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CASE COMMENTS

CONFLICT OF LAWS—RIGHT OF STATE TO REFUSE TO ENFORCE FOREIGN RIGHT OF ACTION WHICH IS OPPOSED TO LOCAL POLICY. [United States Supreme Court]

The purpose of the framers in inserting the Full Faith and Credit Clause[1] into the Constitution was to establish a "nationally unifying force"[2] which would serve to guarantee that rights established in any one of the several states would be given nationwide application. The inescapable effect of the clause is to deprive the individual states of some of the elements of sovereignty,[3] because they are not entirely free, as they would be under international comity, to decline the enforcement of foreign-acquired rights. Since the Supreme Court has said that the Full Faith and Credit Clause does not require the complete subordination of the state's right to refuse the enforcement of such foreign-acquired right of action,[4] the problem is to determine in what instances the state prerogative shall be forced to give way to the dictates of the clause.

Until recently it was generally believed that a state was free to decline to enforce foreign-acquired rights of action when such rights were opposed to the public policy of its own state[5] as evidenced by statutes enacted by the legislature.[6] This supremacy of the policy

[1]U. S. Const. Art. IV, § 1: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[2]Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 439, 64 S. Ct. 208, 214, 88 L. ed. 149, 155 (1943).

[3]Milwaukee County v. M. E. White Co., 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220 (1935); Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935); 12 Am. Jur., Constitutional Law §705.

[4]Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 S. Ct. 208, 88 L. ed. 149 (1943); Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 62 S. Ct. 241, 86 L. ed. 152 (1941); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493, 59 S. Ct. 629, 83 L. ed. 940 (1939); Alaska Packers Ass'n v. Industrial Accident Commission, 294 U. S. 532, 55 S. Ct. 518, 79 L. ed. 1044 (1935); Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. ed. 1026 (1932).

[5]Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481 (1941); Goodrich, Conflict of Laws (3d ed. 1949) §11; Minor, Conflict of Laws (1901) §6. In Griffin v. McCoach, Justice Reed said: "[The Supreme Court] has recognized that a state is not required to enforce a law obnoxious to its public policy."

[6]State policy has been declared to be evidenced by the state statutes. Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577 (1902); Minor, Conflict of Laws (1901) §6.

of the forum was established by the Supreme Court in the oft-quoted case of *Chambers v. Baltimore & Ohio Railroad Co.*[7] Here the plaintiff was the widow of an engineer killed in an accident while in the employ of defendant Ohio corporation. Both plaintiff and decedent husband were citizens of Pennsylvania. Alleging negligence on the part of the railroad company, the widow brought suit in Ohio[8] and obtained a judgment in the trial court. On appeal, the Supreme Court of Ohio upheld defendant's contention that this action could not be maintained in the courts of Ohio because the statute providing for suits in Ohio for wrongful deaths inflicted in other states was intended to cover the deaths only of citizens of Ohio.[9] In affirming this decision the United States Supreme Court declared that "the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain, in its own courts, transitory actions, where the cause of action have arisen in other jurisdictions."[10] The doctrine of the *Chambers* case was subsequently invoked by the Court in cases holding that the state where the contract was entered into between employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred;[11] that the state of the place of injury is free to apply its own law to the exclusion of the state of

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[7]207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143 (1907).

[8]Suit was brought under certain parts of the constitution and laws of Pennsylvania. Chambers v. B. & O. R. R. Co., 207 U. S. 142, 146, 28 S. Ct. 34, 34, 52 L. ed. 143, 145 (1907).

[9]Bates, Annotated Statutes of Ohio §6134a: " . . . whenever *the death of a citizen of this state* has been or may be caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country." See Chambers v. B. & O. R. R. Co., 207 U. S. 142 at 147, 28 S. Ct. 34, 52 L. ed. 143 at 146 (1907). The phrase, "of a citizen of this state," does not appear in the similar section of the present Ohio Code. Ohio Code Ann. (Throckmorton, 1940) §10509-166.

[10]Chambers v. B. & O. R. R. Co., 207 U. S. 142, 149, 28 S. Ct. 34, 35, 52 L. ed. 143, 146 (1907).

[11]Alaska Packers Ass'n v. Industrial Accident Commission, 294 U. S. 532, 547, 55 S. Ct. 518, 524, 79 L. ed. 1044, 1052 (1935):"Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum."

the usual place of employment;[12] that the Full Faith and Credit Clause did not require the courts of the forum to enforce against local policyholders certain assessments valid under the laws of incorporation of a mutual insurance company;[13] and that the forum may decline to enforce an insurance policy in favor of beneficiaries who have no insurable interest under local law.[14]

In recent years some inroads into the supremacy of state policy have been made in a few fields such as commercial law and workmen's compensation, in which the Court considered uniformity particularly desirable. Thus, the rather rigid rule has been imposed that the forum must defer to the law of the place of contract generally and of the state of incorporation as regards stockholder's liability;[15] and a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of employment which temporarily is in another state, has been held to be binding on the state of temporary occu-

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[12]Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493, 502, 59 S. Ct. 629, 633, 83 L. ed. 940, 945 (1939): "It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy . . . . And in the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

[13]Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 210, 62 S. Ct. 241, 246, 86 L. ed. 152, 158 (1941): "But the very nature of the federal union of states, to each of which is reserved the soverign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policies of others."

[14]Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481 (1941). In Magnolia Petroleum Co. v. Hunt, the Court, while recognizing that state courts are bound to honor foreign judgments, said: "In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarly require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events." 320 U. S. 430, 436, 64 S. Ct. 208, 212, 88 L. ed. 149, 154 (1943).

[15]John Hancock Mutual Life Insurance Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. ed. 106 (1936); Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935); Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912).

pation.[16] Outside of these few limited fields, however, the supremacy of forum policy continued unassailed.[17]

Thus the situation stood until the recent case of *Hughes v. Fetter,*[18] concerning an action based on the Illinois wrongful death statute and originally brought by an administrator in a Wisconsin court. The deceased and defendant, both citizens of Wisconsin, became involved in a fatal accident in Illinois, allegedly caused by defendant's negligence. The trial court entered summary judgment dismissing the complaint on the ground that the Wisconsin wrongful death statute, which creates a cause of action only for deaths caused in that state, establishes a public policy against the courts of Wisconsin entertaining a suit brought under the wrongful death act of another state. The Supreme Court of the state affirmed over the plaintiff's objection that such construction of the state statute violated the Full Faith and Credit Clause.

On appeal, the question of whether Wisconsin could close its courts to a cause of action created by the Illinois statute was presented to the United States Supreme Court, which declared in a 5 to 4 decision, that "Under these circumstances we conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit Clause."[19] This decision would seem to be a notable departure from the view adopted in the *Chambers* case and subsequent decisions based on it. The majority of the Court apparently attempts to avoid this conclusion by saying that Wisconsin does not really have a policy against wrongful death suits, inasmuch as the state regularly provides a forum for such suits under its own statute. However, it is not the function of the Supreme Court

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[16]Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571, 76 L. ed. 1026 (1932); Joseph H. Weiderhoff, Inc. v. Neal, 6 F. Supp. 798 (W. D. Mo. 1934); Cole v. Industrial Commission, 353 Ill. 415, 187 N. E. 520 (1933).

[17]In 1942 Justice Murphy, in a dissenting opinion, discussing the Full Faith and Credit Clause, declared, "That clause should no more be read 'with literal exactness like a mathematical formula' than are other great and general clauses of the Constitution placing limitations upon the States to weld us into a Nation . . . . Rather it should be construed to harmonize its direction 'with the necessary residuum of state power'." Williams v. North Carolina, 317 U. S. 287, 308, 310, 63 S. Ct. 207, 217, 218, 87 L. ed. 279, 291, 292 (1942). Justice Jackson in an appraisal of the clause observed that ". . . as to extraterritorial recognition or non-recognition of state law it is doubtful if a century and a half of constitutional interpretation has advanced us much beyond where we would be if there had never been such a clause. Local policies and balance of local interests still dominate the application of the federal requirements." Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution (1945) 45 Col. L. Rev. 1, 33.

[18]341 U. S. 609, 71 S. Ct. 980, 95 L. ed. 1212 (1951).

[19]Hughes v. Fetter, 341 U. S. 609, 613, 71 S. Ct. 980, 983, 95 L. ed. 1212, 1217 (1951).

to tell a state what its policy is. While Wisconsin does not have a policy against wrongful death recoveries generally, it does have a policy, evidenced by a statue, against such recovery based on foreign statutes. It is not apparent why the position taken by Wisconsin should be any the less a valid state policy because aimed at certain wrongful death recoveries rather than all wrongful death recoveries.

Justice Frankfurter, in a strong dissenting opinion in which he was joined by Justices Reed, Jackson and Minton, supported the state policy and argued that there are enough inconsistencies in the various wrongful death statutes to make preferable their applications by local judges who are familiar with the particular state's system. He distinguished the cases in which it was held that the Full Faith and Credit Clause must be honored in order to give certainty to a pre-existing relationship, pointing out that there was no such relationship between the plaintiff and defendant in this case. Conceding that the *wisdom* of Wisconsin's exclusionary policy might be open to question, Justice Frankfurter nevertheless declared that "There is no support, either in reason or in cases, for holding that this Court is to make a de novo choice between the policies underlying the laws of Wisconsin and Illinois. I cannot believe that the Full Faith and Credit Clause provided a 'writer's inkhorn' so that this Court might separate right from wrong."[20]

The point was also made that an Illinois statute contains a similar restrictive clause, and if the case had come up under reverse circumstances, the Illinois court would have presumably dismissed the suit exactly as the Wisconsin court did. Justice Frankfurter concludes succintly that, "There is no need to be 'more Roman than the Romans'."[21] It seems that the dissent has followed the view formerly taken by the Court as to the general supremacy of the state policy in such conflicts, while the majority has departed therefrom.

In practical effect the *Hughes* decision appears to overrule the *Chambers* case, though there is no expression of such intention in the majority opinion. It is true that the *Chambers* case was based on the Privileges and Immunities Clause while the *Hughes* case was based on the Full Faith and Credit Clause. However, in the *Chambers* case it was decided that Ohio could deny a remedy to a cause of action brought by a citizen of Pennsylvania based on the wrongful death

[20]Hughes v. Fetter, 341 U. S. 609, 614, 620, 71 S. Ct. 980, 983, 986, 95 L. ed. 1212, 1217, 1220 (1951).

[21]Hughes v. Fetter, 341 U. S. 609, 614, 621, 71 S. Ct. 980, 983, 987, 95 L. ed. 1212, 1217, 1221 (1951).

of a citizen of Pennsylvania since the Ohio policy, limiting recovery in Ohio courts to deaths of Ohio citizens, would have likewise denied the remedy if the action had been brought by a citizen of Ohio. The *Hughes* case has decided that Wisconsin cannot deny a remedy to a suit brought by one of its citizens based on the Illinois statute, even though such suits based on foreign wrongful death statutes are opposed by state policy. Therefore, it would seem to follow that if a citizen of Illinois were to bring a suit in a court of Wisconsin based on the Illinois statute, since Wisconsin cannot deny a remedy to one of its own citizens on such a suit, it could not deny such a remedy to this Illinois citizen without violating the Privileges and Immunities Clause. The conclusion is that a state cannot close its courts to a suit brought by a citizen of a foreign state, based on foreign law, even when the forum has a policy denying such actions. This is a direct contradiction to the doctrine of the *Chambers* case.

The question naturally arises as to just what weight state policy now carries in a case of conflict. It may be that if the state policy is more strongly set out than it was in the *Hughes* case situation the Supreme Court will honor it;[22] or, on the other hand, it may be that state policy will be consistently subordinated to the nationalizing force of the Full Faith and Credit Clause. Perhaps wrongful death cases are to be put in a special class along with commercial law and the workman's compensation cases. But it appears that state soverignty has received a definite setback by the decision of this case. The questions which arise cannot be answered with any degree of assurance on the basis of this decision. The Supreme Court has left itself convenient leeway by prefacing its decision with the indefinite phrase, "under these circumstances." Just prior to using this phrase the Court had mentioned that, in its opinion, Wisconsin had no real feeling of antagonism to such suits, that the forum non conveniens doctrine did not apply here, and that

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[22]For example, in the case of Clark v. Williard, 294 U. S. 211, 55 S. Ct. 356, 79 L. ed. 865 (1935), which involved conflicting claims to the Montana assets of an Iowa corporation, the Court held that the petitioner, who claimed as liquidator and successor to the corporation under the statutes of Iowa, must prevail over the judgment creditors under the Full Faith and Credit Clause unless Montana clearly had a local policy whereby the title of a statutory successor was to be subordinate to later executions at the suit of local creditors. The cause was remitted to the Montana Supreme Court so that it might declare what the policy of the state was on the subject. That court held that the state policy permitted attachments and executions against insolvent foreign corporations and that the rule would prevail against a statutory successor. The United States Supreme Court promptly, and without dissent, upheld the local policy and declared that the judgment creditors should prevail.

Wisconsin may be the only jurisdiction where service could be had as an original matter on the defendant insurance company. It could be argued that the Court will follow its present ruling only in future cases in which these same considerations are all present, or in which any one of them is present. On the other hand the decision may have a much more widespread importance in that the court may reach the same conclusion in any future case in which state policy denies a remedy to a cause of action derived from the statute of a foreign state. Only on the basis of future decisions can the influence of this case in the field of conflicts be estimated with any degree of certainty.

ROBERT LEE BANSE

CONSTITUTIONAL LAW—VALIDITY OF DIVORCE IN STATE DECREEING IT WHEN DIVORCE COURT'S JURISDICTION HAS BEEN IMPEACHED BY COURT OF SISTER STATE. [Federal]

The status of a divorce decree in other states than the one rendering it, when the respondent in the suit was not domiciled in the divorcing state, was served only by constructive service, and did not appear and defend, has long created a perplexing legal question with acute social ramifications. *Haddock v. Haddock*,[1] one of the early decisions rendered by the Supreme Court as the final arbiter[2] as to what recognition must be given to the decree under the Full Faith and Credit Clause of the Constitution,[3] created the threat of such an undesirable social situation that the legal doctrine there established has been severely critized.[4] In that case the Court proceeded on the premise that

[1]Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867, 5 Ann. Cas. 1 (1906). Another such decision was Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. ed. 347 (1913).

[2]Williams v. North Carolina, 317 U. S. 287 at 302, 63 S. Ct. 207 at 215, 87 L. ed. 279 at 288, 143 A. L. R. 1273 at 1282 (1942); Goodrich, Conflict of Laws (3d ed. 1949) 407.

[3]"Article IV, §1 of the Constitution not only directs that 'Full Faith and Credit shall be given in each State to the ... judicial Proceeding of every other State' but also provides that 'Congress may by general laws prescribe the Manner in which such . . . Proceedings shall be proved, and the Effect thereof.' Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U. S. C. 687, Congress has provided that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken'." Williams v. North Carolina, 317 U. S. 287, 293, 63 S. Ct. 207, 210, 87 L. ed. 279, 283, 143 A. L. R. 1273, 1277 (1942).

[4]For criticisms of the Haddock case see Beale, Constitutional Protection of Decrees for Divorce (1906) 19 Harv. L. Rev. 586; Richards, The Full Faith and Credit Clause of The Federal Constitution as Applied to Suits for Divorce (1920) 15 Ill. L.

the spouse who obtained the divorce in Connecticut was domiciled in that state and that the divorce was valid there, but held that since the Connecticut court did not have personal jurisdiction over the respondent, the divorce was not entitled to recognition elsewhere by force of the Full Faith and Credit Clause. Justice Holmes, accepting the premise of validity where obtained, dissented vigorously and decried the grave dangers the decision would make possible, of a man having two legal wives or a wife having two legal husbands, each being a bigamist for living in a state with the only one which another state would recognize as the lawful spouse. Children of a second marriage would be bastards in one state but legitimate in another.[5] However since the *Haddock* case dealt with the single point of the divorcing husband's duty of support and the power of another state to relieve him of this duty by granting a divorce upon constructive service over the wife, it does not appear that the dangers suggested by Justice Holmes were in fact created by the decision.[6]

To remove the threat of such incongruous martial situations, the Supreme Court in 1942 expressly overruled the *Haddock* case in its first *Williams v. North Carolina* decision,[7] a bigamy prosecution of a man and woman who had left North Carolina and gone to Nevada, obtained a divorce from their respective spouses who were served by constructive service only, married each other, and returned to North Carolina to live together as man and wife. The North Carolina court refused to recognize the Nevada divorce and convicted the defendants of bigamy,[8] but the Supreme Court struck down the North Carolina

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Rev. 259. But cf. Beale, Haddock Revisited (1926) 39 Harv. L. Rev. 417. For a criticism of both the Haddock and the Thompson cases cited in note 1 supra, see Parks, Some Problems in Jurisdiction to Divorce (1929) 13 Minn. L. Rev. 525.

[5]Haddock v. Haddock, 201 U. S. 562, 628, 26 S. Ct. 525, 551, 50 L. ed. 867, 894, 5 Ann. Case 1, 24 (1906). In this case the only danger Holmes actually spelled out was bastardizing children, and he couched the other dangers in the term "considerable disaster to innocent persons."

[6]Bingham, The American Law Institute vs. The Supreme Court—In the Matter of Haddock v. Haddock (1936) 21 Conn. L. Q. 393; Cook, Is Haddock v. Haddock Overruled? (1943) 18 Ind. L. J. 165; Morris, Divisible Divorce (1951) 64 Harv L. Rev. 1287. In Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. ed. 1561, 1 A. L. R. (2d) 1412 (1948) the distinction suggested by Bingham and Cook was recognized.

[7]Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279, 143 A. L. R. 1273 (1942) (hereafter referred to as the first Williams case), commented on by Lorenzen, Haddock v. Haddock Overruled (1943) 52 Yale L. J. 341; Rodman, The Last of Mr. and Mrs. Haddock? (1943) 31 Cal. L. Rev. 167; Cook, Is Haddock v. Haddock Overruled? (1943) 18 Ind. L. J. 165; Bingham, Song of Sixpence (1943) 29 Corn. L. Q. 1.

[8]State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1941).

decision as violating the Full Faith and Credit Clause. The holding was dependent upon the Court's expressed assumption that the defendants in the criminal prosecution had been domiciled in the State of Nevada where the divorce was obtained, and that the divorce was valid there. Under the circumstances of the first *Williams* case, the majority opinion pointed out that if the decrees of a state affecting "the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring 'considerable disaster to innocent persons' . . . ."[9]

Even though the unfortunate consequences pointed out by Justice Holmes in his dissent in the *Haddock* case might not have resulted from the actual decision in that case, they would have arisen from a contrary decision in the first *Williams* case, because there the Court was confronted with the problem of a state's power to reinstate its domiciliaries' power to marry. Nevertheless, the rule adopted by the case had previously been criticized as infringing on a state's sovereignty to decide for itself the matter of marital status, even insofar as it involves the power to marry.[10] In answer to this argument, the Court declared that the Full Faith and Credit Clause substituted a command for the former principles of comity, thus intergrating the parts of the Union into a whole, and that "such is part of the price of our federal system."[11]

After the Supreme Court's decision was handed down, North Carolina retried the *Williams case*. This time the North Carolina court found that the defendants who had obtained the divorce in Nevada had not established bona fide domicile there, and therefore, that the Nevada court had no jurisdiction which would enable it to render a decree entitled to full faith and credit.[12] Thus, in the second *Williams* case[13] the issue before the Supreme Court was whether a sister state could make its own determination of whether the party obtaining the divorce was actually domiciled in the divorcing state. The Supreme

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[9]Williams v. North Carolina, 317 U. S. 287, 301, 63 S. Ct. 207, 214, 87 L. ed. 279, 287, 143 A. L. R. 1273, 1281 (1942) approving the objections of Justice Holmes, dissenting in Haddock v. Haddock, 201 U. S. 562, 628, 26 S. Ct. 525, 551, 50 L. ed. 867, 5 Ann. Cas. 1, 16 (1906).

[10]See Haddock v. Haddock, 201 U. S. 562, 605, 26 S. Ct. 525, 542, 50 L. ed. 867, 884, 5 Ann. Cas. 1, 16 (1906).

[11]Williams v. North Carolina, 317 U. S. 287, 302, 63 S. Ct. 207, 215, 87 L. ed. 279, 288, 143 A. L. R. 1273, 1282 (1942).

[12]State v. Williams, 224 N. C. 183, 29 S. E. (2d) 744 (1944).

[13]Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1577, 157 A. L. R. 1366 (1945) (herein referred to as the second Williams case).

Court recognized the existence of that power, pointing out that the Full Faith and Credit Clause does not make the judgment of one state a judgment in a sister state, and that in order for a judgment of one state to have force in another state it must be made a judgment there by suing on the prior judgment in the second state *or by interposing the prior judgment as a defense to a suit in the second state.*[14]

The decision of the second *Williams* case again created the possibility of the dangers decried by Justice Holmes in the *Haddock* case and purportedly struck down by the Supreme Court in the first *Williams* case, if, but only if, the divorce decree rendered under the circumstances of the second *Williams* case still has validity within the state where rendered. Quite aside from any question of recognition in a third state, the dangers exist if the divorce is valid in the divorcing state and can be refused recognition elsewhere, because parties are then validly divorced and permitted to remarry in one state but not in others. If to this validity in one state is added the possibility that some third states will recognize the validity by comity and some other third states will refuse to recognize it, then the situation is made worse.

The question of the validity of the divorce in the state which rendered it after the divorce court's jurisdiction to do so had been impeached has never been decided by the Supreme Court. The problem, however, was argued in the concurring and the dissenting opinions in the second *Williams* case.[15] These opinions have caused confusion, as was evidenced in the opinion of the United States Court of Appeals for the Seventh Circuit sitting in Illinois when that court was faced squarely with the problem in the recent case of *Sutton v. Leib.*[16]

The plaintiff, Sutton, the former wife of the defendant, Leib, sued for back alimony which was provided for in an Illinois divorce decree. After the plaintiff obtained a divorce from the defendant in an Illinois court, she went to Reno and married Walter Henzel, who had just obtained a divorce in a Nevada court from Dorothy Henzel, a New York resident. Dorothy Henzel had been served only by publication and did not appear. Following the divorce and remarriage, plaintiff and Henzel returned to New York, where Dorothy Henzel instituted a separate maintenance proceeding against Walter Henzel, which resulted in a decree in her favor, the New York court having first declared the Nevada divorce null and void, pursuant to the authority

[14]The circumstance in italics was the inferential holding of the first Williams case, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279, 143 A. L. R. 1273 (1942).

[15]Williams v. North Carolina, 325 U. S. 226, 239, 244, 65 S. Ct. 1092, 1099, 1101, 89 L. ed. 1577, 1587, 1589, 157 A. L. R. 1366, 1375, 1377 (1945).

[16]188 F. (2d) 766 (C. A. 7th, 1951), cert. granted, 72 S. Ct. 73 (1951).

of the second *Williams* case. Plaintiff then instituted a suit for annullment in New York against Walter Henzel, and the New York court entered a decree in her favor declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of their marriage. After the plaintiff had again remarried, she brought a suit in the federal court in Illinois to recover forty alimony installments allegedly due under the Illinois divorce decree. The claim covered the time she had thought she was married to Henzel and the interval between the annullment of the marriage and her last marriage. The defendant, Lieb, denied the claim on the ground that his liability under the Illinois divorce decree had been terminated by the plaintiff's marriage to Henzel in Nevada. When the federal district court rendered a summary judgment in favor of the defendant[17] the plaintiff appealed, but the Court of Appeals affirmed the judgment. It was reasoned that the validity of the plaintiff's marriage to Henzel depended on the compliance of the parties with the marriage laws of Nevada, which compliance in turn depended on the validity in Nevada of the antecedent divorce of Henzel from his New York wife. The court ruled that if Nevada could give the divorce any validity in the face of the New York decision denying that there was domicile in Nevada which would give Nevada courts jurisdiction to render a divorce entitled to full faith and credit, then Illinois could and would give the divorce the same effect *by way of comity*.[18] The concurring opinion in the first *Williams* case[19] and the concurring and the dissenting opinions in the second *Williams* case[20] were then cited for the

[17]Sutton v. Leib, 91 F. Supp. 937 (S. D. Ill. 1950).

[18] The court did not specifically say it was giving the Nevada decree effect in Illinois by way of comity, but this must have been the basis of this decision since it had been decided in the New York decision that the Nevada decree was not entitled to full faith and credit.

[19]Here Justice Frankfurter, concurring, remarked: "It is indisputable that Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where rendered." Williams v. North Carolina, 317 U. S. 287, 307, 63 S. Ct. 207, 217, 87 L. ed. 279, 290, 143 A. L. R. 1273, 1284 (1942). In this concurring opinion, however, it was assumed that there was a bona fide domicile established in Nevada, whereas in the principal case that domicile has been collaterally impeached. Further indication that what Justice Frankfurter said in the first Williams case is not support for the Court of Appeals' argument is language used by him in the second Williams case. "Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises." Williams v. North Carolina, 325 U. S. 226, 230, 65 S. Ct. 1092, 1095, 89 L. ed. 1577, 1581, 157 A. L. R. 1366, 1369 (1945).

[20]The Court of Appeals cited the following language from the concurring opinion in the second Williams case to support its holding: "The State of Nevada has unquestioned authority consistent with procedural due process to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is en-

proposition that such a divorce is valid where rendered until held void there. And in the absence of a decision in Nevada as to the validity of the decree in that state after the Nevada court's jurisdiction to render the decree had been impeached by New York, the federal court held that the decree would be assumed to be valid where rendered.

Although it was not stated in the opinion, the court must have reasoned along the lines of one of two theories: (1) Admitting that such a divorce is not valid even where rendered if there is no domicile there, yet every state has the right to make such determination of domicile for itself, and one state's finding of no domicile in another state is not binding on the other state.[21] Thus, since Nevada could find domicile of the party there irrespective of the New York finding, then domicile will be asumed because of the prior Nevada finding until impeached in Nevada.[22] (2) Admitting that the decision of a court of a sister state

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titled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders." Williams v. North Carolina, 325 U. S. 226, 239, 65 S. Ct. 1092, 1099, 89 L. ed. 1577, 1587, 157 A. L. R. 1366, 1375 (1945). This language, however, "restricts internal power by confining it to what is 'consistent with procedural due process.' Would this be satisfied by adequate notice and chance to be heard as in dealing with nonresident mortorists, or does it suggest some standard of the relation of the petitioner to the state of the forum?" Powell, And Repent at Leisure (1945) 58 Harv. L. Rev. 930, 939. The Court of Appeals cites the dissent in the second Williams case for having pointed out that the majority opinion in that case did not hold that the Nevada judgment was invalid in Nevada. Williams v. North Carolina, 325 U. S. 226, 244, 65 S. Ct. 1092, 1101, 89 L. ed. 1577, 1589, 157 A. L. R. 1366, 1377 (1945). As to this being authority for the validity of the Nevada judgment in Nevada, it is sufficient to point out that such validity was not in issue, and thus, it was not necessary for the Court to decide the point.

[21]In a closely analogous situation involving inheritance tax it was held in the case of In re Dorrance Estate, 115 N. J. Eq. 268, 170 Atl. 601 (1934) that a finding by the courts of Pennsylvania in the case of In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932) that the deceased was domiciled in the state of Pennsylvania and, therefore, the deceased's estate was liable for inheritance tax did not preclude the state of New Jersey finding that he was domiciled in New Jersey and his estate was liable for inheritance tax in that state. An effort to obtain review from the Supreme Court of the United States was unsuccessful when certiorari was denied. 298 U.S. 678 (1936). This tax case is not authority for the holding in the principal case, however, since in the tax case there was a finding that there was domicile in the forum and each state has a direct interest in making such a finding, whereas in the principal case there is no contention that there is domicile in the forum, and the decision is that there is domicile in Nevada after New York has found that there was no domicile in Nevada. Since Illinois has no such direct interest as there was in the tax case, a prior state's finding as to domicile should be binding on such other disinterested states where both of the parties directly concerned with the qùestion were before the court.

[22]It has been said that "No recognized conception of full faith and credit could make binding on Nevada such a determination in a proceeding to which she is not a party. Thus North Carolina's say-so on an issue of jurisdiction in Nevada could no more be binding on Nevada than should Nevada's say-so on its jurisdiction be

impeaching the finding of domicile in Nevada is binding on Nevada, yet the divorce may be valid where rendered, because domicile is not required to give a divorce validity where rendered if the state rendering the divorce does not require domicile.[23] By this reasoning, the divorce may be assumed to be valid where rendered, unless that state declares such divorce void, and the decree may be recognized by another state by way of comity.

In rebuttal of the first of these two theories, it may be said that the reason the Nevada court's finding of domicile was not binding on New York is that if there was no domicile in Nevada, in fact, then the Nevada court had no jurisdiction over the case in which the finding of domicile in Nevada was made. On the other hand, however, it is not contended that New York has no jurisdiction in the case in which it was found that there was not in fact any domicile in Nevada, as the parties were admittedly domiciled within the state of New York at the time. Thus, the only attack which can be made on the New York finding is the correctness of it. It is well settled, however, that if a court has proper jurisdiction, the correctness of such court's decision can be attacked only on appeal,[24] and no appeal was ever taken from the New York decision.

To hold that the New York decision is not binding on Nevada and Illinois is to say that the decision of a state court of competent jurisdiction is to be excepted from the general mandate of the Full Faith the Credit Clause. Under that view the New York court would not be attributed equal dignity with the Navada court, since if the Nevada court had had jurisdiction to make the finding of domicile (domicile in fact giving it such jurisdiction), then the Full Faith and Credit Clause would command recognition by the New York court.

If the court was following the second of these two theories that domicile is not necessary for the divorce to be valid where rendered, the

binding on North Carolina." Powell, And Repent at Leisure (1945) 58 Harv. L. Rev. 930, 978.

[23]"It is not logically necessary to deny Nevada's mastery within her own boundaries in order to deny her power of projection beyond them. Freedom of home manufacture and consumption does not necessarily entail freedom of export . . . ." Powell, And Repent at Leasure (1945) 58 Harv. L. Rev. 930, 936. This would mean that a court has jurisdictional capacity in two senses—in one capacity to give the decree validity at home and in another capacity to give the decree standing in the full faith and credit sense. But Nevada and Illinois have in effect held that there is jurisdictional capacity in a divorce case only in the full faith and credit sense as both of these states require the same basis for jurisdiction as the Supreme Court requires for the Full Faith and Credit Clause to apply, and that is domicile. See notes 25 and 26 infra.

[24]Goodrich, Conflict of Laws (3d ed. 1949) 627.

validity of the decision depends on two conditions: (a) That such a divorce is valid under Nevada law; and (b) That if it is valid in Nevada, Illinois will recognize its validity on principles of comity. An investigation of the law of Nevada discloses that if no domicile exists in Nevada, a divorce decree rendered there is void.[25] Furthermore, even if Nevada were to regard such a decree to be valid it would not be recognized under the state law in Illinois on principles of comity, as the Illinois courts hold that divorce decrees are invalid unless at least one of the parties is domiciled in the state whose court renders the decree.[26]

Such holdings of the Nevada and Illinois courts refusing to recognize the validity of decrees are based on some finding of lack of domicile—that is, a finding of no domicile subsequent to the initial finding of domicile by the divorce court either by the Nevada, Illinois, or some other court whose finding the Nevada and Illinois courts are required to recognize under the command of the Full Faith and Credit Clause. In the principal case neither Nevada nor Illinois has made such a finding, but the New York court has. The question, then is again the same as it was under the first theory considered—that is, whether the New York finding of no domicile in Nevada is entitled to full faith and credit. Since the parties were unquestionably domiciled in New York when the New York court declared the Nevada divorce void, that court clearly had jurisdiction of the case before it, and its judg-

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[25]In Aspinwall v. Aspinwall, 40 Nev. 55, 184 Pac. 810 (1916) the court pointed out that the question of domicile was vital in determining jurisdiction. In Walker v. Walker, 45 Nev. 105, 198 Pac. 433 (1921) the court declared: "Residence in this state for the statutory period... is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear."

