Washington and Lee Law Review

Volume 13 | Issue 2 Article 4

Fall 9-1-1956

Case Comments

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

Recommended Citation

Case Comments, 13 Wash. & Lee L. Rev. 171 (1956).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol13/iss2/4

This Index 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.

CASE COMMENTS

CONFLICT OF LAWS—TORT LIABILITY AS GOVERNED BY LAW OF PLACE INJURY WAS SUSTAINED OR OF PLACE WRONGFUL ACT WAS COMMITTED. [Federal]

A unique conflict of laws problem was presented in the recent case of *United States v. Union Trust Co.*,[1] involving a mid-air collision between an Eastern Airlines DC-4 passenger plane and a P-38 pursuit plane operated by a Bolivian military pilot. The crash occurred while the passenger plane was on the final approach for landing at the Washington National Airport, a controlled public airport owned by the United States, and resulted in the death of all 55 persons aboard.

Suit against the United States to recover for the death of two of the passengers was brought in the United States District Court for the District of Columbia by the personal representatives of the estates of the deceased passengers.[2] There it was established that the proximate cause of the crash was the negligent operation of the airport control tower by a government employee, and that under the provisions of the Federal Tort Claims Act,[3] the government was liable for such negligent conduct. After an examination of lengthy and conflicting testimony, it was further held that the situs of the collision was in the District of Columbia, rather than in adjoining Virginia. There being no statutory limit on wrongful death recovery under the law of the District of Columbia,[4] the court awarded damages in the amount of $50,000 to the estate of the male decedent, and $15,000 to the estate of the female decedent.

On appeal, the liability of the United States and the finding of fact as to the locale of the collision was affirmed by the Court of Appeals for the District of Columbia.[5] However, the decree of the District Court was modified by reducing the award to the estate of the male decedent from $50,000 to $15,000. The basis for this reduction in damages was found in the language of Section 410 (a) of the Federal Tort Claims Act which provides that the government shall be liable for death caused by the negligent conduct of a government employee

---

[1]221 F. (2d) 62 (C. A. D. C., 1955), cert. denied, Union Trust Co. v. United States, 76 S. Ct. 192, 100 L. ed. 127 (1955). The principal case is commented on in Notes (1955) 68 Harv. L. Rev. 1455; (1955) 9 Vand. L. Rev. 83.

[2]113 F. Supp. 80 (D. C. D. C., 1953).

[3]60 Stat. 842 (1946), codified in various sections of 28 U. S. C. A. (1950).

[4]D. C. Code (1951) § 16-1201.

[5]United States v. Union Trust Co., 221 F. (2d) 62 (C. A. D. C., 1955).

"where the United States, if a private person, would be liable to the claimant... in accordance with the law of the place *where the act or omission occurred.*"[6] Since the negligently operated control tower was located in Virginia, the majority of the court apparently felt compelled, although no express rationale was given on this point, to apply the law of Virginia where a statute limited the amount of recovery for wrongful death to $15,000,[7] rather than the law of the District of Columbia, the place where the injury was sustained.

However, this result was reached by a divided court with Judge Miller taking the view that this strict construction of the statute did not effectuate the intent of Congress since it was contrary to the generally accepted conflict of laws rule that tort liability is governed by the law of the place where the injury was sustained, rather than the place where the negligent act was committed.[8] He felt that the language in Section 410 (a), "in accordance with the law of the place where the act or omission occurred," should be construed as meaning "in accordance with the law of the place where the tort occurred."[9] This conclusion was based on the reasoning that the correct meaning of the word "act" includes all the consequences of the act.[10] That view is in accord with the Restatement which declares: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."[11] Futhermore, such a broad construction has been applied to very similar language in the Death on

---

[6]60 Stat. 844 (1946), 28 U. S. C. A. § 1346(b) (1950) [italics supplied].

[7]2 Va. Code Ann. (Michie, 1950) § 8-636. The 1952 amendment increased the maximum recovery from $15,000 to $25,000.

[8]Young v Masci, 289 U. S. 253, 53 S. Ct. 599, 77 L. ed. 1158 (1933); Goodwin v. Townsend, 197 F. (2d) 970 (C. A. 3rd, 1952); Kieffer v. Blue Seal Chemical Co., 196 F. (2d) 614 (C. A. 3rd, 1952); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D. C. D. C., 1955); Jeffery v. Witworth College, 128 F. Supp. 219 (E. D. Wash. 1955); Electric Theatre Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 (W. D. Mo. 1953); Neiman- Marcus Co. v. Lait, 107 F. Supp. 96 (S. D. N. Y. 1952); Dobbins v. Martin Buick Co., 216 Ark. 861, 227 S. W. (2d) 620 (1950); Summar v. Besser Mfg. Co., 310 Mich. 347, 17 N. W. (2d) 209 (1945); Welch v. Kroger Grocery Co., 180 Miss. 89, 177 So. 41 (1937); Hughes Provision Co. v. La Mear Poultry & Egg Co., 242 S. W. (2d) 285 (Mo. App. 1951); Mann v. Policyholders' Nat. Life Ins. Co., 78 N. D. 724, 51 N. W. (2d) 853 (1952); C. I. T. Corp. v. Guy, 170 Va. 16, 195 S. E. 659 (1938); Dallas v. Whitney, 118 W. Va. 106, 188 S. E. 766 (1936); Restatement, Conflict of Laws (1934) § 377; Goodrich, Conflict of Laws (3rd ed. 1949) 263; Stumberg, Conflict of Laws (2d ed. 1951) 182.

[9]See United States v. Union Trust Co., 221 F. (2d) 62, 80 (C. A. D. C., 1955).

[10]Very recently a similar interpretation was applied by the Court of Appeals for the Ninth Circuit. "Under the Tort Claims Act, the language quoted means the place where the negligence, either of act or omission, became operative, directly causing the injury and not places where the negligence existed but was then inoperative." United States v. Marshall, 230 F. (2d) 183, 187 (C. A. 9th, 1956).

[11]Restatement, Conflict of Laws (1934) § 377.

the High Seas Act, which permits a decedent's personal representative to bring suit in the federal district courts "whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore...."[12] In *Lacey v. L. W. Wiggins Airways*,[13] the decedent died in an airplane crash which occurred more than a marine league from shore, but which was caused by the negligent inspection of the aircraft while it was on land. The district court retained jurisdiction of the suit, construing the above language to mean that the substance of the occurrence was the "consummation of the wrongful act as distinguished from its origin."[14]

Although there is little or no legislative history on the choice of law section of the Federal Tort Claims Act, further support for the interpretation of the minority judge can be found in the testimony given by the Assistant Attorney General before the House Judiciary Committee regarding the then pending venue provision of the Act which now provides that suit may be brought "where the plaintiff resides or wherein the act or omission complained of occurred."[15] At this hearing it was stated that a claimant under the Act could bring suit "either where the claimant resides or in the locale of the injury or damage."[16] Since the language of the two sections is practically identical, the minority judge in the principal case felt that this testimony indicated that Congress intended a similar construction to be placed on Section 410 (a).

The principal case is the first instance in which a federal court has been called upon to interpret the choice of law provision of the Federal Tort Claims Act. In view of the explicit language therein, the majority was apparently forced to conclude that liability would be governed by the law of the place of the act, rather than the place of the injury. It is unfortunate that this language produced a result which is diametrically opposed to the general conflicts rule. It seems highly unlikely that the drafters of the Act had such a result in mind, especially when one considers that the express purpose of the Act is to have the United States treated "as a private individual under like circumstances."[17] In the absence of evidence to the contrary, one writer

[12] 41 Stat. 537 (1920), 46 U. S. C. A. § 761 (1944).
[13] 95 F. Supp. 916 (D. C. Mass. 1951).
[14] 95 F. Supp. 916, 918 (D. C. Mass. 1951).
[15] 62 Stat. 937 (1948), 28 U. S. C. A. § 1402(b) (1950).
[16] Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2nd Sess. 9 (1942).
[17] 60 Stat. 844 (1946), 28 U. S. C. A. § 2674 (1950).

has concluded that the unfortunate choice of words was purely accidental.[18]

However, a result equivalent to that advocated by the minority in the principal case could have been reached without attempting to construe the express statutory language so broadly, but rather by following the majority's strict construction of the explicit language of the statute, and applying the controversial doctrine of renvoi. Renvoi, or "reference back," arises when a conflict of laws rule of the forum and of a foreign state are different. The problem presented when the conflicts rule of the forum refers to the law of a foreign state is whether the reference is to the "whole law" of the foreign state, including its conflicts rules, or solely to its internal law. A typical example is presented when an Englishman dies domiciled in Italy leaving tangible movable property in England. Under English conflicts law, distribution is made according to the law of the domicile, and so the English court would be referred to the law of Italy. If the reference is to the "whole law" of Italy, including the applicable conflicts rule, it will be found that Italy would distribute the property according to the law of England, the country of the decedent's nationality. Consequently, due to the "reference back," the English court would "accept the renvoi" and distribute the property according to English internal law. If, however, the reference were solely to the internal law of Italy, not including its conflicts rules, the property would be distributed according to Italian internal law.

Renvoi has gained acceptance in some European countries as a useful device for solving the difficult problems which arise when the conflicts rules of two countries are not in harmony. Such has not been the case in the United States. The American courts and writers were nearly unanimous in their early rejection of the doctrine.[19] The pri-

---

[18]"In the absence of a record as to why the Act was worded in this unorthodox fashion it may be permissible to guess that the wording was accidental and unintentional...." Leflar, Choice of Law: Torts: Current Trends (1953) 6 Vand. L. Rev. 447, 448. See Goodrich, Yielding Place to New: Rest Versus Motion in the Conflict of Laws (1950) 50 Col. L. Rev. 881, 894; Gottlieb, State Law Versus a Federal Common Law of Torts (1954) 7 Vand. L. Rev. 206, 207.

[19]In what has been considered the leading American case involving a rejection of the renvoi, In Re Tallmadge, 109 Misc, 696, 181 N. Y. Supp. 336, 345 (1919), the decedent, an American citizen whose original domicile was in New York, died a resident of France. By his will, he left a residuary estate to two persons, one of whom pre-deceased him. Under New York internal law the share of the deceased legatee would devolve on intestacy, but under French internal law, it would accrue to the surviving legatee. The court held that the decedent was domiciled in France, but applied only the French internal law, disregarding the French conflicts rule that a decedent's will should be construed according to the law of his nationality. In reaching this result, the court stated that "the 'renvoi' is no

mary objection voiced by the critics is that an application of renvoi leads to an endless chain of references back and forth between different conflicts rules of two states or nations. Thus, in the example given above, it is contended that if the "reference back" is to the whole law of England, including its conflicts rules, the English court would again be referred to the law of Italy, and the endless chain of reference would have begun, with the result that the case would never be decided. The opponents of the doctrine contend that once the series of references is begun, there is no logical reason for stopping after the second reference.[20] Consequently, the present American rule is that once the forum is referred by its conflicts rules to the law of another state, "the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state."[21]

However, it would appear that the more recent trend in the United States is that the renvoi is not an evil to be entirely avoided.[22]

---

part of the New York law...." See also Frank, J., concurring in Mason v. Rose, 176 F. (2d) 486, 490 (C. A. 2nd, 1949); Lann v. United Steel Works Corp., 166 Misc. 465, 1 N. Y. S. (2d) 951, 956 (1938); Bates, Remission and Transmission in American Conflict of Laws (1931) 16 Corn. L. Q. 311; Lorenzen, The Renvoi Theory and the Application of Foreign Law (1910) 10 Col. L. Rev. 190; Lorenzen, The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country" (1918) 27 Yale L. J. 509; Schrieber, The Doctrine of the Renvoi in Anglo-American Law (1918) 31 Harv. L. Rev. 523.

[20]"But, logically, why should the inquiry stop with the internal law of New York on the reference from the French law? Why, indeed, should the reference be to the internal law of New York and not to its conflict of laws rule again? In the first instance, the New York court, in seeking to apply the French law, was, by hypothesis, referred to the French conflict of laws rule, instead of its internal laws. Why not the same character of reference upon the return? It is clear that the logical result of this reference back and forth to the conflict of laws rule of the respective countries would be an indefinite oscillation between the two laws." In Re Tallmadge, 109 Misc. 696, 181 N. Y. S. 336, 344 (1919). "There would appear to be no escape in legal theory from this circle or endless chain of references." Lorenzen, The Renvoi Theory and the Application of Foreign Law (1910) 10 Col. L. Rev. 190, 198.

[21]Restatement, Conflict of Laws (1934) § 7(b). However, the Restatement accepts the renvoi theory when title to land is in question, § 8(1), and when the validity of a divorce is challenged, § 8(2).

[22]In Re Schneider's Estate, 198 Misc., 1017, 96 N. Y. S. (2d) 652 (1950), presented the problem of an American citizen of Swiss origin who died domiciled in New York, leaving as part of his estate real property located in Switzerland. It was contended that his attempt to dispose of this realty by will was contrary to Swiss internal law which gave the heirs a vested interest in specific fractions of the decedent's property which could not be divested by testamentary act. The personal representative of the decedent had liquidated the Swiss realty and brought the proceeds into New York. The court held that a reference to the law of Switzerland, the situs of the land, involved a reference to the whole law of that country, including its conflicts rules. After a review of the Swiss authorities, the court concluded

It has been strongly suggested that the fear of the endless chain of references is more imagined than real,[23] and that in many situations, the renvoi would be extremely useful in reaching satisfactory solutions to difficult conflicts problems.[24] Perhaps the view of the advocates of a limited acceptance of the doctrine in the United States was best stated by a French commentator who said: "It would seem that a pragmatic approach to the renvoi principle might well be desirable. The courts should apply the doctrine where it leads to a desirable uniformity of result, and disregard it where its application becomes inconvenient."[25]

It is submitted that the principal case presents a proper situation for an application of renvoi. The federal court sitting in the District of Columbia would be referred by Section 410(a) of the Federal Tort Claims Act to the law of Virginia, the place where the negligent conduct occurred, including the Virginia conflicts rule that in a tort action the substantive rights of the parties are governed by the law of the place where the tort or injury occurred.[26] Consequently, the "reference back" would be to the internal law of the District of Columbia, and the issues of the case, including the question of the measure of damages, would be decided accordingly. Thus, there would be no necessity

---

that since the decedent possessed a dual nationality, Swiss law would require the title to the fund representing the realty to be determined under the law of the decedent's domicile. Consequently, the proceeds were distributed under the law of New York. This case represents a sharp departure from the total rejection of renvoi adopted by the New York court in In Re Tallmadge, 109 Misc. 696, 181 N. Y. Supp. 336 (1919). See note 19, supra.

Other American courts have utilized the renvoi in suits involving problems other than divorce and title to land. Faris v. Tennant, 194 Ind. 506, 141 N. E. 784 (1923) (to decide the applicability of foreign exemption statutes); Hartley v. Hartley, 71 Kan, 691, 81 Pac. 505 (1905) (to determine the distribution of proceeds of a wrongful death action); University of Chicago v. Dater, 277 Mich. 658, 270 N. W. 175 (1936) (to determine the capacity of a party to enter into a contract); Lando v. Lando, 112 Minn. 257, 127 N. W. 1125 (1910) (to determine the validity of a marriage.)

[23]"Recognition of the foreign conflict of laws will not lead us into any endless chain of references if the choice of law rule of the foreign country is the same as the choice of law rule of the country to which it refers.... [Or] if it is clear for any reason that the particular foreign conflicts rule (or any rule along the line of reference) is one which refers to the internal law alone." Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165, 1190.

[24]1 Rabel, The Conflict of Laws: A Comparative Study (1945) 82; Cowan, Renvoi Does Not Involve a Logical Fallacy (1938) 87 U. of Pa. L. Rev. 34; Falconbridge, Renvoi in New York and Elsewhere (1953) 6 Vand. L. Rev. 708; Griswold, Renvoi Revisited (1938) 51 Harv. L. Rev. 1165.

[25](1953) 77 Journal Clunet 992, 994, quoted by Pagenstecher, Renvoi in the United States: A Proposal (1955) 29 Tul. L. Rev. 379, 394.

[26]Atlantic Coast Line R. Co., v. Withers, 192 Va. 493, 65 S. E. (2d) 654 (1951); C. I. T. Corp. v. Guy, 107 Va. 16, 195 S. E. 659 (1938); Sutton v. Bland, 166 Va. 132, 184 S. E. 231 (1936).

for a modification of the measure of damages applied in the trial court, since the law of the District of Columbia places no limit on the amount of recovery for wrongful death.[27]

The value of the use of the doctrine would be that it would lead to the advocated "desirable uniformity of result." Under the present interpretation given to Section 410(a) by the principal decision, future suits arising under the Act in which the liability-forming conduct occurs in one state, and the injury in another, will be decided according to the law of the place of the act, whereas in state courts, similar suits are always decided under the law of the place of the injury.[28] Through an application of the renvoi, this undesirable situation would be eliminated and the federal law would be brought into harmony with the rule applied by the states. That the need for an application of renvoi would be rare is evidenced by the fact that the principal case is the first instance in which such a problem has arisen under the choice of law section of the Act. However, rarity of occurrence would appear to be a poor excuse for lack of uniformity of decision.

Finally, there would seem to be little danger that the federal courts would run the risk of becoming involved in the feared endless chain of references. In nearly all states, the prevailing conflicts rule is that tort liability is governed by the law of the place where the injury was sustained.[29] The reference to the law of the place of injury refers solely to the internal law of the foreign state, not to its conflicts rules, and there the references end.[30] In this sense, the states have uniformly refused to apply the renvoi in tort cases. Thus, by "accepting the renvoi," the federal courts could achieve a more satisfactory and uniform result in situations like that presented by the principal case which may arise in the future under Section 410(a) of the Federal Tort Claims Act.

PHILLIPS M. DOWDING

CONSTITUTIONAL LAW—LOCAL TAX ON PRIVILEGE OF ENGAGING IN LOCAL BUSINESS BY ENTERPRISE ENGAGED IN INTERSTATE COMMERCE. [Virginia]

In the field of state and local taxation there is a recurring problem of resolving the conflict between the local revenue interests of the states

[27] D. C. Code (1951) § 16-1201.
[28] See note 8, supra.
[29] See note 8, supra.
[30] Restatement, Conflict of Laws (1934) § 7(b).

and the national interest in commerce "among the several states."[1] While state taxation of interstate commerce is invalid, whether levied upon interstate business or the privilege of engaging in it,[2] nevertheless, it is no longer questioned that a state can validly levy a tax for the privilege of engaging in local business within the state, even though the tax may have an incidental effect on interstate commerce.[3] This is true even where the local and the interstate business are inseparably intermingled, so long as the tax is not demanded as a condition of carrying on the interstate business.[4]

The validity of the local tax, absent discrimination against interstate commerce, is often made to turn on the existence of a local activity on which the levy can rest.[5] Illustrative of an endless succession of state

---

[1]This conflict of interests arises from "the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received;" and the Supreme Court of the United States, in refusing to adopt a policy of upholding all state taxes not patently discriminatory, and then waiting for Congress to adjust conflicts, has been "forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause." Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 166, 74 S. Ct. 396, 401, 98 L. ed. 583, 591 (1954).

[2]Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 71 S. Ct. 508, 92 L. ed. 1832 (1948); New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338, 50 S. Ct. 111, 74 L. ed. 463 (1930); Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916 (1925); Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You? (1951) 4 Vand. L. Rev. 496, 498; Powell, Contemporary Commerce Clause Controversies Over State Taxation (1928) 76 U. of Pa. L. Rev. 773.

[3]City of Chicago v. Willett Co., 344 U. S. 574, 73 S. Ct. 460, 97 L. ed. 559 (1953); Norton Company v. Department of Revenue, 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517 (1951); Spector Motor Service, Inc., v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573 (1951); Hartman, State Taxation of Interstate Commerce (1953) 102; Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You? (1951) 4 Vand. L. Rev. 496, 498.

[4]City of Chicago v. Willett Co., 344 U. S. 574, 73 S. Ct. 460, 97 L. ed. 559 (1953); Southern Natural Gas Corp. v. Alabama, 301 U. S. 148, 57 S. Ct. 696, 81 L. ed. 970 (1937); Pacific Tel. & Tel. Co. v. Tax Commissioner, 297 U. S. 403, 56 S. Ct. 922, 80 L. ed. 760 (1936).

[5]The selection of a local incident serves other purposes as well. It clearly indicates that the state has sufficient factual connections with the transaction to satisfy the due process requirement of the Fourteenth Amendment, whch is concerned primarily with whether the tax in practical operation bears some relation to the opportunities or protection afforded by the taxing state. Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673 (1938). Secondly, if there is a genuine separation of a local incident, it acts to prevent multiple taxation since there will be less likelihood that other states could impose the same or a similar tax upon that incident. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 at 166, 74 S. Ct. 396 at 401, 98 L. ed. 583 at 591 (1954); Hartman, State Taxation of Interstate Commerce (1953) 46.

court decisions on this point is the Virginia case of *County Board v. Arcade-Sunshine Co.*,[6] instituted to test the validity of an Arlington County ordinance which levied an annual tax on each "outlet (any office, store or vehicle)" operated within the county by any laundry or dry cleaning establishment not located within the county, which does the actual laundry or dry cleaning work wholly or partially outside the county.[7] Plaintiffs, who maintained their laundry establishments in the District of Columbia, operated several trucks to make pick-ups and deliveries within Arlington County. Upon delivery of the finished articles, fees for the service rendered were collected from the customers. The trucks in their daily pick-up and delivery followed a regular route, and at times the drivers solicited new customers within the county. Two of the plaintiffs also operated pick-up and delivery stations in the county where the customers delivered, secured, and paid for their articles that were processed at plaintiffs' plants in the District. The State Supreme Court was confronted with the issue whether there was some incident, constituting a local taxable event, which would support the constitutionality of the tax regardless of the protection afforded interstate commerce by the Commerce Clause of the United States Constitution. It reasoned that there must be a factually distinct local activity actually separate and apart from the flow of commerce which would furnish the fulcrum for the local privilege tax, for a mere mental severance would not suffice.

Having decided that the incidence of the tax was the pick-up and delivery, the court held that as to the trucks these activities could not be factually severed from the interstate movement so as to create local taxable events; rather, they constituted actual, direct and integral parts of the flow of goods in interstate movement upon which the tax could not be imposed without materially burdening interstate commerce. It was decided, however, that the stations were not necessary to, or an integral part of, plaintiffs' interstate businesses, and their operation constituted a factually distinct business activity. Therefore, as applied to the stations, the tax was levied upon the privilege of engaging in a

---

[6]196 Va. 916, 86 S. E. (2d) 162 (1955).

[7]Business Privilege License Ordinance, adopted Feb. 2, 1949, as amended Oct. 18, 1952. Sec. 78: "Every person, (other than a laundry or dry cleaning establishment located in the County of Arlington) engaged in soliciting and/or accepting clothing, rugs, or other fabrics to be cleaned, laundered, dyed or pressed for compensation, and/or delivering clothing, rugs or other fabrics which have been cleaned, laundered, dyed or pressed for compensation where said person does the actual laundry or dry cleaning work outside the County of Arlington or has any part of the dry cleaning, laundry or finishing work done outside the County of Arlington, shall pay $300.00 per annum for one outlet (any office, store or vehicle) and $200.00 for each additional outlet per annum, not prorated."

separate local business, and interstate commerce was merely incidentally affected.

Since the United States Supreme Court is the final authority on whether local taxes constitute a "burden on interstate commerce," the Virginia decision must be tested in the light of the principles laid down and the results reached by that Court in this field. Prior to 1938 the Supreme Court approached the problem of the constitutionality of taxation of interstate commerce in terms of the direct and indirect effect or burden of the tax measure on interstate commerce—the former connoting invalidity and the latter connoting validity.[8] Use of the expression "direct burden" was apparently another way of saying that Congress had sole power to regulate interstate commerce to the exclusion of the state,[9] whereas "incidentally affect" meant that the tax was on local activity separate and apart from interstate commerce.[10] During this period, a tax was not condemned by any actual or probable hampering effect it might have on commerce; rather, the vice of

---

[8]The test under the Commerce Clause was thus phrased in terms of the manner in which the tax touched upon interstate commerce. If the Court found that it bore directly upon interstate commerce it was struck down. Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. ed. 295 (1917); Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910). But, if the tax had only an indirect effect upon interstate commerce, the Court would uphold it as an exaction of no more than a legitimate contribution for the services rendered by the taxing state. Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, 39 S. Ct. 265, 63 L. ed. 590 (1919); Hartman, State Taxation of Interstate Commerce (1953) 28; Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You? (1951) 4 Vand. L. Rev. 496, 498.

[9]The Court made an oft-quoted statement in Lelou v. Port of Mobile, 127 U. S. 640 at 648, 8 S. Ct. 1380 at 1384, 32 L. ed. 311 at 314 (1888) that no state had the right to tax interstate commerce in any form for the reason that such a tax would burden that commerce and would amount to a regulation of it, which belongs solely to Congress; and the cases have continued to announce that same doctrine: e.g., Helson and Randolph v. Kentucky, 279 U. S. 245 at 252, 49 S. Ct. 279 at 281, 73 L. ed. 683 at 687 (1929); Lyng v. Michigan, 135 U. S. 161 at 166, 10 S. Ct. 725 at 726, 34 L. ed. 150 at 153 (1890). But in the purely regulatory field, the Court, commencing with Cooley v. Board of Wardens, 12 How. (53 U. S.) 299, 13 L. ed. 996 (1851), formulated a concurrent power doctrine.

While at first glance it would seem incongruous to apply two distinctive doctrines under the Commerce Clause, it has been suggested that the two were used to convey the idea that more could be done by the states in restricting commerce under the police power than by the taxing power. For a discussion of these dual standards under the Commerce Clause see Hartman, State Taxation of Interstate Commerce (1953) 46; and for a disclussion of the basis for the distinction see Sinon, How Can the States Tax Interstate Commerce? (1954) 32 Taxes 914.

