



Fall 9-1-1953

Constitutional Law—Application of Separate but Equal Doctrine to Racial Segregation in Lower Public Schools. [Delaware]

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Recommended Citation

J. Hunter Lane Jr., *Constitutional Law—Application of Separate but Equal Doctrine to Racial Segregation in Lower Public Schools. [Delaware]*, 10 Wash. & Lee L. Rev. 190 (1953).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol10/iss2/5>

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CASE COMMENTS

CONSTITUTIONAL LAW—APPLICATION OF SEPARATE BUT EQUAL DOCTRINE TO RACIAL SEGREGATION IN LOWER PUBLIC SCHOOLS. [Delaware]

The origin of the "separate but equal doctrine" is commonly traced to the decision of *Plessy v. Ferguson*¹ in which the Supreme Court upheld a Louisiana statute² which required railroads to provide separate but equal facilities for white and colored patrons and provided criminal penalties for any member of either race using the facilities of the opposite race. The contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment³ was defeated by the finding that the regulation was based on a reasonable classification, the Court declaring:

"In determining the question of reasonableness [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable. . . ."⁴

¹163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896). While this case is usually thought of as the origin of the doctrine, the Court, in support of its upholding of segregation in common carriers, noted that the state courts had upheld similar statutes requiring segregation in education. *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405 (1874); *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738 (1874); *Roberts v. City of Boston*, 59 Mass. 198 (1849); *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1891).

²La. Acts (1890) No. 111, p. 152, as amended, La. Gen. Stat. Ann. (1939) § 8130.

³U. S. Const. Amend. XIV, § 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

⁴*Plessy v. Ferguson*, 163 U. S. 537, 550, 16 S. Ct. 1138, 1143, 41 L. ed. 256, 260 (1896). "Laws permitting, and even requiring, [the] separation [of Negroes and whites] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other. . . ." *Ibid*, at 544, 1140, 258 "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. *If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.*" *Ibid*, at 551, 1143, 261 [italics supplied]. Compare the language of Justice Harlan in dissent, *Ibid*, at 560, 1144, 264. "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly

In the nearly six decades which have elapsed since this decision, its rule has been extended to many fields other than common carriers,⁵ and in 1908 the philosophy of the separate but equal doctrine was applied to a controversy involving public education facilities. In *Berea College v. Kentucky*,⁶ without even touching upon the Fourteenth Amendment question, the Supreme Court held that a Kentucky statute requiring segregation was a valid exercise of the State's reserved power to amend the corporate charter of the college. In 1927, in *Gong Lum*

create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana."

Real Estate: Prior to 1948 state courts had generally upheld the validity and enforceability of private agreements, covenants, or conditions imposing restriction upon the alienation of land to persons not of the Caucasian race. *Corrigan v. Buckley*, 55 App. D. C. 30, 299 Fed. 899 (1924); *Steward v. Cronan*, 105 Colo. 393, 98 P. (2d) 999 (1940); *Porter v. Johnson*, 232 Mo. App. 1150, 115 S. W. (2d) 529 (1938); *Ridgway v. Cockburn*, 163 Misc. 511, 296 N. Y. Supp. 936 (1937). State courts have also generally upheld covenants barring persons of certain races from occupying restricted land. *Waytt v. Adair*, 215 Ala. 363, 110 So. 801 (1926); *Fairchild v. Raines*, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944); *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180 (1922); *Doherty v. Rice*, 240 Wis. 389, 3 N. W. (2d) 734 (1942). However, in 1948 the United States Supreme Court held that state court enforcement of such covenants and restrictions constituted state action and as such was violative of the Fourteenth Amendment. *Shelley v. Kraemer*, 344 U. S. 1, 68 S. Ct. 836, 3 A. L. R. (2d) 441 (1948).

Passenger Transportation: State statutes requiring segregation on carriers in intrastate commerce have been held constitutional. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 35 S. Ct. 69, 59 L. ed. 169 (1914); *Chiles v. Chesapeake & O. R. R.*, 218 U. S. 71, 30 S. Ct. 667, 54 L. ed. 936 (1910); *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 21 S. Ct. 101, 45 L. ed. 244 (1900); *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896). Recent tightening of the doctrine is seen in: *Henderson v. United States*, 339 U. S. 816, 70 S. Ct. 843, 94 L. ed. 1302 (1950); *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1030, 90 L. ed. 1317 (1946); *Mitchell v. United States*, 313 U. S. 80, 61 S. Ct. 873, 85 L. ed. 1201 (1941). For a general discussion of racial discrimination and of race as affecting the right to vote, regulation of business, competency of witnesses, etc., see Note (1949) 94 L. ed. 1121.

⁵211 U. S. 45, 29 S. Ct. 33, 53 L. ed. 81 (1908). Cf. *Cumming v. Richmond County Board of Education*, 175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 (1899). In neither case did the Supreme Court feel that the precise question of the constitutionality of the state police power in requiring segregation was before it. "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings." *Cumming v. Richmond County Board of Education*, 175 U. S. 528, 543, 20 S. Ct. 197, 200, 44 L. ed. 262, 266 (1899). See Justice Harlan's dissent in *Berea College v. Kentucky*, 211 U. S. 45, 58, 29 S. Ct. 33, 36, 53 L. ed. 81 (1908).

*v. Rice*⁷ the Court held that a girl of Chinese descent had not been denied equal protection of the laws under a Mississippi statute which resulted in denial of her entrance into "white" public schools of that state. In recent years, the Supreme Court has had the opportunity to review the question specifically,⁸ and though it has refused to overrule the doctrine expressly,⁹ the Court, in cases dealing with education in graduate schools, has emphasized the "equal" factor of the doctrine, making it clear that the standard of equality is a real one and not a legal fiction, and that segregation in fact must fall where inequality is manifest.¹⁰

In *Missouri ex rel. Gaines v. Canada*¹¹ the Supreme Court refused to consider the relative advantages or opportunities of study at the University of Missouri and the universities of neighboring states which plaintiff might have attended at state expense, but held that laws requiring separation must be tested in light of the equality of facilities offered the two groups within the state, thus overthrowing the state's policy of segregation without a "clear and unmistakable" showing that inequality did exist.¹² In 1950, the Court, in *Sweatt v. Painter*,¹³ reversed the Texas Court of Civil Appeals in ruling that equality could not be found as between an old, established law school and a newly

⁷275 U. S. 78, 48 S. Ct. 91, 72 L. ed. 172 (1927).

⁸*McLaurin v. Oklahoma Board of Regents*, 339 U. S. 637, 70 S. Ct. 851, 94 L. ed. 1149 (1950); *Sweatt v. Painter*, 339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S. Ct. 299, 92 L. ed. 247 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938).

⁹*Sweatt v. Painter*, 339 U. S. 629, 635, 70 S. Ct. 848, 851, 94 L. ed. 1114, 1120 (1950): "We cannot . . . agree with respondents that the doctrine of *Plessy v. Ferguson* . . . requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

¹⁰*McLaurin v. Oklahoma Board of Regents*, 339 U. S. 637, 70 S. Ct. 851, 95 L. ed. 1149 (1950); *Sweatt v. Painter*, 339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950). *Ransmier, The Fourteenth Amendment and the "Separate but Equal" Doctrine* (1951) 50 Mich. L. Rev. 203.

¹¹305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938).

¹²Upon this standard, since Missouri provided no separate facilities for Negroes in the study of law, inequality was inevitably found to exist. It certainly seems possible that the facilities at the out-of-state universities were substantially equal to those at the University of Missouri, and it cannot be assumed that attendance at one of them would have been less convenient to plaintiff; but the Court precluded such considerations. See Justice McReynolds' concurring opinion, 305 U. S. 337, 353, 59 S. Ct. 232, 238, 83 L. ed. 208, 215 (1938).

¹³339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950), reversing *Sweatt v. Painter*, 210 S. W. (2d) 442 (Tex. Civ. App. 1948).

instituted one.¹⁴ Then, in *McLaurin v. Oklahoma Board of Regents*¹⁵ the Court held that, once admitted, plaintiff could not be accorded any different treatment than that of other students of the University.¹⁶ While the Court did not in these cases rule upon the constitutionality of segregation, the rules enunciated have so tightened the standard of equality that racial separation in public graduate and professional schools has been, in practical effect, foreclosed.¹⁷

In the field of primary and secondary education, the effect of the doctrine has been largely shaped by the state and lower federal courts. It has been generally held by these courts that there is a lack of requisite equality where the schools for each race fail to conduct terms of the same length,¹⁸ or do not furnish similar courses of study,¹⁹ or

¹⁴"Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro students by the State. In terms of number of faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close." *Sweatt v. Painter*, 339 U. S. 629, 633, 70 S. Ct. 848, 850, 94 L. ed. 1114, 1119 (1950).

¹⁵339 U. S. 637, 70 S. Ct. 851, 94 L. ed. 1149 (1950).

¹⁶"... he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library; but not to use the desks in the regular reading room; and to sit at a designated table and to eat a different time from the other students in the school cafeteria." 339 U. S. 637, 640, 70 S. Ct. 851, 853, 94 L. ed. 1153 (1950).

¹⁷In the *McLaurin* case, the ruling that *McLaurin* must be given the exactly identical treatment as other students would seem to be a recognition by the Court that there are no basic differences between the two races as far as education is concerned, and would seem to destroy the premise upon which separation has been held constitutional—i.e., that race is a material and reasonable basis for classification in the field of education.

For a general discussion of the separate but equal doctrine see: Ransmier, *The Fourteenth Amendment and The "Separate but Equal" Doctrine* (1951) 50 Mich. L. Rev. 203; Roche, *Education, Segregation and the Supreme Court—A Political Analysis* (1951) 99 U. of Pa. L. Rev. 949; Notes (1949) 17 Geo. Wash. L. Rev. 208; (1948) 46 Mich. L. Rev. 639; (1947) 56 Yale L. J. 1059. For a discussion of group discrimination see: Berger, *The Supreme Court and Group Discrimination Since 1937* (1949) 49 Col. L. Rev. 201; Note (1949) 49 Col. L. Rev. 630.

¹⁸*Claybrook v. City of Owensboro*, 16 Fed. 297 (D. C. Ky. 1883); *Lowery v. Board of Graded School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923).

¹⁹Inequality of facilities was found to exist where Negroes were not given similar instruction: *Davis v. County School Board*, 103 F. Supp. 337 (E. D. Va. 1952)

where by taking advantage of such similar courses, pupils encounter unequal circumstances.²⁰ And it has been held that a state may not constitutionally discriminate in salaries paid as between teachers of each race, where their qualifications and training are substantially equal.²¹ In this connection the ratio of teachers to students and the relative competence and training of teachers as between the two school systems, while not conclusive, have usually been given due consideration.²² However, it has been agreed that identity of school plants, in respect to size, cost, and number, is not necessary in order to insure equal facilities, particularly where there is considerable variance in the number of pupils.²³ The fact that certain colored pupils must travel

(physics, world history, Latin, advanced typing, wood, metal and machine shop work and drawing): *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212 (C. C. A. 4th, 1945) (library training course); *Graham v. Board of Education*, 153 Kan. 840, 114 P. (2d) 313 (1941) (departmentalized teaching system and alphabetical grading system, and in music and athletics); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923) (in blacksmithing, auto repairing, banking and commercial courses). Cf. *State ex rel. Checks v. Wirt*, 203 Ind. 121, 177 N. E. 441 (1931).

²⁰*Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936) (granting of insufficient number of scholarships to Negroes to attend law schools outside of state which subjected them to more expense than would attendance at state university).

²¹Discrimination found: *Morris v. Williams*, 149 F. (2d) 703 (C.C.A. 8th, 1945) (where based on custom or policy of school board); *Alston v. School Board*, 112 F. (2d) 992 (C. C. A. 4th, 1940) (where shown by a salary schedule); *Davis v. Cook*, 55 F. Supp. 1004 (N. D. Ga. 1944); *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638 (N. D. Fla. 1941). But the fact that Negro teachers received a lower salary is not violative of Fourteenth Amendment where such is not based upon the difference in race: *Reynolds v. Board of Instruction*, 148 F. (2d) 754 (C. C. A. 5th, 1945) (lacking in experience and education); *Thompson v. Gibbs*, 60 F. Supp. 872 (E. D. S. C. 1945) (difference in professional attainments shown by lower grades made by Negroes on state examination).

²²*Claybrook v. City of Owensboro*, 16 Fed. 297 (D. C. Ky. 1883); *Graham v. Board of Education*, 153 Kan. 840, 114 P. (2d) 313 (1941); *Board of Education v. Ballard*, 299 Ky. 370, 185 S. W. (2d) 538 (1945); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923).

²³*Davis v. County School Board*, 103 F. Supp. 337 (E. D. Va. 1952). No discrimination found: *State ex rel. Hobby v. Disman*, 250 S. W. (2d) 137 (Mo. 1952) (less convenient physical arrangements and lack of gymnasium and auditorium at Negro school); *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274 (1903) (building for large white school was larger than commodious building for a small colored school); *Lowery v. Board of Graded School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905). Discrimination was found: *Claybrook v. City of Owensboro*, 16 Fed. 297 (D. C. Ky. 1883) (number of white schools were disproportionate to colored schools according to enrollment); *Graham v. Board of Education*, 153 Kan. 840, 114 P. (2d) 313 (1941) (lack of auditorium, music and athletic facilities at Negro school); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923) (value of colored school building vastly lower than value of white school building, and so crowded that classes met only half-time). See also, *Corbin v. County School Board*, 177 F. (2d) 924 (C. A. 4th, 1949).

farther to reach school than any white pupil is required to travel to reach his school, or must travel through dangerous or difficult accesses to reach school does not necessarily indicate inequality of facilities.²⁴ Furthermore, the educational advantages afforded, as between white and Negro Schools, need not exist in the same school district.²⁵

The recent Delaware case of *Gebhart v. Belton*,²⁶ involving segregated primary education, is outstanding as an illustration of meticulous state court regard for the precise holdings of the United States Supreme Court in this field and of consequent refusal to anticipate a possible overruling of the separate but equal doctrine. The case was composed of two separate bills in equity which, though substantially different in their factual situations, were consolidated because of the similarity of the questions of law involved. The relief sought in each case was two-fold: (1) a declaratory judgment that the provisions of the Delaware Constitution²⁷ and laws regarding segregation in the public schools of the state²⁸ were in contravention of the Equal Protection Clause of the Fourteenth Amendment, and (2) an injunction restraining the defendants, members of the State Board of Education, from denying the plaintiffs admittance to schools maintained in their districts for white children.

The trial court²⁹ concluded from the evidence that in Delaware, state-imposed segregation resulted in inferior educational opportunities for Negro children as a class, and expressed the opinion that the separate but equal doctrine should be rejected.³⁰ Recognizing,

²⁴Disparity in distance and conditions of travel was not found to be discrimination: *Winborne v. Taylor*, 195 F. (2d) 649 (C. A. 4th, 1952) (round trip of about thirty miles per day, where transportation facilities adequate); *Corbin v. County School Board*, 177 F. (2d) 924 (C. A. 4th, 1949); *McSwain v. County Board of Education*, 104 F. Supp. 861 (E. D. Tenn. 1952) (travel over a fine highway in a new bus for one-way distance of nineteen miles); *Roberts v. City of Boston*, 59 Mass. 198 (1849) (plaintiff required to travel one-fifth mile further to colored school than she would have to travel if allowed to attend nearer white school). *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1891) (colored children required to travel three and one-half miles to reach a colored school, while no white child in district had to travel further than two miles).

²⁵*Winborne v. Taylor*, 195 F. (2d) 649 (C. A. 4th, 1952); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706 (1936).

²⁶91 A. (2d) 137 (Del. 1952).

²⁷Del. Const. (1897) Art. X §§ 1, 2.

²⁸Del. Rev. Code (1935) § 2631.

²⁹*Belton v. Gebhart*, 87 A. (2d) 862 (Del. Ch. 1952).

³⁰"... by implication, the Supreme Court of the United States has said a separate but equal test can be applied, at least below the college level. This Court does not believe such an implication is justified under the evidence. Never-

however, that Supreme Court decisions³¹ in the field of primary education had applied the separate but equal doctrine, the state Supreme Court affirmed the trial court's refusal to enter the declaratory judgment argued for and declined to review that court's position that segregation should be held illegal per se, saying:

"The Supreme Court of the United States has said that the states may establish separate schools if the facilities furnished are substantially equal for all. To say the facilities can never be equal is simply to render the Court's holdings meaningless—in effect, to say that that Court's construction of the Constitution is wrong. If so, it is for that Court to say so and not for us."³²

The court then proceeded to a review of the evidence which plaintiffs submitted in an attempt to show that the facilities offered them were inferior to those offered white pupils similarly situated. In the first suit, plaintiff, colored and of high school age, was denied admittance, solely on grounds of race or color, to Claymont High School, a school maintained in plaintiff's school district for white students only, and was required to travel nine miles to Howard High School in a nearby city, the latter being the only high school maintained in plaintiff's county which offered a complete high school course to Negroes. The lower court found that with respect to teacher training,³³ pupil-teacher ratio,³⁴ extra curricular activities,³⁵ physical plants and aes-

theless, I do not believe a lower court can reject a principle of United States Constitutional law which has been adopted by fair implication by the highest court of the land. I believe the 'separate but equal' doctrine in education should be rejected, but I also believe its rejection must come from that Court." *Belton v. Gebhart*, 87 A. (2d) 862, 865 (Del. Ch. 1952).

³¹*Gong Lum v. Rice*, 275 U. S. 78, 48 S. Ct. 91 (1927). See *Plessy v. Ferguson*, 163 U. S. 537, 544, 16 S. Ct. 1138, 1140 (1896).

³²*Gebhart v. Belton*, 91 A. (2d) 137, 142 (Del. 1952).

³³Teacher training: Claymont: 59 per cent held Master's degrees, 41 per cent had Bachelor's degrees, none were without degrees. Howard: 37.73 per cent had Master's degrees, 52 per cent held Bachelor's degrees, 9.4 per cent held no degree (one teaching a vocational subject, another wood-working, another physical education). *Belton v. Gebhart*, 87 A. (2d) 862, 867 (Del. Ch. 1952).

³⁴Size of classes:

	Claymont	Howard
English	25.56	32.26
Foreign Languages.....	25.75	31.10
Home Economics	16.2	24.71
Industrial Arts	17.14	23.9
Mathematics	30.60	33.25
Natural Sciences	34.87	32.26
Physical Education	24.28	43.67
Social Studies	33.88	32.05

The "average" teacher at Howard carried a teaching load of 178 pupils per week; Claymont, 149. *Belton v. Gebhart*, 87 A. (2d) 862, 867 (Del. Ch. 1952).

³⁵Claymont, School newspaper, Art Club, Drivers Club, Mathematics Club,

thetic considerations,³⁶ and travel conditions,³⁷ Howard was inferior to Claymont. And the position was taken that if the educational opportunities provided for Negroes are, as to *any* substantial factor, inferior to those offered to white children similarly situated, the separate but equal doctrine is violated. The Delaware Supreme Court, finding this latter point of view too severe and likely to lead to the magnifying of minor differences, decided that plaintiffs should be entitled to relief only if they were actually injured by such inequalities as might exist. Reviewing the evidence with unbaised care, the upper court found that the trial court's findings were too sweeping and concluded that, as regards the pupil-teacher ratio, formal teacher training, and average size of classes, the differences were only such as might be found between any two schools, whether white or Negro, and that none of these factors was such as to create substantial inequality of facilities. However, the upper court agreed that in respect to the course of physical education at Howard, the classes were so large as probably to prevent satisfactory instruction³⁸ due to a lack of proper gymnasium facilities, and that since physical education was a necessary and required course, substantial inequality did exist in this respect. It also concurred in the finding of inferiority in the physical plants, but qualified the finding based upon aesthetic considerations.³⁹ It agreed that travel conditions were inferior, and emphasized that these short-

Square Dance Club, Leaders Corps. Howard: Story Hour, Science Club, French Club. *Belton v. Gebhart*, 87 A. (2d) 862, 867 (Del. Ch. 1952).

³⁶While the Howard building as compared with the Claymont building was fairly good, it lacked a proper gymnasium. The Carver building, however, an integral part of the Howard plant, was an old building without a regular cafeteria, gymnasium, or auditorium, and contained but one lavatory which had an unsanitary cement floor.

Howard was located on three and one-half acres of land, without adequate playground facilities. It and Carver are surrounded by industrial buildings and "poor housing." *Belton v. Gebhart*, 87 A. (2d) 862, 866 (Del. Ch. 1952).

³⁷While the court does not say that the state does not provide transportation, its opinion implies such. The court found that plaintiff had to ride to school each morning and back in the afternoon, each way taking about fifty minutes. Plaintiff was also required to take a fifteen minute walk twice a week in order to take business courses. *Belton v. Gebhart*, 87 A. (2d) 862, 866 (Del. Ch. 1952).

³⁸In Physical Education the average class at Claymont was 24.88 and at Howard, 43.67, one class having an enrollment of 88. *Gebhart v. Belton*, 91 A. (2d) 137, 146 (Del. 1952).

³⁹"We are inclined to agree that if these two schools were substantially equal in all other respects such a difference [in sites, based upon esthetic considerations] would hardly justify a finding of substantial inequality; but in this case esthetic considerations do not stand alone." The court felt that the Howard playground facilities were inadequate. *Gebhart v. Belton*, 91 A. (2d) 137, 145 (Del. 1952).

comings occurred not alone because of differences in comparative distances, but also because of a lack of adequate state-provided transportation to and from Howard, while transportation facilities to and from Claymont were adequate. As regards extra-curricular activities, the divergencies were found to be merely reflections of differences in interest and tastes and not the result of inadequacy of facilities in the Negro school. The court concluded that there were in existence such major inequalities—in plant and buildings, in physical facilities and instruction, and in the transportation systems—that the separate but equal doctrine was not satisfied.

The second suit was instituted on behalf of an eight year old Negro. In the county of her residence the State maintained two elementary grade schools, School No. 29, a four-room building with four teachers and one hundred and eleven pupils; and School No. 107, a two-room building with two teachers and forty-four pupils. The evidence disclosed that prior to 1951 the State had discriminated against School No. 107 in the allocation of funds, the value of School No. 107 had depreciated while the value of School No. 29 had appreciated, reflecting differences in maintenance, upkeep and improvements;⁴⁰ that No. 29 had an auditorium, basketball court, accepted forms of drinking fountains, sanitary toilet facilities, adequate fire protection, and adequate transportation, while School No. 107 had none of these; and that teacher training at No. 29 was superior to that at No. 107. The upper court concluded that on the evidence the facilities of School No. 107 were, to the extent set forth, substantially unequal to those at School No. 29, and that plaintiff had suffered injury.

As a result of the findings that the separate facilities were not equal and that the plaintiffs were therefore being denied the equal protection of the laws, the Delaware Supreme Court affirmed the granting of an injunction requiring that plaintiffs be admitted to Claymont and School No. 29, even though the defendants had shown that facilities at Howard and School No. 107 would be equalized by September, 1953. In regard to this latter point the court relied upon pronouncements of the Supreme Court of the United States that the right to equal protection of the laws was a "personal and present" right, and concluded that plaintiffs could not, therefore, be denied such relief as was currently available.⁴¹

⁴⁰School No. 29: Original cost (1932) was \$55,000 while the present value is \$77,000. School No. 107: Original cost (1922) was \$21,000, while the present value was found to be only \$13,000. *Belton v. Gebhart*, 87 A. (2d) 862, 870 (Del. Ch. 1952).

⁴¹*Sweatt v. Painter*, 339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950); *Shelley*

The Delaware court in disposing of those cases emphasized that it was under a duty to uphold the state constitutional requirement of separate schools for white and colored children and not to abrogate the requirement except insofar—and only insofar—as required to do so by a ruling of the Supreme Court of the United States. The state court correctly asserted that the Supreme Court has refused, thus far, to overrule the separate but equal doctrine applied in *Plessy v. Ferguson*, though expressly urged to do so. And in reply to the argument that “the cases of *Plessy v. Ferguson* and *Gong Lum v. Rice* . . . are without force today and that we should assume that they will be overruled,”⁴² the Delaware court said, “We can make no such assumption. ‘It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded.’”⁴³ In its approach to the problem of conflict between state and federal constitutional provisions with consequent federal supremacy, the Delaware court wisely followed the Supreme Court’s own canons in refusing to “anticipate a question of constitutional law in advance of the necessity of deciding it,”⁴⁴ and in declining to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”⁴⁵ The ultimate fate of the separate but equal doctrine and of state separate school laws must await the decision of the Supreme Court of the United States in the segregation cases presently before it.⁴⁶

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v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948); *Sipuel v. Board of Regents*, 332 U. S. 631, 68 S. Ct. 299, 92 L. ed. 247 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938). However, other courts have not reached the same conclusion of requiring immediate matriculation, and have allowed the state time in which to equalize facilities. *Wrighten v. Board of Trustees*, 72 F. Supp. 948 (E. D. S. C. 1947); *Davis v. County School Board*, 103 F. Supp. 337 (E. D. Va. 1952); *Briggs v. Elliott*, 98 F. Supp. 529 (E. D. S. C. 1951).

⁴²*Gebhart v. Belton*, 91 A. (2d) 137, 141 (Del. 1952).

⁴³*Gebhart v. Belton*, 91 A. (2d) 137, 141 (Del. 1952).

⁴⁴*Brandeis'* concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346, 56 S. Ct. 466, 483, 80 L. ed. 688, 711 (1936).

⁴⁵*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347, 56 S. Ct. 466, 483, 80 L. ed. 688, 711 (1936) (concurring opinion).

⁴⁶*Certiorari granted*—Nov. 24, 1952 (21 U. S. L. Wk. 3144); case argued—Dec. 11, 1952 (21 U. S. L. Wk. 3161); case restored to docket for reargument at next term of court in the fall of 1953—June 8, 1953 (21 U. S. L. Wk. 1189).

CONSTITUTIONAL LAW—PROTECTION AGAINST DOUBLE JEOPARDY AS ELEMENT OF DUE PROCESS UNDER FOURTEENTH AMENDMENT. [United States Supreme Court]

Although it has been urged that the Fourteenth Amendment was intended to guarantee to citizens of the States the same rights as against the state governments that are guaranteed in the first eight amendments to federal citizens as against the federal government,¹ the Supreme Court has repeatedly ruled that "due process of law" does not embrace all rights enumerated in the federal Bill of Rights.² The test usually adopted for determining whether an alleged right is one to be protected under the Fourteenth Amendment turns on whether the right claimed by the accused involves a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"³ or, differently stated, a principle "implicit in the concept of ordered liberty."⁴

As a result of case-by-case determination of the scope of due process by the Supreme Court, rights held to be fundamental are the right to just compensation when private property is taken for public use under the power of eminent domain,⁵ freedom of speech,⁶ freedom of the press,⁷ free exercise of religion,⁸ the right of peaceable assembly,⁹ the right to assistance of counsel in special circumstances,¹⁰ and the right to

¹Black, J., dissenting in *Adamson v. California*, 322 U. S. 46 at 71, 67 S. Ct. 1672 at 1686, 91 L. ed. 1903 at 1919, 171 A. L. R. 1223 at 1239 (1947).

²*Adamson v. California*, 322 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903, 171 A. L. R. 1223 (1947); *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937); *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908).

³*Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937); *Brown v. Mississippi*, 297 U. S. 278, 285, 56 S. Ct. 461, 464, 80 L. ed. 682, 686 (1936); *Snyder v. Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. ed. 674, 677 (1934). Also *Hebert v. Louisiana*, 272 U. S. 312 at 316, 47 S. Ct. 103 at 104, 71 L. ed. 270 at 273 (1926).

⁴*Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937).

⁵*Chicago, B & Q. R. R. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. ed. 979 (1897).

⁶*Herndon v. Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. ed. 1066 (1937); *De Jonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937).

⁷*Grosjean v. American Press Co.*, 297 U. S. 233, 56 S. Ct. 444, 80 L. ed. 660 (1936); *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931).

⁸*Hamilton v. Regents of University*, 293 U. S. 245, 55 S. Ct. 197, 79 L. ed. 343 (1934).

⁹*Herndon v. Lowry*, 301 U. S. 242, 57 S. Ct. 732, 81 L. ed. 1066 (1937); *De Jonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937).

¹⁰*Townsend v. Burke*, 334 U. S. 736, 68 S. Ct. 1252, 92 L. ed. 1690 (1948) (defendant was prejudiced either by the prosecution's submission of misinformation

be free from unreasonable searches and seizures.¹¹ On the other hand, the general right to assistance of counsel,¹² the right to presentment or indictment by grand jury,¹³ freedom from self-incrimination,¹⁴ the right to a jury trial,¹⁵ freedom from the use of illegally seized evidence,¹⁶ and freedom from being placed twice in jeopardy for the same offense¹⁷ have been held not to be such fundamental rights as to receive the sanction of the Fourteenth Amendment.

The Supreme Court in the recent case of *Brock v. North Carolina*,¹⁸ by a 6 to 2 vote, has reiterated and extended its earlier ruling¹⁹ that the Fourteenth Amendment does not embrace protection against double jeopardy as a fundamental right within the due process provision. Here, the petitioner and two others, all of whom were striking mill employees, were arrested for allegedly firing five shots from a passing auto into the home of a watchman employed by the same mill. Upon being arrested, one of the petitioner's companions stated that the petitioner had helped plan the assault and had fired the shots. The two companions were tried and convicted, but before sentence was pronounced on them, the petitioner was placed on trial and the two com-

regarding his prior criminal record or by the court's careless misreading of that record); *Wade v. Mayo*, 334 U. S. 672, 68 S. Ct. 1270, 92 L. ed. 1647 (1948) (defendant was an inexperienced youth incapable of adequately representing himself); *De Meerleer v. Michigan*, 329 U. S. 663, 67 S. Ct. 596, 91 L. ed. 584 (1947) (seventeen year old defendant was hurried through trial, nothing was said in his defense and the court did not inform him of the consequences of his plea of guilty).