[26]In Jardine v. Jardine, 291 Ill. App. 152, 9 N. E. (2d) 645 , 649 (1937) an almost idential situation was presented, and the court held: "Since the Nevada court was without jurisdiction and therefore without power or authority to enter the divorce decree, such decree was not legally effective to sever the martial relation existing between the defendant and his then wife. That divorce being void, defendant was not free to remarry and his marriage afterwards to plaintiff pursuant to it was also void. The invalidity of marriage of the parties to this proceeding was an established fact since its very inception ...."; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740 (1905) commented on with approval by Richards, The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce (1920) 15 Ill. L. Rev. 259; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 738 (1887): "The marriage of a man and woman, when one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to avoid the same." Thus, if there is a finding of no domicile in Nevada binding on Illinois, then Illinois treats such a Nevada divorce as being void. Then, if the marriage is void the condition subsequent, marriage, provided for in the Illinois divorce decree alimony provision, involved in the principal case, did not take place when the plaintiff purported to marry in Nevada.

ment should be binding on other state courts. Moreover, there is authority which would have sustained an opposite conclusion by the Court of Appeals in the principal case in regard to the binding effect of the New York decision. The Supreme Court has held that where both of the parties were before the divorce court and litigated the question of domicile there,[27] and then the question of jurisdiction is later raised in a sister court, the divorce court's finding of domicile within its state is entitled to full faith and credit.[28] This rule had as its purpose the ending of litigation where both parties to the divorce contested the question of the divorce court's jurisdiction, and they have done this in the New York litigation involved in the principal case.[29]

From the standpoint of these considerations of reason and authority, the court's holding in the principal case is undesirable, and appears to have confirmed the fear that the second *Williams* case may have opened the doors wide to the dangers pointed out by Justice Holmes in the *Haddock* case, which were thought to have been struck down in the first *Williams* case.[30]

JAMES W. H. STEWART

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[27]This was held to be res judicata in Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26, 118 A. L. R. 1518 (1938). It is not clear, however, whether this is res judicata where the opponent was in court but where the issue of jurisdiction was not litigated. Goodrich, Conflict of Laws (3d ed. 1949) 400.

[28]Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. ed. 1429 (1948). Since this is an application of full faith and credit to the principle of res judicata it may be that the same treatment would be given under the Full Faith and Credit Clause to the situation where the opponent was before the court but where the issue of jurisdiction was not litigated as is given under the doctrine of res judicata. See Goodrich, Conflict of Laws (3d ed. 1949) 400.

[29]This rule is broader than the one which is contended should be applied in the principal case in regard to the binding effect of the New York decision, for it does not guard against the possibility that the rendering court has no jurisdiction in fact to make such a finding, whereas in the circumstances of the principal case there is no question as to New York's jurisdiction over the case to make a finding as to domicile.

[30]If such is the decision, then it can truly be said, as the story goes, about the man traveling on a Pullman with a lady, who when asked by the conductor if the lady was his wife answered, "I don't know, that depends upon which state we are passing through." Richards, The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce (1920) 15 Ill. L. Rev. 259, 263. See also Cook, Is Haddock v. Haddock Overruled? (1943) 18 Ind. L. J. 165, 179, for similar language.

CONTRACTS—CONSTRUCTION OF PURCHASE CONTRACT CONTAINING BOTH ESTIMATE OF INDEFINITE QUANTITY AND STANDARD OF MEASUREMENT OF REQUIREMENTS. [Federal]

Until relatively recent times, contracts for the purchase of the requirements of one's business or the requirements for a certain project were generally held to be unenforceable, largely on the grounds that they lacked consideration and left performance optional[1]. The courts appeared at a loss for a specific meaning of the word, "requirements," and in their attempt at interpretation construed it to mean "wants" or "desires."[2] It was ruled that there was no mutuality of obligation because the buyer did not bind himself to an absolute agreement, inasmuch as he did not promise to take any specified amount of the goods and could, by discontinuing his business or altering its operation, avoid buying any goods at all.[3]

The recent case of *M. W. Kellogg Co. v. Standard Steel Fabricating Co.*[4] illustrates a complete reversal of this early stand regarding contracts for requirements. The defendant, Kellogg Co., agreed to purchase from the plaintiff, Standard Co.,[5] a quantity of steel for use in constructing a fluid catalytic cracking unit. The contract stated that the requirements would be one hundred twenty-five tons of steel "more or less," and detailed specifications of the project were furnished to the seller. In fact, Kellogg needed only fifty-two tons of the steel for the construction of the unit, and Standard brought an action for loss of profits which would have accrued to it had the entire one hundred twenty-five tons been purchased. The trial court construed the agreement as being not a requirements contract, but rather one for approximately one hundred and twenty-five tons, and awarded the plaintiff damages for the defendant's breach in failing to accept the full quantity specified in the contract. The United States Court of Appeals, however, by a two to one decision reversed the trial court and held that "the dominant measure of quantity under the contract was the needs of

[1]Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77 (C. C. A. 8th, 1902); Crane v. C. Crane & Co., 105 Fed. 868 (C. C. A. 7th, 1901); Bailey v. Austrian, 19 Minn. 535 (1873).

[2]A. Santaella & Co. v. Otto F. Lange Co., 155 Fed. 719 (C. C. A. 8th, 1907); Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010 (1904).

[3]Crane v. C. Crane & Co., 105 Fed. 869 (C.C.A. 7th, 1901); Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 Fed. 191 (C. C. W. D. Mo. 1908); Cohen v. Clayton Coal Co., 86 Colo. 270, 281 Pac. 111 (1929).

[4]189 F. (2d) 629 (C. A. 10th, 1951).

[5]The plaintiff, Standard Co., was organized specifically and solely for purposes of this contract. M. W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F. (2d) 629, 630 (C. A. 10th, 1951).

the purchasers . . . ."[6] rather than the estimated amount, and that the defendant was not obligated to take more than its actual needs. One judge dissented on the grounds that certain terms and specifications attached to the purchase order, a number of conservations between the buyer and seller, and the special circumstances under which the contract was entered indicated that the parties did not intend the contract to be one for requirements.[7]

The prevailing opinion in the *Kellogg* case is representative of the approach of most modern courts, which, giving recognition to the needs of business,[8] have generally modified the strict legal requisites of a binding contract sufficiently to hold requirements contracts to be enforceable.[9] Once their former stand was reversed, the courts apparently had little difficulty in working out a technical basis to support this type of contract. Consideration was often interpreted to be the buyer's promise to take his *normal* requirements,[10] or the buyer's

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[6]M. W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F. (2d) 629, 632 (C. A. 10th, 1951). The court, at the same point in the opinion, also said: "To us, it is manifest that neither Kellogg nor Standard knew with any degree of certainty the tonnage of steel that would be required to construct the catalytic cracking unit. The tonnage could have been estimated only after intensive study of the drawings and specifications."

[7]M. W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F. (2d) 629, 632 (C. A. 10th, 1951). The dissenting judge argued that in a number of conversations between the parties before the execution of the contract, an agent of Kellogg informed Standard that a minimum of one hundred twenty-five tons would be needed for the project. These conversations indicated the intent of both parties that the contract was to be for a specific amount, especially in view of the fact that the drawings and specifications of the project were furnished only a day or so before the contact was executed, and it would have taken a matter of weeks to interpret the requirements from them. It is further argued that the fact that Standard was organized only to carry out this contract, owned no steel, and had to purchase on the market the steel required indicated that both parties were dealing with respect to the specific requirements of a particular job.

[8]In T. B. Walker Mfg. Co. v. Swift & Co., 200 Fed. 529, 531 (C. C. A. 5th, 1912), the court observed with reference to a requirement contract: "Business necessities require contracts of this class, though more or less indefinite, to be upheld."

[9]William C. Atwater & Co., Inc. v. Terminal Coal Corporation, 115 F. (2d) 887 (C. C. A. 1st, 1940); El Rio Oils (Canada), Limited v. Pacific Coast Asphalt Co., Inc., 95 Cal. App. (2d) 186, 213 P. (2d) 1 (1950); Knowles Foundry & Machine Co. v. National Plate Glass Co., 301 Ill. App. 128, 21 N. E. (2d) 913 (1939); Hladik v. Noe, 214 Iowa 854, 243 N. W. 180 (1932); Royal Paper Box Co. v. E. R. Apt. Shoe Co., 290 Mass. 207, 195 N. E. 96 (1935); McMichael v. Price, 177 Okla. 186, 58 P. (2d) 549 (1936); Potts v. Mathieson Alkali Works, 165 Va. 196, 181 S. E. 521 (1935); 1 Williston, Contracts (Rev. ed. 1936) 104A; Havighurst & Berman, Requirement and Output Contracts (1932) 27 Ill. L. Rev. 1, 3.

[10]Central States Power & Light Corporation v. United States Zinc Co., 60 F. (2d) 832 (C. C. A. 10th, 1932); Loudenbach Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298 (C. C. A. 6th, 1903); Minnesota Lumber Co. v. White-Breast Coal Co., 160 Ill. 85, 43 N. E. 774 (1895).

promise not to take his requirements from anybody else.[11] At this point it should be noted, however, that the courts which have upheld requirements contracts have insisted that there be some standard of measurement, such as the requirements for operating a business for a certain time,[12] or the requirements for the construction of a certain project.[13]

The principal case[14] presents a further factor of significance in regard to requirements contracts in that the steel purchase agreement included both a standard of measurement and an estimate of the probable requirements. Where an estimate is the *only* indication of what quantity of material is to be purchased, the courts have generally allowed only a small varation from it.[15] But where there is some additional standard of measurement, the modern view is that this other standard, rather than the estimate, controls the quantity to be taken under the contract.[16] The estimate is then generally discarded as immaterial, except that it must have been made in good faith.[17] Deliberately

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[11]Texas Co. v. Pensacola Maritime Corporation, 279 Fed. 19 (C. C. A. 5th, 1922); Trainor v. Buchanan Coal Co., 154 Minn. 204, 191 N. W. 431 (1923).

[12]Nabors Oil Corporation v. Samuels, 170 La. 57, 127 So. 363 (1930); Parks v. Griffith & Boyd Co., 123 Md. 233, 91 Atl. 581 (1914); Edison Electric Illuminating Co. of Brooklyn v. Thacher, 229 N. Y. 172, 128 N. E. 124 (1920).

[13]Webber v. Johnston, 214 Cal. 378, 5 P. (2d) 886 (1931); Miller v. Leo, 35 App. Div. 589, 55 N. Y. Supp. 165 (1898).

[14]M. W. Kellogg Co. v. Standard Steel Fabricating Co., 189 F. (2d) 629 (C. A. 10th, 1951).

[15]Norrington v. Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366 (1885); American Steel Foundries v. Indian Refining Co., 275 Fed. 800 (C. C. A. 7th, 1921); Worcester Post Co. v. W. H. Parsons Co., 265 Fed. 591 (C. C. A. 1st, 1920); United States v. Republic Bag & Paper Co., 250 Fed. 79 (C. C. A. 2d, 1918).

[16]The ready formula for construction of contracts of this nature was first announced in the early case of Brawley v. United States, 96 U. S. 168, 171, 24 L. ed. 622, 623 (1877) in which the court said: "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances . . . and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it." This formula has been the prevailing view ever since. Wolff v. Wells, Fargo & Co., 115 Fed. 32 (C. C. A. 9th, 1902); Maryland Dredging & Contracting Co. v. Coplay Cement Mfg. Co., 265 Fed. 842 (E. D. Pa. 1920); Barkemeyer Grain and Seed Co. v. Hannant, 66 Mont. 120, 213 Pac. 208 (1923); 55 C. J. 390. The formula is generally applied by the courts whether the divergence between the estimate and the quantity actually used or the actual price is large or small.

[17]Biglione v. Bronge, 192 Cal. 167, 219 Pac. 69 (1923); Holland v. Rock, 50 Nev. 340, 259 Pac. 415 (1927). See Note (1928) 28 Col. L. Rev. 223, 228: "In all types of requirement contracts, it is common for the parties to insert an estimate of the quantity required. Such provisions seem designed to limit the seller's obligation roughly and to give him a basis for computing the buyer's probable needs. The legal effect of the estimate, however, is remarkable in its disregard of the facts. The

misrepresenting one's probable requirements to mislead the other contracting party results in making the misrepresenter liable for damages for failure to accept the full amount of the estimate. However, the good faith demanded in making the estimate is not to be regarded as meaning that the estimate must be made with substantial accuracy, for that condition would defeat the advantages of requirements clauses. It appears that the courts, in virtually ignoring the specific advance estimate of the amount of material to be purchased and in concluding that the contract calls for the purchase of the unspecified quantity which may actually prove to be needed in the designated business or project, are deliberately making the contract one for requirements even though there is a reasonable basis for construing it to be a contract for a specified amount. Thus, the law has developed from the early view that requirements contracts are invalid to a point where courts not only recognize the validity of literal requirements contracts but also construe agreements ambiguous in this respect to be requirements contracts.

When the contracting parties are both commercial or professional interests,[18] as was true in the principal case, failure to consider the estimate where there is some other standard of measurement is understandable. In such instances, each party has the business knowledge to evaluate the other's estimate or to compute the probable quantity or cost for itself, thereby eliminating any necessity for reliance entirely upon the estimate. On the other hand, where one contracting party is a commercial or professional interest and the other is not, the former party appears to be placed in an unduly advantageous position if the effect of the estimate is nullified. Through lack of business or professional knowledge, the layman is inclined to place strong reliance on the estimate of the other. The situation in the recent case of *Jones v. Pollock*[19] is typical. Here a contractor agreed with a married couple to build a house on a cost-plus basis, "within the estimated cost of $13,100." When the house was completed, the actual cost proved to be $20,421, and the Supreme Court of California held the couple liable for that amount. Apparently the estimate is not regarded as qualifying the cost-plus character of such contracts, and so the actual expense

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provision is usually a nullity, operative, if at all, only when made by the buyer in bad faith."

[18]National Pub. Co. v. International Paper Co., 269 Fed. 903 (C. C. A. 2d, 1920); Maryland Dredging & Contracting Co. v. Coplay Cement Mfg. Co., 265 Fed. 842 (E. D. Pa. 1920); N. S. Sherman Machine & Iron Works v. Carey, Lombard, Young & Co., 100 Okla. 29, 227 Pac. 110 (1924).

[19]34 Cal. (2d) 863, 215 P. (2d) 733 (1950).

required to complete the building designated in the contract becomes the governing factor in determining the owner's liability.[20]

The view of such cases is supported by the undeniable fact that the contractor cannot foresee intervening factors such as rising prices and labor troubles which render the estimate inaccurate.[21] Where there is a cost-plus contract the very nature of the agreement indicates that the only ceiling is to be the actual cost arrived at by the contractor in good faith.[22] On the other hand, however, the layman, with even less ability to make an accurate estimate, is naturally inclined to rely heavily upon the contractor's professional estimate, and might not be willing to enter the contract except on the assumption that this figure stands as the approximate maximum of his liability. He supposes that the contractor contracted to take the risks of changes in prices, and there is no reason to allow the contractor to avoid the loss involved in the very risk he assumed. If it is admitted that the layman assumes the same risk that the estimate will prove inaccurate, even then it appears that the contractor is generally in a better position financially to bear the loss resulting from the mutual risk. However, the courts generally take the position that the presence of the cost-plus term places the risk on the owner and renders his reliance on the estimate unjustifiable.[23]

The legal effect of requirements contracts, which have progressed from complete invalidity to a prominent position in the business world, is currently being rendered uncertain when an estimate provision is incorporated. Though courts, in interpreting such contracts for requirements, have generally given little weight to the estimate itself, the abundant litigation in which parties base their entire case on the estimate indicates the misleading effect it often carries. Though this problem is most acute where one of the contracting parties is prejudiced by lack of knowledge of commercial and professional

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[20]In Eggers v. Luster, 32 Wash. (2d) 86, 200 P. (2d) 520 (1949), the court held the layman liable to the building contractor for the actual cost of $25,125.64 even though the estimate was only $13,400.

[21]Fluctuation in prices of labor and materials in Jones v. Pollock, 34 Cal. (2d) 863, 215 P. (2d) 733 (1950) accounted for the wide divergence between the estimate and the actual cost for which the owner was held liable.

[22]It is stated in 17 C. J. S. 827 regarding cost-plus contracts that "If there is no agreed limit as to price, the fact that the actual cost exceeds that contemplated by the parties is no ground for charging such excess against the contractor."

[23]Jones v. Pollock, 34 Cal. (2d) 863, 215 P. (2d) 733 (1950); Eggers v. Luster, 32 Wash. (2d) 86, 200 P. (2d) 520 (1949); Kuenzi v. Radloff, 253 Wis. 575, 34 N. W. (2d) 798 (1948). See Blohm v. Kagy, 341 Ill. App. 468, 94 N. E. (2d) 516, 518 (1951).

practices, the *Kellogg* case demonstrates that the same difficulties arise between parties who are approximately equal in that respect.

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DAMAGES—RELAXATION OF CERTAINTY RULE TO ALLOW SUBSTANTIAL DAMAGES IN BREACH OF CONTRACT CASES. [New York]

In order that the jury may have some reliable basis for calculating the amount of damages to be awarded for a breach of contract, the plaintiff must introduce evidence indicating the *extent* of the loss sustained from the breach.[1] This burden is regularly defined by reciting the general rule that damages must be proved with reasonable certainty and must not be contingent, conjectural, or remote.[2] The certainty requirement, while setting up a logical and necessary requisite to the awarding of truly compensatory damages, often forces the courts into a position in which they must either allow defendant to breach a contract with impunity, and thereby deprive a deserving plaintiff of damages even though the contract has been breached to his substantial detriment, or rationalize a means of avoiding the certainty rule thereby awarding damages which may not remotely reflect plaintiff's actual loss.

The difficulty of resolving this problem is well illustrated by the recent New York case of *Spitz v. Lesser*,[3] in which plaintiff obtained a judgment for subtantial damages in the trial court, then suffered a reduction of the award to nominal damages of six cents in a divided Appellate Division decision,[4] and finally won a reinstatement of the substantial damages judgment in the Court of Appeals, again on a split decision. Plaintiff, the inventor of a toy, entered into a contract with defendant, a toy manufacturer, whereby defendant agreed to make the toy " 'for mass production sales'; to 'promote, market and ship same . . .,' and by January 2, 1949, 'to have production samples . . . ready for market . . . .' Defendant also agreed to pay plaintiff a royalty of 5% on the first $100,000 of net sales, 3% thereafter, and 'a minimum for the first year— 1949—of not less than' $2,500."[5] The contract was subject to the defendant's right to " 'return this item . . . not later than Apr. 1st—1949—after the Toy Show,' in which event full royalties were to be paid

[1] 1 Sedgwick, Measure of Damages (9th ed. 1920) §170.

[2] McCormick, Damages (1935) §25; Restatement, Contracts (1932) §331. Also see Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718 (1858).

[3] 302 N. Y. 490, 99 N. E. (2d) 540 (1951).

[4] 100 N. Y. S. (2d) 558 (1950).

[5] 302 N. Y. 490, 99 N. E. (2d) 540 (1951).

for any and all goods shipped under the agreement . . ., and the agreement, which otherwise continued for three years subject to further renewal, would thereby be terminated."[6] Defendant never took any affirmative action toward performing the contract, and on January 24, 1949, he purported to exercise his right to cancel the contract.

In the plaintiff's suit for breach of contract, the trial court awarded the plaintiff $2,500 damages, the amount being set by the minimum royalty provided for in the contract. The Appellate Division, in reducing the damages to a nominal award, declared that "That the value of the contract at the time of the . . . breach must be measured subject to the cancellation privilege which it contained."[7] Admitting that the defendant's premature exercise of the option to cancel the agreement was an anticipatory breach of the contract, this court ruled that it was a mere technical breach, which "would amount to cancellation in contemplation of the law,"[8] and for such a breach the damages should not exceed the royalties which would have been paid on any toys sold up to the time when the defendant could have legally exercised his option to terminate the contract, unless the plaintiff suffered "special damages for failure of the defendant to make and exhibit the toy."[9] Since the plaintiff had not attempted to prove special damages and since the defendant had made and sold no toys, there was no proven basis for awarding substantial damages. The court indicated that the royalty clause would be the proper measure of damages only if the breach occurred subsequent to the last day on which defendant could exercise his option to cancel contract. In the view of the dissenting judge, "Implicit in the agreement was defendant's duty to produce and ship, up to the date when it could legally have cancelled . . . .The record indicates that defendant decided it had made a bad bargain . . . . By total non-performance, defendant has breached its duty, damaged plaintiff, and eliminated every other basis for damages except the minimum guaranteed by defendant for the first year."[10]

The Court of Appeals reversed the Appellate Division and reinstated the judgment for $2,500 damages, but the specific ground on which it avoided the certainty rule is left in doubt. The opinion deals largely in generalities, and though not specifically adopting the theory of the Appellate Division dissent, seems to agree with its interpretation of the contract as to the duty of the defendant to produce and sell toys

[6]302 N. Y. 490, 99 N. E. (2d) 540, 541 (1951).
[7]100 N. Y. S. (2d) 558, 559 (1950).
[8]100 N. Y. S. (2d) 558, 559 (1950).
[9]100 N. Y. S. (2d) 558, 560 (1950).
[10]100 N. Y. S. (2d) 558, 560, 561 (1950).

prior to the end of the period when the option could have been legally exercised.

In one of the few specific references to the actual case before it, the court observed that the minimum royalty provision "was the guaranteed compensation in the event of performance in other respects by defendant; it cannot be less by reason of his breach. Plaintiff may indeed have been damaged far more than this sum, but the minimum was all that could be proved."[11] The opinion makes no application of this statement to the contract involved, and a relevant application is difficult to develop. Obviously the defendant had breached two obligations, in that he failed to have any samples ready by January 2 and that he attempted prematurely to cancel the contract. It is difficult to see what consequences in damages could arise from the first breach, except as it relates to a failure to produce toys in mass production for the market. Production samples would be of no substantial value except in preparation for extensive marketing. Further, no substantial damages would seem to arise from the premature cancellation, unless it is assumed that defendant was under obligation to mass-produce and market toys prior to the last date at which he was authorized to cancel. Only by such production and sale of the product could plaintiff have become entitled to royalties under the contract, and so in awarding damages based on the royalty guarantee, the court apparently assumed that the defendant was under that duty, which, however, is not expressed in the contract. The only provision referred to in the opinion from which such an obligation could be implied was the statement that in the event of cancellation by the defendant, royalties should be paid for any of the toys shipped pursuant to the contract up to the final date for cancellation. This term merely indicates the obvious fact that defendant *could* produce and sell the toys before that date and that if he did so he must pay *royalties for those goods.* This is a very different matter from *requiring* defendant to act, and compelling him to pay the *minimum royalties for an entire year's operation* if he failed to operate during the three months prior to the date on which he could cancel the contract. Even if the duty to manufacture toys during the option period is assumed, the award of $2,500 for the breach is excessive, because that duty would exist for no longer than ninety days, after which defendant could admittedly cancel. If the plaintiff was satisfied to accept a $2,500 guaranty clause for a whole year's production and sale, it seems highly unreasonable for the court to award him that much for a period only one-fourth as long.

[11]302 N. Y. 490, 99 N. E. (2d) 540, 541 (1951).

Since defendant insisted on reserving a privilege to cancel the agreement, it seems only reasonable that he desired to have a period of time in which to decide whether the arrangement was sufficiently profitable to justify full scale production. Parties contracting in this state of mind would hardly intend that the manufacturer should be bound to go through with the heavy initial expense of tooling up and hiring workers for mass production when he might already have concluded that he would exercise his option to cancel.[12] The complaint of the appellate court dissent that "defendant simply decided it had made a bad bargain"[13] and therefore refused to perform is quite beside the point; the privilege not to perform was precisely what the defendant provided for in the contract.

The opinion of the Court of Appeals does nothing to establish the logical basis of the judgment. Instead it stresses that the defendant was a deliberate wrongdoer, and as such should not be allowed to avoid paying substantial damages.[14] The court observed that "If plaintiff cannot measure his damages in terms of the minimum royalties upon which the parties agreed, there is no satisfactory measure of his loss," and further that "Since it is defendant's own wrong which has rendered it impossible for plaintiff to prove his damages with more certainty, he cannot complain of the alleged uncertainty .... 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created'."[15] In order to effectuate that policy, the court felt it necessary to seize upon the only definite figure in the contract and make it the measure of damages. However, to evoke this policy in its logical extreme would result in the complete collapse of the certainty rule, inasmuch as it is designed to require the plaintiff to prove his own case specifically

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[12]Though the contract gave the defendant until April 1, to make up his mind, the parties surely would not have intended to compel the making of useless expenditures in preparing for production which was never to be consummated. The majority of the Appellate Division was apparently taking this view of the contract when it termed the premature cancellation merely "a technical breach of the contract. . . ." Spitz v. Lesser, 100 N. Y. S. (2d) 558, 560 (1950).

[13]100 N. Y. S. (2d) 558, 561 (1950).

[14]This approach is regularly employed by courts which feel impelled by a sense of justice to award substantial damages to a plaintiff who is unable to prove the amount of his losses with any certainty. "There are cases . . . in which the question of an intentional wrong is involved. In such cases the degree of proof necessary is much relaxed in favor of the injured party. Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must realize that in such cases 'juries are allowed to act upon probable and inferential, as well as direct and postive, proof'." Wood v. Pender-Doxey, 151 Va. 706, 713, 144 S. E. 635, 638 (1928). Also, Burckhardt v. Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842 (1885).

[15]Spitz v. Lesser, 302 N. Y. 490, 99 N. E. (2d) 540 541, 542 (1951).

enough to provide the jury with some sound basis for calculating the amount of damages.[16]

Though this decision, both in placing a dubious construction on the contract and then in seizing upon an illogical figure as to the measure of damages, may go somewhat beyond the usual result of modern cases, it is significant in that it reflects an increasing tendency of the courts to circumvent the certainty rule in the contracts cases[17] when its application would result in the denial of damages to a plaintiff whom the court regards as worthy. Formerly, loss of profits was regarded as per se too contingent and speculative to be allowable as an item of damages.[18] However, with the passage of time, a more lenient view was adopted, and where the business was an established one, with a fairly accurate record of past earnings, future profits were more freely allowed.[19] There still remained the problem of the new business, wherein *Paola Gas Company v. Paola Glass Company*[20] presents the classical view. Representing a more modern trend is the federal case of *Excelsior Motor Manufacturing and Supply Company v. Sound*

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[16]A clear demonstration of this salutary employment of the certainty rule may been seen in Dreelan v. Karon, 191 Minn. 330, 254 N. W. 433 (1934), wherein the court very properly entered judgment for defendant notwithstanding the verdict for plaintiff, after plaintiff had shown little inclination even to attempt to present specific proof of the amount of his claim.

[17]In the forty years from 1907 through 1946, in the 122 cases listed in the Decennials of the American Digest System, Damages keynumber 6, in which the certainty rule was relied upon by defendant to defeat plaintiff's claim for damages in contract cases, recovery was denied on that basis in 22.7% of those decisions in 1907-1916, in 19.4% in 1917-1926, in 11.4% in 1927-1936, and in 8.8% in 1937-1946.

[18]1 Sedgwick, Measure of Damages (9th ed. 1920) §175. Also Smith v. Condry, 1 How. 28 (U. S. 1843); The Lively, 1 Gall. 315, Fed. Cas. No. 8403 (C. C. Mass. 1812).

[19]"It is well established that prospective profits are a legitimate item of damages resulting from breach of contract, when the circumstances are such that future profits may be computed with some reasonable certainty, and it is held that evidence of prior profits in the same business furnished a basis for such contemplation." Buxbuam v. G. H. P. Cigar Co., 188 Wis. 389, 206 N. W. 59, 61 (1925).

[20]56 Kan. 614, 44 Pac. 621 (1896). Defendant gas company was under a contract to provide gas to the plaintiff glass company. Because of an insufficient supply of heat, due to defendant's failure to supply enough gas, the plaintiff was forced to cease operation. Plaintiff was in business for approximately two months. In a suit for damages, prospective profits were not allowed, the court stressing the fact that glass manufacturing was untried in that section of the country and there was no basis for estimating profits. The application of the certainty rule to the facts of this case made the result reached inevitable. It is difficult to imagine a situation in which the profits sought to be recovered would be more contingent, speculative, or remote. The court felt constrained to disallow the future profits, but not without some misgiving. It proposed an alternative measure of damages in the form of an amount equal to the rental value of the plaintiff's plant. See also, States v. Durkin, 65 Kan. 101, 68 Pac. 1091 (1902); American Oil Co. v. Lovelace, 150 Va. 624, 143 S. E. 293 (1928); Webster v. Beau, 77 Wash. 444, 137 Pac. 1013 (1914).

Equipment, Inc.[21] in which a different result was reached on similar facts. Though the plaintiff's undertaking was a new venture, the court affirmed a recovery of loss of profits since the plaintiff was able to prove that the demand for such equipment greatly exceeded the supply.

There can be no criticism of the modern trend, insofar as it rests on the conviction that the certainty rule is one of broad flexibility, and that no fixed standard can determine all cases. However, the justification for the trend toward leniency is difficult to explain in terms consistent with the original purpose of the certainty rule. It is doubtful that a greater trust in and respect for the jury's ability to pass on damages issues more accurately is a sufficient explanation, though it may be remotely relevant. It is true that the popular idea of elementary justice is that a deliberate wrongdoer should not escape payment of damages on a procedural mechanism or legalistic technicality. Perhaps the courts feel that there is less risk of harm in grasping for the straw which will justify granting substantial damages than there is in letting the defendant breach with complete impunity.

The most satisfactory solution to the problem appears to be in the more certain and definite drafting of contracts.[22] Of course, there will always be certain eventualities and types of breaches which cannot be anticipated, no matter how much foresight the contracting parties exercise. Nevertheless, liquidated damages provisos and guaranty clauses will greatly reduce the number of instances in which the measure of damages will be left in complete uncertainty. In the principal case, if the parties had stated the defendant's contractual obligations more specifically and added definite liquidated damages or guaranty provisions to cover the probable types of breaches, including an anticipatory breach by defendant, the problems involving the certainty rule would not have arisen in the transaction.

RICHARD H. LIPSCOMB

[21] 73 F. (2d) 725 (C. C. A. 7th, 1934). Plaintiff was exclusive distributor of sound equipment for motion pictures, at this time a relatively new enterprize. Defendant manufacturer failed to supply the machines, and the court in allowing a recovery relied heavily on the plaintiff's evidence that the demand for the new equipment greatly exceeded the supply.

[22] "... in the majority of cases upon contract, there is little difficulty, from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in cases where this can not be done . . ., that there can be any great failure of justice by adhering to such rule as will most clearly approximate the desired result. And it is precisely in these . . . cases that the parties have it in their power to protect themselves from any loss to arise from such uncertainty, by estimating their own damage in the contract itself, and providing for themselves the rules by which the amount shall be measured, in case of a breach . . . ." Allison v. Chandler, 11 Mich. 542, 552 (1863).

DOMESTIC RELATIONS—BASIS FOR WIFE'S RIGHT OF ACTION FOR FRAUDULENT INDUCEMENT TO ENTER VOID MARRIAGE. [Virginia]

The common law rule that a wife may not sue her husband for personal torts committed against her, because a fictional unity and merger of personality exists between the spouses and because such actions would have disruptive effects upon marital harmony,[1] apparently did not forbid one spouse to sue the other for fraudulent inducement to enter a void marriage. It can be reasoned that allowance of that action does not contravene the general prohibition against suits between spouses since, in legal contemplation, the litigating parties are not man and wife. Therefore, such considerations as legal unity of spouses and disruption of marriage are not relevant to this situation.

