ed. 1949) 103. See Justice Brandeis' dissenting opinion *Duplex Printing Press Co v. Deering*, 254 U. S. 443, 479, 41 S. Ct. 172, 181, 65 L. ed. 349, 362 (1921).

<sup>35</sup>Judge Leflar is presently Dean of the University of Arkansas School of Law, and was not a member of the court which decided the principal case.

"The action now being taken by the majority of this court appears to me to be a serious and dangerous one. It is not limited in its impact or effect to labor union cases. It may apply in any case where any group, or any individual, seeks to engage in lawful conduct which in the minds of some or all may create a later opportunity for unlawful conduct. It is the motive, the hope, the uncertain expectation that is feared; and because of the fear a lawful act is enjoined. This is too tenuous. It goes a step beyond our past decisions in seeking to control the minds of men by law, in seeking to prevent the peaceful communication of ideas upon a subject of legitimate public interest. I do not want to take that step."<sup>36</sup>

The judicial ideas of social utility and public policy which are brought to bear when the courts employ the unlawful purpose doctrine are too often inadequate as guiding principles in specific cases.<sup>37</sup> While some courts would permit the jury to decide the lawfulness of the purpose,<sup>38</sup> it seems more feasible to place the responsibility with the legislature. Since the question is primarily one of public policy, the theoretical solution would require that the legislative branch set the standard for the judiciary by making such statutory enactments as it deems desirable.

However, since the legislature could not possibly foresee all the objectives that the labor unions will seek, it should not become an absolute rule that no labor activity could be enjoined unless it is violative of some established tort or criminal law or prohibited by some positive statute. Unquestionably there are some labor union objectives, not within such classification, which would be contrary to the best interests of society. For example, in *Opera on Tour v. Weber*,<sup>39</sup> the New York court sensibly invoked the unlawful purpose doctrine to

---

<sup>36</sup>217 Ark. 953, 235 S. W. (2d) 45, 52 (1950).

<sup>37</sup>See 1 Teller, *Labor Disputes and Collective Bargaining* (1940) 348. Cf. *Dolan Dining Co. v. Cooks' and Assistants' Union*, 124 N. J. Eq. 584, 4 A. (2d) 5, 8 (1958) wherein a distinction was drawn between "big business" and "small business" with reference to the permissibility of peaceful picketing. The court enjoined the picket of the "small business," though it intimated that if this were "big business" no injunction would have been issued. The rationale for this acute analysis: "The labor union was born of necessity. However, that necessity arose not from the abuses of the small business men employing few men, but from the oppression of workmen by large combinations of capital employing such numbers of men that the individual was reduced to a mere number utterly incapable of audible voice protest against the exactions of unscrupulous employers...."

<sup>38</sup>Prosser, *Torts* (1941) 996, n. 48.

<sup>39</sup>285 N. Y. 348, 34 N. E. (2d) 349 (1941).

prevent a musicians' union from impeding scientific progress by picketing against the use of canned music.<sup>40</sup>

When a court evaluates the proper use of purely economic weapons such as strikes and pickets, it is not exercising a proper judicial function since vital public policy considerations are concerned. Because the legislature is normally charged with this responsibility, full accord should be given by the judiciary to that body's enactments, when it determines as a matter of substantive law that some labor objective is prohibited. When the legislature has not acted upon the substantive point in this field, but has set out procedural limitations, such as an anti-injunction act, then the court must of necessity determine the substantive question. However, this should be done with consideration for those legislative procedural standards which have been pronounced. In those situations where the legislature has not acted at all upon the subject, then the court in applying the unlawful purpose doctrine should realize that it is exercising a function which is primarily legislative and consequently should apply the unlawful purpose doctrine with the utmost caution.

JOHN P. WARD

#### MUNICIPAL CORPORATIONS—RIGHT OF CITY TO CHARGE NONRESIDENT CONSUMERS DISCRIMINATORY RATES FOR UTILITY SERVICES. [Texas]

Under the general common law rule, a municipality supplying water as a public service to private consumers acts in a proprietary capacity and cannot discriminate in regard to rates charged to its customers if a private corporation in the same position could not do so.<sup>1</sup> This rule is almost universally followed when applied to the residents of the municipality.<sup>2</sup> However, there have been a number of recent cases

---

<sup>40</sup>In *Haverhill Strand Theatre, Inc. v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918), an injunction was upheld against a musicians' union which had attempted to provide additional work for its members by requiring prospective employer to hire extra, unneeded musicians in order to get the services of a desired organist.

<sup>1</sup>*City of Montgomery v. Greene*, 180 Ala. 322, 60 So. 900 (1913); *Knotts v. Nollen*, 206 Iowa 261, 218 N. W. 563 (1928); *H. O. L. C. v. Mayor of Baltimore*, 175 Md. 676, 3 A. (2d) 747 (1939); *Almaras v. City of Hattiesburg*, 181 Miss. 752, 180 So. 392 (1938); *American Aniline Products v. City of Lock Haven*, 288 Pa. 420, 135 Atl. 726, 50 A. L. R. 121 (1927); *Simons v. City Council of Charleston*, 181 S. C. 353, 187 S. E. 545 (1936); 43 Am. Jur., *Public Utilities and Services* § 172.

<sup>2</sup>*City of Malvern v. Young*, 205 Ark. 886, 171 S. W. (2d) 470 (1943); *Knotts v. Nollen*, 206 Iowa 261, 218 N. W. 563 (1928); *Almaras v. City of Hattiesburg*, 181

which hold that a municipally-owned public utility is not bound by this rule when supplying water to consumers outside the limits of the municipality, and so may arbitrarily charge nonresidents any rate that it desires.<sup>3</sup>

In the face of this growing view that the general rule no longer applies to guarantee equality of rates for nonresidents the Supreme Court of Texas, in a 5 to 4 decision, has recently ruled in *City of Texarkana v. Wiggins*,<sup>4</sup> that the Texas municipal utilities regulation statute<sup>5</sup> does not permit arbitrary discrimination in water and sewer rates between resident and nonresident consumers. In 1948, the City of Texarkana, through the issue of revenue bonds, had purchased a privately-owned water works which had been serving both Texarkana and North Texarkana. The private utility had charged all consumers the same rates, and the city had continued the same rate scale until two years after the purchase, when a city ordinance was passed raising the water rates of nonresidents to one and one-half times the previous charge without a corresponding increase in rates charged to residents of the city. The city gave no reason for this change in rates. Petitioners, residents of North Texarkana, brought an action to enjoin the city from charging the increased rates. The majority of the Texas court found that the general rule still applies in Texas notwithstanding a statute which gives municipal utilities power to serve nonresidents "... under such terms and conditions as may appear to be for the best interest of such town or city."<sup>6</sup> The court said of the statute: "We find no classification of consumers in the language of the statute nor do we find authority for unjustified discrimination there. True, the statute expressly authorizes a city to serve nonresidents of the city and by so designating them it has, perhaps, so classified them. But when the reasons for the enactment of the statute are considered we think it clear that

---

Miss. 752, 180 So. 392 (1938); *Barnes Laundry Co. v. City of Pittsburgh*, 266 Pa. 24, 109 Atl. 535 (1920); *Simons v. City Council of Charleston*, 181 S. C. 353, 187 S. E. 545 (1936); 2 *Pond, Public Utilities* (4th ed. 1932) § 545.

<sup>3</sup>*Service of water: City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P. (2d) 210, 127 A. L. R. 84 (1939); *City of Englewood v. City & County of Denver*, 123 Colo. 290, 229 P. (2d) 667 (1951); *Barr v. City Council of Augusta*, 206 Ga. 753, 58 S. E. (2d) 823 (1950); *Childs v. City of Columbia*, 87 S. C. 566, 70 S. E. 296 (1911). *Contra: Wagner v. City of Youngstown*, 75 N. E. (2d) 724 (Ohio App. 1946). *Sewer service: Davisworth v. City of Lexington*, 311 Ky. 606, 224 S. W. (2d) 649 (1949); *Atlantic Const. Co. v. City of Raleigh*, 230 N. C. 365, 53 S. E. (2d) 165 (1949).

<sup>4</sup>246 S. W. (2d) 622 (Texas 1952).

<sup>5</sup>Texas Stat. (Vernon's, 1939 Supp.) Art. 1108, subd. 3.

<sup>6</sup>Texas Stat. (Vernon's, 1939 Supp.) Art. 1108, subd. 3.

the legislature did not intend to create a class of consumers against which the city could discriminate for any reason or without reason."<sup>7</sup>

The dissenting judges, in disagreeing with this interpretation of the Texas statute, relied on the recent decision of the Supreme Court of Colorado in *City of Englewood v. City and County of Denver*<sup>8</sup> where, under a fact situation remarkably similar to that of the Texas case, it was held that the general rule against discrimination among customers did not apply to the supplying of water outside the limits of the municipality. Further, the Colorado court ruled that even if the common law rule were still generally operative in such situations, it had been abrogated by the Colorado statute which authorized municipalities to supply water to consumers outside their corporate limits, "and to collect therefor such charges and upon such conditions and limitations as said towns and cities may impose by ordinance."<sup>9</sup>

Both the dissenting judges in the *Texarkana* case and the court in the *Englewood* case take the position that there should be no absolute restriction against a variance in rates for the services rendered by a municipally-operated public utility to nonresidents. They argue that a municipality owes no duty to serve nonresidents at all, and therefore if it does agree to provide them with utilities the service can be on any terms which the city may designate.<sup>10</sup> This is the familiar argument that the greater power necessarily includes the lesser, which has been invoked to uphold the right of a municipality to regulate speech

---

<sup>7</sup>*City of Texarkana v. Wiggins*, 246 S. W. (2d) 622, 627 (Texas 1952). The reason for passage of the statute, as given by the court, was to allow cities to serve nonresidents. This power had previously been denied by the courts.

<sup>8</sup>123 Colo. 290, 229 P. (2d) 667 (1951). The municipal corporation had purchased a privately-owned public utility serving the residents of Denver and Englewood with water. The city then raised the water rates charged nonresidents by thirty per cent without also raising rates charged to residents. The City of Englewood unsuccessfully sued to enjoin the City and County of Denver from charging the higher rates. For a discussion of the law in Colorado prior to this decision see Waldeck, *Extraterritorial Service of Municipally Owned Water Works in Colorado* (1949) 21 *Rocky Mt. L. Rev.* 56.

<sup>9</sup>Colo. Stat. Ann. (1935) c. 163, § 22.

<sup>10</sup>Justice Calvert dissenting in the *Texarkana* case said: "It [the City of Texarkana] may furnish water and sewer services and facilities to residents of North Texarkana so long and only so long as the residents of that municipality contract for such services and the authorities of that municipality permit; but being under no duty to furnish in the first instance it may discontinue such services, on reasonable notice, with or without cause. Being entitled to discontinue the services according to its want, it follows that the City can continue them on its own terms and conditions." *City of Texarkana v. Wiggins*, 246 S. W. (2d) 622, 629 (Texas 1952).

making in a municipally-owned common,<sup>11</sup> and to restrict political activities of a city law enforcement officer.<sup>12</sup>

Logically, this contention is difficult to overcome in the water rate cases, but the Texas court compared the situation before it with those of cases involving the doctrine of unconstitutional conditions. Under that rule, the United States Supreme Court has held that a state can, as a prerequisite to allowing corporations to do business therein, require that the corporations agree to certain conditions under which they will carry on their business,<sup>13</sup> so long as those conditions are not unconstitutional.<sup>14</sup> While these cases are distinguishable from the water rate discrimination cases, yet the decisions demonstrate that the greater power of the municipality to refuse service to nonresidents does not necessarily include the lesser power to serve them only if they agree to submit to an unequal rate schedule, for the discrimination may involve an illegal condition. The ordinance of the City of Texarkana, imposing increased rates on nonresidents as a condition to further service, is rendered illegal by its violation of the common law rule forbidding unjust discrimination.

A privately-owned public utility must have its rates approved by a regulatory body, which will not allow the utility to discriminate between different consumers without showing a sound reason there-

---

<sup>11</sup>*Commonwealth v. Davis*, 162 Mass. 510, 39 N. E. 113 (1895) where Judge Holmes said: "When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes. If the legislature had power under the constitution to pass a law in the form of the present ordinance, there is no doubt that it could authorize the city of Boston to pass the ordinance, and it is settled . . . that it has done so."

<sup>12</sup>*McAuliffe v. New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892) (since city had right to refuse to employ individual as policeman, it had right to employ him on condition that he refrain from engaging in political party activities).

<sup>13</sup>*Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S. 73, 21 S. Ct. 535, 45 L. ed. 755 (1901) (upholding a state statute regulating the making of contracts of insurance); *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 S. Ct. 518, 44 L. ed. 657 (1900) (upholding a state statute which required the corporation to abide by the state anti-trust laws).

<sup>14</sup>*Frost & Frost Trucking Co. v. Railroad Comm. of California*, 271 U. S. 583, 46 S. Ct. 605, 70 L. ed. 1101, 47 A. L. R. 457 (1926) (state cannot require private carriers for hire to assume burdens and duties of common carrier as prerequisite to use of state highways); *Terral v. Burke Construction Co.*, 257 U. S. 529, 42 S. Ct. 188, 66 L. ed. 352, 21 A. L. R. 186 (1922) (state cannot restrict right of corporation to bring action in or remove action to federal court). For further discussion see Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 Col. L. Rev. 321; Merrill, *Unconstitutional Conditions* (1929) 77 U. of Pa. L. Rev. 879.

for.<sup>15</sup> It would seem to follow that a municipality which purchases and operates a public utility bound not to discriminate in rate charges has no more right arbitrarily to discriminate between classes of its consumers than did the previous owners. It is the same plant serving the same functions for the same people, the only change being in the management. The municipality stands in the same position as the former private owners.<sup>16</sup> This change in management should not of itself justify depriving nonresident consumers of service they could reasonably expect.<sup>17</sup>

The argument is advanced that no rights of the outside customers are infringed because the city owes no duty to serve consumers outside the city. This is undoubtedly true when the extension of service to new consumers is being considered, as even the majority of the court in the *Texarkana* case agree;<sup>18</sup> but the city would seem to be in a decidedly different position when the withdrawal of service from old consumers is being considered. The leading case of *City of Mont-*

---

<sup>15</sup>This is ordinarily provided by statute. Exemplary are Texas Stat. (Vernon's, 1936) Art. 1125 (judicial regulation); 8 Va. Code Ann. (Michie, 1950) § 56-235 (regulation by commission). See notes 24 and 25, *infra*.

<sup>16</sup>"When the city purchased the private plant it assumed a trust to perform the contract and meet the obligations of the private concern. The obligation of that company to its customers did not require water service at the same rate paid by citizens of Beverly Hills. The obligation which the city assumed through the purchase of the system was an obligation to continue to serve plaintiff water at a reasonable rate. Lack of uniformity in the rate charged is not necessarily unlawful discrimination, and is not *prima facie* unreasonable. Discrimination to be objectionable must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges." *Durant v. City of Beverly Hills*, 39 Cal. App. (2d) 133, 102 P. (2d) 759, 762 (1940).

<sup>17</sup>Here, a distinction can be drawn between services of different types of utilities. A privately-owned electric company after selling part of its facilities to a municipality might very well continue to serve nonresidents. A water company which usually operates on a smaller scale than an electric company would most likely sell all of its facilities to the municipality and be unable to serve its former consumers in any way. If the utilities had completely sold out, the nonresidents would find it easier to get service from another electric utility company than from a new water utility. The Colorado court in *City of Englewood v. City and County of Denver*, 123 Colo. 290, 229 P. (2d) 667 at 671 (1951), recognizes that there is a difference but fails to comment on it.

<sup>18</sup>"We think the effect of the statute is that when a city decides to exercise this power to provide its utility service to customers outside the city limits it may then fix such service charges as it decides the situation requires; if it requires a higher charge than is fixed against residents of the city for the same service, the city may exact the higher rate. But whatever it fixes, a rate status between the city and its outside customers is thereby established and the city cannot thereafter arbitrarily change the rate so as to discriminate, or further discriminate, between them and customers residing in the city." *City of Texarkana v. Wiggins*, 246 S. W. (2d) 622, 627 (Texas 1952).



*gomery v. Greene*<sup>19</sup> holds that since the supply of water is a public necessity, it cannot be arbitrarily limited to residents of the city, implying that the city must continue to serve those persons residing in close proximity to the city unless there are good and compelling reasons for not doing so.<sup>20</sup> And in *Durant v. City of Beverly Hills*,<sup>21</sup> the California court declared: "When the city purchased the private plant it assumed a trust to perform the contract and meet the obligations of the private concern . . . . The obligation which the city assumed through the purchase of the system was an obligation to continue to serve plaintiff water at a reasonable rate."<sup>22</sup> In Virginia a statute<sup>23</sup> requires cities which purchase electric or water plants to continue service to former consumers from the private owner. When the city does not have the greater power to refuse service, it no longer logically follows that the city has the lesser power to impose arbitrary restrictions on the service. The municipality would be governed by the rule requiring a reasonable basis for a difference in rates between classes of consumers.

There are many factors which could enter into a determination of whether the inequality in rates was justifiable. A city could well be justified in charging nonresidents higher rates if the purchase and/or operation of the utility placed an increased burden on the taxpayers of the municipality which was not reflected in the taxes of nonresidents.<sup>24</sup> If the payments of interest or principal on bonds issued to finance the purchase or construction of the system were paid out of the general funds of the city rather than from revenues of the system, the city would have the right to charge the nonresidents their fair share of the expense.<sup>25</sup> In such a situation there would need be no corresponding increase in the rates to residents, for they would be paying their share in taxes.

It appears that the courts in deciding such a controversy as was

---

<sup>19</sup>180 Ala. 322, 60 So. 900 (1913).

<sup>20</sup>The examples of such reasons given by the court were an inadequate supply and the remoteness of the prospective consumers.

<sup>21</sup>39 Cal. App. (2d) 133, 102 P. (2d) 759 (1940).

<sup>22</sup>*Durant v. City of Beverly Hills*, 39 Cal. App. (2d) 133, 102 P. (2d) 759, 762 (1940).

<sup>23</sup> Va. Code Ann. (Michie, 1950) § 15-716. This statute is discussed at length in *City of South Norfolk v. City of Norfolk*, 190 Va. 591, 58 S. E. (2d) 32 (1950), noted in (1950) 7 Wash. & Lee L. Rev. 225.

<sup>24</sup>*Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons*, 307 Ky. 413, 211 S. W. (2d) 122, 4 A. L. R. (2d) 588 (1948); *Village of Fox Point v. Public Service Commission*, 242 Wis. 97, 7 N. W. (2d) 571 (1943).

<sup>25</sup>*Simons v. City Council of Charleston*, 181 S. C. 353, 187 S. E. 545 (1936).

presented in the principal case should first consider whether the non-residents contracted with the city initially for the service, or whether they were originally served by a nondiscriminating, privately-owned water works which was later taken over by the municipality. In the former situation, the argument seems sound that the city owing no duty to serve at all, may serve on any basis it desires, and the courts should not interfere with the practice of charging unequal rates. If the latter situation is found to be involved, then the courts must proceed to the further inquiry of whether the city can show some reasonable basis for charging nonresidents the higher rate. If the city cannot establish such a justification, it should be held to the same duty in regard to nonresidents that it must follow in dealing with residents.

ROBERT E. GLENN

PROCEDURE—IMMUNITY OF NONRESIDENT DEFENDANT IN CRIMINAL PROSECUTION FROM SERVICE OF CIVIL PROCESS. [West Virginia]

Nonresident litigants and witnesses in civil suits are generally granted immunity from service of civil process while in the jurisdiction for purposes of attending to matters concerning the litigation.<sup>1</sup> This immunity was originally asserted as the privilege of the court to secure the administration of justice from outside interference or influence.<sup>2</sup> In regard to the extension of such immunity to defendants in criminal prosecutions, the courts are sharply divided.<sup>3</sup> In those jurisdictions

---

<sup>1</sup>Stewart v. Ramsay, 242 U. S. 128, 37 S. Ct. 44, 61 L. ed. 192 (1916); Nichols v. Horton, 14 Fed. 327 (N. D. Iowa 1882); Moseley v. Ricks, 223 Iowa 1038, 274 N. W. 23 (1937); Diamond v. Earle, 217 Mass. 499, 105 N. E. 363 (1914); Cooper v. Wyman, 122 N. C. 784, 29 S. E. 497 (1898); 72 C. J. S., Process § 80.

<sup>2</sup>"Experience, however, has shown that in order that causes may be fully heard, and the orderly administration of justice may be assured, it is necessary that parties, witnesses, and jurors shall be protected against service of process in civil actions while they are in good faith in attendance upon the trial of causes." Nichols v. Horton, 14 Fed. 327, 330 (N. D. Iowa 1882); Cole v. Hawkins, 2 Strange 1094, 93 Eng. Rep. 1054 (1738).

<sup>3</sup>"... nowhere is there more confusion than in the cases concerning non-resident defendants in criminal actions." Keffe and Roscia, Immunity and Sentimentality (1947) 32 Corn. L. Q. 471, 486. A number of courts base the granting of immunity on whether or not the person voluntarily appeared: Reid v. Ham, 54 Minn. 305, 56 N. W. 35 (1893); Broaddus v. Partrick, 177 Tenn. 335, 149 S. W. (2d) 71 (1941). Other courts grant immunity even though attendance was compulsory. Adamy v. Parkhurst, 61 F. (2d) 517 (C. C. A. 6th, 1932); Feister v. Hulick, 228 Fed. 821 (E. D. Pa. 1916); Morris v. Calhoun, 119 W. Va. 603, 195 S. E. 341 (1938). Still other courts refused to grant immunity to any nonresidents in criminal cases: Wood v. Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747 (1896); Anderson v.

which grant immunity to the nonresident defendant, perhaps the principal justification advanced is that immunity is necessary as a means of encouraging those charged with a crime to enter the jurisdiction voluntarily, thus saving the cost and trouble of extradition.<sup>4</sup> Those courts which go beyond the mere consideration of the convenience of the court argue that a man charged with a crime should not be harassed with the threat of civil process, which might prevent him from devoting all his energies and thoughts to defending against the prosecution.<sup>5</sup> It is also pointed out that to deny immunity would be to force a man to stand trial in the civil action in a county or state far from his residence, among strangers and at great extra expense, whereas a defendant has a right to be tried by a jury in the vicinity in which he resides, so that his true character and conduct may be taken into consideration.<sup>6</sup>

On the other hand, those courts which take the view that immunity from civil process should be denied nonresident defendants in criminal cases base their contentions on the fact that since the defendant can be compelled to come before the court in the foreign jurisdiction, it is not necessary to encourage him to appear by granting him immunity.<sup>7</sup> This reasoning disregards the arguments that the granting of immunity from civil process may protect the state against the delay and expense of extradition, and that there are considerations of fairness which require the granting of this immunity.

In *State ex rel. Sivnksty v. Duffield*,<sup>8</sup> a recent case of first impression, the West Virginia court manifests both the great degree of confusion which exists among courts generally in regard to immunity from civil process of defendants in criminal prosecutions and also the tendency of the judges to apply questionable reasoning and to draw tenuous

Atkins, 161 Tenn. 137, 29 S. W. (2d) 248 (1930). See *Crusco v. Strunk Steel Co.*, 365 Pa. 326, 74 A. (2d) 142, 143, 20 A. L. R. (2d) 160 (1950).

<sup>4</sup>*Church v. Church*, 270 Fed. 361, 14 A. L. R. 769 (C. A. D. C. 1921); *New England Industries, Inc. v. Margiotti*, 185 Misc. 845, 60 N. Y. S. (2d) 53 (1945); *Silvey's Estate v. Koppell*, 107 S. C. 106, 91 S. E. 975 (1917); *Morris v. Calhoun*, 119 W. Va. 603, 195 S. E. 341 (1938).

<sup>5</sup>*Cummins' Adm'r v. Scherer*, 231 Ky. 518, 21 S. W. (2d) 836 (1929); *Feuster v. Redshaw*, 157 Md. 302, 145 Atl. 560 (1929); *Silvey's Estate v. Koppell*, 107 S. C. 106, 91 S. E. 975 (1917); *Whited v. Phillips*, 98 W. Va. 204, 126 S. E. 916 (1925).

<sup>6</sup>*Whited v. Phillips*, 98 W. Va. 204, 126 S. E. 916 (1925).

<sup>7</sup>*White v. Underwood*, 125 N. C. 25, 34 S. E. 104 (1899); *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470 (1875); *Ex parte Hendersen*, 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N. S.) 328 (1914); *Crusco v. Strunk Steel Co.*, 365 Pa. 326, 74 A. (2d) 142, 20 A. L. R. (2d) 160 (1950); *Anderson v. Atkins*, 161 Tenn. 137, 29 S. W. (2d) 248 (1930).

<sup>8</sup>71 S. E. (2d) 113 (W. Va. 1952).

distinctions in deciding the individual cases. Petitioner Sivnksty came into Gilmer County with the intention of remaining a few days, but soon after his arrival his automobile struck and injured two children. As a result, Sivnksty was arrested and placed in the county jail on a charge of reckless driving, where he was held for two days, after which time he was found guilty as charged and fined fifty dollars. Between the time of his arrest and trial, he was served with a civil process issued by the Circuit Court of Gilmer County, commencing an action for damages for the personal injuries sustained by one of the children. In the civil action, Sivnksty appeared specially and filed a plea in abatement, alleging that the circuit court was without jurisdiction because at the time he was served with the process, he was a nonresident of the county and a prisoner in the county jail. The circuit court sustained a demurrer to the petitioner's plea in abatement, and set the trial on the docket. The present action is for a writ of prohibition against the circuit court judge and the injured child to prevent further proceedings in the personal injury action.