¹¹*Wolf v. Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949).

¹²*Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. ed. 1595 (1942).

¹³*Gaines v. Washington*, 277 U. S. 81, 48 S. Ct. 468, 72 L. ed. 793 (1928); *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232 (1884).

¹⁴*Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908). Cf. *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936); *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. ed. 674 (1934).

¹⁵*Wagner Electric Co. v. Lyndon*, 262 U. S. 226, 43 S. Ct. 589, 67 L. ed. 961 (1923); *New York Central R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1916); *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (1900); *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875).

¹⁶*Wolf v. Colorado*, 338 U. S. 25, 69 S. Ct., 1359, 93 L. ed. 1782 (1949). Such evidence is excluded in federal prosecutions for federal crimes. *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

¹⁷*Brock v. North Carolina*, 73 S. Ct. 349, 97 L. ed. 317 (1953); *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

¹⁸73 S. Ct. 349, 97 L. ed. 317 (1953).

¹⁹*Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937) held constitutional a state statute providing for a new trial on appeal by the state from a trial in which there were errors of law. This case is distinguishable from the *Brock* case in that a statute was involved, and the statute concerned a trial in which there were errors of law.

panions were called as witnesses by the state. When they refused to testify on grounds of self-incrimination, the prosecution requested and was granted a mistrial. Sentence later having been pronounced on the companions and their conviction upheld by the Supreme Court of North Carolina, the petitioner was again brought to trial. Although North Carolina has no constitutional guarantee against double jeopardy, the petitioner objected that he was being placed twice in jeopardy and therefore deprived of federal due process of law, but the trial court overruled the objection. At the second trial, one of his companions testified as a witness for the prosecution, and the petitioner was found guilty, which conviction was affirmed on appeal to the highest court of the state.

Justice Minton delivered the opinion of the Supreme Court of the United States which affirmed the judgments of the state courts holding that the petitioner had not been deprived of due process under the Fourteenth Amendment. The majority opinion, joined in by four other Justices,²⁰ relied on a long-standing North Carolina rule that a trial court has the discretion to declare a mistrial and later cause the defendant to be tried again "if it be in the interest of justice to do so,"²¹ and on the 1937 Supreme Court decision in *Palko v. Connecticut*²² that freedom from double jeopardy is not a fundamental right. Prior decisions²³ of the Court were cited for the proposition that, consistent with the North Carolina view, "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."²⁴

²⁰The majority of the Court consisted of Justices Minton, Clark, Reed, Jackson, and Burton. Justice Frankfurter concurred in a separate opinion. Chief Justice Vinson and Justice Douglas wrote separate dissenting opinions. Justice Black took no part in the consideration or decision of the case.

²¹*Brock v. North Carolina*, 73 S. Ct. 349, 350, 97 L. ed. 317, 319 (1953).

²²302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

²³*Wade v. Hunter*, 336 U. S. 684, 69 S. Ct. 834, 93 L. ed. 974 (1949); *Thompson v. United States*, 155 U. S. 271, 15 S. Ct. 73, 39 L. ed. 146 (1894). These cases arose under the Fifth Amendment. In the *Wade* case, the defendant was tried by a general court-martial of the Third Army which continued the case in order to hear certain civilian witnesses. When the witnesses became available the Third Army had progressed so far from the scene of the act that the case was transferred to the Fifteenth Army for a new trial. This was held not to be double jeopardy. In the *Thompson* case, after the jury was sworn and one witness examined, the court discovered that one of the jurors was disqualified by virtue of having been a member of the grand jury that returned the indictment. It was held not to be placing the accused in double jeopardy for the court to discharge the present jury and order another jury to be called.

²⁴*Brock v. North Carolina*, 73 S. Ct. 349, 350, 97 L. ed. 317, 320. (1953).

Justice Frankfurter in a concurring opinion attempted to define more generally the scope of due process in this relation by stating the point beyond which double jeopardy would be a violation of the Fourteenth Amendment. "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."²⁵ However, he did not feel that the record justified overthrowing the decision of the trial judge that a second trial would be fair and not oppressive to the petitioner.

Justice Douglas dissented, pointing out that as early as 1795, the North Carolina court, recounting the conditions in England which led to the fear of double jeopardy in the colonies, had concluded that the practice of allowing the prosecution to have a mistrial in order to prepare better evidence for a second trial of the accused for the same offense, is "so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country."²⁶

Chief Justice Vinson in a very thorough dissenting opinion stated that "For the first time in the history of this Court it is urged that a state could grant a mistrial in order that it might present a stronger case at some later trial and, in so doing, avoid a plea of former jeopardy in the second trial."²⁷ The Chief Justice observed that North Carolina is one of only five states which have no provision in their constitutions forbidding double jeopardy,²⁸ yet include such protection as part of their common law.²⁹ He quoted extensively from two early North Carolina cases³⁰ which point up the injustice of being placed twice in jeopardy for the same offense, and followed by observing that no case has been cited from another state which would allow a mistrial and a second trial in the circumstances of this case. The *Palko* case was distinguished on two grounds: first, a statute was involved there, and the

²⁵*Brock v. North Carolina*, 73 S. Ct. 349, 351, 97 L. ed. 317, 321 (1953).

²⁶*State v. Garrigues*, 2 N. C. 241 (1795), quoted at 73 S. Ct. 349, 357, 97 L. ed. 317, 327 (1953).

²⁷*Brock v. North Carolina*, 73 S. Ct. 349, 352, 97 L. ed. 317, 322 (1953).

²⁸The others named were Connecticut, Maryland, Massachusetts, and Vermont.

²⁹*State v. Benham*, 7 Conn. 414 (1829); *Gilpin v. State*, 142 Md. 464, 121 Atl. 354 (1923); *Commonwealth v. McCan*, 277 Mass. 199, 178 N. E. 633, 78 A. L. R. 1208 (1931); *State v. Clemmons*, 207 N. C. 276, 176 S. E. 760 (1934); *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934).

³⁰*In re Spier*, 12 N. C. 491 (1828); *State v. Garrigues*, 2 N. C. 241 (1795).

Supreme Court has often recognized that such considered action by a state legislature "places the issue of constitutionality in a different posture in respect of due process of law,"³¹ and second, under the statute, the state was seeking a second trial that would be free from error by the court prejudicial to the state. The Chief Justice added that while *Palko* does not control the present case, the following language from Justice Cardozo's opinion in the earlier case comforted him: "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider."³²

The dissenting Justices failed to stress the fact that *Brock v. North Carolina* is a non-capital felony case in which situation the North Carolina rule has always been that the trial judge has discretion to declare a mistrial and continue the case to a later date.³³ The two North Carolina decisions on which the dissenting Justices rely are capital felony cases,³⁴ and state the rule applicable only to such cases. Though it may be questioned that the distinction between capital and non-capital felonies is a logical one in this connection, it is difficult to see why a North Carolina rule which has been followed for over one hundred years should now be struck down because it suddenly would threaten "the hard-won victory achieved in the field of 'double jeopardy'."³⁵

The idea of due process in the procedural sense has become identified with the concept of fairness,³⁶ and the difference of opinion between the Justices in the principal case seems to arise basically from their divergent views as to whether the procedure followed was so lacking in fairness that it violated fundamental principles of justice

³¹*Brock v. North Carolina*, 73 S. Ct. 349, 356, 97 L. ed. 317, 325 (1953).

³²*Palko v. Connecticut*, 302 U. S. 319, 328, 58 S. Ct. 149, 153, 82 L. ed. 288, 293 (1937), Cited by Chief Justice Vinson in *Brock v. North Carolina*, 73 S. Ct. 349, 356, 97 L. ed. 317, 326 (1953).

³³*State v. Bass*, 82 N. C. 570 (1880) (non-capital felony); *State v. Tilletson*, 52 N. C. 114 (1859) (larceny; jury failed to agree and was dismissed) reference at p. 115 to *In re Spier*, 12 N. C. 491 (1828): "These cases may be considered as settling the law in respect to the class of felonies of which they treat, but the restricted range of judicial power, as established in them, has never been applied to offenses of inferior grades whether felonies or misdemeanors, and we think it is not applicable." *State v. Weaver*, 35 N. C. 203 (1851) (misdemeanor); *State v. Morrison*, 20 N. C. 114 (1838) (misdemeanor).

³⁴*In re Spier*, 12 N. C. 491 (1828); *State v. Garrigues*, 2 N. C. 241 (1795). Both were murder cases.

³⁵*Brock v. North Carolina*, 73 S. Ct. 349, 355, 97 L. ed. 317, 325 (1953).

³⁶*Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158, 84 A. L. R. 527 (1932).

and ordered liberty. Independent of the question of fairness, the Supreme Court early decided that in the procedural field, process which was historic, even though by modern standards harsh, was yet due process and would be upheld.³⁷ The majority of the Court seems to have had something of this principle in mind when it stressed the long continued use of the mistrial procedure in North Carolina. And the dissents' reliance on the North Carolina practice in capital felony cases decided early in the state's history was apparently prompted by the same consideration.

The general prohibition against double jeopardy is recognized by all the states, in forty-three by constitutional provision and under the common law in the other five. This widespread acceptance would seem to give the rule at least a near approach to being a fundamental principal of justice. The cases which have arisen concerning the specific point of mistrial have with only a few exceptions held that such a proceeding is a violation of the law of the jurisdiction,³⁸ and this was especially true in the few cases where the mistrial was due to the inability of the prosecution to present testimony.³⁹ Since other states faced with the same problem hold that the accused is placed under double jeopardy when subjected to a second trial following a mistrial

³⁷*Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. ed. 674 (1934) (pointing out specific objects on a viewing of scene by jury held proper historic process not overturned by Fourteenth Amendment); *Corn Exchange Bank v. Coler*, 280 U. S. 218, 50 S. Ct. 94, 74 L. ed. 378 (1930) (property of an absconding husband can be taken over and applied to support of wife and children prior to a judicial decree); *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. ed. 837, 17 A. L. R. 873 (1921) (defendant not allowed to defend a foreign attachment suit where he did not first furnish required security); *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908) (freedom from self-incrimination not historically a protected right). In this regard, it should be noted that while historic process is held to be due process, the converse, that no type of process is due process unless it be historic, has not been adopted.

³⁸*Allen v. State*, 52 Fla. 1, 41 So. 593 (1906); *State ex rel. Meador v. Williams*, 117 Mo. App. 564, 92 S. W. 151 (1906); *People v. Barrett*, 2 Caines (N. Y.) 304 (1805); *State v. Richardson*, 47 S. C. 166, 25 S. E. 220 (1896); *Pizano v. State*, 20 Tex. Crim. 139 (1886); *State v. Little*, 120 W. Va. 213, 197 S. E. 626 (1938). Cf. *State v. Parker*, 66 Iowa 586, 24 N. W. 225 (1885). Contra: *Hughes v. State*, 35 Ala. 351 (1860); *State v. Nelson*, 7 Ala. 610 (1845).

³⁹*Allen v. State*, 52 Fla. 1, 41 So. 593 (1906) (witness to testify for both prosecution and defense not present at first trial; jury discharged; plea of former jeopardy upheld at second trial); *State ex rel. Meador v. Williams*, 117 Mo. App. 564, 92 S. W. 151 (1906) (prosecuting attorney withdrew cause from consideration of jury because of absence of material witness); *People v. Barrett*, 2 Caines (N. Y.) 304 (1805) (mistrial because the prosecution did not have sufficient evidence); *State v. Richardson*, 47 S. C. 166, 25 S. E. 220 (1896) (prosecutor withdrew case from jury on finding a witness not present); *Pizano v. State*, 20 Tex. Crim. 139 (1886) (prosecutor requested discharge of jury on ground that principle witnesses for prosecution were not in court).

granted under the circumstances of the principal case, and since those states not having double jeopardy provisions in their constitutions include such protection as part of their common law, it seems that state legislatures and state courts almost universally regard this protection as a fundamental right. Furthermore, the application of Justice Frankfurter's test to the principal case points squarely to a violation of due process, for the North Carolina trial court has obviously prevented "a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."⁴⁰

The majority opinion can be defended on the ground that even with respect to ancient rights specifically protected by the Bill of Rights as against federal encroachment, the presumption of constitutionality that attaches to state procedures having historic local sanction can be overcome only by convincing proof of essential unfairness to the accused in the particular instance—unfairness so patent as to contravene fundamental principles of justice.

For the second time, the Supreme Court has held that state procedure subjecting an accused to double jeopardy does not deprive him of due process under the Fourteenth Amendment. Although dicta in both cases indicate that a flagrant imposition of double jeopardy would be held to violate the due process guarantee,⁴¹ on neither occasion did the Court draw a precise line as to where deprivation of due process begins. However, the strong dissent in the present case, together with Justice Frankfurter's special concurrence,⁴² gives indication that the North Carolina procedure "went to the verge of the law."⁴³

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⁴⁰*Brock v. North Carolina*, 73 S. Ct. 349, 351, 97 L. ed. 317, 321 (1953).

⁴¹"What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. . . . There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Palko v. Connecticut*, 302 U. S. 319, 328, 58 S. Ct. 149, 153, 82 L. ed. 288, 293 (1937). There is no such inference raised in the Court's opinion in the Brock case, but Justice Frankfurter, concurring, said, "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted. . . ." *Brock v. North Carolina*, 73 S. Ct. 349, 351, 97 L. ed. 317, 321 (1953).

⁴²Justice Frankfurter's attempt to set a standard in his concurring opinion has not helped to clarify the situation materially, inasmuch as it seems that the instant case should have been decided the other way under this very test.

⁴³Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416, 43 S. Ct. 158, 160, 67 L. ed. 322, 326, 28 A. L. R. 1321, 1326 (1922).

CONSTITUTIONAL LAW—RECOVERY OF DAMAGES FOR BREACH OF RACIAL RESTRICTIVE COVENANT IN DEED AS VIOLATIVE OF FOURTEENTH AMENDMENT. [California]

Since the United States Supreme Court's decision in *Shelley v. Kraemer*¹ in 1948, state courts have given strict effect to, and in some instances extended, the principle that the granting of an injunction to enforce a racial restrictive covenant is state action denying to certain citizens the equal protection of the laws, and, as such, violative of the Fourteenth Amendment.² The Supreme Court of Illinois relied on the *Shelley* ruling, which had to do with restrictions on the sale of property, as the basis for striking down an injunction which would have forced defendant to adhere to a covenant which prohibited *leasing* to members of the restricted races.³ The contention that the defendant-grantee took with notice of the restrictive covenant and was therefore "estopped" from claiming the constitutional protection accorded the defendants in the *Shelley* case⁴ has been rejected in cases involving

¹344 U. S. 1, 20, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1184 (1948): "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand... Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." The constitutionality of specific enforcement of racial restrictive covenants was doubted by one authority before the *Shelley* case. See McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5. But with a single exception, *Gandolfo v. Hartman*, 49 Fed. 181 (C.C.S.D. Cal. 1892), the courts had never before refused to enforce a racial restrictive covenant on constitutional grounds. Note (1948) 34 Va. L. Rev. 306.

²*Coleman v. Stewart*, 33 Cal. (2d) 703, 204 P. (2d) 7 (1949); *Clayton v. Wilkins*, 32 Cal. (2d) 892, 197 P. (2d) 162 (1948); *Trovev v. Levy*, 401 Ill. 393, 82 N. E. (2d) 411 (1948); *Malicke v. Milan*, 320 Mich. 65, 32 N. W. (2d) 353 (1948); *Woytus v. Winkler*, 357 Mo. 1082, 212 S. W. (2d) 411 (1948); *Rich v. Jones*, 142 N. J. Eq. 215, 59 A. (2d) 839 (1948); *Kemp v. Rubin*, 298 N. Y. 590, 81 N. E. (2d) 325 (1948); *Earley v. Baughman*, 200 Okla. 649, 199 P. (2d) 210 (1948). In *Dorsey v. Stuyvesant Town Corporation*, 299 N. Y. 512, 87 N. E. (2d) 541 (1949), cert. denied, 339 U. S. 981 (1950), the Court of Appeals of New York held that a private housing corporation which had been organized under a special state statute and was consequently subject to certain special limitations and supervision by the state in return for which it received tax concessions and certain other advantages, could refuse to accept tenants because of their race, color or religion; its action was not state action so as to violate the Equal Protection Clause of the Fourteenth Amendment. There was a strong dissent. See Note (1950) 23 Temple L. Q. 209.

³*Tovey v. Levy*, 401 Ill. 393, 82 N. E. (2d) 441 (1948).

⁴The *Shelley* case originated as a suit in equity for an injunction to restrain defendants from taking possession of the property and to divest defendants of the

restrictions on sale,⁵ and on use and occupancy and the right to lease.⁶ A decision which denied specific enforcement of a restriction in the form of a forfeiture provision was sustained by the Texas Court of Civil Appeals,⁷ which also rejected the plaintiff's contention that the covenant, although admittedly not entitled to specific enforcement, was a good defense to the defendant's cross-action for possession.⁸ In a habeas corpus proceeding, the Supreme Court of California decided that the petitioners, who had been imprisoned for contempt for refusing to obey an injunction issued to enforce a restrictive covenant before the *Shelley* case, should be released, because "it is unquestionable that commitment for contempt for refusing to obey the order of the court to vacate the restricted property amounts to 'state action' to enforce the restrictions, within the purview of the decisions in *Shelley v. Kraemer*. . ."⁹ And, although it was made clear in *Shelley v. Kraemer* that the restrictive covenants standing alone and without enforcement by the courts were valid,¹⁰ a California court has refused to issue a declaratory judgment to that effect.¹¹

Despite this general agreement in the interpretation of the effect of the *Shelley* decision,¹² however, the courts are in direct conflict on one issue: whether the covenantee may recover money damages for the breach of a racial restrictive covenant, or whether the awarding of damages constitutes judicial enforcement prohibited by the Fourteenth Amendment.¹³

title. Defendants had purchased without actual notice of the restriction on the property; however, the contract carrying the restriction was recorded. 344 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).

⁵*Woytus v. Winkler*, 357 Mo. 1082, 212 S. W. (2d) 411 (1948); *Goetz v. Smith*, 191 Md. 707, 62 A. (2d) 602 (1948).

⁶*Tovey v. Levy*, 401 Ill. 393, 82 N. E. (2d) 441 (1948).

⁷*Clifton v. Puente*, 218 S. W. (2d) 272 (Tex. Civ. App. 1948).

⁸*Clifton v. Puente*, 218 S. W. (2d) 272 (Tex. Civ. App. 1948).

⁹*Ex parte Laws*, 31 Cal. (2d) 846, 193 P. (2d) 744 (1948).

¹⁰*Shelley v. Kraemer*, 334 U. S. 1 at 13, 68 S. Ct. 836 at 842, 92 L. ed. 1161 at 1180 (1948).

¹¹*Claremont Improvement Club v. Buckingham*, 89 Cal. App. (2d) 32, 200 P. (2d) 47 (1948).

¹²There has been speculation as to various means of circumventing this effect. See Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases* (1949) 16 U. of Chi. L. Rev. 203; Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values* (1949) 24 Notre Dame Law. 157; Note (1949) 37 Calif. L. Rev. 493.

¹³The American Law Institute's Restatement of the Law considers a judgment for damages for breach to be enforcement of the contract. Restatement, Contracts (1932) § 14. See Note (1949) 12 Detroit L. J. 81.

During the year following the Supreme Court's momentous decision, the Missouri court, in *Weiss v. Leason*,¹⁴ upheld a judgment for damages for the breach of a racial restrictive covenant on the ground that damages and injunctive relief are two distinct judicial remedies, and that the *Shelley* case, while declaring the injunctive relief to be unconstitutional, had decided nothing as to the question of damages. In the absence of any authority bearing directly on the issue, the court referred to the fact that the *Shelley* opinion had conceded that the covenant itself was valid, and then generalized: "For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance,¹⁵ is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages. . . ."¹⁶

Although this view has been severely criticized by reviewing writers,¹⁷ the Supreme Court of Oklahoma adopted substantially the same position in 1951 in *Correll v. Earley*.¹⁸ The specific question there was the sufficiency of a petition which alleged that the defendants had conspired to sell restricted land to an insolvent white person, who would then sell to Negroes, with the intent that the plaintiff should be damaged. The trial court, acting on the basis of the *Shelley* case, had sustained a general demurrer to the complaint, but the highest court of the state reversed, holding that the complaint stated a good cause of action for damages. The court professed to be giving full effect to the principle of the *Shelley* case, and once more it was emphasized that the United State Supreme Court had said the restrictive covenants themselves were valid.¹⁹ While this was a tort action, rather than one for breach of covenant, the court made it clear that the "vice of the

¹⁴359 Mo. 1054, 225 S. W. (2d) 127 (1949), noted (1950) 7 Wash. & Lee L. Rev. 178.

¹⁵The court is here assuming the very thing which needs to be proved. Nowhere in the *Shelley* opinion did the Supreme Court refer to "specific enforcement." The term used throughout the opinion was "judicial enforcement." 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).

¹⁶359 Mo. 1054, 225 S. W. (2d) 127, 131 (1949).

¹⁷See Crooks, Racial Covenant Cases (1949) 37 Geo. L. J. 514 at 525; Lathrop, The Racial Covenant Cases [1948] Wis. L. Rev. 508 at 527; Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203; Scanlan, Racial Restrictions in Real Estate—Property Values Versus Human Values (1949) 24 Notre Dame Law. 157 at 182; Note (1950) 7 Wash. & Lee L. Rev. 178; Note (1948) 21 So. Calif. L. Rev. 358; Note (1952) 1 Buffalo L. Rev. 304. Cf. Note [1950] Wash. U. L. Q. 437.

¹⁸205 Okla. 366, 237 P. (2d) 1017 (1951).

¹⁹205 Okla. 366, 237 P. (2d) 1017 at 1020, 1022 (1951).

conspiracy" was the plan to deprive the plaintiff of his right to pursue defendants directly for damages for breach of contract.²⁰

Opposing these decisions is the recent California case of *Barrows v. Jackson*,²¹ which finds direct support in decisions of the Supreme Court of Michigan and the United States District Court for the District of Columbia²² in declaring that "The doctrine of the *Shelley* case, as we read it, means that no state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to buy a home and live in it. Distinction between direct and indirect state action is tenuous. The enforcement of a covenant by an action for damages furnishes a prepotent motive to prevent use or occupancy of property by non-Caucasians. . . ."²³ The California court, concluding that the *Weiss* case had confused "enforcement" with "specific enforcement,"²⁴ took the position that the question in the *Shelley* case did not relate to the nature of the relief sought, but rather to whether the courts could take any action at all.²⁵ "The thrust of the decision is aimed at prohibition of

²⁰The court said, "This is one vice of the conspiracy." 205 Okla. 366, 237 P. (2d) 1017, 1022 (1951). But the language and tenor of the whole opinion bears out the belief that this was *the* vice of the conspiracy.

²¹112 Cal. App. (2d) 534, 247 P. (2d) 99 (1952). Three of the plaintiffs, the predecessor of the fourth plaintiff, and the defendant, owners of lots of land in Los Angeles, entered into a written agreement by which each bound himself and his successors by a covenant running with the land that no part of his realty should "be used or occupied by any person or persons not wholly of the white or Caucasian race." The agreement provided that if any of the lots should be used or occupied by any person not wholly of the white or Caucasian race, the covenantors of that lot and his successors would be liable to the other covenantors and their successors for all damages which they suffered as a result of the breach. The defendant conveyed one of the restricted lots without incorporating the restriction in the deed or making any reference to it. The day after the defendant moved off the property, persons not of the Caucasian race moved in. The action for damages was brought against the covenantor-conveyor.

²²*Phillips v. Naff*, 332 Mich. 389, 52 N. W. (2d) 158 (1952); *Roberts v. Curtis*, 93 F. Supp. 604 (D. C. D. C. 1950).

²³112 Cal App. (2d) 534, 247 P. (2d) 99, 112 (1952).

²⁴See note 15, *supra*.

²⁵The Civil Rights Cases declared that the Fourteenth Amendment "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizen of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them equal protection of the laws." 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L. ed. 835, 839 (1883). The court in the *Barrows* case called attention to this declaration in a footnote, 247 P. (2d) 99, 111. Justice Bradley for the Supreme Court in the

judicial participation in the maintenance of racial residential segregation. . . . [Either injunctive relief or the damages remedy] necessarily calls upon the courts for action; each is, therefore, equally state action and equally within the proscription of the Fourteenth Amendment."²⁶ To maintain racial discrimination was the purpose of the covenant; and liability for a damages judgment would serve that purpose as surely as would the availability of injunctive relief.²⁷ The coercive effect of the damages remedy would be enhanced by the vexation and expense of defending a lawsuit. Though the *Shelley* opinions²⁸ expressly stated that the Equal Protection Clause of the Fourteenth Amendment would not be violated so long as the purpose of racial restrictive covenants were effectuated by *voluntary adherence* to their terms, adherence to a covenant could never be said to be voluntary if the coveantee could recover damages from the covenantor for its breach.

In the only two other cases involving this question since the *Shelley* holding, the same conclusion was reached. A federal district court, in *Roberts v. Curtis*, interpreted "the ruling of the Supreme Court"²⁹

Civil Rights Cases also said: "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . ." 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L. ed. 835, 839 (1883).

²⁶112 Cal. App. (2d) 534, 247 P. (2d) 99, 111-112 (1952).

²⁷"The coercive device of retribution in the form of damages is as effective as the coercive effect of injunction relief, although not as immediate." 112 Cal. App. (2d) 534, 247 P. (2d) 99, 112 (1952).

²⁸344 U. S. 1 at 13, 68 S. Ct. 836 at 842, 92 L. ed. 1161 at 1180 (1948).

²⁹Strict authority for the Roberts ruling was *Hurd v. Hodge*, 334 U. S. 24, 68 S. Ct. 847, 92 L. ed. 1187 (1948), companion case to *Shelley v. Kraemer* which arose in the District of Columbia, a case in which the supreme Court based its holding against the granting of an injunction to enforce a racial restrictive covenant not on constitutional grounds, but rather on a federal statute, the Civil Rights Act of 1866. See Note 34, *infra*. Strictly speaking, therefore, the Roberts decision is not based on constitutional grounds, either. But the court there spoke of the *Shelley* and *Hodge* decisions in a single breath, seeming to regard them as separate expressions of one principle: "In the cases of *Hurd v. Hodge* and *Shelley v. Kraemer*, however, the Supreme Court changed the prior rules of law applicable to these covenants. The Supreme Court held that such contracts are not invalid so long as their purposes are achieved by voluntary adherence of the parties to the terms of the agreement. [This point was made in both decisions.] The Supreme Court further held that it was contrary to the Fourteenth and Fifteenth Amendments to the Constitution [this was held in the *Shelley* case, but not in the *Hodge* case] and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings [this was held in the *Hodge* case, but not in the *Shelley* case]." 93 F. Supp. 604 (D. C. D. C. 1950). In any event, the principle of the Roberts holding would seem to be the same as that of the Barrows decision—i.e., the giving of damages for breach of a racial restrictive covenant is enforcement of the covenant, and the *Shelley* and *Hodge* decisions barred judicial proceeding of any kind to enforce such covenants.

as "withholding any assistance by way of judicial action of any kind from the enforcement of such restrictive covenants."³⁰ In *Phillips v. Naff*³¹ the highest court of Michigan alluded, as did the California court, to the "voluntary adherence" language in the *Shelley* opinion, and believed that the Supreme Court meant there could be *nothing more than voluntary adherence*.³² As to the effect of liability for a damages suit, the point was made, and later concurred in by the *Barrows* case, that it "would operate to inhibit freedom of purchase by those against whom the discrimination is directed. . . ."³³

It seems plain that it is the intervention by the state, not the particular form of intervention, that is barred by the Fourteenth Amendment. Persons have a right to acquire, enjoy and dispose of property without being subject to any state interference based on racial considerations.³⁴ If the vendor to persons in racial minority groups is to be liable in damages when he breaches a covenant not to sell to them, such persons are being hindered by the state. Vendors bound by such covenants then usually will be unwilling to sell to the proscribed persons; or, if they do sell, they will be inclined to raise the sale price of the property by an amount likely to cover any damages judgments they may incur. The vandeeds, although themselves members of the proscribed minority groups, may be bound by the covenant not to sell to another member of their own race unless they, also, are prepared to pay a damages judgment.³⁵ And it will be less likely that they can sell to someone not of their own race for a fair price, since

³⁰93 F. Supp. 604 (D. C. D. C. 1950).

³¹332 Mich. 389, 52 N. W. (2d) 158 (1952).

³²332 Mich. 389, 52 N. W. (2d) 158 at 161 (1952).

³³332 Mich. 389, 52 N. W. (2d) 158, 164 (1952).

³⁴U. S. Const. Amend. XIV; *Shelley v. Kraemer*, 344, U. S. 1 at 10, 68 S. Ct. 836 at 841, 92 L. ed. 1161 at 1179 (1948); *Terrace v. Thompson*, 263 U. S. 197 at 215, 44 S. Ct. 15 at 17-18, 68 L. ed. 255 at 274 (1923); *Buchanan v. Warley*, 245 U. S. 60 at 74, 38 S. Ct. 16 at 18, 62 L. ed. 149 at 160-161 (1917); *Holden v. Hardy*, 169 U. S. 366 at 391, 18 S. Ct. 383 at 387, 42 L. ed. 780 at 790 (1898); *Sei Fujii v. State*, 38 Cal. (2d) 718, 242 P. (2d) 617 at 624 (1952). Section 1978 of Revised Statutes, 8 U. S. C. A. § 42 (1942), 2 F. C. A. title 8, § 42 (1936), which was derived from § 1 of the Civil Rights Act of 1866, enacted by the Congress while the Fourteenth Amendment was under consideration, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See also *Civil Right Cases*, 109 U. S. 3 at 22, 3 S. Ct. 18 at 29, 27 L. ed. 835 at 843 (1883); *Strauder v. West Virginia*, 100 U. S. 303 at 307-308, 25 L. ed. 664 at 665 (1880).