Though a wife's right of action for fraudulent inducement to enter a void marriage was recognized in England as early as 1684[2] and has been accepted in many American states, the specific issue was not passed on by the Virginia Supreme Court of Appeals until the recent case of *Alexander v. Kuykendall*.[3] A woman brought suit against her supposed husband, alleging fraudulent inducement to enter a marriage ceremony in 1944 which defendant had represented as valid when he knew it would be invalid. The union resulted in the birth of one child and had, prior to this action, been held invalid.[4] Plaintiff asked damages for embarrassment, humiliation and loss of substantial position of employment. Defendant demurred on the ground that (1) Virginia law neither contemplated nor allowed such a cause of action, and, (2) if it did, the allegations were insufficient to support the action.[5] The Circuit Court of the City of Norfolk sustained the demurrer without stating its grounds for so doing. In reversing and remanding the case, the Supreme Court of Appeals adopted the rule "that an innocent woman [who is] induced by fraud and deceit to contract a void marriage with defendant, and subsequently lives with him, performing the normal

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[1]Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180 (1910) (holding a Married Woman's Act did not abrogate the common law rule). See Prosser, Torts (1941) 898.

[2]Anonymous, Skinner 119, 90 Eng. Rep. 56 (1684). See The Lady Cox's case, 3 P. Wms. 339, 24 Eng. Rep. 1091 (1734) (such a cause of action alluded to).

[3]192 Va. 8, 63 S. E. (2d) 746 (1951).

[4]Defendant, at the time of entering the marriage ceremony in 1944, was under disability due to prior existing marriage. Prior to the present action at law for damages, the Circuit Court for the City of Norfolk had decreed annulment of the 1944 marriage.

[5]The second ground of the demurrer involved a procedural point not here commented upon.

duties of a wife, is entitled to recover damages in an action for fraud and deceit."[6]

Ample authority from other jurisdictions supported the recognition of a right of action, and the main problem considered by the Virginia court was whether the recovery should be based upon a quasi-contract or a tort theory.[7] The distinction is important principally in regard to measurement of damages. Under the quasi-contract theory, the woman is permitted to recover on an implied contract the reasonable money value of services rendered, less the cost of her maintenance and support.[8] States following the tort theory allow the woman to recover in an action of deceit both full compensation and exemplary damages for fraudulent representation that the marriage would be valid.[9] Another consideration to be noted is that recovery under the tort theory must depend upon proving the representation to have been fraudulently made,[10] whereas, an innocent representation may be sufficient under the quasi-contract theory.[11]

The quasi-contract theory is based upon the doctrine of assumpsit and principles of equity. Courts allowing recovery on this basis apparently recognize an exception to the normal quasi-contract rule

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[6]Alexander v. Kuykendall, 192 Va. 8, 12, 63 S. E. (2d) 746, 748 (1951). The case was subsequently retried on the merits, the following verdict being returned on December 20, 1951: "We the jury find in favor of the defendant." Estelle Ferguson Alexander v. William Oliver Kuykendall, Circuit Court of the City of Norfolk, File Number 7389.

[7]"This court has never passed upon the question, and there is no Virginia statute authorizing or prohibiting such an action. However, the right of a party so defrauded to recover is authorized in most jurisdictions upon one of the other of two theories." Alexander v. Kuykendall, 192 Va. 8, 10, 63 S. E. (2d) 746, 747 (1951). See also authorities cited, notes 8-15, infra. The captions "quasi-contract theory" and "tort theory" are adopted as a short-hand expression of the two lines of authority.

[8]Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916); In re Fox's Estate, 178 Wis. 369, 190 N. W. 90, 31 A. L. R. 420 (1922) (question of what result where both parties were in good faith was mooted).

[9]Jekshewitz v. Groswald, 265 Mass. 413, 164 N .E. 699, 62 A. L. R. 525 (1929); Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888) (frequently cited for reasoning in criticism of the quasi-contract theory); Amsterdam v. Amsterdam, 56 N. Y. S. (2d) 19 (1945); Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829 (1895).

[10]It should be noted here that the intent to deceive is not an essential element of the tort of deceit in Virginia. Union Trust Corporation v. Fugate, 172 Va. 82, 200 S. E. 624 (1939); McDaniel v. Hodges, 176 Va. 519, 524, 11 S. E. (2d) 623, 625 (1940): "In Virginia, however, we have consistently adhered to the minority view that the intent or good faith of a representator is not in issue and is not controlling." But fraud must be expressly charged, as a bare allegation of fraud is not sufficient to support an action for damages. Lloyd v. Smith, 150 Va. 132, 143 S. E. 323 (1928).

[11]Sanguinetti v. Sanguinetti, 9 Cal. (2d) 95, 69 P. (2d) 845, 111 A. L. R. 342 (1937).

that the party seeking to recover damages as compensation for services rendered must show that the services were not intended as a gratuity. It is said that the defendant's fraud vitiates the plaintiff's intention to make a gift of the services, and that the defendant will be unjustly enriched if he is allowed to retain the benefits rendered by the plaintiff under the mistaken assumption that the defendant was entitled thereto.[12] The law implies the promise, and equity demands that the parties be made whole.[13] This view has been criticized as ignoring the realities of the factual situation. Since parties contemplating marriage do not expect payment for rendering the mutual services of man and wife, there is no basis for implying a promise to pay. Further, the incident of household services should not be singled out for compensation, since they are but part of a greater wrong to be proven as an element of damages.[14] Other objections are also apparent: the recovery in quasi-contract for the reasonable value of services will rarely be adequate to compensate the defrauded party for her actual damages, and punitive damages are not recoverable; a balance of the benefits rendered as against the benefits received may result in a nominal judgment; and, the criteria of value to the defendant as a domestic servant overlooks the more valuable benefits of marriage such as love, companionship and aid in accumulating wealth for the defendant.[15]

The basis for the tort theory recovery is the same as that for any tort action for deceit: that the defendant intentionally misrepresented a material fact intending that the plaintiff rely on it, and the plaintiff, in reliance, suffered damage. Obviously, this theory enables the plaintiff to recover compensatory damages on a broader basis, including the elements of embarrassment, humiliation, loss of economic and social position and also opens up a possibility of punitive damage.[16] While the quasi-contract theory is criticized for pecuniary inadequacy of the recovery, the tort theory is criticized for procedural inadequacy. Thus, if the defendant acts in good faith without fraud, no action lies since no tort was committed; absent a saving statute, the action will

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[12]Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916); Keener, Quasi-Contracts (1893) 315-324. See Note (1922) 7 Minn. L. Rev. 172.

[13]In re Fox's Estate, 178 Wis. 369, 190 N. W. 90, 31 A. L. R. 420 (1922).

[14]Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888) (quoted at length and with approval in the principal case).

[15]See Evans, Property Interests Arising From Quasi-Marital Relations (1924) 9 Corn. L. Q. 246, 252.

[16]Amsterdam v. Amsterdam, 56 N. Y. S. (2d) 19 (1945) (although the plaintiff was clearly entitled to punitive damages, only compensatory damages were requested).

not survive the death of either party; and the statute of limitations[17] is usually shorter for tort actions than for contract actions.[18]

Since neither rule assures a just result in all situations, it has been appropriately suggested, by both writers[19] and occasional decision,[20] that plaintiff be allowed to waive the tort and sue in contract. Thereby, the plaintiff could elect to sue under the theory which would afford her the most advantageous recovery. Such an election would not ordinarily be possible at present, since each jurisdiction seems to adopt one theory to the exclusion of the other. The problem considered in each case should not be which rule is right and which is wrong, but which theory will provide the fairest measure of compensation. There is nothing to indicate that the two theories *must* be mutually exclusive. More complete justice in each case would be possible if courts would reexamine the problem, upon a procedural basis, in an effort to provide relief under any plan which is consistent with recognized principles of legal remedies.

The record in the *Alexander* case did not reveal sufficient facts from which the court could determine whether or not the marriage in question was void or voidable, although certain parts of the opinion appear clearly to assume the existence of a void marriage as regards the rule laid down. [21] Thus there is some reason to speculate whether Virginia would recognize a right of action if the marriage were merely voidable, rather than void.[22] This point of inquiry takes on added

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[17]Many cases hold that the statute of limitations does not run until the fraud is discovered by the innocent party. Jekshewitz v. Groswald, 265 Mass. 413, 164 N. E. 609, 62 A. L. R. 525 (1929); Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829 (1895).

[18]See Evans, Property Interests Arising From Quasi-Marital Relations (1924) 9 Corn. L. Q. 246, 251.

[19]Woodward, The Law of Quasi-Contract (1913) §282.

[20]A North Carolina court employed the principle of "waiving the tort" and allowed plaintiff to recover against the estate of her dead husband under the quasi-contract theory. Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916). However, plaintiff was denied a choice of remedy in a Massachusetts case where the court remarked that a "duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained." Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 894, (1888).

[21]"The only question of substantive law involved is, whether or not a woman may maintain an action against a man, who, by misrepresentation, fraud and deceit, induced her to enter into what she thought a valid marriage, but which in fact was *void*." Alexander v. Kuykendall, 192 Va. 8, 9, 63 S. E. (2d) 746, 747 (1951) [italics supplied].

[22]Of course, one could conclude the obvious: that the Virginia court intends that the rule shall apply to all invalid marriages, because the court recognized a cause of action although it stated that the record did not reveal whether the marriage was void or voidable. However, there is sufficient ambiguity in the opinion to justify discussion of the point.

significance when considered with several specific references made in the opinion to prior Virginia decisions pointing out the necessity for observing a clear distinction between void and voidable marriages[23] and re-affirming the common law doctrine of non-liability for torts between spouses.[24] A void marriage is a nullity and may be impeached collaterally, after death of the parties,[25] while a voidable marriage is valid until action is taken to avoid it, is subject to ratification by the innocent party, and may be impeached only during the lives of the parties thereto.[26] Jurisdictions following the common law rule of non-liability between spouses for personal torts could validly deny the action to a wife for fraudulent inducement to marry where the marriage is *voidable* only, because in such cases the parties are man and wife in legal contemplation so long as the marriage has not been invalidated by judicial action. However, if the ab initio doctrine is invoked,[27] the voidable marriage is said to be void from the beginning as soon as a decree of a court declares it invalid. It is a common principle that fictions in law are used as tools to effectuate justice. Justice would clearly be served if the ab initio doctrine were used to afford relief to defrauded parties induced to enter voidable marriages, for the legal injury is no different whether the marriage is void or voidable.

If the Virginia court in the principal case means only that plaintiff must first secure an annulment decree voiding a voidable marriage, there is nothing to detract from the conclusion that the principal case has far-reaching results. If, on the other hand, the proper interpretation

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[23]Toler v. Oakwood Smokeless Coal Corp., 173 Va. 425, 4 S. E. (2d) 364, 127 A. L. R. 430 (1939) cited in the principal case at 192 Va. 8, 13, 63 S. E. (2d) 746, 748).

[24]Keister v. Keister, 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439 (1918) (cited in the principal case, 192 Va. 8, 12, 63 S. E. (2d) 746, 748). It is interesting to note here that the Virginia court in the Alexander case expressly recognized such a right of action even though the common law rule of non-liability for torts between spouses still obtains in Virginia, while a recent New York decision relies on a statute of New York abrogating the common law rule as grounds for allowing the action in a similar case. Amsterdam v. Amsterdam, 56 N. Y. S. (2d) 19, 22 (1945). [See New York Domestic Relations Laws (1938) §57].

[25]Cook v. Cook, 76 A. (2d) 593 at 597 (Vt. 1950).

[26]Millar v. Millar, 175 Cal. 797, 167 Pac. 394 (1917); Keezer, Marriage And Divorce (3d ed. 1923) §§210, 211.

[27]This doctrine is not universally employed since occasionally a harsh result is reached. In re Moncrief's Will, 235 N. Y. 390, 139 N. E. 550 (1923) (ab initio doctrine used although child thereby was made illegitimate). Other courts employ the doctrine but limit its application on grounds of policy, stating that completed acts during the supposed marriage may not be reopened or undone. The unstated grounds appear to be a policy against actions ex delicto between even supposed "spouses" of a voidable marriage. Callow v. Thomas, 322 Mass. 550, 78 N. E. (2d) 637, 2 A. L. R. (2d) 632 (1948) (denying wife of voidable marriage a cause of action for injuries by husband in automobile accident).

proves to be that only parties to a void marriage are given this new remedy, the decision is a narrow one limited to a very few cases, since the modern trend is to make virtually all defective marriages voidable only.[28] Thus, although the court's recognition of a new remedy is commendable, a proper appraisal of the new rule in Virginia must await clarification by subsequent decisions.

EMMETT E. TUCKER, JR.

EVIDENCE—ADMISSIBILITY IN PROSECUTION FOR SEX CRIME OF EVIDENCE OF COMMISSION BY ACCUSED OF PRIOR CRIME OF SAME NATURE. [Montana]

It is a fundamental rule of evidence that if a defendant is being tried for the commission of one crime, evidence cannot be introduced to show that he at some prior time committed another crime, even though the two offenses may be almost identical.[1] Evidence of different offenses would unduly influence the jury against the defendant, and he probably would be taken by surprise and thus would not be adequately prepared to answer the charges.[2] The general rule, however, is subject to at least five standard exceptions: that the evidence may be introduced to show (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, (5) the identity of the person charged with the commission of the crime on trial.[3]

There is also much authority that the general rule does not apply with its full affect in trials on charges of sex crimes,[4] but not all courts

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[28]Keezer, Marriage And Divorce (3d ed. 1923) §§ 210-221; 35 Am. Jur., Marriage §46.

[1]State v. Baugh, 200 Iowa 1225, 206 N. W. 250 (1925); Romes v. Commonwealth, 164 Ky. 334, 175 S. W. 669 (1915); People v. Thau, 219 N. Y. 39, 113 N. E. 556, 3 A. L. R. 1537 (1916); 22 C. J. C., Criminal Law §682.

[2]Commonwealth v. Henry Jackson, 132 Mass. 16, 20 (1882): "Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

[3]People v. Thau, 219 N. Y. 39, 113 N. E. 556, 3 A. L. R. 1537 (1916). It has been said that the exceptions are founded on as much wisdom as the rule itself. Gianotos v. United States, 104 F. (2d) 929 (C. C. A. 9th, 1939). At least one court has said that the so-called exceptions are really part of the rule. Beach v. State, 28 Okla. Cr. 348, 230 Pac. 758 (1924).

[4]Bracey v. United States, 142 F. (2d) 85 (App. D. C. 1944); Suber v. State, 176 Ga. 525, 168 S. E. 585 (1933); State v. Stitz, 111 Kan. 275, 206 Pac. 910 (1922); Commonwealth v. Kline, 361 Pa. 434, 65 A. (2d) 348 (1949). See State v. Sauter, 232 P. (2d) 731, 735 (Mont. 1951).

recognize such an exception. This divergence of opinion is exemplified by the diverse views within the Montana Supreme Court in the recent case of *State v. Sauter.*[5] The defendant was charged with having committed forcible rape. It was alleged that he and his companion met the prosecutrix, a 22 year old woman, in a barroom, bought her some drinks, and persuaded her to get into their car for a ride to a nearby town. It was further alleged that she was taken on a country road where the defendant's companion first raped her, and after she had been reduced to a state of hysteria, the defendant then raped her. In the trial court the prosecution was allowed to introduce evidence that defendant had committed another similar act with another girl under strikingly similar circumstances. The Supreme Court of Montana, in a 3 to 2 decision, ruled that the admission of such evidence was error, and reversed the decision and remanded the case to the lower court.

The majority could see no reason for making an exception to the general exclusionary rule, inasmuch as the showing that two distinct crimes had been committed the same way does not show a system or scheme. It was observed that, "sexual acts, whether rape, or no rape, originated in barroom pickups, powered by the urge and consummated in automobiles, are entirely too common in this day and age to have much evidentiary value in showing a systematic scheme or plan."[6] Since the defendant admitted having intercourse with the prosecutrix and placed his defense on the absence of force, there was no problem of identity, and the prior crime could not be introduced to show a similarity in operating technique.

The dissenting justices approved the admission of the evidence of a previous offense,[7] but whether they would have admitted the evidence because a sex crime was involved or because it could be brought in under one of the five standard exceptions is not entirely clear. The opinion speaks of plan, scheme and design which would indicate a standard exception. Yet in many of the cases cited as authority, sex crimes are regarded as an exception to the general rule,[8] and the dissent refers pointedly to the fact that courts are more liberal in admitting evidence of a prior offense where a sex crime was involved.

Some courts following the general exclusionary rule applied in the principal case have refused to list sex crimes as an exception, but

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[5]232 P. (2d) 731 (Mont. 1951).

[6]State v. Sauter, 232 P. (2d) 731, 732 (Mont. 1951).

[7]State v. Sauter, 232 P. (2d) 731, 735 (Mont. 1951).

[8]Bracey v. United States, 142 F. (2d) 85 (App. D. C. 1944); State v. Peres, 27 Mont. 358, 71 Pac. 162 (1903); Commonwealth v. Kline, 361 Pa. 434, 65 A. (2d) 348 (1949).

have nonetheless admitted evidence of prior crimes in such cases under one of the standard exceptions.[9] Yet not a few of these rulings are hard to justify under any of the standard exceptions, and it is submitted that there are cases[10] in which the evidence is admitted in fact because of the sex crime and yet the courts, not recognizing this as an exception, have let the evidence in under another name. This becomes more apparent where it is noticed that the evidence is quite often admitted under the name of intent.[11] Yet other courts have said that in sex crimes, intent or guilty knowledge can be inferred from the nature of the act and evidence of other crimes is not admissible to prove intent.[12] Thus, courts which admit evidence of other sex crimes for the purpose of showing intent either refuse to recognize that intent can be inferred from the nature of the act or else intent is being named as the exception when there is some more fundamental reason for the admission.

However, some courts have been quite willing to admit that the general rule does not apply where the charge is of a sex crime.[13] According to this view evidence of prior crimes should be admitted and sex crimes added as another standard exception to the general rule. The dissent in the principal case would have apparently gone this far.

Courts adopting this view have placed great emphasis on the mental attitude of the accused. It is reasoned that criminals are motivated by an abnormal pattern of emotional maladjustments, and the evidence of prior sex crimes is declared to be admissible to show the bent of

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[9]State v. Martinez, 67 Ariz. 389, 198 P. (2d) 115 (1948); People v. Meraviglia, 73 Cal. App. 402, 238 Pac. 794 (1925); State v. Sheets, 127 Iowa 73, 102 N. W. 415 (1905); State v. Gummer, 51 N. D. 445, 200 N. W. 20 (1924).

[10]Lee v. State, 18 S. (2d) 706 (Ala. 1944); State v. Sheets, 127 Iowa 73, 102 N. W. 415 (1905); State v. Jenks, 126 Kan. 493, 268 Pac. 850 (1928); State v. Gummer, 51 N. D. 445, 200 N. W. 20 (1924). See State v. Start, 65 Ore. 178, 132 Pac. 512, 517 (1913).

[11]Lee v. State, 18 S. (2d) 706 (Ala. 1944); People v. Meraviglia, 73 Cal. App. 402, 238 Pac. 794 (1925); State v. Sheets, 127 Iowa 73, 102 N. W. 415 (1905). See State v. Start, 65 Ore. 178, 132 Pac. 512, 517 (1913). In commenting on the fact that courts do not admit evidence of prior sex crimes to show intent and yet admit such evidence to show scheme and design it is said: "The distinction between intent, disposition and system seems tenuous. But they afford convenient grounds for the admission in the court's discretion . . . ." Note (1927) 36 Yale L. J. 879, 880.

[12]State v. Weaver, 182 Iowa 921, 166 N. W. 379 (1918); State v. McAllister, 67 Ore. 480, 136 Pac. 354 (1913); State v. Williams, 36 Utah 273, 103 Pac. 250 (1909).

[13]Suber v. State, 176 Ga. 525, 168 S. E. 585 (1933); Commonwealth v. Kline, 361 Pa. 434, 65 A. (2d) 348 (1949); Proper v. State, 85 Wis 615, 55 N. W. 1035 (1893). See Bracey v. United States, 142 F. (2d) 85 (App. D. C. 1944); State v. Sauter, 232 P. (2d) 731, 735 (Mont. 1951).

mind,[14] the lustful disposition,[15] and the degenerate nature of the defendant.[16] In a California case[17] in which the defendant was charged with petty larceny of women's undergarments it was said that "His selection of the undergarments of women . . . taken with his prior convictions of stealing similar articles, indicate a sexually perverted nature. . . ."[18] The opinion does not make it clear that the evidence was admitted because there was a sex aspect involved, but the comment has been made[19] that the only value of the evidence was to show that defendant had such an abnormal disposition that he would be likely to commit such a crime. The refusal of a court to receive evidence of prior crimes of the sex criminal has been likened to a refusal by a doctor to heed prior pains in other parts of the anatomy than the one under present observation.[20] Such reasoning recognizes that the sex criminal is a degenerate who has a greater propensity than the ordinary criminal to continue in his wrongful conduct.

Between the two extreme positions advocated by the majority and the dissent in the *Sauter* case, there is a middle or compromise view which is said to be followed in the majority of jurisdictions.[21] This view admits evidence of prior and even subsequent crimes if these offenses were committed against the same person who is the victim of the crime presently charged. The dissent in the principal case points out that the Montana court has commonly adhered to this position.[22] It is difficult to ascertain why a prior crime committed on the same person should have more probative value than a prior similar crime committed on a different person. A District of Columbia case in discussing this problem has aptly observed that "The emotional predisposition or passion involved in raping one little girl would seem to be the same as that involved in raping another. . . . The better reasoned cases in other jurisdictions also support the admission of such evidence, within the exception to the general rule."[23] However, a possible explanation of this intermediate view lies in the fact that the rule is applied most often in regard to charges of sex offenses not based on

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[14]Suber v. State, 176 Ga. 525, 168 S. E. 585 (1933).
[15]State v. Hammock, 18 Idaho 424, 110 Pac. 169 (1910).
[16]State v. Badders, 141 Kan. 683, 42 P. (2d) 934 (1935).
[17]People v. Sanchez, 35 Cal. App. (2d) 231, 95 P. (2d) 169 (1939).
[18] People v. Sanchez, 35 Cal. App. (2d) 231, 95 P. (2d) 169, 172 (1939).
[19]Note (1940) 28 Calif. L. Rev. 516, 518.
[20]Note (1949) 23 Temple L. Q. 133, 135.
[21]State v. Stone, 74 Kan. 189, 85 Pac. 808 (1906); Note (1922) 21 Mich. L. Rev. 467.
[22]State v. Sauter, 232 P. (2d) 731, 735 (Mont. 1951).
[23]Bracey v. United States, 142 F. (2d) 85, 88 (App. D. C. 1944).

force, such as incest, adultry, and statutory rape.[24] In such cases prior acts might indicate both a desire and an opportunity on the part of the defendant to have relations with that particular person, and hence evidence of those acts are of probative value in proving the defendant's guilt of the alleged crime for which he is being tried.[25]

It may be argued that the view of the dissent is inconsistent with the American theory of criminal procedure[26] which demands that extensive safeguards against unfounded prejudice be accorded to every accused.[27] Undeniably the result of admitting evidence of prior crimes would be an increase in the number of convictions of sex offenders. It has been pointed out that "If the convicted criminals are to languish in prison . . . without . . . aid of medical and psychiatric therapy, the effect would be most undesirable to society as a whole and gravely injurious to the individual convict."[28] However, that approach seems to overlook the entire reasoning behind the view of the dissent that the admission of evidence of prior crimes is justifiable because of the propensity of the sex offender to repeat himself.[29] If the offender can be convicted, society is protected from this propensity at least for the period of time that he is "languishing in prison." While it is readily admitted that this incarceration will not cure any maladjustments, an acquittal of the sex offender has no better remedial effect, and yet leaves him at large to prey on the public.

While the weight of authority is in accord with the majority of the

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[24]People v. Koller, 142 Cal. 621, 76 Pac. 500 (1904) (evidence of prior and subsequent acts admissible as showing adulterous or incestuous inclination of parties); State v. Stitz, 111 Kan. 275, 206 Pac. 910 (1922); State v. Brown, 85 Kan. 418, 116 Pac. 508 (1911) (evidence admitted of both prior and subesquent acts to show the lustful disposition of the defendant for the same party); State v. Stone, 74 Kan. 189, 85 Pac. 808 (1906) (evidence of subsequent acts between same persons admissible, it not being contested as to admissibility of prior acts).

[25]State v. Brown, 85 Kan. 418, 116 Pac. 508 (1911); State v. Stone, 74 Kan. 189, 85 Pac. 808 (1906).

[26]"The question of admissibility in criminal prosecutions of evidence of other crimes committed by the defendant presents a conflict between the policy of admitting all relevant evidence and the policy of protecting the accused." Note (1940) Calif. L. Rev. 516.

[27]Examples of procedure being in favor of the defendant. Presumption of innocence: Commonwealth v. Madeiros, 255 Mass. 304, 151 N. E. 297, 47 A. L. R. 962 (1926); Wolf v. United States, 238 Fed. 902 (C. C. A. 4th, 1916). No comment can be made on defendant's failure to testify, in at least forty-two states: Reeder, Comment Upon Failure of Accused to Testify (1932) 31 Mich. L. Rev. 40 at 43.

[28]Note (1949) 23 Temple L. Q. 133, 135.

[29]"These sexual crimes, which are an exception to the general rule . . . may be characterized as crimes in continuando. The law recognizes as a matter of common knowledge that where a single act of that character arises, there is great probability of other similar acts . . . ." State v. Reineke, 89 Ohio St. 390, 106 N. E. 52, 53 (1914).

court in the principal case, the dissent finds support from the statement of a noted authority that, "Courts have shown altogether too much hesitation in receiving such evidence . . . . There is room for much more common sense than appears in the majority of the rulings."[30] Thus, while in regard to ordinary crimes, there are ample reasons for preventing admission of evidence of prior crimes, courts might display more wisdom if they gave greater thought to the problem of the sex offender. It has been suggested that the problem of providing more appropriate means for dealing with sex criminals is for the legislatures,[31] but until the legislatures act, there is a chance for the courts to take the initative, at least to the extent of making it possible to convict such offenders and thus remove them from contact with society in a greater number of cases.

S. MAYNARD TURK

EVIDENCE—ADMISSIBILITY OF CONFIDENTIAL COMMUNICATION IN LETTER FROM HUSBAND TO WIFE WHICH WAS INTERCEPTED BY THIRD PARTY. [Arkansas]

Despite the importance of making all relevant evidence available for consideration by the jury, the welfare of society and the orderly administration of justice require that testimony of certain types shall not be admissible in the courts. Thus, in order to protect the institution of marriage, it has been deemed desirable to exclude the confidences of the marriage if the spouse against whom the evidence is attempted to be used so desired.[1] As a consequence of this established privilege it is clear that either husband or wife can prevent the other spouse from testifying as to unfavorable confidential communications between them,[2] but there still exists a sharp diversity of opinion as to whether the privilege enables one spouse to bar a third party into whose hands a confidential communications between husband and wife has come from placing it in evidence in the trial of the spouse.[3]

In the recent case of *Batchelor v. State*,[4] the defendant, accused of

[30] 2 Wigmore, Evidence (3d ed. 1940) 267.

[31] Note (1948) 96 U. of Pa. L. Rev. 872.

[1] 8 Wigmore, Evidence (3d ed. 1935) §2332; 1 Greenleaf, Evidence (16th ed. 1899) §254; 1 Elloit, Evidence (1904) § 628.

[2] Bowman v. Patrick, 32 Fed. 368 (C. C. Mo. E. D. 1887); Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); McKie v. State, 165 Ga. 210, 140 S. E. 625 (1927); Shelden v. State, 74 Wis. 271, 42 N. W. 218 (1889).

[3] See Hammons v. State, 73 Ark. 495, 84 S. W. 718, 719 (1905).

[4] 217 Ark. 340, 230 S. W. (2d) 23 (1950).

raping his eight year old daughter, wrote a self-incriminatory letter to his wife while he was in jail, which was intercepted by the jailer and admitted in evidence at defendant's trial. On appeal from a conviction, the Arkansas Supreme Court, recognizing that some courts have taken a contrary view, held that the incriminatory letter in the hands of a third person was admissible. Though the court offered no reasoning to support its action, the case apparently aligns Arkansas with the view that once the letter leaves the control of husband or wife and falls into the hands of a third person the communication is admissible,[5] though the spouse may still be incompetent to testify as to its contents. The rationale advanced in some decisions seems to be that it is not then the spouse who is violating the confidential relationship, but rather the third party interloper. In *State v. Hoyt,* the Connecticut court, upon admitting such letters in evidence and thus holding them not privileged, observed: "The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not."[6]

Although a respectable number of the courts have adhered to the view of the principal case, about as many states have adopted a directly contrary position. The basis of this latter point of view is well expressed in *Mercer v. State* in which letters from one spouse to another were declared to be privileged regardless of whose custody the letter was in when offered in evidence: " . . . the policy of the law . . . is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself, and . . . protect it from exposure in evidence, wheresoever or in whosesoever hands it may be."[7]

Further support for the exclusion of the evidence may be rested on analogy to the privileged communications between lawyer and client, In discussing the basis of that type of privilege, a federal court has

[5]Hendrix v. State, 200 Ark. 973, 141 S. W. (2d) 852 (1940); McNeill v. State, 117 Ark. 8, 173 S. W. 826 (1915); Hammons v. State 73 Ark. 495, 84 S. W. 718 (1905); State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193 (1878); People v. Dunningham, 163 Mich. 349, 128 N. W. 180 (1910); O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187, 123 N. W. 795 (1909); People v. Hayes, 140 N. Y. 484, 35 N. E. 951 (1894); State v. Wallace, 162 N. C. 622, 78 S. E. 1 (1913); State v. Mathers, 64 Vt. 101, 23 Atl. 590 (1892); Underhill, Criminal Evidence (4th ed. 1935) 680.

[6]47 Conn. 518, 540 (1880).

[7]40 Fla. 216, 24 So. 154, 158 (1898). Also: Bowman v. Patrick, 32 Fed. 368 (C. C. E. D. Mo. 1887); McKie v. State, 165 Ga. 210, 140 S. E. 625 (1927); Wilkerson v. State, 91 Ga. 729, 17 S. E. 990 (1893); Scott v. Commonwealth, 94 Ky. 511, 23 S. W. 219 (1893); Selden v. State, 74 Wis. 271, 42 N. W. 218 (1889).

observed: "To fairly carry out the real purpose of the rule, it must be held that privileged communications are, in and of themselves, incompetent, regardless of the mere manner in which it is sought to put them in evidence . . . . The admissibility of the communication . . . is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself."[8] The same reasoning should apply with greater force to communications between husband and wife, which are so necessary to maintain the stability of the home and to encourage unrestrained disclosures between the spouses.

Even the Arkansas court has seen fit in the past to restrict the rule now applied in the principal case that the evidence is admissible if the communication falls under the control of a third party. Where a letter written by the husband was forcibly taken from a wife, the conclusion was reached that even though the letter was offered in evidence by a third person, since he had acquired it by force, the communication retained its privileged character.[9] It is difficult to understand wherein any difference in principle exists between a forcible taking of a letter from the person of the addressee and the interception of the letter by the jailor, as in the *Batchelor case*. In both situations a third party has gained control, without the authorization of either spouse, of what would otherwise have been a privileged communication.[10] If the policy which supports the privilege applies to one case it should apply with

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[8]Liggett v. Glenn 51 Fed. 381, 396 (C. C. A. 8th, 1892). In attorney-client cases, evidence which would otherwise be privileged may be rendered admissible by "waiver" of the privilege, effected by the client making a confidential disclosure to the attorney in the presence of a third party. The latter is then permitted to testify as to the information disclosed. Goddard v. Gardner, 28 Conn. 172 (1859). It might be argued that the accused in the principal case had waived his privilege by voluntarily putting the letter into the hands of a law enforcement officer who might naturally be interested in this conviction. However, since there was probably no other practicable means by which the prisoner could get a letter mailed, his action was reasonable, and to hold that it constituted a waiver of privilege would in effect deny him the right to communicate with his wife while in jail.