[10]Wiloil Corp. v. Pennsylvania, 294 U. S. 169 at 175, 55 S. Ct. 358 at 360, 79 L. ed. 838 at 841 (1935); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 at 563, 45 S. Ct. 184 at 185, 69 L. ed. 439 at 442 (1925).

the invalid tax was simply the direct bearing of the tax on interstate commerce, and that alone.[11]

Beginning, however, with Justice Stone's "added reason" in *Western Live Stock v. Bureau of Revenue*,[12] the Court began to formulate what was to become the "cumulative-burden test" and which for a short time replaced the "direct-indirect test" as applied to some of the various types of taxes.[13] The new test was based on two main propositions. First, that interstate commerce should bear its just share of the state tax burden, and second, that the tax in quesion should be sustained when it did not involve a risk of cumulative burdens on interstate commerce.[14] But the work of Justice Stone and the Court during this period was dismissed as mere "fashion in judicial writing" in 1946 in the case of *Freeman v. Hewit*,[15] in which the Court returned to what was tantamount to the old "direct-indirect" burden test.[16] The validity of a state tax depends today not upon any so-

[11]This was very succintly stated in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 217, 45 S. Ct. 477, 480, 69 L. ed. 916, 923 (1925) where the Court, in invalidating an excise tax imposed upon foreign corporations which transacted interstate business within the state, said that any tax thought to have as its incidence an integral part of interstate commerce "burdens interstate commerce and is therefore invalid without regard to measure or amount."

[12]303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823 (1938) (New Mexico tax on business of publishing newspaper or magazine having interstate circulation, measured by gross receipts from advertising, held valid.)

[13]The cumulative burden effect of the tax became the controlling reason in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938) and in Gwin, White, Prince, Inc. v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. ed. 272 (1939), but was fairly well confined to gross receipt taxes. However, it was extended into the privilege tax field in Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. ed. 1043 (1938), and in general the Court looked toward state taxation of interstate commerce in a friendly manner, permitting essentially interstate business to be taxed by isolating a local event to serve as the subject of the tax. Hartman, State Taxation of Interstate Commerce (1953) 40; Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You? (1951) 4 Vand. L. Rev. 496, 510.

[14]The first phase of this doctrine was an application of Justice Holmes' succinct, and now famous utterance of dissent in New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U. S. 338, 351, 50 S. Ct. 111, 115, 74 L. ed. 463, 470 (1930): "Even interstate commerce must pay its way." The background for the second phase of the two-fold approach was very aptly summarized in the Western Live Stock case: "The vice characteristic of those [taxes] which have been held invalid is that they have have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed ... or added to ... with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." 303 U. S. 250, 255, 58 S. Ct. 546, 548, 82 L. ed. 823, 828 (1938).

[15]329 U. S. 249, 254, 67 S. Ct. 274, 278, 91 L. ed. 265, 273 (1946).

[16]Hartman, State Taxation of Interstate Commerce (1953) 41; Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What

called multiple burden, although that may be a consideration,[17] but "upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."[18] The Court will strike down any tax the direct incidence of which is on interstate commerce, for that reason alone.[19] As a result of these considerations, the decisive issue turns for constitutional purposes on the operating incidence of the challenged tax. Thus, a state may tax if, by the practical operation of the tax, the state has exerted its power in relation to opportunities given, to protection afforded, or to benefits conferred.[20]

The Court, adopting the rationale that a state may tax the local activity inasmuch as such tax is not one levied upon interstate commerce, has continued to distinguish local activities of commerce from the commerce itself. But not all taxes are saved because they are cast in terms of local events. The sole question in each case is whether the local activity selected as the taxable event is so closely related to the interstate business as to be within the scope of the Commerce

---

Have You? (1951) 4 Vand. L. Rev. 496, 593. In repudiating the "cumulative burden test," the Court, although recognizing the burdensome effect of multpile taxation by two or more states, explicitly announced that the fact that "only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated, ... [and that there was no] warrant in the constitutional principle [theretofore] applied ... to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of Commerce." Freeman v. Hewit, 329 U. S. 249, 256, 67 S. Ct. 274, 278, 91 L. ed. 265, 274 (1946).

[17]In the Court's discussion of the inherent effects of the license tax held invalid in Nippert v. City of Richmond, 327 U. S. 416 at 429, 66 S. Ct. 586 at 592, 90 L. ed. 760 at 768 (1946), it pointed out that one was the cumulative effect of municipal taxes, similar to the Richmond tax in question, laid in succession upon the taxpayer as he traveled from town to town which was obviously greater than that of any tax of statewide application. And in the Michigan-Wisconsin Pipe Line case it gave as an "additional objection" that, if the tax were upheld, it would permit a multiple burden upon the commerce. 347 U. S. 157, 170, 74 S. Ct. 396, 403, 98 L. ed. 583, 593 (1954).

[18]Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 164, 74 S. Ct. 396, 399, 98 L. ed. 583, 590 (1954), quoting from Nippert v. City of Richmond, 327 U. S. 416, 424, 66 S. Ct. 586, 590, 90 L. ed. 760, 765 (1946).

[19]Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916 (1925). At least one writer in the field has said that Justice Frankfurter's assertion in the Freeman case that "any interference" with interstate commerce by the states' use of the taxing power would invalidate the tax was ostensibly intended to give to interstate commerce complete tax immunity and virtually raises a presumption against the validity of any state tax that touches interstate commerce. Hartman, State Taxation of Interstae Commerce (1953) 42.

[20]Wisconsin v. J. C. Penny Co., 311 U. S. 435 at 444, 61 S. Ct. 246 at 249, 85 L. ed. 267 at 270 (1940).

Clause.[21] While the state court determines the incidence of the tax,[22] the validity of the tax as against Commerce Clause objections rests with the United States Supreme Court. This Court recently stated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*[23] that a tax on a local activity is valid only if the local activity is not such an integral part of the flow of commerce that it cannot realistically be separated from it.[24] In that case it was held that as the basis for finding a separate local activity, the incidence of the tax must be a more substantial economic factor than the movement of gas from a local outlet to the connecting pipe line. Such an aspect cannot, by legislative whimsy, be carved out from what is otherwise an entire and integral economic process and segregated as a basis for the tax.[25]

---

[21] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, 98 L. ed. 583 (1954).

[22] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347, U. S. 157, 74 S. Ct. 396, 98 L. ed. 583 (1954); Wisconsin v. J. C. Penny Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. ed. 267 (1940); Armour Packing Co. v. Lacy, 200 U. S. 226, 26 S. Ct. 232, 50 L. ed. 451 (1906).

[23] 347 U. S. 157, 74 S .Ct. 396, 98 L. ed. 583 (1954). A Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company where the taxable activity was the taking of gas from the outlet of an independent gas plant within the state for the purpose of immediate interstate transmission was in dispute. The problem confronting the Court was not whether the state could tax the "gathering" of gas. Here the question was whether the state had delayed the incidence of the tax beyond the step where the production and processing had ceased and transmission in interstate commerce had begun, so that the tax was not levied on the capture or production of the gas, but rather on its taking into interstate commerce after production, gathering and processing. In striking down the tax, the Court felt that it had done so, since the taking of the gas into the pipeline was solely for interstate transmission, and the gas was, at the time of the taking, not only committed to but actually moving in interstate commerce.

[24] 347 U. S. 157 at 166, 74 S. Ct. 369 at 401, 98 L. ed. 583 at 591 (1954).

[25] The Court distinguished cases relied upon by the state from the present case with a statement to the effect that in each of them the tax was imposed upon a less integral part of the commercial process involved: Memphis Natural Gas. Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832 (1948) (corporate franchise tax whose incidence was local activities of maintaining, repairing and manning facilities of interstate gas line lying within state); Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. ed. 1043 (1938) (privilege tax on operating of machines for production of mechanical power assessed against gas compressor stations operated within state to aid in transportation of gas interstate); Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823 (1938) (statute levied privilege tax on gross receipts from sale of advertising on all persons engaged in publishing of newspapers or magazines whose circulation was partially interstate); Chassaniol v. City of Greenwood, 291 U. S. 584, 54 S. Ct. 541, 78 L. ed. 1004 (1934) (occupation tax on all persons buying and selling cotton locally produced but ultimately shipped interstate); Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 53 S. Ct. 591, 77 L. ed. 1155 (1933) (use-tax whose incidence was withdrawl of gasoline from tanks and placing of it in fuel tanks of airplanes).

The most obvious instance of a realistic separation occurs when an interstate business concern engages in local business to induce trade. Although it does not, on entering a local market to gain the advantage of a local business, forfeit its right to the protection of the Commerce Clause for its interstate business, the concern does lose its tax immunity as to all that business channeled through the local outlet.[26] But the Court has made it clear that interstate commerce cannot, for the purpose of upholding the tax, be broken up into a series of local events, each of which is essential to carrying on the commerce.[27] This point was emphasized in *Railway Express Agency, Inc. v. Virginia*[28] where a privilege tax measured by gross receipts levied on the Railway Express Agency was held invalid in the face of the state's contention that the local pick-up and delivery of goods by vehicle was a sufficient local event to warrant a tax on gross revenues earned within the state. The local activities of gathering up and putting down of goods which are to be, or which have been, shipped in interstate commerce have long been considered integral parts of the interstate movement.[29]

The principal case must be considered in the light of these views expressed by the Supreme Court. The incidence of the Arlington tax appears from the state court decision to be the pick-up and delivery.[30]

---

[26]Norton Company v. Department of Revenue, 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517 (1951); Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. ed. 632 (1918); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 58 L. ed. 974 (1914).

[27]Nippert v. City of Richmond, 327 U. S. 416, 423, 66 S. Ct. 586, 589, 90 L. ed. 760, 764 (1946); "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or inegral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

[28]347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757 (1954).

[29]Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993 (1947); Puget Sound Stevedoring Co. v. Tax Commissioner, 302 U. S. 90, 58 S. Ct. 72, 82 L. ed. 68 (1937); Baltimore & Ohio S. W. Ry. v. Burtch, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433 (1924); Glouchester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158 (1885).

[30]A similar tax on laundry and dry cleaning trucks was presented to the Supreme Court in Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436 (1951) but the local incidence question was left un-

If the pick-up and delivery in the *Railway Express* case was an integral part of commerce, there can be little room for doubt that in the principal case the Supreme Court would find the same activities by the laundry company to be direct parts of the interstate flow. If so, the tax would be on a segment of, and would materially burden, interstate commerce.[31] The pick-up and delivery stations, on the other hand, were local outlets used for the purpose of inducing and encouraging trade with plaintiffs' businesses and were not necessary to the interstate movement. Realistically viewed, the stations involve factually distinct local business activities which would support the local tax even though it incidentally affected interstate commerce. It is apparent that the Virginia court has accurately applied the approach of the Supreme Court of the United States in the principal case.

The Supreme Court is, however, open to the criticism that in this field it is "doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached,"[32] and members of the Court itself have questioned whether there is any reasonable justification for vesting such a verbal standard with constitutional dignity.[33] Nevertheless, the approach must be viewed in the light of the fact that the "[c]ourts are not possessed of instruments of determination so delicate as to enable them to weigh the various fac-

decided since the case was disposed of on other grounds. However, it appears that the taxable event there, as in the principal case, was the pick-up and delivery, and the view has been expressed that a tax similar to that levied in the Steam Laundry case would be held valid if nondiscriminatory. Notes (1953) 26 So. Calif. L. Rev. 196; (1952) 66 Harv. L. Rev. 134.

[31]This was apparently the view taken by the Virginia court and is summarized in the opinion by Justice Miller where, in citing the Railway Express case, he stated: "This ingenious mental severance and creation of a local taxable business incidence out of the picking up and redelivery of the goods, separate from the over-all interstate commerce in which the goods are the subject matter, are purely fictional. It has no basis in fact or reality, for the picking up and redelivery constitute respectively the *alpha* and *omega* of the flow of the goods in interstate commerce, and nothing more. The pick up and delivery are actual and direct physical parts of the interstate movement.... They furnish no separate taxable incident or event upon which a local tax may be levied." County Board v. Arcade-Sunshine Co., 196 Va. 916, 927, 86 S. E. (2d) 162, 167 (1955).

[32]See Di Santo v. Pennsylvania, 273 U. S. 34, 44, 47 S. Ct. 267, 271, 71 L. ed. 524, 530 (1927); Hartman, State Taxation of Interstate Commerce (1953) 45.

[33]See Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 at 614, 71 S. Ct. 508 at 515, 95 L. ed. 573 at 581 (1951). Justice Frankfurter evidently had in mind the danger that may result from such a practice, when in Wisconsin v. J. C. Penny Co. he wrote: "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits of the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it." 311 U. S. 435, 444, 61 S. Ct. 246, 250, 85 L. ed. 267, 270 (1940).

tors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce."[34]

NOEL P. COPEN

CONSTITUTIONAL LAW—PAY-WHILE-VOTING LEGISLATION AS DEPRIVATION OF EMPLOYER'S PROPERTY WITHOUT DUE PROCESS OF LAW. [Illinois]

Following a pattern initiated near the turn of the century, a large number of states have adopted election statutes which are commonly referred to as "pay-while-voting" legislation. Though varying somewhat in form, these statutes generally consist of two basic provisions: first, that employers must release all eligible voting employees for a prescribed period of time on days of public elections in order that the employees may exercise their voting franchise; second, that employees must receive regular salary or wages for the time so released.[1] In drafting these measures the state legislatures have sought to serve a dual purpose. Inasmuch as "pay-while-voting" had its origin in a period when working days ranged from twelve to sixteen hours and when transportation facilities were slow and meager, their first purpose was to safeguard the right of suffrage against employer coercion. A further purpose was to stimulate, in the public interest, participation at the polls among the working classes.

---

[34]Freeman v. Hewit, 329 U. S. 249, 256, 67 S. Ct. 274, 278, 91 L. ed. 265, 274 (1946).

[1]The time allowed varies from one to four hours. The statute normally provides: "no deduction from usual wages or salary"; however, prohibition of deduction is sometimes not expressed but left to implication. 4 Ariz. Code Ann. (1939) § 55-514; 2 Ark. Stat. Ann. (1956) §§ 3-1602, 3-1603; Cal. Election Code (Deering, 1954) § 5699; 46 Ill. Stat. Ann. (Smith-Hurd, 1944) § 17-15 (re-enacted without change after the pay provision was ruled unconstitutional in 1923); 7 Ind. Stat. Ann. (Burns, 1949) § 29-4807; 1 Iowa Code (1954) §§ 49.109, 49.110; Kan. Gen. Stat. Ann. (Corrick, 1949) § 25-418; Ky. Rev. Stat. (1948) § 118.340 [held unconstitutional in Illinois Central Ry. v. Commonwealth, 305 Ky. 632, 204 S. W. (2d) 973 (1947)]; 4A Mass. Ann. Laws (1949) c. 149, § 178 (no provision as to payment of wages); 3 Neb. Rev. Stat. (1943) § 32-1159; 4 N. M. Stat. Ann. (1941) § 56-705 (no provision as to payment of wages); 4 N. Y. Consol. Laws (1950) § 226 (primaries excepted where employee has two successive hours in which to vote other than during work period); Okla. Stat. (1941) tit. 26, § 438 (employer is subject to imprisonment for failure to notify employee of his two hours released time); 2 Tex. Stat. (Vernon, 1948) art. 209 (no prescribed period of time); 1 W. Va. Code Ann. (Michie, 1955) § 121 (3 hours allowed, more if necessary). For other ictations to pay-while-voting statutes, see Notes (1955) 33 Chi.-Kent L. Rev. 267; (1947) 47 Col. L. Rev. 135; (1952) 47 Northwestern L. Rev. 252.

Although for a long time these statutes remained free from challenge in the courts, during recent years a sharp conflict of authority has arisen as to the constitutionality of such legislation as an exercise of police power which necessarily clashes with individual rights of the employer.[2] The controversy deals only with the provision requiring employers to pay absent employees, since the released time feature has never been seriously questioned.

The numerical weight of authority sustains the validity of pay-while-voting laws.[3] The favorable decisions have recognized a very broad and inclusive concept of public welfare as the basis for legislative action for the protection of the political as well as the physical and economic well-being of the community.[4] As the Minnesota Supreme Court has recently declared, "the police power which is adequate to fix the financial burden for one [area of well-being] is adequate for the other."[5] Once this position is taken, the majority of the courts experience little difficulty in disposing of the usual constitutional objections that such legislation violates individual rights of equal protection, freedom to contract, and due process of law.[6] In overcoming

---

[2]People v. Chicago, M. & St. P. Ry., 306 Ill. 486, 138 N. E. 155 (1923) was the first case in which the issue was decided. No other case seems to have arisen until 1946. See note 3, infra.

[3]Pay-while-voting laws upheld in: Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 72 S. Ct. 405, 96 L. ed. 469 (1952) aff'g 362 Mo. 299, 240 S. W. (2d) 886 (1951); Ballarini v. Schlage Lock Co., 100 Cal. App. (2d) 859, 226 P. (2d) 771 (1950); Lorentzen v. Deere Mfg. Co., 245 Iowa 317, 66 N. W. (2d) 499 (1954) (turned on interpretation of statute—no constitutional question raised); State v. International Harvester Co., 241 Minn. 367, 63 N. W. (2d) 547 (1954); Williams v. Aircooled Motors, 283 App. Div. 187, 127 N. Y. S. (2d) 135 (1954); People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2d) 697 (1946). Pay-while-voting statutes invalidated in: People v. Chicago, M. & St. P. Ry., 306 Ill. 486, 138 N. E. 155 (1923); Heimgaertner v. Benjamin Electric Mrfg. Co., 6 Ill. (2d) 152, 128 N. E. (2d) 691 (1955); Illinois Central Ry. v. Commonwealth, 305 Ky. 632, 204 S. W. (2d) 937 (1947); International Shoe Co. v. Commonwealth, 305 Ky. 636, 204 S. W. (2d) 976 (1947). See also dissenting opinions in Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 425, 72 S. Ct. 405, 408, 96 L. ed. 469, 473 (1952); People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2d) 697, 699 (1946).

[4]Dealing with other issues, but reflecting the extremely broad police powers in the economic field are the following: Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 212 (1949); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703 (1937); Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940 (1934).

[5]State v. International Harvester Co., 241 Minn. 367, 63 N. W. (2d) 547, 554 (1954) citing United States Supreme Court in Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 72 S. Ct. 405, 96 L. ed. 469 (1952).

[6]While these might be thought of as separate and distinct individual rights and, by the same token, as separate and distinct barriers to questionable legislation, yet due to the very nature of pay-while-voting statutes these objections become so closely interrelated that any one almost necessarily involves the others. According to one writer, "The primary problem posed is one of due process, as the equal

the contention that pay-while-voting denies equal protection by discriminating between employers of labor and persons who do not employ labor, the Minnesota court said: "... legislation ... is not prohibited by either the state or federal constitutions if, within the sphere of its operation, it affects alike all persons similarly situated and the classification is not arbitrary. The grounds for discrimination between persons similarly situated may be slight."[7] The United States Supreme Court has justified such a classification of voters on the ground that it was necessary to free employees from the employer's dominant powers to thwart the free exercise of their voting franchise, "an evil to which the one group has been exposed."[8] When balanced against the importance of removing such evils by means of pay-while-voting, the burden cast upon all in the employer role becomes so slight, according to a New York court, as not to be "unduly oppressive. That the burden may bear unequally does not render its placement unlawful."[9]

In *Ballarini v. Schlage Lock Co.*,[10] a California appellate court in upholding the pay-while-voting statute concerned itself only with the removal of the freedom-to-contract objection. The rule was there invoked that a state's police power cannot be suspended by contract or irrepealable law; consequently, parties are expected to contract in contemplation of the inherent power which the state always reserves to itself to be exercised when necessary to serve the general welfare.[11] It was also pointed out in *State v. International Harvester Co.*, that

---

protection and the contract clauses of the Constitution no longer appear to offer barriers to the statutes, but are principally used for the purpose of bolstering a due process attack upon the constitutionality of such legislation." Note (1947) 47 Col. L. Rev. 135, 137.

[7]State v. International Harvester Co., 241 Minn. 367, 63 N. W. (2d) 547, 553 (1954).

[8]Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 425, 72 S. Ct. 405, 408, 96 L. ed. 469, 473 (1952), the only case on this subject decided by this court. It upheld the Missouri pay-while-voting statute giving employees four hours from work, with pay, for the purpose of voting.

[9]People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2d) 697, 699 (1946). But see dissent by Lawrence, 63 N. Y. S. (2d) 697, 699.

[10]100 Cal. App. (2d) 859, 226 P. (2d) 771 (1950).

[11]The concept of freedom to contract, which has been dealt with as an aspect of due process, is to be distinguished from the contract clause which forbids the impairment of the obligation of contract. U. S. Const., Art I, § 10. Freedom to contract as being a part of due process became an accepted doctrine in Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 (1897). However, as early as 1911 the United States Supreme Court acknowledged that freedom to contract was "a qualified, and not an absolute right.... Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago, B. &. Q. R. Co. v. McGuire, 219 U. S. 549, 567, 31 S. Ct. 259, 262, 55 L. ed. 328, 338 (1911).

the right or liberty to contract is a qualified rather than an absolute right; and then the court exemplified the interrelationship of freedom to contract and due process arguments by observing: "... in the public interest the legislature can interfere with freedom to contract in regard to agreements between employers and employees without violating due process requirements...."[12]

Looking more broadly to the contention that the pay provision of this type of statute amounts to a taking of property without due process of the law, the United States Supreme Court in the *Day-Brite* case observed: "Of course many forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity.... Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid."[13] Though the Court failed to give an example of any such regulation, apparently it had in mind minimum wage legislation, as it had already reasoned that pay-while-voting is a form of minimum wage and, therefore, valid as falling within the legislature's power, "within extremely broad limits ... [to] control practices in the business-labor field."[14]

Closely linked with the broad concept of public welfare and police power, a majority of the courts have carried to its extreme the policy of judicial reluctance to weigh and examine legislative efforts, for fear of engaging in judicial legislation. Since it is not clear that pay-while-voting regulations do not come within the police power, most courts feel that they should not "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends the public welfare."[15]

Demonstrating a contrary point of view is the recent case of *Heimgaertner v. Benjamin Electric Mfg. Co.*,[16] in which the Illinois Supreme Court was called upon, for the second time in thirty-two years, to determine the validity of the Illinois Election Code section which provides for *released time with pay* for employees requesting such a privilege in order to vote.[17] Plaintiffs, forty-nine employees of de-

---

[12]241 Minn. 367, 63 N. W. (2d) 547, 551 (1954).

[13]Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 424, 72 S. Ct. 405, 408, 96 L. ed. 469, 473 (1952).

[14]342 U. S. 421, 423, 72 S. Ct. 405, 407, 96 L. ed. 469, 472 (1952).

[15]Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 423, 72 S. Ct. 405, 407, 96 L. ed. 469, 472 (1952). The Iowa Supreme Court has declared that it is for the law-making body to determine when the need for the statute exists. "It is not for us to overrule its judgment by an interpretation which could be nothing more than judicial legislation." Lorentzen v. Deere Mfg. Co., 245 Iowa 317, 66 N. W. (2d) 499, 503 (1954).

[16]6 Ill. (2d) 152, 128 N. E. (2d) 691 (1955).

[17]The code section in question reads in part: "Any person entitled to vote at a general or special election ... shall, on the day of such election, be entitled

fendant company, employed at an hourly rate, had upon request been granted leave of absence for the prescribed period of two hours in order to participate in the general election of November 4, 1952. The polls were open from 6:00 a.m. to 5:00 p.m., and it was stipulated in the record that plaintiffs could have voted during the two hours before work without interfering with their regular employment schedule. Upon defendant's subsequent refusal to pay their wages for time taken off to vote, plaintiffs instituted an action to recover payment under the terms of the statute. They obtained judgment in the trial court and defendant appealed, contending primarily that the pay provision of the statute violated the Illinois Constitution by depriving the employer of property without due process of law and denying equal protection of the laws.

Representing the minority but better reasoned view on this subject, the Illinois Supreme Court, in reaffirming its 1923 decision,[18] reversed the lower court's finding and struck down the pay provision of the statute in question as an invalid exercise of police power. While the court recognized the police power as being paramount to individual rights, it also very aptly observed that this power "is still restrained by the fundamental principles of justice connoted by the phrase, due process of law."[19] The test for the validity of an exercise of police power was said to be "whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety, and general welfare."[20] The pay-while-voting provision was found not to be reasonably designed to correct the evil (lack of voting participation) because, since actual voting was not made a prerequisite to payment, there is no assurance that the public purpose of stimulating the exercise of the right of suffrage would be accomplished. If, on the other hand, actual voting had been a condition precedent to payment, the court indicated that the statute

to absent himself from any services or employment in which he is then engaged or employed, for a period of two hours between the time of opening and closing the polls; and such voter shall not because of so absenting himself be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; Provided, however, that application for such leave of absence shall be made prior to the day of election.... Any person or corporation who shall... directly or indirectly violate the provisions of this section, shall be deemed guilty of a misdemeanor...." 46 Ill. Stat. Ann. (Smith-Hurd, 1944) § 17-15.

[18]In 1923, the Supreme Court of Illinois invalidated the pay provision of this statute in the first case to be decided on this subject, People v. Chicago M. & St. P. Ry., 306 Ill. 486, 138 N. E. 155 (1923). However, the statute was re-enacted without change in 1943.

[19]6 Ill. (2d) 152, 128 N. E. (2d) 691, 695 (1955).