The Supreme Court of Appeals of West Virginia denied the writ, answering in the negative the sole issue of the case: "In the circumstances of this case was the petitioner immune from civil process at the time he was served with process in the civil action?"<sup>9</sup> The majority of the court set out four reasons for granting immunity to defendants in criminal prosecutions and then ruled that because the present defendant's entry was *voluntary*, "the reason for the application of the immunity rule is not present. . . ."<sup>10</sup> The court did not identify "the reason" which it found inapplicable here, nor did it indicate why it singled out one of four reasons as controlling and ignored the other three, some of which would support immunity as strongly where the entry is voluntary as where involuntary. And the majority judges now apparently ignore several previous West Virginia cases granting immunity which indicate that it is immaterial whether the entrance was voluntary or involuntary.<sup>11</sup>

---

<sup>9</sup>71 S. E. (2d) 113, 114 (W. Va. 1952).

<sup>10</sup>71 S. E. (2d) 113, 115 (W. Va. 1952).

<sup>11</sup>"Whether his presence in that county was voluntary or involuntary is immaterial. . . ." *Morris v. Calhoun*, 119 W. Va. 603, 195 S. E. 341, 344 (1938). In *Whited v. Phillips*, 98 W. Va. 204, 126 S. E. 916 (1925), the court held the defendant to be immune from service of civil process when his appearance was *voluntary*, while in *Lang v. Shaw*, 113 W. Va. 623, 169 S. E. 444 (1933), the court held the defendant to be immune when his appearance was *involuntary*. Therefore, it appears that the West Virginia court has considered the voluntary-involuntary distinction to be of little importance.

The dissenting judge denied the relevancy of the voluntary nature of the entry, arguing that, in accord with the cumulative effect of previous West Virginia decisions,<sup>12</sup> immunity should be granted in either situation because it is needed to protect the defendant against harassment while defending a criminal prosecution, against the prejudices of a strange jurisdiction, and against the extra expense of defending a suit far from his own home. Thus, the two factions of the court did not meet each other's arguments directly because the majority turned the issue on the consideration of the convenience of the state, while the dissent would decide the case on the consideration of fairness to the defendant.

Most of the cases support neither the view of the majority or the dissent in regard to the effect of the voluntary-involuntary entry distinction. In disagreement with the dissent's contention, the nature of the entry is generally considered relevant, but in direct opposition to the position of the principal decision, it is generally held that immunity will be granted where the entrance is voluntary, but not where it is involuntary.<sup>13</sup> The rationale of this view is that immunity is granted mainly to encourage a person charged with a crime to come into the jurisdiction voluntarily, which he will be more likely to do if he knows he is immune from civil process. Thus, the state will be saved the cost and delay of extradition.<sup>14</sup> However, it may well be argued that if the offense is sufficiently serious to justify extradition, the desire to avoid criminal prosecution may be strong enough to keep the defendant from coming back voluntarily. On the other hand, the defendant may think that he can successfully defend against the criminal prosecution, but not against civil liability. Therefore, immunity would encourage him to enter voluntarily.

---

<sup>12</sup>See cases cited, note 11, *supra*. A few other courts are in accord with these decisions: *Cummins' Adm'r v. Scherer*, 231 Ky. 518, 21 S. W. (2d) 836 (1929); *Feuster v. Redshaw*, 157 Md. 302, 145 Atl. 560 (1929); *Thomas v. Blackwell*, 172 Okla. 487, 46 P. (2d) 509 (1935).

<sup>13</sup>*Reid v. Ham*, 54 Minn. 305, 56 N. W. 35, 21 L. R. A. 232 (1893); *Casino Fabrics, Inc. v. Alpren*, 43 N. Y. S. (2d) 260 (1943); *Merritt v. Genth*, 130 Misc. 401, 223 N. Y. Supp. 593 (1927); *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333 (1910); *Broadus v. Partrick*, 177 Tenn. 335, 149 S. W. (2d) 71 (1941); *Husby v. Emmons*, 148 Wash. 333, 268 Pac. 886, 59 A. L. R. 46 (1928); *Note* (1937) 37 Col. L. Rev. 137.

<sup>14</sup>"By coming voluntarily [into the jurisdiction] the defendant removes an obstacle to the administration of justice and saves the expense and trouble of extradition. Is it not in the interest of sound public policy that this should be encouraged?" *Church v. Church*, 270 Fed. 361, 363, (C. A. D. C. 1921). Also, *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333 (1910); *Note* (1925) 20 Ill. L. Rev. 172.

Immunity is generally denied where the entrance is involuntary, because the state already has the defendant within its control and can compel his presence at the criminal prosecution.<sup>15</sup> This reasoning ignores all but one basis for immunity, but it has been asserted that this is the only substantial basis for granting immunity, the others being largely sentimental.<sup>16</sup> It must be conceded that such a proposition finds some support in history, for immunity was originally granted solely for the purpose of protecting the court from interference with its judicial processes.<sup>17</sup> The "sentimental" factors were injected later, when some courts extended the rule in order to protect the personal rights of the individual.<sup>18</sup>

It is to be noted that cases denying immunity under the majority view and the West Virginia decision denying immunity both justify their results by reasoning that the interest of the state does not demand that immunity be granted. Yet the majority view cases state that this is true where the defendant's entry into the jurisdiction was *involuntary*, while the West Virginia court termed the petitioner's entry "*voluntary*." Though there thus appears to be a fundamental disagreement between the two points of view, actually the deviation of the West Virginia court lies merely in its characterization of petitioner's entry as voluntary.

Most courts, when speaking of a voluntary entry, have in mind the situation in which the accused has been in the state previously, committed the alleged crime, and then departed without being arrested. Then, in order to induce him to come back *voluntarily* to stand trial, the law grants him immunity from civil process. However, in the principal case, the petitioner came into the jurisdiction, committed the offense, and was arrested before he could flee the county. In both situations, the defendant's original entry was voluntary, before any

---

<sup>15</sup>"The reason of the [immunity] rule fails when a party to a suit is brought into the jurisdiction of the court under arrest or other compulsion of law. Such a party does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise." *Anderson v. Atkins*, 161 Tenn. 137, 29 S. W. (2d) 248 (1930); *Crusco v. Strunk Steel Co.*, 365 Pa. 326, 74 A. (2d) 142, 20 A. L. R. (2d) 160 (1950); *Broadus v. Partrick*, 177 Tenn. 335, 149 S. W. (2d) 71 (1941).

<sup>16</sup>Note (1925) 20 Ill. L. Rev. 172.

<sup>17</sup>*Feister v. Hulick*, 228 Fed. 821 (E. D. Pa. 1916); *Nichols v. Horton*, 14 Fed. 327 (N. D. Iowa 1882); *Cole v. Hawkins*, 2 Strange 1094, 93 Eng. Rep. 1054 (1738).

<sup>18</sup>"... the rationale of the rule does not depend upon the voluntary nature of the non-resident's appearance, but ... upon broad grounds of public policy and *individual rights*." [italics supplied]. *Feuster v. Redshaw*, 157 Md. 302, 145 Atl. 560, 562 (1929); *Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863 (1905); *Whited v. Phillips*, 98 W. Va. 204, 126 S. E. 916 (1925).

offense was committed. However, the majority courts are not referring to that entry when they talk about voluntary entry, but rather the subsequent entry to stand prosecution.

In the principal case, there was never any such subsequent entry, because the defendant never left the jurisdiction. Therefore, the petitioner in the principal case was actually in the same situation as the defendant in the ordinary situation who has been brought back into the state for prosecution by extradition process. Although he came into the county of his own volition, yet at the time the civil process was served on him, he was being detained there by force of incarceration, and thus would generally be classified as being in the jurisdiction involuntarily.<sup>19</sup> Where a defendant has been extradited and is served with process while in custody or immediately after discharge, the privilege is generally denied under the majority view, as his entry is deemed involuntary.<sup>20</sup> Similarly, where a nonresident defendant has given bail and returns to stand trial, he is generally regarded as being in constructive custody, and his entrance is therefore involuntary, so that the immunity is denied.<sup>21</sup> A few courts have granted immunity in cases of this kind, fearing that not to do so would encourage defendants to jump bail.<sup>22</sup>

The weakness of the West Virginia court's reasoning lay in classifying petitioner's entry as voluntary, because the majority judges

<sup>19</sup>The immunity privilege is generally denied in cases of this kind, apart from statutory provisions. *Dunn's Appeal*, 35 Conn. 82 (1868); *Rosenblatt v. Rosenblatt*, 110 Misc. 525, 180 N. Y. Supp. 463 (1920); *Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333 (1910); *White v. Underwood*, 125 N. C. 25, 34 S. E. 104, 46 L. R. A. 706 (1899); *Mosier v. Aspinwall*, 151 Okla. 97, 1 P. (2d) 633 (1931).

<sup>20</sup>*Nichols v. Goodheart*, 5 Ill. App. 574 (1880); *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35 (1893); *In re Walker*, 61 Neb. 803, 86 N. W. 510 (1901); *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988 (1906); *Williams v. Bacon*, 10 Wend. 636 (N. Y. 1834). A few courts allow immunity in extradition cases on the theory that not to do so would cause a fraudulent use of extradition to obtain civil process. However, since such a use of extradition laws is everywhere recognized as ground for vacating process, this view is of little force.

<sup>21</sup>*Netograph Mfg. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333 (1910); *Ex parte Hendersen*, 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N. S.) 328 (1914); *Broadus v. Partrick*, 177 Tenn. 335, 149 S. W. (2d) 71 (1941); *Husby v. Emmons*, 148 Wash. 333, 268 Pac. 886, 59 A. L. R. 46 (1928).

<sup>22</sup>"... it can readily be seen that defendants under bail would be tempted to evade our courts if they are aware that by voluntarily coming here to face an indictment they are rendering themselves liable to summons or *capias* in a civil action." *Michaelson v. Goldfarb*, 94 N. J. L. 352, 110 Atl. 710, 711 (1920); *Thomas v. Blackwell*, 172 Okla. 487, 46 P. (2d) 509 (1935).

were apparently thinking of the original entry rather than of his status at the time of the criminal prosecution. Under the situation of the principal case, there was no element of need to encourage the defendant to come into the county voluntarily, because when he came in he was not under any threat of criminal liability and after he had committed the offense he was kept in the county by force of law until punished. Thus, the majority of the West Virginia court, by a faulty process of reasoning, has reached a result fully consistent with the general majority view. Whether that rule denying immunity or the dissent's views granting immunity is preferable must be determined as a policy question, turning on the desirability of guarding the accused against the prejudices involved in standing civil prosecution away from his home jurisdiction.

CHARLES F. TUCKER

PROPERTY—EFFECT OF TAX SALES ON APPURTENANT EASEMENT UPON  
SERVIENT ESTATE SOLD FOR DELINQUENT TAXES. [Federal]

In most states, under the applicable statutory provisions and the courts' interpretation thereof, the purchaser at a valid tax sale of real estate for delinquent taxes acquires a new, complete, and paramount title to the land in fee simple absolute, created by grant from the sovereign.<sup>1</sup> As such, the tax sale and subsequent tax deed and title are said to extinguish all prior titles, rights, interests, equities, and encumbrances, whether such be held by the owner or someone not liable for the tax.<sup>2</sup> However, when the question involves the effect of the

---

<sup>1</sup>Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed. 309 (1887); Teget v. Lamback, 226 Iowa 1346, 286 N. W. 522 (1939); Rist v. Toole County, 117 Mont. 426, 159 P. (2d) 340 (1945); Polenz v. City of Ravenna, 145 Neb. 845, 18 N. W. (2d) 510 (1945); Alamogordo Improvement Co. v. Prendergast, 43 N. M. 245, 91 P. (2d) 428 (1939). However, in other jurisdictions the applicable statutes and the courts' interpretation thereof vest in the purchaser a derivative title, that of the owner against whom the assessment was made. Virginia and West Virginia Coal Co. v. Charles, 251 Fed. 83 (W. D. Va. 1917); Rothenberger v. Garrett, 224 Mo. 191, 123 S. W. 574 (1909). In such jurisdictions easement rights of the dominant owner are not affected by the sale of the servient estate for delinquent taxes. Smith v. Smith 21 Cal. App. 378, 131 Pac. 890 (1913); Anderson v. Daugherty, 169 Ky. 308, 183 S. W. 545 (1916); Cardwell v. Crumley, 35 S. W. 767 (Tenn. 1895). For a general discussion of derivative and paramount tax titles and their effect upon easements see: Kloek, Effect of Tax Deeds on Easements Appurtenant and Rights of Way (1938) 16 Chicago-Kent L. Rev. 328; King, The Assessment and Taxation of Easements (1941) 16 Wash. L. Rev. 36.

<sup>2</sup>Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. ed.



tax deed on *easements* upon the servient estate, created by deed and appurtenant to the dominant estate, though some decisions rule that the tax deed extinguishes the easement,<sup>3</sup> many courts are reluctant thus to carry the general rule to its logical extreme.<sup>4</sup>

In the recent case of *Engle v. Catucci*<sup>5</sup> the Court of Appeals for the District of Columbia has placed itself in the latter group of courts. Plaintiff was the owner of two row lots, a part of a large tract of land which had been subdivided into a row of six lots fronting on a street, with one long narrow lot running along the rear of them. By deed to each of the lots in the tract, the row lots had a right of ingress and egress across the rear lot. Defendant acquired the rear lot by tax deed upon payment of the delinquent taxes on it. Thereafter he built a fence upon his lot and across the rear of plaintiff's lots, thereby denying plaintiff his right of way, and plaintiff brought an action to enjoin defendant from thus interfering with the easement right. Defendant claimed that the tax upon the real estate was a tax directly upon the land, that the tax deed conferred upon him a title which was in the nature of a new and independent grant from the sovereign; and that, as such, it extinguished the easement rights of plaintiff. Plaintiff contended that an easement is a property right which is carved out of the servient estate for the benefit of, and attaches to, the dominant estate; that the tax is upon the servient estate less the easement, and that therefore the easement is not extinguished by sale of the servient estate upon a tax sale.

The Federal District Court granted the injunction, and the Court of Appeals affirmed, holding that since the tax sale did not extinguish the easement, plaintiff was entitled to injunctive relief against the defendant's interference with the right of way. While acknowledging that under the District's statute a tax deed extinguishes all liens,

---

309 (1887); *De Roux v. Girard*, 105 Fed. 798 (C. C. E. D. Pa. 1901); *Crum v. Cotting*, 22 Iowa 411 (1867); *Kahle v. Nisley*, 74 Ohio St. 328, 78 N. E. 526 (1906). See also, notes 8, 13, and 14, *infra*.

<sup>3</sup>*Wolfson v. Heins*, 149 Fla. 499, 6 S. (2d) 858 (1942); *Nedderman v. City of Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936); *Harmon v. Gould*, 1 Wash. (2d) 1, 94 P. (2d) 749 (1939).

<sup>4</sup>*Schlafly v. Baumann*, 341 Mo. 755, 108 S. W. (2d) 363 (1937); *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 66 P. (2d) 792 (1937); *Metropolitan Life Ins. Co. v. McGurk*, 119 N. J. L. 517, 197 Atl. 47 (1938); *Queens Park Gardens v. Long Island Water Corp.*, 277 App. Div. 1146, 101 N. Y. S. (2d) 454 (1950); *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654 (1912).

<sup>5</sup>197 F. (2d) 597 (C. A. D. C. 1952).

equities, and encumbrances in and upon the land conveyed,<sup>6</sup> the court ruled that an appurtenant easement created by deed does not fall within any of these categories; rather, it is a part of the dominant estate, being carved out of the servient estate, owned by the owner of the dominant estate to which it is attached, and adding to the value of the dominant estate while decreasing the value of the servient estate. It was pointed out that, by statutory requirement, realty in the District of Columbia must be assessed "at not less than the full and true value thereof in lawful money,"<sup>7</sup> and that, hence, the assessment of the servient estate would be based upon a value lessened by the existence of the easement, and the assessment of the dominant estate would be upon an increased value. Therefore, when the servient estate is sold for non-payment of taxes, it passes subject to the easement, the taxes upon which have been assessed as part of the dominant estate.<sup>8</sup>

While this result and reasoning is in accord with what is said to be the "majority view,"<sup>9</sup> there is a substantial group of courts which

<sup>6</sup>*W. C. & A. N. Miller Development Co. v. Emig Properties Corp.*, 134 F. (2d) 36, 39 (C. A. D. C. 1943): A tax deed "expunges all the interests which spring from the record title and vests in the holder a new and complete title to the property in fee simple."

<sup>7</sup>D. C. Code (1940) § 47-713.

<sup>8</sup>*Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 66 P. (2d) 792 (1937); *Gowen v. Swain*, 90 N. H. 383, 10 A. (2d) 249 (1939); *Metropolitan Life Ins. Co. v. McGurk*, 119 N. J. L. 517, 197 Atl. 47 (1938); *Tax Lien Co. of New York v. Shultze*, 213 N. Y. 9, 106 N. E. 751 (1914); *Queens Park Gardens v. Long Island Water Corp.* 277 App. Div. 1146, 101 N. Y. S. (2d) 454 (1950); *Ross v. Franko*, 139 Ohio St. 395, 40 N. E. (2d) 664 (1942). While these courts are conscious of the statutes which declare that the tax deed vests in the purchaser a new, perfect, and complete title, in fee simple, free of all liens, equities, and encumbrances, they avoid the conclusion of the minority group of courts under similar statutes by holding that the assessment is the basis of the tax title and since the assessment is upon the servient estate less the easement, the statutes apply only to the title to that portion of the estate. *Schlaflay v. Baumann*, 341 Mo. 755, 108 S. W. (2d) 363 (1937); *Almogordo Improvement Co. v. Prendergast*, 43 N. M. 245, 91 P. (2d) 428 (1939); *Crawford v. Senosky*, 128 Ore. 229, 274 Pac. 306 (1929). Some courts have gone so far as to hold that to rule that the easement rights are extinguished would be a deprivation of property without due process of law. *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654 (1912); *Blenis v. Utica Knitting Co.*, 73 Misc. 61, 130 N. Y. Supp. 740 (1911).

<sup>9</sup>"Although there is a division of authority, the majority of the cases hold that the sale for taxes of land which is subject to an easement or servitude, or a restrictive covenant (sometimes called a negative easement), does not have the effect of extinguishing such easement, servitude, or covenant." Note (1947) 168 A. L. R. 529, 530. While it is true that only those cases dealing with affirmative easements are in point with the principal case, a great number of the cases included in the "majority view" deal with negative easements and restrictive covenants, the courts

have adopted the contrary position for which the tax sale purchaser in the principal case contended.<sup>10</sup> The two divergent views expressed by the courts on this problem seem to arise from a difference of opinion as to the nature of an easement for purposes of real property assessment and valuation.<sup>11</sup>

The jurisdictions adopting the "minority view"<sup>12</sup> that the easement is extinguished by the tax sale of the servient estate<sup>13</sup> lay particular stress upon their statutes which declare that the tax lien has priority over all other rights, interests, liens, equities, and encumbrances. The courts reason that a new and complete title is vested in the purchaser,<sup>14</sup> and they refuse to draw any distinctions between the character and nature of easement rights, and the character and nature of the liens, encumbrances, and equities expressly mentioned in the statutes.<sup>15</sup>

apparently seeing no reason for reaching a different conclusion on the basis of the nature or type of easement concerned. *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 66 P. (2d) 792 (1937) (reciprocal negative easements); *Crawford v. Senosky*, 128 Ore. 229, 274 Pac. 306 (1929); *Hayes v. Gibbs*, 110 Utah 54, 169 P. (2d) 781 (1946).

<sup>10</sup>See footnotes 12 and 13, *infra*.

<sup>11</sup>For a discussion of the various considerations in property evaluation and the effect of easements thereof, see Bonbright, *The Valuation of Real Estate For Tax Purposes* (1934) 34 Col. L. Rev. 1397, 1435.

<sup>12</sup>Only two or three of the cases which are generally thought of as comprising the minority view, deal with the precise question of the principal case—i.e., the effect of a tax sale upon an affirmative easement. *Wolfson v. Heins*, 149 Fla. 499, 6 S. (2d) 858 (1942); *Magnolia Petroleum Co. v. Moyle*, 162 Kan. 133, 175 P. (2d) 133 (1946); *Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982 (1917). The others deal with negative easements or restrictive covenants. *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Hunt v. City of Boston*, 183 Mass. 303, 67 N. E. 244 (1903); *City of Jackson v. Ashley*, 189 Miss. 818, 199 So. 91 (1940); *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927 (1911).

<sup>13</sup>*Wolfson v. Heins*, 149 Fla. 499, 6 S. (2d) 858 (1942); *Nedderman v. City of Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936) [but see Iowa Code (1946) § 448.3, which would indicate that the rule has been changed by legislation in Iowa]; *Magnolia Petroleum Co. v. Moyle*, 162 Kan. 133, 175 P. (2d) 133 (1946); *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Hunt v. City of Boston*, 183 Mass. 303, 67 N. E. 244 (1903) [but see Mass Ann. Laws (Michie, 1945) c. 60 § 45, which states: "... the premises conveyed [by tax deed] ... shall also be subject to and have the benefit of all easements and restrictions lawfully existing in, upon or over said land or appurtenant thereto and ... all covenants and agreements running with said premises either at law or in equity."]; *City of Jackson v. Ashley*, 189 Miss. 818, 199 So. 91 (1940).

<sup>14</sup>*Nedderman v. City of Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936); *City of Jackson v. Ashley*, 189 Miss. 818, 199 So. 91 (1940); *Harmond v. Gould*, 1 Wash. (2d) 1, 94 P. (2d) 749 (1939).

<sup>15</sup>This refusal is shown by the courts' constant stress upon the idea that the assessment is upon the land as land and not upon the divided interests therein. See cases in note 16, *infra*.

Therefore, the tax assessment does not take easements into consideration. It is not regarded as being upon the separate and divided interests and titles which might exist in relation to a particular piece of realty (in these cases, the servient estate), but upon the land in its entirety, upon the land as land, upon the entire "res."<sup>16</sup> Hence, when the servient estate is sold for delinquent taxes, the fee simple passes to the purchaser and the easement right is extinguished. The minority view seems to fear that to hold that the easement is not extinguished would be to recognize that the valuation and assessment of the servient estate excluded the easement, and that such a holding would cause undue complexities in the field of tax enforcement and would burden the tax assessor by compelling him to try to determine the existence of any claims adverse to the principal ownership when evaluating the property for taxation purposes.<sup>17</sup>

The arguments on either side of the question seem to reflect the opinions of the courts as to the best solution to the practical problem of whether the issue should be decided from the standpoint of fairness to the owner of the dominant estate or from the standpoint of the state's interests in tax enforcement and collection. In holding that the tax sale of the servient estate extinguishes the easement, the minority courts are placing a burden upon the owner of the dominant estate not only to make sure that his own taxes are paid, but also to see that his neighbor who owns the servient estate does not default in payment of his taxes, thereby depriving the dominant owner of his easement right through no default of his own.<sup>18</sup> The majority view, on the

---

<sup>16</sup>*Wolfson v. Heins*, 149 Fla. 499, 6 S. (2d) 858 (1942); *Nedderman v. City of Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936); *City of Jackson v. Ashley*, 189 Miss. 818, 199 So. 91 (1940).

<sup>17</sup>"... it is not compatible with our general tax system to assume that the assessor took into consideration any question of dominant or servient tenements that might have been revealed had he searched the title records, nor do we think [that the legislature intended that the state] be handicapped in the prompt collection of revenue by the burden of tracing out subdivided or qualified interests and be compelled to seek to hold the various owners responsible according to their respective interests." *Nedderman v. City of Des Moines*, 221 Iowa 1352, 268 N. W. 36, 38 (1936).

<sup>18</sup>"If the principle contended for by the respondents is sound [that the tax sale extinguishes the easement], the owner of the dominant estate who pays taxes upon a valuation which includes the value of his easements, must also, to protect his easements, pay taxes assessed on another's property, although the value of the easement is necessarily excluded from the assessed valuation thereof." *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, 656 (1912). "Shall he [the owner of the dominant estate] be subjected to double taxation? Shall he thus suffer the destruction of his property rights upon which he has regularly paid tax?" *Alamogordo Improve-*

other hand, avoids penalizing the dominant owner for the default of another and, as has been suggested by the New York courts, avoids taking his property without due process of law.<sup>19</sup>

A very important consideration in tax lien sales law, however, is the assurance of collection of delinquent taxes, and from the standpoint of tax enforcement, the minority view is the more practical, because an estate sold free from easement rights will presumably bring a higher bid at the tax sale. Furthermore, under this rule, the job of the tax assessor is simplified, as he can make his assessment on the basis of the full fee title to the land without the burden of examining the estate or investigating the records for claims adverse to the principal ownership. It is this very consideration which justifies the destruction of most kinds of interests in and charges against land when sold for delinquent taxes,<sup>20</sup> and the contention is strong that easements should not be an exception.<sup>21</sup>

Granting the fact that to require the tax assessor to take into con-

---

ment Co. v. Prendergast, 43 N. M. 245, 91 P. (2d) 428, 432 (1939). "To follow such a theory would create a great insecurity of title by placing unreasonable burdens upon landowners by putting them in the precarious position of seeing that everyone of their 1,058 neighbors are properly assessed and their taxes paid, in order to protect their property from loss. . . ." Hayes v. Gibbs, 110 Utah 54, 169 P. (2d) 781, 788 (1946).

<sup>19</sup>Tax Lien Co. of New York v. Schultze, 213 N. Y. 9, 106 N. E. 751 (1914); Jackson v. Smith, 153 App. Div. 724, 138 N. Y. Supp. 654 (1912); Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N. Y. Supp. 740 (1911).