[9]Ward v. State, 70 Ark. 204, 66 S. W. 926 (1902).

[10]Hammons v. State, 73 Ark. 495, 84 S. W. 718, 720 (1905) the dissent argued that: "This court held in Ward v. State . . . that a letter written by a husband while in jail, to his wife and taken from her person, could not be used as evidence against him. The facts of that case were different from the facts here only in that the letter in this case was intercepted before it reached the wife and in the Ward case the letter was taken from the wife after it had reached her. I cannot see, however, that this difference alters the application of the principle or changes the rule . . . . In either case it is a communication made by the husband to the wife, and intended for her only, and by the policy of the law is privileged. It is unimportant and immaterial how the letter comes into the possession of the prosecution, so that it is not with the consent of the husband who wrote it and against whom it is sought to be used."

equal force in the other. The scope of the privilege has been further confused in at least one jurisdiction by the ruling that a confidential letter from husband to wife is admissible against the husband even though it had come into the possession of a third party by the voluntary relinquishment of the wife.[11] Dean Wigmore has pointed out the fallacy of such a view in advocating that the privilege prevents a third person from producing a confidential document of one spouse obtained by voluntary delivery of the other spouse; otherwise, collusion could nullify the privilege.[12] If the confidential character of a written communication between husband wife could be removed by the act of one of the parties alone, then the privilege rests on a very precarious and uncertain basis. To hold that all either spouse has to do is surrender the letter to a third party would provide an obvious means for evading the policy of the law.

Since the privilege given to confidential communications between husband and wife is intended to secure freedom of the mind of the communicating party, whether husband or wife, the privilege should belong exclusively to the addressor spouse, allowing that spouse to invoke or waive the privilege according to his best interests.[13] The fact that the letter finds its way into the hands of a third person should not affect the privileged status of the letter. However, Dean Wigmore has declared that the privilege applies only to the spouses themselves. Hence a third person overhearing is not prevented from testifying nor producing a document obtained surreptitiously.[14] This reference suggests the "eavesdropper" cases in which the courts regularly admit testimony from third persons who have overheard confidential conversations between husband and wife,[15] thus supporting the position of the principal decision.

This position seems to be that the policy of preserving marriage stability is adequately served so long as the spouse is not the actual divulger of confidential communication in the court.[16] It is a matter

[11]State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193 (1878).

[12]8 Wigmore, Evidence (3d ed. 1940) §2339.

[13]8 Wigmore, Evidence (3d ed. 1940) §2340.

[14]8 Wigmore, Evidence (3d ed. 1940) §2339.

[15] Hudson v. State, 153 Ga. 695, 113 S. E. 519 (1922); Gannon v. People, 127 Ill. 507, 21 N. E. 525 (1889); State Bank of Chatham v. Hutchinson, 62 Kan. 9, 61 Pac. 443 (1900); Commonwealth v. Everson, 123 Ky. 303, 96 S. W. 460 (1906).

[16]This interpretation is supported by Wigmore's rule that if spouses voluntarily pass confidential communications on to a third party, it cannot be admitted. In such case, it is in fact the spouse who is the divulger, though the instrumentality of a third party.

However, the two rules stated by Wigmore, while consistent on their face, could lead to very difficult problems for a court as to whether the third party ob-

of protecting the martial harmony by preventing either spouse from testifying in the role of informer against the other. However, this is an unduly narrow view of the basis of the privilege. An important aim of the policy involved could be the promotion of a better understanding between husband and wife by encouraging them to confide in each other in all matters of mutual concern.[17] If so, a rule which allows the confidences thus expressed to be spread before the public by a third party, who has in some way gained knowledge of them, defeats the policy of the privilege, for such a rule serves a warning on all married persons that any confidential communications can be made only under the threat of later divulgence.

Further, the view of the principal case allowing a third party to produce the surreptitiously obtained communication, would set a premium upon theft, fraud, trickery or other artifice to gain possession of a man's letters to his wife. Under such a rule the admissibility in evidence of a husband's letter to his wife will be determined by the vigilance or the ability of the husband to follow the letter up and prevent its being acquired by a third party by some illegal means.[18] The application of mechanical rules as to control, who has control and how was it obtained, does little toward achieving the fundamental aim of protecting the family status.[19]

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tained the communication by his own devices or by the cooperation of a spouse. If the latter desired that the communication be used against the other party to the marriage, it would be a very simple matter for him or her to collude with a third party to set up an appearance of unauthorized acquisition of the communication by the third party so as to cover up an actual voluntary relinquishment of it. Thus, Wigmore's rule for admissibility through an independent third party will tend to defeat his rule against admissibility through voluntary disclosure by the spouse to a colluding third party.

[17]This basis of the privilege is well stated in People v. Hayes, 140 N. Y. 484, 495, 35 N. E. 951, 954 (1894): "The rule which protects confidential communications of this nature was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife, which is the strongest guaranty of a happy marriage . . . .The general evil of infusing reserve and dissimulation between parties occupying such relation to each other would be too great a price to pay for the chance of obtaining and establishing truth in regard to some matter under legal investigation." However, the court permitted the communications in question to be admitted because the defendant, the recepient of the communication, had given the letters to a third party so that they were no longer confidential as to him.

[18]E. g., State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193 (1878).

[19]In the Batchelor case the parties separated after the alleged rape, but the opinion does not state whether the parties remained separated to the time of the communication. If they were separated at the time, it could be argued that the communication was properly admitted because the family relationship no longer existed to be

FEDERAL PROCEDURE—DETERMINATION OF CITIZENSHIP OF MULTISTATE CORPORATION FOR PURPOSES OF DIVERSITY JURISDICTION. [Federal]

A corporation is deemed to be a citizen of the state of its incorporation for purposes of diversity jurisdiction of the federal courts.[1] This status results from the principle that an action in the federal courts by or against a corporation is an action by or against the members of the corporation,[2] and from the rule that it will be conclusively presumed that all members of a corporation are citizens of the state under whose laws the corporation was created.[3]

Serviceable though this fiction[4] of corporate status may be in solving the problem of diversity jurisdiction as regards a corporation created under the laws of one state,[5] it aids little in the cases of corporations doing business by authority of, or incorporated under, the laws

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protected. 8 Wigmore, Evidence (3d ed. 1940) §2335; Holyoke v. Holyoke's Estate, 110 Me. 469, 87 Atl. 40 (1913) (where parties were legally separated). Likewise it might be argued that the atrocious act of the defendant had so destroyed the family relationship as to prevent him from invoking the privilege because there no longer was a family relationship to protect.

[1]Railway Company v. Whitton's Administrator, 13 Wall. 270, 20 L. ed. 571 (1871); Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86 (1868); Ohio and Mississippi Railroad Company v. Wheeler, 1 Black 286 ,17 L. ed. 130 (1861); Rojas-Adam Corporation of Delaware v. Young, 13 F. (2d) 988 (C. C. A. 5th, 1926).

[2]Ohio and Mississippi Railroad Co. v. Wheeler, 1 Black 286, 17 L. ed. 130 (1861).

[3]St. Louis and San Francisco Railway Co. v. James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802 (1896); Muller v. Dows, 94 U. S. 444, 24 L. ed. 207 (1876); Ohio and Mississippi Railroad Co. v. Wheeler, 1 Black 286, 17 L. ed. 130 (1861).

[4]"Fictitious that personality [of a corporation] may be, in the sense that the fact the corporation is composed of a plurality of individuals, themselves legal persons, is disregarded, but 'it is a fiction created by law with intent that it should be acted on as if true.'" Puerto Rico v. Russell & Co., 288 U. S. 476, 479, 53 S. Ct. 447, 448, 77 L. ed. 903, 907 (1933). It was said in Muller v. Dows, 94 U. S. 444, 445, 24 L. ed. 207, 207 (1876) that acorporation cannot be a citizen of any state in the sense in which that word is used in the Constitution.

[5]The product of a series of decisions beginning with Bank of U. S. v. Deveaux, 5 Cranch 61, 3 L. ed. 38 (1809), this fictional corporate status handily circumvents the result of the more logical—if less expeditious—application of the requirement of Strawbridge v. Curtiss, 3 Cranch 267, 2 L. ed. 435 (1806), that in the event of joint plaintiffs and joint defendants, each party-plaintiff must diverse to each party-defendant to establish diversity jurisdiction in the federal courts. Also, the general rule of "deeming" a corporation a citizen, unlike a decision that a corporation *is* a citizen, will not "embarrass both the States and the Federal Government in dealing with corporate problems." See 1 Moore, Federal Practice (1938) 491. After the difficulty encountered from the rule in Commercial and Railroad Bank of Vicksburg v. Slocumb, Richards, and Co., 14 Pet. 60, 10 L. ed. 354 (1840), the Court realized that a strict application of the rule of Strawbridge v. Curtiss would not be feasible in dealing with suits by or against corporations, and the fictional presumption was the result. A history of the development of the doctrine of indisputable citizenship is to be found in St. Louis and San Francisco Railway Co. v. James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802 (1896).

of more than one state.[6] When a corporation, incorporated in one state, carries on business in another state "by virtue of a license, permission, or authority, granted by the laws of the latter state to act in that state under its charter from the former state,"[7] no new corporation exists in the licensing state for purposes of diversity jurisdiction.[8] However, when the corporation carries on business in the second state by virtue of having been created a corporation under the laws of the second state, a new corporation exists for diversity purposes.[9] It is a question of interpretation, to be decided by the federal courts,[10] whether the legislation of the second state has granted authority to act therein or has created a new corporation.[11]

Even if it is found that a domestic corporation has been created under the laws of the second state, the question remains as to whether the status as a domestic corporation in the second state has been accepted voluntarily or only "under compulsion."[12] If it is found that the

[6]See Frankfurter, Distribution of Judicial Power Between United States and State Courts (1928) 13 Corn. L. Q. 499, 523; Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49, 90.

[7]Martin's Administrator v. Baltimore and Ohio Railroad Co., 151 U. S. 637, 677, 14 S. Ct. 533, 535, 38 L. ed. 311, 313 (1894).

[8]Martin's Administrator v. Baltimore and Ohio Railroad Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311 (1894); Railroad Company v. Koontz, 104 U. S. 5, 26 L. ed. 643 (1881).

[9]Memphis and Charleston Railroad Co. v. Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518 (1883); Petersborough R. R. v. Boston & M. R. R., 239 Fed. 97 (C. C. A. 1st, 1917); Missouri Pac. Ry. Co. v. Meeh, 69 Fed. 753 (C. C. A. 8th, 1895); Goodwin v. New York, N. H. & H. R. Co., 124 Fed. 358 (D. C. Mass. 1903).

[10]Railroad Company v. Koontz, 104 U. S. 5, 12, 26 L. ed. 643, 645 (1881), it was said: "With a long line of authorities in this court to the same effect before us, we cannot hesitate to say, with all due respect for the Court of Appeals of Virginia, that the Maryland corporation . . . did not make itself a corporation of Virginia . . . ." The Virginia court had said earlier that the effect of the Virginia Enabling Act was to make the corporation of Virginia as to its road in Virginia. See Baltimore & Ohio R. R. Co. v. Gallahue's Adm'rs, 12 Gratt. 655, 659 (Va. 1855).

". . . the Supreme Court has held that an organization may for some purposes be incorporated in a given state, and yet may not be a corporation of that state for purposes of [diversity] jurisdiction." Goodwin v. New York, N. H. & H. R. Co., 124 Fed. 358, 359 (C. C. D. Mass. 1903).

[11]Martin's Administrator v. Baltimore and Ohio Railroad Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311 (1894); Goodlett v. Louisville & Nashville Railroad, 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 1230 (1887); Memphis & Charleston Railroad Co. v. Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. Ed. 711 (1882).

[12]This distinction was first announced by Justice Holmes, in Patch v. Wabash Railroad Co. 207 U. S. 277, 283, 28 S. Ct. 80, 82, 52 L. ed. 204, 208 (1907), when he distinguished the facts in the Patch case from those in St. Louis and San Francisco Railway Co. v. James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802 (1896) and Southern Railway Co. v. Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078 (1903) on the basis that there was compulsory incorporation in the second state in those cases, as opposed to the voluntary incorporation which he found in the Patch case. The Court in

acceptance of the charter was voluntary, the corporation is deemed to be a citizen of the second state;[13] but if the acceptance was under compulsion, no new corporation exists for diversity purposes.[14] It has been said that this distinction is controlling whether the corporation is a plaintiff or a defendant.[15]

When it has been decided that a corporation has voluntarily accepted incorporation in a state other than the state of the original incorporation, the principle that the corporation is considered a citizen only of the state of suit is applied.[16] In accordance with this principle,

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the Allison case had said, on the basis of the James decision, that the chronological order of incorporation is determinative: The corporation is deemed a citizen of the state of original incorporation. Did "compulsory" incorporation in the second state depend, not upon acts at the time of incorportation and acceptance of the charter, but rather upon the pleadings? See St. Louis and San Francisco Railway Co. v. James, 161 U. S. 545, 556, 16 S. Ct. 621, 629, 40 L. ed 802, 809 (1896): "The [corporate] defendant was not content to leave the question [its citizenship] to be decided by the plaintiff's allegations, but pleaded that it was in law a corporation of the State of Missouri, and that, therefore, an action could not be maintained against it, in the Federal court, by a citizen of that State. In other words, the defendant company claimed that, while it had voluntarily subjected itself to the laws of Arkansas, as interpreted and enforced by the courts of that State, it still remained a corporation of the State of Missouri, disabled from suing or being sued by a citizen of that State in a Federal court, and that such disability was not and could not be removed by state legislation." The pleadings certainly do not determine today. See Town of Bethel v. Atlantic Coast Line R. Co., 81 F. (2d) 60 (C. C. A. 4th, 1936).

[13]Patch v. Wabash Railroad Co., 207 U. S. 277, 28 S. Ct. 80, 52 L. ed. 204 (1907).

[14]St. Louis and San Francisco Railway Co. v. James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802 (1896). At least this is the interpretation given the James case since the Patch decision. See Town of Bethel v. Atlantic Coast Line R. Co., 81 F. (2d) 60, 65 (C. C. A. 4th, 1936); and Geoffroy v. New York, N. H. & H. R. Co., 13 F. (2d) 947, 948 (D. C. R. I. 1926).

[15]For a full treatment of the rule, see Town of Bethel v. Atlantic Coast Line R. Co., 81 F. (2d) 60 (C. C. A. 4th, 1936).

[16]This theory that the federal courts, either on questions of removal or original jurisdiction, would recognize only the incorporation of the state in which the court is located seems the general principle underlying the cases since the case of The Ohio and Mississippi Railroad Co. v. Wheeler, 1 Black 286, 17 L. ed. 130 (1861). This case decided that a federal court in Indiana did not have original jurisdiction when the plaintiff declared as a corporation chartered by Ohio and Indiana, and the defendant was a citizen of Indiana. The Court showed that while there was one operating company, there were two legal entities, one created by Ohio, and the other by Indiana. The declaration was thus tantamount to showing a joinder of two plaintiffs, one of which was not diverse to the defendant. The rule of Strawbridge v. Curtiss would therefore defeat diversity jurisdiction. Railway Company v. Whitton's Administrator, 13 Wall. 270, L. ed. 571 (1871), affirmed the theory and decided that a federal court in Wisconsin had jurisdiction over an action in which the plaintiff was a citizen of Illinois and the defendant corporation was incorporated in Illinois, Wisconsin, and Michigan. "In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not *there* a corporation or a citizen of any other State. Being there sued it can only be brought into court as a citizen of that State. whatever its

it has been held that in an action brought against the multistate corporation by a citizen of one of the states of incorporation, in a federal court of another state of incorporation, the federal court has jurisdiction if the jurisdictional amount is satisfied.[17] The principle has been followed also in decisions holding that in an action brought against the multistate corporation by a citizen of one of the states of incorporation in a federal court of the plaintiff's own state, the federal court does not have jurisdiction.[18] Similarly, in an action brought against the corporation by a citizen of one of the states of incorporation in a state court of his own state, the right of removal to the federal courts by the corporation does not exist.[19]

It has been urged that to uphold diversity jurisdiction in the situation in which the corporation is sued in a federal court in a state of incorporation other than that of the plaintiff in effect ignores the corporation's additional citizenship which is identical with the plaintiff's. Commenting upon this argument, in *Lake Shore & M. S. Ry. Co. v. Eder*[20] a lower federal court said that a corporation incorporated in more than one state is not considered an entity for all purposes, and that a court will observe only the citizenship of the state of suit when a question of diversity jurisdiction arises since the corporation exists, so far as that court in concerned, only by virtue of the laws of that state.[21]

Generally, the principle that a corporation is considered a citizen only of the state of suit applies in cases in which the corporation is plaintiff, in spite of the Supreme Court's inconsistent decision in *Nashua & Lowell Railroad Corp. v. Boston & Lowell Railroad Corp.*,[22] that a corporation of both New Hampshire and Massachusetts could sue a Massachusetts defendant in the federal courts in Massachusetts. This result was said to be necessary since the Massachusetts defendant could have sued the multistate corporate plaintiff in New Hamp-

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status or citizenship may be elsewhere." 13 Wall. 270, 283, 20 L. ed. 571, 576 (1871). The principle has been observed by a state court. See Chicago & N. W. Ry. Co. v. Auditor General, 53 Mich. 79, 18 N. W. 588 (1884).

[17]Muller v. Dows, 94 U. S. 444, 24 L. ed. 207 (1876).

[18]Geoffroy v. New York, New Haven & Hartford Railroad Co., 16 F. (2d) 1017 (C. C. A. 1st, 1927), aff'g 13 F. (2d) 947 (D. C. R. I. 1926); Petersborough R. R. v. Boston & M. R. R., 239 Fed. 97 (C. C. A. 1st, 1917); Missouri Pac. Ry. Co. v. Meeh, 69 Fed. 753 (C. C. A. 8th, 1895); Goodwin v. New York, N. H. & H. R. Co., 124 Fed. (C. C. D. Mass. 1903). *Contra:* Gavin v. Hudson & Manhattan R. Co., 185 F. (2d) 104 (C. A. 3d, 1950).

[19]Memphis and Charleston Railroad Co. v. Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518 (1883).

[20]174 Fed. 944 (C. C. A. 6th, 1909).

[21]174 Fed. 944, 945 (C. C. A. 6th, 1909).

[22]136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363 (1890).

shire in the federal courts.[23] In 1936, the Circuit Court of Appeals for the Fourth Circuit observed that the *Nashua* decision had not been followed and purported to distinguish it in *Town of Bethel v. Atlantic Coast Line R. Co.*,[24] a case in which certiorari was refused by the Supreme Court. It was there decided that a corporation incorporated in both North Carolina and Virginia could not maintain an action in the federal courts in North Carolina against a North Carolina defendant, even though the plaintiff had declared in its capacity as a Virginia corporation as the plaintiff in the *Nashua* case had declared in its capacity as a New Hampshire corporation.[25] The result in the *Bethel* case was based on the reasoning that the corporation became a citizen of North Carolina voluntarily for its own purposes, and therefore had no occasion to appeal to the federal courts for protection of its interest.[26] The court thought that there was no inconsistency in holding that the multistate corporation could not sue in the North Carolina federal court even though the North Carolina defendant could have sued the plaintiff in the federal courts in Virginia, since it could not be said of the North Carolina defendant that it became a citizen of another state voluntarily for its own purposes. Other decisions from the lower federal courts have not recognized the deviation from the general principle made by the *Nashua* case,[27] until the latest case to deal with the problem, *Gavin v. Hudson & Manhattan R. Co.*[28] In this case four citizens of the state of New Jersey brought an action in a federal district court in New Jersey against a corporation that was incorporated in both New Jersey and New York. The plaintiffs declared against the multiple incorporated defendant as a New York corporation, but the district court dismissed the action. On appeal, the court of appeals held that the district court had jurisdiction over the case. The problem of voluntary or compulsory incorporation was not before the court, and the corporate defendant was treated simply as a corporation of two states.[29] To the appellate court the question presented was one demanding merely a rule of certainty, and it was

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[23]136 U. S. 356 at 382, 10 S. Ct. 1004 at 1010, 34 L. ed. 363 at 370 (1890).

[24]81 F. (2d) 60 (C. C. A. 4th, 1936).

[25]*Cf.* Nashua & Lowell Railroad Corp. v. Boston & Lowell Railroad Corp., 136 U. S. 356 at 365, 10 S. Ct. 1004, 34 L. ed. 363 at 364 (1890) with Town of Bethel v. Atlantic Coast Line R. Co., 81 F. (2d) 60 (C. C. A. 4th, 1936).

[26]81 F. (2d) 60 at 69 (C. C. A. 4th, 1936). The court said of the Nashua case: ". . . it has not influenced the definite course which the courts have followed in considering suits against a corporation of two or more states."

[27]See Goodwin v. New York, N. H. & H. R. Co., 124 Fed. 358, 366 (C. C. D. Mass. 1903).

[28]185 F. (2d) 104 (C. A. 3d, 1950).

[29]185 F. (2d) 104, 107 (C. A. 3d, 1950).

reasoned that because the plaintiffs could have instituted the action successfully in a federal court in New York, they should be allowed to bring the action in a federal court in New Jersey. A rule requiring "useless ritual in instituting a suit away from home . . ."[30] should not be announced. The court purported to take a realistic approach that a corporation functions as one operating unit, no matter in how many states it has been chartered.[31]

It would appear that such a view omits a consideration of the basic purpose of diversity jurisdiction of the federal courts. This basis for federal jurisdiction was originally designed to protect the out-of-state party from the prejudice that he might receive at the hands of a state court of the home state of his adversary.[32] The New Jersey plaintiffs in the *Gavin* case could hardly be said to be the victims of provincial prejudice if they were to institute an action in the state courts of their own state. The court did not treat the question as one of venue, but proceeded on the assumption that the plaintiffs were entitled to avail themselves of the jurisdiction of the federal courts.[33]

The logical consequences of the *Gavin* decision would be to permit the multistate corporation to institute an action in the federal courts in one of the states of incorporation against a citizen of that state.[34] Also, since the traditional principle that a court will observe only the citizenship of the corporation of the state where suit is brought was dispensed with in the *Gavin* case, it might be possible for the multistate corporate defendant to remove to the federal courts an action brought against it in the state courts of a state of incorporation by a citizen of that state.[35] Thus, a corporation that voluntary consents to incorporation in a second state would be permitted access to the federal courts in cases involving disputes arising within the state in which the corporation has incorporated and chosen to do business. No reason is apparent for allowing the corporation the federal forum in such cases. There would be no more chance for local prejudice in a state court of the re-incorporating state than in a state court of the state of original incorporation. One authority has argued that diversity jurisdiction should not extend to corporations doing business across state lines

[30]185 F. (2d) 104, 107 (C. A. 3d, 1950).

[31]185 F. (2d) 104, 105 (C. A. 3d, 1950).

[32]See Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49 at 83.

[33]185 F. (2d) 104, 108 (C. A. 3d, 1950): "We think it goes to the legal right of a plaintiff to get into a United States Court in New Jersey."

[34]This would be contrary to the decision in the Bethel case.

[35]This would be contrary to the rule in the case of Memphis and Charleston Railroad Co. v. Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518 (1883).

because the recognition of such jurisdiction withdraws from the state courts the power to settle local disputes.[36] The consequences of the *Gavin* decision would extend these objections.

While the court's effort to clarify the rules in cases involving the multistate corporation are laudable, it would appear that the approach employed ignored the most important element in the entire field: a consideration of why federal courts exercise diversity jurisdiction in the first place.

Between the functional view of a corporation and its consequent expansion of federal jurisdiction expressed by the *Gavin* case, and the suggestion that diversity jurisdiction be withheld altogether from a corporation doing business across state lines, lies the middle course that rests upon the principle that a multistate corporation will be deemed a citizen only of the state where suit is brought. This middle course weaves through a tortuous maze of fictions and legislative intrepretations only to arrive at an archaic legal conception of the modern corporation.[37]

In view of the confusion by such decisions as those of the *Gavin* and *Nashua* cases, it seems that Congress should attempt to give a conclusive expression to the status of a modern corporation that operates across state lines. Such a declaration as to corporate citizenship could set up a positive directive to the federal courts to replace the present illogical presumption of corporate citizenship that has to be bent or circumvented to fit the particular demands of practicality as each court views them.

One such declaration was presented during the last session of Congress, in a proposal that Congress amend Title 28, United States Code, Section 1332[38] so that a corporation would be deemed a citizen of any state in which it is doing business.[39] This, of course, would limit diversity jurisdiction. However, in the view of those who maintain that a free flow of capital between different sections of the country depends upon the guaranty of a federal forum unfettered by local pre-

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[36]See Frankfurter, Distribution of Judicial Power Between the United States and State Courts (1928) 13 Corn. L. Q. 499 at 523; Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49 at 90.

[37]The principle is ultimately based on the theory that a corporation cannot migrate from the incorporating state. See the reasoning in Railway Company v. Whitton's Administrator, 13 Wall. 270 at 284, 20 L. ed. 571 at 576 (1871).

[38]This section grants original jurisdiction to the federal district courts over controversies between citizens of different states if the amount in controversy exceeds $3,000.

[39]1 United States Code Congressional and Administrative Service (1951) Index-Digest, 13.

judices against the out-of-state creditor and "foreign business" the proposal would be detrimental to national commerce.[40]

The report of the Committee on Jurisdiction and Venue of the Judicial Conference has recommended that the proposal not be adopted.[41] As a substitute measure, the Committee would have Congress amend Section 1332 of Title 28 by adding a subsection that would make a corporation a citizen of any state of incorporation and, in addition, a citizen of a state in which it was doing business and in which it had received over 50% of its gross income for the fiscal year preceding the commencement of the action, or for the fiscal year preceding the petition for removal if the action was begun in a state court[42] This proposal of the Committee would appear to have two effects: (1) It seemingly abandons the principle that a federal court will consider citizenship of the corporation only of the state of suit;[43] and (2) it would diminish diversity jurisdiction in some cases since it is possible for the corporation to be deemed a citizen of a state other than one of incorporation.

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[40]See Brown, The Jurisdiction of The Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa. L. Rev. 179, 188: ". . . it is common knowledge that interstate business is done very largely by corporations. Considered from the economic standpoint, a corporation is a device often valuable in small business but absolutely necessary in business operating on a large scale and over wide territory. It may be that we ought to discourage such business, but, if we are going to do so, we must submit to a great decrease, if not a practical cessation, in the development of the more remote parts of our country, and to a very considerable check on the volume of interstate business . . . . Corporations are certainly as subject to local and sectional prejudice as are individuals . . . ." But see Frankfurter, Distribution of Judicial Power Between The United States and State Courts (1928) 13 Corn. L. Q. 499, 522: "Such considerations [increase in western and southern development by local capital] no longer allow the easy assumption that in the west and in the south, state jurors and judges are economic Ishmaelites."

[41]Report of Committee on Jurisdiction and Venue of The Judicial Conference, March 12, 1951, p. 13: "The effect of this [the proposed amendment before the House] however, would be to deny to business corporations doing business over a wide territory the sort of protection which they need against local prejudice and the benefit of the salutary rules and practice of the Federal courts." The Report indicates that if the proposed amendment had been in effect in 1950, it would have meant that of the 13,124 diversity cases in the federal courts (including removal cases) in the fiscal year, 7, 520 (57%) could not have been maintained in the federal courts. Another 5% would have depended upon an interpretation of the phrase, "doing business." No figures were presented for the effect of the Committee's proposed amendment.

[42]Report of Committee on Jurisdiction and Venue of the Judicial Conference, March 12, 1951, Appendix B.

[43]It is to be noted that Judge John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit, was the Chairman of the Committee on Jurisdiction and Venue and also joined in the opinion in Town of Bethel v. Atlantic Coast Line R. Co., 81 F. (2d) 60 (C. C. A. 4th, 1936).

The Committee's proposed measure is a compromise, but unlike the judicial compromises on the subject to date, it has simplicity to recommend it. The Committee has considered the primary question of the extent to which the modern corporation that operates away from home needs the federal courts, and the proposal provides a logical answer to that question.

JOHN C. CALHOUN

INSURANCE—ESTOPPEL OF LIABILITY INSURER TO DENY LIABILITY UNDER POLICY AFTER DEFENDING ACTION AGAINST INSURED. [Virginia]

When a liability insurer defends an action by the injured person against the insured, in the absence of notice of intent to disclaim or of a non-waiver agreement, the insurer is generally thereafter precluded, or "estopped," as against the insured to deny liability under the policy.[1] The basis of the rule is said to be that the assumption of the defense is prejudicial to the right of the insured to conduct his own defense.[2] In those jurisdictions which strictly demand the elements of estoppel for the preclusion of the insurer to deny liability, a presumption of prejudice to the insured based on the insurer's having defended is rebuttable by a showing that there was, in fact, no prejudice.[3] Other decisions, however, make this presumption conclusive.[4] It is sometimes reasoned that when the insurer defends the action with full knowledge of the facts he "waives" his right to disclaim liability, but it is to be noted that even when the term "waiver" is used the courts generally require prejudice to the insured. [5] Thus, it would seem that equitable estoppel, whether based upon the conclusive presumption or upon

[1]Atlantic Lighterage Corp. v. Continental Ins. Co., 75 F. (2d) 288 (C. C. A. 2d, 1935); Meyers v. Continental Casualty Co.. 12 F. (2d) 52 (C. C. A. 8th, 1926); Oehme v. Johnson, 181 Minn. 138, 231 N. W. 817, 81 A. L. R. 1308 (1930); Ford Hospital v. Fidelity and Casualty Co., 106 Neb. 311, 183 N. W. 656 (1921); Caiola v. Aetna Life Ins. Co., 13 N. J. Misc. 845, 181 Atl. 524 (1935). Cases collected in Note (1932) 81 A. L. R. 1326.

[2]Myers v. Continental Casualty Co., 223 Mo. App. 781, 22 S. W. (2d) 867 (1929). See Malley v. American Idem. Corp., 297 Pa. 216, 146 Atl. 571, 573 ,1929).

[3]Sweeney v. Frew, 318 Mass. 595, 63 N. E. (2d) 350 (1945); Lunt v. Aetna Life Ins. Co., 261 Mass. 469, 159 N. E. 461 (1928). Cases collected in Note (1932) 81 A. L. R. 1361.

[4]Snedker v. Derby Oil Co., 164 Kan. 640, 192 P. (2d) 135 (1948); Royle Mining Co. v. Fidelity and Casualty Co., 161 Mo. App. 185, 142 S. W. 438 (1912). Cases collected in Note (1932) 81 A. L. R. 1358.

[5]McDanels v. General Ins. Co. of America, 1 Cal. App. (2d) 454, 36 P. (2d) 829 (1934); Salonen v. Paanenen, 320 Mass. 568, 71 N. E. (2d) 227 (1947).

the proof of prejudice, rather than "waiver," is the essential consideration in applying the rule.[6]

In a case of first impression, *Maryland Casualty Co. v. Aetna Casualty and Surety Co.*,[7] The Virginia Supreme Court of Appeals was recently called upon to apply the doctrine of estoppel out of its usual context to a controversy between the insurers of the same risk. An employer was covered by a general liability policy issued by Aetna, and by a standard automobile policy issued by Maryland. Attached to the latter policy was a non-ownership endorsement stipulating that it was "excess insurance over any other valid and collectible insurance available to the insured." An employee of the insured, while driving his own car in the service of the insured, struck a pedestrian. The employer notified the local insurance agent, who was the mutual agent for both companies and had written both policies. The agent notified Maryland, and investigations of the accident and an attempt to settle with the injured party were carried out by that company. Shortly before the trial of the action between the injured person and the insured, Maryland, being informed by the agent that Aetna also covered the insured, asked Aetna to bear the expense of the trial. Aetna refused, and Maryland continued to defend, but a judgment was rendered in favor of the injured party. Thereafter, the two companies agreed that failure to appeal and payment of the judgment would not prejudice Maryland's position, and that the respective positions of the companies were to be preserved as they were prior to the satisfaction of the judgment. In the principal case, Maryland sued Aetna for the amount of the judgment, on the theory that under the Aetna policy the employer was protected against any loss resulting from the accident, and that Maryland was liable only in the event that there was no other valid and collectible insurance covering such liability.