[20]6 Ill. (2d) 152, 128 N. E. (2d) 691, 695 (1955).

still would not be sustainable because it is unreasonable to place the burden of getting out the vote solely on employers, since neither decreased election participation nor the indivdual right of suffrage in any manner stems from the employer-employee relationship.[21]

In accord with Justice Jackson's dissent in the *Day-Brite* case,[22] the Illinois court also found that the statute was discriminatory in that it placed upon only a few the benefit and upon only a few the burden, both classifications being unrelated to the object sought to be attained. Therefore, the measure violated the equal protection clause of the Illinois Constitution. As Justice Jackson observed in regard to the Missouri statute: "It is obvious that not everybody will be paid for voting and the 'rational basis' on which the State has ordered that some be paid while others are not eludes me."[23] The *Heimgaertner* opinion also looked with approval to the reasoning of the Kentucky Court of Appeals in *Illinois Cent. R. Co. v. Commonwealth*[24] in which a similar statute was struck down. There it was declared: "The law will not countenance a public maintenance of a private enterprise. Neither should the law demand a private maintenance of a public enterprise. Voting is a public enterprise. But if its maintenance is required by the employer group rather than by the entire, broad, general public, then that amounts to a requirement of private maintenance of a public enterprise."[25] The Illinois court pointed out the obvious weaknesses of the minimum wage analogy urged by plaintiffs in support of the statute. First, the two measures are clearly distinguishable on the ground that minimum wages were necessary to remedy an evil which had arisen from, or become incident to, the master-servant relationship, whereas the evil of lack of voting is in no way connected with this relationship. Secondly, because a state may require payment for hours which *are* worked, it does not follow that it may compel pay-

[21]Although the Illinois Court recognized that the Day-Brite decision eliminates the federal problems concerning pay-while-voting legislation, it felt that it "serves to reaffirm that it is for each State to determine if its legislature is empowered to enact such a statute and to determine if the means selected to further the public welfare bear a real, and substantial relation to the objects sought to be obtained." 6 Ill. (2d) 152, 128 N. E. (2d) 691, 695 (1955). In other words, the conflict in the decisions on pay-while-voting serves to indicate that what due process requires in one state is not necessarily due process in another.

[22]See Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 72 S. Ct. 405, 96 L. ed. 469 (1952).

[23]See Justice Jackson, dissenting Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 427, 72 S. Ct. 405, 409, 96 L. ed. 469, 474 (1952).

[24]305 Ky. 632, 204 S. W. (2d) 973 (1947).

[25]305 Ky. 632, 204 S. W. (2d) 973, 975, (1947) quoted in Heimgaertner v. Benjamin Electric Mfg. Co., 6 Ill. (2d) 152, 128 N. E. (2d) 691, 697 (1955).

ment for time which is *not* worked. A third distinction is that minimum wage regulations insure to the public that the evil will be corrected, whereas under pay-while-voting the only direct result is that the employer loses wages and production, and the employees may or may not vote.

It was contended in the *Heimgaertner* case that the change in economic and social conditions since 1923, when an earlier version of the Illinois statute was invalidated, demanded that a contrary result should now be reached. However, the court reasoned that the change of conditions had served to make the statute even less defensible than it formerly was: "In the years that have passed the working period has been reduced to a point where most employees work eight or less hours a day. Modern transportation facilities now permit travel to and from work in the matter of minutes. Further, labor unions, then in their infancy, now guarantee an employee equal bargaining power with his employer. All of these factors have served to diminish the need for regulation...."[26] Regarding the policy of judicial examination of legislative efforts, the Illinois court took a more realistic approach than the courts which have upheld pay-while-voting laws. Though recognizing the broad powers of the legislature to determine *when to act* for the general welfare, the court by its holding indicated that final determination of the *validity of the act* is the duty of the judiciary.[27] A failure of the courts to recognize this duty amounts abrogation of the doctrine of judicial review.

"Obtaining a full and free expression at the polls from all qualified voters... is so fundamental to a successful representative government that a State rightly concerns itself with the removal of every obstruction to the right and opportunity to vote freely. Courts should go far to sustain [such] legislation.... But there must be some limit to the power to shift the whole voting burden from the voter to someone else who happens to stand in some economic relationship to him."[28] In no case has it ever been shown that voting before or after working hours would in any way work a peculiar hardship on employees. If any such inconvenience should develop, there seems to be no reason why merely extending the hours during which the polls are open would not be an adequate solution. Since there appears to be no real need for the pay-while-voting privilege, and since the released time provision has not been found objectionable, it appears that the Illinois court

---

[26]6 Ill. (2d) 152, 128 N. E. (2d) 691, 699 (1955).

[27]6 Ill. (2d) 152, 128 N. E. (2d) 691 at 695 (1955).

[28]See dissenting opinion, Day-Brite Lighting Inc. v. Missouri 342 U. S. 421, 426, 72 S. Ct. 405, 409, 96 L. ed. 469, 474 (1952).

was correct in making the statute divisible by striking down only the pay provision. Though the released time provision alone will admittedly not be as strong an incentive for voting, nevertheless it will put employees in no worse position than all other citizens who find it necessary to sacrifice some income-producing time in order to cast their ballots. Since the statutory privilege is not conditioned on the employee actually casting his ballot, even under the pay-while-voting system the achievement of the desired benefit to the general public still depends entirely upon the recognition by each employee of his duty to vote. Considering the statute as an entity, the negative arguments appear to be the stronger and more reasonable, especially when viewed in the light of the warning words with which Justice Jackson concluded his dissent in the *Day-Brite* case: "... [A] constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent."[29]

LACEY E. PUTNEY

CRIMINAL LAW—FELONY MURDER DOCTRINE AS APPLICABLE TO KILLING OF ACCUSED'S CO-FELON BY INTENDED VICTIM OF ROBBERY. [Pennsylvania]

Under the felony murder doctrine, guilt may be established by proving that the accused *caused* the death, either directly by his own own act or indirectly as a party to the killing, and was engaged in the commission of, or attempt to commit, some other felony at the time the mortal wound was inflicted.[1] Frequently, where a killing is committed during the course of a felony, the accused can be found guilty of murder without use of the doctrine since in many cases the accused will have killed *intentionally* with express malice. However, the crime of murder may be committed without an intention to kill when death is caused accidentally by the accused, and it is with reference to this aspect of the crime of murder that the felony murder rule is unusual.[2] Within the rule, the fact that the accused was engaging

[29]342 U. S. 421, 428, 72 S. Ct. 405, 409, 96 L. ed. 469, 475 (1952).

[1]Clark & Marshall, Crimes (5th ed. 1952) § 248(a).

[2]Other situations in which an unintentional killing may be murder include cases in which: (1) there is an intent to commit great bodily harm; (2) without intent to harm, an act was done or committed wilfully without justification or excuse the natural tendency of which is to cause death; (3) a death occurred while resisting lawful arrest or obstructing a police officer. Clark & Marshall, Crimes (5th ed. 1952) § 242.

in the commission of some other felony at the time of the death, without more, establishes the mental element necessary for murder, or in other words, malice is implied as a matter of law from the commission of the other felony.[3]

A typical illustration of the doctrine appears in the case of *Director of Public Prosecutions v. Beard*[4] where the defendant placed his hand over the mouth of a young girl, and his finger on her throat, while he raped her. As a result the girl died from asphyxiation, and the defendant was convicted of her murder. There was no indication that the accused *intended* to kill the girl, but the court, utilizing the felony murder doctrine, implied the necessary malice from the defendant's act of committing another felony.

The doctrine has persisted in the law although it has been the subject of considerable criticism.[5] Its purpose and indeed the purpose of all criminal law is to protect the interests of society,[6] which places the highest premium on the preservation of human life.[7] The result intended by the courts is both punitive and preventive,[8] and is based on the familiar theory that criminals will consider well before engaging in life-endangering enterprises which may well bring harsh retribution on their heads.

The doctrine has found its way into the statutes of all but three states.[9] Such statutes on murder can be divided into two categories: First, those that define murder and may in addition fix the degree of the murder; second, those that do not define murder but only divide it into degrees. The New York statute is an example of the first classifi-

---

[3]Clark & Marshall, Crimes (5th ed. 1952) § 248(a). A similar evaluation is applicable to the common law of England. 9 Halsbury's Laws of England (2d ed. 1933) 437: "Where a person whilst committing... a felony does an act... likely in itself to cause death... and the death... results... the law implies malice aforethought, and the person causing the death is guilty of murder."

[4][1920] App. Cas. 479, 12 A. L. R. 846.

[5]For discussion, see Arent and MacDonald, The Felony Murder Doctrine and Its Application Under the New York Statutes (1953) 20 Corn. L. Q. 288 at 312. In Regina v. Serne, 16 Cox C. C. 311 (1887), Stephen sets out certain limitations to be placed on this harsh doctrine so as to restrict its use to shocking felonies from which death is a probable result.

[6]2 Stephen, A History of the Criminal Law in England (1883) 76: "By a criminal, people in general understand not only a person who is liable to be punished, but a person who ought to be punished because he has done something... injurious... to the commonest interests of society."

[7]Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204 at 205 (1955).

[8]Ullmann, The Justification of Punishment (1941) 53 Jurid. Rev. 318. "Yet the purpose of punishment—if it is to serve any—is surely the prevention of further action harmful to Society...."

[9]Kentucky, South Carolina and Maine. For a full discussion and reference to these statutes, see Note (1955) 23 Temp. L. Q. 453, 456.

cation both defining murder and dividing it into degrees. The provision relating to felony murder reads: "The *killing* of a human being... is murder in the first degree, when committed... by a person engaged in the commission of... a felony, either upon or affecting the person killed...."[10] A good illustration of the provision relating to felony murder in the second classification is the Pennsylvania statute which reads: "All *murder*... which shall be committed in the perpetration of... robbery... shall be murder in the first degree."[11] The Pennsylvania Supreme Court recently has applied that statute freely and, it is believed, with mistaken zeal.

In the case of *Commonwealth v. Thomas*[12] the Pennsylvania Supreme Court found the accused guilty of murder in the first degree for the death of his accomplice. The facts indicated the accused (one Thomas) and his partner in crime held up and robbed the proprietor of a grocery store, after which they ran out into the street and fled in opposite directions. Thereupon the storekeeper picked up his own gun and shot and killed Thomas' escaping accomplice. Evidently the deceased returned the fire prior to his death but the reported facts of the case do not indicate the sequence of events here and they are not discussed by the court.[13] A majority of the court concluded that first degree murder had been committed, basing the conclusion on the theory that the death was a natural and probable consequence of the defendant's participation in the robbery,[14] that this act of participation was the proximate cause of the death, and that the defensive action by the robbery victim was foreseeable.[15] There were two dissents, each indicating that the killing was a justifiable homocide, not murder, and that the killing was not in furtherance of

---

[10] 7 N. Y. Consol. Laws Serv. (1951) § 1044 [italics supplied]. See also the New Jersey statute: "If any person, in committing... robbery... of which the probable consequences may be bloodshed, shall kill another... then such person... shall be guilty of murder." N. J. Stat. Ann. (Perm. ed. 1939) tit. 2, § 138-1.

[11] Pa. Stat. Ann. (Purdon, 1945) tit. 18, § 4701 [italics supplied].

[12] 382 Pa. 639, 117 A. (2d) 204 (1955).

[13] The majority opinion of the court said: "The sole question is whether the defendant can be convicted of murder... where the victim of an armed robbery justifiably kills the other felon as they flee from the scene of the crime?" Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204 (1955). The concurring opinion used similar language. It seems extraordinary that there is no discussion on the exchange of shots in view of the fact that the decision might have been more tenable had it been suggested that the deceased returned the fire in order to help his own escape and so might have been held to have been acting in furtherance of the common design of the felony.

[14] 382 Pa. 639, 117 A. (2d) 204 at 207 (1955).

[15] 382 Pa. 639, 117 A. (2d) 204 at 206 (1955).

the common design of the robbery but rather entirely opposed thereto.[16]

The majority of the court employed the felony murder statute to reach its decision, even though the Pennsylvania statute does not define felony murder but only divides murder into degrees. Under the terminology of the statute—"all *murder*... committed in the perpetration of... robbery... shall be murder in the first degree"[17]—it becomes necessary to prove that a murder has occurred *before* applying the statute because it only defines the degree of a murder *after* the crime of murder has been established.[18] Therefore, it seems that the court has assumed a murder in order to apply a statute to reach the result of murder previously assumed.

Since the statute only defines the degree of a felony murder, the problem is, properly, one of determining whether Thomas committed a murder at common law. Under the felony murder doctrine at common law, three elements are necessary to establish murder. First, malice is required[19] and this is present here, being implied from the commission of the felony of robbery. Second, the acts which caused the death must be part of, incident to, or in furtherance of, the common design of the felony (in this case, the robbery). This is an essential element with regard to the application of the felony murder rule.[20] In the instant case it is clear that the taking of the accomplice's life by the victim was a justifiable homicide committed in order to prevent escape.[21] As such, the action was in total opposition to the furtherance of the crime, and therefore the doctrine should not have

---

[16]See the dissents of Justice Jones, 382 Pa. 639, 117 A. (2d) 204 at 214 and 215 (1955), and Justice Musmanno, 382 Pa. 639, 117 A. (2d) 204 at 222 and 224 (1955).

[17]Pa. Stat. Ann. (Purdon, 1945) tit. 18, § 4701.

[18]The court itself seemed to admit this when it said: "The Code does not define 'murder,' but merely fixes the degree of the crime." 382 Pa. 639, 117 A. (2d) 204 (1955). Yet, on the next page the court said: "In applying the felony-murder statute...." These two statements appear contradictory.

[19]Clark & Marshall, Crimes (5th ed. 1952) § 239.

[20]People v. Basile, 356 Ill. 171, 190 N. E. 307 (1934) (one of felons killed policeman while preparing for proposed robbery, record showing no connection between robbery and killing; held, killing was not in furtherance of common design); State v. Oxendine, 187 N. C. 658, 122 S. E. 568 (1924) (accused and party firing fatal shot were adversaries and therefore defendant was not guilty of murder as he could not have been acting in furtherance of common design); People v. Kauffman, 152 Cal. 331, 92 Pac. 861 (1907); People v. Garippo, 292 Ill. 293, 127 N. E. 75 (1920); Butler v. People, 125 Ill. 641, 18 N. E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S. W. 1085 (1905); Commonwealth v. Campbell, 7 Allen 541 (Mass. 1863); People v. Sobieskoda, 235 N. Y. 411, 139 N. E. 558 (1923); 26 Am. Jur., Homicide § 190.

[21]Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204, 206 (1955): "That the victim... would attempt to prevent the robbery... and... shoot and kill... was... 'readily foreseeable'."

been applied in the *Thomas* case. As a dissenting judge pointed out, this was not a *murder* committed during the perpetration of a felony but in fact a *justifiable homicide* carried out by the robbery victim[22] to prevent the escape of a felon.[23] It is noted that the California and Pennsylvania statutes are identical,[24] yet in the California case of *People v. Ferlin*,[25] where an arsonist was accidentally burned to death while his accomplice stood guard outside, the appellate court affirmed the granting of a motion for a new trial following the conviction of the accomplice for murder. The court held that no murder had been committed, and noted also that the death did not occur in furtherance of the common design of the felony.[26] The third element to be considered in the *Thomas* case is that of causation. The court held that the accused's act of participation in the robbery was the "proximate cause" of the death and that he should be responsible for the natural and reasonably foreseeable results of the felony.[27] Such language, borrowed from the law of torts, may be the only appropriate means of testing causation,[28] but it should be applied with great care in a first degree murder case where a man may be on trial for his life. Prosser points out that the doctrine of "proximate cause" is a misnomer and would be better termed "legal cause."[29] He stresses that courts must find that the defendant's conduct has *in fact* caused the injury complained of before the proximate cause test can be applied, which he defines as a method of limiting liability.[30] In the *Thomas* case the defendant's act of participating in a robbery and running

---

[22]See 382 Pa. 639, 117 A. (2d) 204 at 222 (1955).

[23]A private citizen is permitted to kill in such a situation in the great majority of jurisdictions. Clark & Marshall, Crimes (5th ed. 1952) § 269(a).

[24]Cal. Penal Code (Deering, 1949) § 189. For Pennsylvania statute, see note 11, supra.

[25]203 Cal. 587, 265 Pac. 230 (1928).

[26]"It cannot be said . . . that the defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it." 203 Cal. 587, 265 Pac. 230, 235 (1928). The other reason given by the court was that since the deceased could not be guilty of his own murder, then neither could the accused. In other words there could not be a principal in the second degree if there was no principal in the first degree. 203 Cal. 587, 265 Pac. 230, 234 (1928).

[27]Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204 at 206 (1955).

[28]For discussion of proximate cause as a test, see: Notes (1955) 10 Rutgers L. Rev. 446 at 447 (maintains that a strict objective test for proximate cause is erroneous and that it should be a subjective test, within the objective framework, determined by what the accused himself knew); (1955) 28 Temp. L. Q. 453, 465 (approves proximate cause test); (1955) 59 Dick. L. Rev. 183, 184 (suggests that malice, not proximate cause, is underlying test for felony murder).

[29]Prosser, Torts (2d ed. 1955) 252.

[30]Prosser, Torts (2d ed. 1955) 252.

away therefrom in the opposite direction to that taken by his accomplice, could hardly be *in fact* the cause of the death of that accomplice. It is therefore questionable whether the court has correctly applied the doctrine of proximate cause.

The decision in the *Thomas* case ignores the *manner* in which the death occurred. Since the court reasoned that the defendant's participation in an armed robbery was the proximate cause of the death resulting therefrom and that death was a foreseeable and natural consequence of any such felony participation, it logically follows that in Pennsylvania a felony murder can be committed under farfetched circumstances. For example, if an escaping robber were to trip over his own shoe lace and die of a fractured skull, all of his co-felons, even though escaping in several directions, are guilty of first degree murder, for under the reasoning of the *Thomas* case, *a* death was a natural consequence and foreseeable result of their participation in the robbery and *a* death had occurred. Therefore, their taking part in the robbery would be the proximate cause of the death.

Despite this criticism, the Pennsylvania court's objective in extending the doctrine is understandable. In the majority opinion, the court pointed out that "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 and consequently must delicately balance the scales of justice so that the rights of the public are protected equally with those of persons accused of crime."[31] The deceased and the accused in the *Thomas* case were not members of innocent society, nor were they law-abiding people,[32] and in substance the court imposed the death penalty on the crime of armed robbery. If this is the objective, then robbery with violence should simply be made a capital offense in Pennsylvania by the legislature, instead of

[31]Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204, 205 (1955).

[32]Note, in addition, that none of the cases relied on by the court in the Thomas case are applicable to the facts therein, with the exception of Commonwealth v. Bolish, 381 Pa. 500, 113 A. (2d) 464 (1955) which was decided by the same judges, with Musmanno again dissenting. In this case the defendant (found guilty of murder in the first degree) and his accomplice were attempting arson. While the defendant stood guard outside, his accomplice carelessly blew himself up with kerosene and died. For discussion of this case see Notes (1955) 17 Pitt. L. Rev. 101; (1955) 59 Dick. L. Rev. 183. The cases relied on by the court included one mentioned as legally on all fours with the Thomas case, Commonwealth v. Almeida, 362 Pa. 596, 68 A. (2d) 595 (1949), in which one policeman by accident killed another policeman, and not an accomplice, while pursuing felons. Other cases were cited in which the deceased was also an innocent victim: Commonwealth v. Lowry, 374 Pa. 594, 98 A. (2d) 733 (1953); Commonweath v. Moyer, 357 Pa. 181, 53 A. (2d) 736 (1947) (attendant killed in filling station holdup); Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926) (police officer killed).

the courts accomplishing this result through a contortion of the felony murder doctrine.

In cases involving a death occurring during the commission of a felony, the courts should require: (1) the act causing death to be in furtherance of, or incident to, the common design and (2) establishment of a close causal—not a mere casual—connection between the acts of the defendant and the occurrence of the death. The doctrine should not be applied to the death of a felon at the hands of persons enforcing law and order so as to hold a co-felon guilty of murder. If one acts in concert with his brother to commit a felony, it shocks the conscience to realize that if a policeman deliberately shoots one brother down the other has committed"fratricide."

GAVIN K. LETTS

CRIMINAL LAW—RIGHT OF PUBLIC TO BE ADMITTED TO CRIMINAL TRIAL OVER OBJECTION OF ACCUSED. [Ohio]

Though there is general understanding that there is a right to a public trial in jurisdictions following the common law, the origin and scope of this right is somewhat obscure. Perhaps the right arose out of an aversion to Star Chamber practices, although it is by no means conclusive that these practices were conducted in secret.[1] At any rate, having already been established as a common law privilege in England, it became a guaranty under the Sixth Amendment of the Constitution of the United States,[2] and has been incorporated into most of the state constitutions.[3]

Equally as uncertain as the origin is the scope of the right to public trial. The connotation of the term "public trial" would seem to be a trial in which all the public has a right of admission, but the term has never enjoyed this literal a meaning. It is generally agreed that the public need not be admitted beyond the courtroom capacity,[4] and that

[1]In Re Oliver, 333 U. S. 257 at 266, 68 S. Ct. 499 at 504, 92 L. ed. 682 at 690 (1948); Radin, The Right to a Public Trial (1932) 6 Temp. L. Q. 381; Note (1949) 49 Col. L. Rev. 110.

[2]U. S. Const. Amend. VI.

[3]In Re Oliver, 333 U. S. 257 at 267, 68 S. Ct. 499 at 504, 92 L. ed. 682 at 691 (1948); Note (1949) 49 Col. L. Rev. 110.

[4]Wendling v. Commonwealth, 143 Ky. 587, 137 S. W. 205 (1911); State v. Brooks. 92 Mo. 542, 5 S. W. 257 (1887); Commonwealth v. Trinkle, 297 Pa. 564, 124 Atl. 191 (1924); Kugadt v. State, 38 Tex. Crim. Rep. 691, 44 S. W. 989 (1898); Note (1949) 49 Col. L. Rev. 110. It has been suggested that if the "public" means all those who desire to be present, then perhaps the limits of the court room do not constitute a proper restriction on the right to public trial; a demand to transfer the case to larger quarters may be proper. Radin, The Right to a Public Trial (1932) 6 Temp. L. Q. 381, 391.

members of the public engaged in misconduct that would obstruct the orderly procedure of the trial may be excluded.[5] This much discretion is necessary for the proper conduct of the trial. Many courts have gone a step further in the interest of public morals and have excluded certain classes of the public in cases involving obscene testimony.[6] It has also been said that such orders of exclusion may be made as will protect the public health and safety as well as public morals.[7] Actually justification for exclusion in the interest of public morals may be somewhat dubious, for it has been stated that "The public morals are not protected by trying to hide its sins behind closed doors. Better that we know our faults that we may ever increase our efforts to live in social rectitude."[8]

Conceding that these limitations render the right to a public trial a qualified right, further problems arise when there is an abuse of discretion by the trial judge in handing down an exclusion order. When there has been such an abuse, it is usually the defendant in a criminal case who complains, and his conviction may be reversed because of the error.[9] But the novelty of this right is that it may not

---

[5]Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508 (1917); People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108 (1894); State v. Scruggs, 165 La. 842, 116 So. 206 (1928); State v. Genese, 102 N. J. L. 134, 130 Atl. 642 (1925); Makley v. State, 49 Ohio App. 359, 197 N. E. 339 (1934); Note (1937) 35 Mich. L. Rev. 474, 475.

[6]State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914); State v. McCool, 34 Kan. 617, 9 Pac. 745 (1886); State v. Adams, 100 S. C. 43, 84 S. E. 368 (1915).

However, in Tilton v. State, 5 Ga. App. 59, 62 S. E. 651, 653 (1908) the court found a blanket order excluding all persons from the trial except those connected with the case to be much too sweeping. Such an order would render the constitutional guaranty of a public trial meaningless for it would add nothing at all to what had already been guaranteed by other provisions. "The right of counsel would give him the presence of his attorney, the right to be confronted by the witnesses would give him the benefit of their presence, the right of trial by jury would give him the benefit of the presence of the 12 men in the box, and besides these who else would be left to witness the trial save the prosecutor, the state's counsel, the judge, and the officers of court, persons absolutely necessary to the carrying on of any trial at all?" And in Ex parte Wade, 207 Ala. 241, 92 So. 104 (1922) the concern for public decency was found not to be enough to support an exclusion order in a mayhem case when the Constitution had vested discretionary power in the courts to exclude the public in cases of rape and assault with intent to rape.

Whereas there seems to be a logical basis for excluding minors in the interest of public morals, there can hardly be a logical basis for distinguishing between the sexes—excluding women and allowing men to remain. Though it may be in better social taste to segregate the sexes in cases of salacious nature, it would seem that men would be just as likely to be adversely affected by testimony concerning immoral actions as women would be.

[7]People v. Miller, 257 N. Y. 54, 177 N. E. 306 (1931).

[8]E. W. Scripps Co. v. Fulton, 125 N. E. (2d) 896, 904 (Ohio App. 1955).

[9]Davis v. United States, 247 Fed. 394 (C. C. A. 8th, 1917); People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108 (1894); Tilton v. State, 5 Ga. App.

belong solely to the defendant, as is exemplified by the recent case of *E. W. Scripps Co. v. Fulton*.[10] This proceeding arose out of an order by an Ohio trial judge during a pandering trial, excluding members of the public from the courtroom on request of the defendant on the ground that it might be possible to compel the witness for the state to tell the truth on cross-examination, if she were examined in private. Certain individuals affected by the order sought a writ of prohibition against the judge to prevent him from excluding them and all other members of the public, on the ground that *their* right to a public trial had been denied. Although the pandering trial was concluded before a hearing on the writ could be held, the Ohio appellate court in which the writ was sought went on to determine the legal right of the trial court to make this exclusion order because of the stipulation by the trial judge that he would in the future again exclude the public during the trial of a felony under like circumstances.

The court held that the section of the Ohio Constitution providing that a defendant is entitled to a public trial is a provision for the benefit of the defendant, but that fact does not, however, guarantee the defendant a *private* trial as against the public whose interests are equally involved in the judicious administration of the law. In other words, members of the public have a right to complain if there is a denial of a public trial. A defendant may waive his own right to have the public present at his proceedings, but this privilege gives him no authority to waive any rights the public may have.[11] Reference to this interest of the public was made by the Montana court in *State v. Keeler*.[12] In reversing a conviction of the defendant on the ground that he had been denied a public trial the court there asserted that this right "involves questions of public interest and concern. The people

---

59, 62 S. E. 651 (1908); State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277 (1906); State v. Osborne, 54 Ore. 289, 103 Pac. 62 (1909).