<sup>20</sup>Cummings v. Cummings, 91 Fed. 602 (C. C. W. D. N. C. 1899) (estate in remainder extinguished, where property is assessed to life tenant); Lucas v. Purdy, 142 Iowa 359, 120 N. W. 1063 (1909) (inchoate right of dower); Shell v. Duncan, 31 S. C. 547, 10 S. E. 330 (1889) (claim of homestead). See Restatement, Property (1944) § 509, comment a: "Incumbrances resulting from conveyance, adverse use or otherwise, however, do affect the sale value of land. If they are not to be destroyed by a sale for tax purposes they should be taken account of in assessing land for such purposes and the assessed value accordingly lowered. Under the interpretation of general tax statutes they are, however, not ordinarily taken account of and are held to be cut off by a sale as a result of assessments under such statute." Restatement, Property (1944) § 509, comment e: "To assess for tax purposes the various legal interests in land would however produce an exceedingly complicated tax structure and it is therefore commonly attempted only in exceptional situations. Hence in levying a tax upon land separate legal interests in the land are ordinarily disregarded."

<sup>21</sup>It is difficult to rationalize and give a categorically justifiable answer to this exception, unless the basic reasoning of the majority view is adopted that the easement is a vested property right carved out of the servient estate for the benefit of the dominant estate. "But account can be taken of an easement appurtenant without increasing the complication of the process of tax collection and without decreasing the amount of the total levy by simply subtracting the value of the use authorized thereby from the servient tenement and adding it to the dominant tenement." Restatement, Property (1944) § 509, comment e.

sideration *all* interests and claims which might be adverse to the principal ownership would immeasurably burden the tax system, it does not follow that such would be the result if he were forced to consider the effect upon the value of the servient and dominant estates caused by easements appurtenant.<sup>22</sup> Most affirmative easements are open and visible, and usually the existence of such is common knowledge within the area. Since the tax assessor is often required by statute to view the property before assessment, it is reasonably probable that he can become aware of such interests. Negative easements generally are recorded and usually appear in the chain of title of either the dominant or servient estate owner. Where such is the case, it would seem not an undue burden to require that the assessor consider such an easement in evaluating the estate in whose chain of title the easement appears. The task of also relating the easement by cross-reference to the corresponding dominant or servient tract for purposes of assessment is no doubt an excessive requirement, however.

Adoption of the majority view would have little effect upon the policy of the state in the collection of delinquent taxes. While the sale of the servient estate subject to the easement would bring a lower price at the tax sale, this loss would be equalized by the increased assessment of the dominant estate by including the value of the easement.<sup>23</sup> In the case of negative easements, which usually take the form of restrictions against certain undesired actions within a tract of land and thereby increase the value of all the lots within the tract, it would actually seem to defeat the state's purpose to hold that such easements are extinguished by the tax sale, thereby lowering the property value of the entire tract.<sup>24</sup>

WILLIAM C. GUTHRIE, JR.

---

<sup>22</sup>Restatement, Property (1944) § 509, comment e.

<sup>23</sup>"It would be a myopic public and financial policy for the state to blow cold on the value of a lot at the tax sale while blowing hot on its assessed value in arriving at the amount of delinquent taxes for which the lot is being sold . . ." *Schlafly v. Baumann*, 341 Mo. 755, 108 S. W. (2d) 363, 368 (1937).

<sup>24</sup>" . . . in cases like the present the mutual easements are created for the very purpose of increasing the taxable value of the entire tract. It is by such development that a large percentage of the aggregate taxable value of the state is created, and a revenue system which should disregard the permanence and safety of such conditions would be highly detrimental to the interest of the people." *State ex rel. Koeln v. West Cabanne Imp. Co.*, 278 Mo. 310, 213 S. W. 25, 28 (1919). "We do not believe that the Legislature intended, nor do the holdings of this court lend color to the theory, that tax lien foreclosures and sales should decrease the value of the realty holdings of citizens by destroying restrictions on the use of real estate mutually beneficial to individual citizens in increasing the value of such holdings and the state in increasing its revenue from taxation." *Hayes v. Gibbs*, 110 Utah 54, 169 P. (2d) 781, 788 (1946).

SALES—APPLICATION OF BULK SALES ACT FOR PROTECTION OF NON-MERCHANDISE CREDITOR OF VENDOR OF STOCK OF DURABLE GOODS.  
[Wisconsin]

Passage of the early bulk sales acts, some sixty years ago, was prompted by the specific need of protection for wholesalers who supplied merchandise to retailers on credit.<sup>1</sup> During the latter part of the nineteenth century it became a prevalent practice for retailers to sell their entire inventories secretly and then abscond leaving the creditor-wholesalers unpaid,<sup>2</sup> and the absence of a bankruptcy act at the time to protect creditors against fraudulent and preferential transfers rendered the need for remedial legislation on bulk sales particularly acute.<sup>3</sup> Hence, pressure brought to bear upon state legislatures by private enterprise<sup>4</sup> eventually led to the passage of the early acts. These statutes, however, were not uniform and some were held to be unconstitutional.<sup>5</sup>

The validity of such legislation having become established,<sup>6</sup> every state and the District of Columbia have enacted bulk sales statutes. Though these acts still vary to a large degree, they can be classified roughly into two main categories. The first, originally known as the

---

<sup>1</sup>For a detailed historical sketch of bulk sales statutes, see Billig, *Bulk Sales Laws: A Study in Economic Adjustment* (1928) 77 U. of Pa. L. Rev. 72.

<sup>2</sup>The following cases concerning bulk sales in which the creditors alleged that they were defrauded are indicative of the situation which gave rise to the great need for bulk sales acts in the period from about 1890 to 1903. *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435 (1897); *Carl & Tobey Co. v. Beal & Fletcher Grocer Co.*, 64 Ark. 373, 42 S. W. 664 (1897); *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075 (1893); *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264 (1897); *Fisher v. Stout*, 74 App. Div. 97, 77 N. Y. Supp. 945 (1902).

<sup>3</sup>As regards sales of inventory, the bulk sales acts now appear to be a more satisfactory remedy than the Bankruptcy Act, largely by virtue of the fact that in bankruptcy all creditors are considered in the distribution of the bankrupt's *entire* assets, whereas in bulk sales the creditors interested in satisfying their claims only from the stock-in-trade are considered.

<sup>4</sup>Agitation for remedial legislation was led by the National Credit Men's Association. Note (1935) 10 Tulane L. Rev. 131, 133.

<sup>5</sup>Several early acts were held unconstitutional on the grounds that one could not be deprived of his right to purchase, hold and sell or dispose of his property without due process of law, *Block v. Schwartz*, 27 Utah 387, 76 Pac. 22 (1904); or that such statutes constituted class legislation, *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264 (1908).

<sup>6</sup>As more states passed bulk sales acts, it was generally held that such legislation was justifiable under the police power. *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461, 30 S. Ct. 606, 54 L. ed. 839 (1910); *Spurr v. Travis*, 145 Mich. 721, 108 N. W. 1090 (1906); *Nobel v. Ft. Smith Wholesale Grocery Co.*, 34 Okla. 662, 127 Pac. 14 (1911).

New York type,<sup>7</sup> provides that the bulk buyer should obtain from the bulk seller or retailer a list of his creditors and give them notice of the prospective bulk sale a specified number of days in advance of its intended consummation, so that they may satisfy their claims against the merchandise. On the other hand, the second form of statute, originally known as the Pennsylvania type and followed in a minority of states,<sup>8</sup> puts a heavier imposition on the bulk buyer, requiring him to go so far as to see that the proceeds of the bulk sale are applied to the creditors' claims.<sup>9</sup> Most bulk sales statutes specify that if the sale is not in compliance with the act, it is either "void,"<sup>10</sup> "fraudulent and void,"<sup>11</sup> or "presumed to be fraudulent and void,"<sup>12</sup> thereby enabling the creditors to satisfy their claims from the goods in the hands of the bulk buyer.<sup>13</sup>

The recent Wisconsin case of *State Bank of Viroqua v. Jackson*<sup>14</sup> illustrates the questionable judicial interpretations which have been placed upon several controversial aspects of the bulk sales statutes by the courts. The defendant, Jackson, who was engaged in the garage business, had undertaken the additional work of selling farm machinery. Because of ill health, however, he had disposed of most of his farm machinery at auction. He was also desirous of selling his garage business and the balance of farm implements and repair parts. Hence, after some negotiations, the defendant Jackson's remaining assets were

---

<sup>7</sup>The New York type is more widely in effect, having been adopted in thirty-eight states, the District of Columbia, Hawaii and Puerto Rico. Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors* (1952) 65 Harv. L. Rev. 418, 420.

<sup>8</sup>This type of statute has been adopted in Pennsylvania, Idaho, Kentucky, Louisiana, Maryland, Montana, Nevada, South Dakota, Utah, Washington, Alaska and the Virgin Islands.

<sup>9</sup>The proposed Uniform Commercial Code has adopted the basic Pennsylvania policy, but appears to go even further in that, in effect, it makes the bulk buyer a special receiver charged with responsibility for carrying out pro-rata distribution among the creditors and for retaining sufficient funds to satisfy disputed claims. Uniform Commercial Code § 6-106.

<sup>10</sup>Colo. Stat. Ann. (1935) c. 27, § 1; 3 Mich. Stat. Ann. (1948) c. 442-1, § 361; N. Y. Pers. Prop. Law § 44.

<sup>11</sup>Mont. Rev. Code Ann. (1947) tit. 18, c. 2, § 202; Pa. Stat. Ann. (1951) tit. 69, § 523.

<sup>12</sup>Ala. Code Ann. (Supp. 1951) tit. 20, § 10; Minn. Stat. Ann. (West, 1945) c. 513, § 18; Tenn. Code Ann. (Williams, 1934) § 7283.

<sup>13</sup>States are not in accord, however, as to the exact remedies of an attacking creditor. For a short discussion of the way some courts have disposed of the problems involved, see Weintraub & Levin, *Bulk Sales Law and Adequate Protection of Creditors* (1952) 65 Harv. L. Rev. 418, 428.

<sup>14</sup>261 Wis. 538, 53 N. W. (2d) 433 (1952).



sold to defendant Iverson for \$6,000, there being no compliance with the Wisconsin bulk sales law.<sup>15</sup> At that time defendant Jackson was indebted to plaintiff bank in the sum of over \$5,000. Plaintiff, after securing judgment against defendant Jackson for \$4,702.45, began garnishment proceedings against the bulk buyer, Iverson, asserting his liability on the ground of failure to comply with the bulk sales law. The plaintiff's complaint was dismissed on the merits by the trial court, but on appeal the Supreme Court of Wisconsin held that the items of farm machinery sold by defendant Jackson in his retail business fell within the act, but that the machinery used by him in his repair business did not.

Though consistent with the general application of the bulk sales statutes, the *Jackson* decision demonstrates several phases of the faulty legislation and application of principles common in the field of bulk sales.<sup>16</sup> One such factor is the matter of what property is meant to be covered by bulk sales legislation. The typical statutory phrase "goods, wares and merchandise" has been held to cover almost any property sold at retail.<sup>17</sup> Consistent with this broad interpretation, no distinction is made in the principal case between perishable or expendable items and hard, durable goods such as farm machinery. It appears, however, that this distinction should be observed. Creditors who supply retailers farm machinery and similar durable items have at their disposal the trust receipt or conditional sale with which to provide security for themselves. If they fail to make use of these devices, it does not appear that they should be allowed to fall back upon the double protection of bulk sales legislation, the original purpose of which was to protect those creditors who otherwise had no means of protection against fraudulent conveyances. Extending the remedy to those creditors

---

<sup>15</sup>Under the Wisconsin bulk sales provision, the bulk buyer is required to demand and receive from the bulk seller, at least five days before the sale, a written, complete and certified list of the names and addresses of all the creditors of the seller. The bulk buyer must then notify personally every creditor of the sale within five days of taking possession of the goods, or in lieu of personal service, notify every creditor by registered mail at least ten days before the goods are paid for, taken possession of, or delivered. Wis. Stat. (1947) § 241.18.

<sup>16</sup>"... the credit men, as a class, believe in the efficacy of bulk sales laws, but at the same time they realize that at best these statutes are limited in their application, and that in their present form many of them still require considerable revision." Billig & Smith, *Bulk Sales Laws: A Study in Statutory Interpretation* (1931) 38 W. Va. L. Q. 309, 318.

<sup>17</sup>Merchandise has been held to mean "something that is sold every day, and is constantly going out of the store and being replaced by other goods." *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S. W. 26 (1926).

who failed to avail themselves with other protective devices at their disposal often has the effect of unnecessarily prejudicing good faith bulk purchasers.

Another discrepancy with original purpose found in modern bulk sales legislation is suggested by the *Jackson* case in the matter of what creditors are included within the protection of the statute. The creditor bank in the principal case is not identified as a merchandise creditor, and hence it appears that the court by implication approved the prevailing view that *all* creditors are covered by bulk sales legislation.<sup>18</sup> Bulk sales statutes, however, were originally passed for the narrow purpose of protecting *merchandise* creditors, or only those wholesalers, jobbers, growers and manufacturers who supplied the retailers their stock-in-trade on credit.<sup>19</sup> It is readily seen that the current prevailing view, which includes personal creditors whose claims are in no way connected with the operation of the retailer's business, imposes too heavy a burden of notification on bulk purchasers. Nevertheless, courts have gone so far as to hold that the United States is a creditor for federal income taxes so as to come within the terms of a bulk sales act;<sup>20</sup> and a lessor to whom rent is owing has been held to be a creditor covered by the applicable statute.<sup>21</sup>

The words of the court in the *Jackson* case that the bulk sales law "does not apply to items that are to be processed or to which labor is to be added prior to sale"<sup>22</sup> suggests the further problem of what businesses are to come under bulk sales laws. In holding that the items of farm machinery to be installed by Iverson in his repair business were not covered by the statute, the Wisconsin decision is in accord with the majority view that the statutes apply only to merchants or traders and not to businesses involving labor or mechanical skill as the principal factors.<sup>23</sup> This view appears consistent with the original

---

<sup>18</sup>The prevailing view is that "no distinction is to be drawn between one class of creditors and another." 24 Am. Jur. 358. In accord with the prevailing view: *Rabalsky v. Levenson*, 221 Mass. 289, 108 N. E. 1050 (1915); *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874 (1912). The court in the principal case stated merely that "Jackson was indebted to the plaintiff bank in a sum in excess of \$5000" with no mention being made of the source of the debt. *State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N. W. (2d) 433, 434 (1952).

<sup>19</sup>Note (1951) 53 W. Va. L. Rev. 188, 189.

<sup>20</sup>*United States v. Goldblatt Bros.*, 128 F. (2d) 576 (C. C. A. 7th, 1942).

<sup>21</sup>*Wright v. Haley*, 208 Ind. 46, 194 N. E. 637 (1935).

<sup>22</sup>*State Bank of Viroqua v. Jackson*, 261 Wis. 538, 53 N. W. (2d) 433, 435 (1952).

<sup>23</sup>*Connecticut Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534 (1912); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257 (1909); *Axtell Co. v. Word*, 29 S. W. (2d) 421 (Tex. Civ. App. 1930); *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905 (1905); 24 Am. Jur. 361; Note (1948) 34 Va. L. Rev. 96, 97.

purpose for which bulk sales laws were enacted, yet courts have frequently expanded the coverage of this legislation to include such transactions as the sale of a dry cleaning establishment<sup>24</sup> and the sale of a manufacturer's machinery and inventory.<sup>25</sup> On the other hand, on the outmoded theory that they render a service rather than make a sale, restaurants have generally been held not within the scope of bulk sales laws.<sup>26</sup>

Though the proposed Uniform Commercial Code<sup>27</sup> now offers a step toward uniformity and provides numerous improvements in bulk sales law,<sup>28</sup> it does not remedy all the defects suggested by *State Bank of Viroqua v. Jackson*. For example, it is provided that "a bulk transfer subject to this Article is ineffective against *any* creditor of the transferor . . ." unless the terms of the statute are fulfilled.<sup>29</sup> Hence, as in the *Jackson* case, creditors are not confined to those people who supplied the retailer his stock-in-trade. Furthermore, though Section 6-102 provides, consistent with the construction of the Wisconsin Act in the principal case, that "the enterprises subject to this Article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell," still the Code clings to an unrealistic concept in holding restaurants not to be covered under the bulk sales laws. The Code also continues to use the term "merchandise" without distinguishing between hard, durable goods and perishable or expendable items. In view of the continued existence of these shortcomings in the proposed Code, it appears that

---

<sup>24</sup>*Flushing National Bank in New York v. Abrams*, 296 N. Y. 1009, 73 N. E. (2d) 582 (1947).

<sup>25</sup>*Kranke v. American Fabrics Co.*, 112 Conn. 58, 151 Atl. 312 (1930). Other extreme cases in which bulk sales legislation has been held applicable: a farmer's sale of all his cattle, *Hall v. Main*, 34 F. (2d) 528 (E. D. Ill. 1929); a sale of all its property by an opera house company, *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N. E. 454 (1919); a sale of a woodworking business, *Mosson v. Kriser*, 212 App. Div. 282, 208 N. Y. Supp. 566 (1925); a sale of a publishing and printing business, *Digregorio v. Avanti Pub. Co.*, 129 Misc. 345, 221 N. Y. Supp. 497 (1927).

<sup>26</sup>*Carnaggio Bros. v. City of Greenwood*, 142 Miss. 885, 108 So. 141 (1926); *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919); *O'Connor v. Smith*, 188 Va. 214, 49 S. E. (2d) 310 (1948); *Vold, Sales* (1931) 411; *Note* (1949) 35 Va. L. Rev. 123, 124.

<sup>27</sup>Article 6 of the U. C. C. (Final Text Edition, Nov. 1951) deals with bulk transfers.

<sup>28</sup>Among the many improvements, so far as details are concerned, are the provisions that equipment, such as fixtures, is not involved unless sold in connection with a sale of inventory, and that bona fide sub-vendees are exempted from bulk sales requirements.

<sup>29</sup>Uniform Commercial Code § 6-104 [italics supplied].

the court in the *Jackson* case would have reached the same decision had the case been decided under the Uniform Commercial Code.

JAMES H. FLIPPEN, JR.

SURETYSHIP—SCOPE OF LIABILITY OF SURETY FOR POLICE OFFICER FOR INJURIES INFLICTED THROUGH MISCONDUCT OF OFFICER. [Maryland]

State statutes generally require that a police official, upon assuming office, execute a surety bond conditioned upon the faithful performance of his duties and the accounting for funds received. Upon the subsequent misconduct of such official and suit on the bond, the court is faced with the vexatious problem of determining the scope of the liability of the surety. On the one hand the court must consider the need for imposing very broad liability, because police officials "are endowed . . . with special and extraordinary official powers which are peculiarly susceptible of abuse,"<sup>1</sup> and because officers are so often financially irresponsible that the victim cannot recover unless the surety bond is held to cover the wrong suffered.<sup>2</sup> On the other hand the courts must bear in mind the undesirability of making the surety liable for every conceivable harm which police officers might do, since this would force the insurers to charge prohibitively high premiums for such bonds. A difficult balance then must be struck between the protection which the public deserves and the risk the surety can fairly be expected to bear at moderate rates. Thus far the courts do not seem to have struck upon any satisfactory formula for determining the scope of the surety's liability.<sup>3</sup>

The recent Maryland case of *State, to Use of Hill v. Fidelity and Deposit Co. of Maryland*<sup>4</sup> demonstrates the inadequacy of the traditional theory based on the distinction between acts *virtute officii* and acts *colore officii*.<sup>5</sup> The state of Maryland brought suit to the use of

<sup>1</sup>Nelson v. Bartell, 4 Wash. (2d) 186, 103 P. (2d) 30, 35 (1940).

<sup>2</sup>Van Pelt v. Littler, 14 Cal. 194 at 200 (1859); The People ex rel Kellogg v. Schuyler, 4 Com. 173 at 179 (N. Y. 1850); Arnold, Suretyship and Guaranty (1927) 397.

<sup>3</sup>The conflict in opinions is well set out in Lee v. Charmley, 20 N. D. 570, 129 N. W. 448 (1910), and in Note (1911) 33 L. R. A. (N. S.) 275.

<sup>4</sup>88 A. (2d) 457 (Md. 1952.)

<sup>5</sup>Lord Kenyon in his oft-quoted definition in *Alcock v. Andrews*, 2 Esp. 542, 170 Eng. Rep. 449 (1788), characterized acts *virtute officii* as those "where a man doing an act within the limits of his official authority, exercises that authority

one Hill against the Sheriff of Talbot County and the Surety Company to recover for personal injuries inflicted upon Hill at the country jail. Police officers had arrested Hill for drunken driving and delivered him into the custody of the sheriff. The sheriff maliciously assaulted and beat Hill and then shot him in the face with tear gas, which act will cause him to become totally blind. It was alleged that the sheriff committed these acts by virtue of his office so that the surety was liable, but the trial court sustained the surety's demurrer. On appeal, the Court of Appeals, recognizing that Maryland has not abandoned the traditional distinction between acts *virtute officii* and *colore officii*, posed the issue thus: If there was a breach of official duty on the part of the sheriff, the surety would be liable; however, if the wrongful act was not committed in discharge of his official duty, the sheriff would be personally liable, but the surety would not be liable. In summation the court explained that, "In an action against the surety, it is necessary to allege and prove that the sheriff was required to take some official action under the circumstances, that the injuries complained of were inflicted by the sheriff while he was attempting to take such action, and that they were the result of official misconduct."<sup>6</sup> The court remanded the case to give the plaintiff an opportunity to amend by specifically alleging how the sheriff breached an official duty at the time of the assault.

The *virtute* and *colore* distinction reaffirmed in the instant case is one of long standing, having been stated by Lord Kenyon in an English case as early as 1788.<sup>7</sup> When the question of liability on a sheriff's bond first rose in Maryland in 1880 the court accepted Lord Kenyon's distinction,<sup>8</sup> and this test for liability was early adopted as well by courts of New Jersey, New York, North Carolina, Wisconsin and Oklahoma.<sup>9</sup>

In cases arising in other states, the courts rejected this distinction

---

improperly, or abuses the discretion placed in him." *Colore officii* he defined as "where the act committed is of such a nature that the office gives him no authority to do it; in the doing of that act he is not to be considered as an officer."

<sup>6</sup>88 A. (2d) 457, 461 (Md. 1952).

<sup>7</sup>Alcock v. Andrews, 2 Esp. 542, 170 Eng. Rep. 449 (1788).

<sup>8</sup>State, Use of Vandeworker v. Brown, 54 Md. 318 (1880).

<sup>9</sup>State v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54 (1860); Ex parte Reed, 4 Hill 572 (N. Y. 1843); State v. Brown, 11 Ired. 141 (N. C. 1850); Dysart et al v. Lurty, 3 Okla. 601, 41 Pac. 724 (1895); Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751 (1875). Ex Parte Reed was overruled shortly after being decided by People ex rel. Kellogg v. Schuyler, 4 Com. 173 (N. Y. 1850).

as illogical and unjust,<sup>10</sup> and adopted what has now become the majority view that the surety is liable for all wrongful acts done under indicia of official position.<sup>11</sup> These courts reason that the "purpose of an official bond is to provide indemnity against malfeasance and misbehavior in public office, the misuse of powers belonging to the office and the assumption under the guise of official action of powers not belonging to it."<sup>12</sup> Under this view all acts which the officer purportedly performs in the capacity of public official, though unauthorized and unlawful, are official acts within the scope of the officer's oath faithfully to discharge the duties of his office. As such they may be considered as having been within the risk contemplated by the surety at the time of undertaking the suretyship contract.<sup>13</sup>

A few states continue to recognize the *virtute-colore* distinction, but this action sometimes seems to be based more upon respect for precedents than on conviction of the logic of the test.<sup>14</sup> In the principal case the court set out the arguments of the majority courts in great length and in approving tones, and in conclusion stated: "Under our decisions *which it is not necessary for us to overrule*, the surety on a sheriff's bond is liable where the sheriff, in discharge of the duties of his office, brutally assaults a person without provocation or necessity."<sup>15</sup>

The passing of the *virtute-colore* test is not to be mourned. The results of its application were frequently illogical and confusing because the terms are too indefinite and nebulous to set out a workable standard for deciding cases.<sup>16</sup> A review of the cases indicates that

<sup>10</sup>"The refinement or supposed distinction between acts that were termed to have been committed *colore officii* or *virtute officii* is as useless in practice as it is obscure in meaning. . . ." *Geros v. Harries*, 65 Utah 227, 236 Pac. 220, 225 (1925).

<sup>11</sup>*Lammon v. Feusier*, 111 U. S. 17, 4 S. Ct. 286, 28 L. ed. 337 (1884); *National Bank of Redemption v. Rutledge*, 84 Fed. 400 (N. D. Ohio 1897); *Clancy v. Kenworthy*, 74 Iowa 740, 35 N. W. 427 (1887); *City of Lowell v. Parker*, 10 Metc. 309, 43 Am. Dec. 436 (Mass. 1845); *Kosowsky v. Fidelity and Deposit Co.*, 245 Mich. 266, 222 N. W. 153 (1928); *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219 (1903); *Turner, Frazer & Co. v. Killian*, 12 Neb. 580, 12 N. W. 101 (1882); *Lee v. Charmley*, 20 N. D. 570, 129 N. W. 448 (1910); *American Guaranty Co. v. McNiece*, 111 Ohio 532, 146 N. E. 77 (1924); *Geros v. Harries*, 65 Utah 227, 236 Pac. 220 (1925); *Mace v. Gaddis*, 3 Wash. Terr. 125, 13 Pac. 545 (1887).

<sup>12</sup>24 R. C. L., *Sheriffs* § 50.

<sup>13</sup>*Lee v. Charmley*, 20 N. D. 570, 129 N. W. 448 (1910); 24 R. C. L., *Sheriff's* § 50. "The Sheriff's official position gives him an advantage over private persons, and, it being a breach of his official duty to use this advantage, his bondsmen are liable therefor." *Mace v. Gaddis*, 3 Wash. Terr. 125, 13 Pac. 545, 546 (1887).

<sup>14</sup>See *Inman v. Sherrill*, 29 Okla. 100, 116 Pac. 426 (1911).

<sup>15</sup>88 A. (2d) 457, 461 (Md. 1952) [italics supplied].

