



Spring 3-1-1957

## Case Comments

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

---

### Recommended Citation

*Case Comments*, 14 Wash. & Lee L. Rev. 40 (1957).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol14/iss1/4>

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

## CASE COMMENTS

## AGENCY—BORROWED SERVANT DOCTRINE AS FIXING LIABILITY ON GENERAL OR SPECIAL EMPLOYER FOR TORT OF EMPLOYEE. [Federal]

The advice of Shakespeare, "neither a borrower nor a lender be,"<sup>1</sup> could well be heeded by all masters who would avoid liability for the torts of servants under the Borrowed Servant Doctrine of the law of agency. Under the doctrine of respondeat superior a master without fault is liable for the torts his servant commits within the scope of his employment.<sup>2</sup> But when the servant commits a tort while he is on loan from his general employer to render services for the borrowing (or special) employer, the determination of which of the two masters shall be liable provides one of the thorniest problems<sup>3</sup> in the law of agency.<sup>4</sup>

Basically, the rules of law which have been developed to cover this type of general occurrence are not in real conflict. The inconsistencies appear when the courts attempt to apply these rules to the facts presented and to justify the decisions reached by citing certain of these all-too-general legal propositions.<sup>5</sup> Two basic tests have evolved as a method of determining which employer, general or special, should

<sup>1</sup>Shakespeare, *Hamlet*, Act I, scene 3, l. 75.

<sup>2</sup>Mechem, *Outlines of the Law of Agency* (4th ed. 1952) § 349 et seq. and § 364 et seq.; *Restatement, Agency* (1933) § 219; 35 *Am. Jur.*, *Master and Servant* § 543.

<sup>3</sup>And one of quite frequent occurrence. "In the writer's experience, based on many years' browsing through advance sheets, three groups of cases in the agency field are by all odds the most common, those dealing with 'in and out of the employment' (workmen's compensation), those dealing with the commission claimed by the real estate broker, and those dealing with borrowed servant." Mechem, *Outlines of the Law of Agency* (4th ed. 1952) 309, n. 81.

<sup>4</sup>A common situation is that in which one master lends to another, either for compensation or gratuitously, an automobile and a servant to drive it. In the course of his driving the servant commits a tort, and the question arises as to whether the lender, commonly called the general employer, or the borrower, usually referred to as the special employer, is liable under respondeat superior. In a similar situation one employer loans or rents a machine and trained operator to another. However, there are myriad other situations in which no instrumentality is present to affect the problem—i.e., where a person generally considered to be the employee or servant of A does for a time the work of B.

<sup>5</sup>The problems involved in this field were distinctly recognized as long ago as 1921 by Justice Cardozo: "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence." Cardozo, *A Ministry of Justice* (1921) 35 *Harv. L. Rev.* 113, 121. One court prefaced a decision with the following: "We shall not attempt to reconcile the decisions of this and other courts in this field. They are to some extent at least irreconcilable." *Rhineland Paper Co. v. Industrial Commission*, 206 *Wis.* 215, 239 *N. W.* 412, 413 (1931).

be considered the master of the loaned servant. They are the "whose business" test and the "control" test.

The "whose business" test puts the main emphasis on the question of whose business is being done or furthered by the employee at the time the injury occurs.<sup>6</sup> Since the employee is *primarily* furthering the business of the special employer by doing the particular work for him at the time of injury, this test provides a ready justification for holding the borrower liable.<sup>7</sup> However, in the great bulk of cases the employee is actually furthering the business—or doing the work—of *both* his employers, general and special, and the businesses of both are benefited by virtue of the employee's labor. Consequently, in most situations the "whose business" test provides no real criteria for determining when a servant is borrowed and whether or not the borrower is liable, and for this reason it seems to have fallen into disuse.

The "control" test seeks to place responsibility for the servant's negligence upon the employer having the right to control his actions at the time the tortious act occurs.<sup>8</sup> "The theoretical basis for this test is probably the desire to impose the liability upon the employer who was in the best position to prevent the injury. Although this may be considered inconsistent with the liability-without-fault nature of *respondeat superior*, the control test has received widespread approval from the courts."<sup>9</sup> Thus, the problem in most cases is not in the choice of a test, but in the application of the control test to the various facets of the borrowed servant situations.

The difficulties presented are illustrated by the recent decision in *Aluminum Company of America v. Ward*,<sup>10</sup> a diversity case in which the United States Court of Appeals for the Sixth Circuit applied the

---

<sup>6</sup>Standard Oil Co. v. Anderson, 212 U. S. 215, 29 S. Ct. 252, 53 L. ed. 480 (1909); Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P. (2d) 35 (1937); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 (1936); Szczepkowicz v. Khelshek Realty Corp., 280 App. Div. 524, 113 N. Y. S. (2d) 870 (1952); Braxton v. Mendelson, 233 N. Y. 122, 135 N. E. 198 (1922); Owen v. St. Louis Spring Co., 175 Tenn. 543, 136 S. W. (2d) 498 (1940).

<sup>7</sup>"The whose business test, then, if properly interpreted, would place liability upon the special employer. Behind the facade of words there is a logical core or basis, economically sound. Yet the test, because of the duplication of enterprises presented in the borrowed-servant cases, is peculiarly susceptible to misinterpretation and misapplication, as the chaotic state of the decisions bears eloquent witness." Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222, 1230-1240.

<sup>8</sup>See generally Mechem, *Outlines of the Law of Agency* (4th ed. 1952) § 460 et seq.; 35 Am. Jur., *Master and Servant* § 541; Notes (1951) 17 A. L. R. (2d) 1388; (1936) 102 A. L. R. 514.

<sup>9</sup>Nepstad v. Lambert, 235 Minn. 1, 50 N. W. (2d) 614, 620 (1951).

<sup>10</sup>231 F. (2d) 376 (C. A. 6th, 1956).

law of Tennessee.<sup>11</sup> Mrs. Ward brought an action against the Aluminum Company of America (Alcoa) for the death of her husband, caused, she maintained, by the negligence of Alcoa's servants. Ward was a truck driver for the Dixie-Ohio Express Company (D. O. X.), which transported aluminum for Alcoa. Due to the shifting of a negligently-loaded cargo of aluminum, the tractor and trailer he was driving overturned on a curve, and he was killed. The loading of Ward's trailer had been directed by Davis, a D. O. X. supervisor, who was in charge of loading all D. O. X. trucks at the Alcoa plant. Although Alcoa paid the loading crew and furnished the materials, the work was actually done under the direction and supervision of Davis, with the loaders, who were in the general employ of Alcoa, doing only the actual labor. Davis testified that the procedure followed in this particular instance was in accordance with the method pursued in loading all D. O. X. trailers at the Alcoa plant. He always backed the trailer in, told the company checker what he wanted done and how, and the trailers were always loaded according to his instructions. On the occasions when he thought a load was not braced safely he told the loading or bracing crew what further action to take, and refused to move the trailers until he considered them properly loaded or braced. He stated that he had no trouble getting the crew to follow his instructions. The load in Ward's trailer was all braced with the exception of two boxes which Davis thought did not require bracing. Alcoa contended in defense that for the purpose of loading the D. O. X. trailers, the servants in its general employ had been loaned to D. O. X., thus absolving Alcoa from liability for any negligence that might have occurred in the loading and bracing of Ward's trailer. However, the court held that the servants were still under the control of Alcoa, thus negating the contention that they had been borrowed by D. O. X.

In support of this conclusion, a great deal of reliance was placed on Justice Cardozo's statement of the control test: "The rule now is that, as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division."<sup>12</sup> The court also

---

<sup>11</sup>An interesting illustration of the application of the Erie doctrine is presented here. The federal court sitting in Tennessee looks to a New York decision for the law, and then finds that "Tennessee law is in accord." *Aluminum Company of America v. Ward*, 231 F. (2d) 376, 379 (C. A. 6th, 1956).

<sup>12</sup>*Charles v. Barrett*, 233 N. Y. 127, 129, 135 N. E. 199, 200 (1922). Although this case is recognized as a leading decision on the control test, it is interesting to note that another prominent New York case, *Braxton v. Mendelson*, 233 N. Y. 122, 135 N. E. 198 (1922), which was decided on the same day, somewhat anomalously adopts the whose business test as the criterion for fixing liability.

quoted with approval from a more recent decision in Minnesota, in which it was reasoned that in order for the borrower to be in control, his orders had to be "commands and not requests," the right to discharge should be considered though it "should not be made decisive," and the borrower must have authority to designate not only the final result but also "the manner in which the work is to be done."<sup>13</sup> It should also be noted that the particular decisional law of Tennessee which the court held to be binding adhered to the doctrine of "full control"—i.e., that "In order to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, the original master must resign *full* control of the servant for the time being."<sup>14</sup>

Although the facts were admitted, the court felt that conflicting inferences could be drawn and that the jury was warranted in inferring that Alcoa had not surrendered "complete control" of its employees to D. O. X. The matter was summed up in these words: "The most that can be said on the subject of control is that there was divided authority and this falls short of that power to command which is the necessary element in the determination of a surrender of complete con-

---

<sup>13</sup>Nepstad v. Lambert, 235 Minn. 1, 50 N. W. (2d) 614, 622 (1951).

<sup>14</sup>Chamberlain v. Lee, 148 Tenn. 637, 257 S. W. 415, 417 (1924) [italics supplied]. However, it is by no means clear that the Chamberlain case represents the present position of the law in Tennessee. In a more recent pronouncement the Supreme Court of Tennessee, in overruling the decision of the intermediate Court of Appeals, used the following language: "The Court of Appeals thought the case was controlled by the decision of this Court in Chamberlain v. Lee, 148 Tenn. 637, 257 S. W. 415, wherein it was held that a servant could not be regarded as a loaned servant unless the master had resigned full control of him for the time being. Applying that rule to the facts of this case, the Court thought that Sharpe had not surrendered full control of the operator of this machine and consequently must be held for the operator's negligence. On its face, as stated in the opinion, Chamberlain v. Lee was a case in which the general employer of the servant and the defendant were merely co-operating in a particular undertaking and the decision, holding it was not a case of loaned servant, was partly rested on the co-operative feature of the effort." Gaston v. Sharpe, 179 Tenn. 609, 168 S. W. (2d) 784, 785 (1943). In still another Tennessee decision the court seemed to imply that the whose business test was determinative in that state: "A test running through our cases, although not always in terms noted, is indicated by the question, 'In whose work was the employee engaged at the time?'" Owen v. St. Louis Spring Co., 175 Tenn. 543, 136 S. W. (2d) 498, 499 (1940). To complicate matters further, a later passage in Gaston v. Sharpe, supra, points out that "Neither the test stated in Chamberlain v. Lee nor that stated in Owen v. St. Louis Spring Co. has proven entirely adequate. Instead of being tests they are rather to be considered as factors in reaching a conclusion as to where the responsibility lies for the servant's act. This is true because a servant at a particular time may remain under the control of his general employer for some purposes and yet be under the control of a special employer for others." 179 Tenn. 609, 168 S. W. (2d) 784, 785-786 (1943). The last sentence especially would seem to indicate that the Tennessee court is not wholly convinced of the necessity for full control.

trol by the general employer to the temporary employer under the loaned servant doctrine."<sup>15</sup>

The general tenets propounded in the opinion do not require the result reached by the decision. On the contrary, the opposite result could have been reached with equal facility by applying the same general legal propositions to the instant case. The fact that Davis had the final authority as to the loading of the trucks and that he had on several occasions refused to move trailers until they had been reloaded to his satisfaction indicates that the servants who did the work of loading were to a large degree in his control. Other factors which indicate that the loaders had been borrowed by D. O. X. are that orders given by Davis appeared to be *commands* rather than mere requests to do the loading, and that Davis had authority to exercise detailed control over the manner in which the work was done as well as the right to designate the final result. Although Davis did not have the right to discharge the servants, the court conceded that this factor should not be made decisive.

The unconvincing nature of the reasoning in the principal case points up the inherent inadequacies of the control test. First, it is impossible to ascertain what is necessary to constitute "control."<sup>16</sup> No *actual* control is needed, for the great weight of authority holds that a master need have only the "right of control" in order to have the loaned employee stand in the relation of his servant.<sup>17</sup> Many cases are in accord with the Tennessee law relied on by the court that there must be "full," "exclusive," or "supreme" control by the special employer in order that the employee be considered his servant.<sup>18</sup> Yet,

<sup>15</sup>Aluminum Company of America v. Ward, 231 F. (2d) 376, 380 (C. A. 6th, 1956).

<sup>16</sup>"... the difficulty arises in attempting to define the extent or degree of dominion necessary to constitute the 'control' which the borrower must have..." Dippel v. Juliano, 152 Md. 694, 137 Atl. 514, 516 (1927).

<sup>17</sup>United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239, 242 (1954); Martin v. Anniston Foundry Co., 259 Ala. 633, 68 S. (2d) 323, 327 (1953) ("power to control"); Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P. (2d) 551, 556 (1937); Peters v. United Studios, 98 Cal. App. 373, 277 Pac. 156, 158 (1929); Tindall v. Perry, 283 S. W. (2d) 700, 701 (Ky. 1955); Willis v. Belger, 357 Mo. 1177, 212 S. W. (2d) 736, 739 (1948); Kessler v. Bates & Rogers Const. Co., 155 Neb. 40, 50 N. W. (2d) 553, 557 (1951); Falk v. Unger, 33 N. J. Super. 589, 111 A. (2d) 283, 285 (1955); Pennsylvania Smelting and Refining Co. v. Duffin, 363 Pa. 564, 70 A. (2d) 270, 17 A. L. R. (2d) 1384 (1950); McConnell v. Williams, 361 Pa. 355, 65 A. (2d) 243, 245 (1949); McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 36 A. (2d) 303, 305 (1944) ("power to control"); Agostini v. W. J. Halloran Co., 111 A. (2d) 537, 539 (R. I. 1955); Note (1951) 17 A. L. R. (2d) 1388, 1394. Cf. Harlan v. Bryant, 87 F. (2d) 170 (C. C. A. 7th, 1936), and Mature v. Angelo, 373 Pa. 593, 97 A. (2d) 59 (1953).

<sup>18</sup>C. F. Lytle Co. v. Hansen & Rowland, 151 F. (2d) 573, 575 (C. C. A. 9th, 1945) ("exclusive control"); Hiller v. Goodwin, 258 Ala. 700, 65 S. (2d) 152, 156 (1953) ("su-

it is nearly always true in the borrowed servant situations that, though the special employer may exercise immediate or particular control over the special work to be done for him, the general employer still exerts a certain amount of control in regard to such matters as payment of wages and right to discharge, which, while somewhat remote or indirect, is nevertheless substantial.<sup>19</sup> Notwithstanding this fact, in several instances courts which purport to apply the "full control" formula have placed liability on the special employer.<sup>20</sup>

Once the extent of control necessary to justify imposing liability is established, the courts must then proceed to the determination of whether this degree of control was held by the defendant employer in the particular situation in question. Among the factors often consid-

---

preme choice, control and direction"); *Lowell v. Harris*, 24 Cal. App. (2d) 70, 74 P. (2d) 551, 556 (1937) ("full control"); *Peters v. United Studios*, 98 Cal. App. 373, 277 Pac. 156, 158 (1929) ("full control"); *Landis v. McGowan*, 114 Colo. 355, 165 P. (2d) 180, 186 (1946) ("wholly subject to the control"); *Standard Oil Co. v. Soderling*, 112 Ind. App. 437, 42 N. E. (2d) 373, 377 (1942) ("supreme choice, control and direction"); *Anderson v. Abramson*, 234 Iowa 792, 13 N. W. (2d) 315, 316 (1944) ("all direction and control"); *Boyce v. Maine Public Service Co.*, 146 Me. 335, 81 A. (2d) 670, 673 (1951) ("exclusive direction and control"); *Wills v. Belger*, 357 Mo. 1177, 212 S. W. (2d) 736, 739 (1948) ("full control"); *Ramsey v. New York Cent. R. Co.*, 269 N. Y. 219, 199 N. E. 65, 66, 102 A. L. R. 511 (1935) ("supreme choice, control and direction"); *Leonard v. Tatum and Dalton Transfer Co.*, 218 N. C. 667, 12 S. E. (2d) 729, 731 (1940) ("control... must be so completely surrendered as to virtually suspend, temporarily, at least, any responsibility which might reasonably be associated with control"); *Edwards v. Cutler-Hammer, Inc.*, 272 Wis. 54, 74 N. W. (2d) 606, 611 (1956) ("full control").

Other courts have not made it clear whether full control is needed for the borrower to be held liable. *Tindall v. Perry*, 283 S. W. (2d) 700 (Ky. 1955); *Osborg v. Hoffman*, 252 App. Div. 587, 300 N. Y. Supp. 690 (1937) aff'd 280 N. Y. 523, 19 N. E. (2d) 924 (1939); *Jackson v. Joyner*, 236 N. C. 259, 72 S. E. (2d) 589 (1952); *Halkias v. Wilkoff Co.*, 141 Ohio St. 139, 47 N. E. (2d) 199 (1943); *Pennsylvania Smelting and Refining Co. v. Duffin*, 363 Pa. 564, 70 A. (2d) 270, 17 A. L. R. (2d) 1384 (1950).

<sup>19</sup>"... it is said that (1) unless the lending master surrenders all control, and (2) unless the servant renounces all obedience to the master who hired and loaned him; and (3) unless the lending master surrenders the power to discharge the employee and the borrowing master has the power to discharge the servant from both employments, there is no release of the hiring master from responsibility for the servant's negligence under the rule of respondeat superior. . . . To us when the principle is tested by the elements stated above, the result is the destruction of the principle. When a master turns an employee to another's service under the tests outlined, it is not a loan of the servant, it is a complete giving up of the servant, a termination of any relationship between the hiring master and the servant. It would be an out and out change of employment. It would be a discharge from one master and a hiring by another." *Wylie-Stewart Machinery Co. v. Thomas*, 192 Okla. 505, 137 P. (2d) 556, 558 (1943).

<sup>20</sup>*C. F. Lytle Co. v. Hansen & Rowland*, 151 F. (2d) 573 (C. C. A. 9th, 1945); *Standard Oil Co. v. Soderling*, 112 Ind. App. 437, 42 N. E. (2d) 373 (1942); *Boyce v. Maine Public Service Co.*, 146 Me. 335, 81 A. (2d) 670 (1951); *MacFarland v. Dixie Machinery & Equipment Co.*, 348 Mo. 341, 153 S. W. (2d) 67, 136 A. L. R. 516 (1941).

ered are the payment of wages,<sup>21</sup> the right to hire and fire,<sup>22</sup> the right to direct movement and operation,<sup>23</sup> the method of direction,<sup>24</sup> the custody and ownership of tools and appliances,<sup>25</sup> the length of time for which the servant was borrowed,<sup>26</sup> the degree of the borrowed servant's specialized skill,<sup>27</sup> and whether the tort was committed during the performance of a particular act for the special employer.<sup>28</sup> With so many variable elements to be considered, it is not surprising that the decisions which pay lip service to the doctrine of control show little uniformity,<sup>29</sup> and that the courts are able to justify their results with appropriate language from the maze of conflicting and ambiguous statements and views on this subject.<sup>30</sup>

<sup>21</sup>United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239 at 242 (1954); Tindall v. Perry, 283 S. W. (2d) 700 at 701 (Ky. 1955); Boyce v. Maine Public Service Co., 146 Me. 335, 81 A. (2d) 670 at 673 (1951); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936); Halkias v. Wilkoff Co., 141 Ohio St. 139, 47 N. E. (2d) 199 at 206 (1943); McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 36 A. (2d) 303 at 305 (1944); Atherholt v. William Stoddart Co., 286 Pa. 278, 133 Atl. 504 at 505 (1926).

<sup>22</sup>Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P. (2d) 551 at 556 (1937); Anderson v. Abramson, 234 Iowa 792, 13 N. W. (2d) 315 at 316 (1944); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936); Mature v. Angelo, 373 Pa. 593, 97 A. (2d) 59 at 61 (1953).

<sup>23</sup>Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936); Osborg v. Hoffman, 252 App. Div. 587, 300 N. Y. Supp. 690 at 693 (1937) aff'd 280 N. Y. 523, 19 N. E. (2d) 924 (1939).

<sup>24</sup>United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239 at 242 (1954); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936).

<sup>25</sup>Anderson v. Abramson, 234 Iowa 792, 13 N. W. (2d) 315 at 316 (1944); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936).

<sup>26</sup>United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239 at 242 (1954); Mature v. Angelo, 373 Pa. 593, 97 A. (2d) 59 at 61 (1953); McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 36 A. (2d) 303 at 305 (1944); Edwards v. Cutler-Hammer, Inc., 272 Wis. 54, 74 N. W. (2d) 606 at 608 (1956); Restatement, Agency (1933) § 227, comment c.

<sup>27</sup>Lee v. Glens Falls Hospital, 265 App. Div. 607, 42 N. Y. S. (2d) 169 at 172 (1943); Mature v. Angelo, 373 Pa. 593, 97 A. (2d) 59 at 61 (1953); Edwards v. Cutler-Hammer, Inc., 272 Wis. 54, 74 N. W. (2d) 606 at 608 (1956); Restatement, Agency (1933) § 227, comment c.

<sup>28</sup>United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239 at 242 (1954); Devaney v. Lawler Corp., 101 Mont. 579, 56 P. (2d) 746 at 749 (1936); McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 36 A. (2d) 303 at 305 (1944); Robson v. Martin, 291 Pa. 426, 140 Atl. 339 at 341 (1928).

<sup>29</sup>Some courts, purporting to be following the control test, often state it in terms of the whose business test, or will consider the two as one. United States Steel Corp. v. Mathews, 261 Ala. 120, 73 S. (2d) 239 at 242 (1954); Kessler v. Bates & Rogers Const. Co., 155 Neb. 40, 50 N. W. (2d) 553 at 557 (1951); Halkias v. Wilkoff Co., 141 Ohio St. 139, 47 N. E. (2d) 199 at 205-206 (1943). Another court has stated that "The 'Whose Business test' has been generally held to be governed by the 'control test,'" Edwards v. Cutler-Hammer, Inc., 272 Wis. 54, 74 N. W. (2d) 606, 611 (1956).

<sup>30</sup>"...it is child's play to construe either the control or the whose business



Several means of bringing more certainty into this segment of the law have been suggested. The Pennsylvania courts have sought to eliminate the confusion produced by divergent rules and inconsistent decisions by formulating their own rule. As enunciated in *Gordon v. S. M. Byers Motor Car Co.*,<sup>31</sup> the answer is to hold both masters vicariously liable as joint tortfeasors. The court reached this result after deciding that the employee was not only furthering the business of both employers, but was also subject to the control of each. Although seemingly an easy way out of the dilemma, the Pennsylvania rule has not been accepted outside of that state,<sup>32</sup> and it would appear to provide a just solution only in those cases in which the question of responsibility of the two employers is a very close one.

In 1940, Professor Smith suggested the use of a "scope of the business" test,<sup>33</sup> analagous to the "scope of employment" test which is used in distinguishing between a servant and an independent contractor. This approach is based on the assumption that "a business must pay the reasonable cost of its passage,"<sup>34</sup> in the sense that liability should be imposed on the special employer whenever the tortious act was committed within the scope of the business of that employer. "If the questioned act is within the scope of the business, within its normal sphere of operations, within the boundaries reasonably fixed by the usual conduct of similar enterprises, liability should normally follow."<sup>35</sup> However, it is questionable whether Smith's test would prove to be more workable or useful than the two tests which the courts now employ.<sup>36</sup> At any rate, no court has been willing to apply it.<sup>37</sup>

'test' in such a way as to hold him [the general employer]." Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222, 1244.

<sup>31</sup>309 Pa. 453, 164 Atl. 334 (1932) noted in (1933) 37 Dick. L. Rev. 267; (1934) 8 Temp. L. Q. 267.

<sup>32</sup>Most courts heed the Biblical admonition that "no man can serve two masters." A typical statement of the general rule is that "It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one, and betray the other. He cannot be subject to two controlling forces which may at the time be divergent." *Atwood v. Chicago, R. I. & P. Ry. Co.*, 72 Fed. 447, 455 (W. D. Mo. 1896).

<sup>33</sup>Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222.

<sup>34</sup>Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222, 1248.

<sup>35</sup>Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222, 1249.

<sup>36</sup>The difficulty inherent in Smith's proposed test may be found in the author's own statement thereof. As he expresses it, the question is "whether the servant's act as to which liability is sought to be imposed was within the normal scope of the business of the borrower. If so, the responsibility should normally be the borrowing employer's unless there has been (1) in fact and in good faith (2) a permissible (not inherently dangerous, etc.) farming out of the operation in question."

In the final analysis, it would seem that in more instances than the courts have been prone to allow, the special employer should be held responsible for the acts of the servant in question. As the situation now exists, there appears to be a presumption that the servant remains under the control of the general employer until it is proved that such control was surrendered to the special employer.<sup>38</sup> The validity of such a presumption seems open to question, for at the time liability attaches, the servant is ordinarily engaged in work which is primarily and directly that of the borrower. Although it is usually true that the general employer still pays the servant's wages and exercises the right to discharge him, the servant is, nevertheless, doing his general employer's work only in a secondary, indirect fashion. Furthermore, even though the borrower may not have what courts designate as "full" control over the servant, yet the special employer is usually in a better position to prevent the act which results in liability. In the *Ward* case situation, a proper regard for these significant factors—i.e., degree of control over the employees, directness of benefit of their services, and opportunity for prevention of the injury—would point to the conclusion that liability should be borne by the special employer rather than the general employer.

J. HARDIN MARION, III

BANKRUPTCY—INSURANCE EXEMPTION EFFECTED BY USE OF NON-EXEMPT ASSETS IN CONTEMPLATION OF BANKRUPTCY AS FRAUD ON CREDITORS. [Federal]

Although a debtor may, on the eve of bankruptcy, change non-exempt property into exempt property and then assert the exemption against the claims of creditors in the ensuing bankruptcy proceedings,<sup>1</sup>

---

Smith, *Scope of the Business: The Borrowed Servant Problem* (1940) 38 Mich. L. Rev. 1222, 1251. Even with all their failings, both the control test and the whose business test are much more easily stated and understood.

<sup>37</sup>But see *MacFarland v. Dixie Machinery & Equipment Co.*, 348 Mo. 341, 153 S. W. (2d) 67 at 71, 136 A. L. R. 516 at 522 (1941), where the "scope of the business" approach was considered at some length by the court.

<sup>38</sup>*United States Steel Corp. v. Mathews*, 261 Ala. 120, 73 S. (2d) 239 at 243 (1954); *Peters v. United Studios*, 98 Cal. App. 373, 277 Pac. 156 at 157-158 (1929); *Falk v. Unger*, 33 N. J. Super. 589, 111 A. (2d) 283 at 286 (1955); *Redmond v. Republic Steel Corp.*, 131 N. E. (2d) 593 at 597 (Ohio App. 1956); *Agostini v. W. J. Halloran Co.*, 111 A. (2d) 537 at 539 (R. I. 1955); *Edwards v. Cutler-Hammer, Inc.*, 272 Wis. 54, 74 N. W. (2d) 606 at 611 (1956); *Mechem*, *Outlines of the Law of Agency* (4th ed. 1952) 318; *Restatement, Agency* (1933) § 227, comment b; *Note* (1951) 17 A. L. R. (2d) 1388, 1394-1395.

<sup>1</sup>*Schwartz v. Seldon*, 153 F. (2d) 334 (C. C. A. 2nd, 1945); *In re Chase*, 141 F. (2d) 299 (C. C. A. 7th, 1944); *Forsberg v. Security State Bank of Canova*, 15 F. (2d) 499, 49 A. L. R. 913 (C. C. A. 8th, 1926); 1 *Collier, Bankruptcy* (14th ed. 1940) 840.

if the transfer of non-exempt property was in actual fraud of creditors, it may be set aside by the trustee in bankruptcy.<sup>2</sup> In order to reclaim the property as assets of the bankrupt estate, the trustee cannot rely merely on proof that the debtor consummated the transfer knowing he was insolvent and about to be declared a bankrupt, but must prove that the debtor has made a positive attempt to defraud his creditors. These conclusions have been reached by the bankruptcy courts in construing the state exemption statutes, which, it is agreed, are to be liberally interpreted in order to shield the bankrupt and his family from possible destitution and pauperism.<sup>3</sup> However, where a fraudulent transfer is alleged, the courts are torn between the policy considerations in favor of the debtor on the one hand, and the injustice creditors will suffer should the exemption be allowed, on the other hand.<sup>4</sup>

The Federal District Court for the Southern District of California was recently faced with this conflict in *In the Matter of Driscoll*.<sup>5</sup> Long before bankruptcy, the debtor took out three life insurance policies with various companies. Two and one-half months before bankruptcy, he borrowed on two of these policies, and then repaid the loans two weeks prior to the filing of a voluntary petition. In his schedule of exemptions, the bankrupt claimed the policies were exempt under the provision of the California Code which exempts "all moneys [and] benefits, . . . accruing or . . . growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars. . . ."<sup>6</sup> The referee disapproved these exemptions and ordered payment into the estate of the cash surrender value which accrued because of the repayment of the loans with non-exempt funds, and stipulated that unless this order were complied with, the policies would lose their exempt character.<sup>7</sup> The district court, prompted basically by public policy

---

<sup>2</sup>*Kangas v. Robie*, 264 Fed. 92 (C. C. A. 8th, 1920); *In re Gerber*, 186 Fed. 693 (C. C. A. 9th, 1911); 1 *Collier, Bankruptcy* (14th ed. 1940) 841.

<sup>3</sup>*In re Dudley*, 72 F. Supp. 943 (S. D. Cal. 1947), *aff'd* in *Goggin v. Dudley*, 166 F. (2d) 1023 (C. C. A. 9th, 1948), wherein it was stated: "Exemption statutes are not only liberally construed, but are 'generally subject to the most liberal construction which the courts can possibly give them.'" 72 F. Supp. 943, 944; *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 L. ed. 1018 (1905); *Turner v. Bovee*, 92 F. (2d) 791 (C. C. A. 9th, 1937); *In re Weich*, 2 F. (2d) 647 (C. C. A. 6th, 1924).

<sup>4</sup>This problem is suggested in *Hartman, Right of Creditors in Insurance—The Tennessee Exemption Statutes* (1952) 5 *Vand. L. Rev.* 760 at 790.

<sup>5</sup>142 F. Supp. 300 (S. D. Cal. 1956).

<sup>6</sup>Cal. Code of Civil Procedure (Deering 1953) § 690.19. The California statute seems to exempt life insurance payable to any beneficiary in any amount which can be purchased with annual premiums not exceeding five hundred dollars. Further, the code appears to exempt additional insurance in the same amount if taken out in favor of the insured's spouse or minor children.

<sup>7</sup>*In the Matter of Driscoll*, 142 F. Supp. 300 at 301 (S. D. Cal. 1956).

considerations, reversed the referee's decision and ordered that the trustee's report of exempt property be approved. In the opinion it was emphasized that the state exemption statute was controlling and had been promulgated for the purpose of "saving debtors and their families from want by reason of misfortune or improvidence."<sup>8</sup> Concerned with the allegation of fraud, the court cited the general rule that it is not ipso facto fraudulent for an insolvent debtor to acquire exempt property with non-exempt funds on the eve of bankruptcy.<sup>9</sup> Though the decision did not stipulate what is and what is not actual fraud, the result indicated that none was found to exist in the case at bar.

The problem of what constitutes fraud sufficient to justify the setting aside of a transfer has arisen in several types of factual situations involving insurance exemptions.<sup>10</sup> Other cases decided on facts similar to the *Discroll* situation appear to justify the result reached by that decision.<sup>11</sup> In *In re Silansky*,<sup>12</sup> a federal court sitting in Pennsylvania reasoned that the repayment of an insurance loan while the insured was insolvent was not fraudulent as to the creditors under the Bankruptcy Act, since it was "not a payment of an existing indebtedness . . . [but rather] a payment intended to increase the amount payable under the insurance policy to the bankrupt's wife as beneficiary."<sup>13</sup> Apparently not quite content with this explanation, the court declared further that the Pennsylvania statute authorizes an *absolute* exemption, without regard to whether payments are made with intent to defraud creditors.<sup>14</sup> Since the Pennsylvania statute<sup>15</sup> contains no express reference to the effect of intent to defraud, it is questionable whether it should be construed as providing "a haven for fraud;"<sup>16</sup> but this type of statutory construction is indicative of the extent to which some courts have gone in an effort to shield the debtor.<sup>17</sup>

<sup>8</sup>142 F. Supp. 300, 302 (S. D. Cal. 1956).

<sup>9</sup>142 F. Supp. 300 at 302 (S. D. Cal. 1956).

<sup>10</sup>The problem of fraud arises where the insolvent debtor: (a) repays an insurance loan, *In re Silansky*, 21 F. Supp. 41 (E. D. Pa. 1937); (b) assigns the policy or changes the beneficiary, *Schwartz v. Cohen*, 131 F. (2d) 879 (C. C. A. 2nd, 1942); (c) pays insurance premiums, *Greiman v. Metropolitan Life Ins. Co.*, 96 F. (2d) 823 (C. C. A. 3rd, 1938).

<sup>11</sup>*Schwartz v. Seldon*, 153 F. (2d) 334, 169 A. L. R. 1375 (C. C. A. 2nd, 1945); *In re Yeager*, 21 F. Supp. 324 (W. D. N. Y. 1937); *In re Silansky*, 21 F. Supp. 41 (E. D. Pa. 1937).

<sup>12</sup>21 F. Supp. 41 (E. D. Pa. 1937).

<sup>13</sup>21 F. Supp. 41, 42 (E. D. Pa. 1937).

<sup>14</sup>21 F. Supp. 41 at 42 (E. D. Pa. 1937).

<sup>15</sup>40 Pa. Stat. Ann. (Purdon 1954) § 517.

<sup>16</sup>*Greiman v. Metropolitan Life Ins. Co.*, 96 F. (2d) 823, 825 (C. C. A. 3rd, 1938).

<sup>17</sup>Ogleby, *Some Developments in Bankruptcy Law (1948)* 22 J. of Nat'l Ass'n of Ref. 41 at 44 criticizes the limits to which some courts have gone in protecting the debtor.

In the *Silansky* case, as in the principal case, reliance was placed, by analogy, on the recognized doctrine that conversion of non-exempt property into exempt property while the debtor is insolvent is not, in the absence of actual fraud, regarded as a transfer with intent to defraud creditors.<sup>18</sup> This rule has also been applied in a case in which a debtor, a week prior to his adjudication in bankruptcy, had purchased ten shares of building and loan stock exempted by statute.<sup>19</sup> The bankruptcy court, in approving the exemption of these shares, concluded that the theory that "the acquisition of such exempt property with non-exempt funds by an insolvent debtor is, ipso facto, fraudulent, is unsound and should not be followed. For, if it were, the entire law of exemptions would be destroyed, and every trustee could invalidate any acquisition of exempt property within the four-months period prior to adjudication."<sup>20</sup>

In both bankruptcy and non-bankruptcy cases, the courts, in passing on fraudulent conveyance charges, have had to cope with the question of fraud in creating insurance exemptions where the insured, while insolvent, has changed his beneficiary or assigned a policy payable to the insured or his estate.<sup>21</sup> While the exemption statutes of some states restrict the class of beneficiaries that can be protected to the insured's wife, children, or dependent relatives,<sup>22</sup> most of the states afford protection to any named beneficiary other than the insured or his estate.<sup>23</sup>

<sup>18</sup>In *re Silansky*, 21 F. Supp. 41 at 42 (E. D. Pa. 1937).

<sup>19</sup>In *re Dudley*, 72 F. Supp. 943 (S. D. Cal. 1947), *aff'd* in *Goggin v. Dudley*, 166 F. (2d) 1023 (C. C. A. 9th, 1948).

<sup>20</sup>In *re Dudley*, 72 F. Supp. 943, 945 (S. D. Cal. 1947).

<sup>21</sup>*Schwartz v. Coen*, 131 F. (2d) 879 (C. C. A. 2nd, 1942) (bankruptcy); *Kirkpatrick v. Johnson*, 197 Fed. 235 (S. E. D. Pa. 1912) (bankruptcy); *Union Central Life Ins. Co. v. Flicker*, 101 F. (2d) 857 (C. C. A. 9th, 1939). State court decisions on this point: *Bailey v. Wood*, 202 Mass. 562, 89 N. E. 149 (1909); *Equitable Life Assur. Soc. v. Hitchcock*, 270 Mich. 72, 258 N. W. 214 (1935); *Klebba v. Struempf*, 224 Mo. App. 193, 23 S. W. (2d) 205 (1930).

<sup>22</sup>Ariz. Code Ann. (1939) § 24-601; 3 Mich. Comp. Laws (1948) § 522.24; 4 Ohio Rev. Code (Baldwin 1953) § 3911.10 (class limited to wife, children, dependent relatives and creditors); 40 Pa. Stat. Ann. (Purdon 1954) § 517.

<sup>23</sup>Among the states in which the protected class is unrestricted: Ala. Code Ann. (1940) tit. 7, § 624; 11 Fla. Stat. Ann. (1943) §§ 222.13, 222.14; Ill. Ann. Stat. (Smith-Hurd Perm. ed. 1940) c. 73, § 850; N. J. Stat. Ann. (1939) § 17:34-28.

Section 70a(5), 2nd proviso of the Bankruptcy Act, 11 U. S. C. A. § 110 (1953) states that if the bankrupt, his estate, or personal representative is the named beneficiary, the cash surrender value of the policy, like any other property of the bankrupt, passes to the trustee; however, the policy may be retained upon payment of the ascertained cash-surrender value of the policy by the bankrupt to the trustee. Section 6 of the Bankruptcy Act, 11 U. S. C. A. § 24 (1955 Supp.) provides in effect that this Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws. The question was raised in *In re D. F. and C. P. Long*, 282 Fed. 383 (S. D. Fla. 1918) whether the Florida exemption statute, which ex-

In this situation, it has been held in state creditor proceedings that an assignment or change of beneficiary by the debtor, while insolvent, is a fraud on creditors, for such action deprives creditors of funds which should have inured to their benefit.<sup>24</sup> However, when the debtor dies after taking such action, most courts will permit the creditors to reach only the cash surrender value of the policy,<sup>25</sup> rather than the stated face value.<sup>26</sup> It would seem that if state tribunals in interpreting their exemption statutes will permit creditors to recover the cash surrender value of a policy which has been fraudulently assigned, the bankruptcy courts, bound by this interpretation,<sup>27</sup> should likewise permit the trustees to recover the cash surrender value notwithstanding the principle that one may change non-exempt property into exempt

---

empted insurance policies though payable to the insured or his estate, would prevent the cash-surrender value of a policy which named the bankrupt's estate as beneficiary from vesting in the trustee. The court concluded that the exemption statute in such situation pertained only to the proceeds of insurance after the death of insured, and thus, the statute would not exempt the policy.

It also has been decided that a trustee in bankruptcy may obtain, by the power invested in him by § 70a (5) of the Bankruptcy Act, the cash surrender value of an insurance policy taken out by the bankrupt on his life payable to his named beneficiaries in which he retains the right to change beneficiary. *Cohen v. Samuels*, 245 U. S. 50, 38 S. Ct. 36, 62 L. ed. 143 (1917); *Cohn v. Malone*, 248 U. S. 450, 39 S. Ct. 141, 63 L. ed. 352 (1919). However, most state statutes have been construed to exempt the cash surrender value of a policy notwithstanding the fact that the insured retains the absolute right to change the beneficiary. *Turner v. Bovee*, 92 F. (2d) 791 (C. C. A. 9th, 1937) (Wash. statute); *In re Messinger*, 29 F. (2d) 158 (C. C. A. 2nd, 1928) (N. Y. statute); *Dussoulas v. Lang*, 24 F. (2d) 254 (C. C. A. 3rd, 1928) (Pa. statute.)

<sup>24</sup>*Kirkpatrick v. Johnson*, 197 Fed. 235 (S. E. D. Pa. 1912) (no exemption statute mentioned). The following decisions involve an interpretation of state exemption statutes as applied to this question: *Union Central Life Ins. Co. v. Flicker*, 101 F. (2d) 857 (C. C. A. 9th, 1939); *Bryson v. Manhart*, 11 Cal. App. (2d) 691, 54 P. (2d) 778 (1936); *Equitable Life Assur. Soc. v. Hitchcock*, 270 Mich. 72, 258 N. W. 214 (1935).

<sup>25</sup>*Davis v. Cramer*, 133 Ark. 224, 202 S. W. 239 (1918); *White v. Pacific Mut. Life Ins. Co.*, 150 Va. 849, 143 S. E. 340 (1928); *First Wisconsin Nat. Bank of Milwaukee v. Roehling*, 224 Wis. 316, 269 N. W. 677 (1936). See *Union Central Life Ins. Co. v. Flicker*, 101 F. (2d) 857, 862 (C. C. A. 9th, 1939). Cf. *Burlingham v. Crouse*, 228 U. S. 459, 33 S. Ct. 564, 57 L. ed. 920 (1930), where it was inferred that if a cash surrender value had existed it could have been recovered by the trustee. But see *Elliot v. Bryan*, 64 Md. 368, 1 Atl. 614 (1885) (cash surrender value could not be recovered).

<sup>26</sup>Some state decisions in creditor proceedings would permit the creditor to reach the stated face value of the policy: *Love v. First Nat. Bank*, 228 Ala. 258, 153 So. 189 (1934); *Planter's State Bank v. Willingham*, 111 Ky. 64, 63 S. W. 12 (1901). There is no question that in bankruptcy proceedings the trustee is *not* entitled to the proceeds of a policy. *Everett v. Judson*, 228 U. S. 474, 33 S. Ct. 568, 57 L. ed. 927 (1913); *Andrews v. Partridge*, 228 U. S. 479, 33 S. Ct. 570, 57 L. ed. 929 (1913).

<sup>27</sup>*Burns v. Kinzer*, 161 F. (2d) 806 (C. C. A. 6th, 1947); *In re Fielchenfeld*, 99 F. (2d) 710 (C. C. A. 7th, 1938); *In re Sherk*, 108 F. Supp. 138 (N. D. Ohio 1952).

property on the eve of bankruptcy.<sup>28</sup> However, in the light of the *Driscoll and Silansky*<sup>29</sup> decisions, this conclusion becomes doubtful, and there is authority which apparently holds that even the cash surrender value would not be recoverable by the trustee in bankruptcy.<sup>30</sup>

The above situation is not to be confused with the case in which an insolvent on the verge of bankruptcy assigns to a creditor or some other unprotected party a policy which is clearly exempt because it was taken out in favor of a protected beneficiary. It is generally held in this case that the assignment is valid since only non-exempt property vests in the trustee so as to become available for distribution to creditors.<sup>31</sup> Thus, the remaining creditors are not prejudiced since they could not have reached the exempt insurance policy had it remained the property of the bankrupt.

A further troublesome question frequently arises when the insured, while insolvent, makes premium payments on life insurance

---

<sup>28</sup>It has been suggested that if the insured while insolvent changes the beneficiary of a policy that has a cash surrender value from his estate to a third party but retains the right further to change the beneficiary, the trustee should be entitled to the cash surrender value by virtue of Sec. 70a(3) of the Bankruptcy Act. It is also suggested that if the right further to change the beneficiary is surrendered the trustee could still obtain the cash surrender value by treating it as a fraudulent conveyance. Note (1936) 3 U. of Chi. L. Rev. 303, 306. There is very little authority on this exact point. 3 Remington, Bankruptcy (4th ed. 1941) § 1247, n. 13, cites only *Kirkpatrick v. Johnson*, 197 Fed. 235 (S. E. D. Pa. 1912), but this decision made no mention of an exemption statute which might aid the assignee of the policy. Collier, Bankruptcy Manual (1948) § 70, p. 929, n. 14, cites *Burlingham v. Crouse*, 228 U. S. 459, 33 S. Ct. 564, 57 L. ed. 920 (1913) and *In re Cooper's Estate* 28 F. (2d) 438 (D. C. Md. 1928) as authority for the point that if a bankrupt makes a valid assignment of a policy payable to himself or his estate, the trustee takes nothing under Sec. 70a(5). This authority seems questionable, however. The *Burlingham* case involved no cash surrender value, and the Supreme Court by way of dictum implied that if one existed, the trustee would be entitled to it. The *Cooper* case failed to mention the possibility that the absolute transfer of the third policy may have been tainted with fraud. 28 F. (2d) 438 at 440.

<sup>29</sup>*In the Matter of Driscoll*, 142 F. Supp. 300 (S. D. Cal. 1956); *In re Silansky*, 21 F. Supp. 41 (E. D. Pa. 1937).

<sup>30</sup>*In re Cooper's Estate* 28 F. (2d) 438 at 440 (D. C. Md. 1928) (see holding on third policy involved); *Greiman v. Metropolitan Life Ins. Co.*, 96 F. (2d) 823, (C. C. A. 3rd, 1938) (though the case involved payment of premiums while insolvent, the court interpreted the New Jersey exemption statute to mean that the cash surrender value could only be used to benefit creditors upon the death of insured).