³⁵*Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180 (1922); 3 *Tiffany, Real Property* (3d ed. 1939) §§ 850, 859; *Restatement, Property* (1944) § 530. See *Ames, Specific Performance For and Against Strangers to the Contract* (1903) 17 *Harv. L. Rev.* 174.

their occupancy has made the property less attractive to other persons, even for investment purposes.³⁶

The decision in *Barrows v. Jackson*, and earlier, the decisions in the *Roberts* and *Phillips* cases, more closely adhered to the spirit and language of the *Shelley* opinion than those decisions which construed that opinion as leaving untouched the availability of the damages remedy for the breach of a racial restrictive covenant. It is to be hoped that the Supreme Court of the United States may soon have an opportunity to make an express ruling that the damages remedy, like injunctive relief, is barred by the Fourteenth Amendment in these cases.³⁷

DONALD S. LATOURETTE*

CONSTITUTIONAL LAW—VALIDITY OF STATUTE MAKING MEMBERSHIP IN
SUBVERSIVE ORGANIZATION EVIDENCE OF UNFITNESS FOR EMPLOYMENT
IN SCHOOLS. [United States Supreme Court]

The current congressional investigations directed at communistic influences among teachers in American schools give renewed significance to the recent controversy over the attempt of the New York legislature to expel subversive persons from employment in the state public school system. In 1949 the New York legislature enacted the Feinberg Law¹ to implement Section 12-a of the New York Civil Service Law,² which authorizes the removal from public employment of anyone who advocates the forcible overthrow of the government. The Feinberg Law empowers the Board of Regents, after notice and hearing, to list subversive organizations, membership in which constitutes prima facie evidence of unfitness to serve as a public school teacher. After having been under attack in the New York courts since 1949,³ the constitutionality of this enactment has now been confirmed

³⁶See Myrdal, *An American Dilemma* (1944) 623; Weaver, *The Negro Ghetto*, (1948) 212, 297.

³⁷Since the writing of this comment, the Supreme Court has affirmed the decision and approved the reasoning of the California court. *Barrows v. Jackson*, 73 S. Ct. 1031 (1953).

*Acknowledgement is made of the contribution of John C. Calhoun, Law Class of February, 1953, to the preparation of this comment.

¹New York Laws (1949) c. 360.

²New York Laws (1939) c. 547, as amended New York Laws (1940) c. 564.

³*L'Hommedieu v. Board of Regents*, 342 U. S. 951 (1952) affirming without opinion 301 N. Y. 476, 95 N. E. (2d) 806 (1950) affirming 276 App. Div. 494, 95 N. Y. S. (2d) 443 (1950) reversing 196 Misc. 686, 93 N. Y. S. (2d) 274 (1949); *Thompson v. Wallin*, 301 N. Y. 476, 95 N. E. (2d) 806 (1950) affirming 276 App. Div. 463, 95 N. Y. S. (2d) 784 (1950) reversing 196 Misc. 686, 93 N. Y. S. (2d) 274 (1949).

by the United States Supreme Court in *Adler v. Board of Education of the City of New York*,⁴ the first occasion upon which such a statute has been passed on by the high court.⁵ The plaintiffs, who are taxpayers, parents, and teachers in New York, contended that the Feinberg Law was unconstitutional because it deprived them of free speech and assembly guaranteed by the First Amendment and made applicable to them by the Fourteenth, and because the procedure set up to fix guilt through proof of membership in listed organizations constituted a deprivation of property without due process of law.

In rejecting these arguments, the Supreme Court followed its previous pronouncement in *United Public Workers of America (C. I. O.) v. Mitchell*⁶ that public employment is a privilege, not a right, and consequently that restrictions of speech and assembly which would be unconstitutional in other circumstances, may be valid when imposed upon persons in public employment. The New York statute was held not to deny due process of law, because membership in listed organizations merely raises a *rebuttable* presumption against the plaintiffs and is not conclusive of guilt.⁷ Justice Douglas, with whom Justice

⁴342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 295 (1952).

⁵Note (1952) 27 Notre Dame Law. 448, 449.

⁶330 U. S. 75, 67 S. Ct. 556, 91 L. ed. 754 (1947). Federal government employees contested the constitutionality of the Hatch Political Activity Act, 53 Stat. 1147 (1939), 18 U. S. C. Supp. V, Section 61h (1946), which limits the freedom of government employees to participate in political campaigns. The Court held that federal government employees are in a peculiar status, for political activity on their part would threaten efficient administration, and a Congressional Act to forestall this occurrence is constitutional.

⁷This fruitless contention by the plaintiffs was based upon the theory that the law proclaimed that membership in an organization listed by the Board of Regents constituted *prima facie* evidence of disqualification, whereas the fact found allegedly bears no relation to the fact presumed. In this instance the fact found was that an organization of which the person in question was a member had for its purpose the violent overthrow of the government and that this purpose was known by the person, and the fact presumed was that such person is disqualified for employment. The Court rejected plaintiffs' argument and took the view that disqualification follows as a reasonable presumption from membership in and support of listed organizations. A further due process objection raised by the plaintiffs was similarly denied by the Court because the presumption growing out of a *prima facie* case remains only so long as there is no substantial evidence to the contrary. Moreover, a hearing is afforded the aggrieved party at which substantial evidence to rebut the presumption will be heard, and once such evidence is received, the officer who made the order of ineligibility then has the burden of sustaining the validity of the order by a fair preponderance of the evidence. At this point should an order of ineligibility be issued, the party in question may still avail himself of the review procedure according to Section 12 (d) of the Law. The Feinberg Law was thus held to provide adequate assurance of due process.

Black concurred in dissent, rejected the Court's view that when a person enters public service he sacrifices his civil rights, and expressed unwillingness to concur in the Court's acquiescence in "a principle repugnant to our society—guilt by association . . ."⁸ Justice Frankfurter also dissented, but on the ground that the issue was not ripe for decision because the plaintiffs had failed to show any present injury and thus had no standing to raise the question of constitutionality.⁹

In such controversies involving charges of governmental invasion of civil rights, courts must decide in favor of one of the two divergent concepts: the interest that a government has in preserving itself from those who would destroy it, as opposed to constitutional guaranties normally enjoyed by citizens.¹⁰ In arriving at a decision, a court necessarily employs a balancing process, and it is apparent in the principal case that the imminent threat of communistic infiltration in the public schools was deemed sufficiently serious to sway the balance in favor of the preservation of constitutional government.¹¹

In opposition to the Court's affirmation of the privilege theory, Justice Douglas' able dissent makes the point that nowhere in this country's tradition is there support for the view lately taken by the

⁸Adler v. Board of Education of the City of New York, 342 U. S. 485, 508, 72 S. Ct. 380, 393, 96 L. ed. 295, 308 (1952). The crux of Justice Douglas' dissent is that the Constitution guarantees freedom of thought and expression to everyone in our society and that the mere fact that a person enters the employment of the government is no just reason for denying him his full civil rights. Furthermore, the manner in which the Feinberg Law proceeds is appalling to Justice Douglas for as he termed it the use of "guilt by association," when drawn to its extremity, will turn the school system into a spying project, and the result will become constant surveillance of the teachers—a typical police state measure.

⁹Adler v. Board of Education of the City of New York, 342 U. S. 485, 497, 72 S. Ct. 380, 387, 96 L. ed. 295, 302 (1952). For a discussion of Justice Frankfurter's dissent see Davis, Standing, Ripeness and Civil Liberties: A Critique of Adler v. Board of Education (1952) 38 A. B. A. J. 924.

¹⁰Note (1952) 5 S. C. L. Q. 85, 86.

¹¹"The preamble of the Feinberg Law, Section 1, makes elaborate findings that members of subversive groups, particularly of the Communist Party and its affiliated organizations, have been infiltrating into public employment in the public schools of the State; that this has occurred and continues notwithstanding the existence of protective statutes designed to prevent the appointment to or retention in employment in public office, and particularly in public schools, of members of any organizations which teach or advocate that the government of the United States or of any state or political subdivision thereof shall be overthrown by force or violence or by any other unlawful means. . . ." Alder v. Board of Education of the City of New York, 342 U. S. 485, 489, 72 S. Ct. 380, 383, 96 L. ed. 295, 298 (1952). "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. . . ." 342 U. S. 485, 493, 72 S. Ct. 380, 385, 96 L. ed. 295, 300 (1952).

Court that when a citizen takes the mantle of public office he no longer enjoys the full constitutional rights of other citizens. This argument is persuasive, and Justice Douglas dramatizes its significance by labelling public school teachers "second class citizens." However, the soundness of the contention may suffer somewhat upon analysis. Men in the armed services on this reasoning would have to be termed "second class citizens,"¹² because they have relinquished a portion of the full complement of constitutional rights that other citizens enjoy. It is recognized that since a serviceman is charged with public responsibility in defending the national security, he temporarily must give up some personal rights normally guaranteed by the Constitution, in order effectively to assure the carrying out of this responsibility. This sacrifice, however, is not regarded as reducing his rank as a citizen. Similarly a teacher who "works in the sensitive area in a schoolroom" in shaping "the attitude of young minds toward the society in which they live," is engaged in public employment in an area in which "the State has a vital concern" and for which the State may establish requirements of "fitness and loyalty." The teacher should not, for this reason, be termed a second class citizen when called upon to forego certain rights normally enjoyed by others not so sensitively situated.

It is notable that the Supreme Court did not expressly mention the traditional "clear and present danger" test, first announced by Justice Holmes in *Schenck v. United States*¹³ in 1919, and amplified by Justices Brandeis and Holmes in their dissenting opinion in *Gitlow v. People of New York*¹⁴ in 1925. In the *Gitlow* case the majority of the Court up-

¹²*Adler v. Board of Education of the City of New York*, 342 U. S. 485, 508, 72 S. Ct. 380, 392, 96 L. ed. 295, 308 (1952).

¹³249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 473 (1919). For an excellent treatise concerning the development of the test see Corwin, *Bowing Out "Clear and Present Danger"* (1952) 27 *Notre Dame Law*. 325.

¹⁴268 U. S. 652, 672, 45 S. Ct. 625, 632, 69 L. ed. 1138, 1149 (1925). Because the defendant printed and circulated "The Left Wing Manifesto," a journal depicting the necessity for overthrowing the government by force and violence, he was convicted of violating the New York criminal anarchy statute, under which the advocacy or teaching of the doctrine of the overthrow of the government by force and violence was made felonious. The majority of the Court upheld the statute as a reasonable exercise of the police power in the face of a threat to the security of the state, and rejected the need for a clear and present danger because it was not deemed reasonable for the state to be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbance of the public peace or imminent and immediate danger of its own destruction.

The dissent, on the other hand, reasoned that the clear and present danger test should have been applied because an admittedly small minority followed the defendant's views, and thus the ideas expressed in the "Manifesto" had no real

held the New York penal law authorizing the arrest and conviction of any person teaching the violent overthrow of the organized government, because the statute was deemed a reasonable exercise of the police power of the State.¹⁵ The Court held that the clear and present danger test had no application in the situation where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character. Under this view, if the statute constitutes a reasonable means to avert a threat to public security it will be upheld. However, the reasonableness test was not followed in subsequent cases. Rather, the Court returned to the clear and present danger test, applying it strictly in cases in the 1940's to strike down a statute prohibiting picketing¹⁶ and a statute requiring the registration of labor organizers.¹⁷ In 1951, in *Dennis v. United States*,¹⁸ however, the Court refused to be bound by the "present" aspect of the test, announcing instead that if the threat was sufficiently substantial, the fact that the danger was not immediate was immaterial. The Court pointed out that:

"Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."¹⁹

Sustained by this recent precedent, the Court was able to approach the principal case from the standpoint of a balance of interests, instead of being bound by a strict application of the clear and present danger test. On this basis it was ruled that the constitutional right of free speech and assembly are not abridged in the present situation.

chance of starting a present conflagration. For the statute to qualify as a privileged withdrawal of First Amendment guaranties under this view, it must be calculated to avert a clear and present danger to the state's security, and also the threatened danger must have some chance of success.

¹⁵*Gitlow v. People of New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925). The defendant, who was convicted of the statutory crime of advocating and teaching the overthrow of the government by force and violence, attacked the statute as repugnant to the Due Process Clause of the Fourteenth Amendment. The Court upheld the statute as a reasonable means taken by the state to insure its primary and essential right of self-preservation.

¹⁶*Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).

¹⁷*Thomas v. Collins*, 323 U. S. 516, 65 S. Ct. 315, 89 L. ed. 430 (1945).

¹⁸341 U. S. 494, 71 S. Ct. 857, 95 L. ed. 1137 (1951).

¹⁹*Dennis v. United States*, 341 U. S. 494, 509, 71 S. Ct. 857, 867, 95 L. ed. 1137, 1152 (1951).

Teachers have no right to work for the state on their own terms,²⁰ but rather are subject to reasonable terms imposed by the state authorities. If they do not choose to work on such terms, they are at liberty to retain their associations and go elsewhere; and certainly, one's associates and conduct are reasonable factors to be considered in determining fitness and loyalty.²¹ As a prelude to the *Adler* decision, the Court had previously upheld a state statute requiring a candidate for public office to take an oath that he is not a member of a subversive organization,²² and a city ordinance requiring a loyalty oath of each of its officers and employees.²³ In each of these cases the position was taken that one who accepts the privilege of public office-holding may be required to surrender some liberties enjoyed by citizens generally.

The Court unquestionably encountered a difficult balancing process when it was confronted with the *Adler* case. Having already sapped the strength of the clear and present danger test in the *Dennis* case, the Court had to employ a new standard. Thus, the "privilege view" of the *Mitchell* case was coupled with a reasonableness test strikingly similar to the test employed in *Gitlow v. People of New York* to form the new criterion for determining the constitutionality of statutes which infringe First Amendment guaranties. An interesting point of speculation is whether or not it was intended in the *Adler* case to rehabilitate the *Gitlow* case test of reasonableness. The latter decision was cited with approval and without qualification.²⁴ Furthermore, the "appropriateness" of testing loyalty by considering one's associates, mentioned in the *Adler* case,²⁵ and the "reasonableness" of the statute as a means to prevent the violent overthrow of the government by force, mentioned in the *Gitlow* case,²⁶ are undeniably similar—if synonymous—tests.²⁷

JOHN P. WARD

²⁰Accord: *Board of Regents v. Updegraff*, 205 Okla. 301, 237 P. (2d) 131, 137 (1951) (a teacher does not have a constitutional right to government employment, and the legislature can make reasonable restrictions).

²¹*Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492, 72 S. Ct. 380, 385, 96 L. ed. 295, 299 (1952).

²²*Gerende v. Board of Supervisors of Elections of Baltimore*, 341 U. S. 56, 71 S. Ct. 565, 95 L. ed. 745 (1951).

²³*Garner v. Board of Public Works of City of Los Angeles*, 341 U. S. 716, 71 S. Ct. 909, 96 L. ed. 1317 (1951).

²⁴*Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492, 72 S. Ct. 380, 385, 96 L. ed. 295, 300 (1952).

²⁵342 U. S. 485, 493, 72 S. Ct. 380, 385, 96 L. ed. 295, 300 (1952).

²⁶68 U. S. 652, 668, 45 S. Ct. 625, 631, 69 L. ed. 1138, 1147 (1925).

²⁷For further law review comment on the *Adler* case see: Notes (1952) 66 Harv. L. Rev. 89, 121; 36 Minn. L. Rev. 961; 100 U. of Pa. L. Rev. 1244.

CRIMINAL LAW—PROPRIETY OF INSTRUCTING JURY AS TO POSSIBILITY THAT SENTENCE SET BY JURY MAY BE AFFECTED BY COMMUTATION OR PAROLE. [Virginia]

While generally the fixing of punishment for one convicted of crime is the function of the presiding trial judge, and the jury is limited to the determination of the guilt or innocence of an accused, a number of states, including Virginia,¹ have provided by statute that the jury shall either recommend or actually assess the proper punishment.² In the operation of this system, the courts are divided as to the extent to which the jury, in the execution of its sentencing function, is to be informed of the possibility that its sentence may in some manner be set aside, changed, or modified by the operation of laws relating to pardons, paroles, or the commutation of sentences.³ While there is considerable authority which holds that the jury is entitled to be fully and adequately informed of these matters,⁴ there are decisions sustaining the proposition that no such information should be given.⁵ Even among courts adopting the latter position, disagreement arises as to the consequences of error committed in the trial court in this regard. Some courts have ruled that though a voluntary instruction concerning the parole system was "unfortunate,"⁶ or even error,⁷ it was not so serious as to warrant reversal. An opposite result

¹ Va. Code Ann. (Michie, 1950) § 19-267. "The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law."

² Lovett v. State, 30 Fla. 142, 11 So. 550 (1892); Brantley v. State, 87 Ga. 149, 13 S. E. 257 (1891); State v. Carrigan, 93 N. J. L. 268, 108 Atl. 315 (1919); State v. Knight, 34 N. M. 217, 279 Pac. 947 (1929); State v. Bethune, 86 S. C. 143, 67 S. E. 466 (1910); Notes (1922) 17 A. L. R. 1117; (1933) 87 A. L. R. 1362.

³23 C. J. S., Criminal Law § 1379.

⁴People v. Chessman, 38 Cal. (2d) 166, 238 P. (2d) 1001 (1951), cert. denied, 343 U. S. 915, rehearing denied, 343 U. S. 937 (1952); State v. Barth, 114 N. J. L. 112, 176 Atl. 183 (1935); State v. Mosley, 102 N. J. L. 94, 131 Atl. 292 (1925); State v. Carrigan, 93 N. J. L. 268, 108 Atl. 315 (1919); State v. Rombole, 89 N. J. L. 565, 99 Atl. 434 (1916); Liska v. State, 115 Ohio St. 283, 152 N. E. 667 (1926); State v. Carroll, 52 Wyo. 29, 69 P. (2d) 542 (1937); cf., State v. Lammers, 171 Kan. 668, 237 P. (2d) 410 (1951).

⁵Lovely v. United States, 169 F. (2d) 386 (C. C. A. 4th, 1948); People v. Bruno, 49 Cal. App. 372, 193 Pac. 511 (1920); Sukle v. People, 107 Colo. 269, 111 P. (2d) 233 (1941); Bryant v. State, 205 Ind. 372, 186 N. E. 322 (1933); Houston v. Commonwealth, 270 Ky. 125, 109 S. W. (2d) 45 (1937); Glenday v. Commonwealth, 255 Ky. 313, 74 S. W. (2d) 332 (1934); Gaines v. Commonwealth, 242 Ky. 237, 46 S. W. (2d) 75 (1932); Postell v. Commonwealth, 174 Ky. 272, 192 S. W. 39 (1917); Commonwealth v. Mills, 350 Pa. 478, 39 A. (2d) 572 (1944); Porter v. State, 177 Tenn. 515, 151 S. W. (2d) 171 (1941); Coward v. Commonwealth, 164 Va. 539, 178 S. E. 797 (1935).

⁶State v. Martin, 94 N. J. L. 139, 109 Atl. 350 (1920).

⁷People v. Sukdol, 322 Ill. 540, 153 N. E. 727 (1926).

has been reached in other cases, where such an instruction is held to constitute reversible error because it induced the jury to impose a greater punishment than it would otherwise have done,⁸ or because it might result in a compromise verdict.⁹ One court, while disapproving of the voluntary instruction concerning parole laws, held that a response to an inquiry by the jury on this subject is not error if fair and not indicating or suggesting what the jury should or should not do; however, this court suggested that in the future, the trial court should fairly answer the inquiry but the answer should be coupled with an admonition that the jury should not speculate on what might happen after the verdict.¹⁰ Yet when this course was followed in another jurisdiction, it was held to constitute reversible error.¹¹

The Supreme Court of Appeals of Virginia was squarely faced with this problem recently in *Jones v. Commonwealth*,¹² and while the decision was unanimous that the trial court had committed reversible error in its directions to the jury in this matter, the Justices were split 4 to 2 in regard to what was the proper course for the trial court to follow. The defendant was indicted for first degree murder, punishable in Virginia by life imprisonment or death, for having stabbed his wife to death upon a public street in the presence of a number of disinterested witnesses. The defense interposed was that the defendant, while admittedly attempting to disfigure his wife for the avowed purpose of making her less attractive to other men, was suddenly overcome by a blackout spell during which he knew nothing of his actions. Evidence was admitted that the defendant had previously suffered such attacks, and medical records, including a medical discharge from the army, corroborated evidence that the spells were epileptic in nature.

After the jury had considered its verdict for about two hours, the foreman came before the court and, in the presence of the defendant, his counsel, and the commonwealth's attorney, stated that the jury had decided that the defendant was guilty of murder in the first degree, but the jurors wanted to know whether, if they gave him life imprisonment, a term of ninety-nine years or any long terms of years, they would have any assurance that the defendant would not "get out." The court replied that it could "not give that assurance; that would be

⁸*Bean v. State*, 58 Okla. Cr. 432, 54 P. (2d) 675 (1936).

⁹*Lovely v. United States*, 169 F. (2d) 386 (C. C. A. 4th, 1948).

¹⁰*State v. Carroll*, 52 Wyo. 29, 69 P. (2d) 542 (1937).

¹¹*Williams v. State*, 191 Tenn. 456, 234 S. W. (2d) 993 (1950).

¹²194 Va. 273, 72 S. E. (2d) 693 (1952).

in the hands of the executive branch of the government and that the court was of the judicial branch; that you and I represent the judicial branch and have nothing to do with that."¹³ Defendant's counsel then inquired of the court, out of hearing of the jury, whether it would be proper to advise the jury that a person sentenced to life imprisonment is not eligible for parole, but the court answered in the negative. Following these colloquies, the jury again retired and after twenty or twenty-five minutes returned a verdict of guilty of murder in the first degree and fixed the punishment at death.

The Supreme Court of Appeals, concluding that the court erred in the nature of its response to the inquiry put to it by the jury and that such error was sufficiently prejudicial as to warrant reversal, remanded the case for a new trial. The majority of the court followed the rule established in 1935 by *Coward v. Commonwealth*,¹⁴ that, upon inquiry of this nature by the jury, the trial court shall instruct that it is the duty of the jury, if it finds the accused guilty, to impose such punishment as it considers to be just under the evidence and within the limits of the court's instructions, and not concern itself with what may afterward happen. Therefore, by answering that it could not give the requested assurance that the accused would not "get out," the trial court in the principal case had led the jury to believe that the defendant might be released at some future time, whereas in truth, had the defendant received a sentence of life imprisonment he would not have become eligible for parole.

The procedure adopted under the *Coward* decision was designed to enable the trial court to avoid any semblance of influencing the jury in its decision, either in increasing or decreasing the severity of the penalty which it might consider proper. A second consideration advanced for denying information concerning the operation of post-trial, extra-judicial machinery of pardons and paroles, is that a contrary rule, providing for a fully informed jury, would tend to frustrate the operation of laws which are designed for the handling of prisoners

¹³194 Va. 273, 275, 72 S. E. (2d) 693, 694 (1952).

¹⁴164 Va. 639, 178 S. E. 797 (1935). Defendant, convicted of driving while under the influence of intoxicants and sentenced to three months in jail and fined \$100, excepted to the trial court's action, in response to an inquiry by the jury as to what time the defendant would get off while confined in jail, of reading the statute providing for commutation of sentence, conditioned upon good behavior, at the rate of ten days per month of sentence. The court held that the response was reversible error in that it permitted the jury to fix the actual time of confinement; but by way of *dicta*, it was indicated that such an error was harmless where the minimum sentence was imposed and harmless in murder cases where the sentence is death.

after sentencing.¹⁵ Those laws, relating to the good conduct allowances made to prisoners, are designed to further the interest of both the public at large and the convict by promoting good conduct in the penal institutions. Any consideration of the possible operation of such a system, made at the time that sentence is passed, could well work an injustice on the accused and defeat the legislative intent. Thus, a jury which considers ten years imprisonment adequate for the crime charged, might, upon being apprised of the possible effects of a law relating to parole or commutation of sentence, impose a sentence of twenty years in order to be sure defendant would actually be confined for at least ten years.¹⁶ Viewed from the opposite standpoint, however, the rationale of the *Coward* rule has been said to rest on the possibility that a jury will view its task lightly if advised that its sentence may not be carried out, but rather is subject to modification by the operation of law relative to pardons and paroles.¹⁷ The Virginia court further noted that since arguments by counsel are precluded from touching upon the subject of possible subsequent parole action,¹⁸ it should hardly be the subject of an instruction to the jury, voluntary or otherwise.¹⁹ Counsels have been repeatedly warned that comment of this nature is "improper and out of place;"²⁰ but usually, while criticizing such conduct, the courts refuse to reverse the case on this point alone.²¹ However, in the face of general criticism of this practice, the

¹⁵7 Va. Code Ann. (Michie, 1950) § 53-213.

¹⁶"Plainly, such a verdict would be indefensible." *Coward v. Commonwealth*, 164 Va. 639, 642, 178 S. E. 797, 798 (1935); also see *State v. Mosley*, 102 N. J. L. 94, 131 Atl. 292, 297 (1925) (dissenting opinion).

¹⁷See *State v. Carroll*, 52 Wyo. 29, 69 P. (2d) 542, 561 (1937). This consideration may explain the dicta found in *Coward v. Commonwealth* (see note 14, supra) that the giving of such instructions, while generally objectionable, is harmless in murder cases where the sentence is death, for it could hardly be said then that the jury viewed its task lightly.

¹⁸*Dingus v. Commonwealth*, 153 Va. 846, 149 S. E. 414 (1929).

¹⁹Some cases distinguished between instances where the questionable instruction is "voluntary"—i.e., given by the court as a part of its charges to the jury *sui sponte*—and where the instruction is responsive to an inquiry put to the court by the jury, but the problem is much the same. As an example of a voluntary instruction, see *State v. Rombolo*, 89 N. J. L. 565, 99 Atl. 434 (1916); the principal case exemplifies an instruction responsive to an inquiry.

²⁰*Commonwealth v. Earnest*, 342 Pa. 544, 21 A. (2d) 38, 41 (1941). Also *People v. La Verne*, 212 Cal. 29, 297 Pac. 561 (1931); *Wechter v. People*, 53 Colo. 89, 124 Pac. 183 (1912); *Pollard v. State*, 201 Ind. 180, 166 N. E. 654 (1929).

²¹*People v. La Verne*, 212 Cal. 29, 297 Pac. 561 (1931); *Wechter v. People*, 53 Colo. 89, 124 Pac. 183 (1912); *People v. Murphy*, 276 Ill. 304, 114 N. E. 609 (1916); *Holmes v. Commonwealth*, 241 Ky. 573, 44 S. W. (2d) 592 (1931). *Contra*, *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35 (1948).

absence of reversal can hardly be viewed as implied permission by the courts to counsel to make such comments to the juries.²²

The concurring minority of the Virginia court in the principal case rejected the *Coward* rule as being against both reason and authority, and asserted that the trial court, instead of refusing completely to respond to the jury's inquiries, should fully inform the jury of the good conduct allowances for convicts,²³ of the eligibility of a convict for parole,²⁴ and of the constitutional power of the Governor to grant pardons or reprieves.²⁵ These Justices felt that "no prejudice would have resulted had such information been given in simple and direct language."²⁶ Under this view, the reversal of the verdict was required because the trial court's reply to the jury was so grossly inadequate as to be misleading and prejudicial to the interest of the accused.

In support of its rule, the concurring minority contended not only that it is in accord with the weight of authority,²⁷ but also that an understanding of these laws is necessary to enable the jury to make a proper and intelligent determination of the sentence.²⁸ Furthermore, the fact that the jury, of its own volition, directed the inquiry to the court is indicative that at least one or more of the jurors had some knowledge of the existence of laws relating to pardon and parole, and only by an adequate and accurate answer could erroneous concepts concerning such laws be effectively dispelled. A refusal to answer the jury's inquiry would only leave the jurors confused and subject to the incomplete knowledge of those having even a remote understanding of these matters. The opinion of the concurring minority also

²²But see Note (1941) 90 U. of Pa. L. Rev. 221, 222, adopting a contrary view by stating that "most courts permit the prosecutor to mention parole possibilities in addressing the jury."

²³7 Va. Code Ann. (Michie, 1950) § 53-213.

²⁴7 Va. Code Ann. (Michie, 1950) § 53-251.

²⁵7 Va. Code Ann. (Michie, 1950) § 53-228; Va. Const. (1902) § 73. Since the gubernatorial pardon is an extraordinary power, rarely restored to, and applicable to all sentences regardless of their severity, it cannot be thwarted by the jury's varying of the sentence, and would seldom influence their decisions.

²⁶*Jones v. Commonwealth*, 194 Va. 273, 283, 72 S. E. (2d) 693, 698 (1952) (concurring opinion).

²⁷*State v. Carroll*, 52 Wyo. 29, 69 P. (2d) 542 (1937).

²⁸*Jones v. Commonwealth*, 194 Va. 273, 280, 72 S. E. (2d) 693, 697 (1952): "The object of the penalty is to punish the accused, deter others from crime, and to protect the public. In considering these elements, questions naturally arise whether the accused will be required to suffer the punishment imposed, or will be able to escape therefrom by reason of the provision of some other law. In such consideration, the jury cannot act intelligently in determining the measure of punishment to fit the crime and the man, unless they have knowledge of the possible consequences of the law relating to the payment of the penalty by the convict."

noted that when the judge is charged with passing sentence, he knows, or ought to know, whether the penalty imposed will be diminished at some future time by some other agency; therefore, when the jury is charged with this duty, it should be similarly informed.