[10]125 N. E. (2d) 896 (Ohio App. 1955).

[11]The court seemed not to be able to discover a specific source of the right it recognized in the public. All authority cited appears to deal with the *accused's* right to public trial, and the court could state no more precise foundation for the public's right than in such indefinite phrases as: "The community is deeply interested in the right to observe the administration of justice and the presence of its members at a public trial is as basic as that of a defendant whether such right be provided for in the constitution or otherwise." E. W. Scripps Co. v. Fulton, 125 N. E. (2d) 896, 899 (Ohio App. 1955).

[12]52 Mont. 205, 156 Pac. 1080 (1916). Also recognizing some interest in the public: State v. Hensley, 75 Ohio St. 255, 79 N. E. 462 (1906); State v. Haskins, 38 N. J. Super. 250, 118 A. (2d) 707 (1955); State v. Bonza, 72 Utah 177, 269 Pac. 480 (1928). However, in all these cases the *defendant* was raising the question of a right to public trial, and not a member of the public who had been excluded.

are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff, and clerk—conduct the public's business."[13]

This broad evaluation of the importance of the right to public trial is by no means universal. To some courts a public trial means simply one that is not secret—that is, if certain classes of spectators are admitted, it is considered public.[14] Moreover, it has been held that there must be an actual showing of prejudice to the accused as a result of the exclusion of someone who might have been of aid before there is a deprivation of the right.[15] Further, the right may be waived by failure to make timely objection to an exclusion order.[16] Courts which follow this narrow view think only in terms of a right belonging to the accused and reject any argument that the public has a right to be present.[17]

Other courts, however, have given a more broad construction to the term "public trial," interpreting it as one in which "the doors of the courtroom are expected to be kept open"[18] with "persons of all classes"[19] being admitted.[20] And if the privilege is not accorded in this full sense, the accused's right is deemed to have been violated even

---

[13]State v. Keeler, 52 Mont. 205, 156 Pac. 1080, 1083 (1916).

[14]Reagan v. United States, 202 Fed. 488, 44 L. R. A. (N. S.) 583 (C. C. A. 9th, 1913) (proper to exclude all but witnesses, court officers and all members of the bar); Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918) (only witnesses, defendant's relatives, and reporters admitted); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896) (only lawyers, law students, court officers and witnesses admitted); Robertson v. State, 64 Fla. 437, 60 So. 118 (1912) (all persons directly interested in the case admitted); State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914) (all persons other than spectators admitted); State v. McCool, 34 Kan. 617, 9 Pac. 745 (1886) (all persons other than ladies admitted); State v. Nyhus, 19 N. D. 326, 124 N. W. 71 (1909) (jurors, court officers, attorneys, litigants, witnesses and persons whom the parties may request to remain admitted); State v. Holm, 67 Wyo. 360, 224 P. (2d) 500 (1950) (witnesses, interested parties and friends admitted).

[15]Reagan v. United States, 202 Fed. 488 (C. C. A. 9th, 1913); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); State v. Nyhus, 19 N. D. 326, 124 N. W. 71 (1909); Note (1949) 49 Col. L. Rev. 110.

[16]Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); State v. Smith, 90 Utah 482, 62 P. (2d) 1110 (1936); Note (1949) 49 Col. L. Rev. 110.

[17]Moore v. State, 151 Ga. 648, 108 S. E. 47 at 52 (1921); Note (1949) 49 Col. L. Rev. 110.

[18]People v. Hartman, 103 Cal. 242, 245, 37 Pac. 153, 154 (1894).

[19]People v. Byrnes, 190 P. (2d) 290, 294 (Cal. App. 1948).

[20]United States v. Kobli, 172 F. (2d) 919 (C. A. 3rd, 1949); Davis v. United States, 247 Fed. 394 (C. C. A. 8th, 1917); State v. Keeler, 52 Mont. 205, 156 Pac. 1080 (1916); State v. Hensley, 75 Ohio St. 255, 79 N. E. 462 (1906); State v. Haskins, 38 N. J. Super. 250, 118 A. (2d) 707 (1955); People v. Jelke, 308 N. Y. 56, 123 N. E. (2d) 769 (1954).

though no actual prejudice is shown.[21] Furthermore, some courts have held that failure of the defendant to make timely objection when the exclusion order is made does not waive the right.[22] It might well follow that these jurisdictions would be likely to recognize the right as belonging to the public as well as the accused. However, this is not necessarily the case, for jurisdictions following the narrow approach to the scope of the right to public trial might still recognize a right in the public after restricting the standing of the accused to raise the question. Conversely, a jurisdiction which accords a broad interpretation to the right as far as the accused is concerned, might rule that the public has no standing at all to assert this right.

Two broad reasons may be advanced in favor of extending this right to the public: (1) the interest of the public in securing justice for those accused of a criminal offense, because members of the public may find themselves in a similar position at some later date. (2) The interest of the public in securing the protection of society by seeing that the guilty are properly tried and punished. These two factors may be merged into one broader consideration—the proper administration of justice in criminal proceedings.[23]

Recognition of the public's concern in the matter creates a possible conflict between the respective interests of the public and the accused, since the latter on occasion may greatly desire a trial without the public in attendance. In the instant case the public had been excluded from the trial of the accused because of his claim of prejudice if they stayed, in that the defense would better be able to compel the witness for the prosecution to tell the truth if they could cross-examine her in private. Because a person might not always enjoy the most favorable position conceivable may not necessarily mean that there is injustice. For instance, the accused could not validly ask that the public be excluded because a witness in absence of the public would

---

[21]United States v. Kobli, 172 F. (2d) 919 (C. A. 3rd, 1949); Tanksley v. United States, 145 F. (2d) 58 (C. C. A. 9th, 1944); Davis v. United States, 247 Fed. 394 (C. C. A. 8th, 1917); People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894); State v. Keeler, 52 Mont. 205, 156 Pac. 1080 (1916); State v. Haskins, 38 N. J. Super. 250, 118 A. (2d) 707 (1955); People v. Jelke, 308 N. Y. 56, 123 N. E. (2d) 769 (1954).

[22]Wade v. State, 207 Ala. 1, 92 So. 101 (1921); Stewart v. State, 18 Ala. App. 622, 93 So. 274 (1922); State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277 (1906); State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923). Whether failure to appeal following a trial from which the public was excluded would constitute a waiver barring collateral attack is an open question. Note (1949) 49 Col. L. Rev. 110, n. 19.

[23]As Justice Black stated in In re Oliver, 333 U. S. 257, 270, 68 S. Ct. 499, 506, 95 L. ed. 682, 692 (1948): "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

lie in his favor. However, the accused in the instant case had an effective argument in his favor, for it is in the best interest of justice to obtain full disclosure of the truth. When the accused has such a valid ground for exclusion and the public still wants admission to the trial, any conflict between their respective rights seemingly would have to be resolved in accused's favor since the primary aim of the public in asserting its right to a public trial is to secure fair trials for those accused of crimes. Thus, it would seem that any real conflict would not lie between the right of accused and the public to a public trial, but between some other right of accused (fair trial, for instance) and the right of the public to attend the trial.[24]

The flaw in trusting a trial judge with power to exclude the public in the interest of justice in a particular case is that his opinion as to whether privacy will serve the interests of justice may be faulty. If that is true, by excluding the public he might as likely enable defendant to defeat adverse justice as to attain favorable justice. Because of the danger of a possibility of faulty judgment by trial judges the rule should be nearly absolute that the public be admitted.[25]

Assuming that the public has a right to open trial, it may be further assumed that its right is subject to the same qualifications noted as limiting the accused's right, one of these qualifications resting on the capacity of the courtroom. If not all members of the public desiring to attend can be accommodated, the problem arises as to whether some members have priority over others. The principal case suggests that members of the press might be in a superior position, for the reason that there may be those who, for various reasons, cannot or are not permitted to attend judicial proceedings and therefore must gain knowledge about such proceedings only through the work of news gathering and disseminating agencies. After stating that "The rights of representatives of the press can... rise no higher and by the same token, can be no less, than the rights of any other member of the public," the court in the instant case went on to say, "when judicious limitation of those attending a public trial is necessary, such fact should be considered in favor of allowing members of the press to

---

[24]When there is a conflict between the right to public trial and another right, it would seem that the right to public trial should give way only to the extent that such yielding is absolutely necessary in the interest of justice. For instance, if a particular witness would tell the truth in absence of the public, the public probably should, in fairness to defendant, be excluded for that particular testimony; but this fact should not be a basis for exclusion of the public from the whole trial.

[25]In order to exclude the public for any reason, the burden should be on the defendant to show that he will be unfairly prejudiced by the public's presence; and it is for this reason alone that the public should be excluded.

attend."[26] A possible explanation for this statement is that the court meant that the members of the press had no superior position merely by virtue of being members of the press, and so if there is reason for exclusion of the public then this reason extends to the press; and conversely, if the press has the right to be admitted then other members of the public also have the right to be admitted. But in a situation where both cannot be admitted the press should be favored because newspaper reports of the trial will reach a larger segment of the public than could be informed by an individual spectator. Some courts, however, seem to feel that there is a sort of sanctity in the presence of the press and therefore hold that a defendant has been accorded his right to a public trial when the press was in attendance even though members of the public in general were excluded despite there having been no problem of capacity of the courtroom.[27] And in *State v. Sheppard*[28] it was found to be within the sound discretion of the court to arrange the courtroom to accommodate a great many representatives of the press, radio and television. This is not to say that all courts acknowledge a right of the press to be present at a trial, for in *United Press Associations v. Valente*[29] it was held that an order of the judge of the Court of General Sessions excluding the general public and the press on the grounds of public decency did not deprive press associations and newspaper publishers of any legal right or privilege.

Perhaps those courts which find the requirements for public trial have been met if the press is admitted lose sight of the main purpose behind admission of the press, which purpose would seem to be expeditiously to apprise the general public of the trial proceedings. And a need for the report of the press only arises when members of the public are prevented, by incapacity of the court room or some other reason, from attending the trial. Thus, the inability of all members of the public to get into the courtroom should be the only consideration in according members of the press any priority.[30]

A further question remains as to the method by which the public may assert its right against an abuse of discretion on the part of the court in excluding members of the public from a trial. If the accused

[26]E. W. Scripps Co. v. Fulton, 125 N. E. (2d) 896, 904 (Ohio App. 1955).

[27]Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); State v. Smith, 90 Utah 482, 62 P (2d) 1110 (1936). One New York decision, following the view that the public trial is for a defendant's benefit and reaffirming the position that the public generally may not attend sittings of the courts, states that the public may be kept informed of what transpires in court by the press. Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245, 103 N. E. 155 (1913); Note (1954) 52 Mich. L. Rev. 609.

[28]128 N. E. (2d) 471 at 500 (Ohio App. 1955).

[29]308 N. Y. 71, 123 N. E. (2d) 777 (1954).

[30]Some courts may confuse the guaranty of freedom of the press with the right

were the aggrieved party, he immediately could enter an objection upon the record on which an appeal from a conviction could be based, but this means it not available to the public. While a conviction might be reversed for error in failing to accord the defendant an open trial, of course an acquittal could not be reversed for error in denying the public its right, as such action would put the accused in double jeopardy. The principal case suggests the possibility of allowing the public the opportunity to assert its right by means of a declaratory judgment. However, a court may refuse to entertain a declaratory judgment action *after* the trial to which the public is seeking admittance has ended and the point has become moot. And even a favorable judgment obtained at that late date may be of no practical benefit. The writ of prohibition, resorted to in the principal case is subject to the same weakness, so far as protecting the public's right in the current trial is concerned. The Ohio court did proceed to issue the writ in order to make a determination of the rights of the public in future actions.[31] But whether this decision would be binding in future situations would seem to be rather questionable. It has been conceded that the trial judge has some discretion in the matter of excluding the public from a trial,[32] and whether there has been an abuse of that discretion would seem to be a question that would have to be determined on the merits of each particular case. At any rate, the res judicata principle would not give the ruling a binding effect, for it is more than likely that the parties would be different and certainly the subject matter of a subsequent trial would be different. Finally, a delay in the trial to allow a determination of whether there has been an abuse of discretion in excluding the public might unduly prejudice the right of the accused to a speedy trial.

Thus, it has been seen that though the public's right may exist

---

of the press to be present at trial in the capacity of a part of the public. As stated in United Press Associations v. Valente, 203 Misc. 220, 120 N. Y. S. (2d) 642, 648 (1953), the guaranty of freedom of the press "obviously guarantees only the free and unrestricted right to disseminate knowledge or information possessed by the public or the press. It does not purport to confer upon ... the press a constitutional right of access to all places, whether public or private, with the object of securing information for purposes of publication."

[31]On appeal to the Ohio Supreme Court, it was held that the point had become moot before the writ had issued. The court stated that the declaration of the trial judge in regard to the exclusion of the public in future trials was not a declaration that he will automatically grant a request to exclude the public, but only that he will use his discretion in determining whether the circumstances warrant such an order. Such a declaration is not the proper subject of an action in prohibition. E. W. Scripps Co. v. Fulton, 130 N. E. (2d) 701 (Ohio App. 1955).

[32]See notes 4-7, supra.

in theory, it is an extremely tenuous one. In any event it must be qualified by the trial judge's discretionary power to set it aside where the administration of justice so requires; and even in the spheres where the right dons a cloak of definiteness, there does not seem to be any effective remedy to insure its prompt enforcement.

BEVERLY G. STEPHENSON

DAMAGES—MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO DRILL OIL OR GAS WELL. [Kansas]

Though the proper theory for awarding damages for breach of contract is recognized to be to place the plaintiff as nearly as possible in the position he would have occupied had there been performance by the defendant,[1] the courts have experienced almost insurmountable difficulties in attempting to apply that theory in actions for damages for breach of contract to drill an oil or gas well.[2] As a result, one of three or four rules may be adopted in any given case as a basis upon which a jury may estimate the amount of damage sustained.

The damages aspect of these cases should be dealt with in three general categories, depending upon the intent or purpose of the parties in making such a contract: (1) where the defendant has been employed to drill a well on a contract basis and has no interest in the possible

[1]McCormick, Damages (1935) § 137; 5 Williston, Contracts (Rev. ed. 1936) §§ 1338, 1339.

[2]Apparently a fine line of distinction exists between the cases where there is a bare breach of an obligation to drill and those cases which deal with the breach of an obligation to develop property upon which there is already a producing well, or where there are wells adjacent to the plaintiff's land subjecting the property to drainage (offset wells). Examples of cases dealing with the obligation to develop are: Empire Oil & Ref. Co. v. Hoyt, 112 F. (2d) 356 at 361 (C. C. A. 6th, 1940) (measure of damages for failure diligently to develop and operate oil leasehold on royalty basis after discovery of oil thereon, is rents or royalties which would have accrued to lessor if lessee had fully complied with contract); Deep Rock Oil Corp. v. Bilby, 199 Okla. 430, 186 P. (2d) 823 (1947) (where there is failure to develop and there is producing well on property and proven loss by drainage, Oklahoma follows royalty rule as to loss by drainage); Bland v. Barkalow, 117 F. Supp. 1 at 2 (W. D. La. 1953) (where mineral lease provides as only penalty for failure to fulfill conditional drilling obligation that lease shall be forfeited, there can be no recovery of damages based on amount it would have cost to drill well); Duncan v. Scott, 128 S. W. (2d) 136 at 139 (Tex. Civ. App. 1939) (both remedy of forfeiture and cancellation, and for damages may be applied in proper case); General Crude Oil Co. v. Harris, 101 S. W. (2d) 1098 (Tex. Civ. App. 1937) (tract located on extreme eastern edge of East Texas oil field and producing well had been drilled on 397 acre tract and no others; held, damages for failure to develop were properly based on loss of royalties caused by delay).

future production; (2) where a lease or assignment has been made based on the expectation of future royalties, the consideration for the lease being the lessee's agreement to drill a well; and (3) where the plaintiff is interested in a test well on his property and in the effect of such a well on adjoining property owned or leased by the plaintiff (giving rise to the so-called "information contract").

In the first situation, where the defendant has no interest in the well and is hired to drill for a contract price, the courts have purported to follow the general rule of contract damages by fixing the measure of damages as the reasonable cost of drilling or completing the well minus the unpaid contract price.[3] It has been held that the loss of profits for such a breach are too speculative to be considered.[4] Thus, it appears that courts in this situation refuse to consider the fact that the plaintiff may have difficulty in employing another driller, or that there may be a loss through the delay caused by defendant's breach. This position is possibly based on the fact that this type of contract would not arise in a developed oil or gas field which would offer available evidence of loss of profits from the failure to strike minerals, or for loss caused by drainage. However, if such losses can be proved with certainty and were within the contemplation of the parties at the time of contracting,[5] they should be recognized as an item of recovery.

Where the dealings between the plaintiff and the defendant involve a lease, the object of which is to collect the benefits of future royalties, and the sole consideration for the lease is the lessee's obligation to drill, the courts have adopted divergent rules as to the proper measure of damages for a breach of the obligation to drill. In the recent case of *Gartner v. Missimer*,[6] the Kansas court applied the cost of drilling or completing the well as the measure of damages. By the terms of the lease, defendant was to drill two wells to the depth of Bartlesville sand (about 900 feet in this instance) within specified times, and one well to the depth of Arbuckle sand (about 1300 feet in this instance) within six months, and an additional Arbuckle well within one year if the

[3]Corbin Oil & Gas Co. v. Mull, 123 Ky. 763, 97 S. W. 385 (1906); North Healdton Oil and Gas Co. v. Skelley, 59 Okla. 128, 158 Pac. 1180 (1916); McCormick, Damages (1935) § 169. Accord: Covington Oil Co. v. Jones, 244 S. W. 287 (Tex. Civ. App. 1922).

[4]Clarke v. Blue Licks Springs Co., 184 Ky. 827, 213 S. W. 222 (1919). Accord: Childers v. Tobin, 111 Kan. 347, 206 Pac. 876 (1922).

[5]See Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854); McCormick, Damages (1935) § 138. It is almost certain that such proof would be available only in a developed field.

[6]178 Kan. 566, 290 P. (2d) 827 (1955).

first was a producer. Though there were producing Bartlesville wells on all sides of the plaintiff's land, his first Bartlesville well was dry, and the second was only a small producer. The Arbuckle well was never drilled and the lease was abandoned. Plaintiff sued for damages for breach of the obligation to drill, but defendant argued that only nominal damages could be awarded because plaintiff failed to prove his damages with sufficient certainty. Testimony was admitted in order to establish the cost of drilling or completing one of the wells already started, and plaintiff was awarded damages of $3500, which judgment was affirmed by the Kansas Supreme Court. This court ruled that defendant, upon breaching the obligation to drill a well to the Arbuckle lime, was answerable in such damages as were the natural and ordinary consequence of the breach, and that under the circumstances of this case, those damages should be measured by the amount of money that would be required to drill a well or complete the well that had already been started.[7]

The rule applied by Kansas has support in several other jurisdictions,[8] and has even been accorded majority status by one writer.[9] The ease with which a jury can estimate damages is a practical factor in favor of this measure, and theoretical justification has been placed on the ground that it gives the monetary equivalent of the act which the defendant agreed to perform,[10] and that prospective royalties were not

---

[7]The court stated that this was not the usual situation to be found where an oil and gas lease is involved, or where the driller has been hired to drill a well or wells to a specified depth, and that each case must be determined on its own set of facts and circumstances. 178 Kan. 566, 290 P. (2d) 827 at 831 (1955). However, the reason for this statement is not clear. It appears that the agreement between the parties in this case as to the lease is the normal situation where there is an obligation to drill.

[8]R. Olsen Oil Co. v. Fidler, 199 F. (2d) 868 (C. A. 10th, 1952); All-American Oil & Gas Co. v. Connellee, 3 F. (2d) 107 (C. C. A. 5th, 1924); Brown v. Homestake Exploration Corp., 98 Mont. 305, 39 P. (2d) 168 at 179 (1934); Eysenback v. Cardinal Petroleum Co., 110 Okla. 12, 236 Pac. 10, 12 (1925) ("As shown by the evidence, this is the only measure of damages [cost of drilling] that is direct and capable of computation."); Ardizonne v. Archer, 72 Okla. 70, 178 Pac. 263 (1919); Curry v. Texas Co., 18 S. W. (2d) 256 (Tex. Civ App. 1929). Cf., Texas Pacific Coal & Oil Co. v. Stuard, 7 S. W. (2d) 878 (Tex. Civ. App. 1928).

[9]Note (1939) 14 Tulane L. Rev. 81, 85.

[10]Curry v. Texas Co., 18 S. W. (2d) 256 (Tex. Civ. App. 1929); dissent in Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343, 347, 348 (Tex. Civ. App. 1933): "By value of contract's performance we understand is meant the monetary equivalent of the contract's performance...." The majority decision in the Guardian Trust Co. case apparently settled the Texas rule. The decisions before 1933 had not been consistent, but this case adopted the royalty rule as its standard of recovery, and Guardian Trust Co. v. Brothers has been followed since that time.

within the contemplation of the parties.[11] However, the strong emphasis which is laid on the ease of meeting the certainty of proof requirement under this rule indicates recognition of the fact that an award given under it may not be an accurate reflection of the plaintiff's loss; rather, it is resorted to because of lack of a better way to award substantial damages. But the rule appears to employ an arbitrary measure and is in conflict with the general rule of damages for breach of contract that the purpose of the monetary award is to place the plaintiff in the position he would have occupied had there been no breach. Where a well drilled under the contract would have produced large quantities of the mineral which the plaintiff can no longer extract or has lost through drainage, he will be left without adequate compensation if awarded only the cost of drilling. Conversely, if the cost of drilling would be more than the royalties which would have resulted from a well, rigid application of this rule will place the plaintiff in a better position than he would have occupied if there had been performance by the defendant.[12] And if the plaintiff is awarded the cost of drilling recovery, and then continues drilling operations which result in a well of profitable production, he gets something like the equivalent of a well on his land plus the royalties from the future production,[13] though there may be some loss through drainage from his property caused by the delay.

If, as appears in the principal case, the drilling was to be done in a developed field, both logical and practical considerations support

---

[11]Dissent in Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343, 347, 348 (Tex. Civ. App. 1933): "In an unproven field a contract for a test well which obligates one party absolutely to drill the well to a specified depth contemplates... that, when the contract is fully performed, there may be no valuable minerals discovered, and hence no profit from the production thereof. It is therefore apparent that the value of the contract's performance in the very nature of such a case would not include something which the contract did not contemplate as being embraced within its performance."

[12]E.g., Golston v. Bartlett, 112 S. W. (2d) 1077 at 1081 (Tex. Civ. App. 1938); Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343 at 345 (Tex. Civ. App. 1933); Curry v. Texas Co., 18 S. W. (2d) 256 (Tex. Civ. App. 1929); Texas Pacific Coal & Oil Co. v. Stuard, 7 S. W. (2d) 878 at 881 (Tex. Civ. App. 1928). In the latter case, the court pointed out that the sole purpose of actual damages is compensation, and the plaintiffs showed damages for loss of royalties at $25,000 while the cost of drilling was $50,000. "The cost of drilling a well is the correct measure of damages for the breach of a drilling contract; but since the plaintiffs saw fit to plead and prove that the total amount which they would have realized, had said well been drilled and the premises thereafter been developed, was less than the cost of drilling, then by such allegation and proof they made such amount the measure of their damages.... Otherwise, the defendant would be penalized in the name of actual damages." Note (1944) 22 Tex. L. Rev. 481, 486.

[13]Hoffer Oil Corp. v. Carpenter, 34 F. (2d) 589 at 591 (C. C. A. 10th, 1929).

the application of the royalty measure.[14] In such a case, the purpose of drilling is not the well per se, but royalties from expected production.[15] The basis for a choice between the two rules would seem to be whether plaintiff can, as a matter of practical proof, show what his royalties would likely have been if the well had been drilled, and cases which follow the royalty rule contend that the evidence by expert witnesses as to royalties from future production will give the jury an adequate basis for establishing damages. Reasonable evidence of the lack of final production should be considered in favor of defendant in the assessment of damages, if such proof is available.[16]

However, it must be noted that where there is a recovery on the basis of expected future royalties, and the plaintiff continues drilling operations with another driller which results in production, he gets double royalties from the same field. For this reason, the West Virginia court has rejected the royalty rule and recommended instead that only the interest on the value of the royalties be allowed as a recovery.[17] On the other hand, the Texas court rejected the West

---

[14]Julian Petroleum Corp. v. Courtney Petroleum Co., 22 F. (2d) 360, 362 (C. C. A. 9th, 1927). In Waldrip v. Hamon, 136 F. Supp. 412, 415 (E. D. Okla. 1955), the federal court refused to follow the cost of drilling rule accepted by Oklahoma, stating that the object of the parties in the present case was the production of oil and not the drilling of a well. "Where the courts have applied such a norm [cost of drilling] two basic conditions have existed. First, the breached contracts were ones wherein there was an *unconditional* promise to drill specific wells, with the drilling of a well, or wells, the paramount object in view. Secondly, the cost of the well appeared to be the most logical rule to apply to determine the exact extent of the loss of the promisee because of the breach." In Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S. W. 286 at 289 (1921), the court implied a covenant to drill a protection well on plaintiff's land, and damages were assessed as plaintiff's proportionate share of the gas taken by the wells drilled so near their boundary line as to draw off gas underneath their land. The defendant had done the drilling on the adjoining land. Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N. E. 308 (1914); Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343 (Tex. Civ. App. 1933); Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S. W. (2d) 1031 (1928). Cf., Fallis v. Julian Petroleum Corp., 108 Cal. App. 599, 292 Pac. 168 (1930).

[15]Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343, 345 (Tex. Civ. App. 1933). The property here was located in an oil field and there had been wells on the land previously. Plaintiff proved only the cost of drilling, and in refusing to measure damages on that basis, the court observed: "No other value to appellants than the value of the royalty was contemplated."