<sup>31</sup>*Negin v. Salomon*, 151 F. (2d) 112, 161 A. L. R. 1005 (C. C. A. 2nd, 1945). *In re Rubin*, 29 F. Supp. 416 (S. D. N. Y. 1939); *Jackson v. Jeter*, 160 Iowa 571, 142 N. W. 431 (1913). Nor can a transfer of exempt property constitute a voidable preference: *Schwartz v. Holzman*, 69 F. (2d) 814 (C. C. A. 2nd, 1934) cert den. 293 U. S. 565, 55 S. Ct. 76, 79 L. ed. 665 (1934); *In re Leech*, 171 Fed. 622 (C. C. A. 6th, 1909).

policies which were taken out in favor of dependent beneficiaries. The exemption statutes have played a major role in providing a solution to this problem, at least in so far as they are indicative of legislative reaction to the debtor's plight. Generally these statutes can be grouped into two broad categories: (1) those in which no specific limitation is placed on the amount of insurance that may be exempted,<sup>32</sup> and (2) those in which only a certain amount of insurance or insurance purchased with a stipulated annual premium is exempted.<sup>33</sup>

Statutes of the first category often are qualified by an express provision that premiums paid in fraud of creditors can be reached by the creditors.<sup>34</sup> One court has interpreted this provision to mean that a showing of insured's insolvency at the time of payment of premiums is sufficient to enable the creditors to reach the premiums;<sup>35</sup> but another court required proof of other indicia of fraud in addition to the mere showing of insolvency at the time of payment.<sup>36</sup> This additional evidence of fraud may be adduced by showing that the debtor used an unreasonable portion of his assets to purchase the insurance.<sup>37</sup> If the allegation of fraud is proved, the creditors are allowed to recover only the premiums paid in fraud of creditors.<sup>38</sup> Thus, a determination must be made as to what constitutes a reasonable amount to devote to premiums, and the reasonable sum having been ascertained, the excess over that amount is then set aside for the creditors.<sup>39</sup> In several states

<sup>32</sup>Ala. Code Ann. (1940) tit. 7, § 624; 6 Ark. Stat. Ann. (1947) § 66-511; 4 Del. Code (1953) tit. 18, § 917; 11 Fla. Stat. Ann. (1943) §§ 222.13, 222.14; Ga. Laws (1947) § 56-905, p. 1154; Ill. Ann. Stat. (Smith-Hurd 1940) c. 73, § 850; Iowa Code Ann. (1954) § 511.37; Kan. Stat. Ann. (1949) § 40-414; Ky. Stat. Ann. (Baldwin 1953) § 427.110; 3 Mich. Comp. Laws (1948) § 522-24; N. J. Stat. Ann. (1939) § 17:34-28; 4 Ohio Rev. Code (Baldwin 1953) § 3911.10; 40 Pa. Stat. Ann. (Purdon 1954) § 517; 10 Tenn. Code Ann. (1955) §§ 56-1109, 56-1110.

<sup>33</sup>Ariz. Code Ann. (1939) § 24-601(13) (\$10,000 limit); Cal. Code of Civil Procedure (Deering 1953) § 690.19 (\$500 annual premium); Miss. Code Ann. (1942) § 308 (\$10,000 limit); Mo. Rev. Stat. (1949) § 376.560 (\$500 annual premium); 4 S. C. Code Ann. (1952) § 37-169 (\$25,000 limit).

<sup>36</sup>Ark. Stat. Ann. (1947) § 66-511; 4 Del. Code (1953) tit. 18, § 917; N. J. Stat. Ann. (1939) § 17:34-28; 5 N. Y. Consol. Laws (1950) Ins. § 166; 4 Ohio Rev. Code (Baldwin 1953) § 3911.10.

<sup>35</sup>In re Hirsch, 4 F. Supp. 708 (S. D. N. Y. 1933).

<sup>37</sup>Doethlaff v. Penn Mutual Life Ins. Co., 117 F. (2d) 582 (C. C. A. 6th, 1941) cert. den. 313 U. S. 579, 61 S. Ct. 1100, 85 L. ed. 1536 (1941).

<sup>38</sup>Levy v. Globe Bank & Trust Co., 143 Ky. 690, 137 S. W. 215 (1911). See Central National Bank of Washington v. Hume, 128 U. S. 195, 209, 9 S. Ct. 41, 46, 32 L. ed. 370, 377 (1888); In re Newberger, 1 F. Supp. 685, 687 (W. D. Okla. 1932) (payment of premiums approximating \$1000 out of \$10,000 yearly income held not unreasonable).

<sup>39</sup>Clay County Bank v. Wilson, 109 W. Va. 684, 158 S. E. 517 (1930).

See Central National Bank of Washington v. Hume, 128 U. S. 195, 209, 9 S. Ct. 41, 46, 32 L. ed. 370, 377 (1888).



the statutes neither limit the amount of insurance which can be purchased nor contain any clause specifying that premiums paid in fraud of creditors can be set aside.<sup>40</sup> As is indicated by the *Silansky* case, the courts of these states have interpreted their statutes as a complete legislative endorsement of the debtor's right to divert assets to exempt insurance.<sup>41</sup>

Those statutes falling into the second classification place a specific monetary limit on the amount of insurance which can be exempt from the claims of creditors, this limitation being achieved by reference either to a stated face amount of insurance or to the amount which may be devoted to payment of premiums annually.<sup>42</sup> An exemption statute in this group may also contain a provision declaring that premiums paid in fraud of creditors may be recovered, meaning that premiums paid in excess of the permitted annual premium may be recovered by the trustee in bankruptcy.<sup>43</sup> The same result has been obtained even in the absence of a clause enabling creditors to claim premiums paid in fraud.<sup>44</sup>

Opinions construing the exemption statutes generally emphasize that if *actual* fraud can be shown, the change of beneficiary, assignment, or payment of premiums can be set aside by creditors.<sup>45</sup> But the term "actual fraud" is rarely defined, and there seems to be no hard and fast test, systematically applied, for determining when actual fraud exists; rather, the rule that actual fraud is a basis for nullifying a

---

<sup>40</sup>3 La. Rev. Stat. (1950) tit. 22, §§ 647, 649; 40 Pa. Stat. Ann. (Purdon 1954) § 517; 10 Tenn. Code Ann. (1955) §§ 56-1109, 56-1110 (applies only in favor of wife, children, or dependent relatives).

<sup>41</sup>In re *Silansky*, 21 F. Supp. 41 (E. D. Pa. 1937). Also *Hogan v. Hall*, 118 F. (2d) 247 (C.C.A. 5th, 1941); *Third National Bank v. Hall*, 30 Tenn. App. 586, 209 S. W. (2d) 46 (1947). A similar result was reached in New Jersey, though the statute states that premiums paid in fraud of creditors can be recovered. *Greiman v. Metropolitan Life Ins. Co.*, 96 F. (2d) 823 (C. C. A. 3rd, 1938) (court interpreted New Jersey Statute to mean that right to reach premiums did not arise until death of insured).

<sup>42</sup>See statutes cited in note 33, supra.

<sup>43</sup>*Harriman Nat. Bank v. Huiet*, 249 Fed. 856 (C. C. A. 4th, 1917). The statute here involved was later ruled in violation of the state constitution on another point. In re *Cunningham*, 15 F. (2d) 700 (C. C. A. 4th, 1926). South Carolina has now removed the intent to defraud proviso and has set the limit of insurance at \$25,000. 4 S. C. Code Ann. (1952) § 37-169.

<sup>44</sup>*Johnson v. Bacon*, 92 Miss. 156, 45 So. 858 (1908) (Mississippi exemption statute interpreted). Cf. in the Matter of *Driscoll* 142 F. Supp. 300 (S. D. Cal. 1956).

<sup>45</sup>*Schwartz v. Seldon*, 153 F. (2d) 344 (C. C. A. 2nd, 1945); *Doethlaff v. Penn Mutual Life Ins. Co.*, 117 F. (2d) 582 (C. C. A. 6th, 1941) cert. den. 313 U. S. 579, 61 S. Ct. 1100, 85 L. ed. 1536 (1941); *Kirkpatrick v. Johnson*, 197 Fed. 235 (S. E. D. Pa. 1912). Cf. In re *Silansky*, 21 F. Supp. 41 (E. D. Pa. 1937); *Greiman v. Metropolitan Life Ins. Co.*, 96 F. (2d) 823 (C. C. A. 3rd, 1938).

transfer is a rule of convenience. It appears from the decisions that the courts are inclined to find actual fraud as a means of providing relief for creditors against an obviously flagrant and unreasonable transfer by the debtor. For example, an exemption was disallowed where the bankrupt for a period of several weeks prior to purchasing the exemption had set aside business funds for that purpose and discontinued paying trade obligations.<sup>46</sup> The court declared that the exemption right was a valuable one but that "it was never intended, and should never be permitted to operate as a vehicle for fraud and rank injustice."<sup>47</sup> Positive fraud has also been based on a finding that a debtor, against whom an involuntary petition had already been filed, promised to submit to an adjudication under a later petition as a scheme for having the present petition dismissed so that he might purchase an exemption in the interim.<sup>48</sup> Similarly, even under a most liberal construction of an exemption statute, it is very doubtful that an insurance policy could be exempted if purchased with embezzled or misappropriated funds.<sup>49</sup> Most courts, however, restrict the actual fraud test rigidly in their efforts to protect the debtor's family. Illustrative of this practice is a Texas case in which the court emphasized that intent to defraud is made out only if the debtor, beneficiary, and insurance company knew the payments were made during insolvency.<sup>50</sup> And a United States Supreme Court decision suggests that actual fraud requires a fraudulent intent of both the insured and either the insurance company or the beneficiary.<sup>51</sup>

Though it is conceded that the legislative purpose to protect a debtor's dependents against destitution should receive sympathetic support, still it appears that the courts have often failed to give due regard to the conflicting policy of the law that creditors should have a right to obtain payment of their claims out of the assets of an insolvent debtor's estate. If an insolvent debtor assigns property which from the outset was of an exempt character, then the creditors cannot complain, for they never could have reached the property;<sup>52</sup> but when he creates an exemption by changing the beneficiary or assigning a non-

---

<sup>46</sup>*Kangas v. Robie*, 264 Fed. 92 (C. C. A. 8th, 1920).

<sup>47</sup>*Kangas v. Robie*, 264 Fed. 92, 94 (C. C. A. 8th, 1920), quoting from *Esty v. Cummings*, 75 Minn. 549, 554, 78 N. W. 242, 244 (1899).

<sup>48</sup>*In re Gerber*, 186 Fed. 693 (C. C. A. 9th, 1911).

<sup>49</sup>*Massachusetts Bonding & Ins. Co. v. Josselyn*, 224 Mich. 159, 194 N. W. 548 (1923).

<sup>50</sup>*San Jacinto Bldg. Inc. v. Brown*, 79 S. W. (2d) 164 (Tex. Civ. App. 1935).

<sup>51</sup>*Central National Bank of Washington v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370 (1888).

<sup>52</sup>See note 31, *supra*.

exempt policy immediately prior to bankruptcy, his action is under suspicion of being a subterfuge designed to defraud creditors rather than a means calculated to protect his beloved ones. It would seem that fair consideration is most likely to be given to both the rights of the creditors and the needs of the debtor's dependents under those exemption statutes which expressly provide that only a specific amount of insurance may be exempted, and that premiums paid with an intent to defraud can be set aside.

CHARLES B. GROVE

CONSTITUTIONAL LAW—VIOLATION OF CONSTITUTIONAL RIGHTS BY REFUSAL OF APPEAL OF STATE CRIMINAL CONVICTION BECAUSE DEFENDANT CANNOT PAY FOR TRANSCRIPT. [United States Supreme Court]

There has long been controversy as to the extent of the federal judicial power to protect individual liberties at the expense of the states' right to control their own criminal procedures, and the dispute has, in *Griffin v. Illinois*,<sup>1</sup> recently been revived even among the members of the Supreme Court itself. Essentially the Court was concerned with only one issue: Whether a refusal to grant an indigent defendant full appellate review of a state criminal conviction, solely because he was too poor to pay for a transcript of the trial proceedings, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>2</sup>

The petitioners had been convicted of armed robbery in Illinois. Thereafter they moved the trial court for a free transcript, contending that they were unable to bear the cost of preparation of a transcript. Illinois law provides that in non-capital criminal appeals the defendant must bear the expense of preparation of the appeal. Petitioners contended that a transcript was necessary to full appellate review and that the failure to provide them with a free transcript was a denial of both due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment. After the court denied this motion, petitioners filed a similar motion under the Illinois Post-Conviction Hearing Act,<sup>3</sup> again claiming that they had been denied due process and equal protection. This petition was likewise dismissed, and the Supreme Court of Illinois affirmed the dismissal on the ground that

---

<sup>1</sup>351 U. S. 12, 76 S. Ct. 585, 100 L. ed. 483 (1956). (All Lawyers Edition citations to the *Griffin* case are to the advance sheet pages.)

<sup>2</sup>351 U. S. 12 at 16, 76 S. Ct. 585 at 588, 100 L. ed. 483 at 488 (1956).

<sup>3</sup>Ill. Ann. Stat. (Smith-Hurd 1955 Supp.) c. 38, §§ 826-832.

no state or federal constitutional issue had been raised. However, the United States Supreme Court held in a five to four decision that the petitioners had been denied due process and equal protection.<sup>4</sup> In so holding, the majority declared: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'."<sup>5</sup>

While conceding that *McKane v. Durston*<sup>6</sup> had held that the Constitution does not require the states to provide any appellate review whatever, the majority in the *Griffin* case ruled that once a state does set up a system of criminal appeals, such system becomes an integral part of that state's criminal procedure and cannot be denied in a discriminatory manner.<sup>7</sup> It was concluded that to deny an appeal on the ground of poverty was an "invidious [discrimination]"<sup>8</sup> which is no more acceptable than a discrimination on the basis of race, religion, or color.

The dissenting opinions acknowledged the desirability of free transcripts for indigents, but denied that the Constitution requires the states to provide them. The dissents pointed out that the administration of state criminal procedures has long been considered to be an area governed by the discretion of the local or state authority, so long as the requirements of due process were met.<sup>9</sup> Relying on the *McKane*

<sup>4</sup>351 U. S. 12 at 19, 76 S. Ct. 585 at 590, 100 L. ed. 483 at 489 (1956). But the Court went on to say: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants." 351 U. S. 12, 20, 76 S. Ct. 585, 590, 100 L. ed. 483, 489 (1956).

<sup>5</sup>351 U. S. 12, 17, 76 S. Ct. 585, 588, 100 L. ed. 483, 488 (1956).

<sup>6</sup>153 U. S. 684 at 687-688, 14 S. Ct. 913 at 914-915, 38 L. ed. 867 at 868 (1894).

<sup>7</sup>351 U. S. 12 at 18, 76 S. Ct. 585 at 589, 100 L. ed. 483 at 489 (1956). Justice Frankfurter, concurring, said: "But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeal, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorize the imposition of conditions that offend the deepest presuppositions of our society." See 351 U. S. 12, 21, 76 S. Ct. 585, 591, 100 L. ed. 483, 490 (1956).

<sup>8</sup>351 U. S. 12, 18, 76 S. Ct. 585, 589, 100 L. ed. 483, 489 (1956).

<sup>9</sup>See *Griffin v. Illinois*, 351 U. S. 12 at 27, 76 S. Ct. 585 at 594, 100 L. ed. 483 at 493 (1956). Therefore it was argued that it is one thing to require the federal courts to provide free transcripts, but quite another to require the states to do so.

It was further noted that it was not until 1944 that an Act of Congress gave indigent defendants in federal courts the right to have free transcripts. 351 U. S. 12 at 38, 76 S. Ct. 585 at 600, 100 L. ed. 483 at 499 (1956), referring to 58 Stat. 5 (1944), 28 U. S. C. A. § 753(f) (1949), 28 U. S. C. A. § 1915(a) (1950).

The dissenting judges actually said that state procedures were unobjectionable

case, the dissenting Justices argued that since appeals may be denied altogether without denying due process, then clearly, where such appeals are granted with certain differences as to the terms upon which an appeal may be taken, there is likewise no denial of due process. If such practice violates any constitutional right, they reasoned, it would be equal protection, and not due process.<sup>10</sup> As to equal protection, the dissenters concluded that when the right of appeal is open to all, there is no unconstitutional discrimination merely because some people are too poor to avail themselves of that appeal. This view was supported by the argument that "The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws."<sup>11</sup>

In a forceful separate dissent, Justice Harlan noted that rather than *preventing* discrimination the majority holding would *require* discrimination by giving to the indigent what all others must pay for. He further argued that the majority must have found that the denial in this case was a denial of a right "implicit in the concept of ordered liberty . . .,"<sup>12</sup> because otherwise the Supreme Court would not have gained the right to enter into a state matter under cover of the Fourteenth Amendment. In Justice Harlan's view, the rationale of the

---

so long as they were within "the broad range of permissible due process." If it was intended that the word "permissible" add any special meaning to the quoted phrase, that special meaning has eluded this writer.

<sup>10</sup>See 351 U. S. 12 at 27, 76 S. Ct. 585 at 594, 100 L. ed. 483 at 493 (1956).

<sup>11</sup>351 U. S. 12, 29, 76 S. Ct. 585, 595, 100 L. ed. 483, 494 (1956).

<sup>12</sup>Griffin v. Illinois, 351 U. S. 12, 38, 76 S. Ct. 585, 600, 100 L. ed. 483, 499 (1956) which quoted from Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937). Justice Harlan argued that there was no denial of equal protection because "All Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." 351 U. S. 12, 34, 76 S. Ct. 585, 598, 100 L. ed. 483, 497 (1956). As to whether or not there had been a violation of due process, he conceded that the holding in the McKane case did not mean that a state is wholly free of restraints once a system of criminal appeals has been set up by the state, but he argued that the decision "does mean, however, that there is no 'right' to an appeal in the same sense that there is a right to trial." 351 U. S. 12, 37, 76 S. Ct. 585, 599, 100 L. ed. 483, 498 (1956). Therefore, Justice Harlan contended that, with respect to appeals, the Due Process Clause merely guarantees the accused that he will not be denied an appeal for purely capricious and arbitrary reasons. 351 U. S. 12 at 37, 76 S. Ct. 585 at 599, 100 L. ed. 483 at 498 (1956). He contended that there was nothing arbitrary in requiring a defendant to pay for his own transcript. But, the majority reasoned, according to Justice Harlan, that if it was not arbitrary, it was at least so unfair as to amount to a denial of due process. To the argument that it is unfair, Justice Harlan replied, "I have some question whether the non-arbitrary denial of a right that the State may withhold altogether could ever be so characterized." 351 U. S. 12, 38, 76 S. Ct. 585, 599, 100 L. ed. 483, 499 (1956).

majority opinion was merely the application of an unarticulated standard of fundamental fairness to state proceedings, which application has no precedent in this specific context.

It is difficult to choose between the majority and the dissenting opinions, since each is appealing in its own way. The dissents, particularly that of Justice Harlan, would appear to present the more conventional and time-honored argument, and, in that sense, the more legalistic argument.<sup>13</sup> Logically, the position of the dissenters appears to be unassailable, and yet, as in the case of many purely logical arguments, it leads to a conclusion which somehow seems not wholly fair. The majority opinion, on the other hand, reflects a breaking away from the reasoning of earlier cases. However, though the decision is a clear departure from previous holdings, it marks only the latest step in the gradual expansion of the federal protection of individual liberties in the field of criminal prosecution.<sup>14</sup>

As early as 1821, in *Cohens v. Virginia*,<sup>15</sup> Chief Justice Marshall laid down the rule that the Supreme Court had the power to review criminal judgments of the state courts whenever a federal question was involved. This power, however, was strictly curtailed by *Barron v. Baltimore*<sup>16</sup> in which it was decided that the Bill of Rights was directed only against the federal government and did not apply to the states. Thus, for many years, the states were left almost entirely free of federal controls in the criminal field.<sup>17</sup>

The first really significant opportunity for expansion of federal supervision of state criminal procedures came with the adoption of the Fourteenth Amendment in 1868,<sup>18</sup> and the scope of that amendment soon became the subject of controversy. In *Hurtado v. California*<sup>19</sup> it was held that the Due Process Clause did not incorporate any of the

<sup>13</sup>This conclusion is drawn from an analysis of the cases cited in note 30, *infra*.

<sup>14</sup>This gradual expansion is briefly traced in the text at notes 15 through 29, *infra*.

<sup>15</sup>Wheat. 246, 5 L. ed. 257 (1821).

<sup>16</sup>7 Pet. 243, 8 L. ed. 672 (1833).

<sup>17</sup>The only real restrictions upon the states were those which were imposed by U. S. Const., Art. I § 10, which relate to *ex post facto* laws and bills of attainder. Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts"* (1953) 41 Calif. L. Rev. 672 at 673.

<sup>18</sup>Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Desserts"* (1954) 41 Calif. L. Rev. 672; Scott, *State Criminal Procedure, The Fourteenth Amendment and Prejudice* (1954) 49 N. W. L. Rev. 319; Allen, *Due Process and State Criminal Procedures: Another Look* (1953) 48 N. W. L. Rev. 16; Nutting, *The Supreme Court, The Fourteenth Amendment, and State Criminal Cases* (1935) 3 U. of Chi. L. Rev. 244 at 245; Boskey and Pickering, *Federal Restrictions on State Criminal Procedure* (1946) 13 U. of Chi. L. Rev. 266.

<sup>19</sup>110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232 (1884) (dissent at 4 S. Ct. 292).

specific guarantees of the Bill of Rights. But, in 1932, in *Powell v. Alabama* (The Scotsboro Cases) the Supreme Court repudiated the *Hurtado* doctrine and held that those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"<sup>20</sup> are included within the meaning of the Fourteenth Amendment, despite the fact that they are specifically enumerated in the Bill of Rights. By means of the Fourteenth Amendment the Supreme Court, since the *Powell* decision, has vastly expanded and increased the power of the federal judiciary to supervise and review state criminal procedures.<sup>21</sup>

It is to be observed, however, that the *Powell* case did not go so far as to say that the Fourteenth Amendment incorporated all of the provisions of the Bill of Rights. Indeed, the theory that the Fourteenth Amendment does do so—which might be called the total incorporation theory<sup>22</sup>—has never been accepted by a majority of the Supreme Court; yet it is significant that this total incorporation theory has been advocated repeatedly in dissenting opinions.<sup>23</sup> This advocacy, even by way of dissent, would seem to be indicative of the strong pull toward greater federal supervision of state criminal procedures.<sup>24</sup>

There is another line of cases which demonstrates this constant

<sup>20</sup>287 U. S. 45, 67, 53 S. Ct. 55, 63, 77 L. ed. 158, 169, 84 A. L. R. 527, 539 (1932) quoting from *Hebert v. Louisiana*, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. ed. 270, 273, 48 A. L. R. 1102, 1106 (1926).

<sup>21</sup>Allen, *Due Process and State Criminal Procedures: Another Look* (1953) 48 N. W. L. Rev. 16. For an exhaustive listing and discussion of cases in which the Supreme Court has condemned certain conduct as violative of the Fourteenth Amendment, see Scott, *State Criminal Procedure, the Fourteenth Amendment, and Prejudice* (1954) 49 N. W. L. Rev. 319 at 321 et seq.

<sup>22</sup>The more conventional term for this view is "incorporation" theory. Gorfinkel, *The Fourteenth Amendment—"Ordered Liberty" or "Just Deserts"* (1953) 41 Calif. L. Rev. 672 at 674. However, it seems that usage of the term "total incorporation" is more satisfying in that it prevents any possibility of confusion of this theory with the widely accepted view that only those procedures "implicit in the concept of ordered liberty" are incorporated by the Fourteenth Amendment. See *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

<sup>23</sup>See *Twining v. New Jersey*, 211 U. S. 78 at 117, 29 S. Ct. 14 at 27, 53 L. ed. 97 at 113 (1908); *Betts v. Brady*, 316 U. S. 455 at 474, 62 S. Ct. 1252 at 1262, 86 L. ed. 1595 at 1607 (1942); *Adamson v. California*, 332 U. S. 46 at 68, 67 S. Ct. 1672 at 1684, 91 L. ed. 1903 at 1917, 171 A. L. R. 1223 at 1237 (1947); *Bute v. Illinois*, 333 U. S. 640 at 677, 68 S. Ct. 763 at 782, 92 L. ed. 986 at 1006 (1948); *Wolf v. Colorado*, 338 U. S. 25 at 40, 69 S. Ct. 1359 at 1368, 93 L. ed. 1782 at 1792 (1949); *Rochin v. California*, 342 U. S. 165 at 174 and 177, 72 S. Ct. 205 at 211 and 212, 96 L. ed. 183 at 191 and 193, 25 A. L. R. (2d) 1396 at 1404 and 1405 (1952).

<sup>24</sup>However, only Justices Black and Douglas remain firmly committed to the total incorporation theory. Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts"* (1954) 41 Calif. L. Rev. 672 at 674.

increase of federal power in the criminal field. These are the cases in which the accused in a state criminal proceeding claims a denial of due process in the state courts and therefore brings an action for a writ of *habeas corpus* in the federal courts. In such cases it early became apparent that federal supervision would not be wholly denied.<sup>25</sup> In *Frank v. Mangum*,<sup>26</sup> the petitioner contended that he had been denied due process because the trial was held under circumstances which amounted to mob domination. Upon appeal to the Supreme Court it was held that due process had not been denied because the petitioner had not exhausted his state remedies. Justices Holmes and Hughes dissented, arguing that where there was in fact no fair trial, the federal courts should exercise their authority notwithstanding the principle of comity.<sup>27</sup> In a later case where the trial was allegedly dominated by a mob, and the accused had appealed to the federal court seeking *habeas corpus*, the reasoning of Justice Holmes prevailed, and the power of the federal courts to issue writs of *habeas corpus* in extreme cases became firmly established.<sup>28</sup>

The result of these decisions is not a clear cut rule which delimits the power of the federal judiciary within sharply defined and easily ascertainable boundaries. Rather, the boundaries of the federal authority to review state criminal procedures are left nebulous and uncertain.<sup>29</sup>

However, some definite principles have been established in regard to the right of appeal. As previously noted, that right is not necessary

<sup>25</sup>Notes (1923) 37 Harv. L. Rev. 247 and 265; (1923) 7 Minn. L. Rev. 513; (1925) 73 U. of Pa. L. Rev. 430; (1923) 9 Va. L. Rev. 556; (1923) 33 Yale L. J. 82.

<sup>26</sup>237 U. S. 309, 35 S. Ct. 582, 59 L. ed. 969 (1915).

<sup>27</sup>"Whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." And, therefore, when there was no fair trial, "notwithstanding the principle of comity and convenience... that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of *habeas corpus*, when, as here, that resort has been had in vain, the power to secure fundamental rights that had existed at every stage becomes a duty and must be put forth." 237 U. S. 309, 347 and 348, 35 S. Ct. 582, 595, 59 L. ed. 969, 988 (1915).

<sup>28</sup>*Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. ed. 543 (1923). However, Justices McReynolds and Sutherland, still adhering to the doctrine of *Frank v. Mangum*, dissented, saying: "Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great State, which this court has refused to review, can be successfully impeached by the mere *ex parte* affidavits..." 261 U. S. 86, 102, 43 S. Ct. 265, 270, 67 L. ed. 543, 550 (1923). For comparison of *Frank v. Mangum* and *Moore v. Dempsey*, see articles cited note 25, *supra*.

<sup>29</sup>It is said that the rights protected by the Fourteenth Amendment are only those which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937).



to due process, because appellate review is a matter of grace and not of right,<sup>30</sup> and thus has not been considered to be essential to a "scheme of ordered liberty."<sup>31</sup> A possible limitation on this general proposition, announced by the United States Court of Appeals for the District of Columbia in 1941, was that a defendant could not be denied an appeal on purely arbitrary grounds.<sup>32</sup> However, the decision in the *Griffin* case, in holding that a denial of appellate review on the grounds of the inability of the accused to pay for it is discriminatory and therefore a violation of due process of law and equal protection of law, definitely narrows the scope of the power of the states to withhold the right of appeal.

The effect of the decision in the *Griffin* case promises to be far-reaching. It has already been cited as controlling in two recent state court decisions. In the first case so decided, involving an hitherto unenforceable claim for a free transcript of record in connection with an appeal in a non-capital case, the New York court ordered

<sup>30</sup>*McKane v. Durston*, 153 U. S. 648, 14 S. Ct. 913, 38 L. ed. 867 (1894); *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390, 47 L. ed. 563 (1903); *Cobbledick v. United States*, 309 U. S. 323, 60 S. Ct. 540, 84 L. ed. 783 (1940); *Haywood v. United States*, 268 Fed. 795 (C. C. A. 7th, 1920) cert. den. 256 U. S. 689, 41 S. Ct. 449, 65 L. ed. 1172 (1920); *United States v. St. Clair*, 42 F. (2d) 26 (C. C. A. 8th, 1930); *De Maurez v. Swope*, 104 F. (2d) 758 (C. C. A. 9th, 1939); *Nivens v. United States*, 139 F. (2d) 226 (C. C. A. 5th, 1943) cert. den. 321 U. S. 787, 64 S. Ct. 780, 88 L. ed. 1077 (1944); *State v. Zukauskas*, 132 Conn. 450, 45 A. (2d) 289 (1945); *State v. Hess*, 178 Kan. 452, 289 P. (2d) 759 (1956); *Smith v. Bastin*, 192 Ky. 164, 232 S. W. 415 (1921); *Poppa v. Wannamaker*, 128 N. E. (2d) 764 (Ohio 1956); *Orfield*, *The Right of Appeal in Criminal Cases* (1936) 34 Mich. L. Rev. 937. The rationale of this view has been that "though writs of error with certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand. In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law." *Haywood v. United States*, 268 Fed. 795, 798 (C. C. A. 7th, 1920).

<sup>31</sup>The quoted phrase is from *Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937), but that case was not concerned with the point here in issue.

<sup>32</sup>*Boykin v. Huff*, 121 F. (2d) 865 (C. A. D. C., 1941). It is interesting to note that this per curiam opinion was delivered by Judge Rutledge (later appointed to Supreme Court) for a court which included Judge Vinson (later elevated to Chief Justiceship of Supreme Court). That this holding may have foreshadowed the holding in the *Griffin* case clearly appears from Rutledge's opinion: "But when the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens. The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily." 121 F. (2d) 865, 872 (C. A. D. C., 1941).

that the defendant be furnished a free transcript as requested.<sup>33</sup> The tone of this case is one of approval of the *Griffin* decision. The second case involved an application for a writ of *habeas corpus* by an indigent prisoner who sought to have reviewed a judgment claimed to be void, but who asserted that he was prevented from doing so by the statutory requirement that he post an appeal bond.<sup>34</sup> Reasoning that the case before it was much stronger than the petitioner's case in *Griffin v. Illinois*, the Oregon court, though limiting its decision "to the specific facts of this case,"<sup>35</sup> waived the requirement of a bond. That the Oregon Supreme Court was extremely cautious in its acceptance and approval of the *Griffin* case was made clear by its declaration that "We are forced, not by our own reasoning, but by the necessary implications of the decision of the United States Supreme Court, to hold that the enforcement in this case of the requirement for an appeal bond would violate the Equal Protection Clause of the Fourteenth Amendment. . . ."<sup>36</sup>

If considered in purely abstract terms, the principal decision is appealing to the sense of "fundamental fairness,"<sup>37</sup> but there are practical and political objections which cannot be lightly cast aside. It may easily lead to a flood of litigation coming from persons now incarcerated who could claim that they have been denied their constitutional rights, on the ground that when they were convicted they were unable to take an appeal because they could not bear the expense imposed by statute. The case then would have a vast disruptive effect upon the criminal procedures of many states. The existence of this problem led Justice Frankfurter to suggest in his concurring opinion that the decision should only be applied prospectively.<sup>38</sup> But the other four members of the majority did not so hold and, consequently, the opinion of those four members of the Court contains no restriction against retrospective operation of the rule laid down. The magnitude of the problems anticipated as flowing from this case so disturbed Justice Harlan that he argued that the Supreme Court should not have

---

<sup>33</sup>*People v. Jackson*, 2 Misc. (2d) 521, 152 N. Y. S. (2d) 893 (1956).

<sup>34</sup>*Barber v. Gladden*, 298 P. (2d) 986 (Ore. 1956).

<sup>35</sup>298 P. (2d) 986, 990 (Ore. 1956).

<sup>36</sup>298 P. (2d) 986, 990 (Ore. 1956).

<sup>37</sup>See *Griffin v. Illinois*, 351 U. S. 12, 36, 76 S. Ct. 585, 598, 100 L. ed. 483, 498 (1956).

<sup>38</sup>See *Griffin v. Illinois*, 351 U. S. 12 at 25, 76 S. Ct. 585 at 593, 100 L. ed. 483 at 492 (1956). The New York court has, however, given the holding retrospective application. *People v. Jackson*, 2 Misc. (2d) 521, 152 N. Y. S. (2d) 893 (1956). Cf. *United States v. Sanders*, 142 F. Supp. 638 at 646 (D. C. Md. 1956).

decided this case at all on the facts as presented by the record,<sup>39</sup> and a similar disquietude as to the disruptive effect of the case is reflected in the cautious and limited application given the new ruling by the Supreme Court of Oregon.<sup>40</sup>

It may well be argued that the problem of whether or not indigents should be provided with the means for taking an appeal without bearing the usual expenses is better left in the hands of local authority and to local discretion. In its zeal to protect individual rights, the Supreme Court may be destroying another American political heritage—the right to be governed at the local level. The federal system should not be sacrificed except when and where such sacrifice is absolutely essential. In view of the increasing amount of state legislation designed to aid indigents,<sup>41</sup> there is considerable doubt as to whether the rule of *Griffin v. Illinois* is such an essential, or, in the familiar words of Justice Cardozo, whether this extension of federal protection of civil rights is essential to a “scheme of ordered liberty.”

LYNN F. LUMMUS

CONTRACTS—MUTUALITY OF OBLIGATION IN CONTRACT UNDER WHICH ONE PARTY MAY DISCONTINUE PERFORMANCE AT HIS DISCRETION. [Maryland]

How far one party can go in reserving the right to avoid being bound by his contract and still have mutuality of obligation sufficient to make the contract binding on the other party is a question of perpetual interest to the business man and the practicing attorney. The familiar assertion that mutuality of obligation is a prerequisite to the

<sup>39</sup>See *Griffin v. Illinois*, 351 U. S. 12, 29, 76 S. Ct. 585, 595, 100 L. ed. 483, 494 (1956). Harlan would have declined to answer the constitutional question raised in the *Griffin* case on the authority of *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549 at 584, 67 S. Ct. 1409 at 1427, 91 L. ed. 1666 at 1686 (1947).

<sup>40</sup>“This decision is strictly limited in its application to the specific facts of this case. It may be argued that the decision in *Griffin v. Illinois* has wider application. We think the Supreme Court will not carry its ruling to such coldly logical extreme as would disrupt the accepted judicial procedures of the 48 states.” *Barber v. Gladden* 298 P. (2d) 986, 990 (Ore. 1956).

<sup>41</sup>As example of such statutes, see 3 Ark. Stats. Ann. (Bobbs-Merrill 1947) § 22-357; 3 Ohio Rev. Code Ann. (Baldwin 1953) § 2301.24 (1952); 2 S. C. Code Ann. (Michie 1952) § 15-1903. For a listing of the early state statutes concerning an indigent's right to counsel, see *Betts v. Brady*, 316 U. S. 455 at 467 et seq., 62 S. Ct. 1252 at 1258 et seq., 86 L. ed. 1595 at 1604 et seq. (1942). Also see notes (1942) 11 Geo. Wash. L. Rev. 254; (1942) 27 Marq. L. Rev. 34; (1949) 97 U. of Pa. L. Rev. 855; (1941) 14 Rocky Mt. L. Rev. 69; (1949) 24 Wash. L. Rev. 161; (1941) 27 Wash. U. L. Q. 272; (1936) 100 A. L. R. 321.

formation of a valid bilateral contract is at best an unnecessarily confusing way of stating that there must be a valid consideration.<sup>1</sup> The doctrine of mutuality of obligation appears to be merely one aspect of the rule that mutual promises constitute consideration for each other, provided they are binding on both parties.<sup>2</sup> But where there is other consideration which will support the contract, mutuality of obligation through binding mutual promises is not essential, and the question of mutuality should not arise.<sup>3</sup>

That the mutuality argument nevertheless continues to harass the courts is indicated by the recent Maryland case of *Stamatiades v. Merit Music Service*.<sup>4</sup> Defendant restaurant owner, in consideration of a loan of \$3,000 from plaintiff, agreed to rent from plaintiff certain coin-operated vending machines on a 50-50 profit-sharing basis. Defendant also agreed to use the plaintiff's machines and no others for the period of the five year agreement. Plaintiff agreed to install the machines and keep them in repair, but reserved the right to terminate the agreement should his share of the profit drop below \$70 per week, and then stipulated further that: "Should there be any necessity in the sole discretion of the Operator [plaintiff] for the equipment to be replaced or for the number of machines to be decreased, the Proprietor [defendant] agrees to permit the operator to change or to decrease the number of machines . . .".<sup>5</sup> A few weeks after the agreement was put into effect, plaintiff discovered that defendant had disconnected the machines and installed machines of plaintiff's competitor without notice

---

<sup>1</sup>There has been a tendency on the part of the courts and attorneys to confuse *mutuality* of obligation with *equality* of obligation, which has never been deemed a requisite in the formation of a binding bilateral contract. Equity may refuse to enforce specifically a contract which it views as imposing a harsh forfeiture or penalty, but to deny the legal validity of the contract would be to contradict the long established rule of law which holds adequacy of consideration to be a matter exclusively for decision of the parties. This confusion is most common in contracts giving an option to one party. Of course, if this option is so unlimited in its scope as to render the promise illusory, there will be no valid contract. I Williston, Contracts (Rev. ed. 1936) § 141 and cases cited.

For confusion of mutuality of *obligation* with mutuality of *remedy* see note 7, *infra*.

<sup>2</sup>*Meurer Steel Barrell Co. v. Martin*, 1 F. (2d) 687 (C. C. A. 3rd, 1924); *Hunt v. Stimson*, 23 F. (2d) 447 (C. C. A. 6th, 1928); *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 283 Pa. 434, 129 Atl. 559 (1925); *Sherril v. Alabama Appliance Co.*, 240 Ala. 46, 197 So. 1 (1940); *Ashley, D. & N. Ry. v. Cunningham*, 120 Ark. 346, 196 S. W. 789 (1917); *Jackson v. Pepper Gas Co.*, 280 Ky. 226, 133 S. W. (2d) 91, 126 A. L. R. 1370 (1939); *Roberts v. Anthony*, 185 S. W. 423 (Tex. Civ. App. 1916); *Lloyd v. American Can Co.*, 128 Wash. 298, 222 Pac. 876 (1924).

<sup>3</sup>See cases cited in note 2, *supra*.

<sup>4</sup>124 A. (2d) 829 (Md. 1956).

<sup>5</sup>124 A. (2d) 829, 832 (Md. 1956).

to plaintiff.<sup>6</sup> On defendant's orders, plaintiff removed his machines, and then commenced this action to secure an injunction preventing defendant from using competing machines during the remainder of the contract period. From a decree for plaintiff, defendant appealed, contending that the injunction, a negative form of specific performance, was improperly issued because plaintiff had power to terminate the agreement at will.<sup>7</sup>

The Court of Appeals of Maryland upheld the issuance of the injunction, first saying that "the granting of the loan was sufficient consideration to support the covenant not to install or permit the installation of competing machines," but immediately thereafter stating that the court was "of the opinion" that the injunction could be sustained on the "independent ground" that "the promises of the [plaintiff] were *not illusory*."<sup>8</sup> "The agreement in the instant case permits Music Service [plaintiff], in the case of any necessity, in its sole discretion, to change or reduce the number of machines. This does not mean that Music Service can evade its obligations to furnish machines and to maintain them in satisfactory operating condition simply by declaring a 'necessity' which does not exist. . . . Though much is left to the discretion of the party to whom the thing or service must be satisfactory, and the judgment of a court is not to be substituted for the honest, even though misguided, judgment of the party, his judgment must be exercised honestly and in good faith. . . .' It is only where the option reserved to the promisor is unlimited that his promise becomes illusory and incapable of forming part of a legal obligation."<sup>9</sup> The court thus

---

<sup>6</sup>Defendant repaid the \$3,000 loan to the bank from which plaintiff borrowed it, also without notice to plaintiff.

Defendant claimed the contract lacked mutuality of *remedy*, but it appears he meant that there was no mutuality of *obligation*. Mutuality of obligation is not to be confused with mutuality of remedy, which requires that specific performance must be available to both parties if it is to be enforced against either. In recent years the doctrine of mutuality of remedy has been practically nullified by exception or expressly rejected by both decisions and statutes. *Esptein v. Gluckin*, 233 N. Y. 490, 135 N. E. 861 (1922). For a complete discussion of the doctrine of mutuality of remedy see 5 Corbin, *Contracts* (1951) § 1180 et seq.; 5 Williston, *Contracts* (Rev. ed. 1937) § 1433 et seq.

<sup>8</sup>124 A. (2d) 829, 837 (Md. 1956) [italics supplied].

<sup>9</sup>124 A. (2d) 829, 838 (Md. 1956) quoting last sentence from I Williston, *Contracts* (Rev. ed. 1936) 126. The sentences immediately following in that treatise suggest that Williston considers any limitation, however slight, as sufficient to sustain a promise: "A promise to give such one of a thousand specified things as the promisor may choose cannot be enforced specifically, but it is not too indefinite to have a clear meaning, and the promisee's damages would be the value of the least valuable of the thousand things. The same is true of a promise to perform whenever within five years the promisor may wish."

held that, even without the loan by plaintiff, the contract was valid, the promises of plaintiff constituting consideration for the promises of defendant.

Generally, in order for a promise to constitute valid consideration it must be definite—i.e., it must provide an objective standard of performance so that the court can fix the legal liabilities of the parties.<sup>10</sup> However, a promise indefinite as to time of performance,<sup>11</sup> price to be paid,<sup>12</sup> property to be transferred,<sup>13</sup> or other miscellaneous matters may be rendered sufficiently definite by a court-imposed standard of reasonable conduct.<sup>14</sup> Apparently there are two essentials prerequisite to such action by the court: the agreement must have been performed on one side either wholly or in part,<sup>15</sup> and it must have been made with contractual intent.<sup>16</sup> Thus, in *Henderson Bridge Co. v. Mc-*

<sup>10</sup>"A promise that is too uncertain in terms for possible enforcement is an illusory promise; but to determine whether or not it is an 'illusion' one must consider the degree and effect of its uncertainty and indefiniteness." 1 Corbin, *Contracts* (1950) 289; "The indefiniteness of promises is important not simply because of the inherent difficulty of enforcing a promise to which no exact meaning can be attached, but also because such a promise is insufficient consideration for another promise." 1 Williston, *Contracts* (Rev. ed. 1936) § 49 and cases cited.

In contract law, vagueness, indefiniteness, and uncertainty are matters of degree, with no absolute standard for comparison, and general principles must be applied in each instance with common sense and in the light of experience. *Shofer v. Jordan*, 284 S. W. (2d) 612 at 615 (Mo. App. 1955). Cf. *Wilhelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 268 N. W. 634 (1936) (holding unenforceable for indefiniteness a promise to take a definite quantity of oil of weight to be chosen by the buyer from a price list), with *Windsor Mfg. Co. v. S. Markransky & Sons*, 322 Pa. 466, 186 Atl. 84, 195 A. L. R. 1096 (1937) (contract held not void for indefiniteness where list established definite standard, performance being limited by reason of a minimum price for each type of goods).

<sup>11</sup>*Sanford v. Luce*, 245 Iowa 74, 60 N. W. (2d) 885 (1953); *Giffels & Vallet, Inc. v. Edward C. Levy Co.*, 337 Mich. 177, 58 N. W. (2d) 899 (1953); *Smith v. Lane*, 236 S. W. (2d) 214 (Tex. Civ. App. 1951).

<sup>12</sup>*Corthell v. Summit Thread Co.*, 132 Me. 94, 167 Atl. 79, 92 A. L. R. 1391 (1933); *Shayeb v. Holland*, 321 Mass. 429, 73 N. E. (2d) 731 (1947).

<sup>13</sup>*Wagner v. Alabama Farm Bureau Federation*, 225 Ala. 513, 143 So. 909 (1932); *Fifer v. Hoover*, 163 Md. 381, 163 Atl. 848. (1933).

<sup>14</sup>For a detailed discussion see 1 Corbin, *Contracts* (1950) §§ 95-102; 1 Williston, *Contracts* (Rev. ed. 1936) §§ 37-49.

<sup>15</sup>No cases enforcing wholly executory promises which are indefinite have been found. It may be argued that where the promisor of an indefinite promise has performed, the promise is thus rendered definite and binding, or that where the promisee has performed he is entitled to recovery on a quantum meruit basis.