The Supreme Court of Appeals' decision in the principal case is consistent with its earlier decisions in that the case was remanded because of the possibility that the defendant was prejudiced, yet its application of the procedure laid down in the *Coward* case seems unwarranted, if not illogical, under the facts and law applicable to this case. Basically, the Virginia court considers that the *Coward* rule gives the accused the benefit of any and all parole laws, by denying the jury the possibility of increasing the sentence in order to frustrate the operation of these laws. Certainly the procedure which prohibits the trial court from giving any information to the jury commends itself in the simplicity of its application, and in *cases in which parole possibilities actually exist*, there is little likelihood that this practice will directly influence the jury. Yet it is subject to the objection that it fails to dispel erroneous notions implanted earlier by partially informed jurors, despite the fact that the court, in lieu of an answer, admonishes the jurors that "such matters are not a proper matter of your concern." It would appear that this objection might be removed by including within the final instructions to the jury an admonition that it is to exclude any considerations of possible pardon or parole,²⁹ since these matters have no application whatever to a criminal trial.³⁰ While this would represent somewhat of an innovation, it would avoid the pitfall of leaving the matter without proper instruction until brought to the fore by an inquiry by the jury, and would stifle the exchange of erroneous ideas by preventing one ill-informed juror from foisting his "little learning" upon the others.

The rule providing for full information, *as applied to cases in which parole possibilities actually exist*, appears defective in that it indirectly encourages as a part of the present determination of sentence

²⁹Such an instruction to the jury might proceed as follows: "In the event that you determine that the accused is guilty of the crime as charged, it is then your duty to impose such penalty as you think appropriate, in view of the nature and circumstances of the crime, and the character of the accused as revealed by his record and your impressions of him at the trial and *at no time during your deliberations shall the possible subsequent action of laws relating to commutation of sentence or parole, or possible action by the Governor, enter into, or in any manner affect these deliberations, for these are matters of which you are not properly concerned.*"

³⁰"The Parole Law . . . has no application whatever to criminal trials and it was error for the court to give the instruction." *People v. Sukdol*, 322 Ill. 540, 153 N. E. 727, 729 (1926).

by the jury, unfounded speculation³¹ as to the future actions of the accused, the Board of Paroles, and, indeed, of the Governor.³²

However, in order for these considerations to be valid, the case must be one in which the possibility of commutation of sentence or parole actually exists, for otherwise there is no legislative intent capable of being defeated, and the jury, in fixing the sentence would have no occasion to be motivated by commutation or parole possibilities.

The court did not take notice of the fact that in the principal case the possibilities of parole did not actually exist, since the jury has but two choices of sentence, either life imprisonment, from which there is no parole, or death. Thus, the *Coward* rule, designed as a safeguard for the accused, could not possibly aid the accused under the circumstances. On the contrary, the procedure required by the *Coward* rule could obviously work to the detriment of this defendant, as the facts of the principal case emphatically demonstrate. Under this self-imposed judicial silence the court leaves the jury in position to believe erroneously that there is a possibility that if it should sentence the accused to life imprisonment only, he may be eventually paroled. Since the majority of states do permit life-termers to be paroled, and the newspapers carry frequent accounts of such paroles being granted, it is entirely reasonable for the jury to entertain such a belief. Thus, the jury may feel compelled to render a death verdict in order to protect society from a repetition of such a crime, although it might well feel that, because his offense was committed involuntarily when under a mental affliction, the accused does not deserve to be put to death. The manner in which the jury in the principal case proceeded in fixing the accused's sentence indicates that it thought he needed only to be isolated from society for the remainder of his life, and that it would have preferred to impose that sentence if granted the assurance which is in

³¹As to the length such speculation might be carried, consider the following: A and B commit the same offense and both are found guilty. The jury deems 10 years confinement as an adequate punishment considering the nature of the offense. A appears recalcitrant and is obviously an incorrigible, whereas B, on the other hand, is the epitome of humility and is overcome with remorse. Would a sentence of 10 years for A, and 20 years for B, be proper? This would appear absurd, but, had the jury inquired of the court and been advised of the laws relating to commutation of sentence or parole, it would realize that B, because of his virtues, would probably become eligible for parole when but one half of his sentence had expired, whereas A, because of his surly nature, probably would never qualify for parole. Thus, the jury, by considering parole possibilities, and indulging in sheer speculation, could almost certainly effectuate its desire that each offender serve 10 years in prison, but such a result would be an outrage.

³²See *Commonwealth v. Johnson*, 368 Pa. 139, 81 A. (2d) 569, 572 (1951).

fact provided by the legislature in excluding life-termers from parole.³³

It would seem, therefore, that since the reason for the *Coward* rule fails, the rule should not be applied to Virginia cases wherein the charge is first degree murder. Thus, while the members of the Virginia court have divided as to which of two rules to adopt, they could have very properly considered the advisability of applying the one rule or the other to each case as the circumstances of the individual case dictate, limiting the *Coward* rule to cases wherein the possibility of parole or commutation of sentence exists. Regardless of the relative merits of either the "no-reply" rule or the "fully responsive" rule, the Virginia Supreme Court of Appeals has embraced a rule thought to be most favorable to the accused, and by doing so has failed to recognize that it operates to the accused's disadvantage when he is found guilty of first degree murder. If the adoption of a rule or rules governing the trial court's instructions to the jury is to depend upon securing to the accused the greatest advantage, then under its own reasoning, the Virginia court could well consider the following possibilities:

(a) Where the sentence involves the possibility of parole, then the *Coward* rule of refusing to answer an inquiry concerning the effect of laws relating to parole should be applied.

(b) Where the sentence involves no possibility of parole, then the full and responsive answer should be given.

KIMBER L. WHITE

DOMESTIC RELATIONS—LIABILITY OF ESTATE OF DECEASED DIVORCED HUSBAND FOR SUPPORT OF CHILDREN UNDER DIVORCE DECREE. [Virginia]

Among the innumerable problems, legal, social, and moral, which arise out of divorce, the courts are properly most deeply concerned with those which affect the welfare of the children of the separated parents.¹ One of the perplexing legal issues in that regard, on which

³³See *Jones v. Commonwealth*, 194 Va. 273 at 282, 72 S. E. (2d) 693 at 698 (1952).

¹Over 371,000 divorces were granted in the United States during the calendar year 1951, a ratio of almost one divorce out of every five marriages performed in that same year. In the state of Virginia alone 6,003 divorces were granted over the year, constituting a break-up of one family for every six marriages recorded over the same period. "The child in every divorce case has *ipso facto* a status of disadvantage which challenges the judge, and opens to him the duty to reduce it so far as possible." Waite, *Children of Divorce In Minnesota: Between The Millstones* (1948) 32 Minn. L. Rev. 766.

the decisions are in wide disagreement, is whether the divorced father's liability for the support and maintenance of his minor children survives his death, thereby operating as an enforceable lien against his estate.

This question has recently been decided for the first time in Virginia in the case of *Morris v. Henry*.² Twenty years earlier the present defendant had been granted an absolute divorce from her husband on grounds of adultery, and that decree ordered the husband to pay the complainant wife " 'as alimony and support for the infant daughter . . . , until further order of this Court,' \$40 a month; gave permanent custody of the child to the complainant and terminated all property rights of each in the property of the other. The decree further provided that an injunction previously granted, restraining the defendant from disposing of his property, be continued in force; that if the defendant failed to make the payments required by the decree, the complainant should have the right to apply to the court for such order as might be necessary to subject the defendant's property 'held under the said injunction'; and the cause was retained on the docket for such further orders relative to alimony and support as the court should consider necessary and proper."³ Just two months after the issuance of that decree the husband conveyed his real estate to his father, and some six months thereafter he died intestate. His infant daughter, in the custody of the mother, did not reach the age of 21 until nearly eighteen years later. The deceased husband's father instituted the present suit asking for a decree that all real estate conveyed to him by his deceased son be absolved of any lien or encumbrance as a result of the earlier divorce decree against his son; or if such earlier decree did constitute a lien, then for a determination of the amount of that lien. On plaintiff's appeal from an adverse decision of the Circuit Court, the Supreme Court of Appeals held that, under the Virginia statutes the offending husband in this case was charged with the payment of a monthly sum for alimony and support of his infant daughter, which sum was to become a lien upon the land he then owned, and "to the extent . . . that the amount thereof was for the benefit of the infant daughter, was . . . to . . . continue in effect after the death of her father, and until she became twenty-one years old or self supporting . . .,"⁴ and that such part of this monthly sum "as the court should, after hearing evidence, determine to have been for the support of the

²193 Va. 631, 70 S. E. (2d) 417 (1952).

³193 Va. 631, 632, 70 S. E. (2d) 417 (1952).

⁴193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952).

daughter should be a charge against the estate of . . ." the deceased.⁵

The conflict in the decisions of the various jurisdictions on this issue appears to be traceable to four factors.

First: The fundamental common law concept is that a father's obligation to support his minor children operates only during his lifetime and terminates on his death. Generally, the father's duty to support his minor children during his lifetime is regarded as a legal duty which is "correlative to and dependent on the parent's right to the custody and services of the child . . ."⁶ and which "springs from the fact of parentage."⁷ Though the growing tendency of the law is to protect children who are caught in the midst of a statutory marital dissolution,⁸ the heavy hand of the common law prevails so strictly that the courts in some jurisdictions are still reluctant to overthrow the firmly entrenched principle that the duty of support terminates on the death of the father.⁹

Second: The matter of care and support for minor children of divorced parents is now generally regarded as governed by divorce

⁵193 Va. 631, 633, 70 S. E. (2d) 417, 418 (1952).

⁶Whitsett, Selected Essays on Family Law, Comment on "Extent Of A Parent's Duty Of Support" (1950) 1072. A minority of jurisdictions say the duty is terminated where custody is lost or awarded to the mother: Finch v. Finch, 22 Conn. 411 (1853); Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680 (1895). But the great weight of authority is contra. Gilley v. Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307 (1887). See Pretzinger v. Pretzinger, 45 Ohio St. 452, 458, 15 N. E. 471, 473, 4 Am. St. Rep. 542 (1887); 4 Vernier, American Family Laws (1936) § 234.

⁷Whitsett, Selected Essays On Family Law, Comment on "Extent Of A Parent's Duty Of Support" (1950) 1072. Even the strict common law jurisdictions hold the father liable for support during his life regardless of whether there is a divorce or separation unless the court expressly orders that the mother support the child instead: Blades v. Szatai, 151 Md. 644, 135 Atl. 841, 50 A. L. R. 232 (1927); Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 452 (1887); 17 Am. Jur., Divorce and Separation § 693. See Mullen v. Mullen, 188 Va. 259, 49 S. E. (2d) 349 (1948); Hawkins v. Hawkins, 187 Va. 595, 47 S. E. (2d) 436 (1948).

⁸Brockelbank, The Problem Of Family Support: New Uniform Act Offers A Solution (1951) 37 A. B. A. J. 93; Note (1949) 35 Va. L. Rev. 482, 490, 492. The common law duty of support is now extended by statute to include adopted and illegitimate children and those in relation to whom he stands in loco parentis as well in 24 of the 48 states: Brockelbank, Problem Of Family Support: New Uniform Act Offers A Solution (1951) 37 A. B. A. J. 93.

⁹Guinta v. Lo Re, 159 Fla. 488, 31 S. (2d) 704 (1947); Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Barry v. Sparks, 306 Mass. 80, 27 N. E. (2d) 728, 128 A. L. R. 983 (1940); Rice v. Andrews, 127 Misc. 826, 217 N. Y. Supp. 528 (1926); Carey v. Carey, 163 Tenn. 486, 43 S. W. (2d) 498 (1931) [later modified by In Re Moore's Estate, 34 Tenn. App. 313, 234 S. W. (2d) 847 (1949) saying court had power to charge estate but only if decree expressly allowed]; Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455 (1948). See Madden, Domestic Relations (1931) § 115; 17 Am. Jur., Divorce and Separation § 706.

legislation rather than common law principles.¹⁰ However, since the statutes speak in extremely broad language¹¹ and usually fail to make express provision on the point, it still remains for the courts to determine whether the law of the state goes beyond the common law rule by making the divorced father's liability for support continue after his death. Though it appears that all statutes properly could be construed as so extending the common law liability,¹² not all courts have done so, and the decisions contain numerous instances of inconsistent interpretations of practically identical statutory provisions.¹³

Third: The methods of enforcing a decree of support against the divorced father differ greatly throughout the various jurisdictions.¹⁴ Most courts declare that the divorce decree itself operates as a lien on the real estate of the divorced father, thereby rendering the child a judgment creditor, who can foreclose against this estate at any time upon the father's failure to pay the stipulated amount required in the decree.¹⁵ Generally, this lien is held equally applicable to future accruals and to presently due installments, and so operates against the father's estate after, as well as before, his death.¹⁶ A minority of

¹⁰Notes (1949) 62 Harv. L. Rev. 1079, 1080; (1949) 35 Va. L. Rev. 482, 493; (1948) 19 Miss. L. J. 249; (1944) 19 Ind. L. J. 162; (1936) 11 Wash. L. Rev. 45.

¹¹E.g., Fla. Stat. Ann (1943) § 65.14 which states that the court shall provide such support for the children as is "fit, equitable and just."

¹²See 2 Vernier, American Family Laws (1932) § 95. See also dissenting opinions in *Guinta v. Lo Re*, 159 Fla. 488, 31 S. (2d) 704, 706 (1947); *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948). It has been noted that Florida has a sufficiently broad and comprehensive statute, which the court failed to consider in the *Guinta* case, to enable it to support the survival of liability for support against the father's estate. Note (1948) 1 Fla. L. Rev. 95. The same would appear to be true under the West Virginia type statute as is suggested in the dissent to the *Robinson* case.

¹³Cf. Cal. Civil Code (Deering, 1941) § 138 and Mich Comp. Laws (1929) § 12378 and Utah Code Ann. (1943) tit. 40, c, e, § 5 with Fla. Stat. (1941) § 65.14 and with W. Va. Code (1943) § 4714. See: Notes (1949) 97 U. of Pa. L. Rev. 736; (1949) 62 Harv. L. Rev. 1079; (1949) 35 Va. L. Rev. 482.

¹⁴2 Vernier, American Family Laws (1932) § 95; Note (1940) 26 Va. L. Rev. 401. See: *Davis v. Davis*, 145 Kan. 282, 65 P. (2d) 562, 565 (1937); *Ostrin v. Posner*, 127 Misc. 313, 215 N. Y. Supp. 259, 260 (1925); *Boaze v. Commonwealth*, 165 Va. 786, 183 S. E. 263, 266 (1936).

¹⁵*United States v. Spangler*, 94 F. Supp. 301 (S. D. W. Va. 1950); *Miller v. Miller*, 64 Me. 484 (1874); *Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111, 114 Am. St. Rep. 656 (1906); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1898); *Gain v. Gerling*, 109 W. Va. 241, 153 S. E. 504 (1930); 17 Am. Jur., Divorce and Separations § 700.

¹⁶*Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111, 14 Am. St. Rep. 656 (1906); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1898); *Isaacs v. Isaacs' Guardian*, 117 Va. 730, 86 S. E. 105 (1915); *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769 (1906).

courts, nevertheless, are hesitant to carry the judgment lien principle this far, excluding its application as to all future accruals or installments becoming due after the father's death.¹⁷

Finally: The divorce decrees often fail to make specific provision for what is to happen with regard to the father's liability for support in the event of his death. Usually, when the decree states that the payments shall be made "during the minority of the children" the courts hold the father's estate liable.¹⁸ But the most common type decree, one which is to take effect "until further order of the court," has been held susceptible to both constructions.¹⁹ And, in case the decree contains no provision at all for support or its duration, some courts will take it upon themselves to modify the decree so as to find the father's estate liable, while others will not do so.²⁰ Frequently the problem of support is erroneously confused with the problem of alimony,²¹ though the two concepts are entirely distinct, alimony being an obligation created by statute and support an obligation arising under the common law.²²

The Virginia court's decision in *Morris v. Henry*²³ is in accord with the majority view and the present trend in the decisions with regard to the scope of the divorced father's obligation to support his child.²⁴

¹⁷*Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455 (1948). See: *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841, 845 (1927); Note (1948) 33 Iowa L. Rev. 703.

¹⁸Note (1949) 35 Va. L. Rev. 482, 493. *Smith v. Funk*, 151 Okla. 188, 284 Pac. 638 (1930); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1898).

¹⁹Liability was imposed under such a decree in: *Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932); *Miller v. Miller*, 64 Me. 484 (1874); *Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111, 14 Am. St. Rep. 656 (1906). Contra: *Barry v. Sparks*, 306 Mass. 80, 27 N. E. (2d) 728, 128 A. L. R. 983 (1940); *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455 (1948).

²⁰Cf. *West v. West*, 241 Mich. 679, 217 N. W. 924 (1928); *Creyts v. Creyts*, 143 Mich. 375, 106 N. W. 1111, 14 Am. St. Rep. 656 (1906) where the decree was modified. Contra: *Guinta v. Lo Re*, 159 Fla. 488, 31 S. (2d) 704 (1947) where decree did make provision for support but made no mention as to its duration.

²¹See *Roberts v. Roberts*, 160 Md. 513, 154 Atl. 95, 100 (1931); *Lukowski v. Lukowski*, 108 Mo. App. 204, 83 S. W. 274, 275 (1904); Warren, Schouler *Divorce Manual* (1944) § 338; 2 *Vernier, American Family Laws* (1932) § 104; Notes (1949) 35 Va. L. Rev. 482, 483; (1948) 33 Iowa L. Rev. 703. Note (1936) 11 Wash. L. Rev. 45, discusses the question of alimony survival.

²²See *West v. West*, 241 Mich. 679, 217 N. W. 924, 925 (1928); Warren, Schouler *Divorce Manual* (1944) § 338; Note (1949) 35 Va. L. Rev. 482, 484: "Thus a child may have a valid claim for maintenance against his father while his mother would not be entitled to alimony."

²³193 Va. 631, 70 S. E. (2d) 417 (1952).

²⁴*Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932); *Myers v. Harrington*, 70 Cal. App. 680, 234 Pac. 412 (1925); *Miller v. Miller*, 64 Me. 484 (1874); *West v. West*, 241 Mich. 679, 217 N. W. 924 (1928); *Creyts v. Creyts*, 143 Mich. 375,

On the issue of whether the courts have power to provide for payments by the father to support the child after the death of the father, it was noted that the very comprehensive Virginia statutes²⁵ authorize the court to make such decree as it deems necessary and expedient "concerning the estate and the maintenance of the parties, or either of them, and the care, custody and maintenance of their minor children . . ." ²⁶ under the circumstances arising out of a divorce suit. In refutation of the view adopted by the minority jurisdictions that the common law still controls the issue of support of minor children in divorce cases, Virginia and the majority decisions accept the statutes as the governing factors in issues which arise out of divorce decrees. Such statutes are remedial and demand liberal construction "in the protection of the rights and interests of infant defendants,"²⁷ and "the evident purpose of the legislature was to give to the court the largest discretion in respect to the estate of the parties, and not to relieve the offending parents of any duty, moral, social, or otherwise."²⁸ As a basis for imposing liability on the father's estate, the Virginia court embraced the reasoning of the early Maine case of *Miller v. Miller*:²⁹ "We do not controvert the position . . . that, by the rules of the common law, a father is under no legal obligation to provide for the support of his children after his death. It may be that he can disinherit them and leave them to be supported by others. . . . But we think such can only be the law when the family relations remain intact, and when there is no great danger

106 N. W. 1111, 114 Am. St. Rep. 656 (1906); *Garber v. Robitshek*, 226 Minn. 398, 33 N. W. (2d) 30 (1948); *Silberman v. Brown*, 72 N. E. (2d) 267 (Ohio Com. Pl. 1946); *Smith v. Funk*, 141 Okla. 188, 284 Pac. 638 (1930); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1898); *Gainsburg v. Garbarsky*, 157 Wash. 537, 289 Pac. 1000 (1930); *Edelman v. Edelman*, 65 Wyo. 271, 199 P. (2d) 840 (1948); 17 Am. Jur., Divorce and Separation § 706, p. 536.

²⁵Exemplary are the following provisions from the Virginia Code: 4 Va. Code Ann. (Michie, 1950) § 20-108 provides for revision, alteration or modification of such decrees by the court on petition or by its own motion; 2 Va. Code Ann. (Michie, 1950) § 8-986 provides that every judgment for money operates as a lien on real estate of one against whom it was rendered; § 8-343 provides further that every decree or order of the court which requires payment of money shall have the effect of a judgment; and § 8-344 provides that those persons who are beneficiaries of the decree or order which requires the payment of money shall be deemed as judgment creditors.

²⁶4 Va. Code Ann. (Michie, 1950) § 20-107.

²⁷*Bailey v. Bailey*, 172 Va. 18, 22, 200 S. E. 622, 624 (1939).

²⁸*Heninger v. Heninger*, 90 Va. 271, 275, 18 S. E. 193, 195 (1893). See dissenting opinions: *Guinta v. Lo Re*, 159 Fla. 448, 31 S. (2d) 704, 706 (1947); *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841, 845 (1927); *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948).

²⁹64 Me. 484 (1874).

that such arbitrary power will be exercised. We think that when, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate."³⁰ This point of view thus subscribes to a distinction between the father's duty to support his minor children and the effect of a judgment based on such duty: "... the duty in absence of any adjudication terminates upon death, the judgment does not."³¹

Having determined that the divorce court had the power to provide for such support, the Supreme Court of Appeals concluded that the 1932 divorce decree did, in fact, impose a lien on the realty of the father which is enforceable as against the plaintiff, as subsequent grantee of the property, and that the minor daughter stood as a judgment creditor against her deceased father's estate.

Exemplifying the reasoning of the minority of courts which have taken a quite positive position contrary to the *Morris* decision is the relatively recent case of *Robinson v. Robinson*.³² There, under facts almost identical with those in the principal case, the West Virginia court held that a divorce decree against the father requiring him to support his minor children during their minority added nothing to his common law obligation, and, therefore, would terminate on his death. The court argued that it is not logical "that an order of a court for support of children, based as it must be on his common law obligation, should be given the force and effect of a judgment for payment of money, and creating a lien for money not due at his death."³³ This contention is supported by the observation of the earlier Maryland case of *Blades v. Szatai*, that it is difficult to see why "a child should be in a better position in respect to his father's estate than he would be without the decree for divorce."³⁴ However, the Virginia court, in common with those following the majority view,³⁵ answers with the argument that a father who has forfeited custody of his children under a divorce decree against him might easily be embittered as a result, thereby losing interest in his children, and being, therefore, more inclined to exercise

³⁰*Morris v. Henry*, 193 Va. 631, 636, 70 S. E. (2d) 417, 420 (1952).

³¹Note (1949) 24 Notre Dame Law. 563, 565 citing dissenting opinion in *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948).

³²131 W. Va. 160, 50 S. E. (2d) 455 (1948), noted (1949) 6 Wash. & Lee L. Rev. 208.

³³*Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 460 (1948).

³⁴151 Md. 644, 135 Atl. 841, 843 (1927).

³⁵See note 24, *supra*.

his arbitrary common law right to disinherit them than he would have been had the family remained intact. Similarly, moved by a vengeful spirit, he could, if the decree for support imposes no lien on his property, defeat the children's right to support by merely squandering the property or by confessing judgment in favor of his creditors.³⁶ As the Virginia court states, "a court dealing with the health and happiness of infant children ought not to be . . . powerless . . ." to guard against such possibilities.³⁷ The minority jurisdictions further contend that imposing a lien on the father's property for the support of his children would restrict the marketability of the property by putting the title under a cloud, and would seriously impair the father's right of testamentary disposition over his property.³⁸ The counter argument under the prevailing viewpoint is that the child's welfare is at least as important as the father's right of free alienation and testamentary disposition of his property. It is pointed out that the imposition of a lien for support affects these rights of the father no more than any other judgment against him would do. "The right of inheritance does not exist until debts are paid. So also with the right to give or take by will."³⁹ However, the West Virginia court argued that since "our law treats the rights of creditors as superior to any claim children may have for support, during their minority, out of the estates of the parents,"⁴⁰ to

³⁶*Morris v. Henry*, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952): "The death of a father does not end the need of his infant children for food and shelter." *Miller v. Miller*, 64 Me. 484, 487 (1874): "We think that when, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate." See dissenting opinion in *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948).

³⁷193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952).

³⁸*Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 458 (1948), citing *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841 (1927), observes that "to hold otherwise would be to disrupt the general theory of inheritance, prefer one child over another, and interfere with the common rules firmly established by statute law, governing the descent and distribution of the property of a decedent." See Note (1949) 35 Va. L. Rev. 482, 492.

³⁹*Morris v. Henry*, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952). Also, *Miller v. Miller*, 64 Me. 484 (1874); *Stone v. Bayley*, 75 Wash. 184, 134 Pac. 820 (1913). See dissenting opinions, *Blades v. Szatai*, 151 Md. 644, 135 Atl. 841, 845 (1927); *Robinson v. Robinson*, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948).

⁴⁰131 W. Va. 160, 50 S. E. (2d) 455, 460 (1948). On that same page the West Virginia court adds further that if a ruling were handed down in favor of the infant defendant in that case, it would necessitate placing the "entire estate of a decedent beyond the reach of his creditors, and apply it to the support and maintenance of his children during their minority. . . . there is simply no law which would authorize such a procedure. . . ."

hold such decree as a judgment lien in favor of the minor child would unfairly prejudice the rights of these creditors. But, under the majority view, the child himself is elevated to the position of creditor by virtue of such lien, the general creditors bearing the same relation to such judgment as they do to other judgments.⁴¹ Finally, it is suggested that, since the lien is necessarily uncertain in amount and duration, its existence will prolong the administration of the estate of the deceased, resulting in considerable expense and consequent loss to heirs and devisees of the father.⁴² Recognition of the lien will therefore defeat the sound policy in favor of the speedy settlement of all estates. But, as noted in the principal case, if the settlement of decedent's estate is postponed for too great a period, or if the exact amount of the lien is undetermined, methods can be devised for providing an early windup in its administration and for determining the amount of the lien itself.⁴³ Then, too, if other children of either spouse or children of a subsequent marriage would be unduly prejudiced by a lien favoring the child involved in the divorce, payments ordered by the decree are subject to adjustment under most statutes.⁴⁴

Through the considerations relied on to support the minority view cannot be completely discounted, it appears that in most states the statutes are adequate to meet and solve such complications as may arise from holding the father's estate subject to a lien for support of children under a divorce decree. The majority of the courts today will not presume that society is to take over the burden of supporting children when the father's means of supporting the children are not exhausted, and those courts properly regard the father's obligation of support as being paramount to his freedom of disposition of his prop-

⁴¹*Morris v. Henry*, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952): "... creditors of the father bear the same relation to the judgment in favor of the child as to other judgments."

⁴²See Note (1949) 35 Va. L. Rev. 482, 494.

⁴³It has been held that the father's personal representative will be required to pay a lump sum out of the estate into the court sufficient to meet the future installments which will accrue from the date of the death of the father and until the child reaches majority, or becomes self supporting in the meantime. *Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932).

⁴⁴Note (1949) 35 Va. L. Rev. 482, 494, illustrating the broad discretionary range open to the courts under which to meet extraordinary contingencies and fortuitous circumstances arising under these support decrees. It is noted that if the child dies before reaching majority once the father's estate has been held liable, then the balance of the sum designated for support is returned pro rata to those parties who have obtained an interest in the father's estate. See *Newman v. Burwell*, 216 Cal. 608, 15 P. (2d) 511 (1932); *Murphy v. Moyle*, 17 Utah 113, 53 Pac. 1010 (1898).

erty by deed, will or intestacy, and to his right of disinherit his children. Enabling such child to attain the favored status of a judgment lien creditor against his father's real estate, even after the death of that father, obviously places a child of divorce in a more favored position than that held by a child who is not involved in such marital dissolution. But this benefit merely helps to offset the many serious prejudices suffered by the children of separated parents. The Virginia court displays foresight in pointing out that the "*possession of the power to bind the parent's estate need not and would not result in its being exercised in all cases.*" It should, of course, be used only where the necessities of the case and the ends of justice require.⁴⁵ Ample provisions are found in the statutes in which to modify, alter, revise, or abrogate such decrees altogether in the light of the size of the estate involved, the claims of the creditors against the estate, and the needs of other children and beneficiaries involved.⁴⁶

ROBERT J. INGRAM

EQUITY—INJUNCTION AGAINST ESTABLISHMENT OF FUNERAL HOME IN RESIDENTIAL DISTRICT AS "NUISANCE IN FACT." [Louisiana]

The equity courts generally have approved the classification of nuisances from the point of view of their nature, as those which are "nuisances per se" and those which are "nuisances in fact."¹ A nuisance per se, sometimes called a nuisance at law, has been defined as an act, thing, or omission, or the use of property, which in and of itself is a nuisance, and hence not permissible or excusable in a particular area.² However, in seeking to define such a nuisance as an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings,³ the courts have employed the term per se in a misleading manner, as a nuisance cannot be created

⁴⁵Morris v. Henry, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952) [italics supplied].

⁴⁶Garber v. Robitshek, 226 Minn. 398, 33 N. W. (2d) 30 (1948).

¹Kinney v. Koopman, 116 Ala. 310, 22 So. 593 (1897); Board of Education of Louisville v. Klein, 303 Ky. 234, 197 S. W. (2d) 427 (1946); New Orleans v. Lenfant, 126 La. 455, 52 So. 575 (1910); 39 Am. Jur., Nuisances § 11.

²Shamburger v. Scheurrer, 198 S. W. 1069 (Tex. Civ. App. 1917).