The trial court denied recovery, and this result was sustained by the sharply divided Supreme Court of Appeals. The court's opinion, representing the view of only two justices, maintained that because Maryland assumed defense of the action, construed its policy to cover the accident, and so informed the Virginia Commissioner of Motor Vehicles,[8] it is now estopped to deny liability. Thus, estoppel was ap-

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[6]See Note (1950) 2 Stanford L. Rev. 383.

[7]191 Va. 225, 60 S. E. (2d) 876 (1950).

[8]7 Va. Code Ann. (Michie, 1950) § 46-346 requires proof of financial responsibility of person involved in an accident which has resulted in damage of $50.00 or more. The penalty for not supplying such proof or security is suspension of the person's operating license and registration certificate. In the instant case, Maryland had notified the Commissioner that its policy covered the employee, and the employee's license had therefore not been suspended.

plied in favor of Aetna when reliance by and detriment to the Commissioner, the employee-driver, and the insured are to be inferred from the facts.

Two concurring justices based their approach on the factor of notice. A condition precedent to Aetna's coverage was notification by the insured, and since the view was taken that when the insured dealt with the agent of both companies it dealt with him as agent of Maryland, no notice was given to Aetna. Therefore, Aetna's policy did not cover the accident, and there was no "valid and collectible insurance" other than Maryland's.[9]

A dissent by two justices answered the concurring opinion by saying that when the companies' mutual agent made the error of not forwarding notice to Aetna, he was acting as the agent of Aetna, not as the agent of Maryland. Thus, notice had been given Aetna, and the condition precedent of its policy had been fulfilled.[10] As to the question of estoppel, the dissent pointed out that the reliance by the driver, by the employer, and by the Commissioner was not material here. "Were this a suit by the [employer or employee] against Maryland Casualty Company, these might be sufficient reasons for holding that Maryland was estopped to deny coverage for the claim,"[11]but this being a suit between two insurance companies, Aetna must show detriment or prejudice to itself by reason of its reliance upon the acts of Maryland.

In Virginia, as elsewhere, the elements of equitable estoppel are essentially misrepresentation by words or conduct of a material fact that leads another to rely reasonably upon such misrepresentations to his detriment.[12] When the person who would take advantage of the rule has knowledge of the true state of facts, the estoppel will not operate.[13] And actual knowledge is not required; it is enough that the means of knowledge were equally available to both parties, [14] or that the person attempting to prove equitable estoppel in his favor was bound to know the true facts.[15]

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[9]See 191 Va. 225, 235, 60 S. E. (2d) 876, 881 (1950).

[10]See 191 Va. 225, 239, 60 S. E. (2d) 876, 882 (1950).

[11]191 Va. 225, 239, 60 S. E. (2d) 876, 882 (1950).

[12]Albemarle County v. Massey, 183 Va. 310, 32 S. E. (2d) 228 (1944); Heath v. Valentine, 177 Va. 731, 15 S. E. (2d) 98 (1941). It is to be noted that in the instant case, the opinion cited two Virginia cases for substantially the same definition of estoppel. See 191 Va. 225, 234, 60 S. E. (2d) 876, 880 (1950).

[13]Smith v. Plaster, 151 Va. 252, 144 S. E. 417 (1928); Cary v. Northwestern Mutual Life Ins. Co., 127 Va. 236, 103 S. E. 580 (1920); Luck Construction Co. v. Russell County, 115 Va. 335, 79 S. E. 393 (1913); Southwest Virginia Mineral Land Co. v. Chase, 95 Va. 50, 27 S. E. 826 (1897).

[14]Jameson v. Rixey, 94 Va. 342, 26 S. E. 861 (1897).

[15]Newport News & O. P. Ry. Co. v. Lake, 101 Va. 334, 43 S. E. 566 (1903).

The burden of proof is upon the misled party to show the estoppel by affirmative evidence, [16] but in the principal case it does not appear that Aetna could sufficiently prove either the requisite prejudice or lack of knowledge of the true situation. Maryland's conduct of the proceedings apparently was prudent and conscientious. The law firm that generally represented Aetna was retained by Maryland as local counsel in the litigation and doubtless would have been employed by Aetna had Aetna defended the action. "Everyone knows that as a practical matter these lawyers would have defended the case in the same manner, regardless of which insurance company it was representing."[17] There was no showing that Maryland's investigation and defense were not thorough, and no real possibility of settlement out of court existed.[18]

The general rule that the insurer is estopped after defending an action against the insured has been extended to work in favor of a third person in at least two other instances in other jurisdictions. In both situations, however, there were especial considerations which dictated that the insurer not be allowed to deny its liability. In *Patterson v. Aden*,[19] the Minnesota court held that after the indemnity insurer had defended an action against the insured, the injured third party could reach the insurer directly in garnishment proceedings, and the insurer was estopped to deny coverage against the injured person. The amount of the judgment in the action against the insured fixed the liability of the insurer. This rule made it possible for the injured party to collect the judgment from the indemnity insurer even when the insured was insolvent and had not paid, and even when the policy contained a "no-action" clause stipulating that the insurer would not be liable unless the insured had actually paid a judgment. Obviously, there is a cogent reason for the adoption of such a rule in the case in which the indemnity insurer could escape paying the judgment when the insured was insolvent and had not actually paid the injured party.[20] Even

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[16]Heath v. Valentine, 177 Va. 731, 15 S. E. (2d) 98 (1941); Newport News & O. P. Ry. Co. v. Lake, 101 Va. 334, 43 S. E. 566 (1903).

[17]Maryland Casualty Co. v. Aetna Casualty and Surety Co., 191 Va. 225, 60 S. E. (2d) 876, 883 (1950).

[18]Immediately upon receipt of the notification of the accident from the agent, a claims investigator for Maryland came to Danville, the scene of the accident, and investigated the facts and attempted a settlement with the injured party out of court. The attempt at settlement was unsuccessful, and the injured party brought suit for $25,000. The judgment in the suit against the insured was $3,000.

[19]119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 (1912).

[20]See Vance, Insurance (2d ed. 1930) §178.

though other courts [21] have adopted the rule of the *Patterson* case, it has been criticized [22] and called the minority view.[23]

In the case of *Miller v. Motor Club Insurance Co.*,[24] it was held that an insurer who had defended an action against its insured and his employee could not buy up the judgment of the injured party and then, as the assignee of the judgment, try to reach another insurer who had covered the employee's father with a policy that might have covered the employee. The court allowed the defendant-insurer to be substituted in the position of the employee in order that the estoppel established by the plaintiff-insurer's defense of the action would operate in favor of the defendant. [25] Such a result was necessary to avoid the unfairness of permitting one insurance company to defend an action against its insured, become the assignee of the judgment by a fictitious name, and then bring an action against the insurer of the party who was not involved in the accident, when the latter insurer had had no opportunity to intervene in the defense.

In the principal case, though no direct notice of the claim was received at the Aetna Company offices, yet in legal contemplation knowledge could be imputed to it. The general rule that the knowledge of an agent acquired in the scope of his agency is imputed to his principal is well established. [26] Where the agent represents two principals with their consent, and the principals are interested in the same subject matter, and the agent is under a duty to communicate to each, both of the principals are bound by the agent's knowledge, in the absence of adverse interest on the part of the agent.[27]

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[21]American Indemnity Co. v. Fellbaum, 225 S. W. 873 (Tex. Civ. App. 1920, aff'd 114 Tex. 127, 263 S. W. 908, 37 A. L. R. 633 (1924). See Brassil v. Maryland Casualty Co., 210 N. Y. 235, 104 N. E. 622, L. R. A. 1915A 629 (1914). The rule is well settled in Minnesota. Powers v. Wilson, 139 Minn. 309, 166 N. W. 401 (1918).

[22]See Elliott v. Belt Automobile Ass'n, 87 Fla. 545, 100 So. 797, 799 (1924); Fidelity and Casualty Co. v. Martin, 163 Ky. 12, 173 S. W. 307, 310, L. R. A. 1917F 924, 927 (1915).

[23]Vance, Insurance (2d ed. 1930) 685.

[24]117 N. J. Law 480, 189 Atl. 636 (1937).

[25]Contra: Fidelity and Casualty Co. v. Martin, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924 (1915). The New Jersey court in the Miller case cited Fiorentino v. Adkins, 9 N. J. Misc. 446, 154 Atl. 429 (1931), which held that an insurer, after defending an action against the insured and his employee, could not sue the employee because of the rule that there is no right of contribution among joint tort-feasors.

[26]New York Life Ins. Co. v. Chapman, 132 F. (2d) 688 (C. C. A. 8th, 1943), cert. denied 319 U. S. 749, 63 S. Ct. 1158, 87 L. ed. 1704 (1943); Sullivan v. Alabama Power Co., 246 Ala. 262, 20 S. (2d) 224 (1944); Leclerc v. Prudential Ins. Co. of America, 93 N. H. 234, 39 Atl. (2d) 736 (1944); Hurley v. John Hancock Mutual Life Ins. Co., 247 App. Div. 547, 288 N. Y. Supp. 199 (1936).

[27]Sullivan County R. R. v. Connecticut River Lumber Co., 76 Conn. 464, 57 Atl.

Thus, from Aetna's admission that its policy covered the accident, the mutual agent was under a duty to notify Aetna when the accident occurred. The agent received notice as the writer of both policies, and since there was no indication of adverse interest or collusion on his part as agent of both companies, Aetna should be bound by the knowledge of the agent. The case for estoppel is thereby further weakened inasmuch as Aetna could not have been misled by Maryland's conduct,[28] and the two concurring justices' view of the issue of notice, which was decisive to them, becomes doubtful.

Because "waiver" is the voluntary relinquishment of a known right,[29] the decision could hardly have been placed on that basis in view of the fact that Maryland was not cognizant of the other insurance when it committed itself to a defense of the action. When it did become aware of Aetna's coverage, it immediately informed Aetna and demanded that Aetna bear the costs of the defense.

It would appear that Aetna was unjustly enriched at the expense of Maryland by reason of the fact that Maryland paid a judgment that Aetna, by its own admission, had contracted to pay. It is submitted that the decision is unfortunate, because it would seem to extend the general rule of estoppel of the insurer who defended an action against the insured to a case where neither the essential bases of estoppel, nor the requirement for waiver, nor the compelling necessities of policy were present.

JOHN C. CALHOUN

LABOR LAW—AVAILABILITY FOR WORK AS PREREQUISITE FOR BENEFITS UNDER UNEMPLOYMENT COMPENSATION ACTS. [Virginia]

Unemployment insurance legislation has been enacted in the interest of public welfare for the purpose of providing a limited income for workers temporarily unemployed due to adverse business and industrial conditions.[1] Since this legislation was not designed to provide

287, 291 (1904); 2 Mecham, Agency (2d ed. 1914) §1837. Cf. Giraud Fire and Marine Ins. Co. v. Gunn, 221 Ala. 654, 130 So. 180 (1930); Johnson v. Blumer, 183 Wis. 369, 198 N. W. 277 (1924).

[28]Jameson v. Rixey, 94 Va. 342, 26 S. E. 861 (1897). It may be argued that the presence of Aetna's agent at the investigation of the accident gave Aetna an equal opportunity to know the facts.

[29]Albemarle County v. Massey, 183 Va. 310, 32 S. E. (2d) 228 (1944); Covington Virginian, Inc. v. Woods, 182 Va. 538, 29 S. E. (2d) 406 (1944).

[1]See Lindley v. Murphy, 387 Ill. 506, 56 N. E. (2d) 832, 835 (1944); Krisman v. Unemployment Compensation Commission, 351 Mo. 18, 171 S. W. (2d) 575, 578 (1943);

economic security for those willfully idle or physically disabled, it seeks to limit the payment of benefits to persons who want employment, not those who want unemployment—that is, those whose record indicates they are normally attached to some labor force, and have in the past secured a reasonable amount of work.[2] However, the unconditional payment of benefits to an individual while he is idle may seriously weaken his willingness to provide for himself through employment. Thus, in order to keep the period of idleness at a minimum and to restrict payments to those involuntarily unemployed, certain limitations are imposed which must be complied with before the unemployed person is eligible to receive benefits. One such safeguard found in all the statutes is the provision in some form that the unemployed individual must be "available for work."[3]The eligibility of many claims has depended on the interpretation given this provision in the statutes, and there has been a notable lack of uniformity in the decisions reached.[4]

This issue was before the Virginia Supreme Court of Appeals in the recent case of *Unemployment Compensation Commission v. Tomko*,[5] involving the claim of several hundred miners to receive unemployment benefits. A decrease in the demand for coal had necessitated a reduction in the number of workers at some of the mines and a temporary shutdown at others. Claimants were thus out of work because of economic conditions over which they had no control. While there was no dispute as to why these miners were unemployed, the Unemployment Compensation Commission found as a matter of fact that the men were willing to work in the mines only three days a week, pursuant

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Department of Labor and Industry v. New Enterprise Rural Electric Co-op., Inc., 352 Pa. 413, 43 A. (2d) 90, 92 (1945). The Federal Social Security Act which contemplated a coordinated system of state and federal unemployment insurance was passed in 1935, and was sufficient inducement to cause all the state legislatures to set up the state part of the system within a period of two years. For a full account of the enactment of Unemployment Compensation legislation see Witte, Development of Unemployment Compensation (1945) 55 Yale L. J. 21.

[2]See Rivers v. Director of Division of Employment Security, 323 Mass. 339, 82 N. E. (2d) 1, 2 (1948); W. H. H. Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, 24 1936).

[3]Freeman, Able to Work and Available for Work (1945) 55 Yale L. J. 123, 124. The New Hampshire Court said recently that "the purpose of the availability requirement is to test the claimant's attachment to the labor market. It is to determine if he is unemployed because of lack of suitable job opportunities or for some other reason such as physical incapacity or unwillingness to work." Roukey v. Riley, 77 A. (2d) 30, 31 (N. H. 1950).

[4]Although the exact wording of the availability requirement is not identical in all the statutes, the lack of uniformity in the decisions reached seems to be the result of the different meanings the general term "available for work" has acquired through judicial and administrative interpretation.

[5]192 Va. 463, 65 S. E. (2d) 524 (1951).

to a directive issued by the International Union, United Mine Workers of America, of which they were members. Therefore, the Commission denied claimants benefits on the ground that since the miners were only willing to work a restricted period of three days per week, they were not "available for work" under the terms of the Virginia statute.[6] On appeal to the appropriate state circuit courts, the Commission's findings were sustained in two instances, but were reversed in three others on the theory that the unemployment was due to a shortage of work at the mines, and not to the lack of availability of the miners for work. On further appeal, the Supreme Court of Appeals unanimously affirmed the ruling of the Commission, by reasoning that one "who undertakes to limit or restrict his willingness to work to certain hours, types of work, or conditions, not usual and customary in the trade, is not 'available for work' . . . . Here . . . these claimants, in obedience to the [union] directive, were willing to work only three days per week instead of five days per week, as is usual and customary in the industry."[7]

The court was of the opinion that the principal involved in the instant case was the same as considered by the Michigan Supreme Court in the case of *Ford Motor Co. v. Appeal Board of Michigan Unemployment Compensation Commission.*[8] There a woman was denied benefits because she was willing to accept employment only on the afternoon shift since it was necessary for her to be at home in the morning to get her two small sons off to school. It was ruled that "There is nothing in the [Michigan] statute to justify the conclusion that the legislature intended a claimant might limit his employment to certain hours of the day where the work he is qualified to perform is not likewise limited."[9] It is submitted that there is one substantial difference in the two cases which the Virginia court failed to consider. In the *Ford Motor Company* case the employee's self-imposed restriction itself could easily have been the reason for the continued unemployment. Since she could not be considered as a potential employee on but one of the three daily shifts, her usability to the Ford Motor Company was substantially limited, and therefore her chances of securing work were not as good as a person who was willing to accept employment

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[6]The availability requirement of the Virginia statute reads as follows: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . . (c) He is able to work, and is available for work." 9 Va. Code Ann. (Michie, 1950) §60-46.

[7]Unemployment Compensation Commission v. Tomko, 192 Va. 463, 468, 65 S. E. (2d) 524, 527 (1951).

[8]316 Mich. 468, 25 N. W. (2d) 586 (1947).

[9]Ford Motor Co. v. Appeal Board of Mich. Unemployment Compensation Commission, 316 Mich. 468, 25 N. W. (2d) 586, 588 (1947).

on any shift. In the *Tomko* case, however, the three day per week limitation would not have prevented the miners' working as much as three days per week if sufficient work had been available to require their services. Considering the fact that the regularly employed miners were only willing and ready to work three days per week, it might be argued that the union restriction was a "usual" and "customary" condition in the mining field at the particular time.[10]

The term "available for work" must be construed with reference to the general purpose of the Act, and should reflect the major function the system is expected to perform.[11] It has been suggested that economic factors, domestic circumstances, and working conditions are all possible variables which must be weighed in each individual case.[12] Yet, if the payment of benefits is to be a nondiscretionary method of providing benefits to the involuntarily unemployed who qualify under the Act, it is necessary to adopt board general principles as guideposts for determining when a person is or is not to be regarded as "available for work."

Logically there is little room for doubt that unemployment benefits should be denied to a person who is out on strike, is physically unable to work, is enrolled as a regular student in school, is of necessity devoting full time to caring for small children or attending a sick member of the family, or has consistently refused to accept suitable jobs offered him.[13] In such clear cut cases, claimant has effectively removed himself from the labor market and is unquestionably not an active job seeker. Of considerable more difficulty is the case involving limited availability where the claimant's willingness and readiness to accept employment

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[10]The Virginia court said that in addition to be unemployed, claimant "must be ready and willing to accept work without attaching to his willingness to work restrictions or conditions not usual or customary in the occupation, and this is so even though there be no work at hand or available to him." Unemployment Compensation Commission v. Tomko, 192 Va. 463, 469, 65 S. E. (2d) 524, 528 (1951).

[11]See Reger v. Administrator, Unemployment Compensation Act, 132 Conn.647, 46 A. (2d) 844, 845 (1946); Leonard v. Unemployment Compensation Board of Review, 148 Ohio 419, 75 N. E. (2d) 567, 569 (1947).

[12]Altman and Lewis, Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation (1944) 28 Minn. L. Rev. 387, 409, and 22 N. C. L. Rev. 189, 208. Also see Hunter v. Miller, 148 Neb. 402, 27 N. W. (2d) 638, 640 (1947); Leonard v. Unemployment Compensation Board of Review, 148 Ohio 419, 75 N. E. (2d) 567, 568 (1947); Jacobs v. Office of Unemployment Compensation and Placement, 27 Wash. (2d) 641, 179 P. (2d) 707, 713 (1947).

[13]Under such circumstances claimants have been denied benefits. Welch v. Review Board of Employment Security Division of Indiana, 115 Ind. App. 230, 58 N. E. (2d) 363 (1944); Wolpers v. Unemployment Compensation Commission, 353 Mo. 1067, 186 S. W. (2d) 440 (1945); Wasyluk v. Mack Mfg. Corporation, 4 N. J. Super. 559, 68 A. (2d) 264 (1949); Keen v. Texas Unemployment Compensation Commission, 148 S. W. (2d) 211 (Tex. Civ. App. 1941).

is subjected to certain voluntary or involuntary restrictions as to hours, location, type of work, or other conditions.[14]

Certainly a person can impose some restrictions upon his employability without detaching himself from the labor market. The term "available for work" must not require total, absolute availability in the sense of complete readiness to accept any work during any and all hours. One factor limiting the harshness of the term is the statutory provision disqualifying only those who refuse or are unwilling to accept *suitable* work—that is, employment which is substantially consistent with the unemployed's previous training, experience, and wage scale.[15] The problem of availability is thus essentially one of degree, and since the Act is clearly remedial, the rule requiring liberal construction in favor of the beneficiary would seem applicable.[16] Nevertheless, many courts have reasoned that the statutory requirement can be satisfied only by a willingness on the part of the idle worker to accept suitable work at all hours on any shift—that is, unrestricted availability for that type of work.[17] In the instant case the Virginia court indicated its adherence to this doctrine by saying that a claimant in order to receive benefits must "show that he has met the benefit eligibility conditions, which in this case is *unrestricted availability* ...."[18] Some courts have permitted a somewhat broader disbursement of benefits by adopting the rule that the availability requirement is satisfied when claimant is willing to accept all suitable work which he

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[14]See Altman and Lewis, Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation (1944) 28 Minn. L. Rev. 387, and 22 N. C. L. Rev. 189.

[15]If claimant refuses to apply for or accept work offered him, then question arises as to whether or not the rejected work was suitable. The Virginia statute reads: "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence." 9 Va. Code Ann. (Michie, 1950) §60-47.

[16]See Bliley Electric Co. v. Unemployment Compensation Board of Review, 158 Pa. Super. 548, 45 A. (2d) 898, 904 (1946); Unemployment Compensation Commission of Virginia v. Collins, 182 Va. 426, 438, 29 S. E. (2d) 388, 393 (1944).

[17]Bedwell v. Review Board of Indiana Employment Security Division, 88 N. E. (2d) 916 (Ind. App. 1949); Romiski v. Unemployment Compensation Board of Review, 169 Pa. Super. 106, 82 A. (2d) 565 (1951); Mills v. South Carolina Unemployment Compensation Commission, 204 S. C. 37, 28 S. E. (2d) 535 (1944). Also see Altman & Lewis, Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation (1944) 28 Minn. L. Rev. 387, and 22 N. C. L. Rev. 189.

[18]Unemployment Compensation Commission v. Tomko, 192 Va. 463, 468, 65 S. E. (2d) 524, 527 (1951). [Italics supplied].

does not have a good cause to reject,[19] and in at least one instance it was held the claimant was available for employment so long as he "is ready, willing and able to accept some substantial and suitable work . . . ."[20]

In the instant case the unemployed miners were willing to work the same number of hours per week in the mining industry that the regular miners in other areas were then working, and were evidently unrestrictively available for suitable work in other industries. Hence, the union order limiting members to a three-day work week did not impair their usability in the labor market, or lessen their chances of obtaining employment, and evidences no desire on the part of the claimants to remain unemployed. Under these circumstances it is difficult to believe the framers of the Virginia Act, by including the "available for work" provision as one of the requirements for benefits, had in mind the barring of such claims as were asserted by the unemployed Virginia miners.

This qualification in the Act has perhaps been more burdsome and complex than the legislators ever foresaw. A strict, rigid interpretation renders the system practically ineffectual in relieving the distress of the unemployed in many instances.[21] One solution would be the adoption by the court of the following suggested rule: "No limitations upon employability should be deemed to render a claimant unavailable for work unless the limitation is such as to show that the claimant is either unwilling or unable to accept a substantial amount of suitable work

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[19]Reger v. Administrator, Unemployment Compensation Act, 132 Conn. 647, 46 A. (2d) 844 (1946); Roukey v. Riley, 77 A. (2d) 30 (N. H. 1950); Leonard v. Unemployment Compensation Board of Review, 148 Ohio 419, 75 N. E. (2d) 567 (1947). For a meaning of the term "good cause," see Barclay White Co. v. Unemployment Compensation Board of Review, 356 Pa. 43, 50 A. (2d) 336, 340 (1947).

[20]Bliley Electric Co. v. Unemployment Compensation Board of Review, 158 Pa. Super. 548, 45 A. (2d) 898, 905 (1946). It has also been suggested, without clarification, that the test as to one's availability should be subjective rather than objective. See Reger v. Administration, Unemployment Compensation Act, 132 Conn. 647, 46 A. (2d) 844, 846 (1946). Also see Note (1948) 17 Fordham L. Rev. 150.

[21]"Statutory requirements of ability to work and availability for work are stated in such general terms that only by interpretation are they given meaning. Whether the protection which workers have in an unemployment compensation law is more than illusory depends on the character of such interpretations. Only if it is understood that an unemployment compensation law is a broad public measure, designed by the payment of benefits to check and ameliorate the effects of unemployment among workers who are able, willing, and ready to work will workers be assured the reasonable protection which the states have provided for them. To paraphrase a statement by Justice Cardozo, an unemployment compensation law *interpreted* in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more." Freeman, Able to Work and Available for Work (1945) 55 Yale L. J. 123, 134.

or unless it is such as to show that he is not substantially usable in the labor market which is available to him."[22]

The total availability requirement as adopted in the *Tomko* case may be sound from the standpoint of strict rules of statutory construction because the term "available" is not expressly qualified in the statute, but it breaks down when examined from the social and economic point of view. In view of the reluctance of courts in many jurisdictions to read exceptions into the statute, the legislatures should further clarify the term so as to prevent it from being applied in a manner which defeats the very purpose for which the Act was passed.

JAMES C. TURK

LABOR LAW—RIGHT OF EMPLOYER TO PROVIDE FOR SENIORITY RIGHTS FOR WORKERS REPLACING STRIKERS. [Federal]

Though the National Labor Relations Board has ruled that strikers returning from an "unfair labor practice" strike are entitled to reinstatement to their old jobs, even though new employees hired during the strike are thereby displaced,[1] the Supreme Court of the United States clearly implied in 1938 in *N. L. R. B. v. Mackay Radio and Telegraph Co.*[2] that no right to reinstatement existed after an "economic" strike, except insofar as reinstatement could be made *without* displacing men hired during the strike.

The principle of the *Mackay* case was recently extended by a federal Court of Appeals in *N. L. R. B. v. Potlatch Forests, Inc.*,[3] wherein it was decided that since an employer was not obligated to discharge "replacements" hired during the strike to provide jobs for returning strikers at the time the strike terminated, then the employer might further provide job security for the "replacements" during any future curtailment of operations by providing that former strikers should be laid off first. In the dispute which led to the litigation, all of Potlatch's 2,600 employees in the bargaining unit involved went out on strike for higher wages. During the strike some new employees were hired, and a large number of former strikers crossed the picket lines to return to work. The court refers to the members of this group

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[22]Altman and Lewis, Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation (1944) 28 Minn. L. Rev. 387, 412, and 22 N. C. L. Rev. 189, 211.

[1]Matter of Western Felt Works, 10 N. L. R. B. 407 (1938)

[2]304 U. S. 333 at 347, 58 S. Ct. 904 at 911, 82 L. ed. 1381 at 1391 (1938).

[3]189 F. (2d) 82 (C. A. 9th, 1951).

as "replacements," regardless of whether they were new workers or former strikers who crossed the picket line. When the strike was finally settled, the group of "replacements" totalled 1,750 men, but the employer reinstated all remaining strikers who returned to work within a specified 10-day period. On the first day after the strike was settled, the management secretly promulgated a "strike seniority policy," under which the employees were divided into two groups: the "replacements," who were either initially hired or returned to work during the strike, and the "strikers," who returned to work during the specified 10-day period after the strike. In the event of future curtailment in plant operations, all "strikers" were to be laid off before any of the "replacements," irrespective of seniority rights held before the strike. All employees retained their pre-strike seniority rights for all purposes other than layoffs.[4]

More than a year later Potlatch invoked the policy to justify the discharging of two former "strikers." The union filed its complaint with the Board, which decided that maintaining the policy was an unfair labor practice and issued a cease and desist order against Potlatch.[5] In a proceeding by the Board to enforce its order, the Court of Appeals for the Ninth Circuit pointed out that the charge against Potlatch was limited to Section 8 (a) (3) of the National Labor Relations Act, which provides that it "shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment . . . to *encourage or discourage membership in any labor organization* . . . ."[6] The Trial Examiner had found that Potlatch had

[4]Matter of Potlatch Forests, Inc., 87 N. L. R. B. 1193 at 1201 (1949). In his findings of fact, the Trial Examiner clearly states that the policy was not made known to the employees for some time, although the court failed to stress this fact or to question any of the facts as found by the Trial Examiner. The court did point out that the extra seniority rights need not have been used to induce "replacements" to work in order that the policy be justified. The court did not attempt to explain the employer's motive in secreting from returning strikers a condition of their reinstatement.

[5]Matter of Potlatch Forests, Inc., 87 N. L. R. B. 1193 (1949). This decision was in accord with three previous decisions by the Board. Matter of General Electric Co., 80 N. L. R. B. 510 (1948) held that "tolling" seniority rights of strikers during the period of a strike was an unfair labor practice. Matter of Precision Castings Co., Inc., 48 N. L. R. B. 870 (1943) held that an employer violated Section 8 (a) (1) of the Act by causing strikers' seniority to run from the time they returned to work after the strike. Matter of Paper, Calemson and Co., 26 N. L. R. B. 553 (1940), held that an employer committed an unfair labor practice when he notified strikers that they would lose seniority rights unless they crossed the picket lines to return to work. In all of these cases the employers obeyed the orders of the Board, and no actions for enforcement were brought in the courts.

[6]61 Stat. 140 (1947), 29 U. S. C. A. §158 (a) (3) (Supp. 1950). The problems presented by the Potlatch case grew out of portions of the National Labor Relations Act

not only violated Section 8 (a) (3), but also Section 8 (a) (1), which provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[7] Section 7 guarantees the so-called "right to strike" by providing that employees shall have the right to engage in concerted activities for the purpose of mutual aid and protection.[8] However, attorneys for the Board had admitted at the hearing before the Trial Examiner that Section 8 (a) (1) was involved only to the extent that the alleged violation of Section 8 (a) (3) would itself constitute a violation of the previous subsection. This may have been a tactical blunder on the part of the general counsel's office, since the court stresses the exact language of Section 8 (a) (3) in its opinion, and is careful to hold that the "strike seniority policy," though it may be said to "discriminate," does not discriminate so as to *discourage membership in any labor organization* within the purview of the Act. Whether the court would have found a violation of Sections 8 (a) (1) had the question been squarely presented, it is impossible to say. The "strike seniority policy" at most has only an indirect effect on *union membership,* but it is undeniable that the direct effect of the policy squarely falls on those who exercise their "right to strike" protected by Section 8 (a) (1).

In addition to the doubts cast upon the decision by the apparent applicability of Section 8 (a) (1), other considerations argue for a different result. The decision seems to run contrary to the doctrine that the employment relation is not severed by a strike. In earlier times a strike was thought to be a severance of employment;[9] however with the rise of organized labor the rule was changed by judicial decision and by both federal[10] and state[11] statutes. Section 2 (3) of the National Labor Relations Act provides that "the term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . ."[12] The *Mackay* case held that

which were unchanged by the 1947 amendments. See 49 Stat. 452 (1935), 29 U. S. C. A. §158 (3) (1947).

[7]61 Stat. 140 (1947), 29 U. S. C. A. §158 (a) (1) (Supp. 1950).

[8]61 Stat. 140 (1947), 29 U. S. C. A. §157 (Supp. 1950).

[9]Brown v. Central West Coal Co., 200 Mich. 174, 166 N. W. 850 (1918).

[10]61 Stat. 137 (1947), 29 U. S. C. A. §152 (3) (Supp. 1950).

[11]E. g. 4A Mass Laws Ann. (Michie, 1950) c. 150A §2 (3); 6 N. Y. Cons. Laws Serv. (Baker, Voorhis, 1951) Labor Law § 701 (3); Pa. Stat. Ann. (Purdon, 1941) tit. 43, c. 7, § 211.3 (d).

[12]61 Stat. 137 (1947), 29 U. S. C. A. 152 (3) (Supp. 1950).

this employment relation was not severed, although the striker's job had been taken by a "replacement."[13] The *Potlatch* case is not complicated by having some of the strikers "left over" after all jobs were filled; all of them were reinstated. Since the strike itself did not sever the strikers' employment, and since no replacement prevented the reinstatement of any striker, there is no factor to disrupt the continuity of employment, which was the basis of seniority among Potlatch employees before the "strike seniority policy" was adopted. Therefore, it could be argued that Potlatch had no normal justification for depriving the "strikers" of their seniority status.