<sup>16</sup>Justice Holmes recognized a tendency to use a broad interpretation of "intent," but favored a restricted use: "But although the courts may have sometimes gone a little far in their anxiety to sustain agreements, there can be no doubt of the principle which I have laid down, that the same thing may be a consideration or not, as it is dealt with by the parties." Holmes, *The Common Law* (1923) 293. Under this view the parties must intend that a sum measured by reasonableness

*Grath*,<sup>17</sup> where plaintiff had already performed, the Supreme Court found that a promise to pay "what was right," was, if made with contractual intent, a promise to pay reasonable compensation and was not too indefinite to be enforced. But in *Varney v. Ditmars*,<sup>18</sup> where the indefinite promise was wholly executory, the New York Court of Appeals held it too vague for enforcement despite the use of adjectives importing reasonableness. Judge Cardozo, dissenting, argued: "I do not think it is true that a promise to pay an employee a fair share of the profits in addition to his salary is always and of necessity too vague to be enforced. . . . The promise must, of course, appear to have been made with contractual intent."<sup>19</sup>

At early common law the courts were apparently unwilling to find an objective standard of performance by imposing their own concept of reasonableness upon parties to an indefinite contract, for in 1553 it was stated as a general proposition of law that "if I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it, then it is good."<sup>20</sup> However, under the demands of business practices the definiteness requirement has yielded somewhat to liberalizing tendencies<sup>21</sup>—for example, a court may award such compensation as *it* finds reasonable where defendant has contracted to pay only such sum as in his sole judgment *he* determined to be reasonable;<sup>22</sup> the requirement of performance to "satis-

---

is to constitute the consideration. An intermediate view is expressed in *Corthell v. Summit Thread Co.*, 132 Me. 94, 167 Atl. 79, 81, 92 A. L. R. 1391, 1394 (1933): "If the terms of the agreement are uncertain as to price, but exclude the supposition that a reasonable price was intended, no contract can arise." See further, note 25, *infra*.

<sup>17</sup>134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934 (1890).

<sup>18</sup>217 N. Y. 223, 111 N. E. 822 (1916).

<sup>19</sup>217 N. Y. 223, 111 N. E. 822, 826 (1916). On agreement to pay an employee a fair share of profits, see Note (1951) 18 A. L. R. (2d) 211.

<sup>20</sup>*Mervyn v. Lyds*, 1 Dyer 90a, 91a, 73 Eng. Rep. 195, 197 (K. B. 1553); 8 Holdsworth, *History of English Law* (1926) 17.

<sup>21</sup>"... the doctrine of consideration with its uncertain lines stood in the way of many things which the exigencies of business called for and business men found themselves doing in reliance on each other's business honor . . . with or without assistance from the law." Pound, *An Introduction to Philosophy of Law* (1922) 277-278.

<sup>22</sup>*Pillois v. Billingsly*, 179 F. (2d) 205, 207 (C. A. 2nd, 1950) (recovery allowed "as on a quantum meruit basis"). "Thus, if the contract provides for the payment of a reasonable or a just and equitable price, and the parties are unable to agree upon what is reasonable or just and equitable, the courts will imply that the parties intended for the court to determine a reasonable price as a consideration for the contract." *Beech Aircraft v. Ross*, 155 F. (2d) 615, 617 (C. C. A. 10th, 1946); *Mantell v. International Plastic Harmonica*, 141 N. J. Eq. 379, 55 A. (2d) 250, 173 A. L. R. 1185 (1947). See further Note (1927) 49 A. L. R. 1464.

faction" is held valid under the reasonable man test;<sup>23</sup> reservation of the right to cancel for cause, or by written notice, or after a definite period of time has been held not to render a contract illusory.<sup>24</sup>

Even under the modern liberal approach, the contract in the principal case may seem of questionable validity when considered apart from the \$3,000 loan. Under the words of the contract, plaintiff could "in his sole discretion" declare a necessity to exist and remove some or all of his machines, but defendant could not install other machines until the expiration of the contract. Unless there is some objective standard upon which plaintiff is to base this necessity, plaintiff's promise to supply defendant with machines appears to be illusory. While rather abruptly declaring the promise not to be illusory, the court failed to show wherein plaintiff was in any way controlled in the exercise of his discretion, except that he must act "honestly and in good faith." It is difficult to see how an objective standard of reasonable conduct could be imposed upon plaintiff under such vague limitations. There is no indication in the contract or negotiations surrounding its execution as to what constitutes a "necessity" within the meaning of the contract. The only plausible reason plaintiff would have for removal would be to install the machines in an economically more advantageous location, and such action would not appear to evidence bad faith or dishonest motives, but rather would be an exercise of sound business judgment. The court expressly stated that it would not substitute its own judgment for the honest, though misguided, business judgment of plaintiff. Thus, of the conceivable bases on which plaintiff might exercise his right of removal, the only one which would seem to come under the court's ban would be the use of threat of removal as an instrument of extortion to coerce defendant to extend to plaintiff some benefit having no relation to their contract.<sup>25</sup>

If this analysis be correct, it appears that the Maryland court has, possibly unintentionally, taken a position which supports the argument of some modern writers that a rigid requirement of consideration should be dispensed with and that, instead, subjective contractual intent should be made the test of a valid contract.<sup>26</sup> That both parties had

---

<sup>23</sup>Justice Holmes in *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312 (1889).

<sup>24</sup>1 Williston, *Contracts* (Rev. ed. 1936) § 105, and cases cited in note 11, *supra*.

<sup>25</sup>For example, plaintiff might say to defendant: "Sell me your restaurant or I will withdraw my machines."

<sup>26</sup>"The only justification for the doctrine of consideration at the present day, it is said, is that it furnishes persuasive evidence of the intention of the parties concerned to create a binding obligation, but it does not follow that consideration should be accepted as the *sole* test of such situations." British Law Revision Committee, Sixth Interim Report 18, 31 (1937), quoted in Smith, *A Refresher Course*



contractual intent appears obvious, because machines were actually installed pursuant to the agreement. The manner in which defendant ordered removal of the machines indicates bad faith on his part in repudiating his original intent, and so morally speaking, the court has perhaps reached a proper result. But legally speaking, plaintiff's right to withdraw his consideration remains unlimited by any objective standard.

Equity's ability to frame its decree in such a manner as to meet future contingencies makes equitable remedies more efficient than legal remedies in the type of situation presented in the principal case.<sup>27</sup> If an action for damages is brought on a contract, the law court can only decide that the contract is binding or that it is not. If the contract is found not to be binding, the party providing for wide latitude of performance will find himself without the right to recover damages for failure of the other party to perform his specific promises. If the contract is found to be binding, the court will give the party retaining wide latitude of performance full damages for the other party's failure to perform, even though it is doubtful whether defendant would ever have received performance from plaintiff had defendant not breached.

This inadequacy of the law remedy can be avoided in a court of equity by issuance of a conditional decree, whereby defendant is required to perform only so long as plaintiff exercises good faith in continuing reasonably to make return performance in favor of defendant.<sup>28</sup> Should plaintiff later try to exercise his supposed right to

---

in Cause (1951) 12 La. L. Rev. 1, 35; Wright, Ought the Doctrine of Consideration To Be Abolished From the Common Law (1936) 49 Harv. L. Rev. 1225. No lesser authority than Lord Mansfield apparently felt that the true basis of the doctrine of consideration was evidential: "I take it, that the ancient notion about the want of consideration was for the sake of evidence only. . . ." *Pillans & Rose v. Van Mierop & Hopkins*, 3 Burr 1663, 1669, 97 Eng. Rep. 1035, 1038 (K. B. 1765). This concept is tenably presented today by Professor Corbin: "The existence of what we call sufficient consideration is very generally evidence that the expectation of performance was reasonable and that refusal to enforce would not satisfy the community. As will be seen . . ., other factors under other names may also constitute such evidence." 1 Corbin, *Contracts* (1950) 354. And see Pound, *An Introduction to the Philosophy of Law* (1922) 276-284 where the author recognizes that four centuries of theorizing about consideration have failed to produce a formula, but in conclusion specifically avoids any attempt to re-define consideration lest such attempt upset what the judges have been doing quietly beneath the surface to make promises more enforceable.

For a practical, theoretical and uncommonly readable study of consideration see 1 Corbin, *Contracts* (1950) § 109 et seq.

<sup>27</sup>I.e., where continued performance of plaintiff is not certain.

<sup>28</sup>5 Corbin, *Contracts* (1951) § 1137 and cases cited; Note (1952) 22 A. L. R. (2d) 510 at 517. Restatement, *Contracts* (1932) § 376 provides that if plaintiff's power

terminate the contract and/or withdraw from further performance, defendant can bring the case back before the equity court to test whether or not plaintiff's conduct is in keeping with the condition of the decree. If the court then finds plaintiff to be acting in such an unreasonable manner as to evidence bad faith, it can decree continued performance by plaintiff, or in the case of an injunction outstanding against defendant, it may dissolve that injunction.

Further, by use of the conditional decree, equity avoids the difficult problem of measure of damages which must be met by the law court if it finds the contract to be binding. Obviously, a jury has no accurate means of determining how much damage plaintiff will suffer from defendant's failure to perform a contract which plaintiff might have seen fit to terminate a week or a month or a year later.<sup>29</sup>

Under the apparently absolute form of the injunction as issued in the instant case, defendant is bound by a specific judicial restraint against using any machines other than plaintiff's for the duration of the contract period, but he is given no indication as to the extent of plaintiff's obligation to continue to supply machines for his use. By issuing a conditional decree, the Maryland court could have given plaintiff present relief and still remained in position to give defendant future relief against an unjust removal of the machines, the obligation of plaintiff's promise to be measured by an objective standard of reasonable conduct implied by the court.

E. B. FORTSON

#### CORPORATIONS—SUSPENSION OF CORPORATE ENTITY WHEN ONE PERSON ACQUIRES OWNERSHIP OF ALL STOCK. [North Carolina]

The general proposition that a corporation is a legal entity separate and distinct from its stockholders is applicable not only to multi-shareholder corporations, but has also been applied with equal force to "one-man" corporations where all, or nearly all, of the stock is owned by one individual<sup>1</sup> or by another corporation.<sup>2</sup> Although one-

---

to terminate is contained within the contract itself, the court can cause this power to be extinguished either by the decree or by the performance of defendant.

<sup>29</sup>... a contract is not sufficiently definite and certain to be valid and enforceable unless a court can determine therefrom *the measure of damages* in the event of a breach." *Shofler v. Jordan*, 284 S. W. (2d) 612, 616 (Mo. App. 1955); *Ingram-Day Lumber Co. v. Rodgers*, 105 Miss. 244, 62 So. 230 48 L. R. A. (N. S.) 435 (1913).

<sup>1</sup>*United States v. Weissman*, 219 F. (2d) 837 (C. A. 2nd, 1955); *In re Sterling*, 97 F. (2d) 505 (C.C.A. 9th, 1938); *Exchange Bank of Spokane v. Meikle*, 61 F. (2d) 176 (C. C. A. 9th, 1932); *Finley v. Kantor*, 256 Ala. 103, 53 S. (2d) 347 (1950); *Home*

man corporations have periodically been the subject of critical comment,<sup>3</sup> they have become an important and integral part of the American economic structure, and since the turn of the century, the courts have consistently recognized that the concentration of all of the stock of a corporation in the hands of one person does not, per se, destroy or suspend the corporate entity.<sup>4</sup>

However, in the recent case of *Park Terrace, Inc. v. Phoenix*

*Builders & Suppliers v. Timberman*, 75 Ariz. 337, 256 P. (2d) 716 (1953); *Condenser Service & Engineering Co. v. Brunswick Port Authority*, 87 Ga. App. 469, 74 S. E. (2d) 398 (1953); *Voll v. Zelch*, 198 Iowa 1333, 201 N.W. 33 (1924); *Mente & Co. v. Louisiana State Rice Milling Co.*, 176 La. 476, 146 So. 28 (1933); *Bachrach v. Allen*, 239 Mass. 272, 131 N. E. 857 (1921); *Koengeter v. Holzbaugh*, 332 Mich. 280, 50 N. W. (2d) 778 (1952); *Brock v. Poor*, 216 N. Y. 387, 111 N. E. 229 (1915); *Barium Steel Corp. v. Wiley*, 379 Pa. 38, 108 A. (2d) 336 (1954); *Donaldson v. Andresen*, 300 Pa. 312, 150 Atl. 616 (1930); *Milwaukee Toy Co. v. Industrial Commission*, 203 Wis. 493, 234 N. W. 748 (1931); *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667 (1884); *Christensen v. Nugget Coal Co.*, 60 Wyo. 51, 144 P. (2d) 944 (1944); 1 *Fletcher, Corporations* (1931) 90.

<sup>3</sup>*Roof v. Conway*, 133 F. (2d) 819 (C. C. A. 6th, 1943); *Eastern Industries v. Traffic Controls*, 142 F. Supp. 381 (D. C. Del. 1956); *Austad v. United States Steel Corp.*, 141 F. Supp. 437 (N. D. Cal. 1956); *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 124, 17 P. (2d) 709 (1932); *Exchange Bank v. Macon Construction Co.*, 97 Ga. 1, 25 S. E. 326 (1895); *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 36 N. E. (2d) 354 (1941); *National Oil Works v. Korn Bros.*, 164 La. 800, 114 So. 659 (1927); *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 141 Md. 67, 118 Atl. 279 (1922); *M. McDonough Corp. v. Connolly*, 313 Mass. 62, 46 N. E. (2d) 576 (1943); *Belle City Malleable Iron Co. v. Clark*, 172 Minn. 508, 215 N. W. 855 (1927); *In re Lawyers Mortgage Co.*, 284 N. Y. 371, 31 N. E. (2d) 492 (1940); *Commonwealth v. Sunbury Converting Works*, 286 Pa. 545, 134 Atl. 438 (1926); 1 *Fletcher, Corporations* (1931) 91.

<sup>4</sup>"In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability." *In re Dixie Splint Coal Co.*, 31 F. Supp. 283, 288 (W. D. Va. 1937). This comment was noted with apparent approval by Justice Jackson in *Pepper v. Litton*, 308 U. S. 295 at 313, 60 S. Ct. 238 at 248, 84 L. ed. 281 at 292 (1939). See *Dollar Cleansers & Dyers, Inc. v. MacGregor*, 163 Md. 105, 161 Atl. 159, 161 (1932); Note (1932) 45 Harv. L. Rev. 1084, 1089.

"American law has generally recognized that a one-man company is not per se invalid." *Ballantine, Corporations* (1946) 300; "The legal entity of the corporation exists even in a one-man corporation, so called, and the concentration of shares in one person, or in less than the legally required number, does not ipso facto extinguish the corporate entity." 1 *Fletcher, Corporations* (1931) 102.

Several nineteenth century cases held that the acquisition of all the stock by one shareholder resulted in a "suspension" (but not dissolution) of the corporate entity. *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 So. 351 (1898); *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 21 S. W. 531 (1893); *Swift v. Smith* 65 Md. 428, 5 Atl. 534 (1886). This concept has been carried over into the twentieth century only in Kentucky. *Russell Lumber & Supply Co. v. First Nat. Bank*, 262 Ky. 388, 90 S. W. (2d) 372 (1936); *Hawley Coal Co. v. Bruce*, 252 Ky. 455, 67 S. W. (2d) 703 (1934). For a critical analysis of the suspension theory, see *Wormser, Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496, 515.

*Indemnity Co.*,<sup>5</sup> the Supreme Court of North Carolina has taken the contrary view. Plaintiff corporation entered into a contract with Park Builders whereby Park Builders agreed to construct certain buildings on land owned by plaintiff. Park Builders also delivered to plaintiff a performance bond executed by defendant as surety. Over two years later, all of the common stock of plaintiff was purchased from the four original incorporators by one McLean. As part of the consideration for the sales contract, McLean agreed to make no claim against the vendors, or against Park Builders, for defective workmanship or inferior building materials in the structures located on the corporate premises which had been built by Park Builders pursuant to the contract with plaintiff. Nearly three years later, plaintiff instituted an action for damages for defective workmanship against Park Builders and the surety. As a bar to this claim, defendants pleaded the agreement made by McLean at the time he purchased all of the stock of plaintiff, contending that McLean, by virtue of his authority as sole stockholder, was acting as agent for plaintiff, and that plaintiff, as principal, was bound by his acts. They further sought to have McLean made a party defendant.

On the original appeal,<sup>6</sup> the Supreme Court of North Carolina affirmed the order of the trial court striking defendant's allegations on the ground that the purchase of stock and the execution of the release were not acts of the corporation, but of McLean as an individual. "At the time McLean signed the release contract, he was not a stockholder, director, or officer of plaintiff corporation, and there is no allegation that he was an employee possessing any authority whatsoever to act in behalf of plaintiff."<sup>7</sup> The court further concluded that McLean was not a necessary party, and that plaintiff's rights could be "fully litigated without making him either a party plaintiff or defendant."<sup>8</sup> However, at the very end of the opinion, the court queried ominously: "Since McLean has acquired all the stock of plaintiff, is it now a corporation? This question is not presented by this record."<sup>9</sup> The two dissenting Justices took the view that the real issue involved was not

---

<sup>5</sup>243 N. C. 595, 91 S. E. (2d) 584 (1956). The principal case is discussed critically in Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation* (1956) 34 N. C. L. Rev. 471, and Note (1956) 34 N. C. L. Rev. 531. See also Latty, *The Close Corporation and the New North Carolina Business Corporation Act* (1956) 34 N. C. L. Rev. 432, 441-444.

<sup>6</sup>*Park Terrace, Inc. v. Phoenix Indemnity Co.*, 241 N. C. 473, 85 S. E. (2d) 677 (1955).

<sup>7</sup>241 N. C. 473, 85 S. E. (2d) 677, 679 (1955).

<sup>8</sup>241 N. C. 473, 85 S. E. (2d) 677, 680 (1955).

<sup>9</sup>241 N. C. 473, 85 S. E. (2d) 677, 680 (1955).

whether McLean was acting as agent for plaintiff, but "whether McLean can maintain under the guise of a corporation suit an action for his benefit as sole owner of the plaintiff's common stock."<sup>10</sup> They felt that McLean was a necessary party to the action, and pointed out that this was an appropriate situation for the utilization of the well-established power of equity to look behind the corporate entity to determine the real party in interest "whenever it becomes necessary to do so to promote justice or obviate inequitable results."<sup>11</sup>

On rehearing, the original holding was repudiated and the conclusion was reached that since McLean was at least the equitable owner of the corporate property, and that any recovery would accrue to his sole benefit, he was a necessary party.<sup>12</sup> In support of this conclusion, the court essentially adopted the rationale embodied in the dissenting opinion in the original action, saying: "He will not be permitted to use the corporation of which he is the sole beneficial owner, to cloak his action as an individual."<sup>13</sup> However, the court went further and found that the North Carolina statutes, when considered in composite, required that a corporation be composed of three or more members, and therefore "No lesser number will suffice."<sup>14</sup> Then, in response to the query in the original opinion, it was stated that when one person becomes the owner of all of the stock of a corporation, "the corporation becomes *dormant or inactive* and exists only for the purpose of holding legal title of the property for the use and benefit of the single stockholder who becomes seized of the beneficial title to the property. Not possessing the managerial agencies—stockholders, directors, or officers—contemplated by statute, *it can no longer act as a corporation*. Its decisions are the decisions of a single stockholder, and its action is his action."<sup>15</sup> The cause was remanded with directions to make McLean a party *plaintiff*,<sup>16</sup> and to allow defendant to plead McLean's individual release as a bar to the corporate plaintiff's right to recover.

The result reached in the *Park Terrace* case is commendable in that the court refused to allow McLean to escape his individual contractual

<sup>10</sup>241 N. C. 473, 85 S. E. (2d) 677, 681 (1955).

<sup>11</sup>241 N. C. 473, 85 S. E. (2d) 677, 682 (1955) quoting *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 1032 (1903).

<sup>12</sup>*Park Terrace, Inc v. Phoenix Indemnity Co.*, 243 N. C. 595, 91 S. E. (2d) 584, 586 (1956).

<sup>13</sup>243 N. C. 595, 91 S. E. (2d) 584, 587 (1956).

<sup>14</sup>243 N. C. 595, 91 S. E. (2d) 584, 586 (1956). This language necessarily indicates that the court would also consider two stockholders insufficient.

<sup>15</sup>243 N. C. 595, 91 S. E. (2d) 584, 586 (1956) (italics supplied).

<sup>16</sup>It should be noted that the court made McLean a party plaintiff, even though defendant sought to have him made a party defendant.

obligation under the guise of a corporate suit. Such a restriction is in line with the well-established principle that separate corporate existence is a limited privilege which cannot be asserted for illegal or unfair purposes, and that in proper situations the courts will not hesitate to disregard the corporate entity.<sup>17</sup> "[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."<sup>18</sup> The result achieved in the principal case seems analogous to those of decisions which prevent an individual from doing business as a corporation in a field in which he had previously personally agreed not to compete,<sup>19</sup> or which refuse to allow corporate recovery on a fire insurance policy where the sole shareholder had deliberately set fire to the property in order to collect the insurance.<sup>20</sup> The decisions in these and all similar cases are founded on the basic premise that a shareholder should not be allowed to profit in his corporate capacity when he is guilty of some wrong, or is under some obligation, which would prevent him from so profiting in his individual capacity.<sup>21</sup>

However, in the reasoning given for its conclusion that McLean was a necessary party, the North Carolina court has placed undue emphasis on the fact that a one-man corporation was involved. The court stated: "With respect to a one-man dominated corporation, the corporation may be disregarded . . . because the real facts and justice require it."<sup>22</sup> Although it may be true that the courts have been less hesitant to disregard the corporate entity in the case of a solely-owned corporation, "they do this in such cases not because it is a one-man company, not because there is but one shareholder, but because the other circumstances of the case makes such action imperative. . . . [I]n

---

<sup>17</sup>Ballantine, Corporations (1946) § 122; 1 Fletcher, Corporations (1931) § 41 et seq.

<sup>18</sup>United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (E. D. Wis. 1905).

<sup>19</sup>Beal v. Chase, 31 Mich. 490 (1875); A. Booth & Co. v. Siebold, 37 Misc. 101, 74 N. Y. Supp. 776 (1902); Kramer v. Old, 119 N. C. 1, 25 S. E. 813 (1896). See Knowles v. Jones, 182 Ala. 187, 62 So. 514, 515 (1913).

<sup>20</sup>Meily Co. v. London & L. Fire Ins. Co., 142 Fed. 873 (E. D. Pa. 1906) aff'd 148 Fed. 683 (C. C. A. 3rd, 1906); Sandersville Oil Mill Co. v. Globe & Rutgers Fire Ins. Co., 32 Ga. 722, 124 S. E. 728 (1924); D. I. Felsenthal Co. v. Northern Assur. Co., 284 Ill. 343, 120 N. E. 266 (1918); Kirkpatrick v. Allemania Fire Ins. Co., 102 App. Div. 327, 92 N. Y. Supp. 466 (1905) aff'd 184 N. Y. 546, 76 N. E. 1098 (1906).

<sup>21</sup>Ballantine, Corporations (1946) 297.

<sup>22</sup>Park Terrace, Inc. v. Phoenix Indemnity Co., 241 N. C. 473, 91 S. E. (2d) 584, 587 (1956).

practically every case of a one-man corporation where the veil of entity was brushed aside, the same result would have followed had there been a thousand stockholders, or ten thousand."<sup>23</sup>

By holding that the acquisition of all of the shares of stock by a single stockholder of itself results in the corporation becoming "dormant or inactive" and that "it can no longer act as a corporation," the North Carolina court has adopted a view that has been criticized by the writers,<sup>24</sup> and for which only very slight precedent can be found.<sup>25</sup> Since the corporate enabling acts of most states are similar to the North Carolina statute in that they require a certain number of incorporators (usually three), the formation of one-man corporations is

<sup>23</sup>Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496, 515.

<sup>24</sup>Ballantine, *Corporations* (1946) 301; Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation* (1956) 34 N. C. L. Rev. 471; Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496, 515.

<sup>25</sup>See note 4, *supra*. In support of its holding, the North Carolina court cited twenty cases, two of which are nineteenth century decisions in which "suspension" of the corporate entity is mentioned: *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 So. 351 (1898), criticized as "notorious" by Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496, 515, and *Swift v. Smith* 65 Md. 428, 5 Atl. 534 (1886), of which the Maryland court later said: "The expressions in *Swift v. Smith* . . . however correctly they may have stated the law as it then was in this state, cannot now be accepted without qualification, in view of changes that have taken place in our statutes." *Dollar Cleansers & Dyers, Inc. v. MacGregor*, 163 Md. 105, 161 Atl. 159, 161 (1932). The other cases support, in varying degree, the general proposition that the corporate entity will be disregarded when used for fraudulent or unfair purposes. *Hay v. Comm. of Internal Revenue*, 145 F. (2d) 1001 (C. C. A. 4th, 1944); *Metropolitan Holding Co. v. Snyder*, 79 F. (2d) 263 (C. C. A. 8th, 1935); *Copeland v. Swiss Cleaners*, 255 Ala. 519, 52 S. (2d) 223 (1951); *Watson v. Commonwealth Ins. Co.*, 8 Cal. (2d) 61, 63 P. (2d) 295 (1936); *D. N. & E. Walter & Co. v. Zuckerman*, 214 Cal. 418, 6 P. (2d) 251 (1931); *Wenban Estate v. Hewlett*, 193 Cal. 675, 227 Pac. 723 (1924); *Minifie v. Rowley*, 137 Cal. 481, 202 Pac. 673 (1921); *D. I. Felsenthal Co. v. Northern Assur. Co.*, 284 Ill. 343, 120 N. E. 268 (1918); *Spadra-Clarksville Coal Co. v. Kansas Zinc Co.*, 93 Kan. 638, 145 Pac. 571 (1915); *Louisville & N. R. Co. c. Nield*, 186 Ky. 17, 216 S. W. 62 (1919); *Potts v. Schmucker*, 84 Md. 535, 36 Atl. 592 (1897); *Hallett v. Moore*, 282 Mass. 380, 185 N. E. 474 (1933); *Gardiner v. Burrill*, 225 Mass. 355, 114 N. E. 617 (1916); *United States Gypsum Co. v. Mackey Wall Plaster Co.*, 60 Mont. 132, 199 Pac. 249 (1921); *Quaid v. Ratkowsky*, 183 App. Div. 428, 170 N. Y. Supp. 812 (1918); *Edirose Silk Mfg. Co. v. First Nat. Bank & Trust Co.*, 338 Pa. 139, 12 A. (2d) 40 (1940); *Gamer Paper Co. v. Tuscany*, 264 S. W. 132 (Tex. Civ. App. 1924); *Western Securities Co. v. Spiro*, 62 Utah 623, 221 Pac. 856 (1923). However, none of the above cases even suggests that the acquisition of all the shares by a single stockholder of itself renders the corporation "dormant." In fact in one of the cited Massachusetts cases, the court said: "The mere fact that William J. Moore, father of the defendant, was the sole owner of stock in one corporation, which owned all the stock in another, and an owner of stock with others in undisclosed proportions in a third corporation, cannot produce the result that the corporate entities are to be disregarded, treated as one unit, and as identical with William J. Moore. This point is too amply covered by authority to warrant further discussion." *Hallett v. Moore*, 282 Mass. 380, 185 N. E. 474, 482 (1933).

usually effected through the use of nominal or "dummy" directors to whom qualifying shares of stock are issued if the statute provides that the directors must be stockholders.<sup>26</sup> Although it seems doubtful that these acts were originally intended to cover corporations formed in this manner,<sup>27</sup> the device has received judicial approval in nearly all jurisdictions on the ground that one who organizes a one-man corporation in order to obtain limited liability is not attempting to circumvent the spirit of the statute, but "is merely taking advantage of a privilege conferred by law."<sup>28</sup> Furthermore, there is economic and social justification for the continued existence of one-man companies, since the prospect of limited liability stimulates the small business man to compete with larger corporations, and encourages the investment of capital into new business ventures.<sup>29</sup> Thus far, the legislatures of only three states have seen fit to provide expressly for incorporation by an individual.<sup>30</sup> However, the vast majority of courts have recognized the validity of one-man corporations as long as the sole shareholder maintains his dual capacities and refrains from using the corporation entity for improper purposes.<sup>31</sup>

It can readily be seen that a literal interpretation of the language used by the court in expounding its "dormancy" theory in the principal case would involve serious consequences for the many one- and two-man corporations now in existence in North Carolina. For example, limited liability with respect to both tort liability and contractual obligations would be lost. All of the income earned by the corporation could be taxed at individual rather than corporate rates. The validity of all past transactions effected by the corporation, including transfers of realty, would be left in a state of uncertainty. Apparently, future corporate transactions can be protected by im-

<sup>26</sup>Stevens, *Corporations* (2nd ed. 1949) § 24.

<sup>27</sup>Fuller, *The Incorporated Individual: A Study of the One-Man Company* (1938) 51 *Harv. L. Rev.* 1373, 1374.

<sup>28</sup>Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations* (1953) 18 *Law & Contemp. Prob.* 473, 475.

<sup>29</sup>Note (1952) 100 *U. of Pa. L. Rev.* 853, 867.

<sup>30</sup>1 *Iowa Code* (1954) § 491.2; 3 *Mich. Comp. Laws* (1948) § 450.3; 1 *Wis. Stat.* (1955) § 180.44.

<sup>31</sup>"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice-versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." *Minifie v. Rowley*, 187 *Cal.* 481, 202 *Pac.* 673, 676 (1921).



mediately transferring qualifying shares of stock to other parties in order to effect at least a technical compliance with the statutory requirement of three shareholders, though the court stated that McLean "could not later, and cannot now, evade the consequences of his act by merely transferring some of the stock to third parties so as to comply with the statute."<sup>32</sup> This language must almost necessarily be construed to apply only to the past act of McLean, since it seems highly unlikely that even the North Carolina court would go so far as to hold that once a corporation becomes "dormant," it can never be revived.<sup>33</sup>

Furthermore, the court's "dormancy" rationale seems to come into direct conflict with both the legislative intent behind, and the specific provisions of, the new North Carolina Business Corporation Act,<sup>34</sup> which will become effective July 1, 1957. The Act requires three incorporators,<sup>35</sup> but it is not necessary that they be subscribers to stock. This provision is, in the words of the draftsmen, "a frank concession to practicality since the initial incorporators are likely to be mere nominees even when, to meet present requirements, they are subscribers as a matter of form."<sup>36</sup> The Act also states that "Corporate existence is not impaired by the acquisition of all the shares by one person,"<sup>37</sup> and that a shareholder's limited liability is not lost "even if all the shares are owned by one person."<sup>38</sup> These latter provisions were incorporated into the already-completed Act by the General Statutes Commission for the specific purpose of combating any possible threat to the existence of one- and two-man corporations offered by the query at the end of the majority opinion in the first *Park Terrace* decision.<sup>39</sup> Since the query has been answered, and the anticipated threat is now a reality, it has been indicated that even stronger corrective legislation in the form of amendments to the Business Corporation Act will soon be forthcoming.<sup>40</sup> Perhaps the North Carolina legislature will even go so

---

<sup>32</sup>*Park Terrace, Inc. v. Phoenix Indemnity Co.*, 243 N. C. 595, 91 S. E. (2d) 584, 587-588 (1956.)

<sup>33</sup>See Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation* (1956) 34 N. C. L. Rev. 471, 478-479.

<sup>34</sup>2B N. C. Gen. Stat. (Michie 1955 supp.) c. 55.

<sup>35</sup>2B N. C. Gen. Stat. (Michie 1955 supp.) § 55-6.

<sup>36</sup>Latty, Powers, and Breckenridge, *The Proposed North Carolina Business Corporation Act* (1954) 33 N. C. L. Rev. 26, 27.

<sup>37</sup>2B N. C. Gen. Stat. (Michie 1955 supp.) § 55-8.

<sup>38</sup>2B N. C. Gen. Stat. (Michie 1955 supp.) § 55-53(e).

<sup>39</sup>Latty, *The Close Corporation and the New North Carolina Business Corporation Act* (1956) 34 N. C. L. Rev. 432, 441-442.

<sup>40</sup>Latty, *The Close Corporation and the New North Carolina Business Corporation Act* (1956) 34 N. C. L. Rev. 432, 443.

far as to do away with the seemingly unnecessary requirement of three incorporators and specifically provide for individual incorporation.

It is difficult indeed to speculate as to the reasoning behind the "dormancy" theory announced by the North Carolina court in the *Park Terrace* case. Without going into this unique rationale at all, exactly the same result could have been reached by simply disregarding the corporate entity, as advocated by the dissent to the original opinion. By adopting this attitude toward one-man corporations, the court has placed itself in a position which is contrary not only to the overwhelming weight of authority, but also to the obvious intent of the legislature of its own state.

PHILLIPS M. DOWDING

CRIMINAL LAW—DOUBLE JEOPARDY AND RES JUDICATA AS APPLIED TO  
SUCCESSION PROSECUTIONS FOR OFFENSES AGAINST MULTIPLE VICTIMS  
OF ROBBERY. [New Jersey]

The view that "no man should be twice vexed for the same cause"<sup>1</sup> found expression at common law under the rulings of *autrefois* convict—or *autrefois* acquit—in criminal prosecutions and in the doctrine of *res judicata* in civil suits.<sup>2</sup> *Autrefois* convict is defined as formerly convicted, and correspondingly, *autrefois* acquit as formerly acquitted.<sup>3</sup> These rules provide the basis for the well-known doctrine of double jeopardy under which no man may be twice put in jeopardy for the same criminal offense.<sup>4</sup> Under the doctrine of *res judicata*, noted in the early case of *Rex v. Duchess of Kingston*,<sup>5</sup> once a cause of action between parties has been litigated, then it cannot be relitigated as to those same parties.<sup>6</sup> The force of *res judicata* not only prevents relitigation of the *same* cause of action, but also prevents a second adjudi-

<sup>1</sup>"Nemo debet bis vexari pro (una et) eadem causa." *State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628, 638 (1956); Lugar, *Criminal Law, Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317, 319.

<sup>2</sup>Lugar, *Criminal Law, Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317 at 319, quoting Perkins, *Criminal Law and Procedure* (1952) 650.

<sup>3</sup>Black Law Dict. (1951) 170; See 1 Wharton, *Criminal Law* (12th ed. 1932) § 394.

<sup>4</sup>1 Wharton, *Criminal Law* (12th ed. 1932) § 395; 13 W. & P. (Perm. ed. 1940) 339.

<sup>5</sup>20 How. St. Tr. 355 (1776) (believed to be one of the earliest cases in which *res judicata* was mentioned). See *Harris v. State*, 193 Ga. 109, 17 S. E. (2d) 573, 580, 147 A. L. R. 980 (1941); Lugar, *Criminal Law, Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317 at 329; Note (1948) 27 Tex. L. Rev. 231 at 233.

<sup>6</sup>30 Am. Jur., *Judgments* § 161 et seq.; 37 W. & P. (Perm. ed. 1950) 615.

cation of such facts and issues as have already been passed on by a court in a *different* cause of action, and this latter variation of the doctrine is termed "collateral estoppel."<sup>7</sup> The underlying protection afforded is essentially similar in both double jeopardy and *res judicata*—i.e., after the courts have judicially ruled for a party on a cause of action or on ultimate facts and issues, there can be no relitigation of the rulings, for to do so would involve a violation of constitutional safeguards and offend basic fundamentals of justice.<sup>8</sup>

Originally, it is believed, *res judicata* was applicable only in civil suits, possibly on the theory that the criminal cases were covered by the double jeopardy provision,<sup>9</sup> but today it is generally agreed by the courts,<sup>10</sup> and by writers on the subject,<sup>11</sup> that *res judicata* is applied in criminal cases also. However, although both *res judicata* and double

<sup>7</sup>State v. Hoag, 21 N. J. 496, 122 A. (2d) 628 at 632, quoting from Scott, Collateral Estoppel by Judgment (1942) 56 Harv. L. Rev. 1 at 10; 7A W. & P. (Perm. ed. 1952) 212; Restatement, Judgments (1942) § 68; Note (1948) 27 Tex. L. Rev. 231 at 232.

<sup>8</sup>The double jeopardy provision appears in U. S. Const., Amend. V: "...nor shall any person be subject for the same offense to be twice put in jeopardy..."

In criminal cases, the doctrine of *res judicata* (particularly the phase known as collateral estoppel) is needed to supplement the protection afforded by the constitutional safeguard against double jeopardy, because the latter principle is only that no man may be twice put in jeopardy for the *same offense*, whereas one act may, in fact, constitute *multiple offenses*. See Lugar, Criminal Law, Double Jeopardy and Res Judicata (1954) 39 Iowa L. Rev. 317 at 332; Note (1952) 65 Harv. L. Rev. 818 at 874. *Res judicata* has been described as "a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations." 30 Am. Jur., Judgments § 162.

<sup>9</sup>See Lugar, Criminal Law, Double Jeopardy and Res Judicata (1954) 39 Iowa L. Rev. 317 at 319.

<sup>10</sup>Scalfon v. United States, 332 U. S. 575, 68 S. Ct. 237, 92 L. ed. 180 (1948); United States v. Oppenheimer, 242 U. S. 85, 87, 37 S. Ct. 68, 69, 61 L. ed. 161, 164, 3 A. L. R. 516, 518 (1916) (it was in this case that Justice Holmes made his much-quoted statement: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."); United States v. Carlisi, 32 F. Supp. 479 (E. D. N. Y. 1940); Mitchell v. State, 140 Ala. 118, 37 So. 76 (1904); Harris v. State, 193 Ga. 109, 17 S. E. (2d) 573, 147 A. L. R. 980 (1941); Commonwealth v. Ellis, 160 Mass. 165, 35 N. E. 773 (1893); State v. Hopkins, 68 Mont. 504, 219 Pac. 1106 (1923); People v. Grzeczczak, 77 Misc. 202, 137 N. Y. Supp. 538 (1912); State v. Barton, 5 Wash. (2d) 234, 105 P. (2d) 63 (1940). For a complete breakdown on all state and federal courts which hold *res judicata* applicable in criminal cases, see Note (1943) 147 A. L. R. 991.

See Note (1948) 27 Tex. L. Rev. 231 at 237, indicating that *res judicata* may be inapplicable when used *against* a defendant. Contra: Note (1943) 147 A. L. R. 991 at 996.

<sup>11</sup>Knowlton, Criminal Law and Procedure, 10 Rutgers L. Rev. 97 at 112; Notes (1952) 65 Harv. L. Rev. 818 at 875; (1948) 27 Tex. L. Rev. 231 at 237 and 239; (1956) 65 Yale L. J. 339 at 349. Also see Lugar, Criminal Law, Double Jeopardy and Res Judicata (1954) 39 Iowa L. Rev. 317 at 332 and 335, wherein it is noted that *res judicata* usually applies in criminal cases but that it is seldom available.

jeopardy are pertinent to criminal proceedings, they differ in that the latter is relevant to *persons* while the former applies to *causes of action*.<sup>12</sup>

In the recent criminal case of *State v. Hoag*,<sup>13</sup> the Supreme Court of New Jersey was called upon to evaluate the effect of both doctrines as applied to the same case. The facts therein arose from a not uncommon situation in which the defendant and two accomplices staged an armed robbery of the owner of a tavern and three of his patrons, relieved them of their valuables, tied up the victims, and made good an escape. Defendant was first tried, on three indictments, for having robbed three of the four victims involved, but he was acquitted, his defense being alibi. Subsequently, he was tried anew and convicted of having robbed the fourth victim with regard to whom there had been no indictment in the initial trial at which defendant had gained his acquittal of the charges of robbing the other three.<sup>14</sup> Following this conviction in the second trial, the defendant appealed to the Supreme Court of New Jersey, founding his case on the supposition that the second trial subjected him to double jeopardy,<sup>15</sup> in that he was being tried a second time for the same offense, and further that this later trial was a relitigation of matter previously decided and therefore encompassed by the principle of *res judicata*.<sup>16</sup>

A majority of the court rejected the plea of double jeopardy, noting that this was not second jeopardy for the same offense but that, in fact, four offenses had taken place, one as to each victim. The robbery of one victim was said not to be an essential and integral part of the robbery as to the others, so that the evidence of each victim was separate and distinct evidence of harm done to himself. Therefore, the evidence adduced by the prosecution at the two trials was not the same, within the meaning of the "same evidence test" used to determine whether the application of the doctrine of double jeopardy is relevant, because the evidence needed to support the indictment as to the fourth victim would not have been sufficient to obtain a conviction upon the

<sup>12</sup>See text at notes 4-6, *supra*.

<sup>13</sup>21 N. J. 496, 122 A. (2d) 628 (1956).

<sup>14</sup>The dissenting opinion observed that "The county prosecutor was at loss on the oral argument to explain the omission at the outset to return an indictment for the robbery of [the fourth witness]. . . ." *State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628, 635 (1956).

<sup>15</sup>"No person shall after acquittal, be tried for the same offense." N. J. Const. (1947) Art. I, par. 11.

<sup>16</sup>There was a further argument put forward by defendant regarding denial of due process. Presumably, this was to cover the possibility of appeal to the United States Supreme Court which has, in fact, granted certiorari, 77 S. Ct. 150 (Nov. 13, 1956).

three earlier indictments.<sup>17</sup> It was further reasoned that the robbery of the four persons was not a "single act" but rather a series of acts which did not occur at the same instant but instead occurred successively and, therefore, each at a different time.<sup>18</sup> The court also rejected the defendant's plea of *res judicata*, or rather collateral estoppel,<sup>19</sup> on the theory that although it is true that facts and issues found in the first verdict may not be relitigated in a new cause of action, there was nothing here to show on what ground defendant had been acquitted in the first action, and therefore there was no basis for an estoppel arising out of the acquittal in the first trial.<sup>20</sup>

The dissenting judges<sup>21</sup> argued that the defendant could invoke the aid of the double jeopardy doctrine on the premise that the robbery involved one transaction only<sup>22</sup> and constituted but a single offense against the public, rather than several trespasses against individual owners. Further, they quoted the "same evidence test" for determining the applicability of double jeopardy and opined that basically the same evidence was being presented in the second trial as in the first. On the matter of *res judicata*, or collateral estoppel, the dissent contended that there could be no relitigation as to facts and issues on which the previous judgment was rendered, and that the prior ad-

---

<sup>17</sup>The "same evidence test" for double jeopardy, used by the court in the principal case, is simply defined in *Harris v. State*, 193 Ga. 109, 17 S. E. (2d) 573, 578, 147 A. L. R. 980, 987 (1941) as follows: "If the same evidence necessary to convict of the one charge would have been sufficient to convict of the other, there would be former jeopardy; but under this rule, if an essential ingredient of necessary element or some additional fact be required in order to convict of either of the two offenses, which is not required to convict of the other, there is no former jeopardy." See 15 Am. Jur., Criminal Law § 380; 22 C. J. S., Criminal Law § 291; Lugar, *Criminal Law Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317 at 321; Notes (1937) 7 Brooklyn L. Rev. 79 at 82; (1956) 65 Yale L. J. 339 at 347.

<sup>18</sup>Though the majority opinion does not refer in so many words to the "single transaction test" relied on by the dissent (see note 22, *infra*), the language at this point suggests that the court may have been using the words in the text, above, to deny that double jeopardy was shown even under the said "single transaction test." 21 N. J. 496, 122 A. (2d) 628 at 631 (1956).

<sup>19</sup>*State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628 at 632 (1956).

<sup>20</sup>But see note 40 and text at note 40, *infra*.

<sup>21</sup>This was a 4 to 3 decision. For the majority, Chief Justice Vanderbilt and Justices Oliphant, Wachenfield and Burling. In dissent, Justices Brennan (since appointed to the Supreme Court of the United States), Jacobs and Heher.

<sup>22</sup>The other test commonly used for double jeopardy is the "same transaction test," by which if the same transaction is involved both in law and in fact, in the two charges, then in the second trial double jeopardy attaches. *Harris v. State*, 193 Ga. 109, 17 S. E. (2d) 573 at 579, 147 A. L. R. 980 at 988 (1941); 15 Am. Jur., Criminal Law § 380; Lugar, *Criminal Law, Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317 at 323; Notes (1937) 7 Brooklyn L. Rev. 79 at 83; (1956) 65 Yale L. J. 339 at 348.

judication as to the innocence of defendant, in this series of acts, was conclusive.

The great weight of authority supports the view of the majority of the Supreme Court of New Jersey that in a fact situation such as is presented in the principal case, there exists a separate and complete robbery as to every victim, involving a separate transaction and separate evidence as to each, so that the defense of double jeopardy cannot be raised at successive trials for the robbery of different victims.<sup>23</sup> This may also be true with regard to some other crimes in which a similar problem is presented. For instance, in the case of *Augustine v. State*,<sup>24</sup> defendant was a member of a mob which killed A, as was their intention, but defendant also killed B, who was A's son. There it was held that the acquittal of murdering A would not prevent subsequent prosecution for the murder of B, and although the malice, the intent and the action of the mob was claimed to be but a single transaction, the court held that separate, rather than the same, evidence was involved.<sup>25</sup> Again, in *State v. Barton*,<sup>26</sup> the defendant was prosecuted on a felony murder charge arising from a killing which took place during a robbery in which defendant participated. He was acquitted of the murder charge but was later tried for the robbery which was based on the same acts previously relied on in the felony murder charge. The court held that neither double jeopardy nor *res judicata* was a bar to the subsequent robbery prosecution.<sup>27</sup>

---

<sup>23</sup>This issue has not been raised in a great number of cases, because of the fact that the state normally prosecutes for only one offense. However, the following cases have held the robbery of several persons to be separate crimes; *People v. Lagomarsino*, 97 Cal. App. (2d) 92, 217 P. (2d) 124 (1950); *In re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790 (1889); *Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. 359 (1892); *Johns v. State*, 130 Miss. 803, 95 So. 84 (1923); *People v. Rogers*, 102 Misc. 437, 170 N. Y. Supp. 86 (1918), *aff'd* 184 App. Div. 461, 171 N. Y. Supp. 451 (1919), *aff'd* 226 N. Y. 671, 123 N. E. 882 (1919); *Orcutt v. State*, 52 Okla. Cr. 217, 3 P. (2d) 912 (1931); *Thompson v. State*, 90 Tex. Cr. R. 222, 234 S. W. 400 (1921). See also, 15 Am. Jur., Criminal Law § 390; 22 C. J. S., Criminal Law § 298. But see, *People v. Perrello*, 350 Ill. 231, 182 N. E. 748 (1932). (Defendant was tried for the one robbery of a house party. He contended, using considerable ingenuity in view of the weight of authority, that the indictment was defective because he should have been tried for eight separate felonies, eight being the number of persons at the party. The court rejected the argument, saying it was one offense fully completed at the same time and place.)