³Engle v. Scott, 57 Ariz. 383, 114 P. (2d) 236 (1941); Swaim v. Morris, 93 Ark. 362, 125 S. W. 432 (1910); Beckwith v. Town of Stratford, 129 Conn. 506, 29 A. (2d) 775 (1942); Simpson v. Du Pont Co., 143 Ga. 465, 85 S. E. 344 (1915); McPherson v. First Presbyterian Church, 120 Okla. 40, 248 Pac. 561, 51 A. L. R. 1215 (1926).

unless someone is affected by the act.⁴ It is held in most jurisdictions that a nuisance per se will not be declared when the act, erection, or the use of property is lawful and authorized by competent authority,⁵ as such an activity can by care and precaution be conducted without danger or inconvenience to others.⁶ Activities which are not nuisances per se, but may become nuisances because of surrounding circumstances or the manner in which an activity is conducted,⁷ have been classified as nuisances "per accidens" or "in fact."⁸ The effect of the difference between a nuisance per se and a nuisance per accidens lies in the proof of the wrong, rather than in the remedy.⁹ A nuisance per se becomes nuisance as a matter of law¹⁰ and the right to relief is established by averment and proof of the mere act.¹¹ However, in the case of a nuisance in fact, the proof of specific harmful consequences

⁴*Northern Pac. Ry. Co. v. Whalen*, 149 U. S. 157, 13 S. Ct. 822, 37 L. ed. 686 (1893); *Town of Colton v. South Dakota Cent. Land Co.*, 25 S. D. 309, 126 N. W. 507 (1910); *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879 (1910). In *Melker v. New York*, 190 N. Y. 481, 83 N. E. 565 (1908), the court observed that whether a thing is a nuisance per se depends upon the surrounding circumstances, including the location, and each case depends upon its own facts for classification as a nuisance, except when the act is malum in se, when the surrounding circumstances have no bearing upon the question. Under this rule, a business can be a nuisance per se in some localities, nuisance in fact in other localities and perfectly lawful in other localities.

⁵*Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 42 Fed. 273 (C. C. M. D. Tenn. 1890); *Simpson v. Du Pont Powder Co.*, 143 Ga. 465, 85 S. E. 344 (1915); *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062 (1899); *McKay v. City of Enid*, 26 Okla. 275, 109 Pac. 520 (1910).

⁶*Kinney v. Koopman*, 116 Ala. 310, 22 So. 593 (1897); *Simpson v. Du Pont Powder Co.*, 143 Ga. 465, 85 S. E. 344 (1915); *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 47 N. E. 2 (1897).

⁷*Explosives*, *Murphy v. Ossola*, 124 Conn. 366, 199 Atl. 648 (1938); horse stable in a city, *Thompson v. Elzy*, 83 Ind. App. 215, 148 N. E. 154 (1925); gasoline filling station, *Thomas v. Dougherty*, 325 Pa. 525, 190 Atl. 886 (1937). For further examples see 28 Words and Phrases (Perm. Ed.) 963.

⁸*Asphalt Products Co. v. Marable*, 65 Ga. App. 877, 16 S. E. (2d) 771 (1941); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S. E. 568 (1938); *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P. (2d) 695 (1950); *Walker v. Wearb*, 6 N. Y. S. (2d) 548 (1938).

⁹*Robinson v. Westman*, 224 Minn. 105, 29 N. W. (2d) 1, 174 A. L. R. 746 (1947); *Pennsylvania Co. v. Sun Co.*, 290 Pa. 404, 138 Atl. 909, 55 A. L. R. 873 (1927).

¹⁰*Town of Lonoke v. Chicago, R. I. & P. R. Co.*, 92 Ark. 546, 123 S. W. 395, 135 Am. St. Rep. 200 (1909); *McPherson v. First Presbyterian Church*, 120 Okla. 40, 248 Pac. 561, 51 A. L. R. 1215 (1926); 39 Am. Jur., Nuisances § 11.

¹¹*Borgnemouth Realty Co. v. Gulf Soap Corp.*, 212 La. 57, 31 S. (2d) 488 (1947); *Gainfort v. 229 Raritan Avenue Corp.*, 127 N. J. L. 409, 22 A. (2d) 893 (1941); *Pennsylvania Co. v. Sun Co.*, 290 Pa. 404, 138 Atl. 909, 55 A. L. R. 873 (1927).

is necessary,¹² and the act will not be enjoined until it is proved that unduly offensive consequences will arise from it.¹³

A type of case in which the courts must strike a most delicate balance of interests in passing on the sufficiency of the proof of the existence of a nuisance arises when property owners attempt to enjoin the proposed establishment of a funeral home in a strictly residential area. The operation of a funeral home being an admittedly legal and necessary business, it is conceded that no nuisance per se is involved.¹⁴ Representing the difficulty of determining whether a nuisance in fact is being threatened is the recent Louisiana case of *Frederick et al. v. Brown Funeral Homes, Inc.*¹⁵ The defendant proposed to erect an undertaking establishment in a strictly residential community. The plaintiffs, nearby residents, brought suit to have the opening of the business restrained on the allegation that it would constitute a nuisance in fact, because of the locality and surroundings. They contended that their homes would be rendered physically uncomfortable, that the occupants would be exposed to noxious odors and gases, and that property values would be depreciated. The trial court granted a preliminary injunction, but a stay order was obtained by defendants, pending an appeal to the Louisiana Supreme Court. On the original hearing that court, with two Justices dissenting, adopted the rule that "the inherent nature of the business is such that, if located in a purely residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of residential property . . ." in such a way as to make it a nuisance in fact.¹⁶ However, on rehearing, this same tribunal, with one Justice dissenting, abandoned its original position, and, admitting that it was reaching a decision contrary to the strong weight of authority, ruled that, "unless the establishment and operation of the funeral home is prohibited by rules of police or custom of the place, it cannot be enjoined prior to its operation and then only if it is operated in such a manner as to cause damage to those living in neighboring houses."¹⁷

¹²*Gainfort v. 229 Raritan Avenue Corp.*, 127 N. J. L. 409, 22 A. (2d) 893 (1941); *Pennsylvania Co. v. Sun Co.*, 290 Pa. 404, 138 Atl. 909, 55 A. L. R. 873 (1927).

¹³*Thomson v. Sammon*, 174 Ga. 751, 164 S. E. 45 (1932); *Board of Education of Louisville v. Klein*, 303 Ky. 234, 197 S. W. (2d) 427 (1946); *Hamlin v. Durham*, 235 Ky. 842, 32 S. W. (2d) 413 (1930).

¹⁴*White v. Luquire Funeral Home*, 221 Ala. 440, 129 So. 84 (1930); *Fentress v. Sicard*, 181 Ark. 173, 25 S. W. (2d) 18 (1930); *Wescott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490 (1887); 54 Am. Jur., *Undertakers & Embalmers* § 7.

¹⁵62 S. (2d) 100 (La. 1952).

¹⁶62 S. (2d) 100, 102 (La. 1952).

¹⁷62 S. (2d) 100, 110 (La. 1952). Justice Hawthorne, who had written the original

The majority of the court thought the authority relied on by the plaintiff's persuasive, but not decisive of the issue, in view of the Louisiana statute which states:

"Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor."¹⁸

Mere inconvenience to neighboring residents and depreciation of the value of their properties was declared not necessarily enough to constitute a nuisance. Physical annoyance of the inhabitants must be proved, and the majority thought it impossible to determine in advance whether the defendant's enterprise would be operated in a manner to cause such consequences. The Justice who had written the opinion for the court on the original hearing still maintained his position that an injunction should issue, declaring:

"I cannot believe that the average person in this jurisdiction is any less sensitive to the depressing effects of a funeral home than is the average person in the common-law jurisdiction where it has been concluded that as a matter of fact funeral homes are by their very nature so depressing that their close proximity deprives one of the enjoyment of his home and that they can be enjoined when they seek to intrude themselves into an exclusively residential district."¹⁹

A number of jurisdictions in the United States, upon which the final majority of the court apparently relied,²⁰ have held in cases involving different fact situations, that if there is no physical danger from noxious vapors or exposures to disease, the depressing influence does not constitute the undertaking parlor a nuisance.²¹ Thus, in *Westcott v. Middleton*²² an injunction sought against the maintenance of an established funeral home on a lot adjoining the one on which the plaintiff resided was refused, where it appeared that no

opinion, now dissented, and the two former dissenting Justices were now joined by the rest of the court to form the majority.

¹⁸La. Civil Code (1938) Art. 668.

¹⁹62 S. (2d) 100, 111 (La. 1952).

²⁰These jurisdictions were not mentioned in the final majority opinion, but were cited on the original hearing by the two dissenting judges, who became part of the majority of the court on rehearing.

²¹*Pearson and Son v. Bonnie*, 209 Ky. 307, 272 S. W. 375 (1925); *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490 (1887); *Stoddard v. Snodgrass*, 117 Ore. 262, 241 Pac. 73 (1925).

²²43 N. J. Eq. 478, 11 Atl. 490 (1887).

noxious vapors or germs of disease were detectable as a result of the business, and the main feature of offensiveness resulted from the plaintiff's over-sensitive nature and repugnance to anything pertaining to death. The New Jersey court relied upon the principle of an English case, that "the injury [complained of] must be *physical*, as distinguished from purely *imaginative*. It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy."²³ The Oregon court ruled that these principles should govern in a case in which an adjacent landowner complained of an injury which was of a mental nature rather than physical, and thereby all persons were not affected adversely, but only those who were over-nervous or supersensitive.²⁴ Similarly, the Kentucky court has declared that the injury or annoyance which will warrant relief must be of a real and substantial character and such as impairs the ordinary enjoyment of property, and not a mere sentimental injury.²⁵ These cases can be readily distinguished from the *Frederick* case in that they dealt with either a permanently established funeral home²⁶ or a defendant undertaker who had conducted a home in the past so as not to interfere with the adjoining property owners²⁷ and it is not even clear that the *Wescott* case dealt with an establishment located in a strictly residential area. While the Louisiana court did not believe that a depreciation in the value of the surrounding property was a sufficient justification for granting injunctive relief, one of these so-called minority cases admitted that there had been no depreciation of property value during the past conduct of the funeral home.²⁸

As the dissent in the principal case contended, a large majority of the jurisdictions in this country, in accordance with the general principles governing the granting of injunctions against threatened nuisances,²⁹ have given relief to prevent the establishment of a funeral

²³*Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, 494 (1887) relying on *Walter v. Selve*, 4 De G. & Sm. 315, 322, 64 Eng. Rep. 849, 852 (1815).

²⁴*Stoddard v. Snodgrass*, 117 Ore. 262, 241 Pac. 73 (1925).

²⁵*Pearson and Son v. Bonnie*, 209 Ky. 307, 272 S. W. 375 (1925).

²⁶*Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490 (1887).

²⁷*Pearson and Son v. Bonnie*, 209 Ky. 307, 272 S. W. 375 (1925); *Stoddard v. Snodgrass*, 117 Ore. 262, 241 Pac. 73 (1925).

²⁸*Stoddard v. Snodgrass*, 117 Ore. 262, 241 Pac. 73 (1925).

²⁹As a general rule an injunction will be granted only to restrain an actual, existing nuisance, *Reynolds v. Union Savings Bank*, 155 Iowa 519, 136 N. W. 529 (1912); *Pfingst v. Senn*, 95 Ky. 556, 23 S. W. 358 (1893); *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516 (1873). But it is well settled that a court of equity may enjoin a threatened or anticipated nuisance, where it clearly appears that a nuisance

home in a residential section of the city, when it appears that the maintenance of such establishment will substantially interfere with the comfort, repose, and happiness of the neighboring residents and will materially decrease the value of their property.³⁰ Even when the risks of physical discomfort or harm are not present, the inherent nature of the business in a strictly residential area has led the courts to enjoin, as a nuisance, the continuance of the existing funeral parlor.³¹ In support of this practice, the Alabama court has observed:

"The hearse, the ambulance, the morgue, are reminders of the presence of the dead; the funeral procession and service with all the incidents of grief-stricken relatives forced upon frequent attention of those entitled to the quiet, peace, and happiness of the home, bring depression and discomfort to the normal person unschooled to such conditions.

"Such discomfort cannot be regarded as fanciful, imaginative, nor due to over-sensitiveness. Conditions, inherent in the business, bring such an atmosphere about the place as to render it less desirable as a place of residence, and if less desirable the property becomes less valuable for residence purposes."³²

will necessarily result from the contemplated act or thing which is sought to be enjoined. *Missouri v. Illinois*, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497 (1901); *St. Louis v. Knapp, Stout & Co.*, 104 U. S. 658, 26 L. ed. 883 (1882); 39 Am. Jur., Nuisances § 151; Prosser, *Torts* (1941) § 74.

³⁰*Mutual Service Funeral Homes v. Fehler*, 254 Ala. 363, 48 S. (2d) 26 (1950); *Laughlin, Wood & Co. v. Cooney*, 220 Ala. 556, 126 So. 864 (1930); *Brown v. Arbuckle*, 88 Cal. App (2d) 258, 198 P. (2d) 550 (1948); *Bevington v. Otte*, 223 Iowa 509, 273 N. W. 98 (1937); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S. W. 202, 43 A. L. R. 1155 (1924). For further authority, see cases cited in *Frederick et al. v. Brown Funeral Homes, Inc.*, 62 S. (2d) 100, 105 (La. 1952); *Jackson, The Law of Cadavers* (2d ed. 1950) 457. In *Higgins v. Bloch*, 213 Ala. 209, 104 So. 429 (1925), the court held that if the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible but to a reasonable degree certain, a court of equity may interfere to arrest the nuisance before it is completed. In *Saier v. Joy*, 198 Mich. 295, 164 N. W. 507 (1917), a proposed funeral home was enjoined when it appeared that the value of the plaintiff's property would be materially decreased by the defendant's business.

³¹These courts have based their decisions many times on the theory that a constant reminder of death is a nuisance: *White v. Luquire Funeral Home*, 221 Ala. 440, 129 So. 84 (1930); *Higgins v. Bloch*, 213 Ala. 209, 104 So. 429 (1925); *Saier v. Joy*, 198 Mich. 295, 164 N. W. 507 (1917). For further cases see *Jackson, The Law of Cadavers* (2d ed. 1950) 457, n. 82.

³²*White v. Luquire Funeral Home*, 221 Ala. 440, 443, 129 So. 84, 86 (1930). It is universally held that a funeral home in a business district does not constitute a nuisance, *Kirk v. Mabis*, 215 Iowa 769, 246 N. W. 759 (1933); *Smith v. Fairchild*, 193 Miss. 536, 10 S. (2d) 172 (1942); *Jackson, The Law of Cadavers* (2d ed. 1950) 458. See *Fentress v. Sicard*, 181 Ark. 173, 25 S. W. (2d) 18, 19 (1930). The decisions, however, are not in accord whether the courts should enjoin a proposed funeral home in a district undergoing transition from a residential section to a business district. In *Daw-*

Although the statute involved in the principal case permits one to use his property as he pleases even though he should occasion some inconvenience to his neighbors, the Louisiana court, to be consistent with the strong majority view, should have found that a funeral home in a residential district is more than a "mere inconvenience" and would be a nuisance in fact. In view of the admitted depressive effect of a funeral home on both the use and sale value of residential property, it seems that the court should have conceded the existence of such an invasion of a property right as will generally be enjoined by equity.

ALVIN Y. MILBERG

INSURANCE—SCOPE OF LIABILITY OF INSURER UNDER OMNIBUS CLAUSE
COVERING AUTOMOBILE DRIVEN BY OTHER THAN NAMED ASSURED.
[Federal]

With the increasing use of automobiles and consequent greater traffic hazards, it has become general practice to incorporate into automobile liability insurance policies an "omnibus clause" which extends protection to persons other than the owner, using the car with his permission. Though the terms vary in detail, a generally standardized clause has been developed which provides that "the unqualified word 'insured' . . . includes not only the named assured, but also any person while using the automobile and any person or organization legally responsible for the use thereof provided, . . . that the declared and actual use of the automobile is with the permission of the named assured. . . ."¹

son v. Lawfersweiler, 241 Iowa 850, 43 N. W. (2d) 726 (1950) no relief was given; in Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925) relief was given; and in Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202 (1924) relief was given where it was shown to be still essentially a residential district.

¹Hauser v. Aetna Cas. and Sur. Co., 187 So. 684, 687 (La. App. 1939); Miller, The Omnibus Clause (1941) 15 Tulane L. Rev. 422; 5 Am. Jur., Automobiles § 533 (1952 Supp.) For the most part the courts have not given any particular effect to minor variations in wording. The most important change effected by the "new" clause in the standard policy is that of substituting the words "actual use" for "use" in the phrase, "provided that the actual use is with the permission of the named assured. . . ." According to Appleman, Automobile Liability Insurance (1938) 110, the change was made to make clear that the use of the car at the time of the accident had to be one actually contemplated by the parties at the time when the original bailment was made. The Ohio Court followed this construction in Gulla v. Reynolds, 320 Ohio App. 243, 81 N. E. (2d) 406 (1948). However, the weight of authority rejects this view and holds the change to be of little or no importance. Vezolles v. Home Ind. Co., 38 F. Supp. 455 (W. D. Ky. 1941), aff'd 128 F. (2d) 257

It is agreed that the major effect of the clause is to extend the insurance coverage within the limits of the policy to any person using the automobile with the consent of the assured, but not to enlarge the insurance coverage as defined in the policy.² In spite of repeated holdings that the provision is not ambiguous,³ however, there has been a great deal of litigation concerning the specific application of the omnibus clause. Such controversies arise most frequently over the meaning and scope of the term "permission" to drive the automobile. Under the present standard clause, the only person having the capacity to grant permission is the named assured,⁴ yet disputes still arise when the permission is granted by the named assured's legal representative,⁵ or where the named assured is a corporation or other impersonal entity,⁶ or where the bailee of the vehicle extends permission to a third person for use of the car.⁷

(C. C. A. 6th, 1942); *Stanley v. Cryer Drilling Co.*, 213 La. 980, 36 S. (2d) 9 (1948); Note (1949) 5 A. L. R. (2d) 607. There is apparently no difference in the words "consent" and "permission" as used in omnibus clauses. *American Automobile Ins. Co. v. Jones*, 163 Tenn. 605, 45 S. W. (2d) 52 (1932); *Appleman, Special Phases of the "Omnibus Clause" in Insurance Policy* (1936) 22 A. B. A. J. 616; 2 Couch, *Cyclopedia of Insurance Law* (1945 Supp.) 1303.

²*Farm Bureau Mutual Auto. Ins. Co. v. Daniel*, 104 F. (2d) 477 (C. C. A. 4th, 1939); *Gudbrandsen v. Pelto*, 205 Minn. 607, 287 N. W. 116 (1939); 45 C. J. S. 894.

³*Hawkeye Cas. Co. v. Western Underwriter's Ass'n*, 53 F. Supp. 256 (S. D. Idaho 1944). This view that there is no ambiguity seems to be based on the maxim that policies are to be construed in favor of the insured. However, the rule to the effect that the terms of the policy cannot be enlarged or diminished by judicial construction is also employed by the courts. *Denny v. Royal Ind. Co.*, 26 Ohio App. 566, 159 N. E. 107 (1927); 5 Am. Jur. 806.

⁴A common variation on the "standard" clause provides that permission may be granted by an adult member of the named assured's household who is not a chauffeur or domestic servant. This provision raises many questions concerning who has the capacity to grant permission. See *Appleman, Special Phases of the "Omnibus Clause" in Insurance Policy* (1936) 22 A. B. A. J. 613, 45 C. J. S. 901; Note (1931) 72 A. L. R. 1391.

⁵*Antone v. New Amsterdam Cas. Co.*, 335 Pa. 134, 6 A. (2d) 566 (1939). *Hobbs v. Cunningham*, 273 Mass. 529, 174 N. E. 181 (1930), is to the effect that under the omnibus clause, the legal representative of the named assured may give permission after the assured's death so long as the car remains an asset of the estate. However, under most policies, provision for such eventualities is made in a separate clause.

⁶The president of an insured corporation has the authority to give permission for use without action of the board of directors, *Georgia Cas. Co. v. Waldman*, 53 F. (2d) 24 (C. C. A. 5th, 1931). Similar results have been reached in the case of a managing official, *(American) Lumbermens Mutual Cas. Co. v. Timms & Howard*, 108 F. (2d) 497 (C. C. A. 2d, 1939). A municipal official has no authority to consent to the personal use by a city employee of a municipally owned and insured automobile, *Fox v. Employers' Liability Assur. Corp. Ltd.*, 243 App. Div. 325, 276 N. Y. Supp. 917 (1935), *aff'd* 267 N. Y. 609, 196 N. E. 604 (1935).

⁷Where any sub-bailment has been expressly forbidden, the original permit-

When the alleged permittor has the capacity to give permission, controversies arise as to what constitutes "permission" within the meaning of the clause. Either by specific policy provision or by judicial construction, it is established that the giving of consent may be either express or implied.⁸ Both types must involve "a mutuality of agreement,"⁹ either directly and distinctly stated¹⁰ or based on "an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent."¹¹

The most troublesome problem presented to the courts in the omnibus clause cases has been the determination of the scope of permissible activity which the law will include within the permission actually granted by a qualified person. The typical situation, as stated by the federal court in the recent case of *Branch v. United States Fidelity & Guaranty Co.*,¹² is that in which "possession of the insured

tee can give no valid permission to a third person within the meaning of the policy, *Columbia Cas. Co. v. Lyle*, 81 F. (2d) 281 (C. C. A. 5th, 1936); *Clemons v. Metropolitan Cas. Ins. Co.*, 18 S. (2d) 228 (La. App. 1944). Similarly, where the named assured permitted such a delegation, the bailee is competent to give permission. *Odden v. Union Ind. Co.*, 156 Wash. 10, 288 Pac. 59, 72 A. L. R. 1363 (1930). However where the named assured remained silent as to the right of such delegation, the majority holds that authority does not exist. *Samuels v. American Automobile Ins. Co.*, 150 F. (2d) 221, 160 A. L. R. 1191 (C. C. A. 10th, 1945); *Trotter v. Union Ind. Co.*, 35 F. (2d) 104 (C. C. A. 9th, 1929); *Cronan v. Travelers Ind. Co.*, 126 N. J. L. 56, 18 A. (2d) 13 (1941); *Allstate Ins. Co. v. Hodsdon*, 92 N. H. 233, 29 A. (2d) 782 (1942); *Idemnity Ins. Co. v. Jordan*, 158 Va. 834, 164 S. E. 539 (1932). According to the minority rule such authority may be implied from the original bailment. For a fuller discussion of this subject see Note (1946) 160 A. L. R. 1195.

⁸*American Cas. Co. v. Windham*, 26 F. Supp. 261 (M. D. Ga. 1939), aff'd 107 F. (2d) 88 (C. C. A. 5th, 1939); *Tomasetti v. Maryland Cas. Co.*, 117 Conn. 505, 169 Atl. 54 (1933); *Conrad v. Duffin*, 158 Pa. Super. 305, 44 A. (2d) 770 (1945); 45 C. J. S. 897.

⁹*Kazdan v. Stein*, 26 Ohio App. 455, 160 N. E. 506 (1927), aff'd 118 Ohio St. 217, 160 N. E. 704 (1928).

¹⁰*Hinton v. Indemnity Ins. Co.*, 175 Va. 205, 8 S. E. (2d) 279 (1940).

¹¹*Hinton v. Indemnity Ins. Co.*, 175 Va. 205, 214, 8 S. E. (2d) 279, 283 (1940). Permission is implied by the courts much more readily when it is shown that a close social relationship exists between the parties, such as good friends or members of the family. *Jordan v. Shelby Mutual Plate Glass & Cas. Co.*, 142 F. (2d) 52 (C. C. A. 4th, 1944). See *United States Fid. & Guar. Co. v. Brann*, 297 Ky. 381, 180 S. W. (2d) 102, 104 (1944). Similarly where an employee has broad, general discretion to use the assured's vehicle (as is often the case with salesmen), it has been held that all of the uses of the automobile come within the protection of the omnibus clause through implied authority. *Maryland Cas. Co. v. Ronan*, 37 F. (2d) 449, 72 A. L. R. 1360 (C. C. A. 1st, 1930); *Ocean Acc. & Guar. Corp. v. Bear*, 220 Ala. 491, 125 So. 676 (1929); *Stovall v. New York Ind. Co.*, 157 Tenn. 301, 8 S. W. (2d) 473, 72 A. L. R. 1368 (1928).

¹²198 F. (2d) 1007, 1010 (C. A. 6th, 1952).

car was obtained by the driver with permission of the owner for a specific purpose, and the driver, without authority from the owner used the car for other purposes of his own, in the course of which an accident occurred." In this case, a garage employee agreed to go to the car owner's home early the next morning and take the car to the garage for washing, with the promise that it would be returned to the owner's home by two o'clock in the afternoon. The car was picked up as planned but rain interrupted the work about noon, and the employee thereupon drove the car to the railroad station to meet his wife. It developed that she was not on the train, and so he drove to his home and then started for a town thirty-five miles distant to get his wife, but during this trip, about fourteen miles from the garage, he met with a serious accident. As a result he was sued for damages and a judgment for \$8,422 was obtained against him. Execution being wholly unsatisfied, plaintiff brought this action against the insurance company, from whom the owner held a liability insurance policy, claiming that the employee was included as an insured under the omnibus clause extending coverage to "any person while using the automobile . . . providing the actual use of the automobile is with the permission of the named assured." The Federal District Court dismissed the action and the Court of Appeals, purporting to apply a Tennessee law, affirmed, on the reasoning that since the employee held only limited possession for the purpose of doing work on the car, and had no authority to use it for his own purposes, he was using the car without the owner's "permission" at the time of the accident.

In determining the extent to which deviation from the purpose and use for which permission was granted is allowable without precluding coverage for the permittee under the omnibus clause, the courts have followed three general theories.¹³

A small minority of the courts employ what is termed the strict or conversion rule, that the insurer will be held liable only if permission was given for the particular use being made at the time of the accident, and the accident took place within the time limits and geographical area specified or contemplated by the parties at the time of permission.¹⁴ Unless all three of these elements—purpose,

¹³*Branch v. United States Fid. & Guar. Co.*, 198 F. (2d) 1007 (C. A. 6th, 1952); *Lloyds America v. Tinkelpaugh*, 184 Okla. 413, 88 P. (2d) 356 (1939); Note (1949) 5 A. L. R. (2d) 622. Such a classification is arbitrary, and some authorities make only two major classifications. *Vezolles v. Home Ind. Co.*, 38 F. Supp. 455 (W. D. Ky. 1941); *Gulla v. Reynolds*, 320 Ohio App. 243, 81 N. E. (2d) 406 (1948).

¹⁴*Johnson v. American Automobile Ins. Co.*, 131 Me. 288, 161 Atl. 496 (1932);

time, and place—are satisfied, the use of the automobile constitutes a conversion, and permission of the owner cannot be found to exist. This view, when rigidly adhered to, has the merit of furnishing a very definite standard for deciding the cases; and since it seems to apply a literal meaning to the words of the policy, it probably affords the most logical solution to the issue of the extent of coverage.¹⁵ Yet, one court even while condemning more liberal rules and declaring that “a use by the operator outside the scope of the owner’s contemplated permission excludes such use from being a permitted use within the terms of the policy,” went on to concede that “even under this doctrine, a slight deviation would not necessarily exclude coverage. . . .”¹⁶ This characteristic modification introduces ambiguity into a rule, the chief strength of which lies in its definiteness, and defeats the announced purpose to confine liability to the literal terms of the policy. However, it is obvious that unless some flexibility is allowed in the application of the rule, it will frequently lead to very unsatisfactory results.¹⁷

A logical justification for rejecting the rule of strict construction of the omnibus clause has been found in the reasoning that the liability insurance contract is as much for the benefit of the members of the public as for the contracting parties, and that therefore when an injury has occurred an important purpose of the insurance is defeated if compensation is withheld from the injured parties by legal refinements regarding the status of the wrongdoing driver of the insured car.¹⁸ This view is reinforced by the traditional rule of construction

Blair v. Travelers Ins. Co. 291 Mass. 439, 197 N. E. 60 (1935); Sauriolle v. O’Gorman, 86 N. H. 39, 163 Atl. 717 (1932); Kazdan v. Stein, 118 Ohio St. 217, 160 N. E. 704 (1928).

¹⁵Appleman, Special Phases of the “Omnibus Clause” in Insurance Policy (1936) 22 A. B. A. J. 613, 616, 617. The Ohio court, pointing out the change in the standard clause from “use” to “actual use” concluded that “it seems logical to this court that the term ‘actual use’ be construed as referable to the use being made at the time and place of the accident. . . .” Gulla v. Reynolds 320 Ohio App. 243, 81 N. E. (2d) 406, 408 (1948).

¹⁶Gulla v. Reynolds, 320 Ohio App. 243, 81 N. E. (2d) 406, 408 (1948).

¹⁷Coverage was denied in Sauriolle v. O’Gorman, 86 N. H. 39, 163 Atl. 717 (1932) when an employee, sent on an errand to another town had an accident during a detour of about one-half a mile made to let a school friend, whom he had picked up, off closer to her destination.