<sup>16</sup>"The best argument against attempting to fix an arbitrary line of demarcation between acts done *colore officii* and those done in virtue of office is that the

various courts have applied a wide variety of meanings to the term *colore officii*.<sup>17</sup> Under such a shifting standard the surety has no means of determining just what degree of risk it is undertaking on the bond, and the injured party has no basis for judging whether he may recover from the surety.<sup>18</sup>

It is obvious that the injured party is not interested in whether the act was done by virtue of under color of office. In either case it is the officer's position which creates the opportunity for harm.<sup>19</sup> As one court has observed, "It is as much his duty as an officer to refrain from corruptly usurping or assuming powers not pertaining to his office, as to refrain from corruptly exercising those which properly belong to it."<sup>20</sup> If the victim of the wrong cannot collect from the surety for his injury, it is highly unlikely that he will collect at all.

Another criticism of this standard is that the distinctions drawn out at great length between acts *virtute officii* and *colore officii* are from their very nature "argumentations in a circle."<sup>21</sup> If the test were carried to its logical conclusion the surety would never be liable. The surety is not held liable for the illegal, unauthorized acts of the official. These are the very acts against which the public seeks assurance and which constitute the only reason for requiring the surety bond, for, the sheriff is obviously not liable for his legal, authorized acts, and consequently the surety is not liable either.

Having rejected the *virtute-colore* test, the majority courts still face the problem of determining what standard to apply in deciding

cases, after a hundred years exposition, are in hopeless and interminable confusion." *Greenius v. American Surety Co.*, 92 Wash. 401, 159 Pac. 384, 385 (1916). See also, note 10 *supra*.

<sup>17</sup>See *American Guaranty Co. v. McNiece*, 111 Ohio 532, 146 N. E. 77 at 79 (1924).

<sup>18</sup>Two Maryland cases illustrate the illogical results achieved by courts applying this standard. In *State, to Use of Wilson v. Fowler*, 88 Md. 601, 42 Atl. 201 (1898), it was held that the surety was liable to the injured party where an officer executed a writ in a wrongful and oppressive manner, but in *State, to Use of German v. Timmons*, 90 Md. 10, 44 Atl. 1003 (1899), the court held that the sureties were not liable for an officer's illegal seizure of property when acting under a void distress warrant, as the act was not done by virtue of his office.

<sup>19</sup>For example, the injured party in the *Timmons* case, *supra* note 18, would not have surrendered the property if he had not thought that the sheriff was acting under his legal powers.

<sup>20</sup>*State v. Wedge*, 24 Minn. 150, 153 (1877).

<sup>21</sup>24 R. C. L., *Sheriffs* § 59. As the Iowa court observed, "If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he of course is not liable." *Clancy v. Kenworthy*, 74 Iowa 740, 35 N. W. 427, 428 (1887).

whether or not the officer acted "unofficially" within the terms of the bond. Unfortunately, no satisfactory substitute has been discovered, for though various alternate tests have been advocated and applied, all have serious shortcomings. Some courts, including the federal courts, have adopted a form of "but for" test for determining liability of the surety,<sup>22</sup> which operates by posing the question: "Would [the officer] have acted in the particular instance if he were not clothed with his official character, or would he have so acted if he were not an officer?"<sup>23</sup> This test shares the disadvantages of the *virtute-colore* test in that it has no concrete meaning and is largely a result-getting device. Whether or not he would have so acted if he were not an officer, the fact remains that it was his official position which made the abuse on his part much more likely and deterred his victims from their ordinary vigor in protecting their persons and property.

A few courts have held that an officer acts officially whenever he believes or claims he is acting in an official capacity.<sup>24</sup> Such a test imposes unreasonably broad liability on the surety. Some acts are so far removed from official duties that it is apparent to any reasonable person that the officer cannot be acting in an official capacity;<sup>25</sup> yet by such a test, if a power-mad or emotionally unstable officer believed that he was acting officially, the surety would be liable for his wrongful acts.

It has been suggested that the most practical criterion of liability is whether the act was done or committed in the course of an attempt to serve or execute a writ or process, and as a means to that end.<sup>26</sup> The advocates of this test claim it will exonerate the sureties from liability

<sup>22</sup>State of Missouri to use of DeVault v. Fidelity and Casualty Co., 107 F. (2d) 343 (C. C. A. 8th, 1939); State ex rel. Penrod v. French, 222 Ind. 145, 51 N. E. (2d) 858 (1943); Stark Hickey Inc. v. Standard Accident Insurance Co., 291 Mich. 350, 289 N. W. 172 (1939); State to Use of Kaercher v. Roth, 330 Mo. 105, 49 S. W. (2d) 109 (1932); Lynch v. Burgess, 40 Wyo. 30, 273 Pac. 691 (1929).

<sup>23</sup>4 R. C. L., Sheriffs § 59.

<sup>24</sup>Mobile County v. Williams, 180 Ala. 639, 61 So. 963 (1913); Myers v. Colquitt, 173 S. W. 993 (Tex. Civ. App. 1914); 43 Am. Jur., Public Officers § 418; Note (1918) Ann. Cas. 1918C 1021.

<sup>25</sup>For instances of outrageous misconduct by a police officer, who nevertheless could argue that he believed he was acting under authority of his office, see Reed v. Philpot's Adm'r, 235 Ky. 429, 31 S. W. (2d) 709 (1930) (a chief of police of a city, in an attempt to take a prisoner away from the deputy sheriff of the county, shot the deputy, causing his death); Greenberg v. People to Use of Balaban, 225 Ill. 174, 80 N. E. 100 (1906) (a constable engaged in levying an execution on a stock of merchandise, roughly shoved the pregnant wife of the debtor aside and struck her in the abdomen with a box, causing her to have a still birth).

<sup>26</sup>State, to Use of German v. Timmons, 90 Md. 10, 44 Atl. 1003 (1899); McLendon v. State, to Use of Kennedy, 92 Tenn. 520, 22 S. W. 200 (1893); 24 R. C. L. 960.



for an assault committed by an officer out of personal malice and bearing no relation to service of the writ. It is apparent that this test restricts liability too closely. His official position makes it possible for the officer to commit abuses in many situations other than the service of process, and injured persons, such as the unfortunate plaintiff in the principal case, are not interested in whether or not a writ was being served at the time they were assaulted.

The distinction is sometimes made that sureties are liable for a mistake of fact made by an officer in attempting to discharge a duty which he is called upon to perform by virtue of his office, but are not liable for a mistake of law, by reason of which he assumed to act as an officer, when the undisputed facts show that he was not called upon to act in his official capacity.<sup>27</sup> This type of test would call for fine distinctions with their accompanying variant results, often ignoring the fundamental fact that it was his official capacity which placed the officer in a position to commit the wrong. Technical distinctions should not be employed to defeat the purpose of the bond to protect the public from misconduct by police officers.

Since the courts have not been successful in establishing a reliable standard for determining to what extent injured persons are to be indemnified by the officers' sureties, and since the mere posting of a bond is no guarantee of good conduct on the part of police officials, some further forms of deterrents should be developed. It has been suggested that imposing broader liability on the surety may help serve that purpose, because if the surety is made to pay, it will become more likely that the wrongdoer will be civilly and criminally prosecuted, since the surety company will pursue him relentlessly for reimbursement.<sup>28</sup> Heavy and certain criminal penalties for guilty officers would add a powerful sanction against misconduct in office. Such penalties, however, would require special procedures, since the regular law enforcement agencies tend to view the situation with sympathy for the offender, who is a compatriot. Perhaps the courts should be given special powers to set up investigational and prosecuting boards divorced from the regular police departments when incidents like that in the principal case occur; or perhaps a permanent overseeing body on a state-wide level would be able to exert the proper impersonal discipline over

---

<sup>27</sup>Mace v. Gaddis, 3 Wash. Terr. 125, 13 Pac. 545 (1887); Fish v. Nethercutt, 14 Wash. 582, 45 Pac. 44 (1896); 24 R. C. L., Sheriffs § 54.

<sup>28</sup>Vance, Insurance (2d ed. 1930) 920.

local officials. Whatever steps are taken, it is evident that some measures must be developed to deter future atrocities such as those practiced on the unfortunate plaintiff of the principal case.

ROBERT LEE BANSE

TAXATION—APPLICATION OF STATE USE TAX TO PRINTING PRESS EMPLOYED IN MAINTAINING INTERSTATE COMMERCE. [South Dakota]

The use tax, levied on the consumption within the taxing state of goods purchased outside of the state by a local consumer,<sup>1</sup> was developed as a means of implementing state sources of revenue during the depression years.<sup>2</sup> In 1937, the constitutionality of the use tax was tested in *Henneford v. Silas Mason Co., Inc.*,<sup>3</sup> where the Supreme Court of the United States sustained a tax imposed on machinery purchased outside the taxing state, but which had come to rest within its boundaries. In declaring this type of revenue-producing device to be valid, the Court considered not only the legal technicalities of constitutionality but also the social and economic ramifications inherent in the imposition of a use tax, and endeavored to balance the necessity for free and unburdened channels of interstate commerce against the indispensibility to the states of such a source of income.<sup>4</sup>

In the recent South Dakota case of *Mitchell Publishing Co. v. Wilder*,<sup>5</sup> the validity of a state use tax imposed on a printing press was contested by a newspaper publisher. The press was operated within the state boundaries of South Dakota, but it had been purchased outside of its jurisdictional limits. The publishing company contended that the press was used in maintaining interstate commerce and thus fell within the clause of the local tax statute which exempted from the levy all items, "used or to be used in operating or maintaining

---

<sup>1</sup>Brown, Some Legal Aspects of State Sales and Use Taxes, (1943) 18 Ind. L. J. 77, 80.

<sup>2</sup>Notes (1938) 48 Yale L. J. 273; (1938) 86 U. of Pa. L. Rev. 787.

<sup>3</sup>300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814 (1937). The Supreme Court ruled that the Washington tax was valid because it was equally imposed by nondiscriminatory methods and was not a burden on interstate commerce, but was a tax upon the privilege of use after interstate commerce had ended. The property here was at rest in the state of Washington, and as such became part of the common mass of property inside the state which was subject to taxation.

<sup>4</sup>For general discussion, see Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way (1938) 38 Col. L. Rev. 49.

<sup>5</sup>52 N. W. (2d) 732 (S. D. 1952).

interstate transportation or interstate commerce.”<sup>6</sup> The Supreme Court of South Dakota, one judge dissenting, adopted this position, on the reasoning that the use of out-of-state raw materials, advertising, news sources, and the dissemination of a small percentage of the copies of the newspaper outside the state, all involved interstate commerce.<sup>7</sup> Since both the receipt of the raw materials and the distribution of the newspaper were held to be interstate commerce, the South Dakota court concluded that the incoming news retained its interstate character during the printing process, and the press was a mechanical instrumentality used in maintaining this commerce. Thus the press was held to be within the scope of the provision of the statute exempting interstate commerce from the state use tax on tangible personal property.<sup>8</sup>

Support for this line of reasoning may be found in the fact that the

---

<sup>6</sup>S. D. Laws (1939) c. 276, 4, subdiv. 3, as amended by S. D. Laws (1943) c. 301: “Tangible personal property, the storage, use or other consumption of which the state is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State, or which is used or to be used in operating or maintaining interstate transportation or interstate commerce . . .”

<sup>7</sup>*Mitchell Pub. Co. v. Wilder*, 52 N. W. (2d) 732 (S. D. 1952): “. . . it appears that the appellant publishes a daily newspaper with a circulation of about 16,000 copies, slightly in excess of two percent of which circulation is mailed or otherwise delivered to subscribers outside this state. That substantially all of the supplies utilized, including ink, paper, mats, comics, supplements, and cartoons are purchased and obtained from outside this State. That approximately fourteen percent of the advertising appearing in the newspaper originates outside this state. That the news service is obtained from the United Press and the Associated Press, of which news eighty-four percent originates outside the state. That reporters, officers and agents of the appellant corporation are frequently required to go outside the state on business connected with the publication of the newspaper.”

<sup>8</sup>A further theory which was not alluded to in either opinion of the principal case might be that the press became a part of the realty and thus was taxable as such after it had gained a local situs on the premises of the publishing company. Justice Butler observed in *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments*, 280 U. S. 338, 346, 50 S. Ct. 111, 113, 74 L. ed. 463, 467 (1930): “It is elementary that a state may tax property used to carry on interstate commerce.” Prior to this decision in *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 15 S. Ct. 360, 39 L. ed. 311 (1895), the Supreme Court observed that a tax imposed on the privilege of doing business in the state but measured by the value of the property situated within the taxing state was really only a substitute for an otherwise valid property tax on corporation property within the state. Although no state could compel a corporation to pay for the privilege of engaging in interstate commerce, this immunity did not prevent a state from imposing an ordinary property tax upon property having a situs within its jurisdictional limits that was employed in interstate commerce. For further cases see: *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995 (1903); *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683 (1897); *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790 (1888).

legislation in question was enacted in 1939 and amended in 1943.<sup>9</sup> It would seem reasonable to assume that the South Dakota legislature in enacting this statute would have taken cognizance of the greatly expanded meaning which the United States Supreme Court had given to the term "interstate commerce" in its decisions prior to the passage of this legislation.<sup>10</sup>

In arriving at its conclusion, the majority relies on one of its own previous decisions construing the statute presently in issue, and on a case decided recently by the Supreme Court of the United States in an entirely different type of controversy. In *Scandrett v. Nord*,<sup>11</sup> distillate purchased outside of South Dakota had been used within the state in burning weeds off of a railroad right of way. In ruling that the distillate was within the exemptions to the use tax provided in the statute, the South Dakota court reasoned that the material was purchased to be used in maintaining interstate transportation and thus was expressly excepted. At its last term, the United States Supreme Court, in *Lorain Journal Co. v. United States*,<sup>12</sup> considered the question of whether a newspaper could be enjoined from taking action to prevent its advertisers from buying advertisement time over a local radio station. The newspaper, which enjoyed a substantial monopoly on news dissemination threatened to cut them off as advertisers in its paper. In determining that the monopoly provisions of the Sherman Anti-Trust Act applied to the situation, it was necessary that the Court find that

---

<sup>9</sup>Mitchell Pub. Co. v. Wilder, 52 N. W. (2d) 732 at 734 (S. D. 1952).

<sup>10</sup>N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937), sanctioned the constitutionality of the National Labor Relations Act as being a valid exercise of congressional power to regulate labor disputes, when in an industry affecting interstate commerce, which is subject to federal regulation. The court said the steel company vitally affected interstate commerce and any dispute within the company also affected interstate commerce by impeding its free flow. Thus the power of regulation reached into the manufacturing process itself and those activities essential to the operation of the process. *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735 (1922), upheld the constitutionality of the Packers and Stockyards Act of 1921, on the ground that stockyards were within the scope of interstate commerce and Congress could regulate their activities and enjoin certain practices which impeded or burdened interstate commerce. *Houston, East and West Texas Ry. Co. v. United States*, 234 U. S. 342, 34 S. Ct. 833, 58 L. ed. 1341 (1914) affirmed a cease and desist order of the Interstate Commerce Commission which forbade carriers to continue to discriminate against interstate commerce by giving lower rates to intrastate commerce. Even intrastate commerce was held to be subject to congressional regulation when it materially affected the flow of interstate commerce.

<sup>11</sup>70 S. D. 527, 19 N. W. (2d) 344 (1945).

<sup>12</sup>342 U. S. 143, 72 S. Ct. 181, 96 L. ed. 121 (1951).

the newspaper was engaged in interstate commerce. Thus the holding became relevant to the issue in the principal case.

The majority of the South Dakota court failed to mention other available authority in support of its reasoning. Illustrative of this omission is a case which holds the activities of a news service company, from the gathering of the news, through publication and dissemination, to be entirely within the zone of interstate commerce, thus subjecting a labor dispute at the publishing site to the provisions of the National Labor Relations Act.<sup>13</sup> The United States Supreme Court has also held that a publishing company was doing business in interstate commerce and was thus subject to the provisions of the Fair Labor Standards Act, where only one half of one percent of the circulation of a newspaper it published was earmarked for out-of-state distribution.<sup>14</sup>

The minority judge in the principal case would uphold the tax as being a valid exercise of the state's taxing power on a subject not within the exemption clause of the statute. It was reasoned that inasmuch as the printing of a newspaper is merely a local activity, separate and distinct from the receipt of information and its subsequent distribution as a newspaper, the printing press was subject to state taxation as it was not within the prohibited scope of interstate commerce. The local activity theory has been employed in diverse cases to uphold the validity of state taxes on property or goods indirectly used in interstate commerce. A Mississippi franchise tax on a corporation operating an interstate pipe line,<sup>15</sup> and a Louisiana privilege tax imposed on a machine used to boost the pressure in an interstate pipe line were

---

<sup>13</sup>Associated Press v. N. L. R. B., 301 U. S. 103, 57 S. Ct. 650, 81 L. ed. 953 (1937).

<sup>14</sup>Mabee v. White Plains Pub. Co., 327 U. S. 178, 66 S. Ct. 511, 90 L. ed. 607 (1946). The Court said that even a small paper sending a minute portion of its circulation out of a state was engaged in interstate commerce and therefore subject to the provisions of the Fair Labor Standards Act which relate to employees' salaries. It reasoned that Congress in passing the law had not explicitly set forth the requisite degree of business that was necessary to be carried on in interstate channels before the producer would be amenable to the provisions of the law. Justice Murphy disagreed with the majority, arguing that when only one half of one percent of the circulation went outside the state it was for all practical purposes a local operation. Mabee v. White Plains Pub. Co., 327 U. S. 178 at 186, 66 S. Ct. 511 at 515, 90 L. ed. 607 at 614 (1946).

<sup>15</sup>Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832 (1948). A franchise tax imposed on all corporations "doing business" in Mississippi was contested as not applicable because all of the operations of the gas company fell within the scope of interstate commerce, but was sustained on the ground that business of repairs and maintenance falls within meaning of term "doing business" and thus was a taxable local activity.

sustained as not being burdens on interstate commerce.<sup>16</sup> The same local activity reasoning was pressed into use to uphold a state license tax on the source and generation of electricity which was produced locally but distributed immediately in interstate channels;<sup>17</sup> and a property tax on manufactured products which had been imposed by the city of St. Louis on a local manufacturer was upheld on the grounds that even though the amount of tax was measured by the quantity of goods shipped in both interstate and intrastate commerce, the actual taxing event occurred after the manufacturing had been completed but before shipments were commenced from the local situs.<sup>18</sup>

In the main, the local activity theory has been employed to sustain state revenue taxes which are deemed not unduly to burden or to impede the free flow of interstate commerce. If the courts feel that the necessity for the revenue to the state overbalances the burden that such a levy would place on interstate commerce, they will sustain the tax. In upholding such an assessment, the courts look to see at what time the actual taxing event occurred.<sup>19</sup> Another relevant consideration is whether a problem of multiple taxation will arise if the tax is allowed.<sup>20</sup> Still a third test, applied in the *Henneford* case, is

---

<sup>16</sup>*Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 58 S. Ct. 736, 82 L. ed. 1043 (1938) (held that tax was on a local activity—the mechanical production of pressure).

<sup>17</sup>*Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 52 S. Ct. 548, 76 L. ed. 1038 (1932) (Idaho tax upheld on ground that power was produced locally even though none was produced until orders were placed and then power produced went directly into interstate channels and was delivered to customers in tri-state area).

<sup>18</sup>*American Mfg. Co. v. City of St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. ed. 1084 (1919). A manufacturing company in St. Louis made its products there and shipped part of them to Missouri distributors and part to out-of-state dealers. A city property tax was imposed on the goods, the measure of the amount of tax being a quantity of goods shipped from the factory. The Supreme Court upheld the tax as not being on interstate commerce but on the goods before they entered interstate channels.

<sup>19</sup>Note (1933) 42 Yale L. J. 94 at 100.

<sup>20</sup>In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 59 S. Ct. 325, 83 L. ed. 272 (1939), the Court struck down a Washington tax measured by the gross receipts from shipment of fruit in interstate commerce. The tax was said to be a burden on interstate commerce and if sustained, other states could impose a similar tax using the same mode of measurement, thus subjecting interstate commerce to a multiple tax burden from which intrastate commerce enjoyed complete freedom. This burden of multiple taxation would again erect the barriers to interstate commerce which it was the object of the Commerce Clause to remove. In *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823 (1938), the doctrine of the *Gwin* case was recognized but not applied. Justice Stone observed that in endeavoring to reconcile the two theories—i.e., that interstate commerce must share local taxation burdens and that interstate commerce shall not be subjected

whether the tax is discriminatory or imposed unequally.<sup>21</sup>

In the light of previous decisions of the United States Supreme Court, a state use tax could have been constitutionally imposed on the printing press without any danger of unduly burdening interstate commerce.<sup>22</sup> As Justice Holmes observed twenty-two years ago: "Even interstate commerce must pay its way."<sup>23</sup> In the case of *Minnesota v.*

---

to multiple tax burdens because it is interstate commerce—the distinctions should be made on practical considerations rather than by the use of logical syllogisms. The validity of an excise tax imposed only upon corporation property situated within the boundaries of the taxing state was upheld in *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790 (1888), on the ground that there was no burden imposed on interstate commerce. The tax was prorated on the value of company property in Massachusetts. The Supreme Court observed that if this tax was unconstitutional because the telegraph company was authorized to put its poles along post roads by congressional statute, then all states would be deprived of a great source of revenue as railroads and other instrumentalities authorized by Congress to use public lands as a right of way could claim exemption from state taxation.

<sup>21</sup>*Henneford v. Silas Mason Co., Inc.*, 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814 (1937). The Court went into the problem of whether the use tax imposed on the machinery was levied in a like fashion on all materials which had ended their interstate transit and had come to rest in Washington. It found that the use tax was an impartial levy and nondiscriminatory in result. The opinion stressed the fact that equality was the theme that ran throughout the the statute.

<sup>22</sup>The majority opinion admits to this and cites *Southern Pac. Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. ed. 586 (1939), where a suit was filed to enjoin the collection of a California use tax which was levied on personal property of the plaintiff, a railroad. The property was brought in from out-of-state and either installed for use on arrival or kept available for use as part of its transportation facilities. The Supreme Court upheld the tax by reasoning that a taxable moment existed at the interval between the receipt of the goods and their subsequent use. At this time the goods were not a part of interstate commerce nor were they so related to it that the imposition of the tax would impose upon it an unconstitutional burden. Accord: *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182, 59 S. Ct., 396, 83 L. ed. 595 (1939). Justice McReynolds dissented in both cases, arguing that the tax was repugnant because it was for all practical intents a burden on interstate commerce.

<sup>23</sup>*New Jersey Bell Tel. Co. v. State Board of Taxes and Assessment*, 280 U. S. 338, 351, 50 S. Ct. 111, 115, 74 L. ed. 463, 470 (1930). The telephone company protested payment of a New Jersey tax levied on its telephone poles. The tax was held to be invalid, as a burden on interstate commerce. The reasoning was that the company was engaged in interstate commerce and thus its property was part of interstate commerce (poles). Justice Holmes in the dissenting opinion observed that only one third of the business was in interstate commerce and all of the poles were located within the state's jurisdiction. The tax on these poles was reasonable and did not constitute a material burden on interstate commerce. Justice Holmes' demand was first voiced in *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. ed. 590, 595 (1919), where Justice Clarke said, "Even interstate business must pay its way."

*Blasius*,<sup>24</sup> the Supreme Court upheld the validity of a state property tax on cattle, Justice Hughes observing that even though the cattle remained within the general flow of interstate commerce, they had to come to rest in the stockyard on tax day and were taxable as a part of the common mass of property within the state. Similarly, it has been held that though grain bought in the west and shipped to the east was a part of the flow of interstate commerce, yet when the transit was interrupted temporarily for sorting and bagging, the grain had attained a local situs and was subject to a state property tax regardless of the interval of time it rested there.<sup>25</sup> A Louisiana property tax on coal mined in Pennsylvania and shipped to Louisiana for transportation elsewhere by water was held valid, the coal having come to rest temporarily in the state and become subject to taxation as part of the common mass of property.<sup>26</sup> The constitutionality of a tax on the gross receipts from the sale of advertising space which had been solicited from out-of-state businesses was upheld, the taxable event having occurred when the advertising was printed.<sup>27</sup>

As the South Dakota tax could have been constitutionally imposed on a newspaper's printing press, the issue involved in the principal case was whether the South Dakota legislature intended to exempt such articles from taxation. The majority examined its prior decision of *Scandrett v. Nord*,<sup>28</sup> where the terms "interstate commerce" and "interstate transportation" had been given a broad general meaning, and decided that the intent of the legislature was to exempt from taxation all tangible personal property used in "interstate commerce," and not merely that which was used in "interstate transportation."

The minority pressed into use the doctrine of *ejusdem generis*<sup>29</sup> in

<sup>24</sup>290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131 (1933).

<sup>25</sup>*Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615 (1913). The grain was taken off the train temporarily in Illinois and put into an elevator for sorting and bagging purposes before being sent on for sale in eastern markets. An Illinois property tax on wheat so stored was held to be constitutional, the Court reasoning that no matter whether future shipment was contemplated when the grain was removed from the train, it was no longer in transit but had acquired a local situs, and thus did not remain a part of interstate commerce.

<sup>26</sup>*Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257 (1885).

<sup>27</sup>*Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823 (1938). The Supreme Court observed that the tax was not measured by the sale of magazine subscriptions, but by the purely local activity of printing and publishing the advertising.

<sup>28</sup>70 S. D. 527, 19 N. W. (2d) 344 (1945).