<sup>24</sup>41 Tex. Cr. R. 59, 52 S. W. 77 (1899).

<sup>25</sup>*Contra*: *Spannell v. State*, 83 Tex. Cr. R. 418, 203 S. W. 357 (1918), where defendant killed his wife and also another man. He was acquitted of killing his wife and successfully interposed the defense of double jeopardy to the prosecution for the second killing. The court held that this was but a single transaction involving the same evidence.

<sup>26</sup>5 Wash. (2d) 234, 105 P. (2d) 63 (1940).

<sup>27</sup>But see, *Harris v. State*, 193 Ga. 109, 17 S. E. (2d) 573, 147 A. L. R. 980 (1941).

With respect to double jeopardy, it is significant to note that in cases involving larceny, the authority lies in the opposite direction,<sup>28</sup> and so it appears that larceny of various owners' valuables from any *unworn* apparel will, if they be removed at the same time, probably be considered as one offense, whereas several offenses are involved if the victims happen to be *wearing* the apparel when valuables are forceably removed therefrom.<sup>29</sup> The conclusion may reasonably be drawn that it is the element of violence to the person which transforms one offense into many, as the majority in the *Hoag* case seemed to indicate when it said: "Whatever conflict may exist in the cases involving offenses against property, when we come to offenses against persons, there is more unanimity. . . . The majority, and certainly the better rule, is that there is a separate offense committed against each person robbed."<sup>30</sup>

It would be difficult to analyze the reason for this difference in approach to larceny, as distinct from robbery, except that it is self-evident that the courts will apply the criminal law with maximum effort to secure the safety of society from armed robbery and the resulting death of innocent victims which has often been found to attend violent felonies.<sup>31</sup> The criminal laws, however, are not invoked to punish for harm done to individuals as such, but rather to impose sanctions for crimes done against the state and against the public.<sup>32</sup> This concept was emphasized by the dissenters in the *Hoag* case in

<sup>28</sup>*Hearn v. State*, 55 S. (2d) 559, 28 A. L. R. (2d) 1179 (Fla. 1951); *People v. Israel*, 269 Ill. 284, 109 N. E. 969 (1915). See *People v. Allen*, 368 Ill. 368, 14 N. E. (2d) 397, 402 (1937) cert. den. 308 U. S. 511, 60 S. Ct. 132, 84 L. ed. 436 (1937); *People v. Perrello*, 350 Ill. 231, 182 N. E. 748, 749 (1932). This is also stated as the majority rule in 32 Am. Jur. 895. See 22 C. J. S. 453, wherein it is noted that prosecution for larceny of one of the victims' goods would bar a subsequent prosecution in connection with any of the other victims.

<sup>29</sup>The latter situation would involve robbery, and come within the rule of the cases cited in note 23, *supra*.

<sup>30</sup>*State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628, 631 (1956), quoting *People v. Lagomarsino*, 97 Cal. App. (2d) 92, 217 P. (2d) 124 (1950). Note also the definition of robbery: "... the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or by putting him in fear." Clark and Marshall, *Crimes* (5th ed. 1952) § 375.

<sup>31</sup>In *Commonwealth v. Thomas*, 382 Pa. 639, 117 A. (2d) 204, 205 (1955), the court declared: "Courts have a duty, especially in these days when crime has become so prevalent, to see that the lives, the property, and the rights of law abiding people are protected. . . ."

<sup>32</sup>*People v. Israel*, 269 Ill. 284, 109 N. E. 969 at 970 (1915); "*All crimes are crimes against the public.*" 1 Wharton, *Criminal Law* (12th ed. 1932) § 14; "A crime is any act . . . prohibited by public law. . . . It is a public wrong, as distinguished from a mere private wrong. . . ." Clark and Marshall, *Crimes* (5th ed. 1952) § 1; accord, 22 C. J. S. 1.

their argument that defendant's act of robbing these four men in a bar, all of whom were presumably unknown to him, was but a single offense of robbery against the public rather than private wrongs and trespasses against individual citizens.<sup>33</sup> Thus, it is plausible to suggest that this robbery was but one transaction, the carrying out of but one evil design, and that the involuntary role of four, or even forty, chance victims does not alter this fact. Whatever ultimate merit such an argument may have, it appears obvious that the majority in the *Hoag* case was rationalizing when it contended that the "robberies" did not occur at the same time because the defendant was unable to remove all the valuables simultaneously and that this time lag provided a line of demarcation by which the one holdup could be split into separate crimes. Yet, the removal of these valuables, although *not* done simultaneously, was the result of but one act of intimidation<sup>34</sup> and could have occupied no more than a few minutes, unless resistance was offered, which is neither indicated in the facts as set out nor discussed by the court.

Considered in the light of the doctrine of *res judicata*, the facts in the *Hoag* case apparently clearly exemplify the operation of the subdivision of the doctrine referred to as collateral estoppel,<sup>35</sup> whereby the State is precluded from relitigating those facts and issues actually found in the first verdict, despite the fact that this is a different offense in which these same facts and issues are being passed on.<sup>36</sup> Accepting the majority argument in the *Hoag* case that there were in fact four robberies and that the defendant cannot avail himself of a double jeopardy defense, it remains highly doubtful whether the court was correct in refusing defendant's plea of collateral estoppel. The defense put forward at the initial trial was *alibi* and, in that adjudication, defendant was acquitted. The majority of

---

<sup>33</sup>See *State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628 at 636 (1956). Accord, *Hearn v. State*, 55 S. (2d) 559 at 561, 28 A. L. R. (2d) 1179 at 1181 (Fla. 1951); *People v. Israel*, 296, Ill. 284, 109 N. E. 969 at 970 (1915); *People v. Perrello*, 350 Ill. 231, 182 N. E. 748 at 749 (1932); 32 Am. Jur. 895. Also see note 32, *supra*.

<sup>34</sup>See the *Hoag* case dissent, 21 N. J. 496, 122 A. (2d) 628 at 635 (1956).

<sup>35</sup>See text at notes 7 and 19, *supra*.

<sup>36</sup>*Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237, 92 L. ed. 180 (1948); *United States v. Oppenheimer*, 242 U. S. 85, 37 S. Ct. 68, 61 L. ed. 161, 3 A. L. R. 516 (1916); *United States v. Simon*, 225 F. (2d) 260 (C. A. 3rd, 1955); *United States v. Carlisi*, 32 F. Supp. 479 (E. D. N. Y. 1940); *Harris v. State*, 193 Ga. 109, 17 S. E. (2d) 573, 147 A. L. R. 980 (1941); *State v. Hopkins*, 68 Mont. 504, 219 Pac. 1106 (1923); *State v. Greely*, 30 N. J. Super. 180, 103 A. (2d) 639 at 647 (1954); *People v. Grzeszczak*, 77 Misc. 202, 137 N. Y. Supp. 538 (1912); *Regina v. Miles*, 24 Q. B. D. 423 (1890); *Lugar*, *Criminal Law, Double Jeopardy and Res Judicata* (1954) 39 Iowa L. Rev. 317 at 318; Note (1948) 27 Tex. L. Rev. 231.



the court in this instant appeal, however, said that it did not necessarily follow from this acquittal that the jury believed that the defendant had not been at the scene of the crime, but that it was, in actuality, impossible to determine why the jury had found him not guilty.<sup>37</sup> In the words of the court: "There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the state's proof. . . . Obviously, the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned. Since it does not appear whether the acquittal was based on the determination of the question as to which the estoppel is sought in the second trial, the first verdict is not conclusive in the second trial."<sup>38</sup> The verdict and the judgment based thereon were not, therefore, according to the court, *res judicata* as to appellant's alibi, nor as to any other particular fact. They were *res judicata* only as to the ultimate fact that appellant was not guilty of the crime of which he was there accused.<sup>39</sup> The crime of which he was accused was the robbery of three out of the four victims, and if he was found to be not guilty of robbing those three victims, after pleading alibi as a defense, it is difficult to grasp why that finding did not constitute a litigation of ultimate facts to the effect that he could not have committed the robbery *at all*,<sup>40</sup> since it must be conceded that all four were robbed together, in each other's presence, despite the time variation factor placed in argument by the court.<sup>41</sup> The dissent suggests this point when it declares that the second trial was "a second attempt to prove the [participation]<sup>42</sup> which at each trial was crucial to the prosecution's case and which was necessarily

---

<sup>37</sup>A similar argument was used in *People v. Rogers*, 102 Misc. 437, 170 N. Y. Supp. 86 at 88 (1918), *aff'd* 184 App. Div. 461, 171 N. Y. Supp. 451 (1919), *aff'd* 226 N. Y. 671, 123 N. E. 882 (1919). *Contra*: *State v. Hopkins*, 68 Mont. 504, 219 Pac. 1106 at 1110 (1923) (Court said that verdict of not guilty in first trial necessarily indicated that jury did not believe that defendant had committed robbery at all and that that fact was therefore *res judicata*).

<sup>38</sup>*State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628, 632 (1956).

<sup>39</sup>*State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628 at 633 (1956).

<sup>40</sup>*Accord*, *State v. Hopkins*, 68 Mont. 504, 219 Pac. 1106 at 1110 (1923), note 37, *supra*.

<sup>41</sup>See text at note 34, *supra*.

<sup>42</sup>The word *participation* is here substituted for the actual word used—*agreement*—because in the *Hoag* case there was no prior agreement. The dissent here was quoting from *Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237, 92 L. ed. 180 (1948), and though the quotation is apt in substance, the prior agreement in the *Sealfon* case did not exist in the *Hoag* case.

adjudicated in the former trial."<sup>43</sup> The fact that the defendant asserted the defense of alibi and was found not guilty definitely points to the conclusion that the jury was of the opinion that the defendant did not participate in the holdup, either because it affirmatively believed that he was where he maintained he had been at the time of the robbery or because it came to the negative conclusion that the state had not proved that he was in the bar when the holdup occurred.<sup>44</sup>

The Supreme Court of the United States will shortly have an opportunity to rule on this controversial subject, as it has granted certiorari in the *Hoag* case.<sup>45</sup> On reason, if not on authority, it seems that a series of acts such as the defendant's should be considered as one offense against the public, one unlawful design against society, rather than several, severable crimes, and that therefore the defense of double jeopardy should have been upheld in the principal case. It is also contended that an acquittal on the charge of robbery in one trial should collaterally estop the state from relitigating the same essential issue already necessarily involved—i.e., in the *Hoag* case, whether defendant robbed the occupants of a bar. It appears that the principal decision may be an indication that the criminal courts are over-zealous in their justifiable desire to protect society and that in so doing they deny fundamental legal safeguards to defendants.

GAVIN K. LETTS

#### CRIMINAL LAW—SCOPE AND BASIS OF DEFENSE OF ENTRAPMENT IN PROSECUTION FOR PROCURING. [Texas]

The activity of over-zealous police authorities in America has given life and form to the somewhat curious defense known as entrapment.<sup>1</sup>

---

<sup>43</sup>See *State v. Hoag*, 21 N. J. 496, 122 A. (2d) 628, 638 (1956) quoting from *Sealfon v. United States*, 332 U. S. 575, 580, 68 S. Ct. 237, 240, 92 L. ed. 180, 185 (1948).

<sup>44</sup>The only other possible reasons for the jury's acquittal of the defendant which come to mind all appear absurd, but are as follows: 1. That the jury believed that the first three victims made a gift of the allegedly robbed articles to defendant. 2. That the articles of the first three victims were thought by the jury to be really the subject of larceny and not robbery. 3. That the jury was of the opinion that defendant's two accomplices robbed the first three victims and that defendant later appeared to help rob the fourth victim. The facts, of course, belie all three of these alternatives.

<sup>45</sup>*Hoag v. State of New Jersey*, 77 S. Ct. 150 (Nov. 13, 1956).

<sup>1</sup>The cases indicate that the courts consider someone acting for the government to be a "police officer" for purposes of entrapment. The federal rule is that, for entrapment to be pleaded in defense, the inciting must have been done directly

"Entrapment is available as a defense when the criminal design originates with the officer who, by persuasion or deceit, entices a law-abiding citizen to commit a crime which he would not have committed in the absence of such inducement."<sup>2</sup> Although the defense is a creation of judicial indignation at the inciting by law enforcement officials of an innocent citizen into criminal conduct,<sup>3</sup> the courts nevertheless tend to apply the doctrine rather sparingly. The difficulty which courts experience in passing on the defense seems to arise not only in applying a general rule of law to the variant facts of individual cases, but also from serious uncertainties as to the propriety of enabling an offender to escape punishment for a crime he has intentionally committed.<sup>4</sup>

Both of these factors are evidenced in the opinions of two recent entrapment cases decided by the Texas Court of Criminal Appeals. *Cooper v. State*<sup>5</sup> resulted from the actions of a plainclothes member of the Dallas Vice Squad who asked the porter at a motel "if he had a girl available." When the porter said that he had no girls and did not know any, the police officer gave him fifty cents and suggested that he call some other porters and find out where to get a girl. The porter,

---

or indirectly by officers or agents of the government. *Polski v. United States*, 33 F. (2d) 686 at 687 (C. C. A. 8th, 1929) and cases cited. This view has been followed recently in North Carolina in *State v. Jackson*, 243 N. C. 216, 90 S. E. (2d) 507 (1955). However, Oklahoma recently allowed entrapment as a defense where the inciting was done by a private person who alerted the police prior to the criminal act charged. The court expressly stated that the defense would not have been available if the police had not been notified prior to the crime. *Beasley v. State*, 282 P. (2d) 249 at 254 (Okla. Cr. App. 1955). A quite recent case indicated a modification of the federal rule by allowing the defense when the federal government took over the prosecution of an accused who was entrapped by a state police officer. *Henderson v. United States*, 237 F. (2d) 169 at 176 (C. C. A. 5th, 1956). For purposes of simplification, the terms "police," "police officers," or "authorities" will be used in this comment as indicating investigators, private detectives, or police decoys.

<sup>2</sup>*People v. Raffington*, 98 Cal. App. (2d) 455, 220 P. (2d) 967, 971 (1950).

<sup>3</sup>With his usual clarity Judge Learned Hand has described its genesis: "The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist. Such an emotion is out of place, if they are already embarked in conduct morally indistinguishable, and of the same kind." *United States v. Becker*, 62 F. (2d) 1007, 1009 (C. C. A. 2nd, 1933).

<sup>4</sup>Only New York and Tennessee have specifically rejected the defense. The classic criticism of the doctrine of entrapment is that of Judge Vann: "We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it." *People v. Mills*, 178 N. Y. 274, 289, 70 N. E. 786, 791, 67 L. R. A. 131, 138 (1904); *Thomas v. State*, 182 Tenn. 380, 187 S. W. (2d) 529 (1945).

<sup>5</sup>288 S. W. (2d) 762 (Tex. Cr. App. 1956).

after making several fruitless calls, called a friend and told him that he had two men in a certain-numbered cabin at the motel who wanted a date. Later a woman presented herself at the cabin in which the officer was waiting, and after she had discussed the price she charged, the officer arrested her. Though the porter claimed that he did not know the girl, had not talked with her over the telephone, and did not see her until after she was arrested, he was convicted of "procuring." Because of the failure of the trial court to instruct the jury as to the defense of entrapment, this conviction was reversed and the case remanded for new trial, with one judge concurring and another dissenting vehemently.<sup>6</sup>

Two months later a similar case, *Thomas v. State*,<sup>7</sup> was decided by the same court. Here it was shown that the Dallas Vice Squad had sent plainclothes agents to an address at which prostitution was reportedly being practiced. Testimony of the police was that the police officer asked an unidentified person about a prostitute and was told to go to the rear of the building and see Vernita, which he did. Upon his request Vernita, the accused, said she would get him a woman and called to a woman on the street who came to them and discussed the price for her favors.<sup>8</sup> Despite her defense of entrapment, the accused was convicted of "procuring" and her conviction affirmed, with the judge who dissented in the *Cooper* case now concurring in a separate opinion.

The opinions of the court in the two cases were consistent in their analysis of the scope of the defense of entrapment. It was stated that "where the criminal intent originates in the mind of the accused the fact the officers furnished the opportunity for or to aid the accused in the commission of the crime constitutes no defense. . . . However, if the criminal design originates in the mind of the officer and he induces a person to commit a crime which he would not otherwise have committed except for such inducement, this is entrapment, and in law may constitute a defense to such crime."<sup>9</sup> In the *Cooper* case the majority concluded that the evidence raised an issue for the jury as to the person with whom the intent to commit the crime originated and as to whether the accused would have acted as he did without the inducement of the officer. In the *Thomas* case, however, the court found no

---

<sup>6</sup>A motion for rehearing produced two more opinions but no change in result. 288 S. W. (2d) 762 and 767 (Tex. Cr. App. 1956).

<sup>7</sup>290 S. W. (2d) 680 (Tex. Cr. App. 1956).

<sup>8</sup>The accused denied this version of the events, claiming she merely called a girl whom the officer had mentioned by name and that there had been no conversation about a date.

<sup>9</sup>*Cooper v. State*, 288 S. W. (2d) 762, 763 (Tex. Cr. App. 1956).

evidence that the accused was induced by the officer to commit an offense which she did not otherwise stand ready to commit.

Judge Davidson, dissenting with considerable emotion in the *Cooper* case, declared that the rule that entrapment constitutes a defense to a conviction of an admitted offender is "not only palpably erroneous but unsound and unsafe; it approaches absurdity."<sup>10</sup> He argued that in Texas the consequence of entrapment is merely to make the officer an accomplice to the crime, with the result that the state must corroborate his testimony just as it must corroborate the testimony of any other accomplice-witness.<sup>11</sup>

The plea of entrapment began emerging in the late 19th century as defendants contended that police authorities had used unfair enticement tactics in apprehending them. The courts looked with little favor upon the use of such tactics by law enforcement officers and sometimes berated them severely; however, they looked with even less favor on the contention of the accused, and prior to 1913 a reversal was obtained on the purported ground of entrapment in only one such case.<sup>12</sup> It appears that entrapment was first mentioned as a defense in the tenth edition of Wharton's Criminal Law Treatise, published in 1896, which gives in support of the defense the strict and now intriguing reason that "the government is precluded from asking that the offenders thus decoyed should be convicted. They are associates with the government in the commission of the crime, and the offense being joint, the prosecution must fail. If that which one principal does is not a crime, the other principal cannot be convicted for aiding him."<sup>13</sup>

In 1913, the conviction of one accused of selling liquor to an Indian in violation of statute was set aside because the prosecuting witness was an agent of the government who had used his Caucasian appearance to trick the accused into selling liquor to him. The judge expressed his indignation by oft-echoed words: "Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending."<sup>14</sup> The decision had the effect of

---

<sup>10</sup>288 S. W. (2d) 762, 765 (Tex. Cr. App. 1956).

<sup>12</sup>288 S. W. (2d) 762 at 765 (Tex. Cr. App. 1956). In the Thomas case Judge Davidson concurred in the refusal to recognize the defense of entrapment to the defendant, and insisted that the two cases required the same result and that the Cooper case should therefore be overruled. 290 S. W. (2d) 680 at 681 (Tex. Cr. App. 1956).

<sup>13</sup>State v. Geze, 8 La. Ann. 52 (1853). Even there the result was probably based on another clearly distinguishable defense—that of consent. See note 21, *infra*.

<sup>14</sup>1 Wharton, Criminal Law (10th ed. 1896) 166.

<sup>15</sup>United States v. Healy, 202 Fed. 349, 350 (D. C. Mont. 1913).

making entrapment available as a defense to crimes in which intent is *not* necessary. Two years later entrapment was recognized as a valid defense against charges of conspiring unlawfully to import Chinese and possession of dynamite with intent to use it for unlawful purpose, crimes in which intent *is* a necessary element.<sup>15</sup>

Near the end of the Prohibition Era, the United States Supreme Court in *Sorrells v. United States*<sup>16</sup> went so far as to read the entrapment doctrine into the National Prohibition Act. Though the Act declared, without qualification in this respect, that the possession or sale of whiskey was a crime, the majority of the Court reversed the conviction for a violation of the Act which had been brought about by the inducement of a federal officer, declaring that the "general words [of the statute] should not be construed to demand a proceeding at once inconsistent with [public] policy and abhorrent to the sense of justice."<sup>17</sup> In a separate concurring opinion, Justice Roberts argued that the accused had clearly committed the offense prohibited by the statute, but that the defense of entrapment should be sustained by the Court as a fundamental rule of public policy rather than by judicial amendment of the statute. "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."<sup>18</sup> Justice Brandeis, who concurred with Justice Roberts, had previously indorsed a similar basis for invoking the de-

---

<sup>15</sup>In *Woo Wai v. United States*, 223 Fed. 412 (C. C. A. 9th, 1915) the authorities urged defendant repeatedly for eighteen months and paid his way from San Francisco to San Diego twice before the accused agreed to enter the scheme to import Chinese unlawfully. The court reversed the conviction on two grounds, the major reason being that such conviction is against public policy because the entrapping was done by authorities. In *Koscak v. State*, 160 Wis. 255, 152 N. W. 181 (1915) accused had written a threatening letter to his former employer who had laid him off because of employment-sustained injuries. The employer hired detectives to catch accused in a contrived offense, and one detective conspired with accused to "get even" with the employer. After refusing to join in a proposed robbery of employer, accused did participate in a plan originated by the detective to dynamite employer's home and was convicted of possession of dynamite with intent to use it for unlawful purpose. The conviction was reversed on appeal.

<sup>16</sup>287 U. S. 435, 53 S. Ct. 210, 77 L. ed. 413 (1932). A government agent gained an introduction to defendant through defendant's friends, and then he repeatedly asked defendant to get some liquor for him. The request that finally succeeded was based on accused's doing a favor for an "old army buddy" (they had been in the same Army Division in World War I). Accused then left and returned in about thirty minutes with the liquor and was arrested and subsequently convicted of violating the National Prohibition Act.

Entrapment has not been considered by the Supreme Court since this case; certiorari has been denied seventeen times in cases in which entrapment was in issue.

<sup>17</sup>287 U. S. 435, 449, 53 S. Ct. 210, 215, 77 L. ed. 413, 420 (1932).

<sup>18</sup>287 U. S. 435, 457, 53 S. Ct. 210, 218, 77 L. ed. 413, 425 (1932).

fense of entrapment: "This prosecution should be stopped . . . in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."<sup>19</sup> In recent years the defense has been pleaded, though usually futilely, in countless cases involving a variety of crimes, with its largest use being in cases involving narcotics and alcoholic beverage violations, and pandering and prostitution charges.<sup>20</sup>

In two types of cases there has been a tendency to recognize the defense of entrapment where it is not needed by the accused. One such type is found in prosecutions for crimes in which lack of consent by the alleged victim is an essential element—e. g., robbery, rape, larceny, kidnapping, and burglary.<sup>21</sup> When police officers set up the situation to catch the accused in this type of crime, their enticing acts may constitute consent,<sup>22</sup> in which case accused is not guilty because no crime has, in fact, been committed. Secondly, since entrapment is not needed as a defense unless the accused has committed all elements of the crime charged, it is not properly applied to situations in which he has, without having the intent to commit a crime, been induced by police to do acts which, combined with intent, would constitute a crime.<sup>23</sup>

---

<sup>19</sup>Dissenting in *Casey v. United States*, 276 U. S. 413, 425, 48 S. Ct. 373, 376, 72 L. ed. 632, 637 (1928) (conviction of purchase of morphine not in original stamped package).

<sup>20</sup>Notes (1954) 33 A. L. R. (2d) 883; (1933) 86 A. L. R. 263; (1922) 18 A. L. R. 146.

<sup>21</sup>So if A entices B to steal goods that actually are A's, then no crime has been committed because of consent. But if A entices B to steal C's goods, the defense of entrapment would be appropriate.

<sup>22</sup>A girl, the prosecuting witness, answered a want ad for employment but discussed it first with a deputy sheriff who advised her to do whatever the man wanted because the police would be nearby if she needed help. The accused drove to a lonely side road and made advances towards prosecuting witness. Accused was convicted of assault on a female, which conviction the court reversed, discussing both entrapment and consent as reasons for the reversal. *State v. Nelson*, 232 N. C. 602, 61 S. E. (2d) 626 (1950); *McDermott v. United States*, 98 A. (2d) 287 (Mun. Ct. App. D. C. 1953).

<sup>23</sup>Perhaps *United States v. Healy*, 202 Fed. 349 (D. C. Mont. 1913), discussed in the text at note 14, *supra*, could have been argued more appealingly on the ground that, because accused did not know the decoy was an Indian, there was no intent to violate the prohibition against selling whiskey to Indians. However, that reasoning might require the court to read the requirement of intent into the statute which defined the crime without reference to intent. Perhaps courts employ a more subtle means of reaching the same results when they sustain the defense of entrapment where accused has been induced to commit a crime unknowingly. However, the Supreme Court in *United States v. Balint*, 258 U. S. 250, 42 S. Ct. 301, 66 L. ed. 604 (1922) held that Congress intended a seller of narcotics, under the Narcotic Act of 1914, to ascertain at his peril whether the drug contained opium. Presumably, if, because of the great danger to the public involved, the statute is passed for the

More serious is the problem of avoiding the extension of the defense to a point inconsistent with the best interests of society.<sup>24</sup> Theoretically, there are no crimes beyond the application of the doctrine.<sup>25</sup> The frightful picture envisioned by the dissenting judge in the *Cooper* case of one committing a heinous crime and being set free upon grounds that a police officer induced him to commit it is not to be dismissed lightly. Opponents of the defense apparently find that danger so great that they would avoid it by refusing to recognize entrapment as a defense in any situation. However, that extreme measure may be unnecessary, for no instance has been found in which the defense has been sanctioned to shield one accused of such offenses as murder, rape, robbery, and mayhem. Since the courts developed the defense to prevent injustice, there seems to be little need for concern that they will permit a perpetrator of a heinous crime to cloak himself with that defense.

Even in regard to the less serious offenses, there is often great difficulty in determining whether in the individual case the accused was actually entrapped. Entrapment hinges upon finding: (1) that the intent to commit the crime originated in the mind of the entrapper rather than in the mind of the accused, and (2) that the entrapper caused the accused to commit an act which otherwise he did not stand ready to commit.<sup>26</sup> These are such highly subjective considerations that both the adducing of reliable proof and the evaluation of the evidence offered present almost insuperable problems. Since the court cannot

purpose of making violation a crime regardless of intent, the courts will not attempt to read intent into the statute via entrapment.

<sup>24</sup>The doctrine has been left almost exclusively to the discretion of the courts by the legislatures. However, in 1949 Florida passed a statute specifically abolishing the use of the defense in prosecutions for bribery. 22 Fla. Stat. Ann. (1955 Supp.) § 838.11. The drafters of the Wisconsin model code proposed that entrapment be made a defense to all crimes. V Wis. Legislative Council Report (1953) § 399-44 (Proposed Criminal Code provisionally adopted in 1953). However, apparently the legislature in adopting the Code in 1955 refused to accept this section. See 2 Wis. Stat. (1955) § 939-42 et seq.

<sup>25</sup>The Supreme Court refused to consider whether the defense applies to heinous crimes: "The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object." *Sorrells v. United States*, 287 U. S. 435, 451, 53 S. Ct. 210, 216, 77 L. ed. 413, 422 (1932).

<sup>26</sup>"The defense of entrapment is not available to one standing ready to commit an offense given an opportunity." *Bloch v. United States*, 226 F. (2d) 185, 188 (C. A. 9th, 1955) cert. den. 350 U. S. 948, 76 S. Ct. 323, 100 L. ed. 826 (1956). An oft-quoted statement of the distinction is: "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime." *Newman v. United States*, 299 Fed. 128, 131 (C. C. A. 4th, 1924).



know what the accused might have done, absent the inducement, attention is often directed to his past conduct and to the prior suspicion of the police that crimes such as that charged against the accused had been committed at that place or by that person. Consideration of these factors may be justified by the supposition that one who has committed an offense in the past is more readily disposed to commit it again. Yet, the admission of such evidence creates an acute danger that the jurors will be inclined to refuse to give due regard to the plea of entrapment because they conclude that defendant's *past* record makes him deserving of punishment. Thus, it would appear very difficult for erstwhile but reformed procurers and prostitutes to avail themselves of the defense of entrapment which might be available under duplicate circumstances for one never before charged or convicted of such crime.<sup>27</sup> Furthermore, this emphasis on past records and on the suspicions of the police creates a dangerous opportunity for extortion by dishonest officers. The other objective factor which has been given great weight by the courts in determining whether the accused was induced to act otherwise than he would have done is the presence of or lack of repeated urging by the police. Such persuasive urging is common to nearly all the leading examples of entrapment.<sup>28</sup> On the other hand, if the accused readily committed the act with little urging, the defense is denied to him.<sup>29</sup>

Both of these factors obviously entered into the decisions of the *Cooper* and *Thomas* cases. In the latter, accused was apparently commonly assumed to be a procurer, and the evidence indicated that she responded promptly to the officer's initial inquiries. In the former,

---

<sup>27</sup>*Cratty v. United States*, 163 F. (2d) 844 (C. A. D. C., 1947); *United States v. Becker*, 62 F. (2d) 1007, 1008 (C. C. A. 2nd, 1933) ("... when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."); *Nero v. United States*, 189 F. (2d) 515 (C. A. 6th, 1951); *Weathers v. United States*, 126 F. (2d) 118 (C. C. A. 5th, 1942); *Simmons v. United States*, 300 Fed. 321 (C. C. A. 6th, 1924). Judge Woodrough in *United States v. Washington*, 20 F. (2d) 160 (D. C. Neb. 1927) flatly condemned the idea that the suspicion of the accused is important, but his protest was apparently rejected in the *Sorrells* case, wherein the United States Supreme Court observed that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." 287 U. S. 435, 451, 53 S. Ct. 210, 216, 77 L. ed. 413, 422 (1932).

<sup>28</sup>*Sorrells v. United States*, 287 U. S. 435, 53 S. Ct. 210, 77 L. ed. 413 (1932) (see note 16, supra.); *Woo Wai v. United States*, 223 Fed. 412 (C. C. A. 9th, 1915) (see note 15, supra.); *State v. Marquardt*, 139 Conn. 1, 89 A. (2d) 219, 31 A. L. R. (2d) 1206 (1952).

<sup>29</sup>*Rodriguez v. United States*, 227 F. (2d) 912 (C. A. 5th, 1955); *People v. Finn*, 136 Cal. App. (2d) 152, 288 P. (2d) 281 (1955); *People v. Roberts*, 40 Cal. (2d) 483, 254 P. (2d) 501 (1953).

accused had no prior record of misconduct of the type for which he was being prosecuted, and he had been subjected to insistent and reiterated requests by the officers before committing the offense. If entrapment should ever constitute a defense, the Texas court seems to have reached a proper result in both cases. But even though the defense is thus applied within narrow limits, it produces the anomalous result to which the dissenting judge in the *Cooper* case objected: one who has admittedly committed a crime is allowed by a court to escape punishment. Of course, the court is not condoning the commission of the offense; rather, it is striving to strike a balance between two policy considerations—the protection of an accused against unfair tactics by the police and the encouragement of alert and ingenious methods of apprehension of criminals by the police.

In this respect, the problem is similar to that of the admissibility of illegally obtained evidence in a criminal prosecution. On that problem the American courts are divided between the view which rejects the evidence in order to protect against illegal police activities and the view which admits the evidence in order to make possible the conviction of the guilty.<sup>30</sup> However, to the latter approach is added the proviso that appropriate punishment may be imposed on the officers who acted illegally in obtaining the evidence. Similarly, in opposition to allowing the defense of entrapment it might be argued that there are other means of discouraging police from engaging in unfair inducement to commit crime. The dissent in the *Cooper* case would at least refuse to allow a conviction on the testimony of the entrapping officer alone, thus requiring the prosecution to bestir itself to obtain corroborating evidence. Certainly the person instigating the crime is guilty of solicitation or, if the offense is committed, he is guilty as an accessory or principal, and over-zealous police officers thus become subject to prosecution on such charges.<sup>31</sup> In Colorado authorities who entrap suspected violators can be convicted of conspiracy.<sup>32</sup> While these sanctions, if effectively enforced, would doubtless bring about a reduction of the use of unfair inducement tactics by police officials, most of the courts are apparently in agreement with the majority

---

<sup>30</sup>For a discussion of the present status of these views, see Note (1956) 50 A. L. R. (2d) 531.

<sup>31</sup>If the offense was not committed, the entrapper is guilty of solicitation. [The better view is that the crime solicited can be either a felony or misdemeanor. Clark and Marshall, *Law of Crimes* (5th ed. 1952) § 109]. If the crime was committed, the entrapper seems to be an accessory or principal. For further discussion, see Mikell, *The Doctrine of Entrapment in the Federal Courts* (1942) 90 U. of Pa. L. Rev. 245 at 264.

<sup>32</sup>*Reigan v. People*, 120 Colo. 472, 210 P. (2d) 991 (1949).

of the Texas court in that in actual practice they are not sufficient to protect against the injustice which recognition of the defense of entrapment does prevent.

NORMAN C. ROETTGER, JR.

EQUITY—RELATION BETWEEN POWER TO ENJOIN LIBEL AND CONSTITUTIONAL GUARANTY OF FREEDOM OF SPEECH. [Massachusetts]

Since the Supreme Court's decision in *Near v. Minnesota*<sup>1</sup> in 1931, there has been no doubt as to the applicability of the Fourteenth Amendment to state actions involving liberty of the press. The traditional view has been to limit prior restraints rather severely,<sup>2</sup> and in situations where the liberty is abused, to limit the damaged person to a remedy at law after the publication.<sup>3</sup> While the courts have recognized that abuses of the liberty are all too common, their attitude has been that "it is better to leave a few of the noxious branches to their luxurious growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."<sup>4</sup> However, equity's reluctance to enjoin the publication of a libel primarily because of the constitutional guaranty of liberty of the press provided by state constitutions<sup>5</sup> and

<sup>1</sup>283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931). The Supreme Court had been moving toward this holding since 1925 when it said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U. S. 652, 666, 45 S. Ct. 625, 630, 69 L. ed. 1138, 1145 (1925).

<sup>2</sup>Three arguments in support of this view insofar as injunctive relief is concerned, are listed by Clark, *Equity* (1954) 354: (1) Equity should protect only property rights; (2) Freedom of speech would be violated by giving an injunction; (3) Libel is a crime, and equity should not enjoin the commission of a crime. A fourth argument against prior restraints is that they interfere with the right of trial by jury. *Wolf v. Harris*, 267 Mo. 405, 184 S. W. 1139 (1916); *Kwass v. Kersey*, 139 W. Va. 497, 81 S. E. (2d) 237, 47 A. L. R. (2d) 695 (1954). A fifth reason sometimes given is that authority to apply prior restraint would impose on courts of equity "a task of insuperable difficulty." *Willis v. Connell*, 231 Fed. 1004, 1010 (S. D. Ala. 1916).

<sup>3</sup>"So our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to intrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth." 1 Chafee, *Government and Mass Communications* (1947) 92. Accord: *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931); *Leflar, Legal Remedies for Defamation* (1952) 6 Ark. L. Rev. 423, 431-436; *Pound, Equitable Relief Against Defamation and Injuries To Personality* (1916) 29 Harv. L. Rev. 640; *Long, Equitable Jurisdiction To Protect Personal Rights* (1923) 33 Yale L. J. 115, 118-122.

<sup>4</sup>Madison's Works, Report on the Virginia Resolutions 544.

<sup>5</sup>E.g., *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Emp's*, 400 Ill. 38, 79 N. E. (2d) 46 (1948); *Mulina v. Item Co.*, 217 La. 842, 47 S. (2d) 560 (1950); *State v. Judge of Civil District Court*, 34 La. Ann. 741, 41 La. Rep. Ann. 490 (1882); *Strange v. Biggers*, 252 S. W. 826 (Tex. Civ. App. 1923).

the Due Process Clause of the Federal Constitution<sup>6</sup> seems to be diminishing.<sup>7</sup>

The Supreme Judicial Court of Massachusetts was recently confronted with this problem in the case of *Krebiozen Research Foundation v. Beacon Press*.<sup>8</sup> Plaintiffs were a cancer research foundation, a physician engaged as scientific advisor to the Foundation, and two proprietors of Daga Laboratories which owns the manufacturing rights to produce "Krebiozen." Defendant was a publisher which had printed and was prepared to put on sale a book called either "Krebiozen; The Great Cancer Mystery" or "The Great Cancer Mystery." Plaintiffs' bill seeking an injunction against publication recited that they believed the book "to contain false, fraudulent, wrongful, malicious and erroneous statements which tend to injure and destroy the good name and professional reputations of the . . . [plaintiffs] and the commercial

<sup>6</sup>E.g., *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931); *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church*, 39 Cal. (2d) 121, 245 P. (2d) 481 (1952) cert. den. 345 U. S. 938, 73 S. Ct. 828, 97 L. ed. 1365 (1953); *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Emp's*, 400 Ill. 38, 79 N. E. (2d) 46 (1948); *Mulina v. Item Co.*, 217 La. 842, 47 S. (2d) 560 (1950).

<sup>7</sup>E.g., cf. *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69, 70, 19 Am. Rep. 310, 311 (1873) (wherein the court stated: "The jurisdiction of a Court of Chancery does not extend to cases of libel or slander. . .") with *Menard v. Houle*, 298 Mass. 546, 11 N. E. (2d) 436, 437 (1937) (wherein the same court said: ". . . equity will take jurisdiction where there is a continuing course of unjustified and wrongful attack upon the plaintiff motivated by actual malice, and causing damage to property rights. . . There is evidence of a process of evolution which may be still in progress.") and with *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N. E. (2d) 241, 175 A. L. R. 430 (1946) (wherein the court stated that equity would protect personal rights by injunction upon the same conditions that it would protect property rights by injunction.)

A trend to extend equity's jurisdiction and permit injunction of trade libels has been evident in the federal courts since *Black & Yates, Inc. v. Mahogany Association, Inc.*, 129 F. (2d) 227, 231, 148 A. L. R. 841, 845 (1941) cert. den. 317 U. S. 672, 63 S. Ct. 76, 87 L. ed. 539 (1942), wherein the court stated: "The irrelevance of 'free speech' and of 'a libel is for a jury' are patent. Freedom of discussion of public issues does not demand lack of 'previous restraint' for injury to private individuals. . . We are quite willing to repudiate the 'waning doctrine that equity will not restrain the trade libel'. We are further willing to do so directly and without hiding behind the other equitable principles put forward in some of the cases." The primary reason for this decision seems to be recognition of the inadequacy of the damages remedy. Compare this statement in *Howell v. Bee Publishing Co.*, 100 Neb. 39, 158 N. W. 358, 360 (1916): "This shows a remarkable growth in the direction of requiring courts of equity to restrain wrongdoing when there is no other remedy to prevent it, and this does not seem to me to be a violation of the [Nebraska] Constitution. Those who publish are 'responsible for the abuse of that liberty', and it is the abuse of the liberty that is enjoined, and not the liberty itself."

<sup>8</sup>134 N. E. (2d) 1 (Mass. 1956) cert. den. 352 U. S. 848, 77 S. Ct. 65, 1 L. ed. (2d) 58 (1957).

value of the drug, Krebiozen."<sup>9</sup> The bill also alleged that the individual plaintiffs were libeled in that the book charged them with having acted unethically and having violated professional standards; that publication of the book would cause irreparable injury to plaintiffs and to the trade name of the drug; and that the book was designed to have the effect of impeding further clinical investigation of the drug. The trial court sustained defendant's demurrer and dismissed plaintiffs' bill of complaint, and on appeal, the Supreme Judicial Court affirmed.

In arriving at its conclusion, the latter court reasoned that although equity has jurisdiction to enjoin libels,<sup>10</sup> whether or not the power will be exercised depends upon all the relevant circumstances. Though the constitutional protection of free speech was recognized as imposing a limit on the area in which equity's jurisdiction may or should be exercised,<sup>11</sup> a further factor for consideration was found in the interest of the public in reading the book, especially so since the subject matter, a possible cancer cure, was of critical importance to the public.<sup>12</sup> On the basis of this consideration, the court held that the attack on the merits of the drug, which are still under investigation, was of such overriding public interest that plaintiffs should be powerless to stop defamatory statements concerning themselves and the drug.

The opinion was concluded with a statement that either the constitutional guaranty or the public interest in the discussion of cancer cures would be a sufficient basis for refusing the injunction, but the court placed more emphasis on the public interest factor, using the constitutional guaranty as a makeweight. In this case, a decision based on the public interest factor or on the constitutional guaranty would lead to the same result—both considerations favored defendant's cause and therefore the injunction was refused. But the court seemed to indicate that, if the two considerations did not complement each other in a given situation, the public interest factor in favor of enjoining the publication would not necessarily have to yield to the constitutional guaranty of freedom of speech.

---

<sup>9</sup>134 N. E. (2d) 1, 3 (Mass. 1956).

<sup>10</sup>It should be noted here that the Massachusetts court, by not considering the absence of a jury trial, the fact that libel is also a crime, the inconvenience of a flood of litigation which might follow equity's extension of jurisdiction, and the lack of a property right on which to base jurisdiction, apparently indicated that these factors are not valid reasons for barring equity jurisdiction.

<sup>11</sup>The court held that this case under the Constitution of the United States was substantially controlled by *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931).

<sup>12</sup>"It is axiomatic in our society that full information and free discussion are important in the search for wise decisions and best courses of action." 134 N. E. (2d) 1, 7 (Mass. 1956).

That conclusion seems to be sound, inasmuch as the *Near* case, generally cited as authority for the broad proposition that equity cannot enjoin a libel, does not seem to control the *Krebiozen* case. The Minnesota statute which was held unconstitutional in the *Near* case provided for an abatement as a nuisance, by injunction, of a "malicious, scandalous and defamatory" or an obscene newspaper or periodical.<sup>13</sup> Defendant newspaper was enjoined from *all* publication of an objectionable nature as a result of its smear campaign against public officials,<sup>14</sup> but on appeal the Supreme Court dissolved the injunction. This decision is clearly distinguishable from the *Krebiozen* type of case on several grounds. First, the decision in the *Near* case placed a great deal of emphasis on the fact that the subject matter of the defendant's publication was misconduct of public officials.<sup>15</sup> Historically, this was, and still is, a favored area of discussion in which prior restraints must be avoided.<sup>16</sup> Second, in the *Near* case, an act of the legislature was under attack and was held to violate the Fourteenth Amendment. The historic conception of liberty of the press has been to prevent censorship by *legislative* measures and *administrative* action,<sup>17</sup> not

<sup>13</sup>2 Minn. Stat. (Mason 1927) §§ 10123-1, 10123-2, 10123-3.

<sup>14</sup>The judgment of the lower Minnesota court perpetually enjoined defendants from publishing any malicious, scandalous or defamatory newspaper, and from further conducting the nuisances under the name *The Saturday Press* or any other name. Further publication was made punishable as a contempt. *Near v. Minnesota*, 283 U. S. 697 at 705, 51 S. Ct. 625 at 627, 75 L. ed. 1357 at 1362 (1931).

<sup>15</sup>"... the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press. . . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct." *Near v. Minnesota*, 283 U. S. 697, 719, 51 S. Ct. 625, 632, 75 L. ed. 1357, 1369 (1931).

<sup>16</sup>"... the common-law right of free speech and 'liberty of the press' which is now guaranteed by American constitutions, goes back historically to the privilege of being free from injunctions in the publication of political libels and is not violated by injunctions in cases of nonpolitical libels." Clark, *Equity* (1954) 354. "That liberty [of the press] was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct." *Near v. Minnesota*, 283 U. S. 697, 717, 51 S. Ct. 625, 631, 75 L. ed. 1357, 1368 (1931). See also: 1 *Journal of the Continental Congress* (1904 ed.) 104, 108; 4 *Madison's Works*, Report on the Virginia Resolutions 544.

<sup>17</sup>2 Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) §§ 1880-1892; Cooley, *Constitutional Limitations* (5th ed. 1883) 518. See Justice Butler's dissent in the *Near* case: "The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the *previous restraints* referred to by him subjected the press to the arbitrary will of an administrative officer." *Near v. Minnesota*, 283 U. S. 697, 733, 51 S. Ct. 625, 637, 75 L. ed. 1357, 1376 (1931).

to prevent restraint on personal conduct by equity courts in a suit between two private individuals.<sup>18</sup> Third, the Supreme Court in the *Near* case expressly limited its decision with the Statement: "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."<sup>19</sup> Fourth, the issue in the *Near* case was whether a party can legally be enjoined from making any future defamatory publication whatsoever because he has published defamatory statements in the past; whereas in the principal case type of situation the issue is whether a party can legally be enjoined from publishing a specific defamatory utterance as he admittedly proposes imminently to do.