[16]Golston v. Bartlett, 112 S. W. (2d) 1077 at 1082 (Tex. Civ. App. 1938); Grass v. Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750 at 755 (1915). See Duncan v. Scott, 128 S. W. (2d) 136, 138 (Tex. Civ. App. 1939): "It has long been the established law that where one has contracted to drill an oil well he may avoid damages for the breach of his contract by pleading and proving that he could not drill a well that would prove to be one producing oil in paying quantities." However, no such defence had been pleaded in this case.

[17]See Grass v. Big Creek Development Co., 75 W. Va. 719, 84 S. E. 750, 755 (1915): "So far as disclosed, they [plaintiffs] have lost nothing more than interest on the value of productions obtainable...."

Virginia view on the ground that the period for which interest is to be allowed cannot be definitely ascertained, and that full value of the royalties must be given if the lessor is to be placed in the same position he would have occupied if the contract had been performed.[18] It was reasoned that the possibility of double recovery could be avoided by allowing the defendant-lessee the privilege of producing, in the future, royalty free.[19] Where the defendant has lost his rights under the lease to continue operations and could show that the plaintiff intends to continue drilling operations, it would be in line with the proper contract damages theory to award plaintiff only the losses caused by the delay in production.

Though the royalty rule is satisfactory in producing areas where expert testimony can be given as to possible future production based on producing wells in that field, in wildcat territory the rule would result in such serious uncertainty of proof that frequently only nominal damages would be awarded. Though the entire risk of loss is on the defendant when drilling under these lease contracts, he should not be heard to say that there shall be no recovery by the plaintiff for defendant's breach merely because the element of damages is uncertain.[20] The well which the defendant has agreed to drill would have been the only possible evidence of the presence of minerals, and his failure to perform is the cause of the plaintiff's inability to prove damages with certainty.[21] Thus, it seems that the cost of drilling would

---

[18]Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S. W. (2d) 1031 at 1036 (1928).

[19]Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6. S. W. (2d) 1031 at 1039 (1928); Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S. W. (2d) 1039 at 1045 (1928).

[20]Hoffer Oil Corp. v. Carpenter, 34 F. (2d) 589 at 592 (C. C. A. 10th, 1929); Daughetee v. Ohio Oil Co., 263 Ill. 518, 105 N. E. 308 at 311 (1914); Brown v. Homestake Exploration Corp., 98 Mont. 305, 39 P. (2d) 168 at 178 (1935); Chamberlain v. Parker, 45 N. Y. 569 at 572 (1871); Golston v. Bartlett, 112 S. W. (2d) 1077 at 1080 (Tex. Civ. App. 1938). See note 16, supra.

[21]In Waldrip v. Hamon, 136 F. Supp. 412, 415 (E. D. Okla. 1955), the court followed the royalty rule, distinguishing the case from the Oklahoma state decisions, but observed: "A different situation exists where it is absolutely impossible to determine whether the well not drilled would have been dry or a tremendous producer. Under such circumstances the 'cost of the well' is the best, if not the only means of judging the damage resulting from the breach."

Where the courts have the choice of following the certainty rule and allowing defendants to breach with impunity, or of rationalizing means of avoiding the rule and thereby awarding damages which may not remotely reflect the plaintiff's actual loss, there appears to be a modern trend to allow substantial damages even at the cost of applying an illogical measure. See Note (1952) 9 Wash. & Lee L. Rev. 75. An example of such procedure in other types of cases is Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255 (1891). Courts that follow the cost of drilling rule may, in effect, compel specific performance of such contracts unwittingly or by intention: a driller

be the only measure by which a jury could fix damages that would save the plaintiff from the nominal damages result.[22]

In the third situation, where the plaintiff is primarily interested in the effect the drilling of a well will have on adjoining land owned or leased by him, the courts have again applied different rules to measure the damages for the defendant's failure to drill. Texas has allowed the plaintiff the reasonable value of the leases assigned—i.e., the monetary value of the property leased—thus giving no damages for the loss of the bargain.[23] Oklahoma, on the other hand, leans to the cost of drilling.[24] However, both rules again depart from the general principles of damages for the breach of contract, and the cost of drilling formula is still open to the objection that it may either over-compensate or under-compensate the plaintiff. A rule which is better in theory allows the value to the plaintiff of the services agreed to be rendered by the defendant in furnishing the information sought, and the value of the services may be set at what the

---

who knows that a future breach will result in damages based on the cost of drilling may be induced to continue drilling even though he feels that the well will produce nothing.

[22]The same result may be reached by a different approach in cases which have placed a value on the chance of recovery of minerals. Fite v. Miller, 192 La. 229, 187 So. 650, 657 (1939): "The measure of damages is the value of the uncertain hope which the plaintiff had, in consequence of the assurance that a well would be drilled in search of oil or gas on the leasehold in which he retained a half-interest. We are not called upon now to lay down a formula for ascertaining the value of the uncertain hope.... The best criterion will be the amount that it would cost to drill the well to the depth specified."

[23]Henry Oil Co. v. Head, 163 S. W. 311 (Tex. Civ. App. 1913). This view was rejected by Hoffer Oil Corp. v. Carpenter, 34 F. (2d) 589, 591 (C. C. A. 10th, 1929) as running counter to the fundamental concept of contract damages—that they are awarded as compensation for injury suffered, and not to restore the consideration paid. In Restatement, Contracts (1932) § 331, two alternate methods of satisfying the certainty requirement are proposed: "(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. (2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property." In a developed field, the first alternative would allow for lost profits proved, but in a wildcat area such proof would not be available, and so the court is left with the second alternative. But what is to be the basis of determining the value of property in a wildcat area? Certainly it would have to be the value of the land as possible oil or gas development property. With no assurance whatever that minerals are present, its value in this respect would probably result in little more than nominal damages. See Cotherman v. Oriental Oil Co., 272 S. W. 616, 622 (Tex. Civ. App. 1925).

[24]Okmulgee Producing & Refining Co. v. Baugh, 111 Okla. 203, 239 Pac. 900 (1925); Eysenback v. Cardinal Petroleum Co., 110 Okla. 12, 236 Pac. 10 (1925).

reasonable person would contribute to the cost of the well.[25] But the obvious practical objection to this measure is that there is no clear test which can be applied by the jury in determining the amount of recovery.[26]

If the breach has resulted in a loss of increase in the value of the lease of adjoining lands, some courts allow recovery for such loss.[27] But where it can be shown that the property is devoid of minerals, the plaintiff should show that he would have sold his leases or interests before the drilling was completed.[28]

---

[25]In Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F. (2d) 488 (C. C. A. 10th, 1930), the trial court had awarded the plaintiff $10,500 as damages based on one-half of the cost of drilling. On appeal, the judgment was reversed on the holding that the instruction on measure of damages was erroneous. At the second trial, the plaintiff was awarded damages for $10,000, with the court having allowed evidence as to the amount a test well would increase the value of nearby leases, and the amount that an operator would contribute to the dry hole test. The judgment was affirmed. Bu-Vi-Bar Petroleum Corp. v. Krow, 47 F. (2d) 1065 (C. C. A. 10th, 1931). Hoffer Oil Corp. v. Carpenter, 34 F. (2d) 589, 593 (C. C. A. 10th, 1929): "The information can be obtained only by drilling.... Therefore the damages must be based upon the value of the services rendered in obtaining the information, and not upon the value of the information after it is obtained.... We conclude that the value of such services is what a reasonable person owning land adjacent to the lands on which another proposes to drill such a test well... would ordinarily pay by way of contribution to the cost of such test well for the log of such well and the geological information which the drilling thereof would disclose. While a witness should not be permitted to speculate or conjecture as to possible or probable damages, still the best evidence obtainable, under the circumstances, is receivable, and this is often nothing better than the opinion of well-informed persons.... It would, of course, be something less than the full cost of drilling the well, because with the full amount the contributor could drill a well on his own land." Cert. den., 280 U. S. 608, 50 S. Ct. 158, 74 L. ed. 651 (1930). The same rule is set forth in Atlantic Oil Producing Co. v. Masterson, 30 F. (2d) 481 at 482 (C. C. A. 5th, 1929), but here the plaintiff relied on the cost of drilling as damages. The court held that damage sustained was the value of the information, and since plaintiff failed or declined to prove any such damages through the failure to drill, a directed verdict for nominal damages was affirmed.

[26]Note (1930) 39 Yale L. J. 431, 432: "A possible objection is that it leaves the jury with no test for determining the value of the services rendered. As the only way to obtain the information is by actual drilling, the value of such services would seem to be the cost of drilling less the value to the defendant of the chance to strike oil—i.e., less the value of the lease at the time it was assigned." And see note 25, supra.

[27]Sanzenbacher v. Howard-Clay Oil Co., 283 Fed. 13 at 15 (C. C. A. 8th, 1922) (plaintiff can recover value of land lost for oil leasing purposes notwithstanding possibility of restoring leased value by someone else drilling well). Cf., Louisville, A. & P. V. Electric Ry. Co. v. Whipps, 118 Ky. 121, 80 S. W. 507 (1904), where there was a breach of an obligation to erect a railroad depot which plaintiff expected would increase the value of adjacent property owned by him. The court held that evidence as to the loss of the market value for contiguous lands of the plaintiff was admissible.

[28]Whiteside v. Trentman, 141 Tex. 46, 170 S. W. (2d) 195 (1943). In Riddle v.

The application of a rule of thumb to all situations in this field will often result in an injustice to one or the other of the parties, because no rigid rule can be drawn to fit all the varied circumstances involved in the cases.[29] Several rules have merit in certain situations, and the courts should be alert to recognize the different factors which are relevant to the selection of a rule for measuring damages in each case. In developed fields where expert testimony can evaluate the loss of expected profits to the plaintiff, the royalty rule would give the plaintiff his full expectations under the lease. Double recovery could be avoided either by allowing only interest on the value of the royalties,[30] or by allowing the defendant to operate thereafter royalty-free.[31] In a wildcat or undeveloped area the cost of drilling would appear to be the only practical method of establishing damages, the theory being that the drilling of the well itself is the obligation of the lessee. The royalty rule here would result in uncertainty of proof to the extent that only nominal damages could be awarded. As for contracts where the primary purpose is to obtain information and to determine the effect a well would have on adjoining leases, the plaintiff should show, before being allowed recovery for the loss of profits on the value of other leases, that he would have sold the leases before the drilling was completed.

The obvious solution for avoiding the disadvantages of uncertain measures of damages in this field is the liquidated damages provision in the drilling contract or in the oil lease in which the lessee covenants to drill.[32] Where such a provision can be upheld as a reasonable estimate

---

Lanier, 136 Tex. 130, 145 S. W. (2d) 1094, 1097 (1941) the remaining leases were worth $8220 before abandonment, and $1370 afterwards, because the evidence showed that if drilling had been completed the well would have been dry. "It is undisputed, however, that up to the time of abandonment plaintiff would not have sold any of these leases, even if he could."

[29]In Owens v. Fain-McGaha Oil Corp., 98 S. W. (2d) 1014 (Tex. Civ. App. 1936), there was an attempt to distinguish between the two situations—a breach of a contract or lease in a developed field, as against a breach in a wildcat area. The court stated that the cost of drilling was the measure on unproven or wildcat acreage, while the royalty measure was applicable to proven acreage. The holding was reversed in Fain-McGaha Oil Corp. v. Owens, 132 Tex. 109, 121 S. W. (2d) 982 (1938) and the decision based on Guardian Trust Co. v. Brothers, 59 S. W. (2d) 343 (Tex. Civ. App. 1933).

[30]As in West Virginia, see note 17, supra.

[31]As in Texas, see note 19, supra.

[32]Fidelity & Deposit Co. v. Jones, 256 Ky. 181, 75 S. W. (2d) 1057 (1934); Creswell v. Dixie Co., 6. S. W. (2d) 380 (Tex. Civ. App. 1928); Witherspoon v. Duncan, 131 S. W. 660 (Tex. Civ. App. 1910); McCormick, Damages (1935) §§ 146-150. But see Waldrip v. Hamon, 136 F. Supp. 412, 416 (E. D. Okla. 1955), where the court stated that awarding damages on the cost of drilling basis was like granting liquidated damages, and that liquidated damages were frowned upon by the law!

of the damages at the time the contract was executed, and is not exacted as a penalty, the parties avoid placing their damages in the hands of a jury, and prevent the party promising to drill from breaching his obligation with impunity.

WILLIAM O. ROBERTS, JR.

EQUITY—PROTECTION OF MEMBER OF VOLUNTARY ASSOCIATION AGAINST ARBITRARY EXPULSION FROM ORGANIZATION. [Minnesota]

Courts of equity are frequently confronted with requests that they intervene in the internal affairs of a voluntary association on behalf of a member who is aggrieved by some action of the association which prejudices his interests. In such a situation—typically involving expulsion of the complaining member—the courts entertain some reservations both as to the existence of their power to act, and as to the extent and advisability of exercising such power, once it is established.[1]

Notwithstanding these uncertainties, it seems clear that equitable jurisdiction can rest upon the ground that there exists no adequate remedy at law. The law courts have no means of reinstating a member of an unincorporated association,[2] and it is usually apparent that money damages will not compensate an expelled member for the intangible detriments suffered as a result of his wrongful expulsion.[3] However, many courts ignore the factor of the law remedy's in-

---

[1]Chafee, The Internal Affairs of Associations Not for Profit (1930) 43 Harv. L. Rev. 993. After discussion of the jurisdictional question, the author outlines the tests which should be applied in the determination of whether the expulsion was wrongful. Often opinions fail to distinguish the two facets of this problem, and unless a careful distinction is drawn, "it may lead to the citation of cases that were really decided on the point of want of jurisdiction over the subject-matter of the controversy, as authority for the position that the civil courts cannot, under any circumstances, go behind the decision of such tribunals." Note (1900) 49 L. R. A. 353, n. 2.

[2]Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers, 273 Fed. 707 (D. C. Md. 1919); Lahiff v. St. Joseph's Total Abstinence & Benevolent Society, 76 Conn. 648, 57 Atl. 692 (1904); 7 C. J. S. 68. However, mandamus may issue from a law court to afford relief to a member of an incorporated association. Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871 (1895); State ex rel. Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294 (1908).

[3]Hatfield v. De Long, 156 Ind. 207, 59 N. E. 483, 485 (1901) ("As an unlawful expulsion would affect appellant's standing in his community, and accomplish an injury for which there is no adequate remedy at law, injunction is the proper remedy."); de Funiak, Equitable Protection of Personal or Individual Rights (1947) 36 Ky. L. J. 1 at 27; Walsh, Equity (1930) 275, 276 ("The personal rights of the members are protected because damages at law for breach of the contract would be inadequate....").

adequacy, and insist that a property interest be established before they permit themselves to assume jurisdiction.[4] By clinging to this antiquated property-right requirement, these courts often find themselves in an embarrassing position where a wrong from which equity should give relief has obviously occurred, but where no ordinary property right is involved. The dilemma thus presented is often circumvented by resort to highly tenuous reasoning to find that such a property interest exists.[5] As a means of obviating this predicament, modern text-writers have advocated that equity should be able to afford protection against invasion of purely personal rights, even though no property or pecuniary interest is involved, and several rather recent opinions have seemingly recognized and adopted this more sensible approach to the problem.[6]

Once the jurisdictional requirements have been fulfilled, the preplexing problem arises as to the extent to which equity should exercise its power to interfere in the operation of a voluntary association. Traditionally, equity courts have been quick to realize that unless caution is exercised, they may easily be drawn into intramural squabbles to which the processes of law are not adapted.[7] As a result, the

[4]Howard v. Betts, 190 Ga. 530, 9 S. E. (2d) 742 (1940); Wilkins v. Brotherhood of Railroad Trainmen, 266 Ky. 377, 99 S. W. (2d) 196 (1936); Rogers v. Tangier Temple, 112 Neb. 166, 198 N. W. 873 (1924); Rigby v. Connol, 14 Ch. Div. 482 (1880) (no property interest found, action dismissed).

[5]E.g., Hardt v. McLaughlin, 25 F. Supp. 684 (E. D. Pa. 1936) (membership in club itself is property right capable of being protected); Evans v. The Philadelphia Club, 50 Pa. 107 (1865) (member held to have vested interest in club property); Baird v. Wells, 44 Ch. Div. 661 (1890) (jurisdiction refused because no property right could be found, but court admitted if club owned furniture for its members, jurisdiction could have been exercised). Several jurisdictions have concluded that a contract arises when one obtains membership in an association, and accordingly a wrongful expulsion may be actionable as a breach of contract. Smetherham v. Laundry Workers' Union, 44 Cal. App. (2d) 131, 111 P. (2d) 948 (1941); Krause v. Sander, 66 Misc. 601, 122 N. Y. Supp. 54 (1910). But this doctrine has been severely criticized: Chafee, The Internal Affairs of Associations Not for Profit (1930) 43 Harv. L. Rev. 993 at 1001; Pound, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640 at 680. Cf. Wrightington, Unincorporated Associations and Business Trusts (2nd ed. 1923) 310, where the contract theory is apparently accepted.

[6]Chafee, The Internal Affairs of Associations Not For Profit (1930) 43 Harv. L. Rev. 993 at 1007; Pound, Equitable Relief against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640 at 682; Berrien v. Pollitzer, 165 F. (2d) 21 (C. A. D. C., 1947); Kenyon v. City of Chicopee, 320 Mass. 528, 70 N. E. (2d) 241 (1946).

[7]United States ex rel. Noel v. Carmody, 148 F. (2d) 684 at 686 (C. A. D. C., 1945); Lawson v. Hewel, 118 Cal. 613, 50 Pac. 763, 765 (1897) ("Courts have no standard by which to determine the propriety of the rule and are not competent to exercise any function in the matter.... [W]ere it otherwise, the courts would control all benevolent associations, all corporations, and all fraternities."); Note (1949) 58 Yale L. J. 999.

courts, almost without exception, have declared that they should not interfere with the decisions of a voluntary association to the extent of a retrial of the merits of the controversy, the theory being that since a member has been tried by a tribunal of his own choosing, he should be bound by its ruling.[8] Obviously, this proposition implies that the facts found by the organization's tribunal regarding the events leading to the member's expulsion will not be disturbed, and the courts will not attempt to make independent findings as to whether the member did or did not commit the acts of which the association found him guilty.[9] It appears that this principle also has been applied to the question of whether the act for which the member was expelled is recognized by the association's rules as good cause for expulsion.[10] Thus, the Pennsylvania Supreme Court in upholding an expulsion for disorderly conduct acknowledged that what conduct is "orderly" and what is "disorderly" is for the determination of the proper tribunal of the association, irrespective of the fact that the offense committed by the member was of a minor nature which would not have "justified his expulsion at common law."[11] There is an additional question of whether courts will pass on the inherent justice of expelling a member where he has admittedly done an act which under the organization's rules is a ground for expulsion—i.e., whether equity should rule that the act is or is not intrinsically a just reason for ex-

---

[8]Stevenson v. Holstein-Friesian Ass'n, 30 F. (2d) 625 (C. C. A. 2nd, 1929); Richards v. Morison, 229 Mass. 458, 118 N. E. 868 (1918); Brandenburger v. Jefferson Club Association, 88 Mo. App. 148 (1901); Maloney v. United Mine Workers, 308 Pa. 251, 162 Atl. 225 (1932); Notes (1951) 20 A. L. R. (2d) 344 at 350; (1900) 49 L. R. A. 354. See Yockel v. German American Bund, Inc., 20 N. Y. S. (2d) 774, 776 (1940) ("...the court will not review the merits of an expulsion after a fair and proper trial....").

[9]Hall v. Supreme Lodge Knights of Honor, 24 Fed. 450 (E. D. Ark. 1885) (relief denied though defendant association failed to discover illness of plaintiff's intestate which would have been justification for non-payment of dues); Williamson v. Randolph, 48 Misc. 96, 104, 96 N. Y. Supp. 644, 650 (1905) ("There must be a total absence of evidence to support the sentence of expulsion, which is equivalent to an absence of jurisdiction to make any inquiry.").

[10]Kopp v. White, 30 Civ. Proc. 352, 65 N. Y. Supp. 1017 at 1020 (1900). aff'd 81 App. Div. 635, 81 N. Y. Supp. 1132 (1903), and 181 N. Y. 585, 74 N. E. 1119 (1905) (what is "unmasonic" is for the Lodge to determine). Cf. Smetherham v. Laundry Workers' Union, 44 Cal. App. (2d) 131, 111 P. (2d) 948 (1941) (expulsion for engaging in personal conflict with another member of association was unwarranted under by-law permitting expulsion for conduct which injured fellow member's interest in the union.)

[11]Commonwealth ex rel. Burt v. Union League of Philadelphia, 135 Pa. 301, 19 Atl. 1030, 1035 (1890). Cf. State ex rel. Waring v. Georgia Medical Society, 38 Ga. 608, 95 Am. Dec. 408 (1806) (by-law authorizing expulsion for ungentlemanly conduct held to be a proper one, but society does not have uncontrollable discretion in its construction and enforcement).

pelling a member from a voluntary association. The declaration that the merits of a controversy will not be retried seems to imply a negative answer, and a corollary pointing to the same result is that the courts regard an organization's by-laws as binding on its members, unless such by-laws are clearly arbitrary or unreasonable.[12] Few cases have been found in which a court has held the ground stipulated for the the expulsion to be inherently inadequate,[13] and there seems to be a great deal of validity in the theory that when a member voluntarily joins an organization, he submits to its rules regarding causes for discharge.[14]

There is general agreement that jurisdiction may be assumed to review the *form* of expulsion proceedings of an association to see whether the expelled member was accorded a fair opportunity to present and prove his side of the case.[15] This principle is exemplified by the recent Minnesota decision of *Peters v. Minnesota Department of the Ladies of G. A. R., Inc.*,[16] which apparently climaxes a seven-year controversy in which a member of an association twice carried her protest against expulsion to the Supreme Court of the state. Plaintiff, while a member in good standing of defendant organization, had instituted two lawsuits to prevent defendant from selling land it had previously received by gift. One action had been dismissed by plaintiff before trial, while the other had been dismissed by the court on the merits. As a result of these lawsuits, defendant's local Advisory Council recommended that plaintiff be expelled under a rule which sub-

---

[12]Sanders v. International Association of Iron Workers, 130 F. Supp. 253 (W. D. Ky. 1955) (by-law held to be reasonable); Commonwealth ex rel. Burt v. Union League of Philadelphia, 135 Pa. 301, 19 Atl. 1030 (1890) (same); Note (1927) 37 Yale L. J. 368 at 369.

[13]E.g., State ex rel. Kennedy v. Union Merchants' Exchange, 2 Mo. App. 96 (1876) (by-law which required members to submit their business controversies to arbitration held unreasonable); Gilmore v. Palmer, 109 Misc. 552, 179 N. Y. Supp. 1 (1919) (provision in organization's constitution providing for summary expulsion without notice or trial held void); Spayd v. Ringling Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921) (by-law in contravention of privilege guaranteed by state constitution held void).

[14]Lawson v. Hewel, 118 Cal. 613, 50 Pac. 763, 764 (1897) ("When men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject themselves to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own.").

[15]Ellis v. American Federation of Labor, 48 Cal. App. (2d) 440, 120 P. (2d) 79 (1941); Gardner v. Newbert, 74 Ind. App. 183, 128 N. E. 704 (1920); Evans v. Brown, 134 Md. 519, 107 Atl. 535 (1919); Jones v. State, 28 Neb. 495, 44 N. W. 658 (1890).

[16]73 N. W. (2d) 621 (Minn. 1955).

jected a member to discharge for resorting to the courts to settle intra-association disputes before her remedies had been exhausted within the organization. The Minnesota State Convention of the association approved the recommendation by a clear majority, after which plaintiff failed to execute her right of appeal to the National Convention, which affirmed plaintiff's dismissal. Thereupon, plaintiff brought a bill in equity asking for reinstatement, and on appeal from a summary judgment for defendant, the Minnesota Supreme Court reversed the judgment and remanded the case to the District Court for a determintion of whether plaintiff had received adequate notice and hearing.[17] The District Court, finding that plaintiff's trial had been satisfactory in that respect, again entered judgment for defendant, and plaintiff appealed from that judgment. This appeal was dismissed by the Minnesota Supreme Court on the reasoning that the regulation requiring members to exhaust their remedies within the organization before resorting to the courts is a valid regulation, and that though the organization's expulsion proceedings were not as complete as those of a judicial trial, they "satisfied minimum requirements of fairness."[18] It was not regarded as essential that plaintiff be served with a written specification of charges and formal notice of the hearings, inasmuch as she actually knew of the proceedings brought against her and was given a fair opportunity to be heard in her own defense.

It appears that the Minnesota Court looked into the merits of the controversy to the extent of determining that the alleged ground for plaintiff's discharge was within the causes for expulsion stipulated in the defendant's rules, and that it was intrinsically a reasonable cause for expulsion from a voluntary association. However, the court refused to pass on whether the plaintiff had actually committed the acts charged or whether there were extenuating factors which justified her acts. Instead, it examined the procedural aspects of the case, and upon concluding that the plaintiff had been given a fair chance to refute the charge against her, it denied reinstatement.[19]

---

[17]Peters v. Minnesota Department of the Ladies of the G. A. R., Inc., 239 Minn. 133, 58 N. W. (2d) 58 (1953).

[18]Peters v. Minnesota Department of the Ladies of the G. A. R., Inc., 73 N. W. (2d) 621, 623 (Minn. 1955).

[19]Even if the court had found that the plaintiff was not given an adequate hearing and chance to defend, it is doubtful that the court would have taken upon itself the task of hearing the controversy on the merits. Probably it would have ordered reinstatement pending a fair trial of the case by the association's own tribunal. Accord: Gilmore v. Palmer, 109 Misc. 552, 554, 179 N. Y. Supp. 1, 2 (1919) ("This determination, however, is without prejudice to the right of the local to properly try the plaintiffs upon the charges preferred against them."). Cf. Stenzel v. Cavanaugh, 189 N. Y. Supp. 883 (1921).