<sup>29</sup>50 Am. Jur., Statutes § 249; "Similarly, in accordance with what is commonly known as the rule of *ejusdem generis*, where, in a statute, general words follow a



order to show that the most cogent interpretation which could be assigned to the legislative intent was that the statutory exemption applied only to property used or to be used in maintaining interstate transportation. The dissenting judge observed that "this construction harmonizes with the objects and purposes of the act and does not impute to the legislation an intention to favor local activities perhaps within the regulatory powers of Congress. . . ." <sup>30</sup> Thus, the argument was that the legislature meant to exclude from taxation only that property used in a narrow zone of interstate commerce, namely interstate transportation.

However, since the legislature designedly conferred an exemption from the States's use tax broader than is required by the federal constitutional limitations, the court justifiably felt impelled to give a broad interpretation to the exemption. Should the legislature now determine that it acted with excessive benevolence in exempting property used in maintaining interstate commerce, it need only repeal the exemptive words at its next session.

ROBERT R. KANE, III

TORTS—IMPUTATION OF DRIVER'S NEGLIGENCE TO PASSENGER INJURED IN COLLISION TO BAR RECOVERY FROM NEGLIGENT DRIVER OF OTHER CAR. [Virginia]

When a passenger, who has been injured in an automobile collision in which both drivers were negligent, brings an action for damages against the driver of the other car, there are several legal bases upon which courts have held that the negligence of the plaintiff's driver can be imputed to the passenger so as to bar recovery. Where the driver is the employee, agent or servant of the passenger who is injured while travelling on a mission involving the passenger's business, the driver's negligence may be imputed to the passenger on the theory of re-

---

designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only things or persons of the same kind, class, character or nature of those specifically enumerated." 50 Am. Jur., Statutes § 250: "... the doctrine of ejusdem generis is but a rule of construction to aid in ascertaining and giving effect to the legislative intent, where there is uncertainty, and does not warrant the court in subverting or defeating the legislative will by confining the operation of a statute within narrower limits than intended by the lawmakers."

<sup>30</sup>Mitchell Pub. Co. v. Wilder, 52 N. W. (2d) 732, 736 (S. D. 1952).

spondeat superior.<sup>1</sup> Negligence has likewise been imputed to the husband who is a passenger in a car driven by his wife, under the theory that a husband is responsible for the torts of his wife.<sup>2</sup> And in some states by statute the negligence of a minor who has a driver's license has been imputed to the parent, guardian or other person who signed the application for the minor's license, with the effect of barring that party from recovery from injuries suffered while riding with the minor.<sup>3</sup> Further, if a driver and passenger are found to be engaged in a "joint enterprise," the driver's negligence is imputed to the passenger, causing him to be liable with the driver for injuries to a third person<sup>4</sup> and to be barred from any recovery against third persons whose negligence also contributed to the accident.<sup>5</sup>

The general test of joint enterprise as laid down by the courts is whether the parties have "a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto."<sup>6</sup> Thus, in order to impute the driver's negligence to an occupant of his vehicle on a joint enterprise theory, there must exist something more than a host and guest relation. There must be such a relationship between the driver and passenger as to make each the agent of the other in the execution of the common purpose and undertaking.<sup>7</sup>

<sup>1</sup>*Secured Finance Co. v. Chicago, R. I. & P. Ry. Co.*, 207 Iowa 1105, 224 N. W. 88 (1929); *Crawford v. McElhinney*, 171 Iowa 606, 154 N. W. 310 (1915); *Meehl v. Barr Transfer Co.*, 296 Mich. 697, 296 N. W. 844 (1941); *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715 (1917); *Flynn v. Kurn*, 183 Miss. 413, 184 So. 160 (1938).

<sup>2</sup>*Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219 (1912).

<sup>3</sup>California Vehicle Act § 62(b): "Any negligence of a minor in a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable which such minor for any damages caused by such negligence except in the event the minor is driving a motor vehicle as the agent, or servant or upon the business of a person other than the person who has signed said application." *Sleeper v. Woodmansee*, 11 Cal. App. (2d) 595, 54 P. (2d) 519, 521 (1936).

<sup>4</sup>*Haynie v. Jones*, 233 Mo. App. 948, 127 S. W. (2d) 105 (1939); *Ahlstedt v. Smith*, 130 Neb. 372, 264 N. W. 889 (1936); *Poutre v. Saunders*, 19 Wash. (2d) 561, 143 P. (2d) 554 (1943).

<sup>5</sup>*Brockman v. Peoples Gas, Light and Coke Co.*, 319 Ill. App. 115, 48 N. E. (2d) 802 (1943); *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910).

<sup>6</sup>*Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763, 765 (1901). Accord: *Crescent Motor Co. v. Stone*, 211 Ala. 516, 101 So. 49 (1924); *Myers v. Southern Pac. Co.*, 63 Cal. App. 164, 218 Pac. 284 (1923); *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 Pac. 385 (1917); *Lawrence v. Sioux City*, 172 Iowa 320, 154 N. W. 494 (1915); *Bowley v. Duca*, 80 N. H. 548, 120 Atl. 74 (1923); *Ryan v. Snyder*, 29 Wyo. 146, 211 Pac. 482 (1923).

<sup>7</sup>*Greenwell's Adm'r v. Burba*, 298 Ky. 255, 182 S. W. (2d) 436 (1944).

It has been held that to constitute a joint enterprise the passenger must have had a right to an equal voice in directing and governing the conduct or movements of the driver in regard to the negligent acts,<sup>8</sup> and that the driver and occupant of a car must have been practically in joint and common possession of the vehicle as regards control and direction.<sup>9</sup> Where there is a prior arrangement to share expenses and the purpose of the trip is a joint one, it has been held to be a joint enterprise.<sup>10</sup> If the journey is made on a matter of business in which both the driver and passenger are mutually interested, the use of the car as part of the common business enterprise makes each responsible for the manner in which it is operated.<sup>11</sup> However, it is not alone sufficient that the passenger indicates the route,<sup>12</sup> or shares in the driving,<sup>13</sup> or pays or contributes to the expense of the trip,<sup>14</sup> or

---

<sup>8</sup>The Supreme Court of Indiana followed this rule in a case brought by a father for damages sustained on account of the death of his daughter while riding in a school wagon which was hit by one of the defendant's railroad cars. Both defendant and the driver of the school wagon were negligent, and defendant contended that the driver's negligence is imputed to the parent on a joint enterprise theory. The court declared that plaintiff had no equal right to control and govern the direction and movements of the driver, and therefore there was no joint enterprise. *Union Traction Co. of Indiana v. Gaunt*, 193 Ind. 109, 135 N. E. 486 (1922). In an Iowa case in which the passenger was being taken home from choir practice on the invitation of the driver, the court held that there was no evidence to show that the passenger had any control over the direction and movements of the vehicle to allow imputation of negligence from the driver to the passenger on a joint enterprise theory. *Lawrence v. Sioux City*, 172 Iowa 320, 154 N. W. 494 (1915). In another Iowa case a passenger had accepted the invitation of the driver for a pleasure outing, and the court declared that a joint enterprise could not be inferred unless the evidence showed that the passenger had some right to control and manage the vehicle. *Withey v. Fowler Co.*, 164 Iowa 377, 145 N. W. 923 (1914).

<sup>9</sup>The California court declared that the fact that the plaintiff was a family relation or a business associate of the driver did not of itself cause imputation of driver's negligence to the passenger, but there must be evidence showing joint "control and direction over the automobile as to be practically in the joint or common possession of it." *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 Pac. 385, 386 (1917). This rule was reaffirmed in *Collins v. Graves*, 17 Cal. App. (2d) 288, 61 P. (2d) 1198 at 1201 (1936).

<sup>10</sup>*Grubb v. Illinois Terminal Co.*, 366 Ill. 330, 8 N. E. (2d) 934 (1937).

<sup>11</sup>Restatement, Torts (1934) § 491, Comment (e).

<sup>12</sup>*Baltimore & O. R. Co. v. Green*, 136 F. (2d) 88 (C. C. A. 4th, 1943); *Hider v. Gelbach*, 135 F. (2d) 693 (C. C. A. 4th, 1943).

<sup>13</sup>*Baltimore & O. R. Co. v. Green*, 136 F. (2d) 88 (C. C. A. 4th, 1943); *Isaacson v. Boston, W. & N. Y. St. Ry. Co.*, 278 Mass. 378, 180 N. E. 118 (1932).

<sup>14</sup>*Jones Mercantile Co. v. Copeland*, 54 Ga. App. 647, 188 S. E. 586 (1936); *Adamson v. McEwen*, 12 Ga. App. 508, 77 S. E. 591 (1913). Cf. *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910) (cited as authority for the principles laid down in the Zell case, see text at note 16, on joint enterprise, but decision bases joint enterprise on sharing of expenses between driver and passenger).

that both parties have certain plans in common such as a "joy ride" or a common destination.<sup>15</sup>

In Virginia, the joint enterprise theory was first invoked on very weak grounds as a basis for the imputation to a passenger of the driver's negligence, in *Washington & Old Dominion Ry. v. Zell's Adm'rs*,<sup>16</sup> decided in 1916. The driver and passenger were engaged in a mutual pleasure trip in the driver's car when the fatal collision with a train of the defendant's company occurred. In the suit by the passenger's administratrix the court held that the driver and defendant were equally negligent and that the joint enterprise doctrine barred recovery by the plaintiff.

To establish joint enterprise the court stressed the fact that where there is a joint or mutual interest, even though it is a pleasure trip, the negligence of the driver can be imputed to the passenger. While courts generally have held that the mere fact that the mutual adventure is one of pleasure does not bar it from being a joint enterprise,<sup>17</sup> neither does that fact in itself establish the undertaking as such.<sup>18</sup> Though it appeared in the *Zell* case that the passenger was the instigator of this particular trip and that the two friends had often gone on similar pleasure trips, taking turns in the driving, these factors were not relied on by the court in establishing the existence of a joint enterprise. Nowhere in the opinion was there mention of the fact that the driver and passenger must have an equal right to direct and govern the movements and conduct of each other in order to constitute joint enterprise, and there was no evidence tending to establish the fact that the passenger had an equal voice in control and management of the trip.

In spite of the questionable nature of the reasoning employed, the *Zell* decision remained an effective precedent for eighteen years,<sup>19</sup> until its holding was greatly weakened by *Miles v. Rose*.<sup>20</sup> There the driver

<sup>15</sup>*Baltimore & O. R. Co. v. Green*, 136 F. (2d) 88 (C. C. A. 4th, 1943); *W. W. Clyde & Co. v. Dyess*, 126 F. (2d) 719 (C. C. A. 10th, 1942); *Clark v. Janss*, 39 Cal. App. (2d) 523, 103 P. (2d) 175 (1940).

<sup>16</sup>118 Va. 755, 88 S. E. 309 (1916).

<sup>17</sup>*Greenwell's Adm'r v. Burba*, 298 Ky. 255, 182 S. W. (2d) 436 (1944); *Lucy v. John Hope & Sons Engraving & Mfg. Co.*, 45 R. I. 103, 120 Atl. 62 (1923).

<sup>18</sup>*W. W. Clyde & Co. v. Dyess*, 126 F. (2d) 719 (C. C. A. 10th, 1942); *Clark v. Janss*, 39 Cal. App. (2d) 523, 103 P. (2d) 175 (1940); *Barry v. Harding*, 244 Mass. 588, 139 N. E. 298 (1923).

<sup>19</sup>The following cases looked to the *Zell* case as authority: *Cashell v. Southern Ry. Co.* 152 Va. 335, 147 S. E. 209 (1929); *Chesapeake & O. Ry. Co. v. Meyer*, 150 Va. 656, 143 S. E. 478 (1928); *Chapman's Adm'r v. Hines*, 134 Va. 274, 115 S. E. 373 (1923); *Canody v. Norfolk & W. Ry. Co.*, 129 Va. 56, 105 S. E. 585 (1921).

<sup>20</sup>The plaintiff was a passenger in a car in which four other persons were riding. The group had purchased some whiskey, which four of them were interested in

and passengers were on a mutually beneficial errand seeking pleasure, but the court specifically held that the fact that the driver and passenger had a mutual or joint interest in the object and purpose of the trip was not sufficient to constitute a joint enterprise. The repudiation of the test of the *Zell* case was, in effect, an overruling of that decision, the court taking pains to point out that the requirement of a relationship between the driver and passenger whereby each is entitled to a voice in the direction and operation of the vehicle had been clearly laid down by cases subsequent to the *Zell* case.<sup>21</sup>

The *Zell* case was further ignored in 1939 by *Carroll v. Hutchinson*,<sup>22</sup> where it was held that the fact of the driver and passenger being sisters created no inference that the passenger had such an equal right to direct and govern the movements and conduct of the undertaking that the negligence of the driver could be imputed to the passenger on the theory of joint enterprise. It was said not to be enough that the driver may voluntarily defer to the request of the passenger if that was done with the idea of pleasing and not as a recognition of right. And even the fact that the parties take turns driving does not necessarily make the enterprise a joint one.<sup>23</sup> The relationship must be analogous to that of principal and agent.

It was not until the 1952 decision of *Painter v. Lingon*,<sup>24</sup> that the *Zell* case was expressly overruled. An action was brought for injuries sustained by the passenger in a collision between defendant's automobile and the automobile owned by plaintiff and driven by her husband on a mutual pleasure trip. Defendant contended that the plaintiff and her husband were engaged in a joint enterprise within the rule of the *Zell* case, and that the husband's negligence therefore barred recovery by the plaintiff. In the face of this argument the Vir-

---

getting, and were heading back to the tourist camp where they were staying to have a party, when the accident occurred with defendant's automobile. Both the driver and defendant were negligent, and defendant depended on the theory of joint enterprise. 162 Va. 572, 175 S. E. 230 (1934).

<sup>21</sup>Gaines v. Campbell, 159 Va. 504, 166 S. E. 704 (1932); Seaboard Air Line Ry. Co. v. Terrell, 149 Va. 344, 141 S. E. 231, 235 (1928); Director General v. Pence's Adm'x, 135 Va. 329, 116 S. E. 351, 356 (1923). It is to be noted that Judge Kelley who wrote the opinion in the Director General case also wrote the opinion in the *Zell* case. In the Director General case he stated that to impute negligence from the driver to the passenger on the theory of joint enterprise there must rest in the passenger some voice in the control and direction of the vehicle, an element which he completely ignored in the *Zell* case.

<sup>22</sup>172 Va. 43, 200 S. E. 644 (1939).

<sup>23</sup>Accord: Isaacson v. Boston, W. & N. Y. St. R. Co., 278 Mass. 378, 180 N. E. 118 (1932).

<sup>24</sup>193 Va. 840, 71 S. E. (2d) 355 (1952).

ginia court was virtually forced to overrule its earlier decision or find for the defendant, since in both cases the driver and passengers were engaged in a mutual pleasure trip, and the indications of the passenger's control over the undertaking were more pronounced in the principal case. Pointing out that later cases had consistently refused to follow the *Zell* case,<sup>25</sup> the court now expressly repudiated it, and ruled that the factor of community of interest was not sufficient to establish a joint enterprise.<sup>26</sup>

Defendant advanced the further argument that the added facts, not present in the *Zell* case, that the passenger was the owner of the car and that the driver was her husband, provided grounds for finding a joint enterprise. While the court conceded that the owner's presence in an automobile driven by her husband tended to indicate that the husband was the plaintiff's agent and was operating the car under her control,<sup>27</sup> it ruled that the fact of the title being registered in the name of a wife was not conclusive proof that she was the actual owner so as to give her all rights, benefits and liabilities therefrom.<sup>28</sup> The testimony showed the husband had bought and paid for the automobile for the use of the family, and had registered it in plaintiff's name merely because she had asked her husband to do so in order that she could say she owned a car. The husband used the car at will, especially to go back and forth to his place of business, and the plaintiff seldom drove the car when he was present. He maintained all the expenses of the vehicle regardless of who used it. Thus, plaintiff was owner in name only, and the court declared that in such a situation a husband is presumed to be in absolute control of the automobile as to its direction and operation even though his wife is present.<sup>29</sup>

<sup>25</sup>*Carroll v. Hutchinson*, 172 Va. 43, 200 S. E. 644 (1939); *Miles v. Rose*, 162 Va. 572, 175 S. E. 230 (1934); *Director General v. Pence's Adm'x*, 135 Va. 329, 116 S. E. 351 (1923); *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632 (1917).

<sup>26</sup>Accord: *MacGregor v. Bradshaw*, 193 Va. 787, 71 S. E. (2d) 361 (1952) (decided the same day as *Painter* case).

<sup>27</sup>*Welch v. Louisiana Oil Refining Corp.*, 17 La. App. 100, 135 So. 617 (1931); *Martens v. Penton*, 15 La. App. 35, 130 So. 354 (1930); *Gochee v. Wagner*, 257 N. Y. 344, 178 N. E. 553 (1931); *Wilcott v. Ley*, 205 Wis. 155, 236 N. W. 593 (1931).

<sup>28</sup>Accord: *United States Casualty Co. v. Bain*, 191 Va. 717, 62 S. E. (2d) 814 (1951).

<sup>29</sup>Accord: *Christensen v. Hennepin Transp. Co.*, 215 Minn. 394, 10 N. W. (2d) 406, 412 (1943). This court ruled: "Ownership of an automobile in which the owner is riding, but which is being driven by another, does not establish as a matter of law right to control in the owner. Right of control may be surrendered, as it often is, where the owner parts with possession of his car to another. In that situation the parties stand in relationship of bailor and bailee. The negligence of a bailee in operating an automobile is not imputable to the bailor.... The existence of the marriage relation between the parties does not change their relationship or liabilities with respect to bailed property."

The court further held that the marital relationship does not establish an agency between husband and wife, upon which an imputation of negligence will be based.<sup>30</sup> It is the duty of the husband to provide recreation for his wife and when he is doing so he is not held to be acting as her agent.<sup>31</sup>

As a result of the principal decision, the last trace of the *Zell* case doctrine has been eradicated from Virginia law. Henceforth, in this jurisdiction, in order for a passenger to be barred from recovery by the imputation to him of his driver's negligence, defendant must show that there existed between the driver and passenger such a relationship that each had a substantial right to direct and govern the movements and conduct of the other in the prosecution of the common purpose. Thus, Virginia has adopted the test of the majority of states in determining the existence of joint enterprise.

DOUGLAS M. SMITH

TORTS—PLACE OF FORESEEABILITY OF HARM IN NEGLIGENCE CASES AS PART OF PROXIMATE CAUSATION OR NEGLIGENCE-DUTY ISSUE. [Pennsylvania]

The problem of "foreseeability" as it affects liability for negligence has received the attention of the Supreme Court of Pennsylvania in the recent case of *Dahlstrom v. Shrum*.<sup>1</sup> The fact situation in the *Dahlstrom* case presented the Pennsylvania court with the opportunity of either adhering to its earlier decision of *Wood v. Pennsylvania R. Co.*,<sup>2</sup> which treats foreseeability of harm to the plaintiff as a matter of proximate causation,<sup>3</sup> or of adopting instead, the approach of the New

---

<sup>30</sup>Accord: *Rodgers v. Saxton*, 305 Pa. 479, 158 Atl. 166 (1931); *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632 (1917).

<sup>31</sup>*Painter v. Lingon*, 193 Va. 840, 71 S. E. (2d) 355 at 359 (1952).

<sup>1</sup>368 Pa. 423, 84 A. (2d) 289 (1951).

<sup>2</sup>177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199 (1896).

<sup>3</sup>Casual relationship is a requisite factor in every case involving liability for negligence, but the technical terminology used to describe the test for legal causation has created serious confusion in this field of the law: Prosser, *Torts* (1941) § 46; Carpenter, *Workable Rules for Determining Proximate Cause* (1932) 20 *Calif. L. Rev.* 229, 396-419; Green, *Proximate Cause in Texas Negligence Law* (1950) 28 *Tex. L. Rev.* 471, 474, 490; James and Perry, *Legal Cause* (1951) 60 *Yale L. J.* 761, 762; Smith, *Legal Cause in Actions of Tort* (1911) 25 *Harv. L. Rev.* 103. Obviously, the test requires that the alleged wrongful conduct supporting the negligence action be the cause-in-fact of the injury or harm suffered by the plaintiff, whether that harm was attributable to some negligent affirmative action on the defendant's part or to some failure or omission to act when he was under a duty to act: *Hayes v.*

York case of *Palsgraf v. Long Island R. Co.*,<sup>4</sup> which treats foreseeability as determinative of the existence of duty, and hence of negligence.

In the *Palsgraf* case,<sup>5</sup> the majority of the New York Court of Appeals, speaking through Chief Judge Cardozo, held that to support a negligence liability against the defendant, there must be conduct shown which involved negligence toward the particular plaintiff; and that "mere negligence in the air"<sup>6</sup> is not sufficient. Negligence was thus treated as a relative concept—i.e., relative to the particular plaintiff who had suffered from the injury.<sup>7</sup> "The ideas of negligence and duty are strictly correlative"<sup>8</sup> in the sense that where there is no duty to the individual complaining, "the observance of which would have averted or avoided the injury,"<sup>9</sup> then, even though the defendant's

Michigan Central R. Co., 111 U. S. 228, 4 S. Ct. 369, 28 L. ed. 410 (1884); *Cobb v. Twitchell*, 91 Fla. 539, 108 So. 186, 45 A. L. R. 865 (1926); *Heiting v. Chicago R. I. & P. R. Co.*, 252 Ill. 466, 96 N. E. 842 (1911); *McNally v. Colwell*, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494 (1892); *Gilman v. Noyes*, 57 N. H. 627 (1876). However, the scope of liability under the cause-in-fact test alone is so broad that modern courts have seen fit to apply various restrictions in order to limit liability for the actual consequences of negligent conduct. See note 27 *infra*; Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization"* (1938) 6 U. of Chi. L. Rev. 36.

The necessity for limitations on this vast scope of liability was what generally gave rise to the terms "proximate cause" or "legal cause." It has been said of them: "To be sure this concept is only one of the devices used to limit the fact and the extent of liability for negligence . . . , however, the concept of proximate cause has been greatly overworked. . . . 'Having no integrated meaning of its own, [the] chameleon quality [of proximate cause] permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the work of Aladdin's lamp.' The result has been a widely recognized confusion, and as luxuriant a crop of legal literature as is to be had in any branch of tort law." James and Perry, *Legal Cause* (1951) 60 Yale L. J. 761.

Green, *Proximate Cause in Texas Negligence Law* (1950) 28 Tex. L. Rev. 471, 472, gives thirty-six common adjectives as supplementary to, or synonymous with, the term "proximate." See St. John Green, *Essay's and Notes On The Law of Tort and Crime* (1933) 1, 3, 9; Street, *Foundations of Legal Liability* (1906) 110.

<sup>4</sup>248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

<sup>5</sup>248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928) (passenger boarding train was pushed by railroad company's guard, causing passenger to drop newspaper-covered package containing fireworks which exploded, the shock of the explosion throwing down scales striking and injuring the plaintiff standing many feet away).

<sup>6</sup>248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253, 1255 (1928). Accord: *Martin v. Herzog*, 228 N. Y. 164, 170, 126 N. E. 814 (1920). Cf. *Salmond, Torts* (6th ed. 1924) 24.

<sup>7</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1256 (1928): "What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not a 'wrong' to any one."

<sup>8</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1256 (1928).

<sup>9</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1255 (1928). Accord: *West Virginia Central & P. R. Co. v. State*, 96 Md. 652, 54 Atl. 669 (1903).



act may have been a wrong with regard to someone other than the plaintiff, there is no liability to the plaintiff or, as might reasonably be inferred, to that class of persons of which plaintiff is a member. "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension."<sup>10</sup> The majority of the New York court added that liability for negligence may attach under this foreseeability test even though the particular manner in which the harm resulted to the plaintiff may have been strange and unexpected.<sup>11</sup> Under this approach, the court added: "The law of causation, remote or proximate, is thus foreign to the case. . . ."<sup>12</sup>

By contrast, the *Wood v. Pennsylvania R. Co.*<sup>13</sup> approach, developed by the Pennsylvania Supreme Court previous to the *Palsgraf* decision, takes a more generalized view of negligence as conduct involving risk of harm to the public, but denies liability for the negligence unless the specific result of that conduct to this plaintiff was "the natural and probable consequence"<sup>14</sup>—i.e., the foreseeable conse-

<sup>10</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1256 (1928).

<sup>11</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1257 (1928). Accord: *Munsey v. Webb*, 231 U. S. 150, 34 S. Ct. 44, 58 L. ed. 162 (1913); *Robert v. United States Shipping Board Emergency Fleet Corp.*, 240 N. Y. 474, 148 N. E. 650 (1925); *Condran v. Park & Tilford*, 213 N. Y. 341, 107 N. E. 565 (1915).

Some authority has even gone so far, and quite logically perhaps, as to provide a basis by which an extension to this liability test may be inferred. It has been said that the view set out by Judge Cardozo "does not always depend on foreseeability of the hazard causing the harm if the evidence indicates that the plaintiff was within range of the effect of the *foreseeable* hazard which made the defendant's conduct negligent, as long as there is a *substantial similarity* between the normal effect of the foreseeable hazard which actually causes the harm." Gregory, *Proximate Cause In Negligence—A Retreat From "Rationalization"* (1938) 6 U. of Chi. L. Rev. 36, 48 [first and last italics supplied]. The author drew his conclusion from personal conversation with Judge Cardozo and claims no other authority as source.

<sup>12</sup>*Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 101, 59 A. L. R. 1253, 1258 (1928). It was also stated by the majority of the court that: "The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort." 258 N. Y. 339, 162 N. E. 99, 101, 59 A. L. R. 1253, 1258 (1928).

<sup>13</sup>177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199 (1896) (train, negligently failing to give signal at railroad crossing, struck decedent, throwing her body against plaintiff, some 50 feet away on station platform, causing injuries to him). Compare: *Hoag & Alger v. Lake Shore and Mich. So. R. Co.*, 85 Pa. 293 (1877).