Some indication of the attitude of the Supreme Court of the United States as to the interplay of the public interest factor with the constitutional guaranty may be observed by comparing the *Near* case with *Beauharnais v. Illinois*.<sup>20</sup> The Court in the *Near* case seemed to accept the Blackstonian theory of "no prior restraint,"<sup>21</sup> with certain limitations in extraordinary situations.<sup>22</sup> Though the statute under attack was said to be "for the protection of the public welfare,"<sup>23</sup> and though the four minority Justices supported it as an exercise of the power of the state to enjoin a nuisance in the interest of public morals, peace and good order,<sup>24</sup> the majority held that defendant's admittedly malicious

<sup>18</sup>2 Story, Commentaries on the Constitution of the United States (4th ed. 1873) §§ 1880-1892; Note (1931) 31 Col. L. Rev. 1148. See Justice Butler's dissent in the *Near* case: "The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity." *Near v. Minnesota*, 283 U. S. 697, 735, 51 S. Ct. 625, 638, 75 L. ed. 1357, 1377 (1931).

<sup>19</sup>283 U. S. 697, 716, 51 S. Ct. 625, 631, 75 L. ed. 1357, 1367 (1931).

<sup>20</sup>343 U. S. 250, 72 S. Ct. 725, 96 L. ed. 919 (1952).

<sup>21</sup>"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4 Blackstone, Commentaries (1825) 151.

<sup>22</sup>E.g., certain utterances during time of war, obstructions to the government's recruiting service or publication of the sailing dates of transports or the number and location of troops, obscene publications, incitements to acts of violence and the overthrow by force of orderly government, and words that have all the effect of force.

<sup>23</sup>"This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare." *State v. Guilford*, 174 Minn. 457, 219 N. W. 770, 772 (1928).

<sup>24</sup>See 283 U. S. 697, 735, 51 S. Ct. 625, 638, 75 L. ed. 1357, 1377 (1931).

and defamatory publications were within the area of constitutionally protected speech.

The *Beauharnais* case, another 5-4 decision, upheld as a form of criminal libel law, a state statute which made it a crime to publish any lithographs, pictures, etc., which exposed the citizens of any race, color, creed or religion to contempt, derision or obloquy or which was productive of riots or breaches of the peace.<sup>25</sup> Although the statute provided for criminal punishment after publication, it seems that, insofar as the criminal law is preventive, the effect of imposing criminal penalties for past defamations will have the practical effect of imposing prior restraint on the utterance of further defamations in the future. Defendant was found guilty of publishing pamphlets which attacked and defamed the Negro race, and on appeal challenged the validity of the statute in the light of the Fourteenth Amendment. With the history of interracial tensions and conflicts in Illinois for over 100 years in mind, the majority opinion pointed out that the state legislature must be allowed a "choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power."<sup>26</sup> The policy chosen by the Illinois legislature was one calculated to curb false or malicious defamation of racial or religious groups, made in public places and designed to stir emotional responses in those to whom it was presented. Thus, the Supreme Court excluded this type of libel from the area of constitutionally protected speech.<sup>27</sup> In regard to this class of publication and others such as the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words, Justice Frankfurter declared: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>28</sup>

Justice Black, in one of the dissenting opinions in the *Beauharnais* case, argued, on the contrary: "I think the First Amendment, with the

<sup>25</sup>Ill. Ann. Stat. (Smith-Hurd 1935) c. 38, § 471.

<sup>26</sup>343 U. S. 250, 262, 72 S. Ct. 725, 733, 96 L. ed. 919, 930 (1952): "That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues." 343 U. S. 250, 262, 72 S. Ct. 725, 733, 96 L. ed. 919, 930 (1952).

<sup>27</sup>"Libelous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behinds the phrase 'clear and present danger'." 343 U. S. 250, 266, 72 S. Ct. 725, 735, 96 L. ed. 919, 932 (1952).

<sup>28</sup>343 U. S. 250, 256, 72 S. Ct. 725, 731, 96 L. ed. 919, 927 (1952).



Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.' Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship."<sup>29</sup>

In the *Near* case, the immediate public interest would have been served by sustaining the statute designed to prevent the circulation of scandal which tends to disturb the public peace and provokes assaults and crimes,<sup>30</sup> but the Court invoked the theory of the constitutional guaranty that a more serious public evil would be caused by sanctioning legislative authority to prevent publication.<sup>31</sup> In the *Beauharnais* case, public interest also favored the statute, as an instrumentality to prevent discord between the races, and in this instance the Supreme Court apparently lowered the barrier against what had heretofore been regarded as invasion of constitutionally protected speech to protect that interest. The explanation of the difference between the two decisions may be contained in an observation in the opinion of the principal case: "Perhaps in the last analysis how a given case is decided will depend upon the principal aspect of what the defendant has done and the nature of the public interest in the particular matter to which the subject words relate."<sup>32</sup>

---

<sup>29</sup>343 U. S. 250, 275, 72 S. Ct. 725, 740, 96 L. ed. 919, 937 (1952). Cf. Chafee, *Thirty Five Years With Freedom of Speech* (1952) 1 Kan. L. Rev. 1, 4: "No free speech problem can be satisfactorily solved by men who think only of the risks from open discussion. It is indispensable to balance against those risks the deeply felt realization that one of the most important purposes of society and government is the discovery and spread of true facts and sound judgments on subjects of general concern. . . . No doubt, some sacrifice of discussion is occasionally required. After careful balancing, the scales may tip in favor of other purposes of society, like protection from disorder and foreign conquest. Nevertheless, it is essential that such careful balancing shall take place in men's minds and that the great social values of open speech and an untrammelled press shall weight very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom."

<sup>30</sup>"... the fact that a public interest against the publication of a scandalous newspaper could be shown was an argument in the *Near* case against the decision of the court." *Krebiozen Research Foundation v. Beacon Press*, 134 N. E. (2d) 1, 8 (Mass. 1956).

<sup>31</sup>This point was clearly made by Judge Pound in his dissent in the case of *People v. Gitlow*, 234 N. Y. 132, 136 N. E. 317, 327 (1922) aff'd 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925): "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."

<sup>32</sup>*Krebiozen Research Foundation v. Beacon Press*, 134 N. E. (2d) 1, 9 (Mass. 1956). Cf. dissent of Justice Black in the *Reauharnias* case: "I do not agree that the Constitution leaves freedom of . . . speech . . . at the mercy of a case-by-case, day-by-day

Decisions in a wide variety of types of controversies demonstrate that to some extent the law does sanction prior restraints of publications. The general concern for the protection of property is apparently the basis for the long-standing rule that equity can and should enjoin libels constituting continuing injuries to a property right.<sup>33</sup> The importance of the public interest as justification for equitable intervention is obvious in the class of libels which tend to create public unrest and discord, such as picketing in some labor disputes,<sup>34</sup> "fighting" words,<sup>35</sup> and words with the force of verbal acts.<sup>36</sup>

Another class of cases in which the public interest factor overrides the constitutional guaranty is that involving profane, lewd, or obscene

majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather than on the grace of this Court on an individual case basis." 343 U. S. 250, 274, 72 S. Ct. 725, 739, 96 L. ed. 919, 936 (1952).

<sup>33</sup>*City of Mobile v. Orr*, 181 Ala. 308, 61 So. 920 (1913); *Chrisman v. Culinary Workers' Local Union No. 62*, 46 Cal. App. (2d) 129, 115 P. (2d) 553 (1941).

<sup>34</sup>*Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union*, 31 Cal. (2d) 441, 189 P. (2d) 277 (1948). Here defendant union was enjoined from picketing plaintiff's tracks, etc. The court held that, although picketing was identified with the constitutional guaranty of freedom of speech, the public interest in plaintiff's carrying out its duties as a common carrier tipped the scales in favor of preventive relief. *Magill Bros., Inc. v. Building Service Employees*, 20 Cal. (2d) 506, 127 P. (2d) 542, 544 (1942): "... it is the nearly unanimous rule throughout the country that equity will interfere where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal." To the same effect are: *Ex parte Blaney*, 30 Cal. (2d) 643, 184 P. (2d) 892 (1947); *Pezold v. Amalgamated Meat Cutters and Butcher Workmen*, 54 Cal. App. (2d) 120, 128 P. (2d) 611 (1942).

<sup>35</sup>E.g., *Chaplinsky v. New Hampshire*, 315 U. S. 568, 573, 62 S. Ct. 766, 770, 86 L. ed. 1031, 1036 (1942) held constitutional, as not repugnant to the Fourteenth Amendment, a state statute which was designed to "prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." Although this case did not involve prior restraint of 'fighting words,' it held that such words were not within the area of constitutionally protected speech.

<sup>36</sup>*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 31 S. Ct. 492, 497, 55 L. ed. 797, 805 (1911): "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as such subject to injunctions as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." See *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 473 (1919): "It [constitutional guaranty of freedom of speech] does not even protect a man from an injunction against uttering words that may have all the effect of force."

publications.<sup>37</sup> The social interest in order and morality is considered more important than the free and unbridled publication of such literature. Public interest has been held paramount in the matter of wartime information,<sup>38</sup> such as sailing dates of ships and military troop information. Also, obstructions to the government's recruiting program during a war-time period have been prohibited, despite the constitutional guaranty.<sup>39</sup> Finally, certain administrative regulations of governmental units which abridge the freedom of speech and press if strictly construed have been held constitutional. These include Post Office regulations which allow exclusion from the mails of certain matter,<sup>40</sup> radio and television broadcasting regulations,<sup>41</sup> and provisions

<sup>37</sup>*Brown v. Kingsley Books*, 1 N. Y. (2d) 177, 134 N. E. (2d) 461, 467 (1956) held constitutional a New York statute which authorizes an injunction against sale of obscene printed matter. Defendant urged that even obscene publications cannot constitutionally be withheld from the market place of ideas, and that the public has a right to read whatever is printed and form its own opinion. The court replied that "the question is one of balancing the several competing interests involved. As the Supreme Court has emphasized, in reference to the federal statute declaring obscene material nonmailable... there is no necessity 'to satisfy all tastes no matter how perverted.'" See *Beauharnais v. Illinois*, 343 U. S. 250, 255-256, 72 S. Ct. 725, 730, 96 L. ed. 919, 926-927 (1952); *Winters v. New York*, 333 U. S. 507, 510, 68 S. Ct. 665, 668, 92 L. ed. 840, 847 (1948); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. ed. 1031, 1035 (1942); *Near v. Minnesota*, 283 U. S. 697, 716, 51 S. Ct. 625, 631, 75 L. ed. 1357, 1367 (1931).

<sup>38</sup>*Pound, Equitable Relief Against Defamation and Injuries To Personality* (1916) 29 *Harv. L. Rev.* 640, 653; *Chafee, Free Speech in the United States* (1941) 10, 97-100, 315. See *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931).

<sup>39</sup>*Chafee, Free Speech in the United States* (1941) 97-100. The Supreme Court has effectively silenced such publications by convictions under the Espionage Act. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 474 (1919).

<sup>40</sup>The Supreme Court decisions seem to hold the power of Congress to impose conditions upon the use of the mails to transcend the constitutional guaranty of liberty of the press. *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 L. ed. 1190 (1913); *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092 (1904); *In re Rapier*, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93 (1892); *Ex Parte Jackson*, 96 U. S. 727, 24 L. ed. 877 (1878). See *Chafee, Free Speech in the United States* (1941) 99: "It is clear that exclusion from the mails practically destroys the circulation of a book or periodical, and makes free speech to that extent impossible. To say, as many courts do, that the agitator is still at liberty to use the express or the telegraph, recalls the remark of the Bourbon princess when the Paris mob shouted for bread, 'Why don't they eat cake?'"

<sup>41</sup>Federal legislation has preempted the field of regulation of radio and television broadcasting. *Dumont Laboratories v. Carroll*, 184 F. (2d) 153 (C. A. 3rd, 1950) cert. den. 340 U. S. 929, 71 S. Ct. 490, 95 L. ed. 670 (1951). The Radio Act of 1927, 44 Stat. 1162 (1927), 47 U. S. C. A. § 81 et seq. (1955) and the Communications Act of 1934, 48 Stat. 1064 (1934), 47 U. S. C. A. § 151 et seq. (1955) are con-

of the Tariff Act which permit officials to refuse entry to some types of literature.<sup>42</sup> In addition, some states have motion picture censorship boards.<sup>43</sup> Although these regulations often operate indirectly, the end result is censorship of literature, motion pictures, or radio or television broadcasts which governmental bodies have determined would be detrimental to the best interests of the public if disseminated.

It appears to be quite logical that the public interest factor should be an important consideration in cases involving possible abridgement of liberty of the press. The constitutional guaranty is, in effect, a declaration of the policy which *usually* works in the best interests of the public by allowing publication to be made. If in a given situation the public interest will be better served by the suppression of the publication, it seems more reasonable to look specifically to the *actual interest* of the public rather than automatically to presume the usually-valid

trolling. Although 47 U. S. C. A. § 326 declares that nothing in the Act should be understood to give the Federal government power of censorship over broadcasting, § 303 (m)(1)(D) authorizes the Commission to suspend the license of any operator upon proof that "the licensee . . . has transmitted . . . communications containing profane or obscene words, language or meaning. . . ." 62 Stat. 769 (1948), 18 U. S. C. A. § 1464 (1950) provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication.

<sup>42</sup>Federal Tariff Act of 1930, 46 Stat. 590 (1930), 19 U. S. C. A. § 1001 et seq. (1937). E. g., 46 Stat. 590, III § 305 (1930), 19 U. S. C. A. § 1305 (1937) provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter, after adjudication that it is in fact obscene.

It seems that, if the book is adjudged to be obscene, the result of the Tariff Act provisions is censorship, despite the fact that only distribution is curtailed. "Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson*, 96 U. S. 727, 733, 24 L. ed. 877, 879 (1878).

<sup>43</sup>However, the Supreme Court held in 1952 that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 72 S. Ct. 777, 96 L. ed. 1098 (1952). The New York statute held unconstitutional in that case permitted the banning of "sacrilegious" films, and the Court limited its decision to "sacrilegious" motion pictures: "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films." 343 U. S. 495, 505, 72 S. Ct. 777, 782, 96 L. ed. 1098, 1108 (1952). *Times Film Corp. v. Chicago*, 139 F. Supp. 837, 841 (N. D. Ill. 1956) held that the First Amendment allowed a local authority to censor films under a statute designed to prevent the exhibition of obscene motion pictures. "It [censorship] is a proper exercise of the police power reserved to the individual States. In the light of the language of the Supreme Court in the cited cases, this Court cannot agree . . . that the individual States . . . must wait until a questionable film is shown and then resort to its remedy by way of protracted criminal proceedings." Cf. *Gelling v. Texas*, 343 U. S. 960, 72 S. Ct. 1002, 96 L. ed. 1359 (1952).

policy declared by the Constitution to be valid in the particular case. Allowing a court to determine the best interests of the public may smack of censorship. But courts frequently decide other types of controversies, such as nuisance cases, on the basis of public policy after deciding what the best interests of the public are.

The court in the *Krebiozen* case seems to have arrived at a just result, not by automatically invoking the constitutional guaranty, but by considering all the relevant factors. It looked to see what the public interest required, which was publication of the book, and although a balancing of this interest against the constitutional guaranty was not necessary here, the court indicated its willingness to strike such a balance in a proper case.

ROBERT G. McCULLOUGH

LABOR LAW—EXTENT OF PRE-EMPTION OF LABOR RELATIONS FIELD BY  
NATIONAL LABOR RELATIONS ACT. [United States Supreme Court]

Under the federal pre-emption doctrine, whenever Congress enacts legislation in a field available to it under the Constitution, that enactment, by virtue of the Supremacy Clause,<sup>1</sup> in that field supersedes conflicting state law, whether statutory or judge made.<sup>2</sup> The effect of such federal legislation upon state jurisdiction in a given field varies, depending upon the intent of Congress at the time the legislation is enacted. It may have the effect of conferring jurisdiction on the states; it may give the states concurrent jurisdiction with the federal government; or it may altogether preclude state jurisdiction.<sup>3</sup> In

---

<sup>1</sup>U. S. Const., Art. 6, Cl. 2.

<sup>2</sup>*Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. ed. 23 (1824). For leading case in labor relations field, see *Garner v. Teamsters Union*, 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 (1953). See *Cooley v. Board of Port Wardens*, 53 U. S. (12 How.) 299, 320, 13 L. ed. 996, 1005 (1851); Pollard, *Federal Labor Law: Administrative Recession* (1955) 6 Lab. L. J. 863; Note (1956) 42 Va. L. Rev. 43.

<sup>3</sup>Guides in judging the validity of state legislation with regard to the exercise of its police powers are: (1) when state and local laws are in conflict with an act of Congress, the law of Congress prevails; (2) when an act of Congress does not clearly prohibit state action but such prohibition is inferable from the scope and purpose of federal legislation, it must be clear that the state legislation is inconsistent with that of Congress in order to render it invalid; (3) when Congress has circumscribed its regulation of interstate commerce to a limited field the intent to supersede the exercise of police power by the state is not implied as to matters not covered by federal legislation; (4) when a state has enacted laws under its police power although they affect interstate commerce, such laws may stand until Congress takes possession of the field under its superior authority to regulate such commerce, but such federal action must be specific in order to be paramount; and (5) Congressional supersedure of local laws is not to be inferred unless clearly indi-

the last of these three situations, federal jurisdiction is protected from attempted infringement by state legislative,<sup>4</sup> judicial,<sup>5</sup> or administrative<sup>6</sup> action.

However, complete federal pre-emption is recognized only within certain limits. In order to preclude a state from asserting jurisdiction, Congress must clearly manifest an intent to occupy a field, although this intent may be implied from the subject matter and the nature of the legislation.<sup>7</sup> Further, before the principle of the supremacy of congressional legislation will be invoked to invalidate a state's exercise of its inherent police power, the conflict between the federal and state acts must be so "direct and positive" that the two cannot be "reconciled or consistently stand together";<sup>8</sup> and even then the state law may be superseded only to the extent that the two are inconsistent.<sup>9</sup> Thus, an act of Congress may occupy only a limited portion of the field, leaving unimpaired the right of the states to enact legislation covering other aspects of the subject.<sup>10</sup>

In recent years Congress has passed many statutes divesting the states of broad powers, and has set up appropriate commissions to which have been delegated certain of the powers contained in these statutes.<sup>11</sup> One of these is the National Labor Relations Act<sup>12</sup> which is administered by the National Labor Relations Board. The legisla-

cated by considerations which are persuasive of its intent to do so." *Atchinson, T. & S. F. Ry. Co. v. Chicago*, 136 F. Supp. 476, 480 (N. D. Ill. 1955). Similar sets of guides are set out in: *First Iowa Hydro-Elec. Coop. v. Federal Power Comm.*, 80 App. D. C. 211, 151 F. (2d) 20 at 26 (1945); *First Nat. Ben. Soc. v. Garrison*, 58 F. Supp. 972 at 983-985 (D. C. D. C. 1945).

<sup>4</sup>*Southern Pac. Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945).

<sup>5</sup>*Kansas City So. Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 34 S. Ct. 564 58 L. ed. 857 (1914).

<sup>6</sup>*Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 (1947).

<sup>7</sup>*Maurer v. Hamilton*, 309 U. S. 598, 60 S. Ct. 726, 84 L. ed. 969 (1940); *Welch Co. v. New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 83 L. ed. 500 (1939); *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. ed. 3 (1937); *Northwestern Bell Tel. Co. v. Nebraska Ry. Comm.*, 297 U. S. 471, 56 S. Ct. 536, 80 L. ed. 810 (1936); *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 51 S. Ct. 65, 75 L. ed. 255 (1930); *Missouri, K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 34 S. Ct. 790, 58 L. ed. 1377 (1914); *Missouri Pac. Ry. Co. v. Larabee Mills Co.*, 211 U. S. 612, 29 S. Ct. 214 53 L. ed. 352 (1908); *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, 47 L. ed. 108 (1902).

<sup>8</sup>*Sinnot v. Davenport*, 63 U. S. (22 How.) 227, 243, 16 L. ed. 243, 247 (1859).

<sup>9</sup>*Savage v. Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. ed. 1182 (1912); *Re Squires*, 114 Vt. 285, 44 A. (2d) 133, 161 A. L. R. 349 (1945).

<sup>10</sup>See note 8, *supra*.

<sup>11</sup>Examples of such commissions are the Securities and Exchange Commission, the Federal Communications Commission, and the Federal Power Commission.

<sup>12</sup>49 Stat. 449 et seq. (1935), 29 U. S. C. A. § 151 et seq. (1956).

tion, as amended by the Taft-Hartley Act of 1947,<sup>13</sup> did not expressly preclude state jurisdiction in the field of labor relations; it has, in fact, left a wide area open to state regulation and control.<sup>14</sup> Where the matter is not one exclusively granted to the National Labor Relations Board, the state courts and agencies possessing jurisdiction prior to the passage of the Act have retained it.<sup>15</sup>

Consequently, the question of what areas are subject to federal jurisdiction and what areas are subject to state jurisdiction since the passage of the Taft-Hartley Act has been the source of much litigation. The Supreme Court itself has observed that "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds."<sup>16</sup> The recent case of *U.A.W.-C.I.O. v. Wisconsin Employment Relations Board*<sup>17</sup> has served to mark one area in which the states have retained their original jurisdiction. In that case members of the appellant union engaged in mass picketing, violence, and coercion directed against the employer (the Kohler Company) and some of its employees. Kohler complained to the Wisconsin Employment Relations Board, which issued an order directing the union and certain of its members to cease and desist from all such activities on the ground that they constituted a violation of the Wisconsin Employment Peace Act.<sup>18</sup> The union appealed from the order, contending that the Wisconsin Board had no power to enforce the order since the acts complained of would be a violation of the Taft-Hartley Act and therefore a matter exclusively for the National Labor Relations Board. The United States Supreme Court, in a six to three decision, upheld the ruling of the Wisconsin Supreme Court that the Wisconsin Board had jurisdiction over the union, and that its order was a valid exercise of the state's police power to protect its citizens from violence and coercion.

In reaching this conclusion, the majority of the Court admitted that

---

<sup>13</sup>Labor-Management Relations Act, 61 Stat. 136 et seq. (1947), 29 U. S. C. A. § 141 et seq. (1956).

<sup>14</sup>*Douglas Public Service Corp. v. Gaspard*, 225 La. 972, 74 S. (2d) 182 (1954).

<sup>15</sup>*International Brotherhood of Teamsters v. Hanke*, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995, 13 A. L. R. (2d) 631 (1950); *Hughes v. Superior Court of California*, 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950); *Algoma Plywood and Veneer Co. v. Wisconsin Emp't Rel. Bd.*, 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691 (1949); *International Union v. Wisconsin Emp't Rel. Bd.*, 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (1949); *Allen-Bradley Local v. Wisconsin Emp't Rel. Bd.*, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942).

<sup>16</sup>*Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 480, 75 S. Ct. 480, 488, 99 L. ed. 546, 557 (1955).

<sup>17</sup>351 U. S. 266, 76 S. Ct. 794, 100 L. ed. adv. p. 666 (1956).

<sup>18</sup>Wis. Stat. (1955) §§ 111.01, 111.04, 111.06 (2) (a, f), 111.07 (1).

the National Board could have issued a similar order, since the union conduct was a violation of Section 8 (b) (1) of the Taft-Hartley Act; that a congressional enactment occupying the field pre-empts state power under the Supremacy Clause; and that, as a general rule, a state may not, in the furtherance of its public policy, enjoin conduct that has been made an unfair labor practice under the federal statutes. But the Court concluded that Congress did not intend to make the National Labor Relations Act the exclusive means of controlling unfair labor practices, because Congress, in passing the Taft-Hartley amendment, when referring to the Board's powers under Section 10 omitted the word "exclusive" and re-enacted the phrase "shall not be affected by other means of adjustment or prevention. . ."<sup>19</sup> Moreover, the Court noted that Congress, when enacting the Taft-Hartley amendment, must have known of the Court's previous decision in *Allen-Bradley Local v. Wisconsin Employment Relations Board*,<sup>20</sup> upholding the provision of the Wisconsin Employment Peace Act which prohibits violence and coercion as unfair labor practices; and since no provision was included in the amendment to overcome the effect of that decision, Congress apparently did not intend to make the National Labor Relations Act exclusive of state remedies. The majority emphasized that the states are the natural guardians against violence, and that Congress would not leave them powerless to prevent violence in a labor dispute without compelling directions to that effect.

The three dissenting justices feared duplication of remedy and conflict arising therefrom.<sup>21</sup> They were of the opinion that Wisconsin had prescribed an administrative remedy that duplicated the administrative remedy prescribed by Congress, each dealing with the same identical conduct. Since the Court had disallowed duplication of remedy in *Garner v. Teamsters Union*,<sup>22</sup> the dissenters felt that to allow it here would open the doors to conflict. They were of the opinion that the states may control violence through their criminal law, but not by allowing their administrative agencies and courts to enjoin conduct which Congress has authorized the federal agency to enjoin.

The view of the majority that the jurisdiction of the National Board was not intended to be wholly exclusive over the field of labor relations is apparently sound. Although Section 10 (a) of the Taft-Hartley Act gives the Board power to prevent any person from engag-

---

<sup>19</sup>Conference Report on H. R. 3020, H. R. Rep. No. 510, 80th Cong., 1st Sess. 52 (1947).

<sup>20</sup>315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942).

<sup>21</sup>See 351 U. S. 266, 275, 76 S. Ct. 794, 800, 100 L. ed. adv. p. 666, 671 (1956).

<sup>22</sup>346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 (1953).



ing in any unfair labor practice listed in Section 8,<sup>23</sup> and although Section 10 (c) directs the Board to issue cease-and-desist orders after appropriate findings of fact,<sup>24</sup> there is no declaration that this procedure is intended to be exclusive. On the contrary, that Congress did not so intend is shown by the report of the congressional conference committee: "By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes it clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be *in addition to, and not in lieu of,* other remedies."<sup>25</sup>

Since Congress did not give the National Board "exclusive" jurisdiction, the states have retained their inherent power to protect their citizens from violence, even though it is invoked in connection with a labor dispute.<sup>26</sup> A police regulation to promote the general welfare is not invalid simply because it may incidentally affect some right granted by Congress.<sup>27</sup> The Supreme Court has said that, even where Congress has enacted legislation in a given field, the states are not prevented from prosecuting where the same act constitutes both a federal offense and a state offense under the police power.<sup>28</sup>

A second factor tending to show that this congressional action did not entirely pre-empt state police power in the labor field was illustrated by *International Union v. Wisconsin Employment Relations Board*,<sup>29</sup> which held that the National Board was empowered to forbid a strike the *purpose* of which was illegal under the Federal Act, but that it had no power to forbid a strike merely because its

<sup>23</sup>L. M. R. A., 61 Stat. 140 (1947), 29 U. S. C. A. § 158 (1956).

<sup>24</sup>L. M. R. A., 61 Stat. 146 (1947), 29 U. S. C. A. § 160 (c) (1956).

<sup>25</sup>Conference Report on H. R. 3020, H. R. Rep. No. 510, 80th Cong., 1st Sess. 52 (1947) [italics supplied].

<sup>26</sup>*Perez v. Trifiletti*, 74 S. (2d) 100 (Fla. 1954) cert. den. 348 U. S. 926, 75 S. Ct. 337, 99 L. ed. 726 (1955).

<sup>27</sup>A federal court allowed the city of Chicago, under its police power, to license carriers transporting through passengers between railroad terminals in Chicago. *Atchinson, T. & S. F. Ry. Co. v. Chicago*, 136 F. Supp. 476 (N. D. Ill. 1955). In *Welch Co. v. New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 83 L. ed. 500 (1939) the Court declared that by mere grant of power to the Interstate Commerce Commission Congress did not intend to supersede state police regulations established for the protection of the public using state highways.

<sup>28</sup>*Gilbert v. Minnesota*, 254 U. S. 325, 41 S. Ct. 125, 65 L. ed. 287 (1920); *Fox v. Ohio*, 46 U. S. (5 How.) 410, 12 L. ed. 213 (1847). See *Pennsylvania v. Nelson*, 350 U. S. 497, 500, 76 S. Ct. 477, 479, 100 L. ed. adv. p. 415, 418 (1956). Police power cannot be used, however, as a pretext for outlawing certain action wholesale. *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. ed. 1317 (1946).

<sup>29</sup>336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (1949).

*method* was illegal. In that case, the Court reasoned that since such conduct is neither prohibited nor protected by the Taft-Hartley Act, it is open to state control, and the state remedy, having no parallel in the federal Act, is therefore not in conflict with the federal Act.<sup>30</sup> On similar reasoning the Supreme Court decided, in *United Construction Workers v. Laburnum Corp.*,<sup>31</sup> that since the state remedy for collecting damages for injuries caused by tortious conduct was neither prescribed nor prohibited by Congress, the states retained jurisdiction over the action even though it arose in connection with a labor dispute. Thus, the jurisdiction of the National Board is also limited by the traditional state remedy for common-law tort actions, since the state remedy has no corollary in the federal Act.

In the principal case, the union conceded that the state may punish violence in a labor dispute under its criminal statutes, but contended that the state could not exercise its police power through the state labor board. The majority of the Court dismissed this contention with these few words: "The fact that Wisconsin has chosen to entrust its power to a labor board is of no concern to this Court."<sup>32</sup> Consistent with this observation is a long line of cases in which the Supreme Court had already held that the fact that a state's policy is expressed by the judiciary rather than the legislature is immaterial.<sup>33</sup> Rights of the states under the Fourteenth Amendment "turn on the power of the State, no matter by what organ it acts,"<sup>34</sup> and that Amendment leaves the states free to distribute the powers between their legislative and judicial branches as they wish.<sup>35</sup> The police power of a state can be delegated to subordinate agencies and can be exercised by such agencies to the extent of such delegation of authority.<sup>36</sup> If the legislature declares a policy which is within the police power of the state,

<sup>30</sup>*International Union v. Wisconsin Emp't Rel. Bd.*, 336 U. S. 245 at 265, 69 S. Ct. 516 at 527, 93 L. ed. 651 at 669 (1949).

<sup>31</sup>347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 (1954).

<sup>32</sup>*U.A.W.-C.I.O. v. Wisconsin Emp't Rel. Bd.*, 351 U. S. 266, 275, 76 S. Ct. 794, 800, 100 L. ed. adv. p. 666, 671 (1956).

<sup>33</sup>*Hughes v. Superior Court of California*, 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950); *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. ed. 497 (1944); *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362, 60 S. Ct. 968, 84 L. ed. 1254 (1940); *Hebert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. ed. 270 (1926); *Del Castillo v. McConnico*, 168 U. S. 674, 18 S. Ct. 229, 42 L. ed. 622 (1898).

<sup>34</sup>*Missouri v. Dockery*, 191 U. S. 165, 171, 24 S. Ct. 53, 54, 48 L. ed. 133, 134 (1903).

<sup>35</sup>*Keller v. Potomac Elec. Power Co.*, 261 U. S. 428, 43 S. Ct. 445, 67 L. ed. 731 (1923); *Soliah v. Heskin*, 222 U. S. 522, 32 S. Ct. 103, 56 L. ed. 294 (1912); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. ed. 150 (1908); *Dreyer v. Illinois*, 187 U. S. 71, 23 S. Ct. 28, 47 L. ed. 79 (1902).

<sup>36</sup>*State v. Donnelly*, 285 S. W. (2d) 669 (Mo. 1956); *State v. Curtis*, 319 Mo. 316, 4 S. W. (2d) 467 (1928).

the filling in of details and the prescribing of rules and regulations for operation and enforcement of the policy can be properly delegated to the administrative agency.<sup>37</sup>

Fear of conflict, arising from duplication of remedy caused by application of both federal and state authority, was the gravamen of the dissent in the principal case. The dissenting Justices relied on the *Garner* case<sup>38</sup> as authority for disallowing duplication of remedy, but in that case the Court was careful to point out that it was not reversing state action enjoining mass picketing, violence, and coercion—only peaceful picketing.<sup>39</sup> Thus, that decision did not limit the power of states in situations involving a breach of the peace.

It is submitted that the majority of the Court in the principal case has correctly considered that the fear of duplication of remedy opening the doors to conflict is outweighed by the danger of leaving the states powerless to control violence in a labor dispute by a holding that they were deprived of their inherent police power by the implications of the Taft-Hartley Act. The late Senator Taft was of the opinion, concerning the problem of duplication of remedy in cases of violence, that "there is no reason in the world why there should not be two remedies for an act of that kind."<sup>40</sup> If employers use violence and coercion to deter employees from joining a union, they are subject to state law, and they are also subject to be proceeded against for violating the National Labor Relations Act.<sup>41</sup> There seems to be no valid reason why employees should not be subject to the same rules as employers. Section 8(b) (1) (A) of the Taft-Hartley Act was not intended to confer on the National Board a general police power covering all acts of violence by a union, but, rather, was intended to bring within the scope of the Act such acts of violence directed against employees exercising rights guaranteed them by Section 7.<sup>42</sup> Fear by courts

---

<sup>37</sup>*Lew-Lew Realty Co. v. Falsey*, 141 Conn. 524, 107 A. (2d) 403 (1954).

<sup>38</sup>*Garner v. Teamsters Union*, 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 (1953).

<sup>39</sup>"Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 470, 479. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority." *Garner v. Teamsters Union*, 346 U. S. 485, 488, 74 S. Ct. 161, 164, 98 L. ed. 228, 238 (1953).

<sup>40</sup>93 Cong. Rec. 4024 (1947).

<sup>41</sup>H. R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947). Similarly, 93 Cong. Rec. 4024 (1947).

<sup>42</sup>*N. L. R. B. v. Furriers Joint Council of New York*, 224 F. (2d) 78 (C. A. 2nd, 1955).

of possible difficulties of duplication of remedy in extreme cases is not a valid reason for ousting a state from the exercise of its police power.<sup>43</sup>

The principal case has not changed the basic concept of the federal pre-emption doctrine. It has merely extended the scope of the "police power" exception so as to allow a state *labor board* to enjoin violent conduct in a labor dispute. It appears that the Court is in fact ameliorating the absolute supremacy of federal legislation under the Supremacy Clause by setting out areas in which the states can act despite the presence of federal legislation in the field.

THOMAS E. LOHREY, JR.

PROCEDURE—NUMBER OF CAUSES OF ACTION ARISING FROM SINGLE ACT OF WRONGDOING CAUSING BOTH PERSONAL AND PROPERTY DAMAGE.  
[West Virginia]

A perplexing problem of determining the meaning of the phrase "cause of action" is presented when two types of damage are sustained by one party through a single act of wrongdoing by another party.<sup>1</sup> The cases typically arise from automobile accidents caused by the defendant's negligence and resulting in personal injury to the plaintiff and property damage to his automobile, as in *Mills v. DeWees*,<sup>2</sup> a recent case of first impression in West Virginia. The accident out of which this litigation grew occurred in 1953 when the automobile owned by DeWess, and negligently operated by his son, collided with plaintiff's automobile. Later in the same year, plaintiff brought suit for his personal injuries, medical expenses, and loss of wages, and was awarded judgment for substantial damages. Subsequently, he instituted the present action to recover for damage to his automobile suffered in the same accident. The trial court sustained plaintiff's demurrer to defendant's plea of former adjudication and refused to permit defendant to introduce evidence of the previous judgment. On appeal the Supreme Court of West Virginia, recognizing that decisions in different jurisdictions have reached various results, held that one act of negligence resulting in both personal injury and property damage gives rise to only one cause of action.

The proper application of *res judicata* was held by the West Virginia court to require that matter which *could have been raised* in the prior action be barred from subsequently being litigated if, in the prior

---

<sup>43</sup>Cf. *Pennsylvania v. Nelson*, 350 U. S. 497, 76 S. Ct. 477, 100 L. ed. 415 (1956).

<sup>1</sup> Am. Jur., Actions §§111-113.

<sup>2</sup>93 S. E. (2d) 484 (W. Va. 1956).

and subsequent actions, there would exist an identity, first, of persons, second, of the quality in persons for or against whom the claim is made, third, of the thing sued for, and fourth, of the cause of action.<sup>3</sup> Though the opinion does not touch on all of those considerations, it appears that the court necessarily had to assume the presence of the established prerequisites in order to reach the desired result.<sup>4</sup> The only reason given to support the conclusion was based on concern for the defendant, the assertion being made that a contrary rule would "permit the splitting of what logically is a single cause of action, and a defendant which [sic] has committed a tort which has caused both property damage and personal injuries, may be harassed by two or more actions at law, though he has committed a single wrong."<sup>5</sup> The court recognized that the rule might cause hardships to plaintiffs under some circumstances; nevertheless, it asserted its conclusion in very inclusive terms: "Though the cause of a action for damage to property is assignable and a cause of action for personal injuries is not; though, under a prior policy of insurance containing a subrogation clause, an insurer may be subject to the rights of the injured party; and though the limitation period provided for by the statute of limitations is different in cases involving damages to property from cases involving personal injury damages, damages resulting from a single tort suffered by one person, consisting partly of property damage and partly of personal injury damages, are the subject of only one action against a tortfeasor."<sup>6</sup>

Courts have adopted three divergent views on this question.<sup>7</sup> The majority has reached the same result as the principal case,<sup>8</sup> the view

<sup>3</sup>93 S. E. (2d) 484 at 487 (W. Va. 1956), quoting prerequisites for *res judicata* from *Hannah v. Beaseley*, 132 W. Va. 814, 53 S. E. (2d) 729 (1949).

<sup>4</sup>A search of the authorities discloses much uncertainty as to what in fact is required to satisfy these prerequisites. The statement quoted in the principal case opinion appears to come from *Bouvier's Law Dictionary* (1946) 1058, which in turn relies on many old English and American cases.

<sup>5</sup>93 S. E. (2d) 484, 494 (W. Va. 1956).

<sup>6</sup>93 S. E. (2d) 484, 485 (W. Va. 1956).

<sup>7</sup>Notes (1950) 2 Ala. L. Rev. 75; (1950) 7 Wash. & Lee L. Rev. 99; (1940) 127 A. L. R. 1081; (1929) 64 A. L. R. 663.

<sup>8</sup>*Van Wie v. United States*, 77 F. Supp. 22 (N. D. Iowa 1948); *Jenkins v. Skelton*, 21 Ariz. 663, 192 Pac. 249 (1920); *Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662 (1936); *Seeger v. Town of Barkhamsted*, 22 Conn. 290 (1853); *Wealth v. Renai*, 114 A. (2d) 807 (Del. 1955); *Gregory v. Schnurstein*, 212 Ga. 497, 93 S. E. (2d) 680 (1955); *Bennett v. Dove*, 93 Ga. App. 57, 90 S. E. (2d) 601 (1955); *Fiscus v. Kansas City Pub. Ser. Co.*, 153 Kan. 493, 112 P. (2d) 83 (1941); *Pillsbury v. Kessler Shoe Co.*, 136 Me. 235, 7 A. (2d) 898 (1939); *Baltimore & Ohio R. R. v. Ritchie*, 31 Md. 191 (1869); *Dearden v. Hey*, 304 Mass. 639, 24 N. E. (2d) 644, 127 A. L. R. 1077 (1939); *Szostak v. Chevrolet Motor Co.*, 279 Mich. 603, 273 N. E. 284 (1937); *Coy v. St. Louis & San Francisco R. R. Co.*, 186 Mo. App. 408, 172 S. W. 446 (1915); *Farmer's*

being that only one tort has occurred and therefore there is a basis for only one cause of action,<sup>9</sup> and that the different injuries resulting, no matter how varied or numerous they may be, are merely items of damage arising out of the same wrong.<sup>10</sup> As it is against the policy of the law to permit the splitting of a cause of action,<sup>11</sup> the majority's concept of the situation places a duty on the plaintiff to include all the items of damage in his initial action.<sup>12</sup> The application of this rule is said to foster speed and economy in the judicial process<sup>13</sup> in that it shields defendant from the expense and trouble of defending two suits and also protects the public against the evils of unnecessary litigation which would crowd the courts and impede the administration of justice.<sup>14</sup> Since the majority rule as pronounced by the principal case

*Ins. Exchange v. Arlt*, 61 N. W. (2d) 429 (N. D. 1953); *Fields v. Philadelphia Rapid Transit Co.*, 273 Pa. 282, 117 Atl. 59 (1922); *Flickner v. One Chevrolet Truck & Trailer*, 178 S. C. 53, 182 S. E. 104 (1935); *Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S. W. (2d) 1059 (1931); *Smith v. Lenzi*, 74 Utah 362, 279 Pac. 893 (1929); *Moultroup v. Gorham*, 113 Vt. 317, 34 A. (2d) 96 (1943); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960, 47 A. L. R. 529 (1926); *Booth v. Frankenstein*, 209 Wis. 362, 245 N. W. 191 (1932). See *Southern Ry. Co. v. King*, 160 Fed. 332, 335 (C. C. A. 5th, 1908); *Mayfield v. Kovac*, 41 Ohio App. 310, 181 N. E. 28, 29 (1932); *Boos v. Claude*, 69 S. D. 254, 9 N. W. (2d) 262, 264 (1943).

<sup>9</sup>*Gregory v. Schnurstein*, 212 Ga. 497, 93 S. E. (2d) 680 (1956); *Mobile & O. R. Co. v. Mathews*, 115 Tenn. 172, 91 S. W. 194 (1906); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960, 47 A. L. R. 529 (1926).

<sup>10</sup>*Georgia R. R. & Power Co. v. Endsley*, 167 Ga. 439, 145 S. E. 851, 62 A. L. R. 256 (1928); *Dearden v. Hey*, 304 Mass. 639, 24 N. E. (2d) 644, 127 A. L. R. 1077 (1939); *King v. Chicago M. and St. P. R. Co.*, 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161 (1900).

<sup>11</sup>*Cassidy v. Berkovitz*, 169 Ky. 785, 185 S. W. 129 (1916); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960, 47 A. L. R. 529 (1926).

<sup>12</sup>*Southern Ry. Co. v. King*, 160 Fed. 332 (C. C. A. 5th, 1908); *aff'd* 217 U. S. 524, 30 S. Ct. 594, 54 L. ed. 868 (1910); *Holcombe v. Garland & Dinwiddie, Inc.*, 162 S. C. 379, 160 S. E. 881 (1931); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960, 47 A. L. R. 529 (1926).

<sup>13</sup>*Kimball v. Louisville & N. R. Co.*, 94 Miss. 396, 48 So. 230 (1909).

<sup>14</sup>*Georgia R. R. & Power Co. v. Endsley*, 167 Ga. 439, 145 S. E. 851, 62 A. L. R. 256 (1928); *Mobile & O. R. Co. v. Mathews*, 115 Tenn. 172, 91 S. W. 194 (1906). However, since the rule is primarily for his benefit and protection, the defendant can waive it under limited conditions. *Georgia R. R. & Power Co. v. Endsley*, *supra*; *Fiscus v. Kansas City Pub. Ser. Co.*, 153 Kan. 493, 112 P. (2d) 83 (1941); *Doran v. Cohen*, 147 Mass., 342, 17 N. E. 647 (1888); *General Exchange Ins. Corp. v. Young*, 206 S. W. (2d) 683 (Mo. App. 1947). It was decided in *Szostak v. Chevrolet Motor Co.*, 279 Mich. 603, 273 N. W. 284 (1937) that a waiver is not accomplished by a mere failure to act in the pleading stage, and the *Fiscus* case, *supra*, held that timely objection must be made at the first opportunity following a statement of the cause of action; but on the other hand, *Mayfield v. Kovac*, 41 Ohio App. 310, 181 N. E. 28, 30 (1932) held that "where two actions are brought when but one should have been brought, and the person against whom they are brought fails to interpose in the second action, and at the earliest opportunity, a plea in bar, or otherwise object to the trial of such action, and submits the case upon the merits, he will be held

admits of no exceptions, it has been argued that its adoption will often produce injustice in that an injured plaintiff will be penalized by an error or omission by his attorney.<sup>15</sup> Responsive to this criticism, some courts which ordinarily follow the majority rule have left open the possibility of departing from it when necessary to prevent unjust results.<sup>16</sup> For example, under this qualification, plaintiff, who, without fault on his part, did not know of the existence of one of the items of damage when bringing his first suit for the other item of damage, will not be barred in a second action for the previously omitted item of damage.<sup>17</sup>

Rejecting the majority rule as failing to recognize that two distinct rights of plaintiff have been violated, a minority of American jurisdictions have adopted the English view, which regards the resulting damages as the gravamen of the action.<sup>18</sup> The theory is that negligence, without more, is not itself actionable,<sup>19</sup> and that harm is the gist of a cause of action.<sup>20</sup> These courts, tracing their authority back to *Bruns-*

to have impliedly consented to the splitting of said single cause of action." The latter idea is further expressed in *Schermerhorn v. Los Angeles Pac. R. Co.*, 18 Cal. App. 454, 123 Pac. 351 (1912).

The *Fiscus* case, *supra*, further stated that the rule against splitting is not absolute to the extent that an attempted splitting would defeat the first cause of action. There is no objection to a judgment being rendered on the part actually litigated, but the plaintiff is precluded from subsequently attempting to maintain an action on the portion omitted in the previous contest. In *Carvil v. Garrigues*, 5 Pa. 152 (1847), this limitation was imposed on the plaintiff even where the court hearing the first action was one of limited jurisdiction. *Wealth v. Renai*, 114 A. (2d) 807 (Del. 1955) pointed out that a single cause of action likewise cannot arbitrarily be made into several proceedings by an assignment.