¹⁸Behaney v. Travelers Ins. Co., 121 F. (2d) 838 (C. C. A. 3d, 1941); Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866, 41 A. L. R. 500 (1924); Nyman v. Monteleone-Ibreville Garage, Inc, 211 La. 375, 30 S. (2d) 123 (1947); Rikowski v. Fid. & Cas. Co., 117 N. J. L. 407, 189 Atl. 102 (1937).

that the terms of the policy are always to be construed most strongly against the insurer.¹⁹

Supported by these considerations, many courts have taken the extreme position, in favor of the injured party, that the bailee only need have permission to take the vehicle in the first instance and that any use he may make of the car thereafter while it remains in his possession is within the "permission" intended in the omnibus clause, regardless of whether it was within the contemplation of either of the parties at the time of bailment.²⁰ This rule has the advantage of applying an easily proved and definite standard of recovery and of providing the broadest possible protection to members of the public who have become the victims of the negligent operation of automobiles. In its most absolute form, the liberal view has been held to extend coverage even to the case in which the particular use being made of the car at the time of the accident was in express violation of the named assured's instructions.²¹ But such a result is hardly justified, since express prohibition and permission cannot exist at the same time, and most of the courts applying the liberal rule have so held.²² Thus, again, the incorporation of necessary qualifications has resulted in the creation of uncertainties in the operation of a rule, of which one of the greatest claimed virtues has been certainty.²³

The development of Tennessee law over a period of two and one half decades presents a study of this process of qualification. In the first instance, the decision of *Stovall v. New York Indemnity Co.* very positively embraced the liberal view in ruling that "If . . . the automobile . . . is delivered to another for use, with the permission of the . . . insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession."²⁴ Subsequent decisions, however, created successive limitations denying coverage when the bailee so used the vehicle as to violate the insured's expressed instruc-

¹⁹See cases cited, note 18, supra.

²⁰*Jefson v. London Guar. & Acc. Co.*, 293 Ill. App. 97, 11 N. E. (2d) 993 (1937); *Parks v. Hall*, 189 La. 849, 181 So. 191 (1938); *Rikowski v. Fid. & Cas. Co.*, 117 N. J. L. 407, 189 Atl. 102 (1937); *Stovall v. New York Ind. Co.*, 157 Tenn. 301, 8 S. W. (2d) 473, 72 A. L. R. 1368 (1928).

²¹*United States Fid. & Guar. Co. v. DeCuers*, 33 F. Supp. 710 (E. D. La. 1940).

²²Note (1949) 5 A. L. R. (2d) 650 and cases collected therein.

²³*Stovall v. New York Ind. Co.*, 157 Tenn. 301, 8 S. W. (2d) 473, 72 A. L. R. 1368 (1928).

²⁴157 Tenn. 307, 8 S. W. (2d) 473, 477, 72 A. L. R. 1368, 1375 (1928).

tions, or where the bailee permitted a third party to drive, or when the bailee retained the car after the period of permissive use has expired.²⁵ Finally the court has come to the conclusion that the "initial permission is not controlling where the use is limited to a specific purpose for a limited time. . . ."²⁶ This transition from liberal to what seems to be an intermediate view has not been smooth, but rather has been marked by startling reversals, so much so that the federal court, attempting to apply the Tennessee law in the principal case, encountered much difficulty in determining just what that law was.²⁷ It thus becomes manifest that a court which adopts either of the extreme views will find many situations in which obvious injustice would arise from the application of its chosen rule. Attempts to avoid such results have created many exceptions and thereby brought confusion into the law.²⁸

This insurmountable defect in either of the two extreme rules has led many courts to adopt an intermediate position, exemplified by the holding of the principal case, which has come to be known as the minor deviation rule. This view requires permission as to the time, place and purpose of the use being made of the vehicle at the time of the accident in order for coverage to be extended under the omnibus clause (as in the strict or conversion rule), but provides that minor deviations in any of these factors will not destroy the protection of the

²⁵Caldwell v. Standard Acc. Ins. Co., 98 F. (2d) 364 (C. C. A. 6th, 1938); American Automobile Ins. Co. v. Jones, 163 Tenn. 605, 45 S. W. (2d) 52 (1932). See Branch v. United States Fid. & Guar. Co., 198 F. (2d) 1007, 1009 (C. A. 6th, 1952).

²⁶Moore v. Liberty Mutual Ins. Co., 246 S. W. (2d) 960, 961 (Tenn. 1952).

²⁷After having reached what appeared to be an intermediate position (discussed below) in Hubbard v. United States Fid. & Guar. Co., 240 S. W. (2d) 245 (Tenn. 1951), the Tennessee court distinguished the Hubbard case and pointedly reaffirmed the Stovall case saying that it has "been the law in this State for many years. . . ." Foley v. Tennessee Odin Ins. Co., 245 S. W. (2d) 202, 204 (Tenn. 1951). While the principal case was pending before the Court of Appeals, the Tennessee court in Moore v. Liberty Mutual Ins. Co., 246 S. W. (2d) 960, 961 (Tenn. 1952) distinguished both the Stovall case and the Foley case from the Hubbard decision on the ground that there was a general permission instead of a limited permission (though in neither of the cases was that made a test, and in reference to the Foley case the court admits that even though "the opinion does not so show, the Court was of the opinion that the driver of the truck had a general permission to use it"), and gives the intermediate (minor deviation) rule as applicable in the cases where limited permission exists. This rule is, of course, followed by the federal court in the principal case.

²⁸Compare Dickinson v. Maryland Cas Co., 101 Conn., 369, 125 Atl. 866, 41 A. L. R. 500 (1924) which is often cited as a leading case for the liberal view, with Mycek v. Hartford Acc. & Ind. Co., 128 Conn. 140, 20 A. (2d) 735 (1941) which reinterprets the Dickinson case and expressly repudiates the liberal view as presented in the Stovall case.

policy.²⁹ Since this approach involves an attempt to set up a flexible formula for deciding the cases, it is difficult to apply,³⁰ the various jurisdictions differing widely on the question of what constitutes minor and major deviations.

Despite this serious objection, however, it would seem that this view is to be preferred above the two extreme rules. Either of the other rules is too rigid for satisfactory application to all fact situations. The intermediate position has the necessary flexibility but by the same token tends to leave both the injured complainant and the insurance company to the varying whims of juries. It would seem that the insurance companies should attempt to devise a wording of the clause which would definitely delimit the scope of the coverage, but this action would tend to remove needed insurance protection from the public-at-large which is a danger of injury in automobile accidents. Perhaps a proper solution would lie in a legislative requirement based on public policy, of a minimum amount of liability coverage to which the liberal rule would be applied in determining coverage under the omnibus clause, while a stricter view should be exercised by the courts in regard to any coverage in excess of the required amount on the grounds that this coverage is merely for the benefit of the parties to the policy.³¹

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²⁹*Frederiksen v. Employers' Liability Assur. Corp.*, 26 F. (2d) 76 (C. C. A. 9th, 1928); *United States Fid. & Guar. Co. v. Brann*, 297 Ky. 381, 180 S. W. (2d) 102 (1944); *Salitrero v. Maryland Cas. Co.*, 109 S. W. (2d) 260 (Tex. Civ. App. 1937); *Phoenix Ind. Co. v. Anderson*, 107 Va. 406, 196 S. E. 629 (1938).

³⁰The Virginia court has worked out a helpful formula for guidance in its application to the effect that when the deviation was slight and not unusual, the court may as a matter of law determine that it was within the scope of permission; where it was very marked and unusual, the court may determine it was not a use within the permission; and when the facts fall between the two extremes, the question should be left to a jury. *Phoenix Ind. Co. v. Anderson*, 170 Va. 406, 196 S. E. 629 at 633 (1938).

³¹Massachusetts has approached more closely than any other jurisdiction to the actual application of such a rule. In *Blair v. Travelers' Ins. Co.*, 288 Mass. 285, 192 N. E. 467 (1934) the court allowed recovery up to the statutory amount although the actual use at the time of the accident was clearly not within the permission of the named assured; but *Blair v. Traveler's Ins. Co.*, 291 Mass. 432, 197 N. E. 60 (1935) denied any additional recovery over the statutory amount. Also *Guzenfield v. Liberty Mutual Ins. Co.*, 286 Mass. 133, 190 N. E. 23 (1934).

INSURANCE—VALIDITY OF ATTEMPTED CHANGE OF BENEFICIARY OF LIFE
INSURANCE WITHOUT COMPLIANCE WITH POLICY REQUIREMENT.
[Texas]

One of the most perplexing problems in the law of life insurance is posed when an insured, having reserved the right to change the beneficiary, has before his death manifested a desire that someone other than the named beneficiary receive the proceeds of the policy but has failed to comply with all the formalities required by the terms of the policy for changing beneficiaries.¹ The various courts follow widely inconsistent rules in different cases as to what extent the insured must have complied with the policy terms to effectuate the change of beneficiaries,² and the approval of irreconcilable principles even within the same opinion has been observed.³ To add to the uncertainty in these controversies, there is sharp disagreement as to whether the fault of non-compliance with the policy can be asserted only by the insurer, or whether the original beneficiary can also object to the validity of the attempted change.⁴

In determining the validity of the attempt to change beneficiaries, courts in different jurisdictions, have followed three basic rules. A few courts hold that there must be "strict compliance" with the terms of

¹Typical policy requirements for change of beneficiary are that the insured gave written notice to the company of the desired change, accompanied by the policy for suitable endorsement, such change to become effective only when endorsed on the policy by the company. *Brown v. Home Life Ins. Co.*, 3 F. (2d) 661 (D. C. Okla. 1925); *Rumsey v. New York Life Ins. Co.*, 59 Colo. 71, 147 Pac. 337 (1915); *Teague v. Pilot Life Ins. Co.*, 200 N. C. 450, 157 S. E. 421 (1931). Also, see Note (1951) 19 A. L. R. (2d) 18.

²*United States v. Burgo*, 175 F. (2d) 196 (C. A. 3d, 1949) (strict compliance); *Sun Life Assur. Co. v. Secoy*, 72 F. Supp. 83 (N. D. Ohio 1947) (insured must have done all within his power to fulfill the policy provisions in order to effectuate a change of beneficiary); *Goldberg v. Hudson County Nat. Bank*, 123 N. J. Eq. 269, 197 Atl. 20 (1938) (substantial compliance); *Glen v. Aetna Life Ins. Co.*, 73 Ohio App. 452, 56 N. E. (2d) 951 (1943) (intent of insured controls although none of the formalities of the policy were fulfilled); *Wilkie v. Philadelphia Life Ins. Co.*, 187 S. C. 382, 197 S. E. 375 (1938) (strict compliance); *Shuler v. Equitable Life Assur. Soc.*, 184 S. C. 485, 193 S. E. 46 (1937) (substantial compliance).

³*Gill v. Provident Life and Accident Ins. Co.*, 131 W. Va. 465, 48 S. E. (2d) 165 (1948). After stating that the insured must substantially comply with the terms of the policy relating to change of beneficiary in order to effectuate a valid change, the court said that some of these terms were for the benefit of the insurer and may be waived by it by the filing of a bill of interpleader, thus giving the claimant a preferred position.

⁴*Cady*, Law of Insurance (3d ed. 1934) § 148; 2 *Couch*, Cylopedia of Insurance Law (1929) § 315; 1 *Richards*, Insurance (5th ed. 1952) §§ 121-122; 29 *Am. Jur.*, Insurance § 1324.

the policy in order for the insured to effect a valid change of beneficiary.⁵ These jurisdictions regard the right of the named beneficiary as a vested one, subject to being divested only by a strict fulfilment of the required formalities of the policy by the insured.⁶ However, most of these courts mitigate the strictness of the rule if the insured did everything he could possibly have done to effect the change before his death, and all that remains to be done is some ministerial act of the insurer.⁷

The majority of the courts follow the rule of "substantial compliance," where the insurer has acceded to the attempted change of beneficiary by interpleading the claimants.⁸ Under this view it is said that "the general rule is that to effectuate a change of beneficiary the method prescribed by the policy must be followed . . . , but an exception is made where the insured in attempting to change his beneficiary has done all he could to comply with the policy requirements and has substantially complied therewith."⁹ Obviously, it is not possible to lay down an inflexible rule as to how near the insured's actions must have approached complete compliance,¹⁰ and so the courts must make

⁵United States v. Burgo, 175 F. (2d) 196 (C. A. 3d, 1949); Gerstel v. Arens, 143 Fla. 20, 196 So. 616 (1940); Warren v. Prudential Ins. Co., 138 Fla. 443, 189 So. 412 (1939); Freund v. Freund, 218 Ill. 189, 75 N. E. 925 (1905).

⁶For the New Jersey courts have held that a beneficiary of a life insurance policy has a vested interest in the policy even though by a change which the insured has reserved the right to make that interest may subsequently be divested. The New Jersey courts have further held that where a policy stipulates that the beneficiary may only be changed by following a specified procedure including surrender of the policy for endorsement a change of beneficiary cannot be effected by any thing short of the procedure specified in the policy." United States v. Burgo, 175 F. (2d) 196, 198 (C. A. 3d, 1949).

⁷Travelers Ins. Co. v. Davis, 102 F. Supp. 5 (S. D. Fla. 1952); Pacific Mutual Life Ins. Co. v. Rotondo, 96 F. Supp. 197 (D. C. N. J. 1951), aff'd 191 F. (2d) 624 (C. A. 3d, 1951); Phoenix Mutual Life Ins. Co. v. Reich, 75 F. Supp. 886 (W. D. Pa. 1948); Bachrach v. Herrup, 128 Conn. 74, 20 A. (2d) 395 (1941).

⁸John Hancock Mut. Life Ins. Co. v. Douglass, 156 F. (2d) 367 (C. C. A. 7th, 1946); Spurlock v. Spurlock, 271 Ky. 70, 111 S. W. (2d) 443 (1937); Henderson v. Adams, 308 Mass. 333, 32 N. E. (2d) 295 (1941); Goldberg v. Hudson County Nat. Bank, 123 N. J. Eq. 269, 197 Atl. 20 (1938); Schoenholz v. New York Life Ins. Co., 234 N. Y. 24, 136 N. E. 227, aff'd 234 N. Y. 605, 138 N. E. 464 (1922); Teague v. Pilot Life Ins. Co., 200 N. C. 450, 157 S. E. 421 (1931); 29 Am. Jur. 989; 46 C. J. S. 75; Note (1951) 19 A. L. R. (2d) 30.

⁹Goldberg v. Hudson County Nat. Bank, 123 N. J. Eq. 269, 197 Atl. 20, 22 (1938).

¹⁰It was amply illustrated by the Colorado court (which usually follows the substantial compliance rule) in Finnerty v. Cook, 118 Colo. 310, 195 P. (2d) 973 (1948) that substantial compliance is not actually necessary under this doctrine. The insured, a prisoner of war in Japan who was allowed to write only certain relatives, wrote his mother a postal card asking that she have the beneficiary

their decisions rest largely on the facts in the individual situations in the different cases.¹¹

Other courts have taken the position that the intent to change the beneficiary should be given effect when that intent is manifested by some affirmative act on the insured's part even though he has made no effort to comply with the policy terms concerning change of beneficiary, provided the insurer, by interpleading the claimants, waives the right to insist upon strict compliance with the policy terms.¹² Thus it has been held that where the insured scratched out the old beneficiary's name on the policy and substituted the name of another person as beneficiary, and also left in a box along with the insurance policy a letter to the insurer requesting that the insurance proceeds be paid to the substituted beneficiary, there was a sufficient act on the part of the insured to make a valid change of beneficiary.¹³

The confusion existing in this phase of the law is amply illustrated in the recent Texas case of *Kotch v. Kotch*.¹⁴ The insured delivered his insurance policy to his wife, the named beneficiary, who kept it with other valuable papers in a trunk to which both had access. The in-

changed on his insurance. It was impossible for the insured to comply with any of the policy provisions relating to change of beneficiary, but the court held the change was valid, and the rule applicable was "that equity will declare a substitution when and only when, the intention of the insured is established beyond question and he has done everything possible under the circumstances to effectuate that intention." 118 Colo. 310, 195 P. (2d) 973, 974 (1948). In *Kelley v. Kelley*, 14 N. Y. S. (2d) 545 at 548 (1939), the court indicated that actually "substantial" compliance is not required by stating: "...if the insured is unable to comply literally with the requirements of a policy or certificate because of physical disability, loss of the policy or certificate, or because it has been wrongfully taken or withheld from him, equity will, notwithstanding such non-surrender, recognize such attempted change as a valid one, when it appears that the insured has done all that he could to comply with the requirements." It was said in *Donahey v. Sweigart*, 336 Ill. App. 366, 84 N. E. (2d) 170 at 172 (1949): "We...recognize the rule...that when an insured has done everything within his power to effectuate a change of beneficiary, equity will not require exact compliance with all stated conditions in order to consider that a change of beneficiary has been effected."

¹¹The statement that when the insured has done all he could to effect the change of beneficiary equity will regard as done that which should be done and recognize the change as valid, is often made by courts which follow the substantial compliance doctrine. *Farley v. U. S.*, 291 Fed. 238 at 241 (D. C. Ore. 1923); *Johnston v. Kearns*, 107 Cal. App. 557, 290 Pac. 640 at 642 (1930); *Barrett v. Barrett*, 173 Ga. 375, 160 S. E. 399 at 402, 78 A. L. R. 962 at 967 (1931); *Saiter v. Miller*, 108 Ind. App. 373, 27 N. E. (2d) 900 at 904 (1940); *Parks' Ex'rs v. Parks*, 288 Ky. 435, 156 S. W. (2d) 480 at 483 (1941).

¹²*Glen v. Aetna Life Ins. Co.*, 73 Ohio App. 452, 56 N. E. (2d) 951 (1943); *Northern Life Ins. Co. v. Burkholder*, 131 Ore. 537, 283 Pac. 739 (1930).

¹³*Glen v. Aetna Life Ins. Co.*, 73 Ohio App. 452, 56 N. E. (2d) 951 (1943).

¹⁴251 S. W. (2d) 520 (Tex. 1952).

sured thereafter went to live with a son by a previous marriage, and the wife left for a visit with relatives in Florida. Thereafter the insured wrote his wife requesting that she write their landlady to ship the trunk to him, so that he might obtain the title to his car, which was in the trunk with the insurance certificate. The wife returned to their home, but instead of sending the trunk, sent only the title to the car. Thereafter, two weeks before his death, the insured sent in an application to substitute his son as beneficiary and an application for a duplicate of the allegedly lost insurance certificate, but no action had been taken on these applications when the insured died. Upon the insured's death, the insurance company interpleaded the claims of the son and the widow to the proceeds of the policy.

The trial court applied the rule of substantial compliance, and entered judgment for the widow on the ground that the insured had not done all that he reasonably could have done to effect the change. Since he at no time made a demand upon his wife for the return of the insurance certificate, it was ruled that he had not substantially complied with the terms of the policy requiring that the certificate be returned with the application for the change of beneficiary so that the change might be endorsed on the certificate.

The Court of Civil Appeals reversed that judgment, holding that the insured had substantially complied with the insurance contract requirements despite his failure to return the policy to the insurer with the application for change of beneficiary, because he asked his wife to send the trunk and because it was never proved that he knew positively where the original certificate was located. The intermediate court further ruled that "a former named beneficiary having no vested right in the policy, not being a party to the contract, will not be heard to contend that a subsequent change in the beneficiary was made inconsistent with the provisions contained in the insurance contract. . . ."¹⁵ and that the insurer, by paying the proceeds of the policy into court, had waived the requirements that the insured must comply strictly with the terms of the insurance contract.

The Texas Supreme Court reversed the Court of Civil Appeals and affirmed the judgment of the trial court holding that the original beneficiary has legal standing to contest the validity of the attempted change of beneficiaries, because, while she had no vested interest prior to insured's death, nevertheless the provisions in the policy requiring certain formalities for changing beneficiaries amounted to a "con-

¹⁵Kotch v. Kotch, 247 S. W. (2d) 587, 589 (Tex. 1952).

tract between the insurer and insured for the benefit of a third party—the named beneficiary. . . .”¹⁶ On the specific issue of whether the attempted change should be sustained, the court ruled that the insured had not done all that he reasonably could have done to comply with the policy terms, his failure to make a positive demand on his wife for the return to the old certificate precluding any showing of substantial compliance.

Both the trial court and the Supreme Court appear to consider the requirements that the insured do “all reasonably possible” to carry out the policy terms, and that he “substantially comply” with those terms, as alternative forms of stating the same essential factor for a valid change of beneficiaries.¹⁷ Under this approach there can be no “substantial compliance” unless insured had done “all reasonably

¹⁶*Kotch v. Kotch*, 251 S. W. (2d) 520, 523 (Tex. 1952). There are two views taken by the courts as to the interest a beneficiary has in an insurance policy, in which the insured has reserved the right to change the beneficiary at will, during the life of the insured. One view is that such a beneficiary has a mere expectancy of a gift at the time of the death of the insured. The fact that the insured reserves control of the policy indicates his intention that nothing is to pass to the beneficiary during the life of the insured, and the designation of the beneficiary is only a manifestation of the desire of the insured, at that time, that the named beneficiary shall have the proceeds of the policy upon insured's death. The formalities required by the policy to effect a change of beneficiary are for the benefit of the insurer, and the beneficiary has no standing to complain if the insurer and insured subsequently agree upon a change of beneficiaries without complying with all of the required formalities in the insurance contract. *Grimm v. Grimm*, 26 Cal. (2d) 173, 157 P. (2d) 841 (1945); *Shay v. Merchants Banking Trust Co.*, 335 Pa. 101, 6 A. (2d) 536 (1939); *Vance, Insurance* (3d ed. 1951) 677; 29 Am. Jur., *Insurance* § 1276.

The second view is that the beneficiary has a vested right in the policy at the time he is designated as beneficiary, and the reservation of the right to change beneficiaries merely gives the insured the right to divest the beneficiary of the right he has in the policy if the insured exercises the reserved right during his life in accordance with the required formalities of the policy. *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192 (1913); *Woehr v. Travelers Ins. Co.*, 134 N. J. Eq. 38, 34 A. (2d) 136 (1943); *Vance, Insurance* (3d ed. 1951) 677.

If the right to change the beneficiary is not expressly reserved in the insurance contract, the named beneficiary has a “true vested interest” in the policy which can not be affected by any act of the insurer or the insured, without the consent of the named beneficiary. The one qualification to this rule is that the interest of the beneficiary may be destroyed by the insured by any act which would result in the destruction of the status of the insured, as by forfeiture of the policy. 2 *Couch, Cyclopedia of Insurance Law* (1929) § 306; 1 *Richards, Insurance* (5th ed. 1952) § 116.

¹⁷“... the purported change will be given effect only if the insured has ‘substantially complied’ with them, or ‘done all he reasonably could have done’ in that behalf.”

“Nor do we regard the request for a new certificate as the equivalent of returning the certificate or ‘all he could do’ in that direction. . . .” *Kotch v. Kotch*, 251 S. W. (2d) 520, 523, 524 (Tex. 1952).

possible" to fulfill the policy formalities, and if he has done the latter, substantial compliance follows as a matter of course.

It is uniformly held that where insured's failure to submit the policy to the insurer for endorsement thereon of change of beneficiary is caused by the named beneficiary's refusal to deliver the policy upon demand, the change of beneficiary will be held valid if the insured has done everything else required of him by the terms of the contract to effect the change.¹⁸ It would appear logical that the claimant relying on the attempted change of beneficiary, in order to prove a refusal by the named beneficiary to deliver the policy would have to prove that the insured had made a demand upon that party for the return of the policy. However, the majority of the courts have held that it is not essential to prove a demand, for if the evidence establishes that the insurance policy was in the possession of the named beneficiary, it is a fair inference that the policy would not have been surrendered even if a proper demand had been made.¹⁹

While the Court of Civil Appeals thus announced the correct rule of law according to the majority of the courts, the Supreme Court seems to have adopted the better view. There should be something more than an assumption of the court that the beneficiary would have refused to deliver up the policy had a proper demand been made by the insured. The insured should be required to fulfill as far as possible the prescribed formalities of the policy,²⁰ so that he will realize fully

¹⁸*Farley v. First Nat. Bank*, 250 Ky. 150, 61 S. W. (2d) 1059 (1933); *Harris v. Metropolitan Life Ins. Co.*, 330 Mich. 24, 46 N. W. (2d) 448 (1951); *Gayden v. Kirk*, 207 Miss. 861, 43 S. (2d) 568, 19 A. L. R. (2d) 1 (1949); *Manley v. New York Life Ins. Co.*, 147 Neb. 646, 24 N. W. (2d) 652 (1946); *Prudential Ins. Co. v. Swanson*, 111 N. J. Eq. 477, 162 Atl. 597 (1932); *John Hancock Mut. Life Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154 (1914). *Vance, Insurance* (3d ed. 1951) 687; 29 Am. Jur. 987; 46 C. J. S. 80. But see *Acacia Mut. Life Ins. Co. v. Feinberg*, 318 Mass. 246, 61 N. E. (2d) 122 (1945), where a written demand on the beneficiary was held insufficient. That court held that the insured had not done all he could do to regain possession of the policy since he could have instituted a suit in equity for the return of the policy.

¹⁹*Doering v. Buechler*, 146 F. (2d) 784 (C. C. A. 8th, 1945); *McDonald v. McDonald*, 212 Ala. 137, 102 So. 38, 36 A. L. R. 761 (1924); *New York Life Ins. Co. v. Cannon*, 22 Del. Ch. 269, 194 Atl. 412 (1937); *Isgrig v. Prudential Ins. Co.*, 242 Iowa 312, 45 N. W. (2d) 425 (1950); *Bowser v. Bowser*, 202 Okla. 97, 211 P. (2d) 517 (1949).

²⁰In *Prudential Ins. Co. v. Mantz*, 128 N. J. Eq. 480, 17 A. (2d) 279, aff'd 130 N. J. Eq. 385, 22 A. (2d) 241 (1941) a purported change of beneficiary was held ineffective partly on the ground that the insured had not made every reasonable effort to comply with the terms of the policy relating to change of beneficiary since it was not proven with certainty that the insured ever made a demand on the beneficiary for the return of the policy, and in *Carson v. Carson*, 166 Okla. 161, 26 P. (2d) 738 (1933) it was held that the insured did not do all in his power to effect a change since he at no time made a demand upon his wife for the policy.

the import of his acts. A less demanding rule may often ultimately result in a failure to carry out the intent of the insured. For example, it could easily happen that an insured might comply with some of the formalities to effect a change of beneficiary and then decide not to carry out his purpose, and therefore take no further action. Knowing that he has failed to comply fully with all the requirements to effect a change, he subsequently goes to his death assuming that the first named beneficiary is still the valid beneficiary. Any qualifications of the essential element, "all that he could have reasonably done," might serve to defeat the insured's intention to have the originally named beneficiary collect the proceeds of the policy. Since the strength of the substantial compliance view lies in the flexibility with which it may be applied to effectuate the insured's intention, the courts should avoid embracing any rule of thumb which might often operate to defeat that intent if regarded as controlling in the many varying situations of the cases.

LAWRENCE C. MUSGROVE

SALES—LIABILITY OF WHOLESALER TO CONSUMER INJURED BY EATING
UNWHOLESOME PACKAGED GOODS. [Texas]

Consumers who have suffered personal injuries from eating unwholesome packaged food quite commonly seek to recover from retailers and manufacturers, but in the recent Texas case of *Bowman Biscuit Co. of Texas v. Hines*¹ the consumer chose the relatively rare course of bringing an action for damages against a wholesaler. Though the manufacturer, the wholesaler, and the retailer may all be regarded as in some degree responsible for the harm done, the legal remedies against any of the three have been surrounded within some uncertainty.

In earlier times, the manufacturer was generally immunized from liability under the legal reasoning that there was no privity of contract between manufacturer and consumer,² or that there was no implied warranty of wholesomeness from the manufacturer even to the retailer and no basis for putting the manufacturer under greater duty to the consumer than to the retailer.³ Modern courts, however, are fairly in accord that liability can be imposed on the manufacturer, on one of several bases.⁴ Some decisions hold that an implied warranty of

¹251 S. W. (2d) 153 (Tex. 1952).

²Waite, Sales (2d ed. 1938) 198; 11 R. C. L., Food § 28.

³11 R. C. L., Food § 28.

⁴Waite, Sales (2d ed. 1938) 204; 22 Am. Jur., Food §§ 104, 105.

wholesomeness has been breached in the production of unfit food,⁵ but most courts insist that liability must rest on tort for negligence,⁶ because a warranty cannot run with the article so as to benefit one not dealing with the warrantors.⁷ These theories for allowing recovery are sometimes supplemented by the arguments that the duty of the manufacturer is based on a general public policy as declared by the pure food laws,⁸ and that the common law rule of caveat emptor does not apply because the consumer has no chance to protect himself by inspecting packaged goods before purchasing them.⁹

The continuing uncertainty on the issue of retailer liability, as well as on the question of wholesaler liability, is demonstrated by the *Hines* case, an action to recover for injuries sustained from swallowing a wire allegedly contained in an "apricot puff" purchased in a sealed cellophane package by plaintiff's wife from a retail grocery. The retailer had purchased it in the same package from the defendant wholesaler, but no negligence or express warranty was alleged by plaintiff against defendant. The lower court certified the following question to the Supreme Court of Texas: "Where the ultimate consumer of food, sold in the original sealed package for human consumption, suffers injury and damage from such food being contaminated, is the wholesaler, or middleman, as well as the manufacturer

⁵*David v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920); *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

⁶*Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314 (1908); *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915); *Norfolk Coca-Cola Bottling Works v. Krausse*, 162 Va. 107, 173 S. E. 497 (1934). It is generally held that foreign substance found in a sealed package or container raises a presumption of negligence on the part of the manufacturer under the doctrine of *res ipsa loquitur*. *Bissonette v. National Biscuit Co.*, 100 F. (2d) 1003 (C.C.A. 2d, 1939); *Watkins v. Dalton Coca-Cola Bottling Co.*, 66 Ga. App. 484, 19 S. E. (2d) 316 (1942); *Goldman & Freiman Bottling Co. v. Sindell*, 140 Md. 488, 117 Atl. 866 (1922); *Hertzler v. Manshum*, 228 Mich. 416, 200 N. W. 155 (1924); *Ritchie v. Sheffield Farms Co.*, 129 Misc. 765, 222 N. Y. Supp. 724 (1927). Some authorities hold that the doctrine of *res ipsa loquitur* does not apply and that some additional evidence is required. *Evans v. Charlotte Pepsi-Cola Bottling Co.*, 216 N. C. 716, 6 S. E. (2d) 510 (1940); *Hollis v. Armour & Co.*, 190 S. C. 170, 2 S. E. (2d) 681 (1939). The latter view obviously greatly lessens the chances of recovery by the consumer, as under modern mass production methods it is very difficult to prove specific negligence in the producing of any single item of goods.