Relying on the principle laid down in the *Mackay* case, the court maintained that the justification for the policy lay in the employer's legitimate concern for providing the "replacements" with permanent employment. This legitimate concern was justified, according to the court, although the effect would be to "discriminate" between employees so as to discourage union membership.[14] The facts of the *Mackay* case did not require the Supreme Court to decide how long after a strike the "replacements" remain in a protected class. There, the "replacements" were only protected from being discharged *at the time the strike terminated* to make room for *the strikers they actually replaced,* whereas the *Potlatch* decision protects them from displacement by *all strikers* and protects them *for all future time.* This may be regarded as merely a logical extension of the *Mackay* doctrine; but it must be noted that the *Potlatch* rule gives to a new employee, hired during a strike, much greater job security than a worker would receive when hired at a time when no strike was in progress. A new employee would normally have a seniority status lower than other employees, not higher. The Supreme Court intended that the existence of a labor dispute should not prejudice a new employee, but it seems doubtful that it intended to provide him with rights he could not expect to obtain in accepting new employment under normal conditions.

The *Potlatch* decision extends the *Mackay* doctrine in still another important particular. Only *new* employees were afforded the protective cloak of "replacements" in the *Mackay* case, but the "strike seniority

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[13]It is implicit in Board and court decisions that the employer is under a duty to prefer former strikers over other job applicants to fill future job vacancies at his plant. See Matter of Container Manufacturing Co., 75 N. L. R. B. 1082 (1948).

[14]N. L. R. B. v. Potlatch Forests, Inc., 189 F. (2d) 82 at 86 (1951). This statement seems to conflict with the court's holding on Page 85 that Potlach's activities did not "discriminate" against union members. Probably the court intended to present an alternative finding to emphasize that, although there was some discrimination which had the effect of discouraging union membership, the action of the employer was not a violation of Section 8 (a) (3), because such action was privileged.

policy" defined "replacements" to include both new employees and strikers who returned to work before the termination of the strike, and this classification was accepted by the court as legitimate. To allow one worker to improve his seniority status to the detriment of his co-workers by defying a picket line, puts a premium on anti-union activity. It has been held an unfair labor practice to offer bonuses to strikers who cross the picket lines to return to work.[15] To offer a seniority "bonus" would logically be a greater discrimination, since those who remained on strike would suffer a corresponding loss of seniority. Admittedly, the "replacements" should be entitled to accumulate seniority referable to the time they were at work while the strikers were not. It should be noted, however, that the "strike seniority policy" does not merely *toll* the accumulation of seniority during the time a striker remains away from the plant, but creates new categories of seniority which have no relation to length or continuity of service.

However, "new" replacements were given lower seniority rights than strikers who crossed the picket lines, and this was true although the new workers may have been hired before the strikers returned to work.[16] It was the "new" replacement group which the *Mackay* doctrine originally sought to protect. Although the "strike seniority policy" affords the new men a large measure of protection, those who crossed the picket lines are benefitted most. This may have influenced the Board's finding that the motive behind the policy was to discourage union activity. The court, however, found no such motive.

Both the contention of the Board and the decision of the court are backed by persuasive arguments. The problem presented was one of first impression in the courts, and a decision against *Potlatch* would have had the effect of broadening the protection afforded strikers by the Act. It is the opinion of some writers that the Taft-Hartley Act, though not applicable by its terms, has nevertheless influenced the courts in recent cases to look less favorably upon strikes as a means of resolving labor disputes.[17] The *Potlatch* case lends support to that interpretation of recent decisions.

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[15] Matter of Aronsson Printing Co., 13 N. L. R. B. 799 at 810 (1939). Note that the giving of extra pay was found to violate Section 8 (a) (1), and so the court in the Potlatch case was technically not concerned with rulings of this sort, since it was considering only whether the policy violated Section 8 (a) (3).

[16] This anomalous situation was created by the portion of the policy which provided that employees retained their pre-strike seniority with respect to other members of the same group. The new men, of course, had no pre-strike seniority and were therefore in a less favorable position than the former strikers who returned to work during the strike. Matter of Potlatch Forests, Inc., 87 N.,L. R. B. 1193 at 1200 (1949).

[17] Blinn, Rights and Obligations of Strikers Under the Taft-Hartley Act, 13 Mo. L. Rev. 1 at 10 (1948).

MUNICIPAL CORPORATIONS—VALIDITY OF ZONING ORDINANCE PERMITTING RECLASSIFICATION OF INDIVIDUAL TRACT WITHIN DISTRICT ON APPLICATION OF OWNER. [New York]

Zoning is a relatively new concept in the field of municipal law, the first comprehensive zoning ordinance having been enacted in New York in 1916.[1] The primary object of zoning is the protection of the value and usefulness of urban land as a whole and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services.[2] The state enabling acts[3] frequently contain the provision that the ordinance must be in accord with a well-considered and comprehensive plan to bring about an orderly development of the area.[4] An integral part of any comprehensive zoning plan is the division of the city into clearly designated districts and the designation of particular uses of real estate in each district.[5] It has been frequently stated that comprehensive zoning contemplates fixed areas within defined boundaries.[6]

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[1]Bettman, Constitutionality of Zoning (1924) 37 Harv. L. Rev. 834. Zoning has been made necessary by the realization that as the population of the country increased and the activities of life became more concentrated and integrated in urban communities, there could be no sense of security in the ownership and use of land, nor adequate protection of the public interest, if individual owners had complete freedom to use their property as they pleased. Thus it has been observed that zoning "is predicated upon a basic principle of urban land economics, that a certain conformity in use stablizes and insures the value of land." Landels, Zoning: An Analysis of Its Purpose and Its Legal Sanctions (1931) 17 A. B. A. J. 163, 165. The supreme Court of the United States, in Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926) first upheld a zoning ordinance as a valid exercise of the police power.

[2]Landels, Zoning: An Analysis of Its Purposes and Its Legal Sanctions (1931) 17 A. B. A. J. 163.

[3]A municipality has no inherent power to establish zoning regulations. Bassett, Zoning (1940) 13. Any zoning ordinance that a municipality does enact is confined by the limitations placed in the enabling statute. Marshall v. Salt Lake City, 105 Utah 111, 141 P. (2d) 704 (1943), wherein it was said that the clearly expressed and mandatory provisions of a zoning enabling statute may not be abrogated, ignored, or relaxed to meet the real or supposed practical needs of a municipality.

[4]See Chapman v. City of Troy, 241 Ala. 637, 4 S. (2d) 1, 3 (1941); City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. Supp. 225, 226 (1922); City of Texarkana v. Mabry, 94 S. W. (2d) 871, 877 (Tex. Civ. App. 1936).

[5]58 Am. Jur., Zoning §1. "The very essence of zoning is territorial division according to the character of the land and the buildings, their peculiar suitability for particular uses, and conformity of use within the zone." Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A. (2d) 799, 804 (1946).

[6]Wilkins v. City of San Bernardino, 29 Cal. (2d) 332, 175 P. (2d) 542 (1946); Bishop v. Board of Zoning Appeals of City of New Haven, 133 Conn. 614, 53 A. (2d) 659 (1947); State v. Harris, 158 La. 974, 105 So. 33 (1925); Nectow v. City of Cambridge, 260 Mass. 441, 157 N. E. 618 (1927); Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931); In re Kensington-Davis Corp., 239 N. Y. 54, 145 N. E. 738 (1924).

Though these principles are clearly established as a part of the law of zoning, the Court of Appeals of New York, in *Rodgers v. Village of Tarrytown,*[7] recently ruled that a municipality could amend its general zoning ordinance to allow the creation of a "district" which would have no definite boundaries until an application for the newly created classification was filed by an individual property owner. In 1947 the Board of Trustees for the Village of Tarrytown added to their General Zoning Ordinance[8] an amendment which created a new district known as "Residence B-B," in which, besides one and two-family dwellings, buildings for multiple occupancy of fifteen or fewer families were permitted. The boundaries of the new type districts were not delineated in the amendment but were to be fixed by further amendment of the official village building map at such times in the future as such district or class of zone was applied to properties in the village by the approval of an application by some land owner possessing a tract of at least ten acres. The amendment gave the Village Planning Board the power to approve such an application, with the right of appeal to the Board of Trustees and then to the courts if the application was denied. In 1948, on application of the defendant and after a favorable report by the Planning Board, the Board of Trustees passed a second amendment applying the "Residence B-B" classification to the property of the defendant. Plaintiff Rodgers, an owner of property in the one-family dwelling district within which defendant's reclassified land was located, brought an action to have these two amendments declared invalid and to enjoin the defendant from constructing a multiple dwelling in that zone. In a 5 to 2 decision, the Court of Appeals of New York upheld the validity of both amendments and refused to issue the injunction.[9]

See Bettman, Constitutionality of Zoning (1934) 37 Harv. L. Rev. 834 to the effect that zoning is the regulation by districts and not by individual pieces of property. The necessity of definite districts is further shown by the frequent requirement that a map be annexed to the ordinance and be made a part thereof. Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926); Katz v. Higson, 113 Conn. 776, 155 Atl. 507 (1931); Town of West Springfield v. Mayo, 265 Mass. 41, 163 N. E. 653 (1928); Capital Homes Inc. v. Dandrow, 123 N. J. L. 362, 8 A. (2d) 325 (1939); Baddour v. City of Long Beach, 279 N. Y. 167, 18 N. E. (2d) 18 (1938); Fierst v. William Penn. Memorial Corp., 311 Pa. 263, 166 Atl. 761 (1933).

[7]302 N. Y. 115, 96 N. E. (2d) 731 (1951).

[8]The General Zoning Ordinance of Tarrytown divides the Village into seven districts—Residence A, for the single-family dwelling; Residence B, for two-family dwellings; Residence C, for multiple-family and apartment dwellings; three business districts and an industrial district.

[9]The essence of the dissenting judges' argument was that the Board of Trustees did not have the statutory power to create a new classification without first establishing definite boundaries, that the amendment was not enacted in pursuance of a

The majority of the court reasoned that the Village of Tarrytown had two possible methods by which it could have amended the General Zoning Ordinance so as to create the desired "Residence B-B" classification. First, it could have amended the general ordinance so as to permit apartments for fifteen or fewer families on any plot of ten acres or more in the one and two-family dwelling zones or any other designated zone; such action would merely add another permitted use to the uses already authorized in definite areas, and if taken for the general welfare of the village, this action would clearly be a valid exercise of the power to amend the original ordinance.[10] Second, it could achieve the same result by amending the ordinance so as to invite owners of ten or more acres to apply for the new classification within the one and two-family dwelling zones. The court declared that the choice as to how to effectuate local zoning policy should be left to the local legislative body,[11] that this decision would not be interfered with unless shown to be unreasonable or arbitrary, and that the plaintiff in this case had failed to prove that the Village's action was of that character. In response to the argument that no definite boundaries were prescribed, the court asserted that the Board of Trustees did not create an additional zone, but only provided the means whereby an additional zone could be created in the future, at which time the boundaries would be delineated on the official village map.

A municipality which has the power to set up a zoning system also has the power to amend the zoning ordinances it has enacted[12] as long as the power is not exercised arbitrarily or unreasonably, and the unorthodox amendatory process adopted by the Board of Trustees in the principal case would seem to have much to commend it. Since the application is to be made to a municipal planning board, the

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comprehensive plan, and that it consitituted spot zoning. Rodgers v. Village of Tarrytown, 302 N. Y. 115, 96 N. E. (2d) 731, 736 (1951).

[10]Following this method, the zoning board would not be creating an additional zone without definite boundaries but would merely create an additional use in a definite zone. There would seem to be no question that the planning board could, in a valid exercise of its police powers, find that changing conditions require a change in the uses allowed in a particular zone.

[11]Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926); Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925); Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923); Berry v. Houghton, 164 Minn. 146, 204 N. W. 569 (1925); Arverne Bay Construction Co. v. Thatcher, 278 N. Y. 222, 15 N. E. (2d) 587 (1938).

[12]Reichelderfer v. Quinn, 287 U. S. 315, 53 S. Ct. 177, 77 L. ed. 331 (1932); Marblehead Land Co. v. City of Los Angeles, 47 F. (2d) 528 (C. C. A. 9th, 1931); Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N. E. (2d) 993 (1938); Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N. W. (2d) 84 (1941).

village has not surrendered its zoning powers to the individual property owners, but has merely provided a method whereby an administrative agency, which would be more fully aware of the needs and physical characteristics of the various zones, could determine the most desirable location for the multiple dwellings. Before granting the application, the planning board could determine the financial and moral responsibility of the applicant—whether the particular piece of land was suited for multiple dwellings, whether the existing public facilities could support the increased burden, and whether the application would in fact fulfill the purposes of the original amendment. The whole method gives the village a complete and specific control over the number and kind of multiple dwellings that could be erected within the city.[13] If the application is denied by the planning board, the applicant may protest against any arbitrary action through the right of appeal to the Board of Trustees and then to the courts.

Despite the administrative advantages of this system and the fact that the same result could have been attained simply by increasing the uses permitted in the more restricted zones, it is urged that the Board of Trustees does not have the power to create a new classification without establishing definite boundaries. Both the enabling act of the state of New York[14] and a long line of decisions of the New York courts[15] require that a zoning district have definite boundaries.

[13]The amendment was enacted to prevent young families from being forced to move elsewhere because of a shortage of living accommodations in the village; to attract business to the community; to lighten the tax load of the small home owners, who were heavily burdened by the shrinkage of tax returns from the depreciated value of large estates and the transfer of many such estates to tax-exempt institutions; and for the development of otherwise unmarketable and decaying property. Rodgers v. Village of Tarrytown, 302 N. Y. 115, 96 N. E. (2d) 731 (1951).

[14]Section III of the 1947 Amendment provides: "The boundaries of the said newly created district or class of zone will be fixed by amendment of the official village zoning map, at such time in the future as such district or class of zone is applied to properties in this village." To be compared with this is the provision in the enabling act, 7 N. Y. Cons. Laws Ann. (Baldwin, 1938) Village Law, Art. 6-A, §176, that the Board of Trustees "may divide the village into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act...." The intention of the legislature that the districts decided upon must have definite boundaries is clearly indicated by the further provision, 7 N. Y. Cons. Laws Ann. (Baldwin, 1938) Village Law, Art. 6-A, §179-a, that the Board of Trustees "shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various original districts . . . ." Throughout the provisions of the enabling act will be found references to "districts" and "boundaries," all of which seemingly indicate that ascertainable districts are to be established whenever a municipality enacts a zoning ordinance.

[15]Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427 (1931); In re Kensington-Davis Corp., 239 N. Y. 54, 145 N. E. 738 (1924); City of Olean v. Conkling, 157 Misc. 63, 283 N. Y. Supp. 66 (1935); Langley v. Rumsey, 130 Misc. 492,

In failing to provide for these boundaries, the 1947 amendment has failed to establish a new zoning district as the word "district" is understood in this branch of the law. Although purporting to create a new district, it merely succeeded in inviting the owner of the prescribed quantity of land to apply for the new classification.

If a new district was not created, the provisions of the old zoning ordinance are still in effect, and the granting of such an application constituted the granting of a non-conforming use within the districts zoned for one and two-family dwellings. While it is within the power of a municipality to grant such a variance,[16] certain requirements must be met, one of the fundamental of which is that the petitioner must show that he will suffer unnecessary hardship unless his request is granted.[17] As a general rule, to which New York adheres,[18] financial hardship alone will not constitute that degree of hardship prerequisite to obtaining a variance.[19] However, as was brought out in the testimony of the principal case, the only reason the applicant wanted to erect the apartment was that she was unable to sell the land and felt she might make it more profitable by erecting an apartment.[20] Most en-

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224 N. Y. Supp. 165 (1927); City of Glens Falls v. Standard Oil Co. of New York, 127 Misc. 104, 215 N. Y. Supp. 354 (1926); Wertheimer v. Schwab, 124 Misc. 822, 210 N. Y. Supp. 312 (1925).

[16]The usual zoning enabling act provides for variances from the strict application of the ordinances if it is found that special hardship would otherwise result. Reps, Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions (1950) 2 Syracuse L. Rev. 54. The New York provision to this effect can be found in 7 N. Y. Cons. Laws Ann. (Baldwin, 1938) Village Law, Art. 6-A, § 179-b.

[17]Real Properties v. Board of Appeal of Boston, 319 Mass. 180, 65 N. E. (2d) 199 (1946); Arverne Bay Construction Co. v. Thatcher, 278 N. Y. 222, 15 N. E. (2d) 587 (1938); Lee v. Board of Adjustment of City of Rocky Mount, 226 N. C. 107, 37 S. E. (2d) 128 (1946). See Note (1951) 29 N. C. L. Rev. 245, for a discussion of the various considerations.

[18]Young Women's Hebrew Association v. Board of Standards and Appeals of the City of New York, 266 N. Y. 270, 194 N. E. 751 (1935); Joyce v. Dobson, 225 App. Div. 348, 8 N. Y. S. (2d) 768 (1938); Ward v. Murdock, 247 App. Div. 808 286 N. Y. Supp. 280 (1936).

[19]Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15, 157 Atl. 273 (1931); Phillips v. Board of Appeals of Building Department, 286 Mass. 469, 190 N. E. 601 (1934); Joyce v. Dobson, 255 App. Div. 348, 8 N. Y. S. (2d) 768 (1938). Nor is the fact that the proposed non-conforming use would be financially more advantageous a sufficient basis for a claim of unnecessary hardship. Benson v. Zoning Board of Appeals, 125 Conn. 280, 27 A. (2d) 389 (1942); National Lumber Products Co. v. Ponzio, 133 N. J. L. 95, 42 A. (2d) 753 (1945); Hopkins v. Board of Appeals, 178 Misc. 186, 33 N. Y. S. (2d) 396 (1942).

[20]The applicant had a number of brokers attempting to sell the land. When it became evident that they would be unable to sell on the terms desired, the applicant thought of having the land reclassified so as to get a F. H. A. loan to build the apartment. Brief of The Regional Plan Association, Inc., Amicus Curiae, in Support of Appellant, 22.

abling acts provide that a board of appeals or adjustment be set up to grant a variance,[21] and under the Village Law of New York this power is given to the Board of Appeals and cannot be retained by the local legislative body.[22] Nevertheless, in the principal case the Board of Trustees and not the Board of Appeals attempted to grant permission for construction which would amount to granting a variance. Thus, since the applicant did not establish the necessary hardship and did not present her claim to the proper municipal body, the 1948 amendment failed to create a proper variance.

Since the zoning power must be administered largely upon the discretion of the municipal officials, it has always been especially subjected to abuse. To overcome the danger of this abuse, one of the fundamental principles of zoning requires that the land within a municipality be divided into districts and that there be uniform regulations throughout each district.[23] By abandoning these traditional safeguards, the decision in the principal case gives great power to the planning board and could, in the future, easily result in individual favoritism and discrimination. While a person whose application has been refused can appeal, the courts are loathe to declare the decision of the planning board unreasonable or arbitrary.[24] The board could easily grant an application where an apartment was not needed, or under circumstances in which, considering the then existing public facilities, it could be more economically located in some other section of the village. One of the primary benefits of comprehensive zoning is that it will enable the municipality to plan for the future provision of public facilities such as sewage disposal, street requirements, public transportation, police and fire protection, and public school systems. If the planning board can grant permission to erect an apartment dwelling anywhere within the one and two-family zones, it is impossible for municipal agencies to anticipate in advance even approximately where such a dwelling would be located and there could certainly be no accurate planning.

Since it is doubtful that the more restricted zones now have adequate public facilities to care for a substantial increase in population,

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[21]Bassett, Zoning (1940) 117.

[22]7 N. Y. Cons. Laws Ann. (Baldwin, 1938) Village Law, Art. 6-A, §175 and 179-b. The members of the Board of Appeals are appointed by the Board of Trustees.

[23]Bassett, Zoning (1940) 50.

[24]Wilcox v. City of Pittsburg, 121 F. (2d) 835 (C. C. A. 3d, 1941); Zadworny v. City of Chicago, 380 Ill. 470, 44 N. E. (2d) 426 (1942); Scott v. Davis, 94 N. H. 35, 45 A. (2d) 654 (1946); Kraft v. Village of Hastings-On-Hudson, 258 App. Div. 1060, 17 N. Y. S. (2d) 630 (1940).

it is suggested that a more feasible plan would be the selection of definite areas within these zones for the construction of multiple dwellings. This would fulfill the basic requirement of definite boundaries, would enable the municipality to know within reasonable approximation where additional public facilities would be needed, and would give more stability to the property within the zones.

ANDREW D. OWENS

NEGOTIABLE INSTRUMENTS—PROPRIETY OF DOMINANT INTENTION RULE PLACING LOSS ON DRAWER OF INSTRUMENT IN IMPOSTOR CASES. [Massachusetts]

The loss arising from a forged or unauthorized indorsement on a negotiable instrument is generally placed on a collecting or drawee bank rather than on the drawer,[1] but where an impostor has obtained the instrument from the drawer, indorsed it, and successfully passed it to another, most courts place the loss on the drawer,[2] under the operation of the so-called "dominant intention rule."[3] The drawer is said to

[1]"The implied contract between the bank and its depositor is that the bank will pay out the funds of the depositor only upon order from the depositor to that effect. It follows then, that if the bank pays out funds upon an instrument purporting to be the check of its depositor, the signature upon which turns out to be a forgery, no right exists in the bank to charge the amount of the item against the account of the depositor, since the payment was wholly without any authority from him. This is elementary, and needs the citation of no authorities. The only exception is where the depositor, by his course of conduct, negligence, or laches, has created a condition which estops him." Denbigh v. First Nat. Bank of Seattle, 102 Wash. 546, 174 Pac. 475, 478 (1918). Britton, Bills and Notes (1943) 592.

[2]United States v. Liberty Insurance Bank, 26 F. (2d) 493 (W. D. Ky. 1928); Ryan v. Bank of Italy Nat. Trust & Savings Ass'n., 106 Cal. App. 690, 289 Pac. 863 (1930); Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 764 (1914); Land-Title & Trust Co. v. Northwestern Nat. Bank 196 Pa. 230, 46 Atl. 420 (1900). Britton, Bills and Notes (1943) 715.

In every true impostor situation there are always two victims of the imposter. The impostor must convince the first victim, the drawer of the check, that he is the person to whom the check is due, and then the impostor must convince the second victim, the person to whom he negotiates the check, that he is the owner of the check. Considering which of the dual victims has most often borne the loss resulting from the impersonation, Abel, The Impostor Payee [1940] Wis. L. Rev. 161, 170 states: "Just over a hundred years have passed since the advent of the impostor in the reported decisions in the field of negotiable instruments. In that span of a century there have been slightly over forty opinions dealing with the problems created by successive impersonation .... In about three-fourths the first victim of the impostor was made to bear the loss,in the other fourth it was fastened on the second victim."

[3]A clear expression of the dominant intention rule is set forth in Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N. J. L. 152, 109 Atl. 296, 297, 22

have a dual intent: (1) to pay the person whom the negotiable instrument is physically delivered, and (2) to pay the person whom the impostor represents himself to be and who appears as payee or indorsee on the instrument; and the former intention is said to be dominant. Thus, since it is concluded that the drawer primarily intended that payment should be made to the person who turns out to be the defrauder, his responsibility for making the fraud possible is sufficiently great that the loss is placed on him rather than on the party who takes the instrument from the impostor.[4]

Though it is widely accepted, the unsatisfactory nature of the dominant intention rule continues to be manifested in the decisions of the courts, as in the recent case of *Santa Maria v. Industrial City Bank & Banking Co.*[5] Plaintiff, a dealer in used automobiles, was induced, upon presentation of a driver's license and automobile registration certificate in the name of Heinz Rettig, to purchase an automobile from an impostor who represented himself to be the owner, Heinz Rettig. Plaintiff made out a check for $1,450 payable to Heinz Rettig and delivered it to the impostor, who cashed it at defendant drawee-bank. When plaintiff discovered the fraud, he turned the automobile over to the police and brought suit to force defendant bank to recredit his account in the amount of the check.

The trial judge, holding for the plaintiff, found " 'that the plaintiff intended said check to be paid by the defendant to Heinz Rettig, or order, only'."[6] This finding was reversed by the Appellate Division, and on further appeal, the Supreme Judical Court of Massachusetts, following the dominant intention rule,[7] held that the drawer intended

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A. L. R. 1224, 1227 (1920). There the court held the drawer liable for the loss caused by an impostor, saying: "In other cases of fraudulent impersonation the drawer is sometimes said to have a double intent: First, to make the check payable to the person before him; and, secondly, to make it payable to the person whom he believes the stranger to be. But the courts have almost unanimously held that the first is the controlling intent . . ." Also, see Abel, The Impostor Payee [1940] Wis L. Rev. 161, 200, for discussion of the prominence of this and other rules in placing the incidence of loss on the drawer.

[4]A summary of impostor cases appearing in Note (1901) 50 L. R. A. 75, 84 concludes: ". . . it as apparent from the foregoing cases that the drawer of check, draft, or bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a bona fide holder, bear the loss where the impostor obtains payment of, or negotiates, the same." This statement has been approved in the typical impostor situation in North Philadelphia Trust Co. v. Kensington Nat. Bank, 328 Pa. 298, 196 Atl. 14, 15 (1938).

[5]95 N. E. (2d) 176 (Mass. 1950).

[6]95 N. E. (2d) 176, 177 (Mass. 1950).

[7]As established in Massachusetts in Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619 (1886).

the check to be payable to the person to whom it was physically delivered. The court further concluded that there was no factual evidence to support the trial judge's finding of intent.

As is generally true of cases decided on this basis, the opinion fails to reveal whether the court purported to find the actual intent of the drawer by some sort of objective standard, or was merely applying a fixed rule of law concerning intent to get the desired result of placing the loss on the drawer. On this question, the Supreme Judicial Court observed inconclusively: "The Appellate Division determined that, if this finding [by the trial court] was a finding of fact, there was nothing in the report in the way of evidence or other facts found which would warrantably support such a finding. We agree with this conclusion. If it was a ruling of law, it was erroneous. . . ."[8] Such confusion as to the basis of application of the dominant intention rule is indicative of its questionable validity.

If it be assumed that the courts in applying the rule are trying to establish the actual intent of the drawer, it is doubtful that any such intent can be established. In the principal decision it was argued that physical presence is the controlling element in determining the drawer's actual intent, on the reasoning that " 'The name of a person is the verbal designation by which he is known, but the visible presence of the person affords surer means of identifying him than his name'."[9] Doubt is cast on the materiality of the element of direct contact, however, by the general rule that the drawer of a negotiable instrument passes good title to an impostor even when the negotiations are carried on by correspondence.[10] The correspondence cases hold that the drawer intended payment to the impostor even though no physical presence is involved.[11] Furthermore, it is noted that in the cases where the impostor has been physically before the drawer but

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[8]Santa Maria v. Industrial City Bank & Banking Co., 95 N. E. (2d) 176, 180 (Mass. 1950).

[9]Santa Maria v. Industrial City Bank & Banking Co., 95 N. E. (2d) 176, 178 (Mass. 1950), quoting Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 620 (1886).

[10]"Where the impersonator operates by means of the telegraph or by use of the mails there is some conflict in the cases on the question whether the impersonator acquires title or not, but the majority of the cases hold that, here also, the impersonator gets title." Britton, Bills and Notes (1943) 720.

[11]A clear statement of the immateriality of physical presence in the correspondence cases is set forth in Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 764, 767 (1914). There, where Nichols, the drawer of a draft, had dealt by mail with the impostor, Warren, the court said: ". . . it appears that the money was paid to the very person to whom Nichols actually intended it should be, the one through whose agency the transaction was brought about. It is idle to say, as does plaintiff, that Nichols never in fact dealt with Warren, the impostor; this contention only goes to show that the deception was complete."

has represented himself to be the agent of another, it is said that the drawer did not intend payment to the impostor and therefore should not be made to bear the risk of loss.[12] The correspondence cases and the agency cases clearly indicate that the element of physical presence relied upon the Massachusetts court cannot be regarded as determinative of the drawer's actual intent.

As further support for the dominant intention rule, the court added that "A similar rule exists in the law of sales."[13] It is true that the sales rule, while recognizing a dual intention on the part of the vendor, states that the vendor's intent to pass the property to the party appearing physically before him is operative, even though delivery is fraudulently induced.[14] Nevertheless, the analogy to the sales rule is not complete, because in the sales cases there is nothing about the goods which are the subject of the transaction to give a warning to the vendee that the impostor might not have good title. On the other hand the word "order" on the face of a negotiable instrument should constitute a warning to all takers that the signatures in the chain of title must be valid before good title to the instrument passes.[15] The adoption of the

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[12]One theory underlying the agency cases is set out in the dissenting opinion of Judge Hotchkiss in Holub-Dusha Co. v. Germania Bank, 164 App. Div. 279, 149 N. Y. Supp. 775, 783 (1914):"I think it is quite impossible to say that the drawer of the check meant that it should be paid to Hodges [who purported to be an agent]. It seems to me that was the very opposite of the drawer's intention. The evidence is uncontradicted that Hodges did not pretend to be Birchard [principal], but represented himself as having authority to act for Birchard as broker." Beutel, Brannan's Negotiable Instruments Law (7th ed. 1948) 474 states that "The dissenting opinion seems the sounder view. X's principal [Birchard] and not X [Hodges] was intended to be the indorsee." Other agency cases hold that where the impostor merely assumes to be the agent of the person named as the payee, and not the payee himself, the drawer, by delivering the check to such a person, may be regarded as vouching for him as the agent of the payee but he does not vouch for his right to indorse the payee's name. Russell v. First National Bank of Hartselle, 2 Ala. App. 342, 56 So. 868 (1911); Goodfellow v. First National Bank, 71 Wash. 554, 129 Pac. 90 (1913). Other cases holding the one who takes a negotiable instrument from the impostor liable where the impostor represents himself to be the agent of another in obtaining the instrument: Bennett v. First Nat. Bank, 47 Cal. App. 450, 190 Pac. 831 (1920); Dana v. Old Colony Trust Co., 245 Mass. 347, 139 N. E. 541 (1923).

[13]Santa Maria v. Industrial City Band & Banking Co., 95 N. E. (2d) 176, 179 (Mass. 1950).

[14]In Martin v. Green, 117 Me. 138, 102 Atl. 977, 978 (1918), where a horse dealer sold a horse to an impostor, the court said: "All the elements of a sale were present and the minds of the parties met. They agreed upon the article to be sold, and the price and the terms of payment. Nor was there any doubt as to who was the vendor and who was the vendee. Green [vendor] intended to sell to the identical man before him, with whom he was dealing, whatever his name might be, and to take back a mortgage from that man. That actual intent governs." Also Hickey v. McDonald Bros., 151 Ala. 497, 44 So. 201 (1907); Vold, Sales (1931) 375.

[15]McDowell, Ambiguous Payees of Negotiable Paper (1949) 2 Wash. & Lee L. Rev.

sales rule in the impostor cases destroys the protection that the word "order" customerly gives the drawer, and seems in no way to aid in the search for the actual intent of the drawer. In citing the sales law analogy, the court apparently failed to notice also another point of difference: that an impostor takes title to goods only when he is physically dealing with the vendor, and not when the transaction is carried on by correspondence; in the latter type of transaction, it is usually held that the predominant or controlling intention of the vendor is to deal with the person whom he independently supposes the writer to be.[16]

Any attempt to ascertain the actual intent of the drawer in the impostor situation seems highly ineffectual. The drawer may have any of many intents, such as (1) an intent to pay the person physically before him, (2) an intent to pay the payee whose name appears on the face of the instrument, or (3) an intent to deal with the person who possesses the proper business status or relation to those goods which are the subject matter necessary to complete the transaction. The last of these suggested intents would be the most logical, inasmuch as the drawer would not care whether the person before him bore the name he assumed so long as he was in fact the owner of the goods for which the check had been delivered.[17] It is probable that the dominant intention of the drawer as found by most courts is not more than a legal fiction for facilitating a quick disposal of the impostor-payee cases without the requirement of a careful examination of the surrounding factual circumstances.