<sup>15</sup>*Georgia R. R. & Power Co. v. Endsley*, 167 Ga. 439, 145 S. E. 851, 62 A. L. R. 256 (1928).

<sup>16</sup>*Farmer v. Union Ins. Co.*, 146 Miss. 600, 111 So. 584 (1927); *Kimball v. Louisville & N. R. Co.*, 94 Miss. 396, 48 So. 230 (1909); *Boos v. Claude*, 69 S. D. 254, 9 N. W. (2d) 262 (1943).

<sup>17</sup>*Boos v. Claude*, 69 S. D. 254, 9 N. W. (2d) 262 (1943).

<sup>18</sup>*Borden's Condensed Milk Co. v. Mosby*, 250 Fed. 839 (C. C. A. 2d, 1918); *Boyd v. Atlantic Coast Line*, 218 Fed. 653 (S. D. Ga. 1914); *Clancy v. McBride*, 338 Ill. 35, 169 N. E. 729 (1930); *Smith v. Red-Top Taxicab Corp.*, 111 N. J. L. 439, 168 Atl. 796 (1933); *Ochs v. Public Service Ry. Co.*, 81 N. J. 661, 80 Atl. 495 (1911); *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772 (1902); *Timian v. Whelan*, 128 Misc. 192, 218 N. Y. Supp. 108 (1926); *Vasu v. Kohlers Inc.*, 145 Ohio St. 321, 61 N. E. (2d) 707, 166 A. L. R. 855 (1945); *Baltimore American Ins. Co. v. Cannon*, 181 Okla. 244, 73 P. (2d) 167 (1937); *Winters v. Bisallon*, 153 Ore. 509, 57 P. (2d) 1095, 104 A. L. R. 968 (1936); *Watson v. Texas Pac. Ry.*, 8 Tex. Civ. App. 144, 27 S. W. 924 (1894); *Carter v. Hinkle*, 189 Va. 1, 52 S. E. (2d) 135 (1949); *Brunsdon v. Humphrey*, 14 Q. B. D. 141 (1884).

<sup>19</sup>*Ochs v. Public Service Ry. Co.*, 81 N. J. L. 661, 80 Atl. 495 (1911).

<sup>20</sup>*Clancy v. McBride*, 338 Ill. 35, 169 N. E. 729 (1930). *Ochs v. Public Service Ry. Co.*, 81 N. J. L. 661, 80 Atl. 495, 496 (1911), pointing out this distinction, states:

*den v. Humphrey*,<sup>21</sup> permit two causes of action because "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. . . . The wrong consists in the damage done without lawful excuse. . . ." <sup>22</sup> The leading American case to adopt the minority view, *Reilly v. Sicilian Asphalt Paving Co.*,<sup>23</sup> in rejecting the theory that one wrongful act can give rise to only one cause of action, pointed out that where the vehicle damaged in the accident belongs to someone other than the driver who was injured in the same accident, the driver and the owner will each have an independent cause of action resulting from the defendant's single act of wrongdoing. The New York court further advocated the adoption of the "two causes of action" view because "there is an essential difference between an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient, in the administration of justice, to blend the two."<sup>24</sup> The minority view is thus consistent with the common law's recognition of a fundamental difference between personal rights and property rights.<sup>25</sup> The different statutory treatment accorded each suggests that legislatures in the various jurisdictions desire to continue the common law distinctions between the two primary rights and thus militates against the "one cause of

---

"In *Roberts v. Read*, 16 East 215, the action was based on the throwing down of a stone wall which resulted from the wrongful act of the defendants as public officers, committed at a time so long before the wall fell as to entitle defendants to the benefit of a special act of limitation if the cause of action arose when the wrongful act was committed, and Lord Ellenborough said: 'It is sufficient that the action was brought within three months after the wall fell, for that is the gravamen; the consequential damage is the cause of action in this case'."

<sup>21</sup>14 Q. B. D. 141 (1884).

<sup>22</sup>*Brunsdon v. Humphrey*, 14 Q. B. D. 141, 151 (1884).

<sup>23</sup>170 N. Y. 40, 62 N. E. 772 (1902).

<sup>24</sup>*Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 773 (1902). *Boyd v. Atlantic Coast Line R. R.*, 218 Fed. 653 (S. D. Ga. 1914) suggests that the minority approach minimizes the danger of jury confusion possibly resulting under the majority rule, and hence the "two causes of action" view facilitates a more convenient method of adjudication. Under this approach, plaintiffs may, of course, make any permissible joinder under the appropriate pleading requirements.

<sup>25</sup>*Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772 (1902); *Carter v. Hinkle*, 189 Va. 1, 52 S. E. (2d) 135 (1949); Note (1929) 14 Iowa L. Rev. 311. In accord with this statement, it has been asserted "that the majority are 'warping' the conception of a cause of action to arrive at a socially desirable result, that under the common law definition two causes of action actually arise, and that unless the courts can clear up the confusion by sound logic or policy, they should cease treating this subject in terms of 'cause of action' and adopt other criteria." Note (1950) 2 Ala. L. Rev. 75, 82.



action" rule.<sup>26</sup> It can also be argued, in support of the minority rule, that since maintaining two suits will increase the expense and trouble of the plaintiff as well as that of the defendant, the fear of willfully vexatious litigation emphasized in the opinion of the principal case will not often prove to be well founded.<sup>27</sup> Excessive litigation should of course be avoided, but not at the cost of depriving the deserving plaintiff of needed compensation for damages suffered.<sup>28</sup> This point of view was appropriately expressed by the Virginia court when it adopted the minority rule, pointing out that actions are instituted to secure compensation for plaintiffs rather than to punish defendants, and that courts should concern themselves with the number of rights invaded, rather than fall victim to the lure of short cuts and the wholesale administration of justice.<sup>29</sup>

An intermediate view, adopted in some jurisdictions, qualifies the majority rule in order to guard against the loss of recovery for one of the items of damage in a situation in which the injured party is insured against property damage.<sup>30</sup> The loss may result to either insured or insurer. The insured, after having been indemnified by the insurer for the property damage, may bring an action against the tort-

---

<sup>26</sup>The statutes of limitations for each establish different periods. Claims for property damages are assignable, but claims for personal injuries are not assignable. If death results, claims for personal injuries inure to the benefit of the surviving spouse or next of kin, but the claims for property damages pass to the decedent's estate. Similarly, where receivers and trustees in bankruptcy are involved, contrary rules and procedures are maintained. *Clancy v. McBride*, 338 Ill. 35, 169 N. E. 729 (1930); *Ochs v. Public Service Ry. Co.*, 81 N. J. L. 661, 80 Atl. 495 (1911); *Carter v. Hinkle*, 189 Va. 1, 52 S. E. (2d) 135 (1949).

<sup>27</sup>Also, it would not be unreasonable for courts to have plaintiffs, attempting to bring a second cause of action under this view, qualify for such right by clearly showing a valid reason for bringing such action and for not having sought recovery for all items of damage in the first action, thus negating any possibility that the plaintiff was deliberately attempting to burden the defendant with an unnecessary lawsuit.

<sup>28</sup>However, courts desiring trial expediency above all else continue to apply the majority rule in all instances, following the theory that "A rule leading to two lawsuits where one will accomplish the same results is not to be favored." *Clark*, *Code Pleading* (2d ed. 1947) 489. But it is also true that "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish." *Schopflocher*, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata* (1942) 21 *Ore. L. Rev.* 319, 321, quoting from *Clark v. Kirby*, 243 N. Y. 295, 153 N. E. 79, 82 (1926).

<sup>29</sup>*Carter v. Hinkle*, 89 Va. 1, 52 S. E. (2d) 135 (1949).

<sup>30</sup>*Fidelity & Guaranty Fire Corp. v. Silver Fleet Motor Express, Inc.*, 242 Ala. 559, 7 S. (2d) 290 (1942); *Traveler's Indemnity Co. v. Moore*, 304 Ky. 456, 201 S. W. (2d) 7 (1947); *Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co.*, 106 Miss. 244, 63 So. 455 (1913); *Underwood v. Dooley*, 197 N. C. 100, 147 S. E. 686, 64 A. L. R. 656 (1929).

feasor for the personal injuries without including the claim for property damage. Under the majority rule, the insurer would thereby lose his right, as subrogee or assignee of the insured, to recover over from the tort-feasor for the property damages.<sup>31</sup> On the other hand, the insurer, after indemnifying the insured for property damage may bring a suit against the tort-feasor to recover as assignee or subrogee of the insured, thereby precluding the insured from later suing the tort feasor for damages for personal injuries.<sup>32</sup> Which party loses, after the insurer indemnifies the insured, may depend on the race to the courthouse, unless they cooperate.<sup>33</sup> To prevent such loss, some courts, while approving the majority view in other situations, compromise here to the extent of recognizing separate causes of action in the injured party for his personal injuries and in the insurer as subrogee of the claim for property damages. However, these courts refuse to adopt the "two causes of action" theory generally, and so will not allow the injured party, himself, to exercise an option of bringing one suit for both items of damage or separate suits for each.<sup>34</sup> The intermediate view regards the insurer as having an equitable interest in the automobile at the time of collision by reason of his having written the policy of insurance, and when the automobile is damaged, an independent cause of action arises in favor of the insurer as well as the insured.<sup>35</sup> While

---

<sup>31</sup>*Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S. W. (2d) 1059 (1931).

<sup>32</sup>*Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960, 47 A. L. R. 529 (1926); Note (1929) 14 Iowa L. Rev. 311 at 313 points out that the result of the majority rule is to trap the injured victim in non-recovery for substantial personal injury damages because he had previously recovered insignificant property damage indemnity from his insurer.

<sup>33</sup>See *Mills v. DeWees*, 93 S. E. (2d) 484, 494 (W. Va. 1956).

<sup>34</sup>Kentucky so holds. For an analysis of the Kentucky decisions, see note 37, *infra*. Mississippi, also an intermediate jurisdiction, has upheld the majority view in cases where subrogation was not involved. *Kimball v. Louisville & N. R. Co.*, 94 Miss. 396, 48 So. 230 (1909). Dicta in intermediate view cases cited, note 18, *supra*, indicates the majority rule will be adhered to when instances not involving subrogation arise in these jurisdictions.

<sup>35</sup>*Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co.*, 106 Miss. 244, 63 So. 455 (1913); Note (1950) 2 Ala. L. Rev. 75. *Contra*: *Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S. W. (2d) 1059 (1931).

"Where the insured has assigned the property-damage claim to the insurance company prior to his action for personal-injury damages, some courts have held that, since he had no right at the time of his action to sue for the property damage, his judgment is not *res judicata* as to the insurance company. Decisions of this kind have been more frequent in states requiring that an action can only be brought by the real party in interest. Thus the issue of whether the insurance company would be allowed a separate action has turned on whether the payment by the company of the property claim and actual subrogation occurred prior to or after the

this view has been adopted in only a few jurisdictions, it is to be noted that almost all of the cases cited in support of the strict majority rule have arisen from situations in which the plaintiff in the property damage action is the same person as the plaintiff in the personal injury action.<sup>36</sup> It is possible that some of the courts which have endorsed the majority view in that situation might shift to the intermediate view when confronted with the problem created by the insurance factor.<sup>37</sup>

Regardless of which of the three views they adopt, the courts uniformly agree that a single cause of action cannot be split; but they differ as to whether in this type of case one or two causes of action exists.<sup>38</sup> The variant views result from substantially divergent concepts of what technically constitutes a cause of action.<sup>39</sup> Courts favoring the "one cause of action" approach to this type of case apparently find that the cause of action is created by the wrongful act of the defendant.<sup>40</sup> They emphasize Clark's definition that a cause of action is

---

action for personal-injury damages was filed. Some courts have dispensed with the necessity for an actual payment of the claim prior to the action since under the insurance contract the insurance company has a right of subrogation." Note (1950) 2 Ala. L. Rev. 75, 80. This distinction can be clearly seen by a reading of the Mississippi cases. The intermediate rule was used by the court in the Underwriters case, *supra*. But in another case the insured sued his insurer on the policy after gaining judgment for personal injuries against the tort-feasor. The court held that the suit could not be maintained, on the grounds that the insured had not reserved his right of action for damage to the automobile. Thus, the court declined to apply the rule. *Farmer v. Union Ins. Co.*, 146 Miss. 600, 111 So. 584 (1927).

<sup>36</sup>*Vasu v. Kohlers Inc.*, 145 Ohio St. 321, 61 N. E. (2d) 707 at 716, 166 A. L. R. 855 at 865 (1945); and see cases cited, note 8, *supra*.

<sup>37</sup>It is submitted that Kentucky has formulated a model series of rules on the main problem under discussion in this comment. Having previously been a proponent of the strict majority rule, the Kentucky court, in *Travelers Indemnity Co. v. Moore*, 304 Ky. 456, 201 S. W. (2d) 7 (1947) approved the intermediate view but cautioned through dictum that there could possibly develop instances where exceptions to the "exception to the general rule" would be proper to facilitate the same justice contemplated in adopting the intermediate view. This approach did not require the court to overrule its previous decisions adhering to the strict majority view in cases not involving subrogation, as in *Cassidy v. Berkovitz*, 169 Ky. 785, 185 S. W. 129 (1916), and *Cole's Adm'x v. Illinois Central R. Co.*, 120 Ky. 686, 87 S. W. 1082 (1905). The court in *Traveler's Indemnity Co. v. Moore*, *supra*, noted that it was hardly possible to have a general rule without an exception.

<sup>38</sup>*Smith v. Red-Top Taxicab Corp.*, 111 N. J. L. 439, 168 Atl. 796 at 797 (1933) (minority jurisdiction); *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772 at 773 (1902) (minority jurisdiction). Of necessity, majority courts so hold.

<sup>39</sup>The confusion results from the difficulty the courts have experienced in attempting to apply the irreconcilable definitions of the various writers. The various views are analytically compared in case situations in *McCaskill, Actions and Causes of Action* (1925) 34 Yale L. J. 614.

<sup>40</sup>*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647 (1888); *King v. Chicago M. & St. P. Ry.*, 80 Minn. 83, 82 N. W. 1113 (1900); *Fields v. Philadelphia Rapid Transit Co.*, 273 Pa. 282, 117 Atl. 59 (1922).

"an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business."<sup>41</sup> Under this view, one cause of action exists and the second action is barred if the facts alleged in the second action are so closely related to those alleged in the first action that the court should consider them as one operative unit.<sup>42</sup> The modern extension of this doctrine makes it virtually mandatory that a party dispose of all his claims in one action.<sup>43</sup> Courts desiring to reach the "two causes of action" result apparently regard the cause of action as created by the suffering of harm by the victim.<sup>44</sup> They have approached the problem using Pomeroy's definition that "the primary right and duty and the delict or wrong combined constitute the cause of action. . . ."<sup>45</sup> These courts permit a second action where the material facts alleged are distinguished from those facts alleged in the first action, maintaining that the second action is barred by the first only where the exact same evidence is relied upon to support both actions.<sup>46</sup>

Since either one of these concepts of a cause of action can be accorded theoretical support, the choice of rules is probably made on the basis of a practical consideration—whether it is less desirable to subject plaintiffs to a risk of losing their chance to recover for one of the damages suffered, or to subject defendants to the risk of having to stand the inconvenience of two suits for one wrongful act.<sup>47</sup> Thus, it

<sup>41</sup>McCaskill, *Actions and Causes of Action* (1925) 34 *Yale L. J.* 614 at 618. It should be noted that Clark's definition referred to the Code states. See Clark, *The Code Cause of Action* (1924) 33 *Yale L. J.* 817 at 837.

<sup>42</sup>Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata* (1942) 21 *Ore. L. Rev.* 319.

<sup>43</sup>One writer states that this view, by its nature, is not capable of abstract definition but that "the more material elements two different sets of fact have in common, the more the courts are willing to bar a plaintiff from repeated litigation either under the pragmatic concept of cause of action or under the concept of his procedural duty to join two closely related causes of action." Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata* (1942) 21 *Ore. L. Rev.* 319, 324.

<sup>44</sup>*Ochs v. Public Service R. R. Co.*, 81 N. J. L. 661, 80 Atl. 495 (1911); *Brunsdon v. Humphrey*, 14 Q. B. D. 141 (1884).

<sup>45</sup>Pomeroy, *Code Remedies* (5th ed. 1928) § 347.

<sup>46</sup>Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata* (1942) 21 *Ore. L. Rev.* 319.

<sup>47</sup>Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata* (1942) 21 *Ore. L. Rev.* 319 at 323 comments that the "one cause of action" approach, which requires that all that could be litigated in the first action be litigated, resulted from Clark's desire to have a liberal definition of the term "cause of action." However, the broader the phrase is in the first instance, the

appears that the discussions debating the technical concepts of a cause of action are used to rationalize a desired judicial result.

LEONARD C. GREENEBAUM

PROCEDURE—SUBSTITUTED SERVICE OF PROCESS TO OBTAIN JURISDICTION OVER FOREIGN MAIL-ORDER INSURANCE COMPANY. [Federal]

The expansion of the mail-order insurance business during recent years has intensified the long-standing problem of how a state may provide its residents with a means of suing foreign corporations in the courts of the home state.<sup>1</sup> Insurance companies doing this type of business issue many thousands of policies each year to persons in states in which the corporation is not licensed to do business and in which it neither maintains offices nor has agents on whom process may be served. Often the policies are for such small amounts that the beneficiary cannot feasibly go to the trouble and expense of suing in a distant foreign forum where the insurer is subject to process.<sup>2</sup>

A number of states have attempted to protect their citizens by enacting statutes providing for local service of process on foreign insurance corporations that are not authorized to do business within the state.<sup>3</sup> Eleven jurisdictions<sup>4</sup> have adopted the substance of Section

---

more restrictive it is on a plaintiff attempting to maintain a second action where he has failed to avail himself of the possible liberality available to him in the first action. *McCaskill, Actions and Causes of Action* (1925) 34 *Yale L. J.* 614 at 630 states that the "two causes of action" view proceeds on the theory that, within reasonable limits, a plaintiff should be given some discretion as to whether he will litigate one or two actions. Many harsh results have occurred due to the rigid, rather inelastic "one cause of action" view, while the other, more elastic view is better able to meet varied circumstances in individual cases.

<sup>1</sup>*Storey v. United Insurance Co.*, 64 F. Supp. 896 (E. D. S. C. 1946); *White v. Indiana Travelers Assurance Co.*, 22 S. (2d) 137 at 143 (La. App. 1945). See Carnahan, *Conflict of Laws and Life Insurance Contracts* (1942) § 5. "The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, 541, 64 S. Ct. 1162, 1167, 88 L. ed. 1440, 1451 (1944).

<sup>2</sup>*Travelers Health Ass'n v. Virginia*, 339 U. S. 643 at 648, 70 S. Ct. 927 at 930, 94 L. ed. 1154 at 1161 (1950); *St. Clair v. Cox*, 106 U. S. 350 at 355, 1 S. Ct. 354 at 358, 27 L. ed. 222 at 224 (1882).

<sup>3</sup>*Ga. Code Ann.* (1951 Supp.) § 56-601a. The statute expresses the desire to eliminate the need of its citizens to resort to a foreign forum in order to enforce their rights under their policies. The same sentiments are expressed in 40 *Pa. Stat. Ann.* (Purdon 1954) § 1005.1; 10 *Tenn. Code Ann.* (1955 Supp.) § 56-327.

<sup>4</sup>6 *Ark. Stat. Ann.* (1947) § 66-244; 1 *Cal. Ins. Code Ann.* (Deering 1950) § 1610; 1 *Conn. Gen. Stat.* (1949 Supp.) § 563a; 3 *La. Rev. Stat.* (1950) § 22-1253; 5A

5 of the Uniform Unauthorized Insurer Act which provides that any foreign insurer who, without authority, transacts business within the state impliedly appoints the commissioner of insurance as its agent for service of process.<sup>5</sup> Other states have adopted more specific provisions, which generally spell out what acts are necessary to subject the foreign insurer to the jurisdiction of the state court.<sup>6</sup> For example, the Florida statute provides that any of the following acts done by a foreign insurance company within the state constitutes appointment of the commissioner as its agent for service of process: "(a) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (b) the solicitation of applications for such contracts, (c) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (d) any other transaction of the business of insurance. . . ."<sup>7</sup>

Though such statutes obviously impose some hardships on insurance concerns, several social justifications for the legislative policy thus effected have been judicially recognized. First, the inconvenience, expense, and uncertainty of bringing suit in a foreign state may frequently cause the insured or his beneficiary to sacrifice a valid claim, thus losing the source of support intended to be derived from the insurance policy.<sup>8</sup> Second, since the corporation enjoys the benefits and protection of the laws of the state, it is not unreasonable to require the corporation to respond to suit there.<sup>9</sup> Third, suits on alleged losses can be tried more conveniently in the state where witnesses are more likely to live and where claims for losses will presumably be investi-

Mass. Laws Ann. (1955 Supp.) c. 175B, § 2; 3 Mich. Comp. Laws §§ 548.1 to 548.6; 2B N. C. Gen. Stat. Ann. (1950) § 58-164(e); 40 Pa. Stat. Ann. (Purdon 1954) § 1005.2; 4 S. C. Code Ann. (1952) § 37-265; S. D. Code (1952 Supp.) §§ 31-3901 to 31-3911; 10 Tenn. Code Ann. (1955 Supp.) § 56-328.

<sup>5</sup>9A U. L. A. (1951) 347; Notes (1955) 44 A. L. R. (2d) 426; (1952) 17 Mo. L. Rev. 73; (1953) 39 Va. L. Rev. 966.

<sup>6</sup>Ga. Code Ann. (1951 Supp.) § 56-601a; 18 Fla. Stat. Ann. (1955 Supp.) § 625.30; 1 Iowa Code Ann. (1954) § 507A.3; 5 N. Y. Consol. Laws (1950) Ins. § 59a.

<sup>7</sup>18 Fla. Stat. Ann (1955 Supp.) § 625.30.

<sup>8</sup>Watson v. Employers Liability Assur. Corp., 348 U. S. 66 at 72, 75 S. Ct. 166 at 170, 99 L. ed. 74 at 82 (1954); Travelers Health Ass'n v. Virginia, 339 U. S. 643 at 648, 70 S. Ct. 927 at 930, 94 L. ed. 1154 at 1161 (1950); Pennsylvania Lumbermen's Mut. Ins. Co. v. Meyer, 197 U. S. 407 at 418, 25 S. Ct. 483 at 486, 49 L. ed. 810 at 816 (1905); Railroad Co. v. Harris, 12 Wall. 65 at 83, 20 L. ed. 354 at 359 (1870); Ace Grain Co. v. American Eagle Fire Ins. Co., 95 F. Supp. 784 at 786 (S. D. N. Y. 1951); White v. Indiana Travelers Assurance Co., 22 S. (2d) 137 at 143 (La. App. 1945).

<sup>9</sup>International Shoe Co. v. Washington, 326 U. S. 310 at 319, 66 S. Ct. 154 at 160, 90 L. ed. 95 at 104 (1945); Storey v. United Ins. Co., 64 F. Supp. 896 at 901 (E. D. S. C. 1946); Consolidated Cosmetics v. D-A Pub. Co., 186 F. (2d) 906 at 907 (C. A. 7th, 1951); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. (2d) 664 at 667 (1951).

gated.<sup>10</sup> However, the efforts of the states to bring the foreign corporations within the jurisdiction of their courts without personal service are continually being subjected to attack as being in contravention of the Due Process Clause of the Fourteenth Amendment.

Such an attack was made unsuccessfully in the recent case of *Schutt v. Commercial Travelers Mutual Accident Association*.<sup>11</sup> The litigation had originated when the administrator of deceased insured brought suit in a Tennessee state court against a non-resident insurance corporation on a policy the company had mailed to the decedent when he resided in Kentucky. He had later moved to Tennessee and died while a resident of that state. Since the company had no officers or employees in Tennessee, service of process was made on the Commissioner of Insurance who immediately forwarded the papers to the insurance company. The Tennessee statute under which plaintiff proceeded provided for such service on any non-resident corporation doing business in the state, and defined "doing business" as "the doing in this state by such company of any act whatsoever, whether interstate or intrastate in nature, including the soliciting, making, or delivering of insurance contracts in Tennessee, by agent, mail or otherwise."<sup>12</sup> Plaintiff obtained a judgment pro confesso upon the failure of the insurer to defend, and subsequently instituted an action to enforce the judgment in a federal district court in New York, where the insurer's home office was located. Defendant attacked the jurisdiction of the Tennessee court over it, contending that substituted service would not support a judgment in personam because the corporation had never transacted business in Tennessee, had had no representatives there, and had never designated the commissioner as its agent. The district court upheld this contention and ruled that the Tennessee judgment was not entitled to full faith and credit. However, the United States Court of Appeals for the Second Circuit reversed and held that the corporation, by mailing premium notices to insured persons in Tennessee and receiving premium remittances and submission of proof of loss mailed from the state, was doing business within the purview of the statute; and service under the statute did not violate the Due Process Clause

---

<sup>10</sup>Watson v. Employers Liability Assur. Corp., 348 U. S. 66 at 72, 75 S. Ct. 166 at 170, 99 L. ed. 74 at 82 (1954); Travelers Health Ass'n v. Virginia, 339 U. S. 643 at 649, 70 S. Ct. 927 at 930, 94 L. ed. 1154 at 1161 (1950); Compania de Astral, S. A. v. Bostons Metal Co., 205 Md. 237, 107 A. (2d) 357 at 368 (1954); Smyth v. Twin State Improvements Corp., 116 Vt. 569, 80 A. (2d) 664 at 668 (1951).

<sup>11</sup>229 F. (2d) 158 (C. A. 2nd, 1956) cert. den. 351 U. S. 940, 76 S. Ct. 836, 100 L. ed. 649 (1956).

<sup>12</sup>4 Tenn. Code Ann. (Williams 1952 Supp.) § 6459-49.

as long as defendant received adequate notice and reasonable time to defend.

Judicial opinion concerning the requirements for obtaining jurisdiction over a foreign corporation has undergone a great transformation during the course of the past century.<sup>13</sup> The early view was that a corporation had no legal existence outside the state of incorporation and could be sued in that state only;<sup>14</sup> but later it was decided that a corporation could be sued in the courts of another state if the corporation would consent to service of the process of that court on it.<sup>15</sup> In order to secure this necessary consent, the states enacted statutes requiring a foreign corporation doing business in the state to designate an agent in the jurisdiction to receive service of process. In default of such designation, these statutes provided that service could be made on a named administrative official of the state, the theory being that by doing business in the state, the corporation impliedly consents to accept service on the official.<sup>16</sup>

Under this consent approach, the pivotal issue regarding the validity of substituted service is whether the foreign corporation has engaged in sufficient activity in the state to be "doing business" there.<sup>17</sup> In the final analysis, the determination must be made in each case on the facts involved,<sup>18</sup> for no rule of thumb has yet defined what specific

<sup>13</sup>Goodrich, *Conflicts of Laws* (3rd ed. 1949) § 76.

<sup>14</sup>See *Bank of Augusta v. Earle*, 13 Pet. 277, 282, 10 L. ed. 274, 308 (1839).

<sup>15</sup>*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451 (1856).

<sup>16</sup>E.g., see *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 22, 27 S. Ct. 236, 241, 51 L. ed. 345, 351 (1907); *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 619, 19 S. Ct. 308, 315, 43 L. ed. 569, 575 (1899); *Storey v. United Insurance Co.*, 64 F. Supp. 896, 898 (E. D. S. C. 1946).

<sup>17</sup>To obtain personal jurisdiction over a foreign corporation, earlier cases required sufficient contacts within the state to warrant an inference that the corporation was "present." *Bank of America v. Whitney Cent. Nat. Bank*, 261 U. S. 171 at 172, 43 S. Ct. 311 at 311, 67 L. ed. 594 at 595 (1923); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516 at 517, 43 S. Ct. 170 at 171, 67 L. ed. 372 at 375 (1923); *Philadelphia & Reading Rd. Co. v. McKibbin*, 243 U. S. 264 at 265, 37 S. Ct. 280 at 280, 61 L. ed. 710 at 711 (1917); *International Harvester Co. v. Kentucky*, 234 U. S. 579 at 589, 34 S. Ct. 944 at 947, 58 L. ed. 1479 at 1483 (1914). The modern approach is to abolish all resort to fiction and thus enable the state to provide a forum wherever, in balancing the interest of the parties, it concludes that justice is served by doing so. *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95 (1945); *Travelers Health Ass'n v. Virginia*, 339 U. S. 643, 70 S. Ct. 927, 94 L. ed. 1154 (1950).

<sup>18</sup>*People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79 at 87, 38 S. Ct. 233 at 235, 62 L. ed. 587 at 590 (1918); *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218 at 227, 33 S. Ct. 245 at 247, 57 L. ed. 486 at 489 (1913); *Willett v. Union Pacific R. R.*, 76 F. Supp. 903 (N. D. Ohio 1948); "For those who expected a well defined test wherewith to decide each of these problems, this investigation is probably a disappointment. Yet even the courts have admitted that each case must be decided



activities are necessary. Only some very broad generalizations are available as directives. Thus, when the activities constitute a continuous course of conduct within the state, it is agreed that jurisdiction over the corporation may be based on substituted service in regard to a cause of action arising out of that activity.<sup>19</sup> At the other extreme, a single act done within the state has usually been recognized as not amounting to such a doing of business within the statutory definition as will justify obtaining jurisdiction by substituted service.<sup>20</sup>

In cases involving insurance companies, the "doing business" test underwent a gradual process of liberalization. In 1897 the Supreme Court of the United States held in *Allgeyer v. Louisiana*<sup>21</sup> that it did not appear that the insurance company was doing business in Louisiana since the contract was not made in that state and the company had no agents there. Similarly, twenty-six years later in *Minnesota Commercial Men's Association v. Benn*,<sup>22</sup> a case concerning a Minnesota insurance company which had obtained members in Montana by mail solicitation but had no agents within the latter state, the Court held that since the contracts were "made and to be performed" in Minnesota, the insurer was not "doing business" in Montana and could not be sued in its courts unless the corporation consented to service of process.

However, *Osborn v. Ozlin*,<sup>23</sup> decided in 1940, recognizing that a state has a legitimate interest in protecting the rights of its residents in insurance policies even though the "state action may have repercussions beyond state lines. . . ." Shortly afterwards, the Supreme Court rejected the reasoning used in the *Benn* case and acknowledged the states' powers to subject the foreign insurer to substituted service of process in *Hoopeson Canning Company v. Cullen*.<sup>24</sup> There the cor-

---

on its individual merits. They are moved only by general principles of policy and have thus far evolved no convenient yardstick for the practitioner." Note (1921) 21 Col. L. Rev. 362, 366.

<sup>19</sup>*International Shoe Co. v. Washington*, 326 U. S. 310 at 317, 66 S. Ct. 154 at 159, 90 L. ed. 95 at 102 (1945); *French v. Gibbs Corp.*, 189 F. (2d) 787 at 789 (C. A. 2nd, 1951); *Consolidated Cosmetics v. D-A Pub. Co.*, 186 F. (2d) 906 at 908 (C. A. 7th, 1951); *Sasnett v. Iowa State Traveling Men's Ass'n*, 90 F. (2d) 514 at 516 (C. C. A. 8th, 1937).

<sup>20</sup>*International Shoe Co. v. Washington*, 326 U. S. 310 at 317, 66 S. Ct. 154 at 159, 90 L. ed. 95 at 102 (1945); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F. (2d) 139 at 141 (C. C. A. 2nd, 1930); *Edgewater Realty Co. v. Tennessee Coal, Iron & R. R.*, 49 F. Supp. 807 at 810 (D. C. Md. 1943).

<sup>21</sup>165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 (1897).

<sup>22</sup>261 U. S. 140, 144, 43 S. Ct. 293, 294, 67 L. ed. 573, 576 (1923).

<sup>23</sup>310 U. S. 53, 62, 60 S. Ct. 758, 761, 84 L. ed. 1074, 1078 (1940). The Supreme Court reaffirmed the same principle in *Travelers Health Ass'n v. Virginia*, 339 U. S. 643 at 647, 70 S. Ct. 927 at 929, 94 L. ed. 1154 at 1161 (1950).

<sup>24</sup>318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777 (1943).

poration contended that since the contracts were made in Illinois and checks were mailed from that state, it was not "doing business" in New York, where the suit was brought against it. The Court declined to become involved in a "conceptualistic discussion of theories of the place of contracting or of performance."<sup>25</sup> Rather, it accorded "great weight" to the consequences of the contractual obligation in the state where the insured resided and the "degree of interest" that state had in seeing that the obligations were carried out.<sup>26</sup>

In 1945 in *International Shoe Co. v. Washington*<sup>27</sup> the Supreme Court of the United States introduced a new line of reasoning by avoiding application of the familiar "doing business" formula and substituting therefor a "balance of inconveniences" to determine whether due process of law had been accorded to the foreign corporation subjected to substituted service of process. Under this approach the issue is whether the corporation has had at least such minimum contacts within the state as to create a reasonable basis for requiring it to defend the particular suit in the courts of that state.<sup>28</sup>

There are several recent insurance cases applying the test laid down in the *International Shoe* case. The foremost of these is *Travelers Health Association v. Virginia*<sup>29</sup> which considered a cease and desist order issued by the Virginia Corporation Commission against a Nebraska corporation until it would comply with the requirements of the state's Blue Sky Law. Upholding the jurisdiction of the state court

<sup>25</sup>318 U. S. 313, 316, 63 S. Ct. 602, 605, 87 L. ed. 777, 782 (1943).

<sup>26</sup>318 U. S. 313 at 319, 63 S. Ct. 602 at 606, 87 L. ed. 777 at 783 (1943).

<sup>27</sup>326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95 (1945).

<sup>28</sup>"... due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U. S. 310, 316, 66 S. Ct. 154, 158, 90 L. ed. 95, 102 (1945).

<sup>29</sup>339 U. S. 643, 70 S. Ct. 927, 94 L. ed. 1154 (1950) noted in (1951) 39 Calif. L. Rev. 152; (1951) 4 Fla. L. Rev. 98; (1951) 64 Harv. L. Rev. 482; (1950) 5 Miami L. Q. 149; (1950) 99 U. of Pa. L. Rev. 245; (1950) 36 Va. L. Rev. 795; (1950) 59 Yale L. J. 360. Although this case is generally recognized as authority for the application of the "minimum contacts" principle laid down in the *International Shoe* case to the field of foreign insurance companies, it should be noted that here the action was one commenced by the state of Virginia against an insurance company to enforce a regulatory measure, and was not the more frequent instance of an insured attempting to sue a foreign insurance company upon the insurance policy.

This is an important distinction, for as Justice Douglas in the concurring opinion in the *Travelers Health Ass'n* case stated: "I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate. . . . It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process." 339 U. S. 643, 652, 70 S. Ct. 927, 932, 94 L. ed. 1154, 1163 (1950).

the Supreme Court declared, in reference to policies issued through the mails by the foreign insurance company, that "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, a court need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."<sup>30</sup> Consistent with this declaration of policy, a United States Court of Appeals in *Parmalee v. Iowa State Traveling Men's Association*<sup>31</sup> upheld a Florida statute which provided that any unauthorized foreign insurer which issues or delivers insurance contracts in Florida to Florida residents by mail thereby appoints the insurance commissioner as its agent for service of process in suits on those policies.<sup>32</sup> The court indicated that legislation in the insurance field need not be judged by the same standards regarding the incidents and extent of activities requisite for valid substituted service, since the state was so intimately concerned with this type of contract. However, the court pointed out that the legislature must recognize the necessity of "minimum contacts" and not offend "traditional notions of fair play and substantial justice." The Tennessee statute invoked in the principal case extends the scope of substituted service much further than does the Florida statute, inasmuch as Tennessee courts are given jurisdiction over foreign corporations that are "doing any act whatsoever" within the state, there being no limitation that the policy must have been delivered or issued in the state to a resident of Tennessee.

Decisions in South Carolina and Delaware indicate that some courts are not inclined to subject foreign insurers to substituted service as readily as did the court in the principal case. In *Sanders v. Columbian Protective Association*,<sup>33</sup> it was held that the mere receipt of a premium from a resident of South Carolina, the policy having been obtained outside the state, is not a sufficient basis on which to make an insurance company amenable to service of process in South Carolina.<sup>34</sup>

---

<sup>30</sup>399 U. S. 643, 647, 70 S. Ct. 927, 929, 94 L. ed. 1154, 1161 (1950).

<sup>31</sup>206 F. (2d) 518, 44 A. L. R. (2d) 410 (C. A. 5th, 1953).

<sup>32</sup>18 Fla. Stat. Ann. (1955 Supp.) § 625.30.

<sup>33</sup>208 S. C. 152, 37 S. E. (2d) 533 (1946). The South Carolina's Unauthorized Insurer Act in effect at that date stated that "The transacting of business in this state by a foreign or alien insurer without being authorized to do business in this state and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance . . ." would subject the corporation to service of process within the state. S. C. Code Ann. (1944 Supp.) §§ 8020-1 to 8020-11. The current South Carolina Unauthorized Insurer Act is found in 4 S. C. Code Ann. (1952) §§ 37-261 to 37-272.

<sup>34</sup>See *Storey v. United Ins. Co.*, 64 F. Supp. 896, 900 (E. D. S. C. 1946); *Parmalee v. Commercial Travelers Mut. Accident Ass'n*, 206 F. (2d) 523 (C. A. 5th, 1953).

The court pointed out that to hold otherwise would subject a company to the jurisdiction of any state simply by a policyholder's mailing a premium from the state, whether the company wished or not. Similarly, it is to be noted that under the construction put on the Tennessee statute in the principal case, a foreign insurer could not prevent being sued in a state by avoiding issuance of policies to persons in that state, since the insured could obtain a policy in one state, move to another and by mailing a premium from there subject the insurer to the jurisdiction of the court of that state. The Delaware Supreme Court reacted strongly in behalf of the foreign insurer in *Atlas Mutual Benefit Ass'n v. Portscheller*,<sup>35</sup> refusing to enforce a Michigan judgment which had been obtained against a Colorado insurance company on the basis of substituted service. Though the policy had been solicited personally by an agent of the company in Michigan and from a Michigan resident, the Delaware court found that the company was not "doing business within the state in such a manner and to such an extent as to warrant the inference that it [was] present there,"<sup>36</sup> and therefore was not amenable to substituted service. The solicitor's activity in Michigan was held not to constitute "doing business" by the company, because he did not have authority to bind the company in consummating business transactions in the state. Instead of adopting a strained interpretation of the situation in order to bring the insurer within the jurisdiction of the insured's state, this court expressly denied that "a court should put a life insurance company in an excepted class and hold it to be present in a state so as to be amenable to process . . ."<sup>37</sup> on a different basis from that applied to non-insurance corporations.

However, it is not necessarily true that contrary decisions depend on classifying insurance companies in a special category. In *Smyth v. Twin State Improvement Corp.*<sup>38</sup> substituted service on a foreign corpora-

---

<sup>35</sup>4 Ter. 298, 46 A. (2d) 643 (Del. 1945). The Michigan statute provided that any corporation doing business within the state must appoint a resident agent upon whom service of process could be made, and that in default of such appointment, service could be made on the Secretary of State. 4 Mich. Comp. Laws (1948) § 613.29.

<sup>36</sup>*Atlas Mut. Bus. Ass'n v. Portscheller*, 4 Ter. 298, 46 A. (2d) 643, 646 (Del. 1945).

<sup>37</sup>*Atlas Mut. Bus. Ass'n v. Portscheller*, 4 Ter. 298, 46 A. (2d) 643, 646 (Del. 1945).

<sup>38</sup>116 Vt. 569, 80 A. (2d) 664 (1951), noted in (1952) 13 Ohio St. L. J. 282; (1952) 9 Wash. & Lee L. Rev. 284. Defendant, a foreign corporation, while repairing a roof for plaintiff, a resident of Vermont, was alleged to have damaged it. A tort action was brought in a Vermont court and service of process was made on the Secretary of State. The court, in deciding for the plaintiff, did not concern itself with whether the activity constituted doing business but whether it met due process requirements. It was decided that the Due Process Clause does not prevent the

tion engaged in other than an insurance business was sustained on the basis of a single tortious act, where the suit was to recover for damages inflicted by that tort. This case was decided under a statute which declared that a foreign corporation which makes a contract to be performed in whole or part or which commits a tort in Vermont, would be deemed to be doing business in the state.<sup>39</sup> If the decision of the *Smyth* case is constitutionally sound, it appears that in insurance cases, so long as the company has done *any act* in the state in connection with the insurance policy which is the basis for bringing suit by substituted service, the minimum contacts required by due process would be met. It is still arguable, however, that there is a substantial difference between the situation in which the corporation sends into the state an agent who commits a tort while there and in which the corporation merely accepts premium payments mailed from the state by policyholders residing there. But under the "balance of inconveniences" approach the importance of the extent of the corporate activities is minimized, and the relative hardships caused to the insured if he must sue in the insurer's home state becomes controlling.<sup>40</sup> Courts may be inclined to favor the insured, since he is usually a person of such small means that the necessity of suing in a foreign forum would prevent him from enforcing his claim. Otherwise, the insurance company would be able to issue small policies indiscriminately in foreign jurisdictions knowing that it would be practically immune from suit on many of them. And since the insurer is profiting from the acts that are carried on within the state of the insured's residence, it can equitably be called upon to bear the inconvenience of being sued on its policies there.

THOMAS C. BROYLES

---

exercise of jurisdiction, "provided always that adequate notice of the litigation be given to the particular defendant against whom liability is sought to be enforced." 116 Vt. 569, 80 A. (2d) 664, 667 (1951).

<sup>39</sup>Vt. Stat. (1947) § 1562.

<sup>40</sup>In *Atlas Mut. Ben. Ass'n v. Portscheller*, 4 Ter. 298, 46 A. (2d) 643, 646 (Del. 1945) the court called attention to a factor in the balancing process which is generally ignored: "Reasonableness is a question not to be determined from the viewpoint of the individual member of a protective association or his beneficiary. We cannot say that a mutual insurance association . . . does not serve a social need. . . . [I]t may be seriously doubted whether the subjection of such association to the expense of suits in far-off states would not work to the disadvantage of the memberships as a whole, an incident to which the individual inconvenience or apparent hardship should properly give way."

## PROPERTY—APPLICATION OF RULE AGAINST PERPETUITIES TO GENERAL TESTAMENTARY POWER OF APPOINTMENT. [Ohio]

Under the classic Rule against Perpetuities requiring that a limitation of a future interest in property must vest within the duration of a life in being and twenty-one years thereafter, the permissible period for vesting starts at the time the future interest is created.<sup>1</sup> Applying this principle to powers of appointment, it would follow that the period within which the appointee's interest under the power must vest is to be computed from the time when the instrument creating the power becomes effective—i.e., from the time of delivery in the case of a deed, and from the time of the death of the testator in the case of a will. However, the courts have not given the Rule this normal application in regard to all of the different types of powers of appointment.<sup>2</sup>

In the case of a special power—one by which the donee is limited in the persons or classes to whom he can appoint<sup>3</sup>—the general principle is followed that the period for vesting begins to run from the creation of the power.<sup>4</sup> The limitation on the donee's appointment constitutes an impairment of the alienability of the property involved, the condition which the Rule against Perpetuities is designed to prevent, and therefore the beginning of the period is set at the earliest possible time so that the restraint on alienation may be terminated under the Rule at the earliest possible time.<sup>5</sup> However, in the case of a general power—one which the donee thereof may exercise at his pleasure, either by

<sup>1</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 201; Simes, *Future Interests* (1936) § 490; Restatement, *Property* (1944) § 374.

<sup>2</sup>Gold, *General Testamentary Powers and the Rule Against Perpetuities* (1942) 58 L. Q. Rev. 400; Gray, *General Testamentary Powers, and the Rule Against Perpetuities* (1913) 26 Harv. L. Rev. 720; Kales, *General Powers and the Rule Against Perpetuities* (1912) 26 Harv. L. Rev. 64; Thorndike, *General Powers and Perpetuities* (1914) 27 Harv. L. Rev. 705; Note (1919) 19 Col. L. Rev. 62.

<sup>3</sup>Tiffany, *Real Property* (3rd ed. 1939) § 688; Restatement, *Property* (1944) § 320(2).

<sup>4</sup>*Graham v. Whitridge*, 99 Md. 248, 57 Atl. 609, 66 L. R. A. 408 (1904); *Rutherford v. Farrar*, 118 S. W. (2d) 79 (Mo. App. 1938), noted in (1938) 17 Tex. L. Rev. 96; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368 (1895); *Von Brackdorff v. Malcolm*, 30 Ch. D. 172 (1885). It has been said that the appointment is construed as if it had been written into the instrument which created the power. Strictly speaking this statement is inaccurate. It is more accurate to say that the words of appointment are to be interpreted in the light of the circumstances existing at the time the power is exercised. *Hopkinson v. Swain*, 284 Ill. 11, 119 N. E. 985 (1918); *Marx v. Rice*, 3 N. J. Super. 581, 67 A (2d) 918 (1949); The inaccurate construction led to an erroneous result in *Smith's Appeal*, 88 Pa. St. 492 (1879), which was remedied, however, by the decision in *Lawrence's Estate*, 136 Pa. St. 354, 20 Atl. 521, 11 L. R. A. 85 (1890).