⁷*Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (1905); *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915).

⁸*Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428 (1909); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

⁹*Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314 at 317 (1908).

and retailer, liable to such ultimate consumer for damages proximately resulting to him by reason of the eating of such food, under an implied warranty imposed by law as a matter of public policy?"¹⁰ On original hearing the question was answered in the affirmative by a five to four majority. But on rehearing, one of the original majority Justices delivered an opinion concurring with the original minority that the question should be answered in the negative, and thus on final disposition of the case the liability of the wholesaler to the consumer was denied by a five to four majority. Eight of the nine Justices agreed that the wholesaler is liable to the consumer if the retailer is liable, but the eight were equally divided on whether the retailer should be liable. The ninth Justice decided on rehearing that the wholesaler should not be liable, irrespective of the liability of the retailer.

The three possible bases for retailer liability are negligence, express warranty, and a warranty imposed by law on the grounds of public policy.¹¹ The four majority Justices agreed that the first two factors would justify imposing liability on either the retailer or wholesaler, but neither negligence nor express warranty was alleged in the complaint in the principal case. An implied warranty must have as its basis some reasonably inferred reliance,¹² and these Justices argued that "it must be assumed that the plaintiff necessarily knew that the wholesaler and retailer had no superior knowledge of the contents of the sealed package,"¹³ and that it is just as impractical for the retailer to analyze or inspect the goods as it is for the consumer to do so. Though at common law a retailer has been held implied to warrant the fitness of food for immediate consumption,¹⁴ this rule does not

¹⁰*Bowman Biscuit Co. of Texas v. Hines*, 251 S. W. (2d) 153, 154 (Tex. 1952). The Court of Civil Appeals assumed the liability of the retailer in its certified question to the Supreme Court, on the basis of the Texas case of *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S. W. (2d) 835 (1942), but four of the majority Justices of the Supreme Court refused to concur with this assumption and based their decision on the view that the retailer is not liable.

¹¹22 Am. Jur., Food § 94.

¹²*Linker v. Quaker Oats Co.*, 11 F. Supp. 794 (N. D. Okla. 1935); *Fleetwood v. Swift & Co.*, 27 Ga. App. 502, 108 S. E. 909 (1921); *Scruggins v. Jones*, 207 Ky. 636, 269 S. W. 743 (1925); *Bigelow v. Maine C. R. Co.*, 110 Me. 105, 85 Atl. 396 (1912). One writer states: "This [implying a warranty to canned goods] is an obvious departure from any idea of a warranty as a representation reasonably inferable from the circumstances." Waite, *Sales* (2d ed. 1938) 224.

¹³*Bowman Biscuit Co. of Texas v. Hines*, 251 S. W. (2d) 153, 166 (Tex. 1952). Accord: *Bigelow v. Maine C. R. Co.*, 110 Me. 105, 85 Atl. 396 (1912).

¹⁴*Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (1905); *Davis v. Williams*, 58 Ga. App. 274, 198 S. E. 357 (1938); *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925); *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812 (1893); *Cantani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915).

apply to food in a can or sealed package because of this lack of opportunity to inspect.¹⁵

The four dissenting Justices pointed out that in cases decided under the Uniform Sales Act it has been "presumed"¹⁶ by the courts from a completely equivocal term of the statute that the consumer relied on the retailer's skill and judgment in regard to the fitness of food sold,¹⁷ no distinction between packaged and unpackaged goods being recognized in the application of the rule.¹⁸ This being a judicial assumption, the minority argued that it may be indulged in to justify retailer liability even in jurisdictions like Texas which have not adopted the Sales Act.

It has been suggested that there are three reasons to justify this assumption: it is borne out by human experience in merchandising fields; it achieves a socially desirable result by providing the victim with a practicable remedy; and it serves procedural convenience by allowing the victim to recover from the party he deals with directly,

¹⁵*Scruggins v. Jones*, 207 Ky. 636, 269 S. W. 743 (1925); *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933); *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S. E. 610 (1936). In *Bigelow v. Maine C. R. Co.*, 110 Me. 105, 85 Atl. 396, 398 (1912), the court declared: "We know of no rule of law which will imply a warranty of that of which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investigation, however great."

¹⁶*Bowman Biscuit Co. of Texas v. Hines*, 251 S. W. (2d) 153 at 158 (Tex. 1952).

¹⁷Uniform Sales Act § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment . . . , there is an implied warranty that the goods shall be reasonably fit for such purpose." It is to be noted that the Act states that an implied warranty will be found if "it appears that the buyer relies on the seller's skill and judgment" See Waite, *Sales* (2d ed. 1938) 224, n. 71. Cf. Uniform Commercial Code, *Sales* § 2-315: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." "Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller." U. C. C., Official Draft (A. L. I. 1952) 108.

¹⁸*Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 192 S. W. (2d) 201 (1946); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918); *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A. (2d) 913 (1942). In the *Ward* case the court stated that § 15 (1) of the Uniform Sales Act is merely a codification of the common law and that at common law the fitness of food is taken as warranted by the seller. In Waite, *Sales* (2d ed. 1938) 224, n. 71, the writer points out the difficulty in application of the Uniform Sales Act § 15 (1) to canned goods.

after which the retailer can pass the liability on to the manufacturer with whom he dealt.¹⁹ The four majority Justices refuted two of these arguments in stating that human experience does not justify the imposition of liability on the basis of superior knowledge which, in fact, does not exist; nor can it be socially desirable to hold an innocent party liable by fabricating a warranty on this erroneous basis. And mere procedural convenience is declared not to be a proper foundation for imposing liability, because an innocent retailer "should not be required to shoulder an unwarranted burden merely for the convenience of the consumer;"²⁰ rather, the consumer should be required to resort directly to his remedy against the manufacturer.

Though Texas has not adopted the Uniform Sales Act, the State Supreme Court had ruled in 1942 in *Griggs Canning Co. v. Josey*²¹ that a retailer is liable to a consumer under the circumstances of the principal case, without any express warranty or negligence being shown as a basis for liability. Since the propriety of that holding is sustained by the weight of general authority²² and by the fact that the Texas legislature has not seen fit to change the rule by statute, the dissent contended that it should control the present controversy. The four majority Justices, on the other hand, were convinced that the *Griggs* case was decided erroneously, and would have overruled it. Since the ninth Justice turned the principal case decision on grounds other than retailer liability, he took the position that the question of overruling the *Griggs* case was not before the court and could not be decided. Thus, the rule in Texas remains, however tenuously, in agreement with the general view in those states having the Uniform Sales Act, and in a number of states not having the Sales Act in force, that a retailer is liable to an injured consumer under an implied warranty theory.²³

¹⁹McCormick and Ray, Evidence § 31, p. 48.

²⁰*Bowman Biscuit Co. of Texas v. Hines*, 251 S. W. (2d) 153, 167 (Tex. 1952).

²¹139 Tex. 623, 164 S. W. (2d) 835 (1942). In this case the defendant retailer sold an unfit can of spinach to the plaintiff's wife, and the plaintiff's wife and stepson became ill as a result of eating the spinach. The court held the defendant retailer liable to the plaintiff on the basis of an implied warranty.

²²*Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P. (2d) 930 at 933 (1938). In *Waite, Sales* (2d ed. 1938) 377, it is stated that thirty-two states have passed the Sales Act which allows retailer liability on the basis of an implied warranty. There are also a number of states which have not passed the Sales Act but which hold the retailer liable on an implied warranty. *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S. W. (2d) 835 at 838 (1942). Professor Williston also agrees that a retailer should be liable to the consumer on an implied warranty theory. 1 *Williston, Sales* (3d ed. 1948) § 242.

²³See note 22, *supra*. Also, *Waite, Sales* (2d ed. 1938) 226.

The question of wholesaler liability still remains in some doubt, as does the further question of whether the situation of the wholesaler should be governed by that of the retailer, although eight of the nine Justices of the Texas court agreed that it should be.²⁴

The arguments employed to justify the imposition of liability on retailers and manufacturers are generally inapplicable to the case of wholesalers. No such privity of contract exists between consumer and wholesaler²⁵ as does between consumer and retailer; and a wholesaler does not have the opportunity to know the contents of a sealed package²⁶ and does not make representations to consumers through advertising, as does the manufacturer. Since the consumer has no personal contact with, or even knowledge of the identity of the wholesaler, he cannot be presumed to rely on the wholesaler's skill and judgment in choosing products likely to be wholesome. Further, it may well be that if the consumer has a cause of action against the retailer or manufacturer of the defective product, he is afforded ample remedy for his injuries without also allowing him rights against the wholesaler.

In rebuttal, however, it is argued that the injured consumer may find his retailer financially irresponsible and the manufacturer so distantly located as to make suit against him very burdensome or even impractical.²⁷ In such case, a remedy against the wholesaler is necessary to provide compensation for the injuries suffered. And since the wholesaler would presumably have an action over against the manufacturer with whom he had dealt, liability would ultimately be placed on the party basically at fault in causing the damage. The contention is also made that if the consumer can recover from the retailer, and the retailer can in turn pass the liability on to the wholesaler,²⁸ it is a sensible expedient to allow the consumer to sue the wholesaler directly, without benefit of contract, as he can do in the case of the manufacturer. The dissent in the principal case posed this as the next

²⁴Accord: *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P. (2d) 930 at 935 (1938).

²⁵*Cornelius v. Flippone & Co.*, 119 N. J. L. 540, 197 Atl. 647 (1938); *Degouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 477, 100 S. W. (2d) 336 (1936).

²⁶*Degouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 at 338 (1936).

²⁷*Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P. (2d) 930 at 935 (1938).

²⁸See *Degouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336, 339 (1936). Although this case held that a wholesaler is not liable to a consumer on an implied warranty, the court stated that a retailer held liable to a consumer would have a recovery over against the wholesaler.

logical legal step to take after the recognition of liability in both the non-negligent manufacturer and retailer to the consumer.²⁰

Though the courts should seek to effectuate the strong public policy to protect the public health against the menace of unwholesome food, this aim furnishes no justification for holding wholesalers liable for damages to injured consumers. While they have an important commercial function in distributing the products, wholesalers do not produce or prepare the food for shipment, do not generally advertise its merits to the public, and do not sell directly to consumers. Under modern business conditions, they are virtually powerless to prevent such injuries as occurred in the principal case. The mere fact that the customers' remedies against retailers and manufacturers may in some few cases prove inadequate to provide compensation hardly justifies burdening all wholesalers with a liability for which the courts can find no sound legal basis.

DOUGLAS M. SMITH

STATUTE OF LIMITATIONS—TIME AT WHICH LIMITATIONS PERIOD BEGINS TO RUN IN REGARD TO ACTIONS FOR WRONGFUL DEATH. [New Mexico]

Under the common law no civil action could be brought for the death of a human being resulting from the wrongful act of another;¹ personal rights of action were said to die with the person, and the wrongful death created no new cause of action in the victim's dependents for loss of services or support.² The original basis for the rule came probably from the doctrine that the wrongful act when amounting to a felony merged in the crime,³ but later cases seemed to find a policy against allowing the value of human life to be mathematically

²⁰Bowman Biscuit Co. of Texas v. Hines, 251 S. W. (2d) 153 at 154 (Tex. 1952). Accord: Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P. (2d) 930 at 935 (1938).

¹See 3 Holdsworth, History of English Law (3d ed. 1927) 333-336; 16 Am. Jur. 35, and cases cited.

²Lord Ellenborough laid down the principle a century and a half ago in Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808), disallowing a husband's suit for loss of his wife's services resulting from her death, stating that a civil forum provided no remedy. See Holdsworth, The Origin of the Rule in Baker v. Bolton (1916) 32 L. Q. Rev. 431.

³For discussion of the reasons for this rule, see Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 755, 24 L. ed. 580, 581 (1878). But query what effect the rule has when there was no felony. See Shields v. Yonge, 14 Ga. 349, 60 Am. Dec. 698 (1854), which allowed an action for damages when the wrongful act constituted only a misde-

fixed by the judiciary.⁴ Whatever the reasoning behind it, the rule wrought the double injustice of absolving the malefactor from civil liability and of leaving the deceased's dependents without right or remedy.

The first step in eliminating these injustices was made in the English Survival Acts, which abolished the common law rule that personal causes of action were extinguished on the death of the wronged person.⁵ Similar enactments in most, if not all, American states now provide that personal actions shall not abate on the demise of the wronged person but shall survive him and be prosecuted by his personal representative, or if the action has already begun, his personal representative may revive the action.⁶ But the Survival Acts left the family without a remedy, since the proceeds of the survival action went to the decedent's estate. It was not until the passage of Lord Campbell's Act in 1846,⁷ and subsequent corresponding legislation in the American states creating a right of action for wrongful deaths, that the dependents of the victim were afforded a remedy for loss of support resulting from the death. Since every state already had a Survival Statute in effect when the Death Acts were adopted,⁸ the courts were faced with the problem of whether there now exists an independent cause of action under each statute, or only a single cause of action, the newer statute merely enlarging the recovery under the earlier statute to include damages for loss to the dependents occasioned by the death.⁹

One of the significant specific issues that arises in connection with this problem of interpretation concerns the application of the Statute of Limitations to wrongful death actions. The general rule, absent express statutory provision, applies the ordinary statute governing actions founded on injuries to the person.¹⁰ But the question remains as to when the limitations period begins to run. Some statutes include provisions specifying the date of death or the date of injury to the de-

⁴See *Philby v. Northern P. R. Co.*, 46 Wash. 173, 89 Pac. 468, 470 (1907); Note (1909) 19 L. R. A. (N. S.) 633.

⁵Tiffany, *Death by Wrongful Act* (2d ed. 1913) §§ 19, 23.

⁶McCormick, *Damages* (1935) 335; Note (1950) 21 Miss L. J. 392. See also Prosser, *Torts* (1941) § 103, and Note (1935) 48 Harv. L. Rev. 1008 for a classification of such statutes.

⁷9 & 10 Vict. c. 93, 86 Stat. at Large 531 (1846).

⁸Tiffany, *Death by Wrongful Act* (2d ed. 1913) §§ 19, 23, 24.

⁹Prosser, *Torts* (1941) § 103; 16 Am. Jur. 47, 48 and cases cited.

¹⁰Graham v. Updegrave, 144 Kan. 45, 58 P. (2d) 475 (1936); *In re Danick Estate*, 208 Minn. 420, 294 N. W. 465 (1940). See Note (1910) 17 Ann. Cas. 519 for peculiar applications of the statute of limitations in various jurisdictions.

ceased.¹¹ But other statutes merely state the requirement that the action be brought within a particular time, without defining the point of time from which the limitation shall run,¹² and still others simply declare the necessity of bringing the suit within a certain period after "the accrual of the cause of action."¹³ Under such provisions the court must determine whether the enactment on which the suit is based is a Survival Act, under which the cause of action accrues at the time of injury to the deceased,¹⁴ or whether the statute is a Death Act creating a new and independent cause of action, commencing at the death of the victim.¹⁵

The courts of New Mexico have recently been confronted with this controversy in the case of *Natseway v. Jojola*.¹⁶ The administrators, parents of a nine year old boy, sought damages of \$15,000 for his death occasioned by the wrongful act of defendants in the giving to their minor son a rifle as a Christmas present, the child carelessly inflicting a fatal wound on the plaintiff's son. The shooting occurred on December 28, 1949, but no suit was brought until six months after the boy died on March 28, 1951. The New Mexico Death By Wrongful Act Statute states that whenever the death of a person is caused by a wrongful act of such nature that it would, if the death had not ensued, have entitled the party injured to maintain an action for damages, the person who would have been liable if death had not ensued is liable notwithstanding the death of the injured person. The same Act creates a limitation on the right to sue as "within one year after the cause of action shall have accrued."¹⁷ Defendant argued that since the complaint was

¹¹Statutes denoting death as the starting point of the statute of limitations may be found in the following: *Lute's Adm'r v. Gray-Von Allmen Sanitary Milk Co.*, 254 Ky. 750, 72 S. W. (2d) 720 (1934); *Davis v. Norfolk-Southern R. Co.*, 200 N. C. 345, 157 S. E. 11 (1931). Illustrative cases denoting date of injury as the point of origin are as follows: *Christilly v. Warner*, 87 Conn. 461, 88 Atl. 711 (1913); *Collins v. Hall*, 117 Fla. 232, 157 So. 646 (1934); *Flynn v. Chicago Great W. R. Co.*, 159 Iowa 571, 141 N. W. 401 (1913).

¹²It is usually held under such statutes that the cause of action accrues at the time of death. *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113 (1869); *Bowles v. Portelance*, 145 Kan. 940, 67 P. (2d) 419 (1937); *Weatherman v. Victor Gasoline Co.*, 191 Okla. 423, 130 P. (2d) 527 (1942).

¹³*Wheeler v. Southwestern Greyhound Lines, Inc.*, 207 Ark. 601, 182 S. W. (2d) 214 (1944); *Gray v. McDonald*, 104 Mo. 305, 16 S. W. 398 (1891); *Hogsett v. Hanna*, 41 N. M. 22, 63 P. (2d) 540 (1936).

¹⁴*Kelliher v. N. Y. C. & H. R. R. Co.*, 212 N. Y. 207, 105 N. E. 824 (1914); *Tiffany, Death by Wrongful Act* (2d ed. 1913) § 19; 16 Am. Jur. 47.

¹⁵*Tiffany, Death by Wrongful Act* (2d ed. 1913) § 19. Cases pointing up this issue are found also in Note (1931) 72 A. L. R. 1313.

¹⁶251 P. (2d) 274 (N. M. 1952).

¹⁷N. M. Stat. Ann. (Bobbs-Merrill, 1941) § 24-102.

not filed until twenty-two months after the fatal injury was inflicted, the cause of action was barred; but plaintiffs contended that the limitations period started to run only from the date of the death. The majority of the court ruled that the action was barred on the reasoning that the Death By Wrongful Act Statute was a Survival Statute under which the cause of action arises when the tort is committed, not when death occurs. Without actually examining the statute to determine its proper classification, the court felt that it was bound by precedent, basing its decision on two earlier New Mexico cases¹⁸ which had in turn based their rulings on the Missouri court's interpretation of legislation of that state¹⁹ from which much of the New Mexico Act had been copied. Though faced with the fact that the Missouri courts have overruled decisions which had initially followed the survival construction, and further faced with the hardship that this type construction will engender, this court did not find itself able to supply "what the Legislature has omitted or to omit what it has inserted."²⁰

A better-reasoned dissenting opinion discounted the authority of the earlier decisions²¹ and argued that the Wrongful Death Act does not revive a cause of action belonging to the deceased, but rather creates a new and independent cause of action for the benefit of named parties. And it was pointed out that "in states having wrongful death statutes similar to ours the courts have almost unanimously

¹⁸The earlier cases relied on were *DeMoss v. District Court*, 55 N. M. 135, 227 P. (2d) 937 (1951) and *Hogsett v. Hanna*, 41 N. M. 22, 63 P. (2d) 540 (1936). Both cases were regarded as holding the New Mexico statute to be a survival statute. Yet the court in the principal case evidences a confusion when it first states that the *Hogsett* case stood for the rule that the intervention of death following the injury created *no new cause of action*, but four paragraphs later, in answering plaintiffs' contention that infancy of the intestate brings the case under the saving clause for infants found in the statute, the court states that the statute under which the claim creates a new right. *Natseway v. Jojola*, 251 P. (2d) 274, 276 (N. M. 1952).

¹⁹The Missouri cases cited and quoted as authority for such ruling in *Hogsett v. Hanna*, note 18 supra, were: *Proctor v. Hannibal & St. J. Ry. Co.*, 64 Mo. 112 (1876); *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398 (1891); *Casey v. St. Louis Transit Co.*, 205 Mo. 721, 103 S. W. 1146 (1907). *DeMoss v. District Court*, note 18 supra, reaffirms the decision of the *Hogsett* case.

²⁰*Natseway v. Jojola*, 251 P. (2d) 274, 277 (N. M. 1952).

²¹The dissent points out that the precedent is not worthy of being followed, because the statements of the court on the issue now involved were dicta in the earlier cases, and because the three Missouri cases cited and quoted as authority for the ruling that the wrongful death statute was a statute of survival rather than a statute creating a new cause of action had been overruled by the Missouri Supreme Court in *Thomas v. Daues*, 314 Mo. 13, 283 S. W. 51 (1926), ten years prior to the decision in the *Hogsett* case. *Natseway v. Jojola*, 251 P. (2d) 274, 279, 280 (N. M. 1952).

held that the cause of action does not exist or come into being until death."²² To the dissenting Justice, the right did not arise from the decedent's injury, but from his death, which gave rise to the need of the beneficiaries for compensation; and this right is completely independent from any action the deceased might have had if he had not died.

The great weight of general authority in this controversy lies with the dissent, for statutes similar to Lord Campbell's Act are most widely accepted as creating a new right of action.²³ The basic components of this type Act are that a right of action is maintainable whenever death is the result of a wrongful act which would have entitled the person injured to maintain an action if death had not ensued, that such suit is for designated beneficiaries of deceased's family, and that damages obtainable are those experienced by the beneficiaries because of the death.²⁴ The New Mexico Statute contains these identifying factors, and text writers,²⁵ legal encyclopedias,²⁶ and case decisions²⁷ all construe the New Mexico type Death By Wrongful Act Statute as providing a totally new action independent of the right of action for personal injuries and based on different principles.

However, the New Mexico holding in the principal case is not unique, for in a few jurisdictions such statutes allowing actions for wrongful death are regarded as mere Survival Acts, on the theory that the cause of action was in decedent from the time of the injury and that the Act merely enlarged the recovery to include damages suffered by reason of the death.²⁸ Under this view, the statutes create no new action upon death, but rather the right which the deceased had before his death is imparted to the beneficiaries. Though the statute of limitations normally is held to run from the time of injury

²²Natseway v. Jojola, 251 P. (2d) 274, 279 (N. M. 1952).

²³Tiffany, *Death by Wrongful Act* (2d ed. 1913) § 19; Note (1950) 21 *Miss. L. J.* 392, 393, 397. For list of those states adhering to the new cause of action theory, see 16 *Am. Jur.* 48.

²⁴McCormick, *Damages* (1935) 336. See Schumacher, *Rights of Action under Death and Survival Statutes* (1924) 23 *Mich. L. Rev.* 114.

²⁵Tiffany, *Death by Wrongful Act* (1st ed. 1893) §§ 23, 24.

²⁶25 *C. J. S.* 1079; 16 *Am. Jur.* 48, 49.

²⁷Chamberlain v. Missouri-Arkansas Coach Lines, 354 Mo. 461, 189 S. W. (2d) 538 (1945); Jordan v. St. Joseph Ry., Light, Heat & Power Co., 335 Mo. 319, 73 S. W. (2d) 205 (1934); Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920 (1933); Thomas v. Daues, 314 Mo. 13, 283 S. W. 51 (1926).

strue the New Mexico type Death By Wrongful Act Statute as pro-

²⁸Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206 (1915); Notes (1948) 174 *A. L. R.* 844 (1950) 21 *Miss. L. J.* 392, 393.

in such a construction,²⁹ some jurisdictions upholding this interpretation unaccountably rule that the statute of limitations does not start to run until death occurs.³⁰

Such an approach to Death By Wrongful Act Statutes evidences a confusion with statutes providing for survival of actions in tort. The two types of statutes are different in intent. A Survival Act provides that any cause of action, whether in tort, fraud, breach of contract, etc., accruing to a person is not extinguished by the death of the person but survives for the benefit of his estate, and the action which survives is for the original wrong to the deceased. The creation of a wrongful death action authorizes statutory beneficiaries, rather than the personal representative, to sue for damages on account of the death.³¹ It is manifest that the Death Acts do not merely provide for the survival of the action which the party injured might have brought, for, though the suit is allowable only when death is the result of such a situation as would have entitled the injured party to bring suit, the death action is not for recovery of damages resulting from the personal injury to the deceased, and hence by survival to his estate. It is brought only for damages for loss resulting from death to the surviving members of the family. Thus, no action can be brought by the beneficiaries against the wrongdoer until after death of the victim of the wrong. If the death occurs after an interval longer than the statute of limitations period, then under the view of the New Mexico court, the remedy of the beneficiaries of the statute would be destroyed before the right ever came into existence. That very situation prevailed in the principal case, as the death did not result until fifteen months after the injury was inflicted. It seems clear that no such construction should be put on the ambiguous terms of a remedial statute which would defeat the purpose the legislation was designed to effectuate.

Rather than approaching the problem of the principal case analyt-

²⁹*Williams v. Alabama G. S. R. Co.*, 158 Ala. 396, 48 So. 485 (1909); *Christilly v. Warner*, 87 Conn. 461, 88 Atl. 711 (1913); *Radezky v. Sargent & Co.*, 77 Conn. 110, 58 Atl. 709 (1904). See Note 1916C Ann. Cas. 714.

³⁰See *Goodwin v. Bodcaw Lumber Co.*, 109 La. 1050, 34 So. 74 (1902) and *Kenard v. Illinois C. R. Co.*, 177 Tenn. 311, 148 S. W. (2d) 1017 (1941), holding the limitation period does not begin until the time of death. For an excellent note on death by wrongful act and survival of personal injury in Virginia, see Note (1952) 38 Va. L. Rev. 959. There are conflicting decisions in Virginia as to whether that state adopts the survival theory or the new cause of action theory. Later cases would evidently classify the Death Act as a Survival Statute but the statute of limitations does not start to run until death. See also Note (1948) 174 A. L. R. 844.

³¹*Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 27 S. W. 66 (1894); *St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784, 142 Pac. 1185 (1914).

ically, the New Mexico court has chosen to rest the decision on authority which has been discredited at its source. Instead of immediately correcting an unsatisfactory situation by overruling the prior decisions as contrary to the overwhelming weight of authority, as well as logic, reason, and justice, the majority of the Justices were willing to leave the problem to future uncertain action of the legislature.

D. HENRY NORTHINGTON

TORTS—LIABILITY FOR PHYSICAL INJURY RESULTING FROM NERVOUS SHOCK AT WITNESSING NEGLIGENT ACTS TOWARD THIRD PARTY.
[Maryland]

The common law doctrine which refused recovery to a plaintiff who had suffered injuries due to the negligent acts of the defendant unless there was a concurrent "impact"¹ has been abrogated in England² and seriously questioned in the United States.³ Generally, in situations where the plaintiff suffers physical harm as a consequence of nervous shock resulting directly from defendant's negligence, recovery is al-

¹The "impact" requirement was announced in England in *Victorian Railways Commisioners v. Coultas*, 13 A. C. 222 (1888). It was accepted in the same year by the New York court in *Lehman v. Brooklyn City R. Co.*, 47 Hun. 355 (N. Y. 1888). The doctrine was also followed in Pennsylvania in *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 147 Pa. St. 40, 23 Atl. 340 (1892), and Massachusetts followed in 1897 in *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897).

²The necessity of "impact" to allow recovery in cases of fright and shock resulting from the negligent acts of the defendant was questioned in *Pugh v. The London, Brighton and South Coast Ry. Co.*, [1896] 2 Q. B. 248, and subsequently repudiated in *Wilkinson v. Downton*, [1897] 2 Q. B. 57, and *Dulieu v. White & Sons*, [1901] 2 K. B. 669. The rule of the *Coultas* case was not followed in Scotland and Ireland. *Gilligan v. Robb*, [1910] S. C. 856, and *Bell v. Great Northern Railway of Ireland*, 26 L. R. Ire. 428 (1890).

³The Texas court refused to follow the New York doctrine laid down in the *Lehman* case and allowed recovery to a woman who suffered a miscarriage resulting from fright incurred when she saw the defendant assault two Negroes in her yard. The court observed: "That a physical personal injury may be produced through strong emotion of the mind there can be no doubt." *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59 (1890). In stating the prevailing Maryland rule the court observed, "It has long been established in this state that recovery may be had for physical injuries resulting from nervous shock, even though there is no actual physical impact." *Resavage v. Davies*, 86 A. (2d) 879, 880 (Md. 1952). Accord: *Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440 (1918); *Whitsel v. Watts*, 98 Kan. 508, 159 Pac. 401 (1916); *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202 (1907); *Throckmorton, Damages for Fright* (1921) 34 Harv. L. Rev. 260.

lowed.⁴ However, most courts deny recovery for negligently caused shock or fright, unaccompanied by physical injury.⁵

While the issue in two-party situations, therefore, is well on its way to settlement in favor of allowing recovery for physical injury, such is not the case where the plaintiff seeks a recovery for physical harm resulting from nervous shock sustained while witnessing the defendant's negligent acts toward a third party, which do not place the plaintiff in a position of personal danger. Formerly, the English courts denied recovery, but this rule was repudiated in the leading case of *Hambrook v. Stokes Brothers*, which is now the accepted authority for granting recovery.⁶ The general American rule denying recovery to the plaintiff in this three-party situation is typified by the recent Maryland case of *Resavage v. Davies*.⁷ The plaintiff was on her front porch watching her two minor daughters as they stood on the curb of a parkway in front of their residence, awaiting the arrival of a bus. The defendant negligently drove her automobile over the curb, striking and killing the two girls, in full view of the plaintiff. Plaintiff was "petrified with horror at the sickening scene unfolded before her and torn with anxiety, ran to the children, who were languishing in pools of blood and in a dying condition."⁸ Thereafter, plaintiff sought to recover damages for physical injuries sustained from nervous shock occasioned by the de-

⁴Central of Georgia Ry. Co. v. Kimber, 212 Ala. 102, 101 So. 827 (1924); Orlo v. Connecticut Co., 128 Conn. 231, 21 A. (2d) 402 (1941), noted 3 Wash. & Lee L. Rev. 177; Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924); Restatement, Torts (1941) § 313, p. 850.