Though the Minnesota decision demonstrates an understandable hesitancy on the part of the courts to set aside the decisions of tribunals even where procedural questions are involved, it appears that certain requisites must be met in the expulsion proceedings if they are to be free from judicial interference. Equity may impose two distinguishable requirements on the organization: (1) proceedings must not be contrary to natural justice or tainted with bad faith;[20] and (2) they must comply with the procedural rules of the association.[21] An analysis of these generalizations reveals that the court will make an investigation to determine whether adequate notice has been given a member, prior to the proceedings, to afford him an opportunity to be heard in defense;[22] however, if the accused member appears before the tribunal without objection, his appearance may constitute a waiver of his right to receive notice of the charges.[23] While it is not necessary that strict judicial court procedure be followed in the expulsion proceedings,[24] the accused member is normally given the right to cross-examine witnesses,[25] although there seems to be a difference of opinion among jurisdictions as to whether the accused has the right to be represented by counsel.[26] These require-

---

[20]Otto v. Journeymen Tailors' Protective & Benevolent Union, 75 Cal. 308, 17 Pac. 217 (1888) (expulsion held to be in bad faith and contrary to natural justice since plaintiff was twice expelled for offense which merely carried penalty of a fine); State ex rel. Waring v. Georgia Medical Society, 38 Ga. 608, 95 Am. Dec. 408 (1869) (plaintiff was expelled for going surety on official bond for a Negro); Wilcox v. Supreme Council of Royal Arcanum, 210 N. Y. 370, 104 N. E. 624 (1914) (discharge not according to laws of land where very officials allegedly defamed by plaintiff conducted his expulsion proceedings).

[21]Byram v. Sovereign Camp of Woodmen, 108 Iowa 430, 79 N. W. 144 (1899); People ex rel. Deverell v. Musicial Mutual Protective Union, 118 N. Y. 101, 23 N. E. 129 (1889); Grassi Bros., Inc. v. O'Rourke, 89 Misc. 234, 153 N. Y. Supp. 493 (1915) (charges not sufficiently specific to apprise accused of nature of offense).

[22]Brotherhood of Painters, Decorators and Paperhangers v. Boyd, 245 Ala. 227, 16 S. (2d) 705 (1944); Smith v. Kern County Medical Ass'n, 112 P. (2d) 268 (Cal. App. 1941) and subsequent opinion 19 Cal. (2d) 263, 120 P. (2d) 874 (1942).

[23]Harris v. Aiken, 76 Kan. 516, 92 Pac. 537 (1907) (if accused appears before disciplinary committee, it is immaterial whether he has been presented with notice of charges); Williamson v. Randolph, 48 Misc. 96, 96 N. Y. Supp. 644 (1905) (by protesting expulsion, plaintiff submitted to jurisdiction of board and waived right to prior notice of charges).

[24]Smith v. Kern County Medical Ass'n, 112 P. (2d) 268 (Cal. App. 1941), and subsequent opinion 19 Cal. (2d) 263, 120 P. (2d) 874 (1942); Harris v. Aiken, 76 Kan. 516, 92 Pac. 537 (1907); Deware v. Minneapolis Lodge, No. 44, B. P. O. E. 155 Minn. 98, 192 N. W. 358 (1923); Kopp v. White, 30 Civ. Proc. 352, 65 N. Y. Supp. 1017 (1900) aff'd 81 App. Div. 635, 81 N. Y. Supp. 1132 (1903), and 181 N. Y. 585, 74 N. E. 1119 (1905) (hearsay evidence is admissible).

[25]Jones v. Moffatt, 183 Misc. 129, 50 N. Y. Supp. (2d) 233 (1944); Moyse v. New York Cotton Exchange, 70 Misc. 609, 129 N. Y. Supp. 173 (1911).

[26]Greene v. Board of Trade, 174 Ill. 585, 51 N. E. 599 (1898) (by-law expressly

ments are embodied in the specification that the accused be given a fair trial before an impartial tribunal.[27]

Still another problem peculiar to this type of equity case is raised by the contention that a member must exhaust his remedies within the association before resorting to the courts for relief.[28] While this proposition is accepted as generally sound in most jurisdictions, it has been weakened by exceptions. Thus, if it is apparent that the provisions for appeal within the organization are so inadequate or unreasonable as to render the possibility of a fair trial remote, there is no necessity for appeal and the courts will assume jurisdiction.[29] Another exception is recognized where the plaintiff has been expelled in an irregular proceeding, or where the tribunal lacks jurisdiction over the expulsion proceedings.[30]

The fact that the courts have found it advisable to intervene, even to a limited extent, indicates that some judicial control over the actions of voluntary associations is needed to provide fundamental justice for the individual members in the application of the organizations' own regulations. However, strong public policy considerations support the exercise of the restraint practiced by the Minnesota court

---

stating that member could not be represented by professional counsel in investigation before board of association upheld). Accord: Richards v. Morison, 229 Mass. 458, 118 N. E. 869 (1918); Local No. 2 v. Reinlib, 133 N. J. Eq. 572, 33 A. (2d) 710 (1943) (member not permitted to be represented by counsel in absence of statute to that effect). Contra: Moyse v. New York Cotton Exchange, 70 Misc. 609, 129 N. Y. Supp. 173 (1911).

[27]Taboada v. Sociedad Espanola De Beneficencia Mutua, 191 Cal. 187, 215 Pac. 673 (1923) (fair trial was not accorded accused, since association had suspended by-laws providing for trial); Rueb v. Render, 24 N. M. 534, 174 Pac. 992 (1918) (in absence of by-law expressly permitting organization to try member twice for same offense, courts will consider second trial a nullity).

[28]Costa v. La Luna Servante, 255 Ala. 6, 49 S. (2d) 672 (1950); Snay v. Lovely, 276 Mass. 159, 176 N. E. 791 (1931); Levy v. United States Grand Lodge, 9 Misc. 633, 30 N. Y. Supp. 885 (1894); Wrightington, Unincorporated Associations and Business Trusts (2nd ed. 1923) 315.

[29]Robinson v. Nick, 235 Mo. App. 461, 136 S. W. (2d) 374 (1940) (appeal within organization would have been "utterly vain and futile"); Blenko v. Schmeltz, 362 Pa. 365, 67 A. (2d) 99 (1949); Willis v. Davis, 233 S. W. 1035 (Tex. Civ. App. 1921) (possibility of fair trial was nonexistent because those who brought charges were to judge plaintiff's case).

[30]Medical Society of Mobile County v. Walker, 245 Ala. 135, 16 S. (2d) 321 (1944) (procedure "irregular and without jurisdiction"); Harris v. National Union of Marine Cooks & Stewards, 98 Cal. App. (2d) 733, 221 P. (2d) 136 (1950) (association violated its own rules of procedure); Rodier v. Huddell, 232 App. Div. 531, 250 N. Y. Supp. 336 (1931) (plaintiff was not even afforded hearing). Where a member has been deprived of valuable property rights in the association, some jurisdictions permit immediate resort to the courts. Gardner v. East Rock Lodge, 96 Conn. 198, 113 Atl. 308 (1921). Contra: Walker v. Pennsylvania Reading Seashore Line, 142 N. J. Eq. 588, 61 A. (2d) 453 (1948).

in refusing to impose a settlement in the controversy giving rise to the principal case.[31] Should equity assume jurisdiction whenever a voluntary association has acted contrary to a member's wishes, the gates would probably be opened to a flood of unnecessary litigation which could, by placing a heavy burden on the legal processes, indirectly affect the public interest. Probably even more important is the fact that most fraternal orders, mutual benefit associations, and social organizations are founded upon the premise that individuals, by joining together can strive toward common goals and ambitions. If the courts assume the position of overseer of the internal operation of such organizations, the benefits which accrue to both the individual and the public as a whole may be seriously thwarted. It has been well said that the "court would find itself a constant intermeddler in community affairs serving no purpose other than to disrupt the morale and good will of voluntary associations."[32]

CHARLES B. GROVE

EVIDENCE—FEDERAL COURT'S POWER TO ENJOIN WITNESS FROM DISCLOSING ILLEGALLY OBTAINED EVIDENCE IN STATE PROSECUTION. [United States Supreme Court]

Although the Fourth Amendment of the Federal Constitution declares without qualification that the right of the people to be secure from unreasonable searches and seizures shall not be violated,[1] an alarming number and variety of problems concerning the scope of the protection afforded have been considered by the Supreme Court over the years,[2] with varying results. As early as 1914 it was held in *Weeks v.*

[31]Peters v. Minnesota Department of the Ladies of the G. A. R., Inc., 73 N. W. (2d) 621 (Minn. 1955).

[32]United States ex rel. Noel v. Carmody, 148 F. (2d) 684, 686 (C. A. D. C., 1945). Professor Chafee has outlined the various policy considerations which courts should recognize in assuming jurisdiction. Chafee, The International Affairs of Associations Not For Profit (1930) 43 Harv. L. Rev. 1020.

[1]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amdt. 4.

[2]The cases may be grouped into the problems presented as follows: (1) the validity of the search warrant; (2) when a search without a warrant incident to arrest is proper; (3) what constitutes consent; (4) when the manner of the search may invalidate it; (5) the difference between seizure of evidentiary and so-called contraband material; (6) information obtained from an illegal search cannot be used as evidence; (7) procedural problems; (8) who may complain; (9) impact on state officers and state proceedings; (10) impact on subpoenae and regulating laws;

United States[3] that the evidence obtained by illegal search and seizure could not be used against the defendant in a criminal trial in a federal court, because to do so would violate the Fourth Amendment.[4] In 1949, the Court took a somewhat different position in *Wolf v. Colorado*[5] when it held that the Fourth Amendment, of itself, would not prevent the use of illegally obtained evidence in the state court.[6] As was said by Justice Black in his concurring opinion, "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[7] Therefore, the states were left to decide individually whether they would admit illegally obtained evidence in their courts,[8] and the majority of the states have allowed it.

In an effort to safeguard the states in their preferences regarding the admissibility of illegally obtained evidence, the Supreme Court has previously endeavored to prevent federal interference in this matter in state prosecutions. Thus, it has been held that a person charged with a state crime could not obtain a federal injunction to prevent the state from using illegally seized evidence,[9] and that a state statute

---

(11) impact on forfeitures; (12) impact on wire tapping and mechanical devices; and (13) proceeding against violators. Fraenkel, Search and Seizure Developments in Federal Law Since 1949 (1955) 41 Iowa L. Rev. 67.

[3]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

[4]232 U. S. 383, 393, 34 S. Ct. 341, 344, 58 L. ed. 652, 656 (1914): "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring this right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided, by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

[5]338 U. S. 25, 69 S. Ct. 1395, 93 L. ed. 1782 (1949).

[6]The Court found that the right against unreasonable searches and seizures was included in the Due Process Clause of the Fourteenth Amendment, so that had the right to have the evidence excluded been a part of the Fourteenth Amendment, it would have been applicable to the states. While conceding that exclusion of evidence was one method of deterring unreasonable searches, the Supreme Court declared that "it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a state's reliance upon other methods which, if consistently enforced would be equally effective." Wolf v. Colorado, 338 U. S. 25, 31, 69 S. Ct. 1359, 1362, 93 L. ed. 1782, 1787 (1949).

[7]Wolf v. Colorado, 338 U. S. 25, 39, 69 S. Ct. 1359, 1367, 93 L. ed. 1782, 1792 (1949).

[8]For a summary of how various states have decided upon this issue, see the Appendix to the Opinion of the Court, Wolf v. Colorado, 338 U. S. 25 at 33, 69 S. Ct. 1359 at 1364, 93 L. ed. 1782 at 1788 (1949).

[9]Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. ed. 138 (1951).

which permitted the use of illegally obtained evidence in some instances is valid.[10]

In the recent case of *Rea v. United States*,[11] however, it appears that the Supreme Court, by a five to four decision, has sanctioned an indirect interference in a state prosecution. Petitioner had been indicted for unlawful acquisition of marihuana in violation of federal statutes, the charge being based on evidence obtained by a search warrant obtained from a United States Commissioner. On trial in federal court, the indictment was dismissed because it was found that the warrant did not comply with provisions of the federal statutes. After this dismissal, a federal narcotics agent swore to a complaint before a New Mexico judge, causing petitioner to be arrested and charged with being in possession of marihuana in violation of New Mexico law. The case against petitioner in the state court would be made by testimony of the federal agent based on evidence seized under the illegal federal warrant. Petitioner asked the federal district court for an injunction to restrain the federal agent from testifying in the state court, but the relief was denied, and the court of appeals affirmed.[12] In reversing that judgment, the Supreme Court first declared that there is no constitutional problem involved,[13] and then proceeded to consider the problem as one concerning the Court's supervisory powers over federal law enforcement agencies, citing for authority *McNabb v. United States*.[14] Justice Douglas, speaking for the majority, asserted that the policy to protect the privacy of citizens from unreasonable searches and seizures is defeated if a federal agent is allowed to use his illegally obtained evidence in state proceedings.

Justice Harlan, writing the dissenting opinion, began his analysis of the case by stating: "So far as I know, this is the first time it has been suggested that the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such."[15] Futhermore, the dissent states not only that the *McNabb* case[16] is not authority for the proposition adopted by

---

[10]Salsburg v. Maryland, 346 U. S. 545, 74 S. Ct. 280, 98 L. ed. 281 (1954) noted (1955) 12 Wash. & Lee L. Rev. 99. The statute permitted illegally obtained evidence to be used for prosecution for certain gambling misdemeanors, although it did not affirmatively sanction the illegal obtaining of evidence.

[11]76 S. Ct. 292, 100 L. ed. 213 (1956).

[12]Rea v. United States, 218 F. (2d) 237 (C. A. 10th, 1954).

[13]Rea v. United States, 76 S. Ct. 292, 293, 100 L. ed. 213, 215 (1956): "We put all the constitutional questions to one side.We have here no problem concerning interplay of the Fourth and Fourteenth Amendments nor the use which New Mexico might make of the evidence."

[14]318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819 (1943).

[15]See Rea v. United States, 76 S. Ct. 292, 294, 100 L. ed. 213, 216 (1956).

[16]318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819 (1943).

the majority, but pointed out that it is authority to the contrary, and quoted from the opinion of the *McNabb* case as follows: "... we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by the federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement."[17] The dissent further stated that a sound policy was adopted in *Stefanelli v. Minard*,[18] in which it was held that although the Supreme Court had the power to enjoin the use of state-seized evidence in state prosecutions, that power will not be exercised because of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law...."[19] Also it was pointed out that since the states are not covered by the federal exclusionary rule, in effect they can "flout" the rule at any time, and so the mere fact that the illegally obtained evidence used in the state prosecution comes from a federal source does not create a new evil.

In order to understand the strong difference of approach of the majority and minority opinions, it is necessary to review previous cases decided by the Court touching on this question. The two basic ideas concerning the use of illegally obtained evidence stem from the difference of opinion as to whether the Fourth Amendment includes the right to have the evidence suppressed.[20]

The interpretation of the exclusionary rule as being a part of the Fourth Amendment is based on the reasoning that a constitutionally guaranteed right against unreasonable searches and seizures is useless if evidence is allowed to be used in court after it is illegally acquired. Therefore, it is said that, of necessity, the exclusion of the illegally obtained evidence is a part of the right guaranteed by the Constitution.[21] If this line of reasoning is followed, however, it ap-

---

[17]McNabb v. United States, 318 U. S. 332, 347, 63 S. Ct. 608, 616, 87 L. ed. 819, 827 (1943).

[18]342 U. S. 117, 72 S. Ct. 118, 96 L. ed. 138 (1951).

[19]Stefanelli v. Minard, 342 U. S. 117, 120, 72 S. Ct. 118, 120, 96 L. ed. 138, 142 (1951).

[20]Contending that the right is included in the Fourth Amendment, see: dissent, Salsburg v. Maryland, 346 U. S. 545 at 554, 74 S. Ct. 280 at 289, 98 L. ed. 281 at 290 (1954); dissent, Wolf v. Colorado, 338 U. S. 25 at 41, 69 S. Ct. 1359 at 1368, 93 L. ed. 1782 at 1796 (1949); Weeks v. United States, 232 U. S. 383 at 393, 34 S. Ct. 341 at 344, 58 L. ed. 652 at 656 (1914).

Holding that the right is not included in the Fourth Amendment: Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949); see McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819 (1943).

[21]See dissent, Salsburg v. Maryland, 346 U. S. 545 at 554, 74 S. Ct. 280 at 289, 98 L. ed 281 at 290 (1954); dissent, Wolf v. Colorado, 338 U. S. 25 at 41, 69 S. Ct. 1359

pears that immediately, collateral problems arise. First, it has repeatedly been held that where evidence is illegally obtained by private persons or state officials, it is admissible in federal proceedings,[22] a result which is inconsistent with the idea that the right against admission of illegally obtained evidence is a federally guaranteed one. If the right is to be a constitutional right, then it would have to be recognized whether evidence was seized by a federal or state official, since the Fourth Amendment does not state that persons are to be free only from unreasonable searches and seizures by federal officers. Secondly, if the right of exclusion is said to be included in the Fourth Amendment, then it would become enforceable against the state through the Fourteenth Amendment as one of those rights "implicit in 'the concept of ordered liberty'."[23] However, the Supreme Court has held that evidence illegally obtained by state officials can be used in state prosecutions,[24] and the state courts have held that evidence illegally obtained by federal officers is admissible in state proceedings.[25] Therefore, if the constitutional right interpretation is adopted, it will be necessary to overrule the state courts and require them to conform to the federal rule.[26] Certainly this action would upset the supposed delicate relation between the state and the federal government regarding the division of powers.[27]

Moreover, if the federal exclusionary rule is treated as a judicially created rule of evidence, some of the results seems equally objectionable. Although it is stated that the exclusionary rule is not applicable to the state courts, it appears that the opposite result is produced when, as in the principal case, although the state court is not enjoined, the same effect is achieved when the witness who will make the state's

---

at 1368, 93 L. ed. 1782 at 1792 (1949); Weeks v. United States, 232 U. S. 383 at 393, 34 S. Ct. 341 at 344, 58 L. ed. 652 at 656 (1914).

[22]Gilbert v. United States, 163 F. (2d) 325 (C. C. A. 10th, 1947); United States v. Lustig, 159 F. (2d) 798 (C. C. A. 3rd, 1947), cert. den., 331 U. S. 853, 67 S. Ct. 1735, 91 L. ed. 1861 (1947); Wheatley v. United States, 159 F. (2d) 599 (C. C. A. 4th, 1946).

[23]Wolf v. Colorado, 338 U. S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. ed. 1782, 1785 (1949); Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937).

[24]Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949). Also, Latimer v. Cranor, 214 F .(2d) 926 (C. A. 9th, 1954).

[25]State v. Gardner, 77 Mont. 8, 249 Pac. 574 (1926); Commonwealth v. Colpo, 98 Pa. Super. 460 (1929), cert. den. 282 U. S. 863, 51 S. Ct. 36, 75 L. ed. 763 (1930). Cf. Little v. State, 171 Miss. 818, 159 So. 103 (1935).

[26]For a summary of how the various states have ruled on this problem, see Wolf v. Colorado, 338 U. S. 25 at 33, 69 S. Ct. 1359 at 1364, 93 L. ed. 1782 at 1788 (1949).

[27]Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. ed. 138 (1951).

case is enjoined. Therefore, although it is a federal rule, it reaches into the state courts in its effect.[28] The result produced when the decision of each case is restricted to its facts as in the principal case, is that a case-by-case approach to the question develops, which breeds uncertainty into the law and allows it to develop piece-meal.[29] The Supreme Court is thereby allowed to keep from squarely facing the constitutional problem that arises with each succeeding case, with the end result that is questionable.

Other considerations which warrant investigation when the decision of the principal case is viewed from all sides are: (1) the apparent enforcement of the federal rule outside the federal court; and (2) the unwarranted interference of the judicial branch of the government into the realm of the executive branch. If the exclusionary rule is merely a federal evidence rule, to be applied only in federal courts, then the application of this rule to prevent the use of illegally obtained evidence in a state court is neither intended nor warranted. Secondly, as was pointed out by Justice Harlan,[30] it has not in the past been considered the duty of the judicial branch of the government to supervise law enforcement as such; therefore, it appears rather doubtful that the reasoning set forth in the principal case is a valid basis for the decision.

It appears that the Supreme Court, in effect, is beginning to recede from the strong position taken on the question in *Wolf v. Colorado*.[31] In that case Justice Douglas dissented because he thought the right was included in the Fourth Amendment,[32] while Justice Reed and Burton went along with the majority opinion which approved the rule as a federal exclusionary rule not applicable to the states. Since the *Wolf* decision, Justice Clark has expressly disapproved of the rule there set out and said: "Perhaps strict adherence to the tenor of that decision [*Wolf* case] may produce converts for its extinction."[33] Therefore, considering the fact that Justices Reed and Burton dissented in the principal case, disapproving the application of the federal ex-

---

[28]See dissent, Rea v. United States, 76 S. Ct. 292 at 296, 100 L. ed. 213 at 217 (1955).

[29]Notes (1955) 41 Va. L. Rev. 662; (1954) 45 Jour. Crim. L. 51. See concurring opinion in Irvine v. California, 347 U. S. 128, 138, 74 S. Ct. 381, 391, 98 L. ed. 561, 572 (1954).

[30]See dissent, Rea v. United States, 76 S. Ct. 292, 294, 100 L. ed. 213, 216 (1956).

[31]338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949).

[32]See Wolf v. Colorado, 338 U. S. 25, 40, 69 S. Ct. 1359, 1372, 93 L. ed. 1782, 1792 (1949).

[33]Irvine v. California, 347 U. S. 128, 130, 74 S. Ct. 381, 391, 98 L. ed. 561, 572 (1953).

clusionary rule here, and noting that Justices Douglas and Clark approved the application of the rule here, it appears that either (1) there has been a radical shifting of opinion, or (2) there has been a misapplication of the rule as originally conceived in the *Wolf* case. Since there is no indication given of the former conclusion, the second alternative must be examined. Certainly the result obtained by the majority opinion agrees with Justice Douglas' idea of total suppression of illegally obtained evidence, and is in line with Justice Clark's idea of adherence to produce extinction. If Justice Douglas does not disapprove of the application of the rule, as here, when the *result* obtained conforms with his idea that strict protection against illegally obtained evidence should be given, then the result to be obtained will determine when the rule will be applied.

If this is to be the future of the exclusionary rule—i.e., a rule applied for the sake of convenience in obtaining the desired result in the individual case—then it is believed that the Court should either (1) accept the broad interpretation of the Fourth Amendment, and thereby include the exclusionary rule as a part of that Amendment so that it will be enforceable against the states, or (2) restrict the application of the rule to proceedings in the federal courts whether the rule is asserted directly, or indirectly by enjoining state's witness. By either of these alternatives, some sort of certainty would be developed into this present illusory treatment.

MILTON T. HERNDON

LABOR LAW—DUTY OF LABOR AND MANAGEMENT TO ENGAGE IN COLLECTIVE BARGAINING IN GOOD FAITH. [Federal]

The duty to engage in collective bargaining, imposed upon employers by the Wagner Act,[1] remains the element of that legislation least susceptible of exact definition. Through amendment of the Wagner Act by the Taft-Hartley Act,[2] this duty was extended to labor

[1]National Labor Relations Act, 49 Stat. 449 et seq. (1935), 29 U. S. C. A. § 151 et seq. (1947). For immediate steps leading to this legislation, see Latham, Legislative Purpose and Administrative Policy Under the National Labor Relations Act, 4 G. W. L. Rev. 433, 434-440 (1936).

[2]Labor-Management Relations Act, 1947, 61 Stat. 136 et seq. (1947), 29 U. S. C. A. § 141 et seq. (1955 Supp.). In adoption of the 1947 amendments, Congress provided: "This chapter may be cited as the 'Labor Management Relations Act, 1947'," 61 Stat. 136 (1947), 29 U. S. C. A. § 141(a) (1955 Supp.). Title I of this legislation was an amended version of the National Labor Relations Act, and Titles II-V were new material. Certain minor amendments since enacted are not pertinent to this comment. For a comparasion of the language of the two acts, see Note (1948) 173 A. L. R. 1401. In this comment, the term "the Act" is used to refer to the present

organizations. In its amended form, the duty is a "mutual obligation ... to meet ... and confer in good faith ...", but does not extend to compulsion of either party to agree to a proposal or to make a concession.[3]

Imposition of this duty theoretically diminished the likelihood of industrial warfare,[4] and it is significant that the entire Wagner Act was justified on the theory that it would tend to prevent the burden on interstate commerce presented when such warfare curtailed the production of industry.[5] However, unlike some European arrangements,[6] this government-imposed duty does not compel agreement, put the government at the bargaining table, or extend to compulsory arbitration.[7] It is the opposing force of these considerations—on the one

legislation, and "the Wagner Act" to refer to the superceded version. "Before the LMRA amendments, the NLRA had in some cases been interpreted as requiring, in effect, good faith bargaining by unions." Note (1955) 64 Yale L. J. 766, n. 4, citing Times Publishing Co., 72 N. L. R. B. 676, 683 (1947); N. L. R. B. v. Express Publishing Co., 128 F. (2d) 690, 692 (C. C. A. 5th, 1942) cert. den. 317 U. S. 676, 63 S. Ct. 157, 87 L. ed. 542 (1942).

[3]61 Stat. 140 (1947), 29 U. S. C. A. § 158(d) (1955 Supp.). The employer's failure to make counterproposals has been considered in finding bad faith under the Wagner Act. "Throughout the conferences between the Union and the respondents, the latter not only rejected every proposal made by the Union, but also, although requested to do so by the Union, failed to make any counterproposals or to exert any effort to submit any plan or offer which could be considered evidence of the respondents' intention to bargain in good faith." The Windsor Manufacturing Co., 20 N. L. R. B. 301, 316 (1940). A provision that there be no obligation to make counterproposals was eliminated from the amended Act. Note (1948) 173 A. L. R. 1401, 1418. Under the amended Act, failure to make counterproposals has been cited as one element in finding lack of good faith. Vanette Hosiery Mills, 80 N. L. R. B. 1116 at 1128 (1948) enforced N. L. R. B. v. Vanette Hosiery Mills, 179 F. (2d) 504 (C. A. 5th, 1950). Cf. N. L. R. B. v. Landis Tool Co., 193 F. (2d) 279 (C. A. 3rd, 1952); Union Mfg. Co., 76 N. L. R. B. 322 (1948), enforced N. L. R. B. v. Union Mfg. Co., 179 F. (2d) 511 (C. A. 5th, 1950). See Newman, The Law of Labor Relations (1953) 60.