<sup>5</sup>Simes & Smith, *Law of Future Interests* (2nd ed. 1956) § 1274; 6 *American Law of Property* (1952) § 24.34; Restatement, *Property* (1944) § 392.

deed or will, and under which the designation of the appointee is unrestricted<sup>6</sup>—the general practice is to start the period under the Rule from the time of the *exercise* of such power rather than from the time of its creation.<sup>7</sup> In other words, the permissible period allowed for the vesting the appointee's interest is considered to begin when the donee makes his appointment under the power. This well-established exception to the general rule is said to be justified by the fact that the donee of a general power is in reality the owner of the property because the interest he is given is not merely an authority to create a limitation, but rather is a limitation in fee to the donee himself.<sup>8</sup> Thus, the property is not inalienable or unmarketable while in the hands of the donee, and consequently the evils intended to be avoided by the Rule against Perpetuities are not present during that period.

The question as to whether a general *testamentary* power—one exercisable by will only but unrestricted as to persons who can be appointed<sup>9</sup>—comes within the normal rule applied to special powers or within the exception applied to general powers has led to conflict in the decisions and dispute among writers. The view which has been followed by the great majority of American courts treats a general testamentary power like a special power, starting the permissible vesting period from the date of the creation of the power and not from the date of its exercise.<sup>10</sup> It is contended in support of this view that

<sup>6</sup>Simes, *Future Interests* (1951) § 52; Restatement, Property (1944) § 320 (1).

<sup>7</sup>Lawrence's Estate, 136 Pa. St. 354, 20 Atl. 521, 522 (1890); Miffin's Appeal, 121 Pa. St. 205, 15 Atl. 525, 1 L. R. A. 453 (1888); Restatement, Property (1944) § 391.

<sup>8</sup>Gray, *The Rule Against Perpetuities* (1942) § 962. Professor Gray's argument in this regard is most compelling and is the real basis for the further discussion in regard to a general testamentary power of appointment.

<sup>9</sup>American Law of Property (1952) § 23.12; Restatement, Property (1944) § 321.

<sup>10</sup>Mondell v. Thom, 79 App. D. C. 145, 143 F. (2d) 157 (1944); Wilmington Trust Co. v. Wilmington Trust Co., 21 Del. Ch. 102, 180 Atl. 597 (1935) [5 Del. Code (1953) tit. 25, § 501, adopted in 1935, providing that the remoteness of an appointment under any sort of power shall be measured from the exercise of the power, marks the first statutory departure from the common law rule that the period is computed from the creation of the power in all cases except a general power exercisable by deed or will]; Northern Trust Co. v. Porter, 368 Ill. 256, 13 N. E. (2d) 487 (1938); Liggett v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S. W. (2d) 720 (1938); Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 64 A. (2d) 704 (1949); Amerige v. Attorney General, 324 Mass. 648, 88 N. E. (2d) 126 (1949); St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S. W. (2d) 569, 101 A. L. R. 1266 (1935); National State Bank v. Morrison, 9 N. J. Super. 552, 75 A. (2d) 916 (1950); Central Hanover Bank v. Helme, 121 N. J. Eq. 406, 190 Atl. 53 (1937); Genet v. Hunt, 113 N. Y. 158, 21 N. E. 91 (1889); In re Lovering's Estate, 373 Pa. 360, 96 A. (2d) 104 (1953); Re Powell's Trust, 39 L. J. Ch. (N. S.) 188 (1869); Wollaston v. King, 8 Eq. 165 (1868); Simes & Smith, *Future Interests* (2nd ed. 1956) § 1275; Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 526.2; 1 Perry, *Trusts and Trustees* (7th ed. 1929) § 383; Restatement, Property (1944) § 392; Notes (1918) 1 A. L. R. 374; (1936) 101 A. L. R. 1282; (1936) 104 A. L. R. 1352.

the right to deal with property as one wishes after his death is not the same as the right to deal with property as one wishes during his life.<sup>11</sup> The significant difference, from the standpoint of the Rule against Perpetuities, is that property subject to a general testamentary power is inalienable and unmarketable during the period from the creation of the power until the death of the donee.

Even when property is left in trust, with the donee of the power as beneficiary for life, the management of the property by the trustee is very limited.<sup>12</sup> He cannot give it away; he cannot invest it in new and untried enterprises; he cannot dispose of it except for management purposes; and he cannot affect the equitable title.<sup>13</sup> Yet, if the interests of society are to be advanced, someone must have power or ownership over property to invest it in new enterprises. "If we are to permit the present generation to tie up all existing capital for an indefinitely long period of time, then future generations will have nothing to dispose of by will except what they have saved from their own income; and the property which each generation enjoys will already have been disposed of by ancestors long dead. The rule against perpetuities would appear to strike a balance between the unlimited disposition of property by the members of the present generation and its unlimited disposition by members of future generations."<sup>14</sup>

Professor Gray has endorsed the majority treatment of the testamentary power,<sup>15</sup> and his tremendous influence in the future interest field has led many courts to adopt his view.<sup>16</sup> He has reasoned that a power to appoint by will alone is not equivalent to an absolute ownership which would justify retarding the application of the Rule until the exercise of the power; rather it is a restricted power, the unexercised duration of which must be included within the period allowed by the

<sup>11</sup>*Minot v. Paine*, 230 Mass. 514, 120 N. E. 167, 1 A. L. R. 365 (1918). In *Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N. E. (2d) 487 (1938), the court pointed out that since the donee could not appoint to anyone during his life, the restraint started at the time of the creation of the power, making it necessary to compute the permissible period from that date.

<sup>12</sup>3 Bogert, *Trusts and Trustees* (1946) § 551.

<sup>13</sup>Even in jurisdictions having the so-called "prudent man rule" of trust investments, the restrictions on the trustee's powers are substantial because that rule refers to the conduct of a prudent man in investing the funds of another entrusted to him, not his own funds. 3 Scott, *Trusts* (2nd ed. 1956) § 227.6.

<sup>14</sup>Simes, *Is the Rule Against Perpetuities Doomed?* (1953) 52 Mich. L. Rev. 179, 191-192.

<sup>15</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) §§ 526 and 948 et seq.; Gray, *General Testamentary Powers and the Rule Against Perpetuities* (1913) 26 Harv. L. Rev. 720.

<sup>16</sup>Note (1918) 1 A. L. R. 374, 376.



Rule.<sup>17</sup> Gray also points out that in making a grant of a general power, the donor intends the donee to have in substance the fee, while in making a grant of a testamentary power, he specifically intends that the donee shall never have it, as in the case of a special power.<sup>18</sup>

Though the majority is widely adhered to, an Ohio court in *Cleveland Trust Co. v. McQuade*,<sup>19</sup> a case of first impression in the jurisdiction, has recently aligned that state with the contrary position. The case arose when the trustees sought a declaratory judgment to determine the interpretation and effect of a trust. Anne Baldwin Schultze had executed a trust agreement, with the plaintiff as trustee, which had become irrevocable upon her death in 1922. By its terms the trust estate was divided into two equal parts, one part being for the benefit of Gouverneur Morris and providing that he was to have a general testamentary power of appointment to dispose of that part of the estate. Morris died in 1953, exercising his power of appointment by creating another trust that was to last during the lives of eight named persons, after which the corpus of the trust estate was to be disposed of according to provisions which were not set forth in the court's opinion. In sustaining the validity of Morris's exercise of the general testamentary power of appointment,<sup>20</sup> the court decided that there is no difference between a general power to appoint by deed or will and a general testamentary power, which justifies different treatments of the two interests, and that in both the period of the Rule against Perpetuities is to be computed from the date the power is exercised.

The reasons given by the Ohio court to support its conclusion follow two dissimilar approaches.<sup>21</sup> First, it was pointed out that in this

---

<sup>17</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 948 et seq.; Gray, *General Testamentary Powers and the Rule Against Perpetuities* (1913) 26 Harv. L. Rev. 720.

<sup>18</sup>Gray, *General Testamentary Powers and The Rule Against Perpetuities* (1913) 26 Harv. L. Rev. 720, 722.

<sup>19</sup>133 N. E. (2d) 664 (Ohio Prob. 1955).

<sup>20</sup>Under the majority view, the exercise by Morris of his general testamentary power would not be valid. The permissible period would be measured from the creation of the power, and since that time a life in being—the donee's—has terminated. Consequently, the estate appointed would be too remote because there was a possibility that the corpus of the trust would not vest within twenty-one years after the death of the donee. Under the rule applied in the principal case, however, the disposition of the property is valid because all of the interests will have vested within a life in being and twenty-one years after the exercise of the power, which took effect at the donee's death.

<sup>21</sup>In addition to its primary reasoning, and as somewhat of an afterthought, the court noted that a strict application of the Rule against Perpetuities to this interest would "thwart the obvious intention of the donor." While the court may be commended for wishing to carry out the donor's intentions, it must be recognized

instance, as in any other well-written trust instrument, the trustee was given broad powers of sale and reinvestment, and in fact that one of the duties imposed by law upon a trustee is to use reasonable care in making the trust property productive.<sup>22</sup> The existence of these extensive powers in the trustee was considered sufficient to refute the usual contention that such property is inalienable and unmarketable while held under the power, and so the basis for a strict application of the Rule against Perpetuities is not present. Second, it was argued that no valid distinction can be drawn between the position of the donee of a general power, who is characterized as only the "practical owner"<sup>23</sup> of the property, and the position of the donee of a general testamentary power who is also the "practical owner" of the property inasmuch as the donee of a testamentary power can appoint to his own estate.<sup>24</sup>

Respectable authority can be cited to sustain the American minority view adopted in the principal decision.<sup>25</sup> It is supported by the rule which the English courts, after some earlier wavering, have now adopt-

---

that the effect of the application of the Rule against Perpetuities is generally to overcome the grantor's intent when such is necessary to effectuate the social policy of keeping property freely alienable.

<sup>22</sup>The American majority view is to the effect that this factor is not enough to prevent the application of the Rule against Perpetuities. *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167, 1 A. L. R. 365 (1918); Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 526 et seq.

<sup>23</sup>This expression, which was employed by Professor Gray, was the basis of Professor Kales' argument that the interest should be dated from its exercise, rather than from its creation. Cf. Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 526.2, and Kales, *General Powers and the Rule Against Perpetuities* (1912) 26 *Harv. L. Rev.* 64. For Gray's rejoinder to this argument, see Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 948 et seq.; Gray, *General Testamentary Powers and the Rule Against Perpetuities* (1913) 26 *Harv. L. Rev.* 720.

<sup>24</sup>To the same effect it was further observed that in either case, general or testamentary, the property may be reached in equity by creditors of the donee and is to be included in the donee's estate for federal estate and/or state inheritance tax purposes. For a discussion of the rights of such creditors, see 5 *American Law of Property* (1952) § 23.16(3). See, also, *Int. Rev. Code* (1954) § 2041; Craven, *Powers of Appointment Act of 1951* (1951) 65 *Harv. L. Rev.* 55; Polisher, *The 1951 Powers Appointment Act—Its Federal Estate Tax and Gift Tax Implications* (1951) 56 *Dick. L. Rev.* 3.

<sup>25</sup>*Miller v. Douglass*, 192 *Wis.* 486, 213 *N. W.* 320 (1927); *Rous v. Jackson*, 29 *Ch. D.* 521 (1885); *In re Flower*, 55 *L. J. Ch.* 200, 53 *L. T. R.* 717 (1885); *Stuart v. Babington*, [1891] 27 *Ir. L. R.* 551; Kales, *General Powers and the Rule Against Perpetuities* (1912) 26 *Harv. L. Rev.* 64; Thorndike, *General Powers and Perpetuities* (1914) 27 *Harv. L. Rev.* 705; Bettner, *The Rule Against Perpetuities as Applied to Powers of Appointment* (1940) 27 *Va. L. Rev.* 149, 171-178; *Notes* (1935) 48 *Harv. L. Rev.* 1239; (1921) 35 *Harv. L. Rev.* 326; (1919) 19 *Col. L. Rev.* 62. *Ellett's Ex'rs and Trustees v. Ellett*, decided on Dec. 4, 1956 by the Chancery Court of the City of Richmond, Va., is the most recent authority found for this view.

ed. The early English case of *Re Powell's Trust*<sup>26</sup> held that a general testamentary power should date from the time of its creation, and this decision became the basic authority for the American majority view.<sup>27</sup> However, in 1885 the *Powell* decision was decisively repudiated in *Rous v. Jackson*,<sup>28</sup> the court there holding that the permissible period for vesting of interests under a general testamentary power should be computed from the date of the exercise.<sup>29</sup> Among the text writers, the most outstanding proponent of the minority view has been Professor Kales, who argued that it is not important that the property can never vest in the donee of a power, as long as he can act as the owner when he *exercises* the power.<sup>30</sup> Under the Kales approach it is when the donee of a general power *exercises* his power that he is considered to be "practically the owner;"<sup>31</sup> therefore, the donee of a general testamentary power should also be considered "practically the owner" upon the exercise of his power, because at that time he may appoint to anyone he chooses, including himself—i.e., his estate. Thus, the two powers are alike and both should come within the same exception to the general rule as to the time for computing the permissible period for vesting.<sup>32</sup>

While both points of view as to the nature of the general testament-

<sup>26</sup>39 L. J. Ch. 188 (1869).

<sup>27</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 963.

<sup>28</sup>29 Ch. D. 521, 526 (1885). In referring to the contrary decision of *James, V. C.*, in *Re Powell's Trust*, 39 L. J. Ch. 188 (1869), Chitty, J., said: "I think the Vice Chancellor in that case fell into an error. I can find no distinction between the case of capacity to alienate existing by reason of the general power and general capacity to alienate property."

<sup>29</sup>While the overruling of *Re Powell's Trust*, 29 L. J. Ch. 188 (1869), is clear, it is not so easy to ascertain upon what principle it was overruled. None is stated in the *Rous* case opinion, and the basis appears to be in the propositions that are to be drawn from the authority cited. Gray contends that the authorities cited by Justice Chitty were dealing with general powers exercisable by deed, or by deed and will, and not with general testamentary powers of appointment. Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 967. However, Thorndike, *General Powers and Perpetuities* (1914) 27 Harv. L. Rev. 705, 709, argues to the contrary.

<sup>30</sup>Kales, *General Powers and the Rule Against Perpetuities* (1912) 26 Harv. L. Rev. 64.

<sup>31</sup>Kales, *General Powers and the Rule Against Perpetuities* (1912) 26 Harv. L. Rev. 64, 67: "What, then, is there that an owner of property can do in the way of disposing of his property at the moment of his death which the donee of a general power to appoint by will cannot accomplish? Nothing! *Ergo*, the donee of a general power to appoint by will, if that power be valid in its inception, is, at the moment when he may exercise the power, practically the owner."

<sup>32</sup>Gray's rejoinder to Kales is that "a man cannot, in the eye of the law, be at the same time alive and dead. So long as he is alive, the condition necessary for the exercise of the power is not fulfilled, and after he is dead he cannot be an appointee." Gray, *General Testamentary Powers and the Rule Against Perpetuities* (1913) 26 Harv. L. Rev. 720, 722.

ary power are defensible, Gray's argument that there is an essential distinction between a general testamentary power and a general power exercisable by deed or will seems sound.<sup>33</sup> The fact that the donee in the former case cannot appoint to himself involves a real practical difference, because it means that the donee cannot sell the property. This factor was emphasized in *Minot v. Paine*,<sup>34</sup> where the Massachusetts court, in a typical application of the American majority rule, observed: "No one can be an owner unless he can sell his property at will. Although a life tenant with power to appoint by will . . . enjoys many of the incidents of ownership, he lacks the fundamental one of power to sell a fee. Even though he has the power to appoint to his own estate, that does not go far enough."<sup>35</sup>

This argument appears to be compelling enough to refute the proposition of the principal case that the interest of a tenant for life, with power of appointment by will only, sufficiently approximates absolute ownership so as to call for the application of the same rule which applies to the general power of appointment exercisable by deed or will.<sup>36</sup> In either case the donee could be the owner, either absolute or practical, only upon the exercise of the power given him. But the donee of a general testamentary power could be the "owner" only after his death, and so could never put himself in position to alienate the property during his lifetime.<sup>37</sup> His fundamental inability to pass a fee is the primary reason behind the majority rule in the United States.<sup>38</sup> The property, during the existence of this power, is, from a practical standpoint, removed from commerce. Therefore, the purpose of the Rule against Perpetuities to prevent long term restraints on alienability comes into play, and that purpose will best be served by dating the permissible period for vesting from the date of the creation of power.

J. FRANK SHEPHERD

---

<sup>33</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 962.

<sup>34</sup>230 Mass. 514, 120 N. E. 167 (1918).

<sup>35</sup>*Minot v. Paine*, 230 Mass. 514, 120 N. E. 167, 170 (1918).

<sup>36</sup>*Mondell v. Thom*, 79 App. D. C. 145, 143 F. (2d) 157 (1944); *Lamkin v. Safe Deposit & Trust Co.*, 192 Md. 472, 64 A. (2d) 704 (1949). Even if a general testamentary power is exercised in favor of the donee's estate in an earlier clause of his will, and then in a later clause, such as a residuary clause, a disposition of the property in the donee's estate is made, the later clause is still an appointment under the power, and the validity of its provisions is determined by computing the period of the Rule from the time of the creation of the power. *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N. E. (2d) 3 (1947), noted in (1948) 28 B. U. L. Rev. 251; (1948) 61 Harv. L. Rev. 715.

<sup>37</sup>Gray, *The Rule Against Perpetuities* (4th ed. 1942) § 952.

<sup>38</sup>*Northern Trust Co. v. Porter*, 368 Ill. 256, 13 N. E. (2d) 487 (1938); *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N. E. (2d) 3 (1947); *Marx v. Rice*, 3 N. J. Super. 581, 67 A. (2d) 918 (1949); *Restatement, Property* (1944) § 392.

PROPERTY—UPPER PROPRIETOR'S LIABILITY FOR EXCESS DRAINAGE IMPOSED ON LOWER ESTATE AS RESULT OF IMPROVEMENT OF UPPER ESTATE. [New Jersey]

The right to the free use of one's property is qualified to the extent that the use must not unreasonably interfere with an adjoining owner's right to the quiet enjoyment and use of his land.<sup>1</sup> Within reason, each owner has the right to a continued enjoyment of his property in its present condition, along with the corresponding right to develop his land for new uses. When the development of one's property causes injury to an adjoining owner's use of his property, a delicate balancing of the rights of each owner is necessary to determine which should bear the burden of the loss.

The New Jersey courts have recently been called upon to deal with this problem of conflicting interests in *Armstrong v. Francis Corporation*.<sup>2</sup> Plaintiff, the lower proprietor, sought relief against defendant, a building contractor, for artificially gathering surface and percolating waters and discharging them into a stream adjacent to plaintiff's property. Originally a small natural stream arose in and served as the natural drainage for defendant's 42-acre tract. It flowed north 1200 feet across defendant's land, then through a box culvert under an avenue, and finally emptied into a lake 900 feet north of the avenue. Defendant erected 186 small houses on its tract, and 14 others on an adjacent tract in another drainage basin. An artificial drainage system was constructed of gutters, ditches, culverts and catch basins to serve both developments. The water was emptied into an underground iron drainage pipe so designed that percolating waters could enter through the joints. This pipe generally followed the original course of the stream, all evidence of which has disappeared, and emptied into the culvert under the avenue. From this point, the stream became evil-smelling and dirty, flooding frequently and causing such serious erosion at some points as to threaten improvements on plaintiff's land. The lower court order the piping of the remainder of the stream the entire distance to the lake, and defendant appealed, contending that the situation is merely the non-actionable consequence of the privileged expulsion by defendant of water from its tract as an incident to the improvement thereof. On appeal, the Supreme Court of New

---

<sup>1</sup>The ancient maxim is *Sic utere tuo ut alienum non laedas*—use your own property in such a manner as not to injure that of another. Black's Law Dictionary (3rd ed. 1933) 1626.

<sup>2</sup>20 N. J. 320, 120 A. (2d) 4 (1956).

Jersey,<sup>3</sup> recognized that most jurisdictions adhere either to the "civil law" rule or the "common enemy" rule and that New Jersey in prior cases had applied the latter rule. In the present decision, however, the court adopted the modern "reasonable use" rule, under which "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable."<sup>4</sup> On the finding that the gravity of harm to plaintiff's property outweighed the utility of defendant's use of his property, the order of the lower court was affirmed.

Of the two divergent views which have been adopted widely to govern the upper proprietor's right regarding surface waters, the "common enemy" rule has probably been accepted by the majority of the courts.<sup>5</sup> In effect, it declares broadly that the possessor of land has a legal privilege to alter and improve the surface of his property as he pleases, regardless of the harm which may be caused to others by an alteration in the flow of surface water.<sup>6</sup> This rule has been justified both on the ground of the nature of land ownership—that an owner has the privilege to determine to what use he will put his property because by an ancient theory an owner owns to the heavens above and through the soil below<sup>7</sup>—and on the ground of public policy—that the development of property is in the public interest and should have the protection of the law.<sup>8</sup> Though the common enemy rule

---

<sup>3</sup>Defendant appealed to the Appellate Division, and the appeal was certified to the New Jersey Supreme Court on its own motion.

<sup>4</sup>20 N. J. 320, 120 A. (2d) 4, 8 (1956).

<sup>5</sup>Kinyon and McClure, *Interferences With Surface Waters* (1940) 24 Minn. L. Rev. 891.

<sup>6</sup>*Gannon v. Hargadon*, 92 Mass. (10 Allen) 106 at 109, 87 Am. Dec. 625 at 626 (1865); *Bowlsby v. Speer*, 31 N. J. L. 351, 353, 86 Am. Dec. 216, 217 (1865): "... the conclusion is reached that no right of any kind can be claimed in the mere flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission is an actionable injury, even though damage ensues."

<sup>7</sup>*Goodale v. Tuttle*, 29 N. Y. (2 Tiff.) 459, 467 (1864): "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." Cf. *Grant v. Allen*, 41 Conn. 156 at 160 (1874).

<sup>8</sup>"Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt... the law of nature... would... place undue restriction upon industry, and enterprise, and

may be commendable from the point of view of the upper proprietor, it fails to consider the interests of the injured lower proprietor who may be put in the position of not being able either to continue with the previous use of his property or to improve it for better usage. If this view were followed rigidly, there would be no opportunity for the balancing of the respective rights of each of the landowners.

A substantial number of states have rejected this arbitrary rule, and instead have adopted the "civil law" theory which respects the natural laws of drainage. Under this view, the upper proprietor has an "easement" to have surface water flow naturally from his land onto the land of the lower proprietor.<sup>9</sup> However, alterations in the property that deflect this natural flow are not permitted if such alteration increases the burden on lower owners.<sup>10</sup> This rule, designed to maintain the status quo and protect the lower owner against interference with the present use of his land, seriously interferes with any development of property which would cause an alteration in surface water flow. Thus, an owner is restricted in one of the fundamental rights of property—the free use and development of his land.

As a result of the inflexibility of both rules, courts which have adopted them have found that neither, standing alone, could cope with the demands and requirements of an ever-changing society. Consequently, each rule has been limited and modified,<sup>11</sup> so that the law could be applied more sensibly to each new development. Such a practice left the law in a highly confused state, with the courts purporting to adhere to rules that have been subjected to so many exceptions as to have been rendered practically out of existence. Thus, the courts adopting the civil law theory have recognized that an owner is privileged to make minor alterations in the natural flow of surface water upon his own land when necessary to the normal use and development of land, even though surface water is thereby caused to flow on adjacent land in a

---

the control by an owner of his property." *Barkley v. Wilcox*, 86 N. Y. (41 Sickles) 140, 148, 40 Am. Rep. 519, 524 (1881). Also, *Bowlsby v. Speer*, 31 N. J. L. 351 at 353, 86 Am. Dec. 216 at 217 (1865).

<sup>9</sup>*Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412 (1882); *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593 (1893).

<sup>10</sup>*Heier v. Krull*, 160 Cal. 441, 117 Pac. 530 (1911); *Elam v. Cortinas*, 219 La. 406, 53 S. (2d) 146 (1951); *Boynton v. Longley*, 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781 (1885).

<sup>11</sup>The possible future necessity of modification was recognized in *Bowlsby v. Speer*, 31 N. J. L. 351 at 353, 86 Am. Dec. 216 at 217 (1865).

Exceptions are grouped generally into categories dealing with appropriation, repulsion, and alteration of flow and discharge of water through artificial means. Since appropriation and repulsion are not involved in the question here, discussion of them has been omitted.

different manner than formerly. Adoption of this qualification is more likely when the water is deposited in existing natural drainways, either naturally or through artificial contrivances.<sup>12</sup> Courts adopting the civil law view have been plagued by the rapid growth of urban areas and the deterrent effect the civil law rule has on property development. Therefore, though there is a split of authority on this point, some civil law states have decided that that rule is applicable to rural areas, but that the common enemy rule applies to urban land.<sup>13</sup>

---

<sup>12</sup>The rights of others are not uniform from state to state in this regard, and the latitude permitted in some civil law jurisdictions is greater than might be expected from the restrictiveness of the general rule. *Hughes v. Anderson*, 68 Ala. 280, 286, 44 Am. Rep. 147, 150 (1880): "Under these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of plaintiffs, which, in the absence of such ditches, would have flowed in a different direction. As to the water theretofore accustomed to flow on the lands of the plaintiffs, defendant was not bound to remain inactive. He was permitted to so ditch his own lands as to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. This, however, must be weighed and decided with a proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior; and even this license must be conceded with great caution and prudence." The following cases, with slight variations, hold that the upper owner cannot discharge directly onto lower lands, but that surface water can be gathered and discharged, if for a reasonable purpose, into a stream or natural drain upon his own land without incurring liability for causing an increased flow of the stream, provided water is not taken out of its natural course of drainage: *Archer v. City of Los Angeles*, 19 Cal. (2d) 19, 119 P. (2d) 1 at 6 (1941); *Dwyer v. Village of Glen Ellyn*, 314 Ill. App. 572, 41 N. E. (2d) 786 (1942); *Dayton v. Rutherford*, 128 Ill. 271, 21 N. E. 198 at 199 (1889); *Owens v. Fayette County*, 241 Iowa 740, 40 N. W. (2d) 602 at 605 (1950); *McKeon v. Brammer*, 238 Iowa 1113, 29 N. W. (2d) 518 at 527 (1947); *State ex rel. Wood v. Pinder*, 41 S. (2d) 479 at 485 (La. App. 1949); *McCoy v. Rankin*, 42 N. E. (2d) 234 at 238 (Ohio App. 1941); *Coleman v. Wright*, 155 S. W. (2d) 382 at 383 (Tex. Civ. App. 1941). The latter two cases specifically state that the discharge must not exceed the capacity of the watercourse in its natural drainage. *Cavanaugh v. Texas Distributing Co.*, 45 N. E. (2d) 142 at 143 (Ohio App. 1943) (may improve land and thereby alter flow of surface water even though in a different direction and in larger quantities than previously, provided altered flow is not artificially accumulated in a negligent manner); *Beals v. Robertson*, 159 Pa. Super. 325, 48 A. (2d) 56 at 57 (1946) (upper owner may increase flow through natural and reasonable use of his land and have water discharged into natural watercourse on lower land, but cannot make new channels nor concentrate and increase the flow by artificial means).

<sup>13</sup>*Los Angeles Cemetery Ass'n v. Los Angeles*, 103 Cal. 461, 37 Pac. 375 at 377 (1894). Kan. Gen. Stat. (Supp. 1955) c. 24, § 105: "It shall be unlawful for a landowner or proprietor to construct or maintain a dam or levee which has the effect of obstructing or collecting and discharging with increased force and volume the flow of surface water to the damage of the adjacent owner or proprietor; . . . Provided, that the provisions of this section shall apply only to lands used for agricultural purposes and highways lying wholly outside the limits of any incorporated city. . . ." *Contra: Carland v. Aurin*, 103 Tenn. 555, 53 S. W. 940, 941, 48 L. R. A. 862, 864



The common enemy rule states have often found it necessary to curtail the sweeping protection given the improver of land under this rule. Thus, the rule has been held to apply only to alterations in flow caused by changes in the land surface and topography.<sup>14</sup> It was reasoned that because the acceleration and concentration of flow caused by artificial drainage methods would result in damage far beyond the foresight of the original propounders of the doctrine, definite limitations had to be placed on the utilization of artificial drains. Generally there is no privilege to drain premises artificially in such a manner as to cast unreasonable amounts of water on lower proprietors, except by means of natural drainways.<sup>15</sup>

Thus it appears that, though both rules started at opposite extremes, the exceptions which have been applied to each have brought them closer together until, in many situations, a case could be decided the same way under either rule. Nevertheless, the tendency of the courts has been to attempt to adhere to rules of thumb for every case.

(1899): "We are unable to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors, and hence we do not think it is wise to apply one rule to city lots and a different rule to agricultural lands, especially in the same state."

<sup>14</sup>United States v. Shapiro, Inc., 202 F. (2d) 459 (C. A. D. C., 1953); Rutka v. Rzegocki, 132 Conn. 319, 43 A. (2d) 658 (1945); Harrison v. Poli-New England Theatres, 304 Mass. 123, 23 N. E. (2d) 99 (1939); Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. (2d) 576 (1942); McCutchen v. Village of Peekskill, 167 Misc. 460, 3 N. Y. S. (2d) 277 (1938). Cf. Norfolk and Western R. Co. v. Carter, 91 Va. 587, 22 S. E. 517 (1895).

<sup>15</sup>In this respect, both rules are much alike, with many local variations—so much so that some cases would be decided the same way under either rule. United States v. Shapiro, Inc., 202 F. (2d) 459, 460 (C. A. D. C., 1953) (surface water is a common enemy which may be repelled or deflected onto the lands of other proprietors, provided such deflection is the result of an ordinary use of the land and is not accomplished by means of channels, ditches, or other extraordinary construction); Harrison v. Poli-New England Theatres, 304 Mass. 123, 23 N. E. (2d) 99, 100 (1939): "The landowner has the right to improve his land by a change of grade or by the construction of buildings even if the natural course of surface water is thereby changed. But he has no right to collect surface water into an artificial channel and discharge it upon the way in a greater quantity than would have been discharged if the natural conformation of his land had not been altered." Also: White v. Wabash R. R., 240 Mo. App. 344, 207 S. W. (2d) 505 at 509 (1947); Schomberg v. Kuther, 153 Nev. 413, 45 N. W. (2d) 129 at 137 (1950); Smith v. Orben, 119 N. J. Eq. 291, 182 Atl. 153 at 155 (1935); Rix v. Town of Alamogordo, 42 N. M. 325, 77 P. (2d) 765 at 768 (1938); McCutchen v. Village of Peekskill, 167 Misc. 640, 3 N. Y. S. (2d) 277, 279 (1938); Third Buckingham Community, Inc. v. Anderson, 178 Va. 478, 486, 17 S. E. (2d) 433, 436 (1941) (generally recognized under both civil and common law that landowner cannot collect surface water in artificial channel or volume and precipitate it in greatly increased or unnatural quantities to the injury of his neighbor). Virginia follows what is sometimes termed the "qualified common enemy rule," but the term is misleading in that nearly all states have qualified the rule to a greater or lesser extent.

Because of the impracticability of applying rigid rules in these cases and of the confusion resulting from piecemeal modification of the general rules, a third approach, which may be termed the "reasonable user" doctrine has been suggested. Though previously accepted in only two jurisdictions—New Hampshire<sup>16</sup> and Minnesota<sup>17</sup>—this view is

<sup>16</sup>The first case in New Hampshire applying the doctrine seems to be *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179 (1862), involving percolating waters. It was then applied in *Swett v. Cutts*, 50 N. H. 439, 443, 9 Am. Rep. 276, 278 (1870): "The test is, the reasonableness of the use or disposition of such water; and ordinarily that is a question of fact for the jury under the instructions of the court." Probably the outstanding opinion on this point appears in *City of Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 913, 58 L. R. A. 112, 114 (1901): "Reasonableness is the vital principle of the common law. . . . In determining this question all the circumstances of the case would . . . be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen. . . . If the correlative rights of adjoining owners in the control of surface water . . . is peculiar to the jurisprudence of this state . . . the principle involved is based upon a broader ground of justice than attends the practical operation of either of the extreme views above noted, and is recognized as an essential element in many cases in other jurisdictions. . . ."

<sup>17</sup>Minnesota has gone through a process of evolution in its decisions, starting with the common law which was very rapidly modified. *Rowe v. St. Paul, M. and M. Ry.*, 41 Minn. 384, 43 N. W. 76 at 77 (1889) (common law rule prevails, subject to the reasonable restriction that one must so use his own land as not to injure his neighbor); *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 463, 26 L. R. A. 632, 634 (1894) (court reviewed previous decisions setting forth circumstances to be considered in determining reasonableness); *Gilfillan v. Schmidt*, 64 Minn. 29, 66 N. W. 126, 129, 31 L. R. A. 547, 550 (1896) ("No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but, if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use. . ."). Minnesota demonstrated the complete flexibility of the rule in *Rieck v. Schamanski*, 117 Minn. 25, 134 N. W. 228, 230 (1912), a case in which the defendant drained part of the water from his land outside of its natural course of drainage, a privilege not generally recognized under either of the other two rules. The court said: "The rule of reasonable use had been recognized, without modification, . . . and the rule is now definitely settled that a landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another; but in so doing he must use all reasonable means to avoid unnecessary injury to the land of others—that is, he cannot, in draining his own land, cause unreasonable or unnecessary injury to the land below. What is reasonable in such cases depends upon the special facts of each particular case." As late as 1934, Minnesota still paid lip service to the common enemy doctrine in *Bush v. City of Rochester*, 191 Minn. 591, 255 N. W. 256 at 257 (1934). *Enderson v. Kelehan*, 226 Minn. 163, 32 N. W. (2d) 286, 289 (1948) appears to be the final break with the common enemy rule and the completion of the evolutionary process in this state. The court there set forth rules of testing reasonableness.

espoused by the American Law Institute,<sup>18</sup> and may be expected to gain more favor as providing a means of emerging from the dilemma in which the courts have been placed in attempting to apply the traditional rules. With the decision in the principal case, New Jersey has become the third state to apply the approach which will most likely lead to the attainment of just results in this type of controversy. This approach breaks completely with the older rules, which are based on the rights of property ownership, and determines liability on tort principles. Each possessor is legally privileged to make a reasonable use of his land even though the flow of surface water is altered thereby and causes some harm to others.<sup>19</sup> An owner incurs liability only when his harmful interference with the flow of surface water is intentional and unreasonable, or unintentional and otherwise actionable under rules governing liability for negligent, reckless, or ultra-hazardous conduct.<sup>20</sup> As in tort cases, the issue is a question of fact based on circumstances surrounding the case, such as the amount of harm caused, the foreseeability of the harm, and the purpose or motive of the upper owner.<sup>21</sup>

An attempt has been made to justify the application of a "simple rule of thumb" in these cases by pointing out that contractors can plan their developments with a view towards avoiding liability, based on the existing rule of law.<sup>22</sup> There is, of course, merit in establishing certainty in this field of the law, but justice is not done merely because an upper proprietor can with safety cast his drainage upon a lower owner, to his injury, in accordance with a rule of law which grants protection

---

<sup>18</sup>Restatement, Torts (1939) § 833.

<sup>19</sup>See cases cited in notes 16 and 17, *supra*.

<sup>20</sup>This is the basic Restatement test. Restatement, Torts (1939) §§ 822-831.

<sup>21</sup>For these and other factors, see cases cited in notes 16 and 17, *supra*, and *Armstrong v. Francis Corp.*, 20 N. J. 320, 120 A. (2d) 4, 10 (1956).

<sup>22</sup>*Yonadi v. Homestead Country Homes*, 35 N. J. Super. 514, 114 A. (2d) 564 (1955). This decision, which was relied on by the defendant in the principal case, is an example of an extreme application of the common enemy rule. The defendant was allowed to drain his property artificially and cast three and one-half times as much water onto the plaintiff's property as had flowed there formerly. The architect drawing up the plans for the drainage system had done so with an eye to the New Jersey decisions in order to avoid liability.

The inconsistency in these cases is evident from *Smith v. Orben*, 119 N. J. Eq. 291, 182 Atl. 153 (1935) which would appear to have been a strong precedent for a contrary decision in the *Yonadi* case, but was not even mentioned in the latter opinion. There the defendant drained his premises artificially by depositing the water *in a watercourse on his own land*, and the excess drainage caused the watercourse to overflow causing injury to the plaintiff's property. Injunctive relief was granted, consistent with the view in most common enemy rule jurisdiction that when drainage is deposited in a stream it must not exceed the capacity of the stream. Yet in the *Yonadi* case, where through artificial means, the surface water was drained *directly onto the lands of the plaintiff*, recovery for the damage caused was denied.

to only one party. Advance planning as a means of avoiding liability is quite feasible under the reasonable user doctrine, for those wishing to improve their property can still proceed safely by purchasing easement rights from lower owners to maintain the excess drainage.<sup>23</sup> Since the improvements are designed to benefit the upper owner by increasing the value of his property, and since the lower property is decreased in value by the greater flow of surface water, it seems that the cost of compensating a lower owner for damages simply should be considered one of the normal expenses of the improvement. Furthermore, if a rule is established which places the loss on the upper proprietor for unreasonable invasions, future improvers will be stimulated to try to prevent extra drainage from being imposed on adjoining lands, and economic losses to society will thereby be forestalled.

It must be conceded that the reasonable user theory is not infallible, but it does not place liability for invasions in this field in the same category with other invasions of the use and enjoyment of property. Liability or non-liability based on the rights of land ownership has proved to be too rigorous at the outset, and a need for exceptions to the doctrine has been recognized in order to keep pace with the requirements of persons living in close proximity to one another. To allow an advantage to one owner or the other based on his rights as a landowner is unfair to the reciprocal rights of his neighbors. There must be a balancing of interests in these situations, and the reasonable user doctrine is the only one which places the parties on an equal footing in this respect.

WILLIAM O. ROBERTS, JR.

#### TAXATION—CLASSIFICATION OF LOSSES ON SALES OF COMMODITY FUTURES AS CAPITAL OR ORDINARY LOSSES. [Federal]

While the 1954 Internal Revenue Code clarified many uncertainties existing in the 1939 Code, there are some areas in which provisions apparently clear and explicit on their face are becoming more complex through judicial interpretation.

---

<sup>23</sup>See Mo. Rev. Stat. (1949) § 244.010 cited in *Young v. Moore*, 241 Mo. App. 436, 236 S. W. (2d) 740 at 743 (1951) to the effect that an owner in protecting or draining his land for sanitary or agricultural purposes may construct an artificial drain through or across any tract of land situated between the land to be drained and a natural or artificial watercourse into which the waters from such land can be drained, provided the owners of the land through which the drain must be built are paid a sum equal to the value of land, if any, consumed in constructing such works and the amount of damages, if any, that will be sustained by such land from the construction and maintenance of the improvement.

Singularly illustrative of this situation is the treatment afforded capital gains and losses;<sup>1</sup> and the one factor in that treatment which accounts for the greater part of the resulting complexity is the definition of capital gain and of capital loss. Section 1222 defines capital gain and capital loss, whether "short-term" or "long-term," as gain or loss resulting "from the sale or exchange of a capital asset."<sup>2</sup> Further resort is then necessary to Section 1221 for the definition of a "capital asset."<sup>3</sup> However, this section does not purport to state what a capital asset is, but rather what it is not. That is, the law has enumerated a list of specific categories which are not capital assets, and all assets other than those groups specified are classified as capital assets. This series of exclusionary clauses now covers almost every type of property, tangible and intangible, held by a taxpayer in connection with his trade or business.<sup>4</sup>

The apparent reason for this negative definition was the inherent difficulty in attempting to specify with any degree of preciseness the types of transactions which were to receive special consideration.<sup>5</sup> This

---

<sup>1</sup>Sections 1201 to 1241 of the 1954 Code provide for relief where sales or exchanges of capital assets are made at a profit, and for a limitation where they result in a loss. The beneficial tax treatment for long-term capital gains is provided for by means of an alternate tax (§ 1201) and a fifty percent deduction for taxpayers other than corporations (§ 1202). The limitation is in the form of a restriction upon the amount of capital losses which can be deducted in any one year (§ 1211) with a provision for a five-year carry over of unused losses (§ 1212).

<sup>2</sup>Int. Rev. Code (1954) § 1222. The citations through-out this comment are to the Internal Revenue Code of 1954, Title 26 U. S. C. A. (1955), and where the citations in cases or regulations are to the 1939 Code they have been converted to the appropriate section designation in the 1954 Code.

<sup>3</sup>"... the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; (2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business..." Int. Rev. Code (1954) § 1221. Source: Int. Rev. Code (1939) § 117(a)(1).

<sup>4</sup>The Regulations specify that "The term 'capital assets' includes all classes of property not specifically excluded..." Fed. Tax Reg. (1955) § 39.117 (a)-1. And the courts have said that the term "property" should not be given a narrow or technical meaning; rather it should be "construed to include obligations, rights and other intangibles, as well as physical things." *Citizens State Bank v. Vidal*, 114 F. (2d) 380, 382 (C. C. A. 10th, 1940). Accord: *Jones v. Corbyn*, 186 F. (2d) 450 (C. A. 10th, 1950).

As to the special treatment afforded real and depreciable property used in a trade or business, see Int. Rev. Code (1954) § 1231.

<sup>5</sup>Miller, *The "Capital Asset" Concept: A Critique of Capital Gains Taxation*: II (1950) 59 *Yale L. J.* 1057 at 1085; *Surrey, Definitional Problems In Capital*

difficulty in turn stems from the obscurity of the rationale for favored tax treatment of capital gains—that the transfer of certain types of “capital investments” should be encouraged by taxing the resultant profit at a rate lower than the normal rates.<sup>6</sup> Thus, in the absence of a comprehensive statement of congressional policy considerations for the segregation of capital gains and losses, the courts have tended “to let whatever passed through the coarse ‘trade or business’ sieve fall into the ‘capital asset’ bucket.”<sup>7</sup>

It had been suggested that this approach of the courts be reversed, pending congressional action, and that the capital gain and loss sections of the Code be applied only to those situations clearly intended to be covered.<sup>8</sup> Such a change would involve a broader construction

Gains Taxation (1956) 69 Harv. L. Rev. 985 at 995. The congressional objective was to distinguish between business and investment transactions. *Corn Products Refining Co. v. Com'r*, 350 U. S. 46 at 52, 76 S. Ct. 20 at 24, 100 L. ed. 29 at 35 (1955); *Gruver v. Com'r*, 142 F. (2d) 363 at 365 (C. C. A. 4th, 1944); *Com'r v. Crawford's Estate*, 139 F. (2d) 616 at 621 (C. C. A. 3rd, 1943). This was to be accomplished, first, by the exclusionary clauses to distinguish investment from business transactions and, second, by the holding period requirement to distinguish investment from speculative transactions. *Miller*, *supra* at 848; *Surrey*, *supra* at 999.

<sup>6</sup>The basic reasons given for the enactment of the provisions are that it is inequitable to apply the ordinary rates to gain realized from the sale of investments, and that the normal treatment impedes the efficient operation of the national economy. The first is an acknowledgement that a different type of income or loss is realized upon the sale of property held for investment purposes. A gain may represent an appreciation, accumulated over a period of years, which should not be taxed as though it had been earned all in one year. *Com'r v. Shapiro*, 125 F. (2d) 532 at 535 (C. C. A. 6th, 1942); *Kenan v. Com'r*, 114 F. (2d) 217 at 220 (C. C. A. 2nd, 1940); *Boomhower v. United States*, 74 F. Supp. 997 at 1001 (N. D. Iowa 1947). And on the other hand, a loss may represent a depreciation which has occurred over several years and should not, therefore, be fully allowed in any one year. The second is based on the argument that investments represent the foundation of the national economy and that no tax obstacle should stand in the way of their unrestricted use. *Com'r v. Harmel*, 287 U. S. 103 at 106, 53 S. Ct. 74 at ??, 77 L. ed. 199 at 202 (1932); *McAllister v. Com'r*, 157 F. (2d) 235 at 239 (C. C. A. 2nd, 1946); *Alexander v. King*, 46 F. (2d) 235 at 236 (C. C. A. 10th, 1931); *Miller*, The “Capital Asset” Concept: A Critique of Capital Gains Taxation: II (1950) 59 Yale L. J. 1057 at 1068. But see *Lowndes*, The Taxation of Capital Gains and Losses Under the Federal Income Tax (1948) 26 Tex. L. Rev. 440; *Tudor*, The Equitable Justification For the Capital Gains Tax (1956) 34 Taxes 643.

<sup>7</sup>*Miller*, The “Capital Asset” Concept: A Critique of Capital Gains Taxation: II (1950) 59 Yale L. J. 1057, 1085.

<sup>8</sup>Enactment of the capital asset provisions was predicted upon two assumptions: “(1) that ‘investment’ gains can be satisfactorily distinguished from ‘business’ and ‘speculative’ profits, and (2) that ‘investment’ gains deserve favored treatment.” *Miller*, The “Capital Asset” Concept: A Critique of Capital Gains Taxation: II (1950) 59 Yale L. J. 1057.