⁵"The general rule supported by the weight of authority is that mental pain and suffering will not alone constitute a sufficient basis for the recovery of substantial damages." 25 C. J. S., Damages § 64; Prosser, Torts (1941) 216.

⁶After the abrogation of the "impact" requirement, the English court in *Hambrook v. Stokes Brothers* allowed the plaintiff to recover damages for the death of his wife resulting from nervous shock incurred because of the negligence of the defendant's servant when he had allowed an improperly parked truck to roll down the street. The deceased was not an eye witness but was close enough to appreciate the danger to her child. Lord Justice Bankes observed: "I am merely deciding that in my opinion the plaintiff would establish a cause of action if he proved to the satisfaction of the jury... that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses... and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children." *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141, 152; Prosser, Torts (1941) 218.

⁷86 A. (2d) 879 (Md. 1952). The majority of the court followed the rule laid down in *Waube v. Warrington*, 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394 (1935), where no recovery was allowed to the plaintiff whose intestate had died as a result of seeing defendant strike and kill intestate's child. The Wisconsin court ruled that no duty was owed to the plaintiff's intestate by the defendant.

⁸*Resavage v. Davies*, 86 A. (2d) 879 (Md. 1952).

defendant's negligence toward her daughters. The trial court sustained the defendant's demurrer to the declaration and the plaintiff appealed. By a three to two majority the Court of Appeals affirmed the action of the lower court on the ground that defendant violated no duty owed to plaintiff. The majority observed: "We think the operator of a motor vehicle on the highway is not liable to spectators in a place of safety off the highway for visible shock to them. If such a rule were adopted it would involve a tremendous extension of liability to the world at large, not justified by the best considered authorities."⁹ The minority of the court would have extended the liability of the defendant to include the plaintiff, on the ground that previous decisions in the Maryland court, such as *Bowman v. Williams*¹⁰ and *Mahnke v. Moore*,¹¹ had extended the allowable scope of recovery to plaintiffs who were not put in personal danger by the defendant's acts.

The principal decision concurs with the view of most courts that in such a situation the defendant is not liable to an injured person who is out of the scope of foreseeable danger.¹² The main problem in these three-party situations is really one of how far the courts will extend the liability of defendants in allowing or denying recovery to plaintiffs. The minority in the principal case recognizes this to be the crux of the problem and proceeds to examine Maryland cases to ascertain the extent to which they have gone in allowing recovery. The conclusion is reached that under the test of foreseeability, employing either a duty or a proximate cause approach,¹³ the courts have allowed

⁹*Resavage v. Davies*, 86 A. (2d) 879, 883 (Md. 1952).

¹⁰164 Md. 397, 165 Atl. 182 (1933) (plaintiff allowed to recover for injuries resulting from shock and fright incurred through defendant's negligence toward plaintiff's children directly and toward plaintiff indirectly when defendant's truck was allowed to crash into side of plaintiff's house).

¹¹77 A. (2d) 923 (Md. 1951) (illegitimate child of deceased allowed to recover from the father's executor for physical injuries resulting from nervous shock sustained when she saw her father shoot her mother and then himself).

¹²*Minkus v. Coca-Cola Bottling Co.*, 44 F. Supp. 10 (N. D. Cal. 1942); *Cleveland, C. C. & St. L. Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917 (1900); *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Sperier v. Ott*, 116 La. 1087, 41 So. 323 (1906); *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542 (1902); *Cote v. Litawa*, 96 N. H. 174, 71 A. (2d) 792 (1950); *Nuckles v. Tennessee Electric Power Co.*, 152 Tenn. 611, 299 S. W. 775 (1927).

¹³Under the duty theory, a duty must be found owing to the particular plaintiff, while in the proximate cause theory the duty runs to society in general, and the plaintiff need not be specified. Judge Cardozo clarified the former situation in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 101 (1929), when he observed: "If the harm was not wilful, he [plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended."

Judge Andrews in his dissent in the *Palsgraf* case, summarized the existence

recovery for much less foreseeable injuries than were suffered by the present plaintiff.

In jurisdictions which follow the majority view of the *Resavage* case, the cases are turned on the issue of the existence of a duty in the defendant to the particular plaintiff, and no duty is found because it is said not to be foreseeable that the plaintiff will suffer physical harm from mere fright when he is not put in any danger of direct personal injury by the negligent acts of the defendant.¹⁴ Unforeseeability is used here in the sense that to impose liability would place an onerous and unwarranted burden on the defendant to comprehend that that specific kind of injury will be sustained by that particular plaintiff or that group of plaintiffs who are not within the orbit of direct and immediate harm or fear of harm.¹⁵

The dissenting opinion is representative of the minority view which allows recovery to the plaintiff in three-party situations, on the reasoning that defendant's negligence is the proximate cause of the injury suffered by the plaintiff.¹⁶ Under this approach there must be fore-

of a duty in the proximate cause view when he observed: "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A. B. or C. alone. . . . Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain." *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 102, 103 (1928).

¹⁴*Cleveland, C. C. & St. L. Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917 (1900); *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Cote v. Litawa*, 96 N. H. 174, 71 A. (2d) 792 (1950); *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 147 Pa. St. 40, 23 Atl. 340 (1892).

¹⁵In *Waube v. Warrington*, 216 Wis. 603, 258 N. W. 497, 500, 98 A. L. R. 394, 401 (1935) the court observed: "Fundamentally, defendant's duty was to use ordinary care to avoid physical injury to those who would be put in physical peril, as that term is commonly understood, by conduct on his part falling short of that standard. . . . It is quite another thing to say that those who are out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment."

¹⁶*Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182, 184 (1933) ("The physical damages which the plaintiff sustained naturally, directly, and reasonably arose from this negligent act or omission, without the intervention of any other cause, and so the causal connection between the injury and the occurrence is established."); *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59 (1890); *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 P. (2d) 1037 (1935); *Hambrook v. Stokes Bros.*, [1925] 1 K. B. 141.

seeability of some *harm to someone* as a result of defendant's act. Once this is established, however, defendant is liable for all harm to anyone flowing in an unbroken causal sequence from the act and which is the "proximate result" of the act.¹⁷

Support for the minority view is also found in certain situations in the decisions of jurisdictions which normally adhere to the majority doctrine. Such support arises in cases granting recovery to the plaintiff when the acts of the defendant toward the third party are intentional,¹⁸ when such acts are perpetrated merely as a practical joke,¹⁹ or when the plaintiff is pregnant and subsequently suffers a miscarriage.²⁰ Similarly, courts have imposed liability on the defendant when it can be established that a specific duty was owed to the plaintiff as well as to the person directly injured.²¹ Illustrative of this latter ten-

¹⁷Judge Andrews in the *Palsgraf* case observed: "...when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. . . . what we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 103 (1928.)

¹⁸*Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916) (defendant shot plaintiff's dog which was near plaintiff's child); *Rogers v. Williard*, 144 Ark. 587, 223 S. W. 15 (1920) (defendant pointed pistol at plaintiff's husband); *Ex parte Heigho*, 18 Idaho 566, 110 Pac. 1029 (1910) (defendant attacked son-in-law of plaintiff in her presence); *Mahnke v. Moore*, 77 A. (2d) 923 (Md. 1951) (plaintiff saw her father shoot her mother and himself); *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435 (1886) (defendant shot plaintiff's dog while she was watching); *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59 (1890) (plaintiff witnessed defendant assault two Negroes on her premises).

¹⁹*Great A. & P. Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1931); *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

²⁰*Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Rogers v. Williard*, 144 Ark. 587, 223 S. W. 15 (1920); *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435 (1886); *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59 (1890); *Frazee v. Western Dairy Products*, 182 Wash. 578, 47 P. (2d) 1037 (1935); *Lambert v. Brewster*, 97 W. Va. 124, 125 S. E. 244 (1924). *Contra*: *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Cote v. Litawa*, 96 N. H. 174, 71 A. (2d) 792 (1950); *Hay or Bourhill v. Young*, [1943] A. C. 92.

²¹*Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912) (plaintiff and her husband were standing beside their buggy, in which plaintiff's children were riding, when defendant's negligently driven automobile frightened plaintiff's horses causing them to run away; plaintiff allowed to recover for physical injuries resulting from fright suffered from fear for safety of her children as well as for a breach of duty to her personally); *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182 (1933) (plaintiff allowed recovery for nervous shock and fright suffered due to his fear for safety of his children when he saw defendant's negligently operated truck run

gency is the Maryland case of *Bowman v. Williams*, in which the defendant was held liable for injuries suffered by the plaintiff when the defendant's negligently driven truck crashed into the side of the plaintiff's home and protruded into a basement room, above which the plaintiff was standing and in which two of his children were known to be playing. In finding a duty running both to the plaintiff and his children, the court observed, "The master has the right to drive the truck upon the highway, but, in the exercise of this right, the master owes a duty to . . . occupants of the contiguous premises so . . . that an injury to [them] . . . will not be inflicted by the failure of the master to operate the truck with reasonable care and caution under the circumstances."²²

The differing legal theories of the duty approach on the one hand and proximate cause view on the other are not the true legal basis for the apparently divergent results achieved by their use. Since both turn on the test of foreseeability, it appears clear that the same result may be attained by the application of either approach in a given situation. The minority in the principal case gave guarded expression to this point by observing that "There is a difference between the question of proximate cause and the question of duty, but not as great a difference as defendant argues. . . . the element of foreseeability has not the same but a similar place in each question."²³ In a situation like that of the *Resavage* case, it is submitted that the presence of a parent in the vicinity of the endangered child is quite as foreseeable as the coming of a rescuer to the aid of a victim imperiled by the wrong of another party. Of the latter situation, Judge Cardozo wrote in *Wagner v. International Ry. Co.*: "The cry of distress is the summons

into the side of his house); *Gulf, C. & S. F. Ry. Co. v. Coopwood*, 96 S. W. 102 (Tex. Civ. App. 1906) (plaintiff allowed to recover for injuries resulting from nervous shock sustained when she witnessed the negligence of the defendant railroad toward her daughter who was ill); *Frazer v. Western Dairy Products Co.*, 182 Wash. 578, 47 P. (2d) 1037 (1935) (held a jury question whether recovery should be allowed when, due to defendant's negligence, his truck was allowed to run up on the plaintiff's lawn upon which plaintiff knew her son was standing); *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141 (plaintiff allowed to recover for wife's death caused by shock and fright when she found out that her daughter had been injured by the negligence of the defendant; plaintiff did not see the accident, but was close enough to appreciate the risk of harm to her child); *Richards v. Baker*, [1943] 5 Austr. St. 245 (plaintiff allowed recovery for injuries suffered from fright as a result of seeing her child struck by defendant's car as plaintiff and child were walking down highway). Contra: *Kelly v. Fretz*, 19 Cal. App. (2d) 356, 65 P. (2d) 914 (1937); *Keyes v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 290, 30 N. W. 888 (1886); *Lone Star Gas Co. v. Haire*, 41 S. W. (2d) 425 (Tex. Civ. App. 1931).

²²*Bowman v. Williams*, 164 Md. 397, 165 Atl. 182, 183 (1933).

²³*Resavage v. Davies*, 86 A. (2d) 879, 886 (Md. 1952).

to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."²⁴ So, it may be argued, is the wrongdoer accountable as if he had foreseen the presence of the mother, and this is true whether the *Wagner* case is accepted as a proximate cause decision or is reinterpreted in the light of Judge Cardozo's later opinion in *Palsgraf v. Long Island Ry. Co.*,²⁵ as a "negligence-duty" decision.

Since the legal theories employed offer no adequate explanation for the decision reached by the courts in three-party situations, it is apparent that the real issue with which the courts are confronted is how far they are willing to go in constricting or expanding the limits of liability. Those jurisdictions which follow the circumscribed view of liability base their decisions on the policy ground that an expanded liability would subject the courts to a flood of litigation,²⁶ and would impose upon users of the highway an unreasonable and disproportionate burden.²⁷ However, in a *Resavage* situation the fear of the parent for the safety of her child is just as real and injurious as the fear of the parent for her own safety would be if she were placed in personal peril of bodily harm. The imposition of liability for these injuries, while it increases the penalty for negligent driving, does not add to the degree of care required, for if drivers operate their cars in the manner necessary for the protection of those within the area of direct danger, they very seldom will be subjected to suits of third parties.

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²⁴*Wagner v. International Ry. Co.*, 232 N. Y. 176, 133 N. E. 437, 438 (1921).

²⁵248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

²⁶*Cleveland C. C. & St. L. Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917 (1900); *Waube v. Warrington*, 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394 (1935).

²⁷*Cote v. Litawa*, 96 N. H. 174, 71 A. (2d) 792, 795 (1950); "Such consequences are such an unusual and extraordinary result of the careless operation of an automobile that to recognize such a right and impose such a duty would, in our opinion, place an unreasonable burden upon users of the highway." *Waube v. Warrington*, 216 Wis. 603, 258 N. W. 497, 501, 98 A. L. R. 394, 401 (1935); "The liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent trotfeator [and] would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."

WORKMEN'S COMPENSATION—RIGHT OF INJURED EMPLOYEE RECEIVING
COMPENSATION TO RECOVER DAMAGES FROM FELLOW EMPLOYEE
WHO CAUSED INJURY. [South Carolina]

Though workmen's compensation legislation¹ now governs the liability of the employer to an employee for injuries arising out of the employment, the question of whether the employee's statutory right against his employer affects the generally recognized common law right of recovery from a negligent fellow-employee at whose hands he was injured remains a point of disagreement. In at least one state, the Compensation Act specifically denies such recovery, providing that "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ."² In some other jurisdictions, provisions making the compensation award the exclusive remedy for "any injury arising out of the employment" have been applied to bar any action against a negligent fellow-employee, where the injury occurred in the course of their mutual employment.³

The statutes of most states, however, are ambiguous on this specific point.⁴ They normally contain sections providing that the employee's cause of action against third parties causing injury is preserved, and that an employer who has paid compensation to the injured employee under the Workmen's Compensation Act is subrogated to such right; and, on the other hand, they specify that an employee included under the Act can collect from his employer and "those conducting his business" only by means of a workmen's compensation

¹Workman's Compensation statutes have been passed in all states, all United States territories, and by the federal government. For an indexed collection and comparison of the statutes of the different jurisdictions, see 4 Schneider, *Workmen's Compensation Statutes* (1940) 4411-4443.

²New York Workmen's Compensation Law (Baker, Voorhis, and Co., 1952) § 29-1 (6). *Pantolo v. Lane*, 185 Misc. 221, 56 N. Y. S. (2d) 227 (1945); *Puccio v. Carr*, 177 Misc. 706, 31 N. Y. S. (2d) 805 (1941).

³The Workmen's Compensation Laws of the following have provisions making the compensation award the "exclusive remedy" [all citations refer to Schneider, *Workmen's Compensation Statutes* (1939-40)]: Alabama, 1 Schneider 4; Arizona, 1 Schneider 118; Colorado, 1 Schneider 325; Montana, 3 Schneider 2069; Oklahoma, 4 Schneider 3127; Oregon, 4 Schneider 3185; Washington, 4 Schneider 4102. *Kowcun v. Bybee*, 182 Ore. 271, 186 P. (2d) 790 (1947); *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685 (1913).

⁴No state has a statute specifically conferring a right of action against a fellow employee.

award.⁵ This form of legislation gives rise to the issue of whether a co-employee causing injury is liable under the first type of provision as a "third party," or is immune under the second type of provision protecting "those conducting his [employer's] business."

The recent case of *Nolan v. Daley*⁶ pointedly illustrates the divergence of opinions under such indefinite statutes. The plaintiff was injured on the job as a result of his co-employee's negligent operation of a crane.⁷ After having collected an award from his employer under the South Carolina Workmen's Compensation Act,⁸ he sought to recover additional damages in a negligence action against the co-employee. The South Carolina statute provides: "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified."⁹ The majority of the court, finding itself faced with a case of first impression but drawing on Virginia and North Carolina authority,¹⁰ denied recovery, resting the decision on the premise that the negligent employee is within the scope of the immunity offered by the statute to those conducting the employer's business. To prove that the intent of the legislature was to include fellow-employees under the immunity clause, the majority opinion argued that to allow such suits as the plaintiff here seeks to bring would defeat the fundamental purpose of the law to put industrial accidents in the category of general business risks, compensable by the employer from the profits of his enterprise. In support of this conclusion, the court reasoned that if the plaintiff were allowed a right to recover from his co-employee, as an unprotected third party, the employer, having paid the compensation award, could exercise his right of subrogation to the injured employee's cause of action against the

⁵The Workmen's Compensation Acts of the following states are typically ambiguous: N. C. Gen. Stat. (1950) § 7035-10; 9 Va. Code Ann. (Michie, 1950) § 65-99.

⁶73 S. E. (2d) 449 (S. C. 1952).

⁷The employee operating the crane negligently swung the boom into a high tension wire on the premises of the employer, seriously burning the plaintiff employee.

⁸4 S. C. Code (1942) § 7035-21.

⁹4 S. C. Code (1942) § 7035-10.

¹⁰*Warner v. Leder*, 234 N. C. 727, 69 S. E. (2d) 6 (1952); *Essick v. City of Lexington*, 232 N. C. 200, 60 S. E. (2d) 106 (1950); *Feitig v. Chalkley*, 185 Va. 96, 38 S. E. (2d) 73 (1946).

co-employee, thus passing the loss on to his employees instead of absorbing it as a general business risk.¹¹ In reference to the implication arising from the section excluding common law liability of employers and those conducting their business, but not mentioning rank and file employees in this respect, the majority opinion cited the unfairness of immunizing employees of a managerial nature while leaving lower employees subject to personal liability, and pointed out that the purpose of the Act would be defeated by the subjection of either category of employee to liability. It was concluded that the legislature would not have intended to establish such an unjust distinction or allow for an incidental right which would undermine the primary objective.

The dissent, which is well supported with persuasive authority, contended that the words of the immunity section of the South Carolina statute¹² do not provide immunity to a co-employee, since a mere employee cannot be considered to be "conducting business" for his employer. It was further pointed out that, while another section of the Act expressly precludes an employee from exercising his common law rights and remedies against his *employer*,¹³ there is no term abrogating his right against his *fellow-employee*, this omission indicating that the latter rights are still in effect. The purpose of the statute was asserted not to be to relieve wrong-doing persons causing injury from liability, but rather to assure just compensation to the injured person.

Under the interpretation put on the inconclusively phrased statutes in other jurisdictions, a co-employee is generally held to be a third party liable for his negligent injury to his fellow servant, even though both are covered by the compensation provisions of the Act.¹⁴ Some

¹¹"To hold otherwise would, in a large measure, defeat the very purpose for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act, G. S. § 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency." *Nolan v. Daley* 73 S. E. (2d) 449, 452 (S. C. 1952).

¹²4 S. C. Code (1942) § 7035-10.

¹³4 S. C. Code (1942) § 7035-11.

¹⁴*Hudson v. Moonier*, 94 F. (2d) 132 (C. C. A. 8th, 1938); *Wallace v. Pacific Electric Ry. Co.*, 105 Cal. App. 664, 288 Pac. 834 (1930); *Stulginski v. Gizauskas*, 125 Conn. 293, 5 A. (2d) 10 (1939); *Kimbrow v. Holladay*, 154 So. 369 (La. App. 1934); *Webster v. Stewart*, 210 Mich. 13, 177 N. W. 230 (1920); *Behr v. Soth*, 170 Minn. 278, 212 N. W. 461 (1927); *Sylcox v. National Lead Co.*, 225 Mo. App. 543, 38 S. W. (2d) 497 (1931); *Churchill v. Stephens*, 91 N. J. L. 195, 102 Atl. 657 (1917); *Morrow v. Hume*, 131 Ohio St. 319, 3 N. E. (2d) 39 (1936); *Zimmer v. Casey*, 296 Pa.

courts go so far as to allow this right even after the injured employee has accepted payments under the Compensation Act, thus creating a problem of double compensation for a single injury.¹⁵ The decisions following this view are based upon the principle that an employee who contributes nothing to the compensation fund and who is himself a potential beneficiary of it has done nothing to deserve protection under the statute from liability for his own wrongdoing.¹⁶ These employees are held still to owe the common law duty of due care to their fellow employees, and it is argued that refusal to allow actions against co-employees would encourage carelessness among workmen and result in generally greater occupational hazards.¹⁷ One opinion expresses the idea that as each employee is under a separate contract of labor, even though contracting with a common employer, their relationship to each other is separate and independent.¹⁸ The decisions

529, 146 Atl. 30 (1929); *McGonigle v. Gryphan*, 201 Wis. 269, 229 N. W. 81 (1930); 3 *Schneider, Workmen's Compensation* (3d ed. 1943) § 842 (c); 71 C. J., *Workmen's Compensation Acts* § 1565.

¹⁵The benefits under the Workmen's Compensation statutes of the various states are generally held to be exclusive only as applies to the employer and not to interfere with the employee's common law right of action against a third party who was responsible for his injury. It is quite generally provided in the statutes that the employee cannot recover in full from both the employer and the negligent third party, though he may bring simultaneous actions against both parties under some statutes. Some of the Compensation Acts require the employee to elect whether he will claim compensation or prosecute his remedy against the negligent third party, while others permit him to go against the employer if the amount of his recovery from the third party is not sufficient to cover his damages. The statutes of the various states present a wide variety of modifications of these types of provisions. The following cases represent some of these variations: *Arkansas Valley Ry., L. and P. Co. v. Ballinger*, 65 Colo. 548, 178 Pac. 566 (1919); *U. S. F. & G. Co. v. N. Y., N. H. & H. R. Co.*, 101 Conn. 200, 125 Atl. 875 (1924); *Travelers Ins. Co. v. Georgia Power Co.*, 51 Ga. App. 579, 181 S. E. 111 (1935); *Lebak v. Nelson*, 62 Idaho 96, 107 P. (2d) 1054 (1940); *O'Brien v. Chicago City Ry. Co.*, 305 Ill. 244, 137 N. E. 214 (1922); *Black v. Chicago G. W. R. Co.*, 187 Iowa 904, 174 N. W. 774 (1919); *Lowe v. Morgan's La. & T. R. & S. S. Co.*, 150 La. 29, 90 So. 429 (1921); *Bunner v. Patti*, 343 Mo. 274, 121 S. W. (2d) 153 (1938); *Corria v. Fink Bros.*, 45 R. I. 80, 120 Atl. 321 (1923); *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112 (1917). See also 3 *Schneider, Workmen's Compensation* (3d ed. 1943) § 834. See Note (1952) 9 Wash. & Lee L. Rev. 316 for a discussion of one phase of the double recovery problem arising out of workmen's compensation legislation.

¹⁶See *Nolan v. Daley*, 73 S. E. (2d) 449, 453 (S. C. 1952) (dissenting opinion).

¹⁷"To hold that a fellow servant is not liable for his tortious acts in such an action as the one at bar would...mean a free hand to everybody to neglect his duty toward his fellow servant, and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty." *McGonigle v. Gryphan*, 201 Wis. 269, 229 N. W. 81, 83 (1930). See also *Rehn v. Bingham*, 151 Neb. 196, 36 N. W. (2d) 856, 860 (1949).

¹⁸*Zimmer v. Casey*, 296 Pa. 529, 146 Atl. 130 at 131 (1929).

following this view reason that the preservation of the cause of action against a fellow servant furnishes the employer a deserved right of reimbursement, through the subrogation procedure provided for in most compensation statutes.¹⁹

In spite of the clear statement in the Acts that only statutory compensation can be collected from the employer and "those conducting his business," the courts seem to make no consistent distinction between an employee in some type of managerial capacity and a mere workman in the ranks. Thus, despite the fact that the employer was covered by workmen's compensation, liability has been imposed on such employees as the chief of a municipal fire department,²⁰ the vice-president of the corporation employing the injured employee,²¹ a railway company which was the agent of an express company employing the plaintiff,²² the manager of an electric company employing an injured lineman,²³ and a foreman in charge of the gang in which the the injured party was working.²⁴

The view followed by the majority in *Nolan v. Daley*²⁵ has been adopted in only a few jurisdictions,²⁶ and in denying liability these courts also make no clear delineation between the employee in an executive or managerial position and a mere employee.²⁷ Like the South Carolina court in the principal case, they predicate their decisions on the logical ground that workmen's compensation legislation was con-

¹⁹The Workmen's Compensation Acts of all but three states—New Hampshire, Ohio, and West Virginia—contain such provisions, which allow subrogation against negligent third parties. See 3 Schneider, *Workman's Compensation Statutes (1940)* 2275 (N. H.); 4 Schneider, *Workmen's Compensation Statutes (1940)* 2985 (Ohio), 4163 (W. Va.)

²⁰*Behr v. Soth*, 170 Minn. 278, 212 N. W. 461 (1927).

²¹*Webster v. Stewart*, 210 Mich. 13, 177 N. W. 230 (1920).

²²*Wallace v. Pacific Electric Ry. Co.*, 105 Cal. App. 664, 288 Pac. 834 (1930).

²³*Kimbro v. Holladay*, 154 So. 369 (La. App. 1934).

²⁴*Churchill v. Stephens*, 91 N. J. L. 195, 102 Atl. 657 (1917).

²⁵73 S. E. (2d) 449 (S. C. 1952).

²⁶*Murphy v. Miettinen*, 317 Mass. 633, 59 N. E. (2d) 252 (1945); *Caira v. Caira*, 296 Mass. 448, 6 N. E. (2d) 431 (1937); *Tscheiller v. National Weaving Co., Inc.*, 214 N. C. 449, 199 S. E. 623 (1938); *Rosenberger v. L'Archer*, 31 N. E. (2d) 700 (Ohio App. 1936); *Landrum v. Middaugh*, 117 Ohio St. 608, 160 N. E. 691 (1927); *Feitig v. Chalkley*, 185 Va. 96, 38 S. E. (2d) 73 (1946). See *Bresnahan v. Barre*, 286 Mass. 593, 190 N. E. 815, 816 (1934).

²⁷See cases cited in note 26, *supra*. While all these cases (with the exception of *Landrum v. Middaugh*, in which the negligent employee is a foreman) involve mere employees, the opinions in denying liability make no mention of the type of position which they occupy. The court in *Landrum v. Middaugh* bases its opinion on the argument that the foreman is the alter ego of the employer, upon whom the liability is placed under the doctrine of *respondet superior*.

ceived as a means of affording to an employee speedy relief at a uniform rate of damages, such damages to be borne by the employer as one of the risks of business. To impose upon a fellow employee liability to to a workman whom he has negligently injured, and to allow their common employer to be subrogated to the right of an injured employee by statutory provision,²⁸ would be to make the employees, rather than the business which they carry on, the ultimate bearers of the loss.²⁹ These courts also argue that the workmen's compensation statutes were intended to abolish all common law rights of an employee against fellow servants as well as employers, unless expressly reserved by a statutory provision.³⁰ As a matter of principle, it would appear that the view expressed by the majority of the South Carolina court has logic and fairness on its side. From a practical standpoint, the argument advanced by the advocates of preserving the fellow employee's common law liability that a denial of such liability would encourage carelessness among workers seems unsound; it is probably safe to assume that the average workman will exercise the same degree of caution and humane consideration toward the men with whom he works daily regardless of the extent of his legal liability. It is also questionable in the light of the expressed purpose of the Workmen's Compensation Acts whether the argument in favor of giving the employer a right of reimbursement is a valid one, since, as argued by the courts following the majority view, this would allow him to foist the ultimate loss off on

²⁸The underlying reason behind such provisions is to provide the employer a means of recovery from a third party stranger, not connected with the industry, whose negligence has resulted in injury to an employee who has in turn claimed compensation from the employer. To hold the employer liable for such injuries which do not arise from his business without chance for repayment would be to pervert the express intention of the Workmen's Compensation Acts and over-extend the employer's already broad liability. Such injuries were not intended to be ultimately cast upon the business, and the purpose of the subrogation provisions was to give the employer an opportunity to recoup that loss from such negligent third parties. See *Feitig v. Chalkley*, 185 Va. 96 at 102, 83 S. E. (2d) 73 at 76 (1946), for an excellent discussion of this point.

²⁹"One purpose of the Workmen's Compensation Act was to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer insured under the act, and not to preserve for the benefit of the insurer or of the insurer and those injured liabilities between those engaged in the common employment which but for the act would exist at common law." *Bresnahan v. Barre*, 286 Mass. 593, 190 N. E. 815, 817 (1934).

³⁰*Caira v. Caira*, 296 Mass 448, 6 N. E. (2d) 341 (1937); *Dresser v. New Hampshire Structural Steel Co.*, 296 Mass. 97, 4 N. E. (2d) 1012 (1936); *Tscheiller v. National Weaving Co.*, 214 N. C. 499, 199 S. E. 623 (1938); *Feitig v. Chalkley*, 185 Va. 96, 38 S. E. (2d) 73 (1946).

his employees. It would seem only logical that an employee who elects to accept the benefits of a workmen's compensation award should forego any additional right of recovery against a fellow employee, where the injury occurred within the scope of the employment. While the fellow employee has contributed to no specific fund for his relief, he has given up his common law rights against the employer for a guaranteed award under the Compensation Act.

Since no state statute expressly allows a right of action against a fellow employee, the responsibility for the seemingly illogical rule in the majority of jurisdictions rests with the courts, and the legislatures in those states should amend their workmen's compensation laws so as to effectuate fully their intended purpose of making compensation for industrial injuries a risk of business.

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