[4]Mr. Connery of Massachusetts (House sponsor of the Wagner Act) opening House consideration of S. 1958 (the Wagner Act): "The whole story in this bill from our viewpoint, from the point of view of the Committee on Labor, and the point of view of the Senate when it passed the bill, is to bring about industrial peace, peace between capital and labor." 79 Cong. Rec. 9683 (1935). See 2 Teller, Labor Disputes and Collective Bargaining (1940) §§ 242, 244-245. See generally, N. L. R. B., Legislative History, National Labor Relations Act (1950). See discussion, note 47, infra.

[5]N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893, 108 A. L. R. 1352 (1937); Newman, The Law of Labor Relations (1953) 132.

[6]Note (1934) 3 G. W. L. Rev. 51, 54, n. 17 contains a good, brief coverage of various foreign arrangements.

[7]N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 628, 81 L. ed. 893, 916, 108 A. L. R. 1352, 1369 (1937); 2 Teller, Labor Disputes and Collective Bargaining (1940) § 327. With narrow limits and in certain situations,

hand to limit the scope and pernicious effect of industrial warfare, and on the other hand to avoid government arbitration—which renders the extent of the duty uncertain and which stresses the importance of the standard adopted. The standard of good faith has been said to require "reasoned discussion in a background of balanced bargaining relations. . . ."[8]

This concept of good faith has been tested by a recent case in which the Court of Appeals for the District of Columbia, in a 2 to 1 decision, reversed a National Labor Relations Board decision which found that the standard had not been met. The case, *Textile Workers Union of America v. National Labor Relations Board*,[9] arose upon complaint by the employer that the union, through a campaign of harassing tactics conducted contemporaneously with negotiations following the expiration of a labor contract was guilty of an unfair labor practice. The tactics to which the complaint referred were not denied by the union and included slowdowns, unauthorized extensions of rest periods, a series of short unannounced walkouts, and an organized refusal to work overtime or to work special hours.[10] The Board found a refusal to bargain collectively within the meaning of the Act,[11] but the Court of Appeals held that the Board had no jurisdiction to deal with the conduct upon which it had found a lack of good faith.[12]

In reaching this conclusion, the majority of the Court of Appeals relied on *International Union, U. A. W., AFL v. Wisconsin Employment Relations Board*,[13] in which the United States Supreme Court, ruling on injunctive action by the Wisconsin Supreme Court in a case involving "intermittent and unannounced work stoppages," held that the state court *could* act despite a vigorous union contention that federal regulation of the conduct pre-empted this field, preventing state action. The majority opinion in the *Textile Workers* case, noting that the Supreme Court by permitting state action in the Wisconsin case had indicated that intermittent and unannounced work stoppages

---

the government is given powers of mediation by Title II of the Act. Note (1948) 173 A. L. R. 1401, 1439.

[8]Phelps Dodge Copper Products Corp., 101 N. L. R. B. 360, 368 (1952) cited by the intermediate report: Textile Workers Union of America, CIO, 108 N. L. R. B. 743, 770 (1954).

[9]227 F. (2d) 409 (C. A. D. C., 1955).

[10]227 F. (2d) 409 at 410 (C. A. D. C., 1955). A further Board finding that the union induced employees of a sub-contractor not to work for the employer is not considered material, nor were other findings not in issue.

[11]Textile Workers Union of America, CIO, 108 N. L. R. B. 743 (1954).

[12]227 F. (2d) 409, 410-411 (C. A. D. C., 1955).

[13]336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (1949).

were outside the jurisdiction of the Board,[14] thought that the Court of Appeals was thereby foreclosed from upholding the Board in the present case.[15] Within the past few years a number of cases have held that federal legislation has pre-empted the field of labor controversies involving interstate commerce so that when the Board has authority to regulate particular conduct, the state courts cannot take any action as regards that conduct.[16] However, maintenance of the converse of this proposition, at least upon the basis of the *Wisconsin* case, involves several difficulties.

The first of these difficulties is implied in the opinion of the Supreme Court where it was said: "This conduct is governable by the State or it is entirely ungoverned."[17] Such a statement leads to at least a suspicion that the Court was anxious to permit the state to exercise its police power in the belief that the Board lacked legislative mandate to regulate the conduct.[18] Ironically, the statements of the Supreme Court were relied upon by the Court of Appeals in the *Textile Workers* case to prevent effective control by the Board of similar union conduct.[19]

The dissenting opinion contains the second objection to the majority reasoning and presents cogently the reasoning upon which the

---

[14]"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct.... [T]he conduct here described is not forbidden by this Act [L. M. R. A.] and no proceeding is authorized by which the Federal Board may deal with it in any manner.... There is no...conflict or overlapping...because the Federal Board has no authority either to investigate, approve, or forbid the union conduct in question." International Union, U. A. W., AFL v. Wisconsin Employment Relations Board, 336 U. S. 245, 253, 69 S. Ct. 516, 521, 93 L. ed. 651, 662 (1949).

[15]The dissent takes issue on this point. See text at note 20, infra.

[16]Garner v. Teamsters Union, 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 (1953); Weber v. Anheuser-Busch, 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546 (1955). Cf. United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 (1954); United Mine Workers v. Arkansas Oak Flooring Co., 24 U. S. L. Wk. 4197 (24 Apr. 1956).

[17]International Union, U. A. W., AFL v. Wisconsin Employment Relations Board, 336 U. S. 245, 254, 69 S. Ct. 516, 521, 93 L. ed. 651, 663 (1949).

[18]The Supreme Court has acknowledged 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." Weber v. Anheuser-Busch, 348 U. S. 468, 480, 75 S. Ct. 480, 488, 99 L. ed. 546, 557 (1955). The reaction of state authorities to gaps in Board regulatory power was expressed recently by the New York Superior Court. In determining that it would take jurisdiction of a suit to enjoin a union's recognition picketing of a circus despite the pre-emption doctrine, the court observed: "If then the state courts do not take jurisdiction an area of employer-employee relationships reverts to unsupervised jungle where decisions go to the strong and ruthless." Ringling Bros. v. Lewis, 24 U. S. L. Wk. 2487 (24 Apr. 1956).

[19]227 F. (2d) 409 at 410-411 (C. A. D. C., 1955).

Board proceeded in dealing with the union conduct in this case. The dissent pointed out that "The Board here has not asserted that the 'tactics' constitute a violation of federal law. It has said that such conduct taken into account with all other factors 'on the entire record' justified a finding of failure to bargain in good faith."[20] This being the case, the dissent would uphold the Board in its findings of fact.[21]

There appears to be a third fallacy in the majority reasoning. Many acts performed in a context of labor relations are yet cognizable by the states;[22] regulation of the federally-imposed duty to bargain collectively is, of course, a function of the Board. Under the reasoning of the majority only one of the two governmental units could deal with a course of conduct properly cognizable by each although many incidents may be supposed which could properly be ignored by neither.[23]

---

[20]See 227 F. (2d) 409, 411, 412 (C. A. D. C., 1955).

[21]See 227 F. (2d) 409, 411, 415 (C. A. D. C., 1955). "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 61 Stat. 146 (1947), 29 U. S. C. A. § 160(e) (1955 Supp.).

[22]The Supreme Court permitted a state injunction prohibiting, inter alia, obstruction of streets and public roads and the blocking of entrance to and egress from a factory. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942). Although the decision in that case recited that such conduct was neither prohibited nor protected by the Act, Board proscription under the Act of similar conduct in the Textile Workers case was not challenged by the Union. See 227 F. (2d) 409, 411 (C. A. D. C., 1955). The state may give a remedy where the federal remedy is ineffectual: United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 (1954). Of course, a state may not prohibit the exercise of rights which the federal Act protects, Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782 (1954), even though it enjoins that conduct for other reasons. See Weber v. Anheuser-Busch, 348 U. S. 468, 480, 75 S. Ct. 480, 487, 99 L. ed. 546, 557 (1955).

[23]The Supreme Court has recently held that the general rule that a state may not enjoin conduct made an unfair labor practice under federal statute "does not take from the States power to prevent mass picketing, violence, and overt threats of violence." UAW-CIO v. Wisconsin Employment Relations Board, 24 U. S. L. Wk. 4283 at 4285 (5 June 1956). Cf. Pennsylvania v. Nelson, 24 U. S. L. Wk. 4165 (3 April 1956). In Fox v. Ohio, 5 How. (46 U. S.) 410, 12 L. ed. 213 (1846), a state conviction for defrauding the person to whom spurious money was passed was upheld despite a contention that the crime was the federal offense of counterfeiting. In Gilbert v. Minnesota, 254 U. S. 325, 41 S. Ct. 125, 65 L. ed. 287 (1920), the Court upheld a state conviction under a local police measure proscribing interference with, or discouragement of, enlistment in the armed forces of the United States or of Minnesota. The Supreme Court is concerned over the problem of this dual aspect of offenses in the labor field. Amalgamated Clothing Workers of America v. Richman Bros. declined to enjoin state court consideration of a problem in the labor field (where an injunction issued) noting that there is a "rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems." See 348 U. S. 511, 519, 75 S. Ct. 452, 457, 99 L. ed. 600, 609 (1955). For a consideration of another area in which this difficult problem arises (jurisdiction of arbitrators and state courts over conduct constituting both a contract violation and an unfair labor practice), see Note (1956) 69 Harv. L. Rev. 725.

As the other ground for its decision, the Court of Appeals, noting that a strike called by the union in these circumstances would have enjoyed the protection of the Act and that "no inference of failure to bargain in good faith" could have been drawn therefrom, reasoned that no such inference could be drawn from a "partial withholding of services."[24] This superficially appealing comparison is challenged in the dissenting opinion by reference to cases which have drawn a sharp distinction between the two actions.[25] In fact, each of the actions engaged in by the union in the *Textile Workers* case has been repeatedly condemned as an invasion of management prerogative.[26]

It appears that the reasoning of the majority of the Court of Appeals expresses no valid objection to enforcement of the Board order in the *Textile Workers* case. However, the reasoning of the dissenting opinion that the harassing tactics were only considered as evidence of a lack of good faith cannot obscure the fact that the Board order, if enforced, will effectively prevent this conduct.[27] It is therefore necessary to examine the real question presented by the case: Does the duty to bargain collectively impose upon a labor organization an enforceable obligation to refrain, while bargaining, from the type of harassing tactics used in this case?[28]

As previously noted, each element of the conduct involved here has generally been held to be unlawful or at least without the protection of

---

[24]227 F. (2d) 409, 410 (C. A. D. C., 1955).

[25]See 227 F. (2d) 409, 411, 414 (C. A. D. C., 1955).

[26]Home Beneficial Life Ins. Co. v. N. L. R. B., 159 F. (2d) 280 (C. C. A. 4th, 1947) cert. den. 332 U. S. 758, 68 S. Ct. 58, 92 L. ed. 344 (1947) (disobedience of orders; failure to report to work at time set); N. L. R. B. v. Reynolds International Pen Co., 162 F. (2d) 680 (C. C. A. 7th, 1947) (short, unannounced walkout to protest demotion of foreman); N. L. R. B. v. Montgomery Ward & Co., 157 F. (2d) 486 (C. C. A. 8th, 1946) (installment strike; refusal to obey orders); C. G. Conn, Ltd. v. N. L. R. B., 108 F. (2d) 390 (C. C. A. 7th, 1939) (refusal to work overtime); Firth Carpet Co., 33 N. L. R. B. 191 (1941), enforced Firth Carpet Co. v. N. L. R. B., 129 F. (2d) 633 (C. C. A. 2nd, 1945) (refusal to work overtime). The employer is freed of the obligation of continuing to bargain by union adoption of slowdown tactics, Phelps Dodge Copper Products Corp., 101 N. L. R. B. 360 (1952).

[27]This point was convincingly made by the union. Textile Workers Union of America v. N. L. R. B., 227 F. (2d) 409 (C. A. D. C., 1955). Petitioners Reply Brief, U. S. C. A. for D. C., p. 23 et seq. The Board order at issue requires the union to "1. Cease and desist from (a) refusing to bargain collectively in good faith with the company by engaging in slowdowns and unauthorized extensions of rest periods; by engaging in walkouts or partial strikes for portions of shifts or entire shifts; ... by refusing to work special hours or overtime; or by engaging in any similar or related conduct in derogation of the statutory duty to bargain...." Textile Workers Union of America, CIO, 108 N. L. R. B. 743, 750 (1954).

[28]Note (1955) 64 Yale L. J. 766, 770 in commenting on the Board decision in the Textile Workers case, in effect, omits the phrase "while bargaining" from this statement of the issue.

the Act.[29] However, it has been urged that restriction upon the power of the Board to control strikes prevents the Board from ordering a union to cease and desist from the economic pressure involved in the *Textile Workers* case as an unfair labor practice per se.[30] Section 13 of the Act provides that nothing in the Act shall be construed to interfere with the *right* to strike,[31] and Section 501 includes "any concerted slowdown or other concerted interruption of work" within the term "strike."[32] It might appear from these sections that the Board is indeed without authority to interfere with any type of strike. However, the courts have approved Board action withholding the protection of the Act from the sit-down strike, mutiny, wildcat strikes, strikes in violation of contract, and a strike to compel violation of statute.[33] The House of Representatives receded from proposed specific restrictions on the right to strike on conference committee assurance that these decisions were the law.[34] Since there is no absolute right to strike guaranteed by either the Constitution or the common law,[35] the sweep of the quoted language of the Act is thus less broad than might at first appear. However, the constitutional prohibition of involuntary servitude and prohibition of federal action without due process of law indicate that there is a right to engage in a lawful strike beyond the consti-

[29]See note 26, supra.

[30]Textile Workers Union of America v. N. L. R. B., 227 F. (2d) 409 (C. A. D. C., 1955), Brief for Petitioners, U. S. C. A. for D. C.

[31]61 Stat. 151 (1947), 29 U. S. C. A. § 163 (1955 Supp.).

[32]61 Stat. 161 (1947), 29 U. S. C. A. § 142 (1955 Supp.).

[33]N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490, 83 L. ed. 627, 123 A. L. R. 599 (1933) (sit-down strike); N. L. R. B. v. Clinchfield Coal Corp., 145 F. (2d) 66 (C. C. A. 4th, 1944) (interference with mine property); Southern Steamship Co. v. N. L. R. B., 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 1246 (1942) (mutiny); Korthinos v. The Niarchos, 175 F. (2d) 730 (C. A. 4th, 1949) cert. den. 338 U. S. 894, 70 S. Ct. 241, 94 L. ed. 550 (1949) (seamen's rights); Hazel-Atlas Glass Co. v. N. L. R. B., 127 F. (2d) 109 (C. C. A. 4th, 1942) (wildcat strike); N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. ed. 682 (1939) (wildcat strike and strike in violation of contract); American News Co., 55 N. L. R. B. 1302 (1944) (strike to compel violation of statute).

[34]For the House proposals and reasoning, see H. R. Rep. No. 245, 80th Cong., 1st Sess. pp. 26-28 (1947). But in conference, the House receded from its position, noting court decisions concerning "unlawful or other improper conduct" and "unlawful concerted activities." "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was a real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act." H. R. Rep. No. 510, 80th Cong., 1st Sess., U. S. Code Cong. Serv. (1947) 1145.

[35]"Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." Justice Brandeis in Dorchy v. Kansas, 272 U. S. 306, 311, 47 S. Ct. 86, 87, 71 L. ed. 248, 269 (1926).

tutional power of the federal government, or any of its agencies, to deny.[36] The proper analysis of the impact of federal labor legislation upon this situation was well expressed by the Supreme Court in the *Wisconsin* case—it struck at the doctrine "that concerted activities were conspiracies and for that reason illegal," but because legal conduct could not thereafter be made illegal because in concert, it did not follow "that otherwise illegal action is made legal by concert."[37] In short, the Wagner Act left labor and its antagonist in much the same position as it found them in regard to the legality of a strike.[38]

Both Section 8(b)(4) (secondary boycotts and jurisdictional disputes) and Section 8 (d)(4) (strikes in violation of contract or without lawful notice) outlaw certain unfair labor practice strikes.[39] The Supreme Court majority in the *Wisconsin* case declared that the intent to include "any concerted slowdown or other concerted interruption of work" within the "strike" activity proscribed in this sub-sections (rather than to broaden the "strike" protected by the Act) prompted the broad language of Section 501.[40] In Section 208, the President of the United States is given power to direct the Attorney General to seek an injunction in any United States District Court against a "strike" which the court finds will "imperil the national health or safety."[41] In determining whether to grant such injunction, the court is freed of the restrictions of the "Norris-LaGuardia" Act.[42] The few decisions which have interpreted Section 208 and succeeding sections appear to indicate that the broadened definition of the word strike may also have been written into the Act to cover slowdowns or other concerted action where these provisions are otherwise applicable.[43]

---

[36]U. S. Const. Amends. XIII and V.

[37]International Union, U. A. W., AFL v. Wisconsin Employment Relations Board, 336 U. S. 245, 257, 69 S. Ct. 516, 523, 93 L. ed. 651, 667 (1949).

[38]See Note (1949) 6 A. L. R. (2d) 416, 435-436.

[39]61 Stat. 140 (1947), 29 U. S. C. A. § 158 (1955 Supp.).

[40]"Thus, the obvious purpose of the Labor Management Amendments was not to grant a dispensation for the strike but to outlaw strikes when undertaken to enforce what the Act calls unfair labor practices...." International Union, U. A. W., AFL v. Wisconsin Employment Relations Board, 336 U. S. 245, 261, 69 S. Ct. 516, 526, 93 L. ed. 651, 667 (1949).

[41]61 Stat. 155 (1947), 29 U. S. C. A. § 176 (1955 Supp.).

[42]61 Stat. 155 (1947), 29 U. S. C. A. § 178 (1955 Supp.).

[43]United States v. International Union, U. M. W. of America, 89 F. Supp. 179 (D. C. D. C. 1950); United States v. International Union, U. M. W. of America, 89 F. Supp. 187 (D. C. D. C. 1950). The mine stoppage cases most clearly indicate the need for a comprehensive definition of "strike." Other cases have involved atomic energy and shipping, and typically order the union to cease and desist from in any manner interfering with or affecting the orderly continuance of work in the

Legislative history of the 1947 amendments to the Act discloses that two purposes (or perhaps one purpose stated two ways) motivated the Congress.[44] The first was to secure mutuality in the operation of the Act—that is, within the limitations raised by natural differences in position between employers and employees and their representatives, to impose upon each the same duties and to extend to each the same government aid in economic clashes.[45] The second was to rectify what was considered to be a bias in the original Act in favor of the interests of labor organizations to the exclusion of the interests of the employer, the individual employee, and the general public.[46] In connection with the second objective, the House committee noted that the original Act was avowedly designed to secure industrial peace but had not done so.[47]

Of primary significance to the purpose to create mutuality was the

---

plant. United States v. United Steelworkers of America, CIO, 202 F. (2d) 132 (C. A. 2nd, 1953) (atomic energy); United States v. International Longshoremen's and Warehousemen's Union, CIO, 78 F. Supp. 710 (N. D. Cal. 1948) (shipping); United States v. International Longshoremen's Ass'n, 116 F. Supp. 255 (S. D. N. Y. 1953) (shipping). It has been contended that Section 501 applies only here and not to the amended Wagner Act. See Note (1955) 64 Yale L. J. 766, 771, n. 37.

[44]See generally, N. L. R. B., Legislative History of the Labor Management-Relations Act (1948). For a comparison of the two Acts, see Note (1948) 173 A. L. R. 1401.

[45]"... the findings and policies of the amended National Labor Relations Act are to be two-sided." H. R. Rep. No. 510, 80th Cong., 1st Sess., U. S. Code Cong. Serv. (1947) 1136. The Act "was designed to accomplish two primary purposes... and to place employers on a more equal position with unions in bargaining and labor relations procedures." Note (1948) 173 A. L. R. 1401, 1402. "The findings and policy expressed in Section 1 of the amended Wagner Act convert it from a union encouragement law to a union-management relations statute." 2 Teller, Labor Disputes and Collective Bargaining (1950 Supp.) § 398.26.

[46]The bill was described in the conference committee report as one "to prescribe fair and equitable rules of conduct to be observed by labor and management... to protect the rights of individual workers in their relations with labor organizations... to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare...." H. R. Rep. No. 510, 80th Cong., 1st Sess., U. S. Code Cong. Serv. (1947) 1135. The report of the House Committee on Education and Labor contains a detailed indictment of the Wagner Act's deficiencies in this respect. H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 4 et seq.

[47]"The act did not reduce industrial strife. Under the act strikes increased and, up to the very time this Congress met, they continued to increase. The effect was to impede commerce, not to promote its flow as the act undertook to do." H. R. Rep. No. 245, 80th Cong., 1st Sess. 10. U. S. Department of Commerce Bureau of Labor Statistics figures show an average loss through strikes of 13 million man-days per year for the five years preceding adoption of the Wagner Act. In 1946, this had risen to 113 million and in 1947 to 157 million. Note (1948) 6 A. L. R. (2d) 416, 424.

extension to labor organizations of the duty to bargain collectively.[48] The union in the *Textile Workers* case has claimed that the duty is nothing more than an obligation to sit down and negotiate with the employer.[49] That it certainly extends that far is clear from decisions under the Act holding labor organizations guilty of an unfair labor practice for refusing entirely to negotiate or for conduct which amounted to the same thing.[50] But the adoption of this restrictive view requires one to ignore the phrase "in good faith" as virtually meaningless and to assume that the avowed aim to secure mutuality or to equalize the positions of the parties did not extend to this portion of the Act. On the other hand, Congressional definition of collective bargaining as the "*mutual obligation* of the employer and the representative of the employees to meet at reasonable times and *confer in good faith*..." seems to indicate that such mutuality as might be possible was intended.[51]

The majority of the Court of Appeals in the *Textile Workers* case thought that "there is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants."[52] This truism is, of course, unassailable, but, if made the only test of the obligation of either party, it would put beyond the reach of this portion of the Act wholesale discharges, blacklisting, lockouts, or any other in the catalogue of either party's economic weapons. Neither the Board nor the courts have ever used this reasoning in testing the good faith of the employer.[53] More than sterile discussion has uniformly been held to be required of him;[54]

---

[48]H. R. Rep. No 510, 80th Cong., 1st Sess., U. S. Code Cong. Serv. (1947) 1149. See National Maritime Union of America, 78 N. L. R. B. 791, 980 et seq. (1948).

[49]Textile Workers Union of America v. N. L. R. B., 227 F. (2d) 409 (C. A. D. C., 1955), Brief for Petitioners in U. S. C. A. for D. C., 21 et seq.

[50]N. L. R. B. v. Retail Clerks International Ass'n, AFL, 211 F. (2d) 759 (C. A. 9th, 1954) cert. den. 348 U. S. 839, 75 S. Ct. 47, 99 L. ed. 662 (1954); Madden v. United Mine Workers, 79 F. Supp. 616 (D. C. D. C. 1948); International Brotherhood of Teamsters, AFL, 87 N. L. R. B. 927 (1949); National Maritime Union of America, 78 N. L. R. B. 971 (1948).

[51]61 Stat. 140 (1947), 29 U. S. C. A. § 158(d) (1955 Supp.) [italics supplied]. This provision "imposed upon labor organizations the *same duty to bargain* which under section 8(a)(5) of the Senate amendment was imposed upon employers." H. R. Rep. No. 510, 80th Cong., 1st Sess., U. S. Code Cong. Serv. (1947) 1149 [italics supplied].

[52]227 F. (2d) 409, 410 (C. A. D. C., 1955).

[53]Note (1943) 147 A. L. R. 7, 12 et seq. contains an exhaustive list of decisions construing employer good faith. See Newman, The Law of Labor Relations (1953) 56 et seq.

[54]H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514, 61 S. Ct. 320, 85 L. ed. 309 (1941); N. L. R. B. v. Boss Mfg. Co., 118 F. (2d) 187 (C. C. A. 7th, 1941); N. L. R. B. v. Griswold Mfg. Co., 106 F. (2d) 713 (C. C. A. 3rd, 1939); Dallas Cartage Co., 14 N. L. R. B. 411 (1939).

he must not make unilateral changes in wages, hours, or working conditions at least until he has bargained upon the subject;[55] and there is some indication that he may be required to submit counterproposals.[56]

Complete good faith—that is, complete reliance upon the give and take of negotiation—is, of course, not required. One of the fundamental features of the Act is the protection afforded the lawful strike when used to back up collective bargaining demands.[57] However, any substantial identity between the obligations of the parties would seem to require that the union as well as the employer rely upon the process of bargaining rather than, as the Board found had occurred in the *Textile Workers* case, attempt, while purporting to bargain, "to force the employer's hand" by *unprotected* tactics.[58]

The second Congressional purpose in enacting the amendments to the Act appears to be at least equally ill-served by the decision of the majority in the *Textile Workers* case. As the dissent points out, "if the majority be correct, the employer's remedy will be to discharge the employees who use unprotected tactics and retaliate by a shutdown."[59] When these harassing tactics are used, the employer may of course accede to union demands. If he does not choose to do so, denial of Board relief will not protect the interest of the individual employee, the general public, or industrial peace.

The Supreme Court has granted certiorari in the *Textile Workers* case.[60] As noted by the Court of Appeals dissent, that Court has "repeatedly stated that one of the prime purposes of the National Labor Relations Act as amended is the achievement of industrial peace."[61]

---

[55]N. L. R. B. v. Crompton-Highland Mills, Inc., 337 U. S. 217, 69 S. Ct. 960, 93 L. ed. 1320 (1949); May Department Stores Co. v. N. L. R. B., 326 U. S. 376, 66 S. Ct. 203, 90 L. ed. 145 (1945); Sullivan Drydock & Repair Corp., 67 N. L. R. B. 627 (1946); Dallas Cartage Co., 14 N. L. R. B. 411 (1939). Unilateral control cannot be insisted upon, N. L. R. B. v. American National Ins. Co., 343 U. S. 395, 72 S. Ct. 824, 96 L. ed. 1027 (1952). Cf. Majure v. N. L. R. B., 198 F. (2d) 735 (C. A. 5th, 1952).