However, it has been argued that the separation of business from investment dealings has not, in practice, been successful because of: (1) the adoption of an artificial distinction, intensified by judicial interpretation; (2) the lack of a body of

of the clause which excludes from the capital asset category all "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." While this available technique of interpretation could not be used to alter the preferred tax status of transactions Congress clearly intended to favor, it would resolve doubtful cases in favor of ordinary gain or loss treatment.

This suggestion was followed by the Supreme Court of the United States in *Corn Products Refining Co. v. Com'r*<sup>9</sup> when it placed "the congressional definition of section 1221 gently to one side and... [decided] the case on its own concept of the capital gain-ordinary income division between investment and business."<sup>10</sup> In so doing, the Court approved a new theory of capital assets which reinforced a developing tendency on the part of the Tax Court to permit capital gain only in connection with sales or exchanges of property which was clearly held for investment purposes.<sup>11</sup> It reasoned that the preferential treatment provided by the capital asset section should be applied solely when its application would effectuate the legislative purpose, which the Court deemed to be to relieve *investors* from excessive hardships when they sell their investments.

---

consistent doctrine; (3) the invalidity of the concept as a measure of taxpaying ability; (4) the varied connotations that have attached themselves to the words "investment" and "business." Miller, *The "Capital Asset" Concept: A Critique of Capital Gains Taxation: I* (1950) 59 Yale L. J. 837. In addition, the arguments favoring such special treatment have been seriously questioned upon the grounds that: (1) they are based upon mere speculation and are void of statistical support; (2) the ability to pay is ignored; (3) those who never realize any gain are penalized. Lowndes, *The Taxation of Capital Gains and Losses Under the Federal Income Tax* (1948) 26 Tex. L. Rev. 440.

<sup>9</sup>350 U. S. 46, 76 S. Ct. 20, 100 L. ed. 29 (1955), noted (1956) 54 Mich L. Rev. 719, (1956) 9 Vand. L. Rev. 885, (1956) 65 Yale L. J. 401, (1955) 41 Va. L. Rev. 389. The taxpayer, a manufacturer of various corn products, had contracted with the buyers of its products to deliver at fixed prices. However, it did not maintain large inventories of corn and so was subject to a price freeze if corn prices rose. Therefore, corn futures were purchased at harvest time as protection and then delivery on them was taken when necessary to maintain a supply of corn for manufacturing operations. The remainder of the futures were sold in early summer if no shortage was imminent. Even if shortages appeared, it sold futures only as it bought spot corn for grinding. Through this means it obtained protection against an increase in spot corn prices. The Supreme Court held that the gains on the sales of the corn futures were not capital gains.

<sup>10</sup>Surrey, *Definitional Problems In Capital Gains Taxation* (1956) 69 Harv. L. Rev. 985, 993.

<sup>11</sup>*Brady v. Com'r*, 25 T. C. 682 (1955); *Zack v. Com'r*, 25 T. C. 675 (1955); *Wood v. Com'r* 25 T. C. 468 (1955); *Bagley and Sewall Co. v. Com'r*, 20 T. C. 983 (1953) aff'd 221 F. (2d) 944 (C. A. 2nd, 1955); *Western Wine and Liquor Co. v. Com'r*, 18 T. C. 1090 (1952); *Dunitz v. Com'r*, 7 T. C. 672 (1946); *Kanawha Valley Bank v. Com'r*, 4 T. C. 252 (1944).

The *Corn Products* decision, in giving the exclusionary clauses a broad interpretation even where the property did not fall within the literal language of the exclusions, was a significant departure from the traditional rule of literal interpretation of tax statutes.<sup>12</sup> Its effect upon the taxpayer and tax planning is two-fold: Under a broad interpretation of the exclusionary clauses it is more difficult for the taxpayer to treat certain profits as capital gain, and on the other hand it is easier for him to treat certain losses as fully deductible ordinary losses.

Since the language used in the opinion was not specifically limited to the particular fact situation involved,<sup>13</sup> the approach adopted could have led to a questioning of such well-accepted capital gains and losses as those from the sale of securities by a trader. For if the taxpayer is considered in the business of trading, the gains and losses could be considered ordinary under this reasoning, since they are incurred in every-day operations.<sup>14</sup>

However, the Supreme Court, by denying certiorari in the case of *Faroll v. Jarecki*,<sup>15</sup> which involved the question of whether a trader's losses are capital or ordinary, has recently passed up an opportunity to take a further step in the direction indicated by the *Corn Products* decision. Left in effect was the decision of the Court of Appeals for the Seventh Circuit which, in reversing the District Court, had held that the taxpayer's losses on sales of commodity futures on the floor of the Chicago Board of Trade to other members of the Board on his own behalf were capital losses not allowable as an ordinary deduction from his gross income.

The factual situation presented in the *Faroll* case was "the converse of the familiar instances when taxpayers insist upon capital gain treatment for their transactions," for here the government was seeking to impose the capital asset status under the Code while the taxpayer

---

<sup>12</sup>E.g., *Crooks v. Harrelson*, 282 U. S. 55, 51 S. Ct. 49, 75 L. ed. 156 (1930); *United States v. Merriam*, 263 U. S. 179, 44 S. Ct. 69, 68 L. ed. 240, 29 A. L. R. 1547 (1923); *Masonite Corp. v. Fly*, 194 F. (2d) 257 (C. A. 5th, 1952); *Forstmann v. Rogers*, 128 F. (2d) 126 (C. C. A. 3rd, 1942); *Minnesota Tea Co. v. Com'r*, 76 F. (2d) 797 (C. C. A. 8th, 1935); *Wallace v. United States*, 50 F. Supp. 178 (W. D. N. Y. 1943).

<sup>13</sup>See Note (1956) 65 Yale L. J. 401.

<sup>14</sup>See *Polachek v. Com'r*, 22 T. C. 858 at 862 (1954) where such a contention was made, but was rejected by the Tax Court on the ground that even if the purchase and sale of commodity futures did constitute a business, it did not follow that the resulting gains and losses were ordinary because the futures were capital assets since the taxpayer was a trader and not a dealer.

<sup>15</sup>231 F. (2d) 281 (C. A. 7th, 1956) cert. den. 77 S. Ct. 45, 1 L. ed. (2d) 51 (1956), noted (1956) 56 Col. L. Rev. 1230, (1956) 42 Va. L. Rev. 838.



resisted.<sup>16</sup> Involved was a claim of a refund for taxes erroneously collected for the 1943 tax year from deceased taxpayer on whose behalf the action was brought. During that year and for many years prior, taxpayer had been engaged in two separate, distinct businesses. He was not only a general partner in a brokerage firm, but he also bought and sold commodity futures on the floor of the Board of Trade of the City of Chicago, of which he was a member. However, he devoted no substantial amount of time in 1943 to the operations of the partnership but rather spent the greater part of it on the floor of the Exchange; and when not there, he was working on research and other activities relating to his tradings on the Exchange. Altogether, during 1943, taxpayer handled, on his own account, over 10,000 transactions in commodity futures involving almost 81,000,000 bushels of grain at prices totaling more than \$84,000,000. Since only members were permitted to do business on the floor of the Exchange taxpayer made all his purchases from and all of his sales to other members of the Exchange, either for their own account or as agents for non-members. In the record it was stipulated that none of the transactions were hedges nor entered into for the purpose of hedging.<sup>17</sup>

Upon the basis of the *Corn Products* case, the taxpayer's personal representative contended that these virtually undivided efforts of the taxpayer devoted to the commodity futures transactions constituted " 'business' during which he held property (commodity futures) for sale to customers in the ordinary course of his trade or business."<sup>18</sup> However, this contention was not upheld by the Court of Appeals, which reasoned that taxpayer was a trader and that the commodity futures in which he dealt and traded were capital assets within the definition of the Code. This conclusion followed from the fact that futures contracts are entered into for either speculation or hedging, and since the taxpayer was not hedging he must have been speculating

---

<sup>16</sup>231 F. (2d) 281, 283 (C. A. 7th, 1956). It would be of interest to speculate as to the positions the parties would have taken had the transactions resulted in a gain rather than a loss, for it would then have been to the taxpayer's advantage to have transactions treated as sales of capital assets.

<sup>17</sup>231 F. (2d) 281 at 283 (C. A. 7th, 1956). The effect of the stipulation was to eliminate any consideration of the distinction drawn between speculative transactions and hedging transactions in commodity futures. See *Corn Products Refining Co. v. Com'r*, 350 U. S. 46 at 52, 76 S. Ct. 20 at 24, 100 L. ed. 29 at 35 (1955); *United States v. N. Y. Coffee & Sugar Exchange, Inc.*, 263 U. S. 611 at 619, 44 S. Ct. 225 at 227, 68 L. ed. 475 at 477 (1924); *Com'r v. Farmers & Ginners Cotton Oil Co.*, 120 F. (2d) 772 at 774 (C. C. A. 5th, 1941); *Com'r v. Covington*, 120 F. (2d) 768 at 772 (C. C. A. 5th, 1941); *Board of Trade of City of Chicago v. L. A. Kinsey Co.*, 130 Fed. 507 at 508 (C. C. A. 7th, 1904); Note (1955) 41 Va. L. Rev. 389 at 390.

<sup>18</sup>231 F. (2d) 281, 286 (C. A. 7th, 1956).

as a trader. Also there was the fact that the gain or loss realized by the taxpayer resulted from price fluctuation and not the sales entered into by him. Nor, the court stated, were the transactions sales to customers within the meaning of Section 1221(1). Further the court found no evidence that the taxpayer had intended to make or accept delivery of the actual commodities themselves under the futures contracts. But of primary significance was the view of the majority that the enlarged policy scope of the exclusionary clause in Section 1221(1), as laid down by the *Corn Products* case, was not binding upon it under the facts of the principal case. The court was of the opinion that "despite the reflection of Congressional intent described in *Corn Products* . . . the opinion is limited to hedging transactions" and is not applicable in the principal case.<sup>19</sup>

The one dissenting judge stated that the District Court had properly analyzed the case and had been correct in holding that commodity futures constituted property, that the commodity futures were held by the taxpayer primarily for sale to customers, and that such sales were made in the ordinary course of taxpayer's trade or business.<sup>20</sup> Thus, he should be allowed to deduct his losses from the sales as ordinary losses on the ground that, although he was not a dealer, he held the futures primarily for sale to customers. The conclusion reached by the District Court and the dissenting judge in the Court of Appeals is more in harmony with the view expressed by the Supreme Court in the *Corn Products* case than is that of the majority. Therefore, the decision should be evaluated in the light of the scope of the pronouncement in *Corn Products*.

The Court of Appeals was correct in its determination of the taxpayer's status as that of a trader rather than a dealer, and its finding was based on sound established distinctions.<sup>21</sup> And prior to the

---

<sup>19</sup>231 F. (2d) 281, 288 (C. A. 7th, 1956).

<sup>20</sup>*Faroll v. Jarecki*, Standard Federal Tax Reporter, 55-1 U. S. T. C. Advance Sheets (C. C. H.) par. 9386 (N. D. Ill. 1955).

<sup>21</sup>*Dealers* are those who purchase securities with the expectation of reselling at a profit, not because of price fluctuation, but because of the existence of a market upon which the securities may be sold at a price in excess of their cost, such excess to represent compensation for their services as retailer or wholesaler of the securities. *United States v. Chinook Inv. Co.*, 136 F. (2d) 948 (C. C. A. 9th, 1943); *Kemon v. Com'r*, 16 T. C. 1026 at 1032 (1951). Accord: *Securities Allied Corp. v. Com'r*, 95 F. (2d) 384 (C. C. A. 2nd, 1938); *Com'r v. Charavay*, 79 F. (2d) 406 (C. C. A. 3rd, 1935). On the other hand, *traders* are those who perform no merchandising functions, whose relation to the source of supply of securities is not unique, and who are dependent upon a rise in value to enable them to sell at a profit. *Polachek v. Com'r*, 22 T. C. 853 at 862 (1954); *Kemon v. Com'r*, 16 T. C. 1026 at 1033 (1951). Accord: *Schafer v. Com'r*, 299 U. S. 171, 57 S. Ct. 148, 81 L. ed. 101 (1936).

*Corn Products* case commodity futures had consistently been held to be capital assets in the hands of a trader in such futures, and gave rise to capital gain or loss treatment upon their sale or exchange.<sup>22</sup> Likewise, it is generally recognized that one dealing in commodity futures is not dealing in an actual commodity but only in claims for the commodity.<sup>23</sup>

However, it is submitted that in accordance with the views expressed in the *Corn Products* case the character and nature of the transaction—i.e., whether of an investment or business nature—rather than the status of the taxpayer or the nature of the asset, should determine the tax treatment afforded transactions involving commodity futures where no hedging is present. Indicative of this proposition is the key phrase of the capital asset definition in the Code: “. . . held. . . primarily for sale to customers in the ordinary course of . . . trade or business.”<sup>24</sup> Over the years the real potential of this phrase has been choked off by the grocery-store connotations which have attached themselves to the words “trade or business” and “sale to customers,” and by the idea that it was merely a duplication of the preceding clauses which exclude stock in trade and inventory.<sup>25</sup> Such connotations should be

---

<sup>22</sup>*Trenton Cotton Oil Co. v. Com'r*, 147 F. (2d) 33 (C. C. A. 6th, 1945); *Com'r v. Banfield*, 122 F. (2d) 1017 (C. C. A. 9th, 1941); *Com'r v. Farmers & Ginners Cotton Oil Co.*, 120 F. (2d) 772 (C. C. A. 5th, 1941); *Com'r v. Covington*, 120 F. (2d) 768 (C. C. A. 5th, 1941); *Polachek v. Com'r*, 22 T. C. 858 (1954); *Kemon v. Com'r*, 16 T. C. 1026 (1951); *Estate of Makransky v. Com'r*, 5 T. C. 397 (1945); *Tennessee Egg Co. v. Com'r*, 47 B. T. A. 558 (1942). Cf. trader's hedging transactions: *Corn Products Refining Co. v. Com'r*, 350 U. S. 46, 76 S. Ct. 20, 100 L. ed. 29 (1955); *Stewart Silk Corp. v. Com'r*, 9 T. C. 174 (1947); *Battelle v. Com'r*, 47 B. T. A. 117 (1942); *Grote v. Com'r*, 41 B. T. A. 247 (1940); G. C. M. 17322, XV-2 Cum. Bull. 151.

<sup>23</sup>Commodity futures are in effect executory agreements to buy or sell a definite quantity of a particular commodity at a future date for an agreed price, and no title passes until an appropriation has been made. Therefore, they are mere rights to the commodity. *Com'r v. Covington*, 120 F. (2d) 768 at 771 (C. C. A. 5th, 1941); *Modesto Dry Yard, Inc. v. Com'r*, 14 T. C. 374 at 385 (1950); *Hoffman, Future Trading* (1932) 110; 2 Fed. Tax Coordinator (R. I. A. 1956) § I-3701.

Appearing in the concurring opinion in *Com'r v. Covington* is the statement that “it is immaterial whether [the] taxpayer was a trader in the actual commodities or in rights to the commodities, [for] the substance is the same whether the taxpayer acquires tangible or intangible property.” 120 F. (2d) 768 at 772 (C. C. A. 5th, 1941). This would tend to support the idea that the nature of the transaction rather than the nature of the asset or the status of the taxpayer should be determinative of the tax treatment to be received.

<sup>24</sup>Int. Rev. Code (1954) § 1221 (1).

<sup>25</sup>Miller, The “Capital Asset” Concept: A Critique of Capital Gains Taxation: II (1950) 59 Yale L. J. 1057 at 1083. The very purpose of the “primarily for sale to customers” clause was “to remove any doubt as to whether property which is held primarily for resale constitutes a capital asset, whether or not it is the type

wiped out and the section so construed as to give some effect to each of its provisions.

The purpose of the capital assets provisions ostensibly was to relieve investors from the deterring effects of the high surtax rates, and their existence can be supported only on an investment-business rationale.<sup>26</sup> This fact is pointed up by the very provisions themselves—e.g., the exclusionary clauses to distinguish gain and loss realized from sale of investments from that realized from business, and the holding period to distinguish speculative from investment transactions. Therefore, implicit in the provisions is the concept that profits and losses arising from everyday business transactions are to be considered ordinary income or loss rather than capital gain or capital loss. It should be, then, the nature and character of the taxpayer's activities, rather than his status or the property involved, that govern the determination of whether or not he is engaged in a particular business so as to bring his transactions within the exclusionary clause of Section 1221(1). Some of the factors which have been considered relevant to this determination are: (1) the continuity and activity related to the making of sales over a period of time; (2) frequency of sales as opposed to isolated transactions; (3) activity of seller to attract purchasers; (4) extent and substance of transactions; and (5) the reason and purpose of the acquisition.<sup>27</sup> With these factors in mind it would appear that the taxpayer in the *Faroll* case was in the "business" of trading commodity futures and that the losses resulting from such transactions were ordinary and not capital losses.

Another cogent reason for holding that the assets were not capital assets in the *Faroll* case is that pointed out by the Court in the *Corn Products* case: "... if a sale of the future created a capital transaction while delivery of the commodity under the same future [and a sale of the actual commodity] did not, a loophole in the statute would be

---

of property which . . . would be included in the inventory." Report No. 179, 68th Cong., 1st Sess., p. 19 (1924).

For an example of an unsuccessful Board of Tax Appeals attempt to construe the clause as a mere duplication of the "stock in trade" and "inventory" clauses see *Gilbert v. Com'r*, 56 F. (2d) 361 (C. C. A. 1st, 1932).

<sup>26</sup>See notes 5 and 6, *supra*.

<sup>27</sup>*Dunlap v. Oldham Lumber Co.*, 178 F. (2d) 781 (C. A. 5th, 1950); *White v. Com'r*, 172 F. (2d) 629 (C. A. 5th, 1949); *Fahs v. Crawford*, 161 F. (2d) 315 (C. C. A. 5th, 1947); *Harriss v. Com'r*, 143 F. (2d) 279 (C. C. A. 2nd, 1944); *United States v. Robinson*, 129 F. (2d) 297 (C. C. A. 5th, 1942); *Com'r v. Boeing*, 106 F. (2d) 305 (C. C. A. 9th, 1939); *Snell v. Com'r*, 97 F. (2d) 891 (C. C. A. 5th, 1938); *Kanawha Valley Bank v. Com'r*, 4 T. C. 252 (1944).

created and the purpose of Congress frustrated."<sup>28</sup> Such would be the result under the reasoning of the majority in the *Faroll* case, for the rules governing commodity futures are not applicable to commodities which are received by taxpayer and then sold in the regular course of his business.<sup>29</sup>

Prior to the *Corn Products* case, too much thought had been devoted to the letter of the law and too little to the spirit. It seems unfortunate that the Supreme Court by refusing to grant certiorari in the *Faroll* case, failed to take advantage of an opportunity to confirm or extend the approach announced in the *Corn Products* case.

NOEL P. COPEN

TORTS—LIABILITY FOR INJURIES RESULTING FROM NEGLIGENT CONSTRUCTION SUSTAINED BY PERSON NOT IN PRIVITY OF CONTRACT WITH BUILDER. [Federal]

Since *Winterbottom v. Wright*,<sup>1</sup> it has been a fundamental principle of Anglo-American jurisprudence that the only persons who can sue for a breach of contract, or for a breach of a duty arising out of a contract, are the stipulating parties.<sup>2</sup> From this concept grew the basic rule that "the builder of a structure for another party and under a contract with him, or one who sells an article of his own manufacture, is not liable in an action by a third party, who uses the same with the consent of the owner or purchaser, for injuries resulting from a defect therein, caused by negligence. The liability of the builder or manufacturer for such defects is, in general, only to the person with whom he contracted."<sup>3</sup>

Early courts, apparently without looking for a theory, simply stated that the absence of privity prevented an action. However, the "no privity" reasoning gave way to several theories proposed in support of the doctrine denying recovery to injured third parties. One court has suggested that the contractor could not reasonably anticipate that any per-

<sup>28</sup>*Corn Products Refining Co. v. Com'r*, 350 U. S. 46, 54, 76 S. Ct. 20, 25, 100 L. ed. 29, 36 (1955).

<sup>29</sup>2 Fed. Tax Coordinator (R. I. A. 1956) § I-3701. See *Battelle v. Com'r*, 47 B. T. A. 117 at 128 (1942).

<sup>1</sup>10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>2</sup>*Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837 (1896); *Curtain v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322 (1891); *Alton v. Midland Ry.*, 19 C. B. (N. S.) 213, 144 Eng. Rep. 768 (1865); *Maylor v. Laskey*, [1907] 2 K. B. 141; Note (1950) 13 A. L. R. (2d) 191 at 202.

<sup>3</sup>*Devlin v. Smith*, 89 N. Y. 470, 477, 42 Am. Rep. 311, 313 (1882).

son other than the contractee would be injured by the negligence.<sup>4</sup> Another reason advanced is that an intervening cause breaks the chain of causation, the true proximate cause of the injury being the contractee's negligence in maintaining a defective building or structure.<sup>5</sup> It has also been said that without such a rule of non-liability, the courts would be overburdened with an excessive number of cases by persons injured as a result of a defect in an article manufactured or constructed by someone with whom they had no contract rights.<sup>6</sup> Closely related to the theories supporting the rule of non-liability is a conservative public policy designed to encourage manufacturing and building contracting as socially desirable enterprises by limiting the risk of loss through liability to persons injured as a result of defective construction, so that, even though the individual is deprived of a right of recovery, society as a whole may benefit from the enterprise.<sup>7</sup>

But with the decision of Judge Cardozo in *MacPherson v. Buick Motor Co.*,<sup>8</sup> the way was opened to allow injured third parties to recover from manufacturers with whom they had no privity. Although the doctrine of the *MacPherson* case has received general approval and

"But when a contractor builds a house or a bridge, or a manufacturer constructs a car or carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction." *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 867, 61 L. R. A. 303, 305 (C. C. A. 8th, 1903).

<sup>5</sup>In *Grodstein v. McGivern*, 303 Pa. 555, 154 Atl. 794 (1931) it was said that "the outstanding reason for nonliability in these cases is the causal connection which must in all cases exist between the negligent act and the injury has been broken by the delivery or sale to the intermediate party." Also, *Casey v. Hoover*, 114 Mo. App. 47, 89 S. W. 330, 334 (1905): "By occupying and resuming possession of the work, the owner deprives the contractor of all opportunity to rectify his wrong. Before accepting the work as being in full compliance with the terms of the contract, he is presumed to have made a reasonably careful inspection thereof, and to know of its defects, and, if he takes it in the defective condition, he accepts the defects and the negligence that caused them as his own, and thereafter stands forth as their author." See other cases cited in Note (1950) 13 A. L. R. (2d) 191 at 207.

<sup>6</sup>Cases cited in Note (1950) 13 A. L. R. (2d) 191 at 206.

<sup>7</sup>It has been felt by some courts that absent such a rule of non-liability, it could be argued that contractors would in effect be warranting their products to all users the world over. *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 489, 2 L. R. A. (N. S.) 799, 802 (C. C. A. 7th, 1904): "If the law should hold all the builders and makers and doers in the land to a particular duty to their contractees, and at the same time to another absolute duty to use care that the thing shall be innocuous as it passes through the hands of all mankind—a duty separate and distinct from the first, which might or might not be co-extensive with the first, but, whether so or not, unavailing to avoid the second—we fancy few persons would be willing to do business, in the face of the insufferable litigation that would ensue."

<sup>8</sup>217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 (1916).

acceptance by the courts throughout the United States, there remains substantial uncertainty as to the full extent of its application.

In its recent decision in *Hanna v. Fletcher*,<sup>9</sup> the United States Court of Appeals for the District of Columbia has extended the *MacPherson* doctrine to support the imposition of liability on a contractor for injuries to a third party. Plaintiffs, husband and wife, were tenants of the premises leased to them by defendant Fletcher. In 1942 Fletcher, upon request by plaintiffs, hired defendant Gichner Iron Works, an independent contractor, to make repairs on the iron railing attached to the cast iron front steps of the leased premises. Seven years after the work was completed, Mrs. Hanna fell from the stairway into the areaway below when the railing broke in the same place it had been broken before having been repaired. Plaintiffs joined both the landlord and the contractor in an action for damages, and in the opening statement recited that the manner in which the contractor repaired the railing had caused the break by allowing an open seam to remain exposed, thereby permitting rain water to enter the hole and to cause the railing to rust out and give way when Mrs. Hanna leaned against it.

Of the several issues considered by the court,<sup>10</sup> the most significant question was whether, assuming the contractor's work was done carelessly, he is liable to the tenants in the absence of any privity of contract between the parties. The trial court directed a verdict for the defendant contractor after plaintiffs' opening statement, but the Court of Appeals reversed and remanded the case for trial, repudiating its earlier decision in *Ford v. Sturgis*<sup>11</sup> on which defendant relied and endorsing the principle of the *MacPherson* case as being applicable to contractor's liability. "The bridge described in the *MacPherson* case between the manufacturer of an article and its third party user, not in privity of contract with the manufacturer, is the same as that between a landlord's contractor or repairman and the tenant of the premises repaired; for in each case the negligent conduct often may

---

<sup>9</sup>231 F. (2d) 469 (C. A. D. C., 1956) cert. den. 351 U. S. 989, 76 S. Ct. 1051, 100 L. ed. 881 (1956).

<sup>10</sup>The court reasoned that there were five issues involved: (a) Is the action barred by the Statute of Limitations? (b) Did the opening statement by plaintiffs allege sufficient lack of due care that a directed verdict for defendant was in error? (c) Did the opening statement allege sufficient proximate cause that the case should have gone to the jury? (d) If the contractor's work were done negligently, may he be liable to the tenant without privity of contract? (e) Is the landlord liable to the tenant for the repair work done by a contractor hired by the landlord, if that work is done negligently? 231 F. (2d) 469 at 471, 472, 476 (C. A. D. C., 1956).

<sup>11</sup>56 App. D. C. 361, 14 F. (2d) 253, 52 A. L. R. 619 (1926).

be expected to result in injury to one reasonably foreseen as a probable user."<sup>12</sup> The court reasoned that plaintiffs here were foreseeable users, since it was the tenants—not the landlord—who were to use the steps, just as in the *MacPherson* case it was the ultimate purchaser—not the dealer—who was to use the car.

Three of the seven judges who heard the case joined in a strong dissent, in which it was argued that plaintiffs should be required to show facts instead of mere "rhetorical summations"<sup>13</sup> which would tend to prove that the repair work was the proximate cause of the collapse of the railing after a period of seven years of wear and weather. The dissent did not directly reject the view of the *MacPherson* decision that a contractor may be liable to third parties if his negligence in construction creates an imminently or inherently dangerous condition, but rather sought to distinguish that case on the ground that there the wood in the automobile wheel was defective from the first moment of its use, while in the instant case "the railing merely wore out, rusted out in the course of time and usage; it did not collapse when put to its intended use."<sup>14</sup> The dissent pointed out that as a result of the majority ruling, "a person not privy to a contract, injured by a product of a contractor or manufacturer, can go to a jury upon showing merely that the original manufacture or construction was not 'good.' . . . It makes a contractor or manufacturer an insurer, it makes him liable in the jury room for conditions arising during a long interim of safe use. . . ."<sup>15</sup> And the majority view failed to allow for "reasonable limitations upon this liability," such as public policy demands.<sup>16</sup>

Basically, the *MacPherson* case relied on an established exception to the general rule of non-liability:<sup>17</sup> the manufacturer is liable to a third

<sup>12</sup>Hanna v. Fletcher, 231 F. (2d) 469, 474 (C. A. D. C., 1956).

<sup>13</sup>Hanna v. Fletcher, 231 F. (2d) 469, 479 (C. A. D. C., 1956).

<sup>14</sup>231 F. (2d) 469, 481 (C. A. D. C., 1956).

<sup>15</sup>231 F. (2d) 469, 482 (C. A. D. C., 1956).

<sup>16</sup>231 F. (2d) 469, 482 (C. A. D. C., 1956).

<sup>17</sup>Since the general rule still stands as such, several exceptions have been developed to justify the imposition of liability on the contractor to third persons not in privity with the contractor. None could have been applied under the facts of the principal case except possibly the last two of those set out following. (a) Lack of privity will not bar an action brought by a third party under a statute imposing liability on a manufacturer or contractor to all persons suffering damage as a result of the sale or manufacture of a particular article. *Wellington v. Dawner Kerosene Oil Co.*, 104 Mass. 64 (1870); *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227 (1905); *Raley v. Swift & Co.*, 152 Wis. 570, 140 N. W. 292 (1913); *Pizzo v. Wiemann*, 140 Wis. 235, 134 N. W. 899 (1912). (b) Where the contractor is guilty of deceit with regard to the transaction which divested him of control over the object which caused the injury complained of, he may be liable to third persons on the



party not in privity of contract for injuries sustained as a result of faulty construction of a thing which is "inherently dangerous"<sup>18</sup> in nature, provided the defendant had knowledge of the intended use of the thing by the plaintiff. Though early cases interpreted the term "inherently dangerous" in its most strict sense, so as to apply it only to that class of articles dangerous in their ordinary state,<sup>19</sup> the term has grown in its scope to include those "cases where an article not inherently dangerous becomes so by reason of negligent preparation."<sup>20</sup>

basis of fraud. *Langridge v. Levy*, 2 Mees. & W. 519, 150 Eng. Rep. 863 (1837) (imposed liability solely on ground of fraudulent representation by maker of safety of gun.) See *Longmeid v. Holliday*, 6 Ex. 761, 766, 155 Eng. Rep. 752, 754 (1851). This exception has also been recognized by: *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047 (1911); *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098 (1905). (c) Where the performance of the work of a contractor results in a public nuisance, a third party suffering special damages therefrom may recover from the contractor. *Schumacher v. Carl G. Newmann Dredging Co.*, 206 Wis. 220, 239 N. W. 459 (1931). See *Longmeid v. Holliday*, 6 Ex. 761, 767, 155 Eng. Rep. 752, 755 (1851). (d) Where one makes an inherently dangerous article designed and fitted for a specific use, the maker is liable for his negligence when he knows the article is to be used by the person injured therefrom. *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed., 865, 61 L. R. A. 303 (C. C. A. 8th, 1903); *Grodstein v. McGivern*, 303 Pa. 555, 154 Atl. 794 (1931). (e) Where the defective article is imminently or inherently dangerous due to negligent construction, the maker may be liable to third persons injured from the proper use thereof where such third person, although not specifically foreseeable, was a member of a class whose use of the article could be anticipated. *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878, 8 A. L. R. 1023 (C. C. A. 2d, 1919); *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 (1916).

<sup>18</sup>The term "imminently dangerous" is the most used expression in the cases dealing with this exception. *Standard Oil Co. v. Murray*, 119 Fed. 572, 575 (C. C. A. 7th, 1902); *Larrabee v. Des Moines Tent & Awning Co.*, 189 Iowa 319, 178 N. W. 373, 374 (1920). Other commonly-used expressions include: "imminently and immediately dangerous," *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 489, 2 L. R. A. (N. S.) 799, 803 (C. C. A. 7th, 1904); "dangerous in itself," *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227, 229 (1905); "inherently dangerous," *Tompkins v. Quaker Oats Co.*, 239 Mass. 147, 131 N. E. 456, 457 (1921); "intrinsically harmful," *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474, 491 (1915); "in their nature calculated to do injury," *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 402 (C. C. A. 7th, 1894); "inherently and necessarily dangerous," *Salliotte v. King Bridge Co.*, 122 Fed. 378, 381 (C. C. A. 6th, 1903); "intrinsically dangerous," *Wriser v. Holzman*, 33 Wash. 87, 73 Pac. 797 (1903); "inherently dangerous and harmful," *Kearse v. Seyb*, 200 Mo. App. 645, 209 S. W. 635, 636 (1919); and "noxious or dangerous," *White v. New York, N. H. and H. R. Co.*, 25 R. I. 19, 54 Atl. 586, 587 (1903).

<sup>19</sup>E.g., *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1852).

<sup>20</sup>*Tompkins v. Quaker Oats Co.*, 239 Mass. 147, 131 N. E. 456, 457 (1921). "A tendency appears in some recent cases to extend the class of 'inherently dangerous' articles, so as to include not only those that in their ordinary state are dangerous to health and safety, such as poisons and explosives, but also those that are reasonably certain to place life and limb in peril because of negligent preparation." *Windham Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123, 131 N. E. 454, 455, 17

Several conditions must be met before a case can fall under this exception to the general rule. Generally, it must be shown that the dangerous quality of the object or structure existed before the thing passed out of the control of the defendant,<sup>21</sup> and that this dangerous quality is attributable to a want of care by the defendant in the production of the article.<sup>22</sup> The defendant must have had actual or constructive knowledge of the dangerous quality of his work,<sup>23</sup> and the plaintiff must show that he was one of the class of persons by whom it was contemplated the dangerous thing would be used.<sup>24</sup> Also, the evidence must show that the dangerous thing was the proximate cause of the injury of which plaintiff complained.<sup>25</sup>

There is some question as to whether the *Hanna* case fits into this exception to the general rule of non-liability. Though the majority opinion turns on the premise that a manufacturer and a contractor should be treated alike in this respect, there is at least some basis for a distinction between the positions of the two parties, even though many courts through the years have failed to differentiate between them.<sup>26</sup> A contractor is ordinarily one who agrees to improve or build

A. L. R. 669, 671 (1921). Liability has been imposed for injuries resulting from articles not inherently dangerous, such as a defective switch, *Smith v. New York & Harlem Ry.*, 19 N. Y. 127, 75 Am. Dec. 305 (1859); a defective scaffolding, *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311 (1882); a piece of defective farm machinery, *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 61 L. R. A. 303 (C. C. A. 8th, 1903); a storage tank that could not withstand its rated internal pressure, *Keep v. National Tube Co.*, 154 Fed. 121 (D. C. N. J. 1907); and defective wood in an automobile wheel, *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 (1916).

<sup>21</sup>In *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 2 L. R. A. (n. s.) 799 (C. C. A. 7th, 1904) liability was denied on the ground that the dangerous quality developed after the defendant had turned over the work.

<sup>22</sup>*Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S. W. 155 (1915).

<sup>23</sup>*O'Neill v. James*, 138 Mich. 567, 101 N. W. 828 at 831 (1904); *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 at 1053, L. R. A. 1916F, 696 at 699 (1916). In *Pierce v. C. H. Bidwell Thresher Co.*, 153 Mich. 323, 116 N. W. 1104, 1106 (1908) it was said that if the jury could find that the object was inherently dangerous, "it is implied that it was such to the knowledge of the defendant."

<sup>24</sup>Negligence presupposes a duty to exercise due care to the person complaining, and unless the injured party was one of the class to whom the defendant owed a duty of care through knowledge that this class might be injured from careless construction, then clearly there would be no duty owed the injured party, and hence, no negligence for which the complaining party could recover. *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626 (1914).

<sup>25</sup>*Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626 at 627 (1914).

<sup>26</sup>"It is first to be kept in mind that the duties of the defendant [an independent contractor] must be measured by the same rules that apply to manufacturers and vendors. . . . Although defendant did not manufacture the elevator machinery, as the repairer thereof, it is to be held to the same duties and liabilities that the manufacturer is held to." *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P. (2d) 1013, 1015

a designated item for a certain price according to specifications arrived at in an agreement with the contractee. A manufacturer, on the other hand, is one who is engaged in the business of working raw materials into wares suitable for use according to his own specifications dictated by what he thinks ultimately will sell on the open market. The contractor's only true concern is the satisfaction of the other parties to the contract, whereas the manufacturer's primary interest is in creating an article which will appeal to the purchasing public at large. A rationale behind the exception to the non-liability of a manufacturer is that he knows that the goods he produces will not be used exclusively—if at all—by his immediate purchaser, but that they will be put on the general market for public consumption. Therefore, he ought to owe a duty of care to such ultimate purchasers, and use reasonable diligence in his manufacturing process. But a contractor does not ordinarily act with the interest of third parties in mind. Although his products may well be used by foreseeable third parties, such use will ordinarily be in the control of and for the benefit of his contractee. Therefore, a contractor should not be under such a duty as is a manufacturer to guard the ultimate safety of third parties who happen to make use of his construction through a separate agreement with the original contractee.

It is possible that a contractor may be hired to repair a structure or a piece of machinery and be required by the contract to keep it in a safe state of repair over a specified period of time. In other words, the contract may impose a continuing duty after the acceptance of the work by the owner by providing for the contractor's retention of control over the article or work. In such a case there would be a stronger reason for by-passing the landlord and imposing liability directly on the contractor. But where, as in the principal case, the contract makes no provision for a continuing duty to maintain the subject of the contract in a state of safe repair, to impose on the contractor a continuing liability to third-party users is to extend his undertaking by law beyond that to which he was willing to agree.

Even if it be conceded that a contractor and a manufacturer should receive similar treatment, it nonetheless seems that the decision in the *Hanna* case represents a substantial extension of the *MacPherson* doctrine. The *MacPherson* case established limitations on the lia-

---

(1932), quoted with approval in *McDonald v. Houghton Elevator & Machine Co.*, 60 Ohio App. 185, 20 N. E. (2d) 253 at 256 (1938). "It is assumed that the defendant [an independent contractor] stands in the same relation that a manufacturer who originally furnished the apparatus would stand..." *Kahner v. Otis Elevator Co.*, 96 App. Div. 169, 89 N. Y. Supp. 185, 187 (1904.).

bility of a manufacturer to third-party users, but those limitations were not fully observed in the *Hanna* decision. The court quoted at length from Judge Cardozo's opinion in the *MacPherson* case: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."<sup>27</sup> But the court failed to continue its quoting to the next sentence, which adds a significant limitation: "There must have been knowledge of a danger, *not merely possible, but probable.*"<sup>28</sup> Further in the same paragraph Cardozo made the statement that "the proximity or remoteness of the relation is a factor to be considered." Clearly, a railing on a stairway, when negligently constructed or repaired, is reasonably certain to place life and limb in peril. Also, where a contractor makes repairs on such a railing at a home, he should know that it will be used by the occupiers or those in possession of the premises.<sup>29</sup> But since the stairway was used safely for seven years before the plaintiff was injured, it seems unwarranted to charge defendant with having done its job in such a way as to create a *probable* danger to users of the stairway.<sup>30</sup>

Further, the lapse of so long a time before the defect in the railing developed to a point where it could cause plaintiff's injury may well remove the thing constructed by the defendant from the "im-

<sup>27</sup>*MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, 1053, L. R. A. 1916F, 696, 699 (1916).

<sup>28</sup>*MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, 1053, L. R. A. 1916F, 696 699 (1919) [italics supplied].

<sup>29</sup>At one point in the opinion it was observed that "the plaintiff must be within the class protected, that is, one as to whom the consequences of negligence may be foreseen." *Hanna v. Fletcher*, 231 F. (2d) 469, 473 (C. A. D. C., 1956). Since the tenants were in possession of the premises when the contractor made his repairs, he probably knew that, although the landlord had contracted with him, the tenants were the ones who would be using the steps.

<sup>30</sup>In *Cohen v. Brockway Motor Truck Corporation*, 240 App. Div. 18, 268 N. Y. Supp. 545, 546, (1934) the court said that "the doctrine outlined in *MacPherson v. Buick Motor Co.*, should not be extended. It was not intended to make a manufacturer of automobiles liable in negligence for every conceivable defect. We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' It cannot be said that this defendant, the manufacturer, could have been charged with 'knowledge of a danger' because of a defective 'door handle.' Such a defect may make danger possible, but not probable." In *Poore v. Edgar Bros. Co.*, 33 Cal. App. 6, 90 P. (2d) 808 (1939), the court quoted with approval the above statement from the *Cohen* case, and subsequently declared: "in order to make a defendant liable his wrongful act must be the *causa causans*, and not merely the *causa sine qua non.*" 90 P. (2d) 808, 810 (1939).

minently dangerous" classification.<sup>31</sup> Though the scope of the term "imminently dangerous" has been expanded so that it is now applied to a wide variety of subjects, there still remains about the term a connotation of the immediacy of the danger.<sup>32</sup> Thus, a distinction could be drawn between defects resulting directly from the construction itself and defects subsequently developing as a result of the natural elements or usual wear and tear. This distinction would seem plausible, particularly where the object, because of its nature or location, is likely to be exposed to uncontrolled forces which may produce defects. If there was no defect in the railing involved in the principal case likely to cause injury immediately upon completion of the repairing, then under this distinction there would be no liability on the contractor. Without this distinction, liability akin to that of an insurer might be imposed on a contractor whenever an object which he has built or repaired develops a flaw which might conceivably have been prevented or delayed by some different method of construction.

---

<sup>31</sup>Though the court in the principal case did not mention the term "imminently dangerous," it did observe that "if defendant's repair was so negligently performed as to cause the railing to become insecure, there arose a probable dangerous physical condition." *Hanna v. Fletcher*, 231 F. (2d) 469, 474 (C. A. D. C., 1956). The decision relied substantially on the *MacPherson* case, which was determined largely on the basis of the imminently dangerous character of the defective wheel.

<sup>32</sup>In *Gorman v. Murphy Diesel Co.*, 42 Del. 149, 29 A. (2d) 145, 147 (1942) it was said: "The time when the accident and resulting injury occurred, whether soon or long after the sale and delivery of the article causing the injury, is manifestly of importance upon the question of its known imminently dangerous quality when sold and delivered."

The importance of the time and use relation in determining whether or not an article is imminently dangerous can be seen clearly in a comparison of *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 61 L. R. A. 303 (C. C. A. 8th, 1903) and *Lynch v. International Harvester Co. of America*, 60 F. (2d) 223 (C. C. A. 10th, 1932). In both cases the accident involved a breaking of a covering over the revolving blades of a threshing machine while a person was standing on the covering. In the *Huset* case the cover broke shortly after its purchase, and liability was imposed on the manufacturer by use of the imminently dangerous exception to the general rule of non-liability. But in the *Lynch* case, the cover did not break until after five years of safe use, and the court refused to apply the imminently dangerous exception. "These facts, it seems to us, are a conclusive denial and contradiction of the allegation that the machine was imminently dangerous to life and limb when defendant sold it." 60 F. (2d) 223, 225 (C. C. A. 10th, 1932).

"There was no imminent danger in the use of the instrument when the repair was made and it was used without incident for more than two years." *Miller v. Davis & Averill*, 137 N. J. L. 671, 61 A. (2d) 253, 255 (1948). "'imminent' means 'threatening, menacing, perilous.'" *Jaroniec v. C. O. Hasselbarth, Inc.*, 223 App. Div. 182, 228 N. Y. Supp. 302, 304 (1928). "IMMINENT: Near at hand; . . . impending; on the point of happening." *Black, Law Dictionary* (3d ed. 1933) 920. "IMMINENT: Threatening to occur immediately; near at hand; impending;— said esp. of misfortune or peril." *Webster, New International Dictionary* (2d ed. 1952) 1245.

It is this further problem of proximate causation in the *Hanna* case which distinguishes it from the *MacPherson* case. In the latter situation, the defective article produced by defendant broke and caused plaintiff's injury soon after it was put into use. In the principal case, the railing fell only after a long period of time and a great number of uses. Something else in addition to defendant's assumed negligence was required to cause the collapse. The most obvious explanation of the collapse is the effect of the elements and the passage of time. But there may have been defective materials in the original railing; there may have been a complete failure on the part of plaintiffs to do anything to help protect the railing from rust; there may have been negligence on the part of the landlord in failing to see that the railing was repaired properly. In the words of the dissent: "Faced with the fact of seven years of safe service, seven years of innumerable events and incidents, weather and wear, [plaintiffs] needed to show some connecting relation, some negative of the compelling force of seven years of safe use. . . . Plaintiffs offered no factual data on the factual problem of causation."<sup>33</sup>

But even if there was proximate causation in the present case, it would seem that the court has misinterpreted its position. The general rule required privity of contract before a cause of action would accrue between a third-party plaintiff and a defendant contractor. The exception eliminates the requirement of privity if the article is imminently dangerous, and, once plaintiff is within the limits of either privity or imminent danger, he has merely to show negligence and proximate cause in order to recover. But the *Hanna* case in effect omits the imminently dangerous limitation and allows plaintiff to recover if he can show only negligence and proximate causation. Proximate causation, instead of the imminently dangerous nature of the thing producing the injury, becomes the bounds of the contractor's liability.

Apart from legal theory, a practical consideration throws doubt on the propriety of the decision in the *Hanna* case. If such a liability is to be imposed on a contractor, then the law should in some way allow him to re-enter for the purpose of making reasonable inspections. If he does re-enter, it is not clear how he is to be protected from liability for trespass. Nor is there any certainty as to how long he should be required to make inspections before he can be sure that his liability for any future collapse will have completely ceased. The duty to make repeated inspections could place a heavy burden on construction com-

---

<sup>33</sup>*Hanna v. Fletcher*, 231 F. (2d) 469, 480 (C. A. D. C., 1956).

panies, which would have an increasing number of articles to check each successive inspection period, and the ultimate consequence would be increased costs of construction to be borne by the public. Inasmuch as the *Hanna* case in no way required or provided a legal means for for the contractor to make such inspections, the extension of his liability to such an injury as plaintiff suffered makes him virtually an insurer of his work.

ROBERT E. STROUD

Printed at the Journalism Laboratory Press  
Washington and Lee University  
under the supervision of C. HAROLD LAUCK