A suggestion has been advanced that the dominant intention rule be replaced by a test of relative care of the two victims of the impostor.[18] If the basis of this relative care test is to be normal business practice, then the test is worthy of consideration for, though difficult in application, it has two distinct advantages: (1) it promotes better

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44, 51: "The sales cases involving ordinary personal property bear no warning as to the requisite of any endorsement, whereas the very word 'order' on negotiable paper should be a warning to the purchaser that he cannot rely on possession alone, but must be sure the order payee's authentic endorsement is on the instrument."

[16]Newberry v. Norfolk & Southern Ry. Co., 133 N. C. 45, 45 S. E. 356, 358 (1903): "It appears that there was in the neighborhood one person whose real name was Arthur B. Alexander, and another whose real name was Alfred Alexander. Conceding that Arthur ordered the goods in the name of A. Alexander, and the Fairbanks Company shipped them supposing that they were ordered by Alfred Alexander, and intending to sell and ship to him, and not to Arthur, no title passed to the latter." In the correspondence type of transaction in sales, no property is held to pass from the seller, for lack of a buyer assented to by the seller. Vold, Sales (1931) 375.

[17]Abel, The Impostor Payee [1940] Wis. L. Rev. 161, 230.

[18]Note (1950) 7 Wash. & Lee L. Rev. 94, 98.

business practice by rewarding the party who has been more careful in his business relations, and (2) it would be in conformity with past decisions in impostor cases.[19] Upon consideration of the factual circumstances of the American impostor cases, it may be concluded the courts have generally held for the party exercising the greatest degree of care.[20] Since the courts have in actuality been giving great weight to the element of care exercised by the victim of the impostor, it would be better for them to make clear the importance of that factor rather than to cloak their decisions in the confusion of an illusive dominant intent.

Another solution to the problem has been provided in the leading minority case of *Tolman v. American National Bank*,[21] wherein Chief Justice Stiness, one of the Commissioners who framed the Uniform Negotiable Instruments Law, expressed the opinion that Section 23 of the Negotiable Instruments Law was applicable to the impostor situation.[22] Under the view of the *Tolman* case, the indorsement of the impostor is considered "a typical case of forgery" so that no title to the instrument would pass under Section 23. There would then be no need for courts to seek an illusive actual intent of the drawer, for the loss would regularly be imposed on the second victim of the imposter. Also a desirable uniformity would be achieved in the impostor decisions, and the current illogical distinctions between the direct-impostor and the agent-impostor cases and between the face-to-face impostor cases and the correspondence-impostor cases would be eliminated.

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[19]Abel, The Impostor Payee [1940] Wis. L. Rev. 362, 388: "It is not due care nor reasonable care nor comparative care with which the cases have concerned themselves in distributing the loss arising from imposture in commercial paper cases, but simple business care. It is that which will conditionally relieve the first victim from the consequences of the impersonation under the rule of the *Tolman* case; and its exercise by the second victim will effectually protect him from harm and cast the loss back on his predecessor."

[20]Abel, The Impostor Payee [1940] Wis. L. Rev. 161, 193, considers all the American impostor cases through 1940 and states: "There remains the situation where the first victim has exercised some care, the second none. Here the picture is quite reversed. Not only is there no unanimity in the opinions; but more than that, here decisions relieving the first victim of the loss and imposing it on the second preponderate."

[21]22 R. I. 462, 48 Atl. 480 (1901).

[22]Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. 480, 482 (1901) states Section 23 of the Negotiable Instruments Law as follows: "'Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against a party thereto, can be acquired through or under such signature, when the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority'." It further states that "The statute covers this case."

This suggested remedy for removing conflicts in the present dominant intention rule by uniformly placing the loss on the second victim of the impostor may seem harsh to innocent parties who take from the impostor. But it should be remembered that frequently in forgery cases innocent parties are made to bear the loss resulting from the forgery, where forgery is a real defense. Since the innocent second victims of the impostor are often banks, they would be better able to bear the loss through insurance protection,[23] whereas the cost of insurance to an individual, usually the first victim of the impostor, would be prohibitive.

The dominant intention rule is a majority rule and the Commercial Code has adopted it in the new codification.[24] But it is doubtful whether justice is facilitated by the ready adoption of a rule that is productive of the ambiguous reasoning of the principal case.

VIRGIL S. GORE, JR.

NEGOTIABLE INSTRUMENTS—RIGHT OF DRAWEE BANK TO CHARGE BACK PAYEE'S ACCOUNT AFTER CHECK OF DRAWER IS DISHONORED FOR INSUFFICIENT FUNDS. [Colorado]

When a drawee bank honors a check drawn by one depositor in favor of another, and subsequently discovers that the drawer's account is insufficient to cover the check, the question arises as to whether the bank or the payee must bear the burden of pursuing the drawer for a settlement of his obligation. The payee argues that the bank, in accepting a check, assumes the responsibility of the sufficiency of its depositor's account, and must seek its remedy in recovering the amount of the overdraft from the drawer. The bank contends that its dealings with the payee are conditional upon the drawer's deposits covering the check, and that when this condition is not fulfilled, the payee has no right to the sum paid out or credited to him for the check, and must call upon the drawer for payment of his obligation by some other

[23]"... if the consideration be the relative ability to bear the loss it seems that the burden should be put on the bank. The bank may then shift the burden by insurance which the individual drawer would find impossibly expensive." Note (1930) 18 Calif. L. Rev. 693, 696.

[24]Uniform Commercial Code (1950) §3-405-1:"With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons, or their agents or confederates: (a) an impostor who through the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee . . . ."

means. As the law has developed through successive decisions of many courts, no simple answer to the question has evolved, although certain principles are generally agreed upon.

The bank will prevail in its contention unless it has unconditionally accepted the check, and there can be no such acceptance unless or until the bank has taken some positive action towards the check or the payee.[1] Thus, where a depositor laid a check drawn upon his own bank on the counter and said, "Place this to my account," the bank clerk not seeing the check until after the depositor left, and not taking any action toward the check or the accounts of the parties, it was held that the bank was not liable for the amount of the check since there was no promise to pay it or to allow the payee credit for it.[2] On the other hand, it is said that the bank has an election when the check is presented to accept, reject, or accept qualifiedly,[3] and where it has taken such an affimative action as charging the drawer's account and cancelling the depositor's note, it may not subsequently charge back the payee's account.[4] In such case the bank is held to have accepted the check unconditionally in payment of the note.[5]

The question is closer in the typical case in which the drawee bank takes no affirmative action except to credit the payee's account in the amount of the check, but such action alone is generally ruled to be an acceptance which precludes the bank from charging back against the payee's deposit when the drawer's account proves to be insufficient.[6]

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[1]National Gold Bank and Trust Company v. McDonald, 51 Cal. 64, 21 Am. Rep. 697 (1875); Oddie v. The National City Bank of New York, 45 N. Y. 735, 6 Am. Rep. 160 (1871); Boyd v. Emmerson, 2 A. & E. 184, 111 Eng. Rep. 71 (1834).

[2]Boyd v. Emmerson, 2 A. & E. 184, 111 Eng. Rep. 71 (1834).

[3]See National Bank v. Burkhardt, 100 U. S. 686, 689, 25 L. ed. 766, 768 (1880); City National Bank of Selma v. Burns, 68 Ala. 267, 44 Am. Rep. 138, 142 (1880); Cohen v. First National Bank of Nogales, 22 Ariz. 394, 198 Pac. 122, 124, 15 A. L. R. 701, 705 (1921); First Nat. Bank at Paris v. McKeen, 197 Ark. 1060, 127 S. W. (2d) 142, 143 (1939); National Deposit Bank of Owensboro v. Ohio Oil Co., 250 Ky. 288, 62 S. W. (2d) 1048, 1050 (1933); 7 Am. Jur., Banks §457.

[4]Pratt v. Foote, 9 N. Y. 463 (1854).

[5]Security Nat. Bank v. Old Nat. Bank, 241 Fed. 1 (C. C. A. 8th, 1917); Pratt v. Foote, 9 N. Y. 463 (1854).

[6]National Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766 (1880); Federal Savings & Loan Ins. Corp. v. Third Nat. Bank in Nashville, 173 F. (2d) 192 (C. A. 6th, 1949); City National Bank of Selma v. Burns, 68 Ala. 267, 44 Am. Rep. 138 (1880); Cohen v. First National Bank of Nogales, 22 Ariz. 394, 198 Pac. 122, 15 A. L. R. 701 (1921); First Nat. Bank at Paris v. McKeen, 197 Ark. 1060, 127 S. W. (2d) 142 (1939); American Exchange National Bank v. Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171 (1891); National Deposit Bank of Owensboro v. Ohio Oil Co., 250 Ky. 288, 62 S. W. (2d) 1048 (1933); Bryan v. First Nat. Bank of McKees Rocks, 205 Pa. 7, 54 Atl. 480 (1903). See Citizens' Bank of Norfolk v. Schwarzschild & Sulzberger Co., 109 Va. 539, 543, 64 S. E. 954, 955, 23 L. R. A. (N. S.) 1092, 1095 (1909); 9 C. J. S., Banks and Banking §284.

This rule is subject to the qualification that the chargeback will be allowed if the depositor of the check is regarded as not having acted in "good faith," as where he presented the check for deposit knowing that the drawer had not sufficient funds on deposit to satisfy it.[7]

In normal banking transactions there is very little said to express the meaning and intent of the actions of each party, though the true nature of the agreement between the parties must be interpreted by the court from these routine actions.[8] The usual holding against the bank is generally supported on the grounds that the giving of credit is the legal equivalent of giving the depositor cash for the check and receiving it back again as a deposit.[9] However, since it must be admitted that even the giving of cash could conceivably be done with the intent to make only a qualified acceptance,[10] this reason does not appear to be wholly conclusive of the parties' true intent. Among the arguments advanced in support of the majority rule[11] is that public policy

[7]Federal Savings & Loan Ins. Corp. v. Third Nat. Bank in Nashville, 173 F. (2d) 192 (C. A. 6th, 1949); City National Bank of Selma v. Burns, 68 Ala. 267, 44 Am. Rep. 138 (1880); National Deposit Bank of Owensboro v. Ohio Oil Co., 250 Ky., 288, 62 S. W. (2d) 1048 (1933); Peterson v. Union National Bank, 52 Pa. 206, 91 Am. Dec. 146 (1886); 9 C. J. S., Banks and Banking §284.

[8]National Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766 (1880); Pollack v. National Bank of Commerce In St. Louis, 168 Mo. App. 368, 151 S. W. 774 (1912). See Arkansas Trust and Banking Company v. Bishop, 119 Ark. 373, 178 S. W. 422, 423 (1915); Oddie v. The National City Bank of New York, 45 N. Y. 735, 6 Am. Rep. 160, 162 (1871).

[9]See Federal Savings & Loan Corp. v. Third Nat. Bank in Nashville, 173 F. (2d) 192, 199 (C. A. 6th, 1949); City National Bank of Selma v. Burns, 68 Ala. 267, 44 Am. Rep. 138, 141 (1880); Pollack v. National Bank of Commerce In St. Louis, 168 Mo. App. 368, 151 S. W. 774, 775 (1912); Oddie v. The National City Bank of New York, 45 N. Y. 735, 6 Am. Rep. 160, 163 (1871); Bryan v. First National Bank of McKees Rocks, 205 Pa. 7, 54 Atl. 480, 482 (1903); Union State Bank of Lancaster v. People's State Bank of Lancaster, 192 Wis. 28, 211 N. W. 932, 933 (1927).

[10]See First National Bank of Owenton v. Sidebottom, 147 Ky. 690, 145 S. W. 404, 405 (1912).

[11]"While the reasoning of the courts . . . is not altogether satisfactory, the conclusion reached by them is sustained by the great current of authority." Citizens' Bank of Norfolk v. Schwarzchild & Sulzberger Co., 109 Va. 539, 545, 64 S. E. 945, 956, 23 L. R. A. (N. S.) 1092, 1096 (1909). The reasons given for the rule include: (1)The Bank is responsible for knowing the status of the drawer's account and therefore as between the bank and payee, the bank must bear the loss. See Manufacturers' Nat. Bank v. Swift, 70 Md. 515, 17 Atl. 336 (1889). (2) Once the bank has given credit to the payee and the payee has relied thereon, the bank is estopped to deny that it has unconditionally accepted the check. See Oddie v. National City Bank of New York, 45 N. Y. 735, 742, 6 Am. Rep. 160, 164 (1871). (3) Public policy demands that the transaction should be regarded as completed when credit is given. See Spokane & Eastern Trust Co. v. Huff, 63 Wash. 225, 115 Pac. 80, 82 (1911).

demands certainty in commercial transactions, and that there must be some point at which the depositor can regard the transaction as complete; therefore, when the bank gives credit to the depositor the issue should be settled.[12] Strong as this argument may be, there exists a contrasting policy adopted in a minority of jurisdictions that a bank should be given a reasonable time in which to examine the status of a drawer's account, and that in order to prevent unnecessary delays during banking hours, this examination should be allowed after hours during the same or following business day.[13]

Even in jurisdictions where the view adverse to the bank is firmly entrenched in the law, some courts, apparently perceiving that its effect is to work a hardship on banks, seek to avoid the result by relaxing the established tests of whether there has been an unqualified acceptance.[14]

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[12]"But, while the courts are uniform in holding that a bank cannot recover under the circumstances cited, they are not agreed upon the principle upon which the rule prohibiting a recovery rests. Some of them, it will be observed, put it on the grounds of want of privity between the holder of the check and the bank; others upon the ground that the payment is not a payment by mistake within the meaning of the rule that permits a recovery; others again on the ground that to permit the bank to repudiate the payment would destroy the certainty that must pertain to commercial transactions of this sort if they are to remain useful to the business public. To our minds the latter reason is the most satisfactory. If, for example, a merchant conducting a retail business must hold the money he receives from the bank in payment of checks and drafts, taken in by him from his customers in payment for the purchase of goods, until such reasonable time as the bank has to determine whether or not it will call upon him for a return of the money, it is manifest that he must discard the use of checks and drafts in the conduct of his business and require his customers to bring him cash. The uncertainty, delay, and annoyance such rule would cause him would forbid their use in his business." Spokane & Eastern Trust Co. v. Huff, 63 Wash. 225, 115 Pac. 80, 82 (1911).

[13]Ocean Park Bank v. Rodgers, 6 Cal. App. 678, 92 Pac. 879 (1907); National Gold Bank and Trust Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697 (1875). The California Rule has been codified in Deering's General Laws, Act 652, §16c. Hansen v. Bank of America National Trust and Savings Ass'n, 101 Cal. App. (2d) 300, 225 P. (2d) 665 (1950). See W. A. White Brokerage Co. v. Cooperman, 207 Minn. 239, 290 N. W. 790, 794 (1940); Stankey v. Citizen's Nat. Bank of Laurel, 64 Mont. 309, 209 Pac. 1054 (1922). And see Justice Holt's dissent in First Nat. Bank at Paris v. McKeen, 197 Ark. 1060, 127 S. W. (2d) 142, 145 (1939): "The effect of this decision is that when customers, such as large department stores in the larger cities of this state, that accept literally hundreds of checks daily, go to make their deposits, the bank teller, before crediting the grand total of these checks on the passbook of this depositor, must leave his cage, go back to the bookkeeper and ascertain whether each one of these hundreds of checks is good. This might conceivably take hours while the line of customers waited. Such a rule would, in my opinion, paralyze banking and is not the law of this state."

[14]First National Bank at Paris v. Ihle, 202 Ark. 46, 149 S. W. (2d) 548 (1941); Walnut Hill Bank v. National Reserve Bank, 141 App. Div. 475, 126 N. Y. Supp. 430 (1910).

Thus, there has developed what is in effect a disguised retreat from the majority doctrine, and while it may still be said that "giving credit" or "receiving as a deposit" constitutes an unqualified acceptance, it is impossible to determine in many instances what amounts to "giving credit" or "receiving as a deposit." For example, one court held that a notice mailed to the payee that credit had been given completed the transaction, precluding the bank from making a charge back,[15] while another court held a similar notice to be a mere erroneous statement not amounting to the giving of credit, and allowed the bank to prevail.[16]

Despite this confusion there appear to be two ways in which the parties can make sure of the manner in which the courts will interpret their acts. One method is to express in a deposit contract the bank's right to charge back the depositor's account upon discovery of insufficient funds subsequent to crediting the depositor's account. This procedure clearly makes the giving of credit a qualified acceptance, since the intent is expressed by the contract rather than left to be inferred from routine actions.[17] The other method is to have the bank

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[15]Cohen v. First National Bank of Nogales, 22 Ariz. 394, 198 Pac. 122, 126, 15 A. L. R. 701, 708 (1921). This court construed the dilemma as one in which the demands of justice were in open conflict with the demands of our economy, and avoided the confusion by reluctantly deciding in favor of the economic demand and refusing to allow a charge back. "We have reached the conclusions stated in this decision with a great deal of reluctance. It seems to be one of those cases where a party has the right to stand upon his legal rights no matter how selfish and harsh such conduct may appear to be. While we may not condemn the conduct of the plaintiff, we are not compelled to approve it. The case is decided as it is because we think it would be an extremely pernicious thing to throw doubt upon the scope of the doctrine covering negotiable paper. These doctrines are of immense value to every form of industry. To seek too readily for exceptions from the well settled rule of this branch of law in pursuit of a supposed equity would tend to impair the value of the principles of commercial law which depend largely upon their certainty."

[16]Walnut Hill Bank v. National Reserve Bank, 141 App. Div. 475, 126 N. Y. Supp. 430 (1910).

[17]Hardee v. George H. Price Co., 89 F. (2d) 497 (App. D. C. 1937); Adams County v. Meadows Valley Bank, 27 Idaho 646, 277 Pac. 575 (1929); Canal Bank and Trust Co. v. Denny, 172 La. 840, 135 So. 376 (1931); E. S. Macomber & Co. v. Commercial Bank, 166 S. C. 236, 164 S. E. 596 (1932); Lebanon Bank and Trust Co. v. Grandstaff, 24 Tenn. App. 162, 141 S. W. (2d) 924 (1940). A like result has been obtained where a prevailing banking custom of giving only conditional credit was proved. Pollack v. National Bank of Commerce in St. Louis, 168 Mo. App. 368, 151 S. W. 774 (1912). But see First National Bank at Paris v. Ihle, 202 Ark. 46, 149 S. W. (2d) 548 (1941), where it was held a custom had been established, and First National Bank at Paris v. McKeen, 197 Ark. 1060, 127 S. W. (2d) 142 (1939), where, in a controversy arising out of the same transaction but involving different parties, no such custom was found to exist.

pay the depositor in cash, which action seems always to have been regarded as an unqualified acceptance of the check by the bank.[18]

A situation involving a conflict between these two extremes was recently presented in the Supreme Court of Colorado, in *Citizens State Bank of Cortez v. Pritchett.*[19] Defendant bank took from plaintiff,under a deposit contract which provided that all deposits for credit were conditional upon final payment, a check drawn on itself, giving in return half cash and half credit. The account of the drawer being insufficient, the bank charged back plaintiff's account with the entire amount of the check. In suit for that amount, plaintiff's judgment at the trial was reversed on appeal, the Supreme Court stating that in the absence of an express agreement to the contrary, the entire transaction was a qualified acceptance, subject to the terms of the deposit contract.[20] Two judges, in dissent, argued that the unusual half cash (indicating unqualified acceptance), half credit (indicating qualified acceptance under the contract) situation raised a question of fact as to what the parties actually intended, for determination at the trial level.[21]

At some points in the majority opinion, reliance appears to be placed solely upon the terms of the depositor's contract as making the receiving of all checks, for cash or credit, qualified acceptances.[22] However, in summarizing the basis for the decision, the opinion in its

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[18]See Bryan v. First National Bank of McKees Rocks, 205 Pa. 7, 54 Atl. 480, 482 (1903). " . . . it cannot be pretended that, if an actual cash payment had been made to Bryan by the bank, there could be a recovery from him, if unwilling to pay it." Citizens' Bank of Norfolk v. Schwarzschild & Sulzberger Co., 109 Va. 539, 544, 64 S. E. 954, 956, 23 L. R. A. (N. S.) 1092, 1096 (1909); Ocean Park Bank v. Rodgers, 6 Cal. App. 678, 92 Pac. 879, 880 (1907). Britton, Bills and Notes (1943) 638.

[19]231 P. (2d) 462 (Colo. 1951).

[20]Citizens State Bank of Cortez v. Pritchett, 231 P. (2d) 462 at 465 (Colo. 1951). The applicable language of the deposit contract was: The bank "may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited." 231 P. (2d) 462, 464 (Colo. 1951).

The check was 65 days old and there was slight evidence that the plaintiff did not present the check in good faith. It is possible that the court was influenced by the suspicion of bad faith, for although it stated at page 463 that "There is no suggestion of fraud in the acts of the plaintiff in the receiving, holding and presentment of the check," it later declared at page 465 that "when plaintiff failed to use reasonable promptness, he should not, in fairness and equity, be allowed to recover from the bank for a loss which it did not occasion." However, bad faith is clearly not the basis of the decision.

[21]Citizens State Bank of Cortez v. Pritchett, 231 P. (2d) 462, 465 (Colo. 1951).

[22]"Under the contract here prevailing, checks were received subject to credit at close of the business day. We find no indication that there was an intention on the part of the bank to handle the check in question in any other manner." Citizens State Bank of Cortez v. Pritchett, 231 P. (2d) 462, 464 (Colo. 1951).

final paragraph asserts: "In the absence of any clear and unmistakable intention to do otherwise, in equity and good conscience, we must, and do, hold and determine that *this was a deposit* without absolute acceptance of the check by the bank, and is to be governed by the existing agreement relative to deposits."[23] Since this statement without the last twelve words would have led to the same decision as was reached in the case, it is logical to conclude that even without the deposit contract, the acceptance would have been ruled conditional unless there had been an express agreement that it be unconditional. Thus the court strongly implies that all such half-cash, half-credit transactions should be treated as conditional acceptances, absent agreement to the contrary.

The court clearly has indicated its support of the minority view regarding deposits of checks for credit in the full amount,[24] although this revelation was not essential to the decision of the issues here involved. Further, the court has extended the minority view to include not only deposits for credit in the full amount, but transactions involving receipt by the bank of items for partial credit and partial cash payment. These transactions it also designates "deposits," thus bringing the entire transaction under the terms of the deposit contract and allowing chargebacks in the full amount.

Such an extension of the scope of the term "deposit" seems unwarranted since it requires overlooking the cash portion of the transaction. It seems clear that the transaction was not in its entirety a deposit, but was only a deposit of that amount for which credit rather than cash was received. This being the case, the chargeback should only have been allowed for the credit amount.

WILLIAM H. HOGELAND, JR.

PROCEDURE—CONSTRUCTION OF NEW APPELLATE RULES OF VIRGINIA TO REQUIRE STRICT COMPLIANCE. [Virginia]

The new appellate rules of the Supreme Court of Appeals of Virginia have now been in effect for nearly two years, and while only eight cases have reached the Supreme Court of Appeals on matters calling for interpretation of the rules, preliminary indications are

[23]Citizens State Bank of Cortez v. Pritchett, 231 P. (2d) 462, 464 (Colo. 1951) [italics supplied].

[24]The court expresses the policy behind the minority view in these words: "To hold otherwise would be to leave the business of commercial banking in a state of hopeless confusion." Citizens State Bank of Cortez v. Pritchett, 231 P. (2d) 462, 465 (Colo. 1951).

already giving promise that the intended procedural reform will be successful in curing some of the defects of the old rules. When the rules were promulgated it was intended that they should bring about a simplification in making up the record and presenting it to the Court of Appeals, that issues involved in the appeal should be clarified, and that the expense of the appeal should be reduced.[1] It would appear that if these objectives are attained, an important incidental benefit will also be conferred in that the Court of Appeals will be saved a considerable amount of time and labor by being relieved of the burden of reading through a mass of irrelevant testimony, pleadings and motions.[2] With a simplified record, the court will be able to give greater attention to the true issues of the appeal from a standpoint of substantive law.

Even though these objectives have been advocated for many years[3] they were unobtainable under the old procedure because of the difficulty in limiting the record to material supporting the specific issues involved in the appeal. The source of the difficulty lay in the fact that no deletion of the record could be made safely without the consent of both parties litigant,[4] and the instances in which the appellee would give consent were rare.[5] Two major reasons have been asisgned to explain the appellee's unwillingness to give his consent to any such abbreviation.[6] First, he did not want to lighten the burden of the appellant in prosecuting an appeal. It was only natural that the appellee should want to frustrate any appeal which might upset the judgment that had been rendered in his favor. This refusal to agree to an abbreviation of the record was a very effective method of harassing the efforts of the appellant, for by that means the appellee could cause the appellant added expense and labor, thus making the appeal process difficult and unattractive. Second, the appellee usually refused

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[1]Skeens v. Commonwealth, 192 Va. 200, 64 S. E. (2d) 764 (1951). Also see The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 36.

[2]The Judicial Council for Virginia fails to mention this incidental benefit in its report on the proposed modifications of Virginia procedure. The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 37.

[3]These objectives have been desired since 1887. The judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 36.

[4]2 Va. Code Ann. (Michie, 1950) §8-470.

[5]See The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 36.

[6]The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 36.

to agree to any shortening of the record, because he did not want to prepare a legal defense that would not be needed if the appeal was denied. Before any intelligent deletion could be made from the record, appellee would have to know what defenses he was going to make to the appeal and what parts of the record he would need to rely on to support his defense in the event that the appeal was allowed.[7]

Without the consent of the appellee, the appellant could not, with any degree of assurance, omit any parts of the record.[8] If the appellant did not bring up all the evidence, it could be argued by the appellee that the omitted part supported him; and if the appellant failed to bring up instructions, it would be contended that they were against him. Further, it was possible for the appellee to insist that any omitted parts of the record cured the error alleged on appeal.[9] Therefore, even if the appellant may have desired to shorten the record, as a matter of prudence it became necessary for him to use the complete record. In order to remedy this situation it was necessary to formulate rules that did not require the consent of the appellee and did not permit omitted parts of the record to be used as the basis for arguments against the appellant. The new appellate rules were meant to effect such change.

The interpretation given by the Supreme Court of Appeals to Rule 5:1[10] of the new rules demonstrates how their purposes have been achieved in actual practice. From the language of *Vick v. Siegel*[11] it appeared that the court was going to deviate from the true policy of the rules, for there, in ruling that the appellant's attempt to bring an appeal was adequate, the court stated: "There has been, we think, a substantial compliance with the rule."[12] The intimation was thus raised that the standard governing appellant's conformity would be one of merely *substantial* compliance. However, it appears that this language is limited to the facts of that case, since the later case of *Avery v. County*

[7]The record must accompany the petition for appeal, but at the time of the petitioning it is not known whether the court will allow the appeal or not.

[8]See The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 41.

[9]See Bowen v. Bowen, 122 Va. 122 Va. 1, 94 S. E. 166 (1917), where, under the old rules, a question was raised over omitted parts of the record. Also The Judicial Council for Virginia, Proposed Modifications of Practice and Procedure (1949) 36, 37.

[10]Rules of Supreme Court of Appeals of Virginia, Rule 5:1. This rule deals with the form and contents of the record, and sets the time limits for the various acts that are to be performed before an appeal can be perfected.

[11]191 Va. 731, 62 S. E. (2d) 899 (1951). The appellee moved to dismiss the appeal on the grounds that the appellant had not designated for printing as required by Rule 5:1 §6 (d) and had failed to print any assignment of error.

[12]Vick v. Siegel, 191 Va. 731, 737, 62 S. E. (2d) 899, 901 (1951).

School Board[13] held that nothing less than *strict* compliance with Rule 5:1 will be acceptable.[14]

Though it would seem that the language of the two decisions is in conflict, the cases are distinguishable. The *Vick* case [15] arose under Section 6 (d) of Rule 5:1, whereas the *Avery* case[16] arose under Section 6(a) of Rule 5:1. Section 6 (a) provides that: "Not less than twenty days before the record is transmitted, counsel for appellant shall file with the clerk a designation of the parts of the record that he wishes printed."

This section proposes that the appellant shall, after deciding what parts of the record he desires to use in support of the appeal, designate such parts so that they may be printed and those parts not so designated may be omitted. The choosing of the part of the record to be printed is an act that can be done only by the appellant's counsel, and if he fails to make this designation no one can do it for him. Therefore, ruled the *Avery* case, if the appellant fails to designate within the allotted time period, his case must fail. Thus, a strict construction of the rule was made. However, the court thought that the act (designation of the assignment of error to be printed) omitted in the *Vick* case was one required to be performed by the clerk of the trial court.[17] This act was purely ministerial in nature and demanded no exercise of discretion as to what should be included. In order not to defeat a right because of the failure of a public official to perform a ministerial act,[18] the court placed a liberal construction on the rules to hold that in this particular situation substantial compliance would be satisfactory.

[13]192 Va. 329, 64 S. E. (2d) 767 (1951). This case arose on a motion to dismiss on the grounds that appellant had failed to designate parts of the record to be printed within the time required by Rule 5:1. The appellant admitted that he had been late in making the designation, but contended that, notwithstanding this, the rules were merely directory and not mandatory.

[14]Hall v. Hall, 66 S. E. (2d) 595 (Va. 1951) further substantiates this view. In this case the appellant admitted that he failed to comply with Rule 5:1, §4 but he contended that he had substantially complied with the rule by giving notice of intention to apply for a transcript of the record (the procedure followed under the old rules). The court disallowed this contention.

[15]192 Va. 731, 62 S. E. (2d) 899 (1951).

[16]192 Va. 329, 64 S. E. (2d) 767 (1951).

[17]It is true that appellant designates the material required by Section 6 (d) along with other parts of the record that are covered by section 6 (a), but this is only for convenience so that the clerk can hand the form guide which contains a designation of all parts of the record that are to be printed over to the printer without having the burden of checking it.

[18]"He [the appellant] should not be denied a review simply because of an error by a ministerial officer of the court." Leigh v. Commonwealth, 192 Va. 583, 66 S. E. (2d) 586 (1951).

The court, in finding the language of Section 6 (a) was mandatory, acknowledged the fact this was a very technical ruling but justified it on the basis that an orderly administration of justice requires that procedural rules be strictly complied with, especially in the case of time limits. It was only proper that such a stand be taken in the *Avery* case because to hold otherwise, first, would raise the highly speculative problem of just how far the appellant could stray from the specifically stated provisions of the rules, and second, would, if there be no time limit, leave the appellee in the uncomfortable position of never knowing when a final determination had been reached in the case.[19]

After placing the foregoing construction on the rules, the court continued to elaborate on this technical ruling by outlining the procedural steps under the new rules, with particular attention devoted to those dealing with time limits. The appellant has *four months*[20] in which to perfect his appeal, but in the first *sixty days* he must do three things: file notice of appeal,[21] present transcribed oral evidence to the trial judge to be signed by him,[22] and file assignments of error.[23] The reason for requiring the assignments of error to be filed before more than half of the time for perfecting the appeal has elapsed is that until such assignment of error is made, the issues are not defined and the appellee does not know how to defend. The court did not ascribe any reason for requiring that presentation of the transcribed testimony and notice of appeal should be made within the same period as that provided for the making of the assignment of error, but it would seem that the close relationship the three factors bear to defining the issues and notifying the appellee of them would be reason enough.

After receiving the notice of appeal and assignment of error, it is the duty of the clerk to make up the record.[24] But if the appellant

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[19]See Skeens v. Commonwealth, 192 Va. 200, 64 S. E. (2d) 764 (1951) for further support of the point of view that there should be a definite time limit.