<sup>14</sup>*Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 Atl. 699, 700, 35 L. R. A. 199, 201 (1896): "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of

quence—thereof. Under this approach the limits of liability are marked as an application of the law of proximate causation. The court apparently reasoned that “even if the defendant was negligent in some respects and even if that negligence was in fact causally contributive to the harm complained of, the court will nevertheless direct a verdict for the defendant if in its opinion the eventuality complained of was not a foreseeable incident of the defendant’s negligent conduct, i.e., was a rather weird and improbable occurrence.”<sup>15</sup>

The fact situation in *Dahlstrom v. Shrum*<sup>16</sup> was strikingly similar to that of *Wood v. Pennsylvania R. Co.* The accident occurred when a bus in which decedent and plaintiff were passengers stopped at night on the highway to allow them to alight at a sparsely settled village. Defendant, approaching the scene in his automobile at a speed of about 35 miles per hour was partially blinded by the headlights of the stationary bus, so that he could neither determine what kind of vehicle it was nor see any activity around it. Just as defendant’s car reached the spot, decedent stepped out from behind the bus and started to walk across the highway. The car struck him and hurled his body against plaintiff, who was standing at the rear of the bus preparatory to crossing the highway about four or five feet behind decedent. Plaintiff was seriously injured and sued for damages. The trial court granted a compulsory nonsuit however, on the ground that the plaintiff had failed to produce evidence that the defendant was negligent, and on appeal the Supreme Court of Pennsylvania affirmed.

In its opinion the Pennsylvania court defined negligence as “the absence of care under the circumstances”<sup>17</sup> and then continued: “The test of negligence is whether the wrongdoer could have anticipated and foreseen the likelihood of harm to the injured person, resulting from

attending circumstances.” [quoting 1 Jaggard, *Torts* (1895) 374.] Also: Bohlen, *Studies In the Law Of Torts* (1926) 16, 17 [Reprint from Bohlen, *The Probable or The Natural Consequence as The Test of Liability in Negligence*. (1901) 40 *Am. L. Reg. n. s.* 79, 148].

<sup>15</sup>Gregory, *Proximate Cause In Negligence—A Retreat from “Rationalization”* (1938) 6 *U. of Chi. L. Rev.* 36, 43. Accord: *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 *U. S.* 469, 24 *L. ed.* 256 (1877); *Merlo v. Public Service Co.*, 381 *Ill.* 300, 45 *N. E.* (2d) 665 (1942); *Evansville & T. H. R. Co. v. Welch*, 25 *Ind. App.* 308, 58 *N. E.* 88 (1900); *Uvalde Const. Co. v. Hill*, 142 *Tex.* 19, 175 *S. W.* (2d) 247 (1943); *Texas & Pacific Ry. Co. v. Bigham*, 90 *Tex.* 223, 38 *S. W.* 162 (1896).

<sup>16</sup>368 *Pa.* 423, 84 *A.* (2d) 289 (1951).

<sup>17</sup>368 *Pa.* 423, 84 *A.* (2d) 289, 290 (1951). Accord: *Adams v. Bullock*, 227 *N. Y.* 208, 125 *N. E.* 93 (1919); *Paul v. Consolidated Fireworks Co.*, 212 *N. Y.* 117, 105 *N. E.* 795 (1914); *Palsgraf v. Long Island R. Co.*, 248 *N. Y.* 339, 162 *N. E.* 99, 59 *A. L. R.* 1253 (1928); *Beck v. Stanley Co. of America*, 355 *Pa.* 608, 50 *A.* (2d) 306 (1947).

his act. . . . Was plaintiff within that group of people to whom a reasonable man could foresee an injury under these circumstances? We think not."<sup>18</sup> Laying stress on the point that the defendant was not aware of the presence of *anyone* behind the bus because he was not certain as to the vehicle's identity and was partially blinded by its light as he approached at a reasonable speed, the court added: "Such reasonable man would not foresee that anyone would be behind the bus and would not foresee that such person would be passing behind the bus and stepping into the oncoming lane of traffic."<sup>19</sup> Thus, there was no negligence toward the *decedent*. Furthermore, the court decided that "A reasonable man, under the present circumstances, could not foresee that anyone standing in the street behind the bus would be injured by an object struck by defendant's car."<sup>20</sup> Therefore, there was no negligence toward the *plaintiff*. "Plaintiff was clearly outside the orbit of risk and therefore no right of plaintiff was invaded and defendant breached no duty which he owed to plaintiff."<sup>21</sup> The gist of the court's reasoning seems to be that the one killed was an unforeseeable decedent and plaintiff was an unforeseeable plaintiff—i.e., both were outside the orbit or zone of any apparent danger, and no duty was owed to either.

If the opinion had stopped there, on the note that foreseeability of harm to the plaintiff is the test of negligence, the result would have rested squarely on the *Palsgraf* decision. But the court was not content to conclude at that point and stated further that "*Even if defendant were held to be negligent with respect to deceased, in that he should have foreseen that someone might be in back of the bus attempting from that position to cross the road, no negligence existed as to the plaintiff, because it could not be foreseen that deceased's body would strike plaintiff.*"<sup>22</sup> The earlier decision of *Wood v. Pennsylvania R. Co.*<sup>23</sup> was cited to substantiate this point.

The troublesome factor arising from this last observation is that,

<sup>18</sup>368 Pa. 423, 84 A. (2d) 289, 290 (1951). Cf.: *Scurfield v. Federal Laboratories, Inc.*, 335 Pa. 145, 6 A. (2d) 559 at 561 (1939); *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 at 100, 59 A. L. R. 1253 at 1257 (1928).

<sup>19</sup>368 Pa. 423, 84 A. (2d) 289, 291 (1951) ("darting out" case analogy struck). *Rowe v. Coopey*, 339 Pa. 105, 14 A. (2d) 76 (1940); *Taylor v. Philadelphia Rural Transit Co.*, 111 Pa. Super. 575, 170 Atl. 327 (1934); *McAteer v. Highland Coffee Co.*, 291 Pa. 32, 139 Atl. 585 (1927).

<sup>20</sup>368 Pa. 423, 84 A. (2d) 289, 292 (1951).

<sup>21</sup>368 Pa. 423, 84 A. (2d) 289, 292 (1951).

<sup>22</sup>368 Pa. 423, 84 A. (2d) 289, 292 (1951) [italics supplied].

<sup>23</sup>177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199 (1896).

if the defendant were thus *negligent toward the deceased*, then on the same reasoning, plaintiff's presence behind the bus was foreseeable, and hence it is difficult to see why plaintiff would not be within the zone of risk from the hurtling body of decedent. This is the same difficulty that is often encountered when the *Wood* case is under consideration. There, the woman at the grade crossing was a foreseeable decedent, plaintiff standing on the nearby station platform was "known" to be there, and it was certainly a foreseeable risk that any object struck by the train at the crossing would be tossed aside, and *might* strike anyone within the area. Apparently, the *Wood* case is insisting upon foreseeability, not as to *risk* but as to the happening of the precise event that occurred in the precise manner in which it occurred. Such a concept of foreseeability, whether it is enforced under the negligence-duty issue, as in the *Dahlstrom* case, or under the doctrine of proximate cause, as in the *Wood* case, seems unduly strict in limiting liability.

It is logical to suppose that Judge Cardozo would not have decided the *Wood* case as the Pennsylvania court did.<sup>24</sup> To him, "the risk reasonably to be perceived"<sup>25</sup> does not mean that the precise event must be foreseen. In his *Palsgraf* opinion he quotes with approval from a United States Supreme Court decision: "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye."<sup>26</sup>

Apparently the instant case places Pennsylvania in that group of jurisdictions which follows the *Palsgraf* case in holding that foreseeability of injury is relevant to the question of duty, and thus of negligence, and not, as the *Wood* case held, to the issue of proximate cause. On the other hand, the second part of the opinion, while re-

---

<sup>24</sup>Although some have hinted that the Cardozo view in the *Palsgraf* case and the Pennsylvania's court view in the *Wood* decision are virtually the same, this very striking analysis has been given in reply: The Cardozo view "emphasizes those factors in a case which might indicate that the result of the defendant's negligence was probable or foreseeable, whereas the latter ignores these clues and looks only at the damage in light of normal expectancies. That is to say, under the Cardozo formula the step by step method might lead up to foreseeability of what happened, whereas the eventuality itself might, without consideration of the intermediate steps, seem quite improbable." Gregory, *Proximate Cause in Negligence—A retreat from "Rationalization"* (1938) 6 U. of Chi. L. Rev. 36, 53.

<sup>25</sup>*Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1256 (1928).

<sup>26</sup>248 N. Y. 339, 162 N. E. 99, 100, 59 A. L. R. 1253, 1257 (1928), quoting *Munsey v. Webb*, 231 U. S. 150, 156, 34 S. Ct. 44, 45, 58 L. ed. 162, 166 (1913).

jecting the *Wood* teaching as to technique, adopts the actual result of the *Wood* case as to the meaning of "foreseeability," and thus enforces a limitation of liability which appears to be stricter than that contemplated by the prevailing opinion in the *Palsgraf* case. The Pennsylvania court, then, while seizing the opportunity afforded by *Dahlstrom v. Shrum* to return foreseeability to its proper place under the negligence issue,<sup>27</sup> still felt compelled to adhere to the specific decision of the *Wood* case as to what is foreseeable under the specific facts involved in these cases.

ROBERT J. INGRAM

#### TORTS—RIGHT OF ACTION OF CHILD AGAINST PARENT FOR PERSONAL TORT COMMITTED IN NON-PARENTAL CAPACITY. [Ohio]

Though no cases testing the right of an infant to recover against his parent in a personal tort action appear to have arisen until late in the nineteenth century,<sup>1</sup> the first clear American decision on the point

---

<sup>27</sup>It may be hoped that this decision is one more indication that the "proximate cause" test for limiting liability is losing favor among the courts. *Sinram v. Pennsylvania R. Co.*, 61 F. (2d) 767 (C. C. A. 2d, 1932); *Kinderavitch v. Palmer*, 127 Conn. 85, 15 A. (2d) 83 (1940); *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *DeGregorio v. Malloy*, 356 Pa. 511, 52 A. (2d) 195 (1947); *Ennis v. Atkin*, 354 Pa. 165, 47 A (2d) 217 (1946); *Salvitti v. Throppe*, 343 Pa. 642, 23 A. (2d) 445 (1942); *Green, Rationale of Proximate Cause* (1927) 77-121, 144-170; *Green, Proximate Cause in Texas Negligence Law* (1950) 28 Tex. L. Rev. 471, 621, 755. The American Law Institute has stated that "the duty to abstain from certain conduct may be established solely to protect the other from the risk of harm from *one particular hazard*, and *as to that hazard*, the conduct is clearly negligent." Restatement, Torts (1948 Supp.) § 281 [italics supplied]. "When volume II [Restatement of Torts] was written, most courts were still treating the hazard problem as one of 'proximate cause'" Restatement, Torts (1948 Supp.) § 281. The new comments state the modern approach in analyzing most of the problems which were once generally treated under the vague term 'proximate cause.' This increasing recognition required expansion and revision of the original comment.

In referring to the *Wood* decision, and its approach under the proximate cause method, the Restatement comments: "Opinions in such cases frequently lead the seeker after light into the realm of utter confusion." Restatement, Torts (1948 Supp.) § 281.

<sup>1</sup>It would seem that such an action was unknown to the English law, though there were no prohibitions of it. See *Worrell v. Worrell*, 174 Va. 11 at 18, 4 S. E. (2d) 343 at 345 (1939). *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905, 906 (1930): "There never has been a common law rule that a child could not sue its parent." *Villaret v. Villaret*, 169 F. (2d) 677 (C. A. D. C., 1948): "The ancient common law did not, it appears, expressly deny to a child a right of action against a parent for personal injury negligently inflicted. But since 1891 there has grown up in this country a mass of authority holding that such a suit is against public policy and cannot be man-

has been widely accepted as establishing a general rule against the recognition of such a cause of action. In 1891 the Mississippi Supreme Court in *Hewellette v. George*, without citing any precedents or making any examination of earlier authorities, ruled against recovery by the child from his parent on the grounds of public policy. It was declared that "So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society . . . and a sound public policy . . . forbid to the minor child a right to . . . [assert] . . . a claim to civil redress for personal injuries suffered at the hands of the parent."<sup>2</sup>

Other American courts proceeded to adopt the principle of parental immunity from suit, and set about bolstering up the somewhat dubious logic of the *Hewellette* case with a variety of additional reasons, which are principally amplifications of the policy basis of that decision. Among the most frequently advanced arguments is that the relationship between parent and child is roughly analogous to that existing at common law between husband and wife, and that therefore the child should be under the same disability to sue as is the wife.<sup>3</sup> However, though there is some similarity between the relationships,<sup>4</sup> the husband's immunity from suit rested fundamentally on the doctrine

---

tained." Also *Mahnke v. Moore*, 77 A. (2d) 923 at 924 (Md. 1951); dissenting opinion, *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 at 24, 31 A. L. R. 1135 at 1146 (1923); Prosser, *Torts* (1941) 905; Eversley, *Domestic Relations* (1885) 601.

However many of the courts which bar recovery take a different view of the common law. *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 789, 68 L. R. A. 893, 894 (1905): "At common law it is well established that a minor child cannot sue a parent for a tort. . . . So well is this principle of law understood that there have been few attempts to inaugurate actions of this kind." Also *Belleson v. Skilbeck*, 185 Minn. 537, 242 N. W. 1 at 2 (1932); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12 at 13, 31 A. L. R. 1135 at 1137 (1923); *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 at 199, 200, 42 A. L. R. 1360 at 1362 (1925); *Kelly v. Kelly*, 158 S. C. 517, 155 S. E. 888 at 889 (1930); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991 (1903). This seeming conflict in the interpretation of the law can be best understood if one considers that "perhaps there is a useful distinction to be noticed between the law and a mere social conformity, however well established. A social rule or prevailing sentiment excluding for ages all practical opportunity to institute actions *ex delicto* cannot be said to be the same thing as a rule of law denying the action." Note (1951) 19 A. L. R. (2d) 431.

<sup>2</sup>68 Miss. 703, 9 So. 885, 887, 13 L. R. A. 682, 684 (1891).

<sup>3</sup>Prosser, *Torts* (1941) 906.

<sup>4</sup>The father has a right to the earnings of a minor child, as the husband does to his wife's earnings at common law. The father and the husband have similar duties of support to child and wife. The stability of the home is dependent on the discipline of the father over the child as it is on the discipline of the husband over the wife (hardly a valid concept in the mid-twentieth century).

of the unity of the spouses, and there is no such theory in effect in parent and child law. Furthermore, even if the analogy between the relationships were sound, its weakness as a basis for the parental immunity rule is indicated by the fact that several states now permit actions between husband and wife while still denying the right of a child to sue his parent.<sup>5</sup>

It is also often asserted that the recognition of a cause of action in favor of an unemancipated child against a parent would result in destroying the harmony of the family relationship and the stability of the home.<sup>6</sup> This argument is emotionally appealing and has long been advanced as a justification for the wife's disability to sue her husband for personal torts, but in both situations it may be regarded as doubtful that domestic harmony will continue to exist after serious personal injuries have been inflicted by one member of the family on another. Yet, in the unfortunate case of *Roller v. Roller*, wherein the father had committed rape on his minor daughter, the argument was made that domestic relations had already been irreparably disturbed but the court's rejoinder was that "there seems to be some reason in this argument, but it overlooks the fact that the courts in determining their jurisdiction or want of jurisdiction rely on certain uniform principles of law . . ." <sup>7</sup> Courts have been similarly adamant in refusing to concede that since property and contract rights of action have long been allowed between child and parent without unduly disrupting the family relationship, actions for personal torts could also be safely permitted.<sup>8</sup>

---

<sup>5</sup>*Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753 (1929); *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923); *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927).

<sup>6</sup>*Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 16 (1923): "There are some things that are worth more than money. One of these is the peace of the fireside and the contentment of the home, for such is the kingdom of righteousness . . . . If this . . . [rule of non-liability] . . . were not announced by any of the writers of the common law . . . it was unmistakably and indelibly carved upon the tablets of Mount Sinai." *Briggs v. Philadelphia*, 112 Pa. Super. 50, 170 Atl. 871 at 872 (1934), rev'd on other grounds in 316 Pa. 48, 173 Atl. 316 (1934); *Trundell v. Leatherby*, 212 Cal. 678, 300 Pac. 7 at 8 (1931); *Matarese v. Matarese*, 47 R. I. 131 at 132, 131 Atl. 198 at 199 (1925).

<sup>7</sup>37 Wash. 242, 79 Pac. 788, 789 (1905) [holding disapproved as too broad, in *Borst v. Borst*, 251 P. (2d) 149 at 156 (Wash. 1952)].

<sup>8</sup>*Mesite v. Kirchstein*, 109 Conn. 77, 145 Atl. 753, 755 (1929): "... it is asked, Are the property rights of a minor of more importance to him than the rights of his person? No; but their protection will not disturb the family relation as will the action for personal injuries . . ." Unfortunately, the court offers no proof of this questionable assertion.

Financial considerations have also been put forward in support of the immunity rule. The fear is expressed that the family's financial resources might be depleted to the detriment of other children if the parent is forced to pay one child a judgment for damages.<sup>9</sup> However, this argument seems to be employed in the cases without regard to whether there actually are other children; and in any event, no reason is shown why the injured child is not deserving of compensation for detriment suffered but rather must bear the whole loss of the injury personally. Similarly, courts seem unduly alarmed by what has been called the "possibility of succession"<sup>10</sup> which grows out of the fact that the parent, in case of the death of the child while still a minor, would, as next of kin, reacquire the damages previously awarded the child.

Though most of the reasoning purporting to prove the necessity for parental immunity from tort actions can be logically discredited, the basic theory of the *Hewellette* case, that the parent's right of discipline and control over the family must not be undermined by allowing children to sue them in tort, continues to have validity. The growing body of case and text authority repudiating the absolute immunity doctrine still recognizes that the maintenance of the family institution requires that parents be privileged to some extent in this regard.<sup>11</sup> However, a number of modern courts have taken the position that immunity should not be extended to cover injuries arising from obvious disciplinary excesses or injuries suffered from wrongful acts of the parent not done in his capacity as parent. Thus, in suits involving wilful or malicious acts the modern inclination has been favorable to recovery by the infant because the wilful conduct is regarded as evidencing an abandonment of the parental relationship by the wrongdoer.<sup>12</sup> Where an insurer will have to bear the ultimate liability for the parent's tort committed in a non-parental capacity, several courts have held recovery ought to be allowed. The Virginia Supreme Court

---

<sup>9</sup>Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Prosser, Torts (1941) 906.

<sup>10</sup>Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Prosser, Torts (1941) 906.

<sup>11</sup>Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 909 (1930): "It is conceded, of course, that parental authority should be maintained. To this end it is also conceded that the parent should not ordinarily be accountable to the child for a failure to perform a parental duty. . . ." Cowgill v. Boock, 189 Ore. 282, 218 P. (2d) 445 at 451 (1950); Borst v. Borst, 251 P. (2d) 149 at 156 (Wash. 1952).

<sup>12</sup>Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905, 910 (1930): "But there is such a thing as abandonment of the parental relation. This . . . may be implied from acts. It should be implied in the cases of malicious injuries." Brown v. Cole, 198 Ark. 417, 129 S. W. (2d) 245, 122 A. L. R. 1348 (1939); Meyer v. Ritterbush, 196 Misc. 551, 92 N. Y. S. (2d) 595 (1949); Cowgill v. Boock, 189 Ore. 282, 218 P. (2d) 445, 19 A. L. R. (2d) 405 (1950).



of Appeals in *Worrell v. Worrell* ruled that because the tort was committed by the parent in a vocational capacity as operator of a common carrier, and because the parent in this capacity was covered by liability insurance which was compulsory under state statute, the case was removed from the general immunity rule.<sup>13</sup> When faced with a very similar problem, the West Virginia court declared that it was "not impressed with the idea that the ills accredited to . . . [actions between parent and child] . . . may be obviated merely by suing the parent in his business capacity . . . . To both, the defendant would be essentially the parent, and it would be against him (as such) the child would be publicly arrayed." But recovery for the child was allowed because a "different situation arises where the parent is protected by insurance in his vocational capacity . . . ." <sup>14</sup> For under such circumstances the suit "is not unfriendly as between the daughter and the father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery . . . . There is no filial recrimination . . . . Family harmony is assured instead of disrupted . . . . When no need exists for parental immunity, the courts should not extend it as a mere gratuity."<sup>15</sup> Thus, the allowance of recovery rests primarily on the fact that there was liability insurance. However, a different approach was used by the New Hampshire court in *Dunlap v. Dunlap*, on finding that the injured child was working for his parent under circumstances showing a master's liability for tort damages to a servant.<sup>16</sup> Here the employer-parent's liability insurance was regarded as merely evidence that a master and servant relationship existed to a degree which so modified the parental relationship that recovery should be allowed.

In these cases in which the parental immunity was not recognized, recovery was allowed on the basis of special circumstances, and the courts were not prepared to deny the validity of the general non-liability rule. In each case there was a relationship additional to that of parent and child, such as master and servant,<sup>17</sup> or carrier and passen-

---

<sup>13</sup>174 Va. 11, 27, 4 S. E. (2d) 343, 349 (1939): "For the protection of . . . passengers, in the event of the violation of his [defendant's] duty, the State required him to carry liability insurance. Can it be that his duties to other passengers are higher than his obligations to his own child, when his interest, her interest and the interest of the State all require the preservation and protection of her rights?"

<sup>14</sup>Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

<sup>15</sup>113 W. Va. 17, 166 S. E. 538, 539 (1932).

<sup>16</sup>Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930).

<sup>17</sup>Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930). Some courts, while paying lip-service to the immunity rule, have allowed recovery by the child in suit against his parent's employer for a tort committed by the parent in the scope of his employment, though recovery directly from the parent is denied. Chase v. New Haven Waste Material Corp. 111 Conn. 377, 150 Atl. 107 (1930).

ger;<sup>18</sup> the breach of duty was not within the scope of the conduct of the domestic establishment or the duty of rearing the child; and the courts have very pointedly restricted their holdings to the narrow question thereby presented.<sup>19</sup>

In the recent case of *Signs v. Signs*<sup>20</sup> the Ohio Supreme Court has taken a further step in this judicial process of obviating the immunity rule where under the special circumstances of the case a denial of recovery would work a manifest injustice. Plaintiff, an unemancipated minor, brought an action for personal injuries allegedly caused by the negligence of the defendant partnership, composed of the plaintiff's father and another, in the maintenance of a gasoline pump. In the lower courts, it appears to have been assumed that a minor child could not sue for personal injuries against his parent, and the case turned on the question of whether a partnership in which the parent is a member may be sued in tort by the minor child upon the theory that it is a legal entity apart from the partners.<sup>21</sup> In the Supreme Court of Ohio, however, the plaintiff abandoned the partnership entity theory, and argued directly that an unemancipated child should be allowed to maintain a tort action against his parent in the latter's "business or vocational capacity." In affirming the intermediate court's order remanding the case for trial on the merits, the unanimous court declared:

"In view of the changed conditions to which we have referred, we have come to the conclusion that, if there ever was any justification for the rule announced in Mississippi in 1891, that justification has now disappeared and that an unemancipated child should have as clear a right to maintain an action in tort against his parent in the latter's business or vocational capacity as such a child would have to maintain an action in relation to his property rights."<sup>22</sup>

As the "changed conditions" which justify a departure from the established rule, the court cited "the advent of the motor vehicle and

---

<sup>18</sup>Worrell v. Worrell, 174 Va. 11, 4 S. E. (2d) 343 (1939).

<sup>19</sup>Note (1951) 19 A. L. R. (2d) 433, § 2. The courts are now in considerable conflict on how far the immunity rule should be extended to one who is not a natural parent but who stands "in loco parentis." Note (1951) 19 A. L. R. (2d) 434, § 5, and cases therein cited.

<sup>20</sup>156 Ohio 566, 103 N. E. (2d) 743 (1952).

<sup>21</sup>The trial court entered judgment for the defendant on the pleadings on the grounds that since "the liability of each partner was joint and several, any judgment recovered against the partnership would become a liability of the father." The Court of Appeals reversed the judgment, holding that the immunity rule "should not obtain on this record as a matter of law." 156 Ohio 592, 103 N. E. (2d) 743, 745 (1952).

<sup>22</sup>156 Ohio 566, 103 N. E. (2d) 743, 748 (1952).

the growing complications of business and industry... in an industrial age...."<sup>23</sup> The reference is ambiguous in regard to the issue of parental immunity from tort liability, but it would be a logical assumption that the prevalence of liability insurance brought on by these modern conditions influenced the decision. The opinion gave particular attention to several modern cases in which other courts have at least implied, if not definitely ruled, that the fact that the defendant-parent was protected by liability insurance obviated the reason for the rule denying liability. However, the Ohio tribunal expressly denied that the presence or absence of liability insurance should influence the decision of whether a child should be allowed to recover. Since the opinion is specific in recognizing the liability of the parent in his "business or vocational capacity," it may be that the court thought that the "growing complications of business and industry" would produce more situations in which the parties would stand in some other relationship than merely that of parent and child. But if there is real reason in 1952 for allowing recovery for injury inflicted on a child by his parent acting in a business capacity, it would seem that recovery should have been allowed in 1891 in the fewer cases which would have arisen under the different industrial conditions of sixty years ago.

In view of the ambiguity of the phrases "changed conditions" and "business and vocational capacity," it is not possible to determine definitely to what extent the Ohio court advocates the abandonment of the general parental immunity rule. Manifestly, it does not go so far as to advocate a total withdrawal of parental immunity in all types of situations. It does seem certain, however, that the court intends to go beyond the earlier cases which have recognized liability of a parent,<sup>24</sup> but have conditioned its imposition upon the existence of liability insurance protecting the parent from financial loss or of an employment relationship between the parties which tends to indicate the economic, if not the legal, emancipation of the injured minor. In laying down the broad rule that the parent should be liable for injuries caused by him in his business or vocational capacity, the Ohio court has made a further step toward establishing a modified immunity rule granting the parent a privilege from liability for injuries inflicted while reasonably exercising parental discipline and control in maintaining the

---

<sup>23</sup>156 Ohio 566, 103 N. E. (2d) 743, 748 (1952).

<sup>24</sup>Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Worrell v. Worrell 174 Va. 11, 4 S. E. (2d) 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).

domestic establishment, with no privilege in relation to those injuries inflicted outside of this sphere.<sup>25</sup>

EUGENE M. ANDERSON, JR.

TORTS—RIGHT OF MARRIED WOMAN TO SUE HUSBAND FOR PERSONAL INJURIES INFLICTED BEFORE MARRIAGE. [Virginia]

Since at common law the personality of the wife merged in that of the husband,<sup>1</sup> and the husband was entitled to the wife's choses in action,<sup>2</sup> it followed that no tort action could be maintained by a wife against her husband.<sup>3</sup> Under the common law theories of the status of married persons, if a cause of action were to be recognized in the wife for the wrongdoing of the husband, he would be under a duty of compensating himself,<sup>4</sup> and would have to be both the plaintiff and defendant, since the wife could sue and be sued only through her husband.<sup>5</sup>

The general disability of the wife to sue in her own name has been removed in modern times by the Married Woman's Acts which typically provide that a married woman may sue and be sued as if unmarried.<sup>6</sup> Under these statutes the courts recognize the right of the

<sup>25</sup>In *Borst v. Borst*, 251 P. (2d) 149 (Wash. 1952) the court, citing the Signs case with full approval, and disapproving its own holding in the Roller case, allowed recovery to a child injured by his father's negligence in the operation of a truck in which the child was not a passenger. After a thorough review of the reasons commonly given to support the immunity of the parent from liability, the court declared: "The reasons for the rule do not exist, and the mantle of immunity therefore disappears, where the tort is committed by the parent while dealing with the child in a nonparental transaction." 251 P. (2d) 149, 156. McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 Harv. L. Rev. 1030 at 1079, advocates such a view.

<sup>1</sup>*Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910); *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597 (1936); *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N. E. 93 (1925); *Lillienkamp v. Rippetoe*, 133 Tenn. 57, 179 S. W. 628 (1915).

<sup>2</sup>*Austin v. Austin*, 136 Miss 61, 100 So. 591 (1924); Prosser, *Torts* (1941) 898.

<sup>3</sup>*Spector v. Weisman*, 40 F. (2d) 792 (C. A. D. C. 1930); *Newton v. Weber*, 119 Misc. 240, 196 N. Y. Supp. 113 (1922); *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N. E. 93 (1925); 41 C. J. S., *Husband and Wife* § 396.

<sup>4</sup>*Newton v. Weber*, 119 Misc. 240 at 242, 196 N. Y. Supp. 113 at 114 (1922); *Harper*, *Torts* (1933) § 288.

<sup>5</sup>*Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462 at 463 (1896); *Harper*, *Torts* (1933) § 288.

<sup>6</sup>3 Vernier, *American Family Laws* (1935) § 179 states that thirty-one states have statutes of this type.

wife to sue her husband to protect her property interests against tortious injury,<sup>7</sup> but in regard to suits for personal torts, there is still disagreement.<sup>8</sup> Though the Married Woman's Acts are usually in such general terms as to *allow* courts to recognize by implication the right of the wife to sue her husband for personal torts, the statutes are not so specific on this point as to *require* the recognition of the right.<sup>9</sup> The question thus becomes whether the legislation shall be construed as having abrogated the entire common law restriction against a married woman suing for wrongs committed against her, including those of the husband, or merely as having given her a remedy of suit in her own name to enforce any cause of action that could have been enforced by action in the joint names of husband and wife prior to the enactment of the statute. If the latter is the correct interpretation, no action can be brought by a wife against her husband for a personal tort since no right of action against the husband was recognized in the wife at common law, and the Married Woman's Act would create no new causes of action.

Representing the majority view<sup>10</sup> is the recent Virginia decision of *Furey v. Furey*,<sup>11</sup> a case of first impression on the precise issue presented.<sup>12</sup> Plaintiff brought an action against her husband for damages for personal injuries suffered, before the marriage of the parties, as a result of the defendant's gross negligence in the operation of an auto-

<sup>7</sup>Prosser, Torts (1941) 900.

<sup>8</sup>Harper, Torts (1933) § 288. For the division of the states see note 10, *infra*.

<sup>9</sup>A table of the states and United States possessions and the relevant Married Woman's Act of each may be found in 3 Vernier, American Family Laws (1935) §§ 179, 180; Prosser, Torts (1941) 902. New York amended its Married Woman's Statute in 1937 so as expressly to authorize personal tort actions between husband and wife. New York Dom. Rel. Law § 57 as amended by N. Y. Laws (1937) c. 669, § 1.

<sup>10</sup>The states following the majority rule are: California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wyoming, and the District of Columbia. The states following the minority rule are: Alabama, Arkansas, Colorado, Connecticut, Idaho, North Carolina, North Dakota, New Hampshire, New York, Oklahoma, South Carolina, South Dakota, Wisconsin. Also see Notes (1920) 6 A. L. R. 1038; (1924) 29 A. L. R. 1482; (1934) 89 A. L. R. 118; (1946) 160 A. L. R. 1406; (1926) 4 Wis. L. Rev. 37.

<sup>11</sup>193 Va. 727, 71 S. E. (2d) 191 (1952).

<sup>12</sup>The Virginia court held in *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439 (1918) that a wife could not maintain an action against her husband for a personal tort committed during coverture under the Virginia Married Woman's statute, but the issue of an antenuptial tort was not involved in that case.

mobile in which plaintiff was a passenger. She contended that the Virginia Married Woman's statute providing that "A married woman may . . . sue and be sued in the same manner and with the same consequences as if she were unmarried . . ." <sup>13</sup> empowered her to bring the present action. However, the circuit court sustained defendant's plea in bar denying the right of a wife to sue her husband in tort, and the Virginia Supreme Court of Appeals affirmed the judgment for defendant.

The Virginia court had held thirty-four years earlier that the Married Woman's Act does not allow a wife to sue her husband for a personal tort committed during coverture.<sup>14</sup> The principal case now holds that the same reasoning applies to the case of an antenuptial tort.<sup>15</sup> In aligning itself with the majority by these two decisions, the Virginia court has relied upon the usual reasons advanced in support of this view. The opinion declares that: The statute, being in derogation of the common law, must be strictly construed;<sup>16</sup> that if it had been the intent of the legislature to permit personal tort actions between husband and wife, it would have been a simple matter to have expressly so provided;<sup>17</sup> and that the marriage relationship, "upon the preservation of [the] integrity [of which] the health, morals, and purity of the State is dependent,"<sup>18</sup> must be protected, and to allow an action for personal tort between spouses would tend to disrupt the peace and harmony of the home.<sup>19</sup> It is also suggested that an unequal situation would result from giving the wife the right to sue her husband, because there is no statute "removing the common law inhibition against the husband's suing the wife for personal tort,"<sup>20</sup>

<sup>13</sup> Va. Code Ann. (Michie, 1950) § 55-36.

<sup>14</sup> *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439 (1918).

<sup>15</sup> *Furey v. Furey*, 193 Va. 727 at 730, 71 S. E. (2d) 191 at 192 (1952).

<sup>16</sup> *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832 (1916); *Heyman v. Heyman*, 19 Ga. App. 634, 92 S. E. 25 (1917); *Willott v. Willott*, 333 Mo. 896, 62 S. W. (2d) 1084 (1933).

<sup>17</sup> *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287 (1898); *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N. E. 93 (1925); *Fehr v. General Accident Fire & Life Assur. Corp.*, 246 Wis. 228, 16 N. W. (2d) 787, 160 A. L. R. 1402 (1944).

<sup>18</sup> *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 176, 96 S. E. 315, 322, 1 A. L. R. 439, 449 (1918).

<sup>19</sup> *Yellow Cab Co. v. Dreslin*, 181 F. (2d) 626, 19 A. L. R. (2d) 1001 (C. A. D. C. 1950); *Broadus v. Wilkenson*, 281 Ky. 601, 136 S. W. (2d) 1052 (1940); *Lindley v. Cusson*, 22 N. Y. S. (2d) 516 (1917). See *Welch v. Davis*, 410 Ill. 130, 101 N. E. (2d) 547, 549 (1951).

<sup>20</sup> *Furey v. Furey*, 193 Va. 727, 732, 71 S. E. (2d) 191, 194 (1952). Also *Brandt v. Keller*, 347 Ill. App. 18, 105 N. E. (2d) 796 (1952).

and therefore a husband would not have a cause of action against the wife. As additional arguments for this rule it has been asserted that the danger of collusion by the spouses against insurance companies would be great if the wife could maintain an action against her husband for personal injuries,<sup>21</sup> and that each spouse has remedy enough in the criminal and divorce courts.<sup>22</sup>

The courts following the minority view<sup>23</sup> argue that there should be a legal remedy for every wrong,<sup>24</sup> and construe the Married Woman's statutes as having wholly abrogated the common law disability of married women to sue, and as preserving the separate legal identity of the wife.<sup>25</sup> These authorities refute the arguments of the majority by pointing out that: The Married Woman's Acts are remedial in nature and should be broadly construed;<sup>26</sup> that the courts following the majority rule allow the wife to sue her husband to protect her property rights, and there is no greater danger of disturbing the domestic tranquility by allowing actions for personal torts;<sup>27</sup> that the danger of many trivial actions being brought for minor annoyances may be abated by invoking a doctrine of assumption of risk or by recognizing the special relationship between husband and wife as a basis for finding an implied license as to unimportant acts which are technically torts;<sup>28</sup> that the risk of collusion is involved in many well-recognized actions as

---

<sup>21</sup>See *General Accident, Fire & Life Assur. Corp. v. Morgan*, 33 F. Supp. 190, 192 (W. D. N. Y. 1940); Prosser, *Torts*, (1941) 903, n. 40.

<sup>22</sup>*Thompson v. Thompson*, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910); *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27 (1877).

<sup>23</sup>See note 10, *supra*.

<sup>24</sup>*Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 (1938); *Fiedeer v. Fiedeer*, 42 Okla. 124, 140 Pac. 1022 (1914).

<sup>25</sup>*Brown v. Brown*, 88 Conn. 42, 89 Atl. 889 (1914); *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920); Note (1949) 6 Wash. & Lee L. Rev. 213, 217.

<sup>26</sup>*Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 (1938); Prosser v. Prosser, 114 S. C. 45, 102 S. E. 787 (1920).

<sup>27</sup>*Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920); *Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 (1938); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926).

<sup>28</sup>3 Vernier, *American Family Laws* (1935) § 180; Prosser, *Torts* (1941) 903; McCurdy, *Torts Between Persons In Domestic Relation* (1930) 43 Harv. L. Rev. 1030, 1055. It seems that under this theory the wife would not be considered as having assumed the risk that her husband might beat or chastise her or deprive her of her liberty, but would assume only the risks of the ordinary frictions of the marital relationship. In the case of negligence, since the husband and wife are engaged in a common enterprise, usually under the control of both and for the common benefit, each would bear the risk of the actions which the other spouse would take in the ordinary course of the marriage relationship.

one of the hazards in the administration of justice, but this alone should not defeat the cause of action;<sup>29</sup> that the spouses do not always have sufficient remedy in the divorce and criminal courts, since neither of the above courts would compensate the plaintiff for the injuries, and these courts do not have jurisdiction over all torts—e.g., inflicting of a personal injury by ordinary negligence is nowhere grounds for divorce or criminal prosecution.<sup>30</sup>

Text writers purport to see a trend toward allowing a wife to bring a tort action against her husband for personal tort.<sup>31</sup> However, the principal case and a recent Illinois case<sup>32</sup> point to the strengthening of the majority view.<sup>33</sup> The Virginia court was virtually forced to this result by its earlier decision in the *Keister* case. Though the cases are distinguishable on the basis of the time of the occurrence of the tort, an opposite decision in the principal case would have created the anomaly of allowing recovery for antenuptial torts but not for torts committed during coverture, whereas there seems to be no justi-

<sup>29</sup>See *Brandt v. Keller*, 347 Ill. App. 18, 105 N. E. (2d) 796, 801 (1952).

<sup>30</sup>*Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 at 338 (1917); *Courtney v. Courtney*, 184 Okla. 395, 87 P. (2d) 660 at 666 (1938); *Fiedeer v. Fiedeer*, 42 Okla. 124, 140 Pac. 1022 (1914); *Prosser, Torts* (1941) 903, n. 39.

<sup>31</sup>*Prosser, Torts* (1941) 904; *Harper, Torts* (1933) § 288; 3 *Vernier, American Family Laws* (1935) § 180; Note (1949) 6 Wash. & Lee L. Rev. 213, 217. The text writers vigorously support the views of the minority courts, setting forth the same reasons for their position as are advanced by the minority courts for the liberal interpretation of the Married Woman's Act.

<sup>32</sup>*Brandt v. Keller*, 347 Ill. App. 18, 105 N. E. (2d) 796 (1952) (case of first impression in Illinois holding wife could not maintain an action against husband for personal tort committed during coverture under Illinois Married Woman's statute).

<sup>33</sup>There appear to be twenty-nine states and the District of Columbia following the majority, and thirteen following the minority. In five of the latter states, the rule has been established by cases of first impression within the past quarter century: *Rains v. Rains*, 97 Colo. 19, 46 P. (2d) 740 (1935); *Lorang v. Hays*, 69 Idaho 440, 209 P. (2d) 733 (1949); *Fitzmaurice v. Fitzmaurice*, 62 N. D. 191, 242 N. W. 526 (1932); *Scotvold v. Scotvold*, 68 S. D. 53, 298 N. W. 266 (1941); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926). New York adopted the rule by statute in 1937. N. Y. Laws (1937) c. 699, § 1. In the same period, ten states have adopted the majority rule in cases of first impression: *Corren v. Corren*, 47 So. (2d) 774 (Fla. 1950); *Brandt v. Keller*, 347 Ill. App. 18, 105 N. E. (2d) 796 (1952); *Furstenburg v. Furstenburg*, 152 Md. 247, 136 Atl. 534 (1927); *Conley v. Conley*, 92 Mont. 425, 15 P. (2d) 922 (1932); *Emerson v. Western Seed & Irrigation Co.*, 116 Neb. 180, 216 N. W. 297 (1927); *Von Laszewski v. Von Laszewski*, 99 N. J. Eq. 25, 133 Atl. 179 (1926); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 663, 104 A. L. R. 1267 (1936); *Comstock v. Comstock*, 106 Vt. 50, 169 Atl. 903 (1934); *Poling v. Poling*, 116 W. Va. 187, 179 S. E. 604 (1935); *McKinney v. McKinney*, 59 Wyo. 204, 135 P. (2d) 940 (1943). No decision has been found in which a court has changed from one view to the other during that time.



fication for different results.<sup>34</sup> Furthermore, the Virginia legislature apparently approves the view of the *Keister* case, inasmuch as it has shown no inclination during thirty-four years to amend the Married Woman's Act so as to repudiate the court's earlier construction.<sup>35</sup> Since the court has now extended its previous application of the majority view and since the legislature indicates no desire to overthrow the rule by revising the statute, it appears that Virginia will not in the foreseeable future join any trend toward recognizing a wife's right to sue her husband for a personal tort.

LAWRENCE C. MUSGROVE

WORKMEN'S COMPENSATION—INJURY INFLICTED ON EMPLOYEE BY ASSAULT OF FELLOW WORKER AS "ARISING OUT OF THE EMPLOYMENT."  
[Mississippi]

Since Workmen's Compensation Acts almost invariably specify that an injury to an employee is compensable only if it "arises out of his employment,"<sup>1</sup> the courts must continually decide whether particular injuries so qualify—a task that frequently proves troublesome because of the obvious vagueness of the requirement. In 1952 the Supreme Court of Mississippi in *Mutual Implement & Hardware Ins. Co. v. Pittman*,<sup>2</sup> a vivid case of first impression, was confronted with the issue of whether the injury inflicted by the personal assault of one workman upon a fellow workman met this prerequisite to the awarding of compensation.

Claimant, a Negro boy sixteen years old, and his assailant, a white man, were employed in laying a concrete floor in a garage. The boy brought the concrete into the garage in a wheelbarrow which he filled from a cement mixer located outside the building. After the

---

<sup>34</sup>The English courts now allow the wife to recover for antenuptial tort, but deny the wife the right to maintain an action against her husband for a personal tort committed during coverture. The courts justify this apparent inconsistency by reasoning that the cause of action which the wife acquires before marriage is a right of property, and when the plaintiff marries the defendant the action becomes her separate property within the meaning of the Married Woman's Act, and by the same Act the plaintiff is entitled to enforce the action against the defendant. See Note (1949) 12 Mod. L. Rev. 93.

<sup>35</sup>This statute has been amended three times since 1918. Va. Code (1919) § 5134; Va. Acts (1932) 21; Va. Acts (1950) 460.

<sup>1</sup>Prosser, Torts (1941) 528; 6 Schneider, Workmen's Compensation Text (3d ed. 1948) § 1542; 58 Am. Jur. 716.

<sup>2</sup>59 S. (2d) 547 (Miss. 1952).

concrete was emptied from the wheelbarrow, it was the job of claimant's assailant to spread the mixture over the floor with a shovel. When the mixer became empty, there was of necessity a few minutes while the mixer was being refilled during which neither the Negro boy nor the white man had any duties to perform. During one such interval, the assailant lit the last cigarette in a package and then crumpled the package into a small ball and tossed it at the claimant, striking him in the back of the neck. The boy picked up a small pebble and tossed it at the white man, hitting him on the neck or shoulder. Each worker when hit had his back turned to the other, and no injury was inflicted on either employee thereby. While the claimant stood by the wheelbarrow, waiting for it to be refilled from the mixer, his assailant walked over behind him and "struck him a tremendous blow on the back of the head with the shovel with which he was working." The blow knocked the claimant unconscious, fractured his skull, and inflicted a serious and permanent brain injury. An award in his favor was made by the Workmen's Compensation Commission, which award was affirmed by the circuit court. His employer's insurance company then brought the case before the Supreme Court of Mississippi, contending principally that the evidence did not show that the injury arose "out of and in the course of employment" so as to be compensable under the state's Workmen's Compensation Act.<sup>3</sup>

The award was affirmed, over the dissent of two judges, by the Supreme Court of Mississippi, which found that although the cause of the injury was a willful assault and battery, yet since "the employment and the nature of the work brought Pittman and Stewart in close contact with each other, . . . one of the hazards of this contact was that of an assault committed by one employee upon another, [and] under our compensation law the injured employee is entitled to compensation for injury resulting from such a hazard the same as he would be if he had been injured by the machine in proximity to which he was required to work, and . . . the injury from this hazard arose out of and in the course of Pittman's employment."<sup>4</sup> A vigorous dissent, in bitterly attacking the ruling that the injury arose out of the employ-

---

<sup>3</sup>Miss. Laws (1948) c. 354.

<sup>4</sup>Mutual Implement & Hardware Ins. Co. v. Pittman, 59 S. (2d) 547, 556 (Miss. 1952). In *Joe N. Miles & Sons v. Myatt*, 61 S. (2d) 390 (Miss. 1952), the court referred to the quoted portion of the principal case opinion as indicating that the employer also assumes the risk of injury to an employee resulting from "horseplay" between friendly employees. The decision was limited, however, to the situation in which the injured party was not the aggressor in the horseplay.

ment, asserted that the decision means that "even though the injury results from personal malice on the part of the wrongdoer towards the injured employee . . . [and does not arise] out of the employment other than in the sense that both were employed and were working at, or about, the same place . . . every employer is the guarantor against eccentricities, habits, temperament, disposition, inclinations, emotions, and foolish whims of all his employees."<sup>5</sup>

To obtain any effective understanding of decisions involving the "arising out of employment" proviso, it is essential to remember that no question of proximate causation, as that term is used in negligence actions, is involved. A claimant is not required to show that his employment and his injury are so closely linked that the former would be said in tort law terminology to be the proximate cause of the latter.<sup>6</sup> However, since it would be both illogical and unconstitutional<sup>7</sup> to award compensation for injuries unrelated to employment, the "arising out of employment" proviso makes necessary the showing of a causal connection between injury and employment.<sup>8</sup> What degree of causal connection will suffice is a matter of confusion in the courts today.<sup>9</sup> It has been generally held, especially in the earlier cases, that

<sup>5</sup>Mutual Implement & Hardware Ins. Co. v. Pittman, 59 S. (2d) 547, 556 (Miss. 1952).

<sup>6</sup>Truck Insurance Exchange v. Industrial Accident Comm., 27 Cal. (2d) 813, 167 P. (2d) 705 (1946); Fiarenzo v. Richards & Co., 93 Conn. 581, 107 Atl. 563 (1919); Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N. W. 19 (1941); Travelers' Ins. Co. v. Peters, 14 S. W. (2d) 1007 (Tex. Com. App. 1929); A. N. Campbell & Co. v. Messenger, 171 Va. 374, 199 S. E. 511 (1938). "To incorporate in the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the Legislature industriously put out at another." City of Milwaukee v. Industrial Comm., 160 Wis. 238, 151 N. W. 247, 249 (1915).

<sup>7</sup>"It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution." Cudahy Packing Co. v. Parramore, 263 U. S. 418, 423, 44 S. Ct. 153, 154, 68 L. ed. 366, 369, 30 A. L. R. 532, 535 (1923).

<sup>8</sup>Mulligan v. Oakes, 128 Conn. 488, 23 A. (2d) 870 (1942); General Properties Co. v. Greening, 154 Fla. 814, 18 S. (2d) 908 (1944); Connor Co. v. Industrial Comm., 374 Ill. 105, 28 N. E. (2d) 270 (1940); Carney v. Hellar, 155 Kan. 674, 127 P. (2d) 496 (1942); Bradshaw v. Aronovitch, 170 Va. 329, 196 S. E. 684 (1938).

<sup>9</sup>The following brutal but accurate description of many judicial opinions in this field has been made: "The courts have struggled arduously and valiantly in their attempts to decide whether a particular accident 'arises out of the employment.' The usual opinion, after a few preparatory remarks concerning the humane character of compensation legislation and the liberal interpretation that should be given to the act, customarily gives expression to one or more general formulas, by which it professes to be guided in reaching a decision. It then follows with a

the employment must expose the employee to the injury from *risks and hazards peculiar to that employment* and to which the general public is not subject.<sup>10</sup> It is frequently stated that one's mere presence at the place of employment and the doing of one's usual work at the time of injury is insufficient to establish the requisite causal relationship between injury and employment.<sup>11</sup> Yet there are numerous cases in which the awarding of compensation seemingly is explainable only on the basis that such a time-place coincidence will suffice.<sup>12</sup>

A survey of cases involving assaults by employees on co-employees reveals no adequate test for determining whether the assault was sufficiently linked with the employment to be compensable. Certain typical situations appear clearly to qualify—e.g.: where a timekeeper was ordered by the company to withhold a co-employee's paycheck and was assaulted by this employee following a dispute over the check;<sup>13</sup> where an assault resulted from a quarrel among two employees as to the proper amount of work each should do in alternately pushing a

---

large number of supposedly analogous cases from numerous jurisdictions, many dissimilar and not a few irrelevant, and then with the air of a magician pulling the rabbit out of the hat declares that it is clear that the accident involved in the present case either does or does not arise out of the employment. It is not surprising that conflict and confusion results." Brown, "Arising out of and in the Course of the Employment" in *Workmen's Compensation Laws—Part III* (1932) 8 *Wis. L. Rev.* 134, 143.

<sup>10</sup>*Consumers' Co. v. Industrial Comm.*, 324 Ill. 152, 154 N. E. 423 (1926); *Harvey v. Caddo DeSoto Cotton Oil Co.*, 6 S. (2d) 742 (La. App. 1941); *McNicol's Case*, 215 Mass. 497, 102 N. E. 697 (1913); *Thier v. Widdifield*, 210 Mich. 355, 178 N. W. 16 (1920); *Slanina v. Industrial Comm.*, 117 Ohio St. 329, 158 N. E. 829 (1927); *Carey v. Industrial Comm.*, 181 Wis. 253, 194 N. W. 339 (1923); *Prosser, Torts* (1941) 533.

<sup>11</sup>*Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 19 Cal. (2d) 622, 122 P. (2d) 570, 141 A. L. R. 798 (1942); *Math Iglor's Casino v. Industrial Comm.*, 394 Ill. 330, 68 N. E. (2d) 773 (1946); *In re Betts*, 66 Ind. App. 484, 118 N. E. 551 (1918); *Ricketts v. Story Laundry & Dry Cleaning Co.*, 155 S. W. (2d) 536 (Mo. App. 1941); *Hopper v. Industrial Comm.*, 71 Ohio App. 156, 48 N. E. (2d) 125 (1943); *Archibald v. Ott*, 77 W. Va. 448, 87 S. E. 791 (1916). See also 58 *Am. Jur.* 719.

<sup>12</sup>*Boris Construction Co. v. Haywood*, 214 Ala. 162, 106 So. 799 (1925) (truck driver killed by stray bullet fired a block away by small boy shooting at birds); *Harivel v. Hall-Thompson Co.*, 98 Conn. 753, 120 Atl. 603 (1923) (traveling salesman injured in fire at hotel at which he was staying); *Filitti v. Lerode Homes Corp.*, 244 N. Y. 291, 155 N. E. 579 (1927) (cornice fell from building injuring laborer on adjoining lot); *Consolidated Pipe Line Co. v. Mahon*, 152 Okla. 72, 3 P. (2d) 844 (1931) (during sudden thunderstorm outdoor worker took shelter in old house which shortly thereafter was struck by lightning); *Globe Indemnity Co. v. MacKendree*, 39 Ga. App. 58, 146 S. E. 46 (1928) (newspaper employee driving car through woodland was killed when a violent storm blew down a tree on the car).