[20]Rules of the Supreme Court of Appeals of Virginia, Rule 5:4 by incorporation 2 Va. Code Ann. (Michie, 1950) §8-463 allows four months to perfect the appeal. In no case will this time be extended. Cousins v. Commonwealth, 187 Va. 506, 47 S. E. (2d) 391 (1948); Johnson v. Merritt, 125 Va. 162, 99 S. E. 985 (1919).

[21]Rules of Supreme Court of Appeals of Virginia, Rule 5:1, §4.

[22]Rules of Supreme Court of Appeals of Virginia, Rule 5:1, §3 (f). After the sixty day period has elapsed, the judge still has another ten days to sign the transscript.

[23]Rules of Supreme Court of Appeals of Virgina, Rule 5:1, §4.

[24]Rules of Supreme Court of Appeals of Virginia, Rule 5:1, §5. No time limit is fixed as to when the clerk must make up the record after receiving assignment of error and notice of appeal. The only thing said in that respect is that the clerk shall make up the record "promptly" after receiving such notice. The court in the Avery case refused to place a construction upon the word "promptly."

has failed to file his notice of appeal and assignment of error within the sixty day limit, the clerk has no authority to make up the record, because such acts are of a jurisdictional nature, and as such constitute a condition precedent to the clerk's authority to proceed. A failure of the appellant to present the transcribed testimony within sixty days does not preclude the exercise of the clerk's power to make up the record, but the practical effect of such a failure could be that the appeal would be defeated because where such transcribed testimony is not presented to the judge within sixty days, the judge has no authority to sign the transcription and so it cannot become part of the record. Consequently, the appellant would have nothing in the record to support any assignment of error that is based on the oral testimony—for example, the admission of some objectional evidence.

Between the time of the preparation of the record and the expiration of the four month period given to perfect the appeal, the appellant must designate the parts of the record to be printed,[25] and only such parts that are germane to the appeal should be so designated. The court regards this as a very important consideration, in that such a clause encourages the reduction of the size of the record,[26] thus accomplishing one of the basic reforms intended by the new rules. A failure to make such designation within the given time limit will be fatal to the appeal since this action has been made a condition precedent to the clerk's power to transmit the record to the Supreme Court of Appeals.

Notwithstanding the fact that Section 8-463 of the Virginia Code as incorporated into Rule 5:4 allows four months for the perfecting of the appeal, Rule 5:1, Section 6 (a) and Section 7 provide that after appellant makes his designation of the parts of the record to be printed there must be a twenty day waiting period to give the appellee, as a matter of right, an opportunity to examine the record and designate any additional parts that he may wished printed.[27] In order that the appellee may be accorded this right and the appead still perfected within four months, the time actually available to appellant for preparing his appeal is twenty days less than four months.[28]

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[25]Rules of Supreme Court of Appeals of Virginia, Rule 5:1, §6 (a).

[26]The rules also place much favor on this consideration by imposing a penalty for designating parts not germane to the record: Rules of Supreme Court of Appeals of Virginia, Rules 5:1 §6 (e).

[27]Since this provision is for the benefit of the appellee, it would appear that it may be waived by him. Query: Do the new rules force appellee to define his defenses before the appeal is actually granted?

[28]Any designation of what is to be printed must be made in the trial court. Avery v. County School Board, 192 Va. 329, 64 S. E. (2d) 767 (1951).

The *Avery* case carried the new rules a long way toward the achievement of procedural reform. But the decision in *Babbit v. Miller*[29] made it appear that the attempt to reduce costs and wastefulness might not be entirely successful. In that case the court was not willing to say that where the appellee had a transcript made of oral testimony, he was under a duty to grant access to it to the appellant.[30] The waste entailed by such a holding is obvious. Under this ruling, if either party in the trial court has any intention of appealing in the event that he loses, he must hire a court reporter to transcribe the testimony, and this could in many cases mean that there would be two court reporters doing the job that one might just as easily accomplish. However, the question was mooted by an amendment to the new rules[31] which provides that where one party has had oral testimony transcribed he must provide access to it to the other party.

There has not yet been sufficient case material to afford an opportunity for a comprehensive examination of the operation of the rules, and undoubtedly many weak places in their structure must go undetected until tested in the heat of litigation. Nevertheless, the future policy for interpreting the problems that may arise appears to be well established by the few cases that have been decided on the subject. From the strict application that the court has made of Rule 5:1, it would seem safe to predict that the same technique will be adopted when the other rules come under scrutiny. The one exception to this strict approach thus far indicated would seem to arise where a court officer fails to perform a ministerial duty.[32]

JACKSON L. KISER*

[29]192 Va. 372, 64 S. E. (2d) 718 (1951).

[30]It was so held even though the court in Matthews v. W. T. Freeman Co., Inc., 191 Va. 385, 60 S. E. (2d) 909 (1950) had determined that it is a duty of the litigants not to increase the cost of appeal.

[31]Rules of Supreme Court of Appeals of Virginia, Rule 1:10 as adopted June 21, 1951.

[32]In Vick v. Siegel, 191 Va. 731, 62 S. E. (2d) 899 (1951), appellant was the cause of the failure. However, in Leigh v. Commonwealth, 192 Va. 583, 66 S. E. (2d) 586 (1951), the fault was solely that of the clerk because appellant had in fact filed notice of appeal and assignment of error within the sixty day period, but the clerk had negligently failed to note it until after the sixty days had elapsed.

*Acknowledgement is made of the contribution of Emory Widener, Law Class of 1952, now on active duty with the United States Navy, in the research for this comment.

PROPERTY—CREATION OF TENANCY BY ENTIRETIES BY CONVEYANCE TO HUSBAND AND WIFE AND THIRD PARTY. [Pennsylvania]

The type of concurrent ownership of real property which reflected the common law concept of the unity of person of a husband and wife was the estate by the entirety.[1] Any conveyance which to other grantees would have created a joint tenancy was held to create an estate by entireties where the grantees were husband and wife.[2] This was so even though the grantor expressly indicated a different intent, since husband and wife, being one person in law, could not take the estate by moieties.[3] Thus, in the concept of entireties, a fifth unity, that of person, was added to the four requisites of a joint tenacy—unity of time, title, interest, and possession.[4]

The Married Women's Acts, passed in varying form in all of the states, have done away with the common law unity of person. The wife is acknowledged to be a separate legal person, and as such is given the right to sue, execute contracts, hold property, and carry on business.[5] In England and some of the American states, courts construe these Acts as having abolished estates by the entireties.[6] In other states tenancies by the entirety have been expressly abolished by statute.[7] However, in a majority of jurisdictions the existence of this type of interest in reality is still recognized, and a conveyance to two grantees who are husband and wife creates an estate by the entirety, unless an intent to the contrary is indicated.[8]

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[1]Burby, Real Property (1943) §204. See Note (1896) 30 L. R. A. 306: "An estate by entireties is an estate held by husband and wife together so long as both live, and, after the death of either, by the survivor so long as the estate lasts."

[2]See Walthall v. Goree, 36 Ala. 728, 733 (1860).

[3]". . . if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 Blackstone, Commentaries on The Laws of England (1807) 181. "Being but one person, they cannot be joint tenants or tenants in common as these tenancies require more than one tenant." 30 C. J. 556

[4]13 R. C. L. 1098.

[5]Madden, Persons and Domestic Relations (1931) 110-121.

[6]Swan v. Swan, 156 Cal. 195, 103 Pac. 931 (1909); Semper v. Coates, 93 Minn. 76, 100 N. W. 662 (1904); Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92 (1900). Also see 13 R. C. L. 1101.

[7]Madden, Persons and Domestic Relations (1931) 124.

[8]Commissioner of International Revenue v. Hart, 76 F. (2d) 864 (C. C. A. 6th, 1935); Dixon v. Becker, 134 Fla. 547, 184 So. 144 (1938); Young v. Cockman, 182 Md.

The problem of whether such an estate is created when a conveyance is made to *three persons,* two of whom are husband and wife, was raised before the Pennsylvania Supreme Court for the first time in the recent case of *Heatter v. Lucas.*[9] The granting clause of the deed read "to Francis Lucas, a single man, and Joseph Lucas and Matilda Lucas, his wife,"[10] but the proportionate share the grantor intended each to take was not expressly mentioned in the conveyance. Action for a declaratory judgment was brought by creditors of Joseph Lucas, now deceased, to determine his interest in the property for attachment purposes. In Pennyslvania, the general common law rule is followed that creditors of a tenant by the entireties cannot levy on their debtor's interest in the estate, because in legal contemplation he owns nothing independently of the other tenant, and the interests of the latter are disturbed if any part of the property is taken to satisfy the debts of one tenant.[11] Furthermore, survivorship being one of the distinctive characteristics of an estate by the entireties, the death of one spouse vests the entire estate in the surviving spouse.[12] However, if the estate is held by a tenancy in common, the debtor's interest can be subjected to the payment of his debts,[13] and this is true whether the action is commenced before or after the debtor's death.[14]

The court cited the rule in Pennsylvania to be that where a conveyance of land is made to three grantees, two of whom are husband

246, 34 A. (2d) 428 (1943); Childs v. Childs, 293 Mass. 67, 199 N. E. 383 (1935); Baker v. Lamar, 140 S. W. (2d) 31 (Mo. 1940); Kennedy v. Rutter, 110 Vt. 332, 6 A. (2d) 17 (1940). Also see Burby, Real Property (1943) §204.

[9]367 Pa. 296, 80 A. (2d) 749 (1951).

[10]Heatter v. Lucas, 367 Pa. 296, 80 A. (2d) 749, 750 (1951).

[11]In re Meyer's Estate, 232 Pa. 89, 81 Atl. 145 (1911); McCurdy and Stevenson v. Canning, 64 Pa. 39 (1870). In any jurisdiction where the separate legal entity theory is followed the creditors of either spouse cannot subject the land belonging to both by the entireties to the payment of the debts. Such an estate can only be reached to satisfy debts that are owed jointly by husband and wife. However, in states following the statutory modified "unity of persons" theory, the property interest of one spouse may be reached to satisfy individual debts, so long as they do not prejudice the survivorship rights of the other spouse. See Burby, Real Property (1943) §207.

[12]"Each is seized of the whole, and each owns the whole. If one dies, the estate continues in the survivor, the same as if one of several corporators dies. It does not descend upon the death of either, but the longest liver, being already seized of the entire estate, is the owner of it." Town of Corinth v. Emory, 63 Vt. 505, 22 Atl. 618 (1891). This right of survivorship is all the more important when it is remembered that a tenancy by the entirety cannot be terminated without the consent of both husband and wife. See 30 C. J. 567.

[13]49 C. J. S. 914.

[14]Upon the death of one tenant his undivided interest will pass to his heirs or devisees, since there is no right of survivorship connected with a tenancy in common, Burby, Real Property (1943) §210.

and wife, but not designated as such, each grantee will take one-third as tenant in common with the other two, unless a contrary intention is expressed. The court was of the opinion that the intention of the grantor should be the controlling factor, and in regard to the grant involved in the instant case, it thought that mention of the marital status of each grantee, the use of the conjunction, "and," between the name of the son and the names of the husband and wife, and the fact that the first grantee was the son of the other two, was sufficient evidence to show that the grantor intended the husband and wife together to take only an undivided one-half interest as tenants by entirety.

As was pointed out in the opinion of the principal case, there were at least three possible interpretations of the granting clause of the deed in question: first, each grantee may have taken an undivided one-third interest as a tenant in common; second, the son may have taken an undivided one-half interest as a tenant in common with his mother and father, who hold the other one-half interest as tenants by the entireties; or third, the son may have taken an undivided one-third interest as tenant in common with the other two grantees who hold the remaining two-thirds interest as tenants by the entireties. Clearly the second construction would be the proper one under the strict common law rule, and the majority of the courts reach that result, absent a contrary expressed intention of the grantor.[15] Thus, in the New York case of *Bartholomew v. Marshall*,[16] it was held that a conveyance to husband and wife and a third person which failed to mention the marital relationship and said nothing as to the nature of the estate conveyed, entitled the husband and wife to one moiety as tenants by the entirety, and the third grantee held the other moiety as a tenant in common with them. However, the Pennsylvania court was unwilling to follow the strict common law principle, which has been termed an "ancient absurdity"[17] and has been severely criticized in the light of the Married Women's Acts;[18] and this court would not even

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[15]Dennis v. Dennis, 152 Ark. 187, 238 S. W. 15 (1922); West Chicago Park Commissioners v. Coleman, 108 Ill. 591 (1884); Hall v. Stephens, 65 Mo. 670, 27 Am. Rep. 302 (1877); Hardenbergh v. Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371 (1828); Johnson v. Hart, 6 Watts & S. 319, 40 Am. Dec. 565 (Pa. 1843). Also see 2 Tiffany, Real Property (3d. 1939) 222.

[16]13 N. Y. S. (2d) 568 (1939).

[17]"One peculiarity incident to this estate [by the entireties] is that, if an estate be given to A., B., and C., and A. and B. are man and wife, they, being one person, will take half interest, and C. will take the other half. This ancient absurdity seems to be the law in this state now." Moore v. Greenville Banking & Trust Co., 178 N. C. 118, 100 S. E. 269, 272 (1919).

[18]See Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92 (1900).

give effect to the modern presumption favoring entireties. It will rule the husband and wife to be tenants by the entirety when there are three grantees, *only* if there is some affirmative evidence that the grantor intended to create such an interest.

The test as announced in the instant case is a welcome move away from the strict common law rule, and is certainly in keeping with the purpose of the Married Women's Act. In view of these Acts, there is no justification for a rule today which holds that in a conveyance to three parties without any reference to marital ties, the fact that two of them are married completely changes the effect of the deed as to the shares and types of estates taken by the grantees. Obviously, the intent of the grantor should control here as in other situations.

However, courts have not hesitated to hold that a conveyance to the husband and wife creates a tenancy by entireties, even though there is strong indication that the grantor intended the grantees to take some other estate.[19] In an earlier Pennsylvania case, *In re Rhodes' Estate*,[20] it was held that a tenancy by entireties had been created although the deed stated the shares of the grantees were to be apportioned. The grantor conveyed land to his daughter and her husband, and stated in the deed that the consideration was $6,000 of which $3,700 represented the daughter's share. It was held that this was not sufficient evidence to rebut the presumption in favor of a tenancy by entireties. The Missouri court in the case of *Welch v. Harvey*[21] reasoned that the grantors intended to create a tenancy by entireties in spite of the express declaration in the deed that grantors do " 'hereby convey and sell to said Fannie and William [wife and husband] . . . two hundred and fifty acres . . . *most eastern fifty acres is the land sold to William Finley and the other two hundred acres we give to Fannie.*' . ." [22]

In the instant case, though the grantor did not name the type of estate intended for the grantees, the granting clause of the deed strictly conformed to the conventional wording used at common law to create

[19]In the following cases the conveyance was to husband and wife expressly as tenants in common, but tenancies by entireties wer held to have been created: Martin v. Jackson, 27 Pa. 504 (1856); Stuckey v. Keefe, 26 Pa. 397 (1856). Also see Russell v. Russell, 122 Mo. 235, 26 S. W. 677 (1894). Conveyances to husband and wife expressly as joint tenants made them tenants by entireties in the following cases: Commissioner of Internal Revenue v. Hart, 76 F. (2d) 864 (C. C. A. 6th, 1935); Strauss v. Strauss, 148 Fla. 23, 3 S. (2d) 727 (1941). Also see In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 408 (1893).

[20]232 Pa. 489, 81 Atl. 643 (1911).

[21]281 Mo. 684, 219 S. W. 897 (1920).

[22]Welch v. Harvey, 281 Mo. 684, 219 S. W. 897, 898 (1920).

an estate by the entireties, and this alone is strong evidence that the grantor intended husband and wife to take such an estate. Stress was also put on the grantees' relationship as parents and child as some indication that the grantor intended to convey a one-half interest to the son, and the other half to the parents. However, it might well be that such a close relationship would be more indicative of the grantor's desire that the three members of the same family should share in the estate equally. Relationship alone would seem to be no indication that the grantor intended the son to hold as much singly as his parents took together.

Nevertheless, the Pennsylvania court has definitely taken the sound position that the expressed intent of the grantor is to be given effect, and that no presumption in favor of an estate by the entireties is to be applied. The ruling concerned only a grant to three parties, and the court did not say whether it was willing to go one step farther than this case requires and apply the same rule to grants to husband and wife alone. Referring to such a grant, it is stated in the opinion that the court *"has been content to allow* the construction that, in the absence of an intention otherwise, the quality of the estate should be deemed one of the entireties."[23] This peculiar form of expression does not seem to denote a strong conviction of the propriety of the present rule, and the same considerations which recommended change in three-grantee cases apply with equal force in two-grantee cases. It may be, therefore, that the *Lucas* decision will prepare the way for a later transition to the view that where only husband and wife are involved, they take by entireties only if affirmative intention of the grantor to give them such interest is indicated.

EDWARD L. OAST, JR.

PROPERTY—DISPOSITION OF ESTATE HELD AS TENANCY BY ENTIRETIES AFTER ONE TENANT FELONIOUSLY KILLS OTHER. [Delaware]

Disagreement and confusion exist among the courts in regard to the legal rules and principles controlling the disposition of an estate held as a tenancy by the entireties after one spouse has feloniously killed the other. The outcome of the decisions on this and similar questions arising in wills, intestacy, or insurance cases[1] has been along

[23]Heatter v. Lucas, 367 Pa. 296, 80 A. (2d) 749, 751 (1951) [italics supplied].

[1]The testacy, intestacy, and insurance cases involving a beneficiary under a will or policy, who has slain the testator, ancestor, or insured, present very similar issues.

three general lines:[2] (1) the wrongdoer is entirely excluded from any interest in the property;[3] (2) the wrongdoer takes and keeps the entire estate;[4] (3) the wrongdoer takes the property but holds it under a constructive trust, the extent of the trust varying among the jurisdictions employing this technique.[5] Though the issue is complicated by a number of properly applicable but somewhat conflicting legal and equitable doctrines, a condition of law offering such diversity in results upon the same facts is manifestly undesirable.

The foundation of the minority view barring the criminal from any interest in the property is the fundamental maxim that no one

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[2]These possible answers were suggested in Ames, Can A Murderer Acquire Title By His Crime and Keep It? (1897) 36 Am. L. Reg. (N. S.) 225, 227, reprinting in Ames, Lectures on Legal History (1913) 310, 311, and it is significant that all subsequent "acquisition of property by murder" cases fall within one of the three catagories. 3 Bogert, Trusts and Trustees(1946) §478; 3 Scott, Trusts (1939) §492. Professor Ames advocated the use of the constructive trust device and, as the issue had only arisen very few times at this early date, the present uncertainty would have been avoided to a great extent if the courts had followed his suggestion.

[3]Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933) (intestacy); Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239 (1930) (intestacy); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908) (intestacy); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918) (tenancy by entireties); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889) (testacy); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042 (1904) (insurance); In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456, 51 A. L. R. 1088 (1926) (statute authorizing property to be set over in lieu of homestead and exemptions); In re Wilkins' Estate, 192 Wis. 111, 211 N. W. 652 (1927) (will). It has been said the Van Alstyne case purports to apply the constructive trust view. Reppy, The Slayer's Bounty—In New York (1945) 20 N. Y. U. L. Q. Rev. 424, 425; and some writers have cited it in support of that theory, 3 Scott, Trusts (1939) §492 n. 3; Note (1931) 11 B. U. L. Rev. 129, 130; Note (1927) 5 N. C. L. Rev. 373, 374; however, the case makes no reference to constructive trust terminology and may very properly be classed as falling under the first class. Because the case holding absolutely and completely deprives the slayer and all those claiming through him of any beneficial interest in the property, to argue which theory the case follows is, in all practical aspects, really to beg the question. Irrespective of the technique employed to reach this result, substantially the same legal issues are presented.

[4]Crumley v. Hall, 202 Ga. 588, 43 S. E. (2d) 646 (1947) (inhertance); Welsh v. James, 408 Ill. 18, 95 N. E. (2d) 872 (1950) (joint tenants); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914) (inheritance); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906) (inheritance); Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916) (dower and inheritance); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894), rev'g 31 Neb. 61, 47 N. W. 700 (1891) (interstacy); Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888) (dower); Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838 (1935) (joint bank account); Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S. W. 108 (1907) (tenants by entireties).

[5]Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930) (estate by entirety); Sherman v. Weber, 113 N. J. Eq. 451, 167 Atl. 517 (1933) (estate by entirety); Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896) (will); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, 51 A. L. R. 1100 (1927) (estate by entirety).

may acquire property by his own wrong.[6] Well illustrating the weight and effect given to this principle is the leading New York case of *Van Alstyne v. Tuffy*[7] in which the court enjoined the malfeasor's administrator and heirs from asserting any claim of ownership to the estate held by the entireties. In refusing even to permit the killer-husband a life estate in one-half of the profits, the court declared that "where the natural and direct consequence of a criminal act is to vest property in the criminal . . . the thought of his being allowed to enjoy it is to abhorrent for the courts . . . to countenance . . . . And equity will restrain in such a case though contract, testament, or statute be thereby nullified."[8] The doctrine has stood, even in the face of the Statutes of Wills and Distribution and of severe accusations of unjustifiable judicial legislation, on the grounds that "the reason of the law prevails over its letter"[9] and that the legislature must have intended to exclude such a wrongdoer from taking under the statute.[10] These cases attain the purpose of preventing the killer from obtaining any practical benefits, but their method completely ignores the very nature of an estate by the entirety with its characteristics of survivorship, the four unities, and the legal fiction that the husband and wife, as a unity, own the title.

Most jurisdictions, however, in the absence of specific statutory provisions, have permitted the slayer to acquire and retain complete ownership in the property.[11] These cases dismiss the maxim that one should not be allowed to profit by his own wrong, as having no application because in theory of law the wrongdoer owned the entire parcel from the time of the grant and thus has acquired nothing by his crime. Exemplifying the reasoning behind this theory is *Welsh v. James*,[12] an Illinois case involving property held in joint tenancy where the court stated that survivorship was an essential characteristic of such an estate and to hold that the killer got naked legal title only as a trustee would be contrary to constitutional provisions against corruption of blood and

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[6]This is one of the forms of the maxim: "Nullus commodum capere potest de injuria propria." Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 190 (1889); Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042, 1045 (1904).

[7]103 Misc. 455, 169 N. Y. Supp. 173 (1918).

[8]103 Misc. 455, 169 N. Y. Supp. 173, 175 (1918).

[9]Perry v. Strawbridge, 290 Mo. 621, 108 S. W. 641, 648 (1908).

[10]Garwols v. Bankers' Trust Co., 251 Mich. 420, 232 N. W. 239, 241 (1930); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641, 643 (1908); Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 189 (1889).

[11]Wade, Acquisition of Property By Wilfully Killing Another—A Statutory Solution (1936) 49 Harv. L. Rev. 715.

[12]408 Ill. 18, 95 N. E. (2d) 872 (1950).

forfeiture of estate by one convicted of crime. Admitting that this is probably the sounder view from a strictly technical, legal standpoint, the practical result is obviously repugnant to all sense of morality and justice. There is no morally justifiable reason why the killer or those claiming through him should be allowed to retain the property and enjoy its full benefits.

In the recent case of *Colton v. Wade*,[13] the Delaware court, recognizing the fallacies of the other two theories, chose a third and more logical method of disposing of the issue by applying the equitable doctrine of constructive trust. Here, William and Beatrice Wade, husband and wife, had taken title as tenants by the entireties to certain real estate. Thereafter, the defendant wife shot and killed her husband and was convicted of manslaughter. Suit was brought by the heirs and next of kin of William Wade asking that a constructive trust be declared in their favor on the whole of the real estate. The court held that under such circumstances the survivor does possess the whole legal interest in the property but would be required to hold it under a constructive trust for the successors of the deceased co-tenant. The extent of the trust declared was in effect on the whole parcel, excepting for the survivor the equivalent of a life estate in one-half the net income of the property.[14]

The court, conceding that many of the principles advanced to support the majority view and relied upon here by the defendant were still the law in the state, refused "to close its eyes to the defendant's mode of acquiring sole possession"[15] of the realty and to permit one principle to override other equally important ones. Chancellor Seitz argued that his "conclusion pays full homage to the legal consequences under the common law rule of the death of one of two tenants by the entirety .... yet .... gives powerful recognition to the deeply imbedded

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[13]80 A. (2d) 923 (Del. Ch. 1951).

[14]The actual case holding was "the entire interest upon a constructive trust for those other than the defendant entitled to the estate . . . except that the survivor is entitled to receive the commuted value of the net income of one-half of the property for the number of years of his expectancy of life." Colton v. Wade, 80 A. (2d) 923, 925 (Del. Ch. 1951). If the killer is given the present money value of the interest vested in him prior to his crime, the successors of the deceased are permitted immediate and absolute enjoyment of the fee. Though such a result has its merits, absent statute, it is not technically correct. The slayer is entitled to the same interest he had prior to his act, nothing more and nothing less, and this technique may prove to be the extreme in, either, over or under compensation depending upon the actual life span of the killer and the fluctuations in the value of the property.

[15]80 A. (2d) 923, 925 (Del. Ch. 1951).

equitable principle that a person shall not be permitted to profit by his own wrong." [16]

Equity, in preventing unjust enrichment, has long used the constructive trust as an expedient device where title to property has been obtained under circumstances which would render it unconscionable for the holder of the legal title to retain it.[17] As the principal case points out, the slayer before her act had only a mere possibility of getting the exclusive interest in the parcel through the resolution of the survivorship contigency in favor of herself, and she has by her wrong deprived her co-tenant of his chance of getting the fee. She has rendered that which was uncertain and contingent, certain and absolute. To say with the majority rule adherents that the malfeasor has acquired nothing by his wrong is to ignore the realities of the situation.

On the basis of this reasoning, the principal case pointed out that impressing the trust did not constitute a forfeiture because it merely prevented the defendant "from obtaining more 'rights in fact' than she had"[18] before her act. As the trust device is not applied until after the common law or property devolution statutes have been allowed to operate normally and the title has passed to the new holder, accusations of judicially legislating or reading implied exceptions into the statutes are untenable. Furthermore, this action is civil, not criminal, and the trust is employed because the slayer had been unjustly enriched, not as a punishment for the crime. It is irrelevant that the manner of acquisition may also give rise to a criminal action.[19]

In spite of the argument some courts advance that the public policy regarding punishment for crimes is clearly stated in constitutional provisions prohibiting forfeiture of estates, it is extremely difficult to imagine how public policy could under any circumstances, be said to favor a murderer over an innocent party. The drafters of these documents very likely did not contemplate this particular situation, as is indicated by the fact that many states have enacted statutes for the specific purpose of overruling case decisions following the majority view which favors the slayer.[20]

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[16] 80 A. (2d) 923, 925 (Del. Ch. 1951).

[17] Bogert, Trust and Trustees (1946) §741; 3 Scott, Trusts (1939) §426.2; 54 Am. Jur., Trusts §218, 219; Note (1949) 37 Ky. L. J. 113.

[18] 80 A. (2d) 923, 926 (Del. Ch. 1951).

[19] Another very important attribute of the constructive trust remedy is that it is an equitable one, and bona fide purchasers without notice would be protected if they bought from the murderer. Equity would raise the trust on the proceeds from the property in the hands of the slayer instead of on the property itself which has passed into the hands of an innocent party.

[20] Among the states in which statutes were passed shortly after a court had

After a court has adopted the method of the principal case, it must then decide what interest in the property should be covered by the trust. The decisions have furnished several answers to this aspect of the problem: (1) The trust should cover the entire estate.[21] But it is obvious that this view ignores any vested beneficial interest the wrongdoer may have at the time of the act. (2) If the victim was older than the slayer and so probably would have predeceased him, thereby making the slayer ultimate owner of the fee, the trust should give the heirs of the victim the commuted value of one-half the net income of the property for the victim's expectancy of life.[22] This conclusion disregards other equally important factors of survivorship such as physical condition and habits of the deceased. (3) If the victim had the greater life expectancy the wrongdoer should be allowed to retain a life estate in half the property, but declared constructive trustee of the other half and of the remainder in fee for the heirs of the deceased.[23] (4) One-half the parcel should descend to each party.[24] This view reasons that violent death at the hands of the spouse is not survivorship in legal contemplation and that the crime dissolved the martial relationship, severed the estate and divided it equally.[25]

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rendered a decision in favor of the wrongdoer are: Kansas, Minnesota, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania and West Virginia. A lower court decision caused the enactment of the California statute. Wade, Acquisition of Property By Wilfully Killing Another—A Statutory Solution (1936) 49 Harv. L. Rev. 715, 716, n. 7; Note (1949) 22 Temp. L. Q. 443, n. 6.

[21]Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918) (assuming that this case was decided under the constructive trust theory).

[22]Sherman v. Weber, 113 N. J. Eq. 451, 167 Atl. 517 (1933).

[23]Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, 51 A. L. R. 1100 (1927). The North Carolina court declared that the slayer "by his crime took away his wife's interest, and as to this he must be held a constructive trustee for the benefit of her heirs; the judge in effect having found as a fact that the deceased would have survived him. Even in the absence of such finding, equity would probably give the victim's representatives the benefit of the doubt." 193 N. C. 372, 137 S. E. 188, 191, 51 A. L. R. 1100, 1105 (1927). This language indicates that the crime gives rise to a conclusive presumption of survivorship in favor of the deceased victim, notwithstanding all the factors entering into normal life expectancy and that all doubts are resolved against the wrongdoer.

[24]Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930). The court in this case said that "merely outliving the wife does not satisfy the conditions imposed by the common law relative to estates by entirety so that the survivor may take all. One must not only be a survivor in fact but also a survivor in contemplation of law. Indispensable is the prerequisite that the decease must be in the ordinary course of events and subject only to the vicissitudes of life. The killer can assert no right of complete ownership as survivor. And no exception is made in favor of his heirs. . . . " 224 Mo. App. 913, 27 S. W. (2d) 757, 761 (1930).

[25]The Restatement proposes that the trust be impressed to the extent that the murder has enlarged his interest and states that age, health, and other factors of

A survey of the cases involving the instant question reveals them to be deeply entangled with the "precedents and prejudices"[26] which are a part of the law. There can be no doubt that the undesirable and uncertain condition of the law needs remedying. The courts could and should take the initiative themselves by uniformly adopting the technique of the principal case which reaches a just and satisfactory result without departing from established principles of equity and rules of law. However, in view of the great divergence of views and opinions, it appears very unlikely that the courts will come to an agreement, and the only apparent dependable answer to the problem lies in a statutory solution.[27]

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life expectancy are immaterial. Restatement, Restitution (1937) §188a. But query, how is it posisble to know to what extent the slayer has actually enlarged his interests unless you determine what the normal life expectancies would have been? The only definite points are: (1) that the slayer should not be deprived of all of his then vested interst and, (2) that the fee should ultimately go to the successors of the victim. Professor Scott apparently advocates this same view and offers some enlightenment by stating "that to the extent to which [the killer's] interest is contigent on the death of his victim, he should not be allowed to retain it, although if it is already vested, he should not be deprived of it." 3 Scott, Trusts (1939) 2398. For still another view on the proper extent of the trust see, 3 Bogert, Trusts and Trustees (1946) 57.

[26]Note (1949) 22 Temp. L. Q. 443.

[27]Though many states have enacted statutes covering the general issue, they have not completely resolved the problem, as they vary in their requirements of intent, motive, conviction, the crimes included, and the types of property interests covered. 3 Bogert, Trusts and Trustees (1946) 53; 3 Scott, Trusts (1939) §492.1. For excellent discussions of ideal statutory solutions see, Wade, Acquisition of Property By Wilfully Killing Another—A Statutory Solution (1936) 49 Harv. L. Rev. 715; Note (1948) 26 N. C. L. Rev. 232.