<sup>13</sup>*Warren Const. Co. v. Industrial Accident Comm.*, 64 Cal. App. 260, 221 Pac. 381 (1923).

truck;<sup>14</sup> and where an assault stemmed from an argument over the use of a pencil.<sup>15</sup> Such situations are illustrative of the well-established principles that compensation will be allowed for an assault by a fellow employee where the person injured is a supervisory employee acting to discipline a worker or to withhold wages on company orders,<sup>16</sup> or where the assault arises from an altercation as to how the work shall be done,<sup>17</sup> or as to who is entitled to possession of a tool used in the work.<sup>18</sup> However, where the assault originates in matters of a purely personal nature, recovery is usually denied—e.g.: where a remark by one employee to a co-employee's wife precipitated an assault by the husband;<sup>19</sup> where a worker refused to lend money to the assailant;<sup>20</sup> and where the refusal of a white employee to share drinking water with a Negro co-employee brought on an assault by the latter.<sup>21</sup> The reasoning in such cases is that the employment is too remotely related to the injury because the assault is made solely to gratify the assailant's feeling of anger or hatred and is directed at the employee as an individual and not as an employee.<sup>22</sup>

While some such situations can be readily classified as either involving or not involving sufficient causal connection between injury and employment to justify compensation, the difficult problems appear in incidents such as gave rise to the principal case, where elements of both employment and personal actions blend to form a "twilight" zone. In the *Pittman* case the assault occurred during working hours and during an interval when assailant and victim were required by the nature of their work to stand idly by, a situation which might reasonably be considered as conducive to horseplay and resulting

---

<sup>14</sup>*Hinchuk v. Swift & Co.*, 149 Minn. 1, 182 N. W. 622 (1921).

<sup>15</sup>*Travelers' Ins. Co. v. Culpepper*, 82 S. W. (2d) 1054 (Tex. Civ. App. 1935).

<sup>16</sup>*Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149 (1918); *Hansen v. Frankfort Chair Co.*, 249 Ky. 194, 60 S. W. (2d) 349 (1933); *Winter v. U. S. Gypsum Co.*, 20 N. J. Misc. 425, 28 A. (2d) 545 (1942); 58 Am. Jur. 768.

<sup>17</sup>6 Schneider, *Workmen's Compensation Text* (3d ed. 1948) 131.

<sup>18</sup>*Ashley v. F-W. Chevrolet Co.*, 222 N. C. 25, 21 S. E. (2d) 834 (1942); *Industrial Comm. v. Pora*, 100 Ohio St. 218, 125 N. E. 662 (1919); *Indian Territory Illuminating Oil Co. v. Jordan*, 140 Okla. 238, 283 Pac. 240 (1929).

<sup>19</sup>*Elrod v. Union Bleachery*, 204 S. C. 481, 30 S. E. (2d) 73 (1944).

<sup>20</sup>*Schlener v. American News Co.*, 240 N. Y. 622, 148 N. E. 732 (1925).

<sup>21</sup>*City of Chicago v. Industrial Comm.*, 292 Ill. 406, 127 N. E. 49, 15 A. L. R. 586 (1920).

<sup>22</sup>*Stulginski v. Waterbury Rolling Mills Co.*, 124 Conn. 355, 199 Atl. 653 (1938); *Kentucky Fluorspar Co. v. Wolford*, 263 Ky. 471, 92 S. W. (2d) 753 (1936); *Horvath v. La Fond*, 305 Mich. 69, 8 N. W. (2d) 915 (1943); *Continental Life Ins. Co. v. Gough*, 161 Va. 755, 172 S. E. 264 (1934).

assaults.<sup>23</sup> Clearly, however, the incidents which precipitated the assault neither were intended to serve the interests of the employer nor did serve them in fact. The assault seems to have been motivated purely out of anger and was made to obtain revenge for what the assailant considered a personal affront. Every injury results from a combination of numerous factors, and when an injury occurs during working hours at the place of employment, it is almost impossible not to regard the employment as some sort of contributing cause thereof.<sup>24</sup> But when liability is to be imposed on the company in certain of such cases and denied in others, it would seem that the courts must have some criterion with which to work. In finding that the injury "arose out of the employment," the majority in the *Pittman* case appears to use a "but for" test—i.e., that the employment was an essential element in the occurrence of the injury in the sense that if it had not been for the fact of employment no injury would have occurred. The test that the dissenting justices thought appropriate is more obscure. Apparently they would have found liability only if the assault had been for the purpose of serving some real or fancied interest of the employer or if the employer had had reason to know that such an assault might occur between these *particular* employees. In essence, however, their refusal to concur with the rest of the court appears to have been founded not on the espousal of any affirmative test of their own but upon the conviction that the test utilized by the majority makes the employer an absolute insurer of his workers as to personal assaults by a co-employee committed during working time.

The ground of decision selected by the majority is so excessively broad as to justify the fears of the dissent. Stripped of surplusage and make-weights, the *ratio decidendi* of the *Pittman* case is that a personal assault by a fellow employee is made one of the hazards of employment *by the mere fact that the employees work together in close association*. Some men are friendly, peaceful, and slow to anger; others are unfriendly, belligerent, and temperamental. According to the ma-

---

<sup>23</sup>*Gillmore v. Ring Construction Co.*, 227 Mo. App. 1217, 61 S. W. (2d) 764 (1933). The decisions are in conflict as to whether injuries incurred in friendly horseplay between employees on the job are compensable. Since the principal case was decided, the Mississippi Court has held such injuries to be within the scope of the Compensation Act, where the injured party was not the aggressor. *Joe N. Miles & Sons v. Myatt*, 61 S. (2d) 390 (Miss. 1952). Justice Roberds who dissented in the principal case, wrote the court's opinion in the *Myatt* case, declaring that he was not in accord with the decision but felt compelled to hold horseplay injuries compensable because the court had already ruled malicious injuries to be under the Act.

<sup>24</sup>Prosser, *Torts* (1941) 533.

majority opinion, when an employer hires a group of men of varying personalities, races, religions, and national origins, assaults between such employees while on the job are to be considered the normal and natural product of their working together. Under this approach, the temperamental explosion of claimant's assailant may be likened to the physical explosion of a machine at the place of employment, a situation in which compensation would be awarded. In both cases the "machine," human or mechanical, was an essential part of the employer's business, and claimant was compelled to be in its presence to do his work; and in neither case could claimant choose the quality of machine with which he should work, since that was a matter wholly determined by his employer. It has also been asserted that a trivial incident, such as the throwing of the paper and the pebble in the principal case, frequently precipitates an assault which is really the culmination of a long sequence of irritations between employees that were produced by their associations on the job.<sup>25</sup>

It must be acknowledged that considerable case following exists for the theory of the *Pittman* case.<sup>26</sup> Justices Cardozo and Rutledge, prior to their elevation to the United States Supreme Court, handed down two notable decisions frequently quoted in support of the view.<sup>27</sup> Nevertheless, the present weight of authority indicates that one's mere presence at the place of employment and doing the usual work at the time of injury does not establish such a causal connection between in-

---

<sup>25</sup>"Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures." *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App. D. C. 52, 112 F. (2d) 11, 17 (1940).

<sup>26</sup>*Hartford Accident & Indemnity Co. v. Cardillo*, 72 App. D. C. 52, 112 F. (2d) 11 (1940); *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 26 Cal. (2d) 286, 158 P. (2d) 9 (1945); *Chicago I. & L. Ry. Co. v. Clendennin*, 81 Ind. App. 323, 143 N. E. 303 (1924); *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522 (1920); *Verschleiser v. Joseph Stern & Sons*, 229 N. Y. 192, 128 N. E. 126 (1920); *Chambers v. Union Oil Co.*, 199 N. C. 28, 153 S. E. 594 (1930).

<sup>27</sup>*Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522 (1920); *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App. D. C. 52, 112 F. (2d) 11 (1940). Regarding the latter decision one of the dissenting Justices in the principal case observed: "The Hartford case has been given undue weight because Justice Rutledge, the writer of the opinion, later became a member of the Supreme Court of the United States. However, I think it must be admitted that much of the meaning is obscured by the language used in the opinion. Also a considerable part of the opinion is a discourse upon philosophy and social relations—not an analysis of legal principles." *Mutual Implement & Hardware Ins. Co. v. Pittman*, 59 S. (2d) 547, 561 (Miss. 1952).

jury and employment as to satisfy the "arising out of the employment" proviso.<sup>28</sup> Such a test of liability as the principal case advances would make it virtually impossible for any assault by one worker on another not to be compensable if it occurred while the men were on the job. Further, while trivial incidents may ignite long-smouldering animosities produced by close association in employment, no proof of the existence of such a situation was made in the principal case, nor did the court intimate that such proof was necessary.<sup>29</sup> On the bare proof of an assault by a co-employee while at work, the Mississippi court was ready to assume the validity of such a speculative origin of the assault. The causative danger here was not peculiar to the work in any realistic sense, for as one of the dissenting justices observed: "... Stewart would just as likely and quickly have gone haywire and attacked Pittman had they been at a baseball game as he did under the circumstances here."<sup>30</sup>

The result reached in the *Pittman* case points up a growing tendency among the courts to pay only lip service to the "causal relationship" requirement. Workmen's Compensation Acts are construed with liberality in favor of the employee,<sup>31</sup> and such a policy of construction appears to have led naturally over a period of years to a steady erosion of the amount of causal relationship needed to obtain an award. One of the basic theories behind such Acts is that payment for injuries incidental to employment should be borne by the employer as an ordinary cost of business, a cost which can be passed on to consumers in the form of higher prices for the employer's goods and services.<sup>32</sup> The fact that the cost falls not directly on the employer but only indirectly on a vague group called the consuming public, coupled with the pur-

<sup>28</sup>See note 11, *supra*.

<sup>29</sup>But see *Edelweiss Gardens v. Industrial Comm.*, 290 Ill. 459, 125 N. E. 260, 262 (1919) quoting from *C. E. Peterson & Co. v. Industrial Board*, 281 Ill. 326, 117 N. E. 1033, 1035 (1917): "Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

<sup>30</sup>*Mutual Implement & Hardware Ins. Co. v. Pittman*, 59 S. (2d) 547, 559 (Miss. 1952).

<sup>31</sup>*Krupp v. J. C. Penny Co.*, 51 Ariz. 228, 75 P. (2d) 692 (1938); *Haverly v. Union Const. Co.*, 236 Iowa 278, 18 N. W. (2d) 629 (1945); *Schenck's Case*, 293 Mass. 526, 200 N. E. 266 (1936); *Jones v. Herbert Equities*, 186 Misc. 163, 60 N. Y. S. (2d) 88 (1946); *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 20 S. E. (2d) 530 (1942); *Felty v. Compensation Com'r*, 124 W. Va. 75, 19 S. E. (2d) 90 (1942).

<sup>32</sup>*Birchett v. Tuf-Nut Garment Mfg. Co.*, 205 Ark. 483, 169 S. W. (2d) 574 (1943); *Stapf v. Savin*, 125 Conn. 563, 7 A. (2d) 226 (1939); *Hays v. Illinois Terminal Transp. Co.*, 363 Ill. 397, 2 N. E. (2d) 309 (1936); *Archibald v. Employers' Liability Assur. Corp.*, 202 La. 89, 11 S. (2d) 492 (1942); *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N. Y. 175, 15 N. E. (2d) 567 (1938).



pose of the Acts to afford dependable protection for injuries in any way significantly linked with employment,<sup>33</sup> has been a potent inducement for courts to sustain somewhat dubious awards originally made by an administrative board. However, it appears questionable that even the liberal social purpose underlying the Acts meant to guarantee a near certain form of insurance for assaults made while on the job by a co-employee without regard to motive.

THOMAS C. DAMEWOOD

WORKMEN'S COMPENSATION—LIABILITY OF EMPLOYER TO THIRD PARTY  
SUSTAINING LOSS THROUGH INJURY TO EMPLOYEE RECEIVING COM-  
PENSATION. [New Jersey]

It is generally agreed that Workmen's Compensation legislation serves the twofold purpose of providing the injured employee with a prompt, sure, and definite recovery for injuries suffered in the course of employment, and of relieving the employer of liability to the employee based on common law tort principles.<sup>1</sup> However, the question of whether an employer may still be liable to third parties who may sustain a loss through the injury to the employee continues to confront the courts. A majority of the courts have ruled that employee's next of kin cannot recover benefits under the Death Acts, because the Workmen's Compensation statutes provide for recovery in the event of the employee's death, and the employee's being covered by Workmen's Compensation cuts off any right his next of kin would otherwise have had.<sup>2</sup> It is reasoned that the deceased has "the power to sell out the

---

<sup>33</sup>Koeppel v. E. I. du Pont de Nemours & Co., 7 W. W. Harr. 369, 183 Atl. 516 (Del. 1936); Brownfield v. Southern Amusement Co., 196 La. 74, 198 So. 656 (1940); Barber Asphalt Corp. v. Industrial Comm., 103 Utah 371, 135 P. (2d) 266 (1943).

<sup>1</sup>Thus, the cost of accidental injuries to workmen becomes a part of the cost of business, borne by the general consumer rather than the unfortunate workman. 1 Schneider, Workmen's Compensation (3d ed. 1941) § 3, and cases there cited. Also, the Acts cover only accidental injuries and, frequently, occupational diseases. However, they seldom include intentional wrongs by the employer. 1 Schneider, Workmen's Compensation (3d ed. 1941) § 2.

<sup>2</sup>Elliott v. Armour & Co., 30 F. Supp. 367 (E. D. S. C. 1939); Bigby v. Pelican Bay Lumber Co., 173 Ore. 682, 147 P. (2d) 199 (1944). This is true regardless of the fact that deceased may have left no dependents so that there could be no award under the Workmen's Compensation laws. Chamberlain v. Florida Power Corp., 144 Fla. 719, 198 So. 486 (1940); Atchison v. May, 201 La. 1003, 10 S. (2d) 785 (1942). But there can be recovery beyond the workmen's compensation award where the employer was grossly negligent or deliberately intended the death of the employee. McAlester v. Sinclair Refining Co., 146 F. (2d) 36 (C. C. A. 5th, 1944); Morrison v. Carbide & Carbon Chemicals Corp., 278 Ky. 746, 129 S. W. (2d) 547 (1939).

claim of the beneficiaries before it has come into existence."<sup>3</sup> Further, a parent cannot recover from the employer when an injured child-employee is covered by Workmen's Compensation, because the child's recovery includes the loss of wages and hospitalization expenses which the parent could recover at common law.<sup>4</sup> Various other third party claims asserted in isolated cases have generally been held unenforceable.<sup>5</sup>

In the recent case of *Danek v. Hommer*,<sup>6</sup> the New Jersey Supreme Court, over the dissent of the Chief Justice, followed the same exclusionary approach to Workmen's Compensation legislation in denying a husband's right to recover for loss of consortium of an injured wife-employee. There had been an injury to the plaintiff's wife for which she had received a Workmen's Compensation award, and thereafter plaintiff brought suit against the employer for the husband's loss of consortium due to his wife's injuries. Plaintiff admitted that the legislature could bar such an action, but contended it had not done so in express terms, and that the court should not imply the abolition of the common law right. The New Jersey Act<sup>7</sup> provides for an agreement

<sup>3</sup>Prosser, *Torts* (1941) 968.

<sup>4</sup>*Courage v. Carleton*, 77 A. (2d) 111 (N. H. 1950); *Deluhery v. Sisters of St. Mary*, 244 Wis. 254, 12 N. W. (2d) 49 (1943). "A parent's common law action for loss of services of a minor is generally held to be abrogated by the 'exclusive of all other remedies' provision of the compensation acts." 1 Schneider, *Workmen's Compensation* (3d ed. 1941) § 96 (c).

<sup>5</sup>*Bankers Indemnity Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N. E. (2d) 180 (1945) (after a recovery under Workmen's Compensation for the death of three employees in an explosion caused by using the wrong type of gas, employer, even if negligent, held not liable to gas company which had been held liable in a suit by the deceased employees' dependents); *Monteleone v. Canter Storage Warehouses*, 68 N. Y. S. (2d) 369 (App. Div. 1946) (recovery for a minor employee's death under Workmen's Compensation held to be exclusive and parent's common law action against employer barred, even though minor was illegally employed); Cf. *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N. Y. 175, 15 N. E. (2d) 567 (1938) (third party, who had paid judgment for workman's death, recovered from employer whose negligence also contributed to the death, even though Workmen's Compensation would have barred a suit by deceased employee's administratrix against employer).

<sup>6</sup>9 N. J. 56, 87 A. (2d) 5 (1952).

<sup>7</sup>N. J. Laws (1911) c. 95, p. 134: "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability, and compensation thereunder."

N. J. S. A. (1937), R. S. 34:15-7: "When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the

whereby the employee receives compensation from the employer, regardless of the latter's negligence, for injuries suffered within the course of the employment. The agreement is expressly stipulated to constitute a surrender of other rights of the parties thereto and to bind the employee, his personal representatives, and his widow and next of kin, as well as the employer. The trial court ruled that the remedy under the Act was exclusive as to the employee and placed an absolute limitation on the employer's liability. The Supreme Court of New Jersey affirmed the summary judgment for defendant, holding that with the award to the wife "any action in tort that the husband had by virtue of the marital status of his employee-wife" was precluded.<sup>8</sup> In the view of the majority of the court, the controlling purpose of Workmen's Compensation was to provide one award which would relieve the employer of all liability quickly and with little litigation, such award extinguishing all common law rights and liabilities which might have formerly arisen out of the injury compensated. The dissenting Justice argued that the husband's right to consortium was "personal to him and independent of any cause of action his wife might have,"<sup>9</sup> and was therefore not abrogated by the exclusion section of the Act, and not compensated for by the award to the wife.

The cases in which a spouse is the third party who is bringing suit against the employer can readily be distinguished from those actions brought under a Wrongful Death Act by the employee's next of kin or brought by a parent of a child-employee. In neither of the latter situations does the plaintiff have an independent right, except as such may have been created by statute. The Wrongful Death Acts generally provide for recovery by the next of kin *only if the deceased, had he not died, could have recovered for the injury*.<sup>10</sup> Since the deceased em-

---

schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of the injury, and the burden of the proof of such fact shall be upon the employer."

N. J. S. A. (1937), R. S. 34:15-8: "Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

<sup>8</sup>Danek v. Hommer, 9 N. J. 56, 87 A. (2d) 5, 7 (1952).

<sup>9</sup>Danek v. Hommer, 9 N. J. 56, 87 A. (2d) 5, 8 (1952).

<sup>10</sup>Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 23 N. E. (2d) 564 (1939); Emands v. Olson, 64 R. I. 39, 9 A. (2d) 860 (1939); McCormick, Damages (1935) §§ 93, 94.

ployee could not have recovered except under Workmen's Compensation, the Death Act confers no right on the next of kin. And at common law a parent could recover loss of wages and hospitalization expenses when his child was tortiously injured, because he had complete control over the child's earnings.<sup>11</sup> This common law right is abolished where the child has a recovery under Workmen's Compensation,<sup>12</sup> because the child's recovery includes the loss of wages and hospitalization fees which the parent could have recovered.<sup>13</sup> In the *Danek* case, on the other hand, the husband has suffered a personal injury which at common law afforded him an independent right of action not derived from the injured wife, and which is not expressly provided for by the Workmen's Compensation statutes.<sup>14</sup>

The *Danek* case turns primarily on the interpretation of the applicable provisions of the New Jersey statute. The majority clearly states its conclusion as to the meaning of this legislation, insofar as it applies to plaintiff's rights of consortium: "... the common law remedy in tort falls by reason of the statutory contract for compensation, based not upon the principle of tort but on remuneration regardless of fault to the injured employee. With it fell any action in tort that the husband had by virtue of the marital status of his employee-wife.... This seems to be so implicit in the statute that it is as much a part of it as if it had actually been therein expressed."<sup>15</sup> But this conclusion is not supported by any reasons in the opinion, and is apparently based on the preconceived notion that the essence of Workmen's Compensation statutes lies in protection for employers from any liability except for benefit payments as scheduled in the Act. If this were the exclusive purpose of the legislation, the court's conclusion might be acceptable. But it is arguable that the primary aim of the statutes is to insure to the employee a quick and inexpensive award for injuries received while on the job,<sup>16</sup> and this purpose does not require the exclusion of independent claims by third parties. The actual words of the statute,

---

<sup>11</sup>*Danek v. Hommer*, 9 N. J. 56, 87 A. (2d) 5, 8 (1952); McCormick, Damages (1935) § 91.

<sup>12</sup>See note 4, *supra*.

<sup>13</sup>N. J. S. A. (1937), R. S. 34:15-15, 34:15-37; 4 Schneider, Workmen's Compensation (3d ed. 1945) § 1177 (n).

<sup>14</sup>See dissenting opinion of Chief Justice Vanderbilt in *Danek v. Hommer*, 9 N. J. 56, 87 A. (2d) 5, 8 (1952).

<sup>15</sup>*Danek v. Hommer*, 9 N. J. 56, 87 A. (2d) 5, 7 (1952).

<sup>16</sup>"The Workmen's Compensation Act was intended as a simple and speedy remedy by way of compensation to the employee." *Ex parte Puritan Baking Co.*, 208 Ala. 373, 94 So. 347, 349 (1922).

which were inadvertently misquoted in the court's opinion, exclude only claims of the employee and claims of those having derivative rights based on the employee's death or injury.<sup>17</sup> But the majority would use the statute to exclude all claims of whatever nature growing out of the injury, once compensation has been given under the Act. This action would seem to violate the rule that statutes in derogation of the common law are to be strictly construed, so that no rights not specifically designated would be destroyed.<sup>18</sup> It also ignores the rule of construction "... that if a statute enumerates the things upon which it is to operate, every thing else must necessarily, and by implication, be excluded from its operation and effect."<sup>19</sup>

The view of the New Jersey court makes more acute the unequal operation of the Workmen's Compensation system as between married and unmarried employees. Under the conclusions of the *Danek* case, part of the wife's award compensates the husband for his loss of consortium. Yet an unmarried employee in the same position would have received the same award, presumably all for her personal losses. This inconsistency would tend to deny that it is "implicit in the statute" that the husband's rights fell with the passing of the Act.

The weight of authority is heavily in accord with the decision of the *Danek* case.<sup>20</sup> However, the recent federal case of *Hitaffer v. Argonne Co., Inc.*<sup>21</sup> involving a statute<sup>22</sup> similar to that under consideration in the principal case and facts different only in that it was a plaintiff-

<sup>17</sup>N. J. S. A. (1937) R. S. 34:15-8 (see note 7, supra). Compare the statute as quoted by the New Jersey court: "... and shall bind the employee himself and for compensation for his death and shall bind his personal representatives, his widow and next of kin. ..." *Danek v. Hommer*, 9 N. J. 56, 87 A. (2d) 5, 6 (1952). [italics supplied.]

<sup>18</sup>Crawford, *Statutory Construction* (1940) 486. And compensation laws are in derogation of the common law. *Liberato v. Royer*, 270 U. S. 535, 46 S. Ct. 373, 70 L. ed. 719 (1926); *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825 (1939).

<sup>19</sup>Crawford, *Statutory Construction* (1940) § 195.

<sup>20</sup>*Holder v. Elms Hotel Co.*, 338 Mo. 857, 92 S. W. (2d) 620, 104 A. L. R. 339 (1936); *Sharp v. Producers' Produce Co.*, 226 Mo. App. 189, 47 S. W. (2d) 242 (1932); *Swan v. F. W. Woolworth Co.*, 129 Misc. 500, 222 N. Y. S. 111 (1927); *McVey v. Chesapeake & Potomac Telephone Co.*, 103 W. Va., 519, 138 S. E. 97 (1927); *Guse v. A. O. Smith Corp.*, 260 Wis. 403, 51 N. W. (2d) 24 (1952). No cases holding contra have been found, except *Hitaffer v. Argonne Co., Inc.*, 183 F. (2d) 811 (C. A. D. C. 1950), discussed in this comment, *infra*.

<sup>21</sup>183 F. (2d) 811 (C. A. D. C. 1950).

<sup>22</sup>"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law. ..." 44 Stat. 1426 (1927), 33 U. S. C. § 905 (1947).

wife suing for loss of the injured husband-employee's consortium, allowed recovery from the employer. The federal court reasoned:

"There can be no doubt but that this [exclusion] section is designed to make the employer's liability under this statute exclusive of any other liability... to the injured employee or anyone suing in the employee's right. But where a third person is suing in his or her own right on account of the breach [of] some independent duty owed them by the employer, even through the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action . . . . There can be no doubt . . . the injury to the *consortium* is an injury to a right which is independent of any right in the other spouse and to which the defendant owes an independent duty. And in view of the fact that this appellant is suing in her own right for the breach of an independent duty owing her, we cannot say that the Act was designed to deprive her of her action.

Moreover it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss."<sup>23</sup>

The better view under the present statutes appears to be to allow recovery in the situation of the *Danek* case. Accurate statutory construction is the issue, and the reasoning of the *Hitaffer* case, while it stands alone on its holding, conforms more closely to the *expressed* legislative intent. If policy considerations require exclusion of all third party claims, the step should be taken by the legislatures in specific terms, not by the courts through strained reasoning and illogical statutory interpretation. If such change is made, consideration should be given by the legislatures to the need for varying the Workmen's Compensation awards on the basis of the employee's marital status, in order that those with dependents and/or spouses with independent causes of action may receive a proportionately greater award, in view of the greater injury suffered by such employees and the third parties.<sup>24</sup>

EDWARD L. OAST, JR.

---

<sup>23</sup>183 F. (2d) 811, 819 (C. A. D. C. 1950).

<sup>24</sup>In case of *death* of the employee, but not injury alone, New Jersey is typical in providing a proportionately greater award determined by the number of dependents. N. J. S. A. (1937), R. S. 34:15-13. 4 Schneider, Workmen's Compensation, Statutes (3d ed. 1939) 4424.