[56]See discussion and cases cited, note 3, supra.

[57]N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904, 82 L. ed 1381 (1937).

[58]227 F. (2d) 409, 410 (C. A. D. C., 1955).

[59]See 227 F. (2d) 409, 411, 413 (C. A. D. C., 1955). This is the Achilles heel of the union case. The union has argued that various rights of employees are infringed by the Board decision here. Federal legislation was and is intended to rectify what prior to 1935 was an imbalance favoring the employer in labor relations. To do this it protected labor organizations. But when the interest of the labor organization actually clashes with that of the employee—as the union admitted was true in this case—it seems to this writer that all reason for protection of the labor union entity's position evaporates.

[60]3 Apr. 1956, 76 S. Ct. 650, 100 L. ed. adv. p. 469 (1956).

[61]See 227 F. (2d) 409, 411, 412 (C. A. D. C., 1955).

It seems highly doubtful that that Court will, by affirmance, immunize the Union from responsibility for its unprotected harassing tactics when such result, by emasculating Board power to assess union good faith through examination of conduct away from the bargaining table, will encourage this unprotected conduct and, of the interests sought to be protected by federal labor legislation serve only that of the labor organization as an entity.

JOHN S. STUMP

PROPERTY—NON-TRAVEL USE OF HIGHWAY RIGHT-OF-WAY AS ADDITIONAL SERVITUDE FOR WHICH ABUTTING LANDOWNER IS ENTITLED TO COMPENSATION. [West Virginia]

The ever-increasing utilization of electric power, oil, natural gas, the telephone and telegraph, and other similar utilities renders the question of the nature and extent of the rights of the public and of adjacent landowners in regard to highway rights-of-way proportionately more significant. Most courts have regarded the interest of the public in the land over which the highway runs as being in the nature of an easement.[1] From this point of unanimity, there seems to be a great divergence of judicial opinion as to whether the several non-travel uses commonly made of the highway right-of-way constitute additional servitudes on the land over which the easement runs, or merely amount to public purposes within the reasonable scope of the easement.[2] If the particular use in question is found to be an additional servitude amounting to a taking of private property, then the owner is entitled to some compensation for this encroachment, or conceivably to the removal of it.[3] If the use is within the scope of the easement, however, the owner is presumed to have received compensation for it when the

[1]See State v. Board of Com'rs, 28 Wash. (2d) 891, 184 P. (2d) 577, 581, 172 A. L. R. 1001, 1010 (1947); Note (1947) 4 Wash. & Lee L. Rev. 192.

[2]Duquesne Light Co. v. Duff, 251 Pa. St. 607, 97 Atl. 82 (1916): "...practically the only point that the courts are in harmony on is that there is an irreconcilable conflict in the decisions."

[3]Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066 (1890) (gas pipeline); Ward v. Triple State Natural Gas & Oil Co., 115 Ky. 723, 74 S. W. 709 (1903) (same); American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 Atl. 910 (1889) (telephone poles and wires); Baltimore County Water & Elec. Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439 (1907) (water mains); Eels v. American Tel. & Tel. Co., 143 N. Y. 133, 38 N. E. 202 (1894) (telephone poles and wires); Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105 (1886) (gas pipeline); Duquesne Light Co. v. Duff, 251 Pa. St. 607, 97 Atl. 82 (1916) (electric power line). See 3 Thornton, Oil and Gas (5th ed. 1932) §§ 765, 974-77; 3 Tiffany, Real Property (3rd ed. 1939) § 926, for additional authority.

right-of-way was originally acquired.[4] The various tests which have been set up to define the boundaries of the interest of the public show considerable cleavage even in reaching the same result, and the courts seem reluctant to provide any comprehensive principle which could be applied in handling all, or at least major divisions, of the non-travel highway uses.

Prior to the turn of the century, the tendency of the courts was to grant recovery to the abutting landowner on the ground that new facilities constituted additional servitudes. The basic premise of these earlier decisions was that the scope of the highway easement is distinctly limited to a public right of passage on the surface by the normal methods of travel. The holder of the easement was regarded as having only a right to "pass and repass."[5] Some courts placed emphasis on the contemplation of the parties as to the purposes for which the land was originally taken. While the parties are usually said to have contemplated that travel conditions and modes of transportation might change, they often were considered not to have anticipated any new utility which might require the construction of permanent, stationary equipment or installations on, above, or under the right-of-way.[6] Thus, it has been said that "the primary law of the use of the highway is motion, and... movement by some moving body is contemplated and must be present, and these bodies can occupy any given portion only momentarily, but... no part of the highway may be per-

[4]McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870 (1904) (telephone poles and wires); Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204 (1905) (same); Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310 (1895) (same); Hardman v. Cabot, 60 W. Va. 664, 55 S. E. 756 (1906) (gas pipeline); Herold v. Hughes, 90 S. E. (2d) 451 (W. Va. 1955) (same).

[5]Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066 (1890): "... the public acquires... nothing more than a right to pass and repass.... Subject to the right of the public, the owner of the fee of a rural road retains all right and interest in it. He remains the owner, and, as such, his rights are very comprehensive." See Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 107 (1886).

[6]Baltimore County Water & Elec. Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439 (1907); Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105 (1886). However, some highly confusing decisions in the same jurisdiction have been reached in regard to different types of uses. This is particularly true in Kentucky, where the imposition of telephone poles and wires was held to require no additional compensation in Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204 (1905), while a gas pipeline was judged to be additional servitude on the land for which the landowner must be paid in Paine's Guardian v. Calor Oil & Gas Co.; 133 Ky. 614, 103 S. W. 309 (1907) (court granted compensation for gas pipeline, while at same time recognizing that steam and electric railroads and telephone equipment within rural rights-of-way were not additional servitudes, primarily because they were regarded as taking the place of prior modes of transportation or communication).

manently appropriated and occupied exclusively by any person or corporation."[7]

Contrasting with this earlier restrictive view is the more expansive approach illustrated by the recent West Virginia case of *Herold v. Hughes*,[8] which is being endorsed by a greater number of jurisdicdictions.[9] Plaintiff, an abutting landowner who held the fee to the land over which public easement ran, brought suit to compel the removal of a natural gas transmission pipeline from the subsurface area within the public right-of-way of a rural highway. Defendant was a privately-owned gas corporation which had acted with the authority and under the regulations of the state highway commission in laying the pipeline. The main issue of the case was whether the privilege to construct and maintain a gas pipeline was a reasonable user within the rights and privileges included in the scope of an easement taken for public highway purposes. The trial court held for the plaintiff, who apparently relied in part on a prior decision involving an encroachment on the highway by a privately-owned tramway which was confined to the personal use of its owner.[10] The West Virginia Supreme Court of Appeals reversed the judgment and dismissed the suit, reasoning that the real nature of the public highway easement was expansive, broadening to fit the needs and uses of the public as new uses were developed: "Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are

---

[7]See Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642, 645 (1936) (court here rejected this contention, holding new use not to be additional servitude requiring further compensation); Paine's Guardian v. Calor Oil & Gas Co., 133 Ky. 614, 103 S. W. 309, 310 (1907) ("It is the perpetual occupancy; not to the exclusion, or even hindrance, of the public, it may be true, but nevertheless, it is the taking possession of the land, to the exclusion to that extent, of the owner and all others for any purpose whatever."); Eels v. American Tel. & Tel. Co., 143 N. Y. 133, 38 N. E. 202 (1894). Contra: Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111, 113 (1895): "It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move.... If an immovable structure in the highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it impairs the special easements of abutting owners."

[8]90 S. E. (2d) 451 (W. Va. 1955).

[9]McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870 (1904); Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111 (1895); Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642 (1936).

[10]Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 34 S. E. (2d) 348 (1945).

designed."[11] The court concluded that "the grant of an easement for public road purposes includes all rights and privileges necessary or convenient to the use of the public in travel or transportation of properties of all kinds over, under, or along all public highways.... Being a part of the grant for public road purposes, [the gas pipeline] cannot be an additional burden on the fee. It is, in reality, an additional public use."[12]

Under this more modern approach, the contested new use of the right-of-way will not be held to be an additional servitude if: (1) it serves a substantial public purpose, and (2) it leaves the highway free and safe for travel by members of the public and allows the reversionary owner to conduct whatever uses he could make of the right-of-way without interference with the public easement.[13] Attempts to define the term "public purpose" lead the courts into rather vague generalizations: "A use, to be public, must be... one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use."[14] In making specific application of this concept, it is generally agreed that a corporation, whether publicly or privately owned, will meet this requirement if it has the legislative power of eminent domain granted to it. "Undertakings which are sought to be promoted by the right of eminent domain are often of private benefit. The judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and disregard the private benefit as a mere incident. This practice is correct where the public interest clearly dominates the private benefit...."[15] Cases in which the requisites of public pur-

---

[11]Herold v. Hughes, 90 S. E. (2d) 451, 454 (W. Va. 1955), quoting Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111 (1895).

[12]90 S. E. (2d) 451, 458 (W. Va. 1955).

[13]Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111 (1895). Cf. Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642 (1936). See State v. Kansas Natural Gas Co., 71 Kan. 508, 80 Pac. 962, 963 (1905): "The transportation of commodities on the highway is one of the uses for which it has always been maintained. The means, however, used by the gas company in the transportation of its gas are exceptional.... But shall this fact alone deprive the defendant of the use of the highway for a usual and proper purpose, unless such use necessarily obstruct, seriously inconvenience, or endanger public travel?"

[14]See Nichols v. Central Virginia Power Co., 143 Va. 405, 130 S. E. 764, 767 (1926), quoting in substance Fallsburg Power Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 196 (1903).

[15]See Fallsburg Power Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 197 (1903). The court went on to say: "Even where the disproportion between public and private benefit is much less marked, the courts are justified in sustaining a legislative act by singling out the public use." See State v. Board of Com'rs, 28 Wash. (2d) 891, 184 P. (2d) 577, 583 (1947), wherein the court construed a statute authorizing

pose are not met usually involve privately-owned facilities, the use and benefit of which go solely to their owners.[16] But even in such situations there is some dissent. In *White v. Blanchard Bros. Granite Co.*, a privately-owned and used quarry railway was held not to impose an additional servitude on the land: "The use of a highway for the transportation of merchandise to be used by different purchasers in many places is a public use, and the defendant corporation, in carrying its stone over the road, is doing it as one of the public."[17] Private pipeline corporations which sell only to one or two public utility companies have been held to be serving a public purpose.[18] In general, it has been held that "the production and distribution of natural gas for light, fuel, and power affects the people generally to such an extent that it may be regarded as a business of a public nature, and is almost, if not quite, a public necessity; the control of which belongs to the state."[19] Actually the courts do not seem to place great emphasis on the quality of public purpose involved in these new uses, so long as the facilities benefit the public and are of such importance that they require comprehensive legislative regulation, and possess the power of eminent domain. But where they are privately owned, and are clearly maintained for the profit of private persons, they do not seem to be so inherently public in nature as to justify the installation of permanent encroachments on the highway without exercising that power of eminent domain.[20]

---

franchises to public and private corporations and persons for putting impositions on the public highway which were in the "public interest." The court held that "public interest" was a more general term which would include uses which would not fall into the category of "public use" in connection with the privilege of eminent domain power. Thus, a cooperative utility company not having the power of eminent domain was held to be able to use the public highway right-of-way without giving compensation, because it fell under the term "public interest."

[16]Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618 (1893); Benton v. Yarborough, 128 S. C. 481, 123 S. E. 204 (1924); Acme Cement Plaster Co. v. American Cement Plaster Co., 167 S. W. 183, 184 (Tex. Civ. App., 1914) ("The allegations show that appellees are not such corporations as are given the right of eminent domain or the right to construct and maintain telephone lines over the public highways."); Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 34 S. E. (2d) 348 (1945).

[17]178 Mass. 363, 59 N. E. 1025, 1026 (1901).

[18]Home Gas Co. v. Eckerson, 94 N. Y. S. (2d) 221, 225 (1950): "Even though as admitted here the petitioner sells to only two customers, that service, in effect, redounds to the benefit of the entire population serviced by the two local utilities."

[19]City of La Harpe v. Elm Twp. Gas Co., 69 Kan. 97, 76 Pac. 448, 449 (1904).

[20]Paine's Guardian v. Calor Oil & Gas Co., 133 Ky. 614, 103 S. W. 309, 310 (1907): "Appellee serves the public in such matters, [transmission of natural gas] but in no different sense from the butcher or coal dealer, for gas is no more essential to the public than meat or coal.... In the case at bar, appellee is not a common carrier. It does not propose to carry gas for everybody—the owners of all wells along its line—but it proposes to carry its own gas alone to the market. The

Some confusion and apparent conflict has stemmed from a distinction which has been made between the imposition of new facilities on a city street and their installation on a rural highway. This distinction is the major concession made by the courts following the rules which generally give recovery to the landowner. Where the use is to be placed in a city street, the public interest and concern is considered to be so great as to amount to necessity, and the benefits to the public, and to the abutting landowner himself, are sufficient reasons for allowing the new facilities to be imposed without further compensation to the owner of the fee.[21]

Once the fundamental public nature of the use is approved, it still must pass the requirement set up by the courts which would place it within the scope of a proper *highway* purpose. Of course, the normal travel of the public along the road will be protected from obstruction,[22] but the abutting owner must usually show a substantial interference with his rights before the courts will uphold his protest. For example, a Washington decision held that an additional servitude was imposed by the construction along a rural roadway of a drainage ditch so wide that it seriously impeded the abutting owner's ingress to and egress from his property.[23] More typical of the current point of view are the decisions which regard transmission and transportation of

---

carrying of its gas is a private enterprise, just as would be the coal dealer carrying his coal to market.... But it is not true that, because a man has a right to haul his wares over a highway, he may erect thereon permanent means of transporting them." Cf. Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642, 644 (1936). In Oklahoma, all petroleum and natural gas pipelines are common carriers by statute. Okla. Stat. (1931) § 11555.

[21]This distinction is recognized in the following jurisdictions: Indiana: Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951 (1898) (urban); Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066 (1890) (rural); Ohio: Smith v. Central Power Co., 103 Ohio St. 681, 137 N. E. 159 (1921) (urban); Hofius v. Carnegie-Illinois Steel Corp., 146 Ohio St. 574, 67 N. E. (2d) 429 (1946) (rural). From the broad definition of both urban and rural highway easements in the Smith case, it is difficult to reconcile the two Ohio decisions, even though a municipality takes more than an easement by statute in Ohio. See Ohio Rev. Code (Baldwin, 1953) § 711.07; Pennsylvania: McDevitt v. People's Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948 (1894) (urban); Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105 (1886) (rural).

[22]In Thacker v. Ashland Oil & Ref. Co., 129 W. Va. 520, 41 S. E. (2d) 111, 116 (1946), after quoting from Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642, 645 (1936), the court made the following remark: "But, in our opinion, the use of the public highways for the transportation by pipeline of oil or other petroleum products should not be confined to public purpose. Of course, such transportation should not interfere with public travel and should not constitute a hazard or a public nuisance."

[23]Gray v. Ramsay, 117 Wash. 218, 200 Pac. 1074 (1921). Other rights which the owner might exercise in the land along the highway include the laying of water conduits and the digging and mining of minerals.

commodities as but new ways to effect the same highway purposes.[24] In *Nazworthy v. Illinois Oil Co.,* where the use in question was an oil pipeline, the Oklahoma court held that "the new or different use of the highway, or new or different method of transmission or transportation, is but a further proper use of the highway in line with the general purpose of highways: that general purpose of highways being that subject to proper supervision, they may be used by the public and by common carriers for such form of travel, transportation, and transmission as may be in keeping with the declared policy of the state; a chief restriction being that each such use of the highway shall not improperly interfere with the rights of others in the use of same highways."[25] The same view was expressed in the early case of *Cater v. Northwestern Telephone Exchange Co.,* in which the doctrine of the expansive nature of the public highway easement was approved in denying compensation to the abutting landowner for the installation of telephone poles and wires on the right-of-way.[26]

The courts which have adopted this approach usually find that the power of the state over its highways is of a plenary nature, such that while its interest in the land is technically an easement, the rights of the landowner are so relatively trivial that the state has, in effect, an interest amounting to a defeasible fee.[27] This interpretation of the state's power and control is largely justified by the fact that the compensation which is given when land is condemned for highway purposes would probably be the same whether the fee or only an easement is taken.[28] Since the landowner is considered to be paid in full, his contention that the new use of the highway is an additional taking of property would obviously be accorded much less weight in these jurisdictions.

---

[24]Cumberland Tel. & Tel. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204 (1905): "The telephone takes the place of the private messenger. The transmission of messages by telephone is a business of public character, which is conducted under public control in the same manner as the carriage of persons or property."

[25]176 Okla. 37, 54 P. (2d) 642, 645 (1936). See State v. Kansas Natural Gas Co., 71 Kan. 508, 80 Pac. 962, 963 (1905).

[26]60 Minn. 539, 63 N. W. 111 (1895). Accord, McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870, 871 (1904): "The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply."

[27]Herold v. Hughes, 90 S. E. (2d) 451 at 457 (W. Va. 1955).

[28]Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642, 643 (1936): "... where the land of an individual is once taken, under proper authority, for a public use and full compensation is paid the owner for a perpetual easement, the owner is not entitled to additional compensation when the same land or a part thereof is afterwards appropriated under legislative authority and subjected to another or to further public use of a like kind...." Notes (1933) 33 Col. L. Rev. 1070, (1947) 4 Wash. & Lee L. Rev. 192, 196. See note 29, infra.

The view of the more modern cases apparently would ignore the situation which would arise in the event of the subsequent abandonment of the highway as a course for vehicular traffic.[29] Where an additional user has been approved as being within the scope of the easement, and the highway is subsequently abandoned by the public road commission, the portion of the right-of-way occupied by the utility could presumably be considered as still unabandoned, since it was a proper use when installed. Yet, the utility would then be using land after the primary purpose of the public easement has ceased to exist. This new use was at best incidental to the main highway purpose when the highway was in existence. It is open to question whether the user would now constitute a public highway purpose of such substantial nature that the facility would be allowed to stay on the premises and thereby interfere with the owner's enjoyment of his reversion without compensation to him.

A possible method of settling the problem of new uses of highways to be constructed in the future would be to enact legislation requiring that the state hereinafter take a fee simple interest in the land.[30] This action would eliminate the landowner's reversionary interest and leave him with no basis for complaint as to the uses which could be made of the highway rights-of-way on land acquired under such statutes. But that plan fails to solve the existing problem as far as all the easements already acquired are concerned.

In any situation in which the use in issue is privately owned but obviously of public benefit, the fact of private ownership and profit should be balanced against the convenience to the public, the relative importance of keeping the cost of the public service as inexpensive as possible, and the encouragement of private enterprise to operate this service. Once this issue is settled favorably for the user, then it would seem that the more liberal view, as expressed in *Cater v. Northwestern Telephone Exchange Co.*,[31] would be the most practical and utilitarian, even though the rights of the landowner are technically violated.

---

[29]Some indication of this conclusion is found in Herold v. Hughes, 90 S. E. (2d) 451, 457 (W. Va. 1955): "... the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value or to be regarded as property...."

[30]White v. Salt Lake City, 239 P. (2d) 210 at 212 (Utah 1952) (statute which "vests the fee" in public thoroughfares, whether in corporate limits of town or in county, so long as it was platted on registered map, was held to give county commissioners right to give city a franchise along county highway, and interest of county in highway was held to be more than an easement, thus eliminating any liability on city to pay for use of highway).

[31]60 Minn. 539, 63 N. W. 111 (1895).

The highway right-of-way is usually a practical location for such facilities. The ease of access for repair, the rarity of practical use to which the landowner can put the land, and the fact that he has already received, in most instances, adequate compensation for the complete loss of the land are all valid reasons for allowing such impositions. While the limits as to interference with the public or with the rights of the abutting landowners are not often reached, the very fact that there seldom is any actual damage, obstruction, or deprivation alleged in these cases should manifest the technical nature of the burden on the fee. Moreover, the rationalization that all these new uses are but new ways to serve the same highway purposes is a logical one. The telephone poles and wires and the messages transmitted along them, and the gas which flows through pipelines are analogous to the flow of traffic over the highway. The permanent installations are only more efficient avenues of travel for these commodities.[32] Thus, it seems artificial to maintain that such non-travel facilities are so different as to be beyond the original scope of the public easement; yet it would be unwise to pass over the issue of the quality and adequacy of public purpose which the new use will serve. Perhaps the legislatures could solve this problem by declaring the specific status of all common non-travel users of the highway in their relation to the public.[33]

ROBERT H. MANN, JR.

TORTS—CONTRIBUTORY NEGLIGENCE OF STATUTORY BENEFICIARY AS BAR TO RECOVERY FOR WRONGFUL DEATH. [Illinois]

While the rule is firmly established that the contributory negligence of a person injured through the negligence of another will bar recovery of damages for the injury,[1] there is a difference of opinion as to the effect the contributory negligence of a third party should have on the rights of one injured by the negligence of another. Ordinarily, an injured party's recovery is not barred by a third party's contributory negligence, because the doctrine of imputed negligence has been, except in limited classes of cases, repudiated by most courts of this

[32]Smith v. Central Power Co., 103 Ohio St. 681, 137 N. E. 159, 163 (1921): "It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. It would be more correct to say that present uses are the progression and modern development of the same uses and purposes."

[33]See note 20, supra.

[1]Restatement, Torts (1934) § 467; Prosser, Torts (2nd ed. 1955) 283.

country.[2] "Negligence in the conduct of another will not be imputed to a party if he did not authorize such conduct, participate therein, or have the right or power to control it."[3]

As the foregoing reference suggests, one qualification to the general rule that the contributory negligence of a third party will not prevent recovery is established in situations in which the injured party may be charged with responsibility for the third party's negligence. Thus, recovery is barred if the injured party had such control over the contributorily negligent party as to have been in position to prevent the latter's wrongful conduct, as when two persons are engaged in a joint enterprise.[4]

A second qualification may be suggested by the policy consideration which prohibits a person guilty of wrongful conduct from benefiting from his own wrongdoing. Such an issue is raised when a parent's negligence contributes to the wrongful death of a child in conjunction with the primary negligence of another person. In this situation, the courts have had considerable difficulty in determining whether recovery under Wrongful Death Acts should be barred because a beneficiary named by the Act to receive a share of the damages was guilty of contributory negligence in causing the death.[5]

---

[2]As a general rule it may be said that in order to impute the negligence of one person to another, there must exist between them some relation of master and servant or superior and subordinate or other relationship akin thereto. Little v. Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. ed. 652 (1886); East Tennessee, V. & G. R. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281 (1891); Johnson v. Turner, 319 Ill. App. 265, 49 N. E. (2d) 297 (1943); Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660 (1903); Cincinnati St. R. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340 (1896); Restatement, Torts (1934) § 485; Prosser, Torts (2nd ed. 1955) 299.

[3]Johnson v. Turner, 319 Ill. App. 265, 49 N. E. (2d) 297, 304 (1943).

[4]Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799 (1904) (where two persons go out in a rowboat, and one does all the rowing and has charge of the boat, with the consent of the other, the negligence of the former in getting the boat in front of a steamer held to be chargeable to the other); Tannehill v. Kansas City, C. & S. Ry. Co., 279 Mo. 158, 213 S. W. 818 (1919) (two brothers, who were returning from a trip to another town in an automobile jointly owned by them and another brother, held engaged in joint undertaking, and admitted negligence of driver was imputed to deceased and precluded recovery); Omaha & R. V. Ry. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599 (1896) (two mechanics were struck by train while crossing a railroad track in wagon in which they were transporting their tools, and negligence of one who was driving was imputed to other); Schron v. Staten Island Electric R. Co., 16 App. Div. 111, 45 N. Y. Supp. 124 (1897) (two persons engaged in moving furniture held to be engaged in joint enterprise, so that negligence of one in managing wagon was imputable to other); Restatement, Torts (1934) § 491.

[5]Some few courts have looked upon this situation as one in which the "injured party" himself has been contributorily negligent, the "injured party" being not the person who was killed, but the person who suffered a loss by the death of the deceased. See note 16, infra.

The recent case of *Nudd v. Matsoukas*[6] demonstrates the extreme negative approach to that issue. An action to recover under the Illinois Wrongful Death Act[7] was brought by the administrator of the estates of a mother and son killed in a collision of two automobiles. The complaint alleged that the husband-father of the deceased persons had negligently operated the car in which they were riding with the result that it had collided with a car being negligently operated by the defendant, killing the woman and child.[8] The Illinois Supreme Court upheld the trial court's order sustaining a motion to dismiss on the ground that the action was barred by the contributory negligence of one of the persons who would be a beneficiary of a recovery under the Wrongful Death Act. The upper court based its decision on the reasoning that the cause of action is entirely statutory and the statute creates a single cause of action. "There is no separation of the damages to be assessed by the jury. Their finding is for a single gross amount in an inseparable cause of action, and the contributory negligence of one beneficiary who may be entitled to share in the amount recovered is a defense to the action."[9] The rule barring recovery was conceded to be an extremely harsh one, but the court concluded that the rule laid down in *Hazel v. Hoopeston-Danville Motor Bus Co.*[10] in 1923 controlled the present decision. In that earlier decision the court had declared itself bound by the established Illinois rule,[11] but had

---

[6]6 Ill. (2d) 504, 128 N. E. (2d) 609 (1955).

[7]Ill. Stat. Ann. (Smith-Hurd, 1936) c. 70, § 1.

[8]The husband-father, being insured, was also joined as a party defendant. The court stated the issue of the case to be: "Can the administrator of an estate maintain a suit for tort under the wrongful death statute where one of the surviving next of kin is made a principal party defendant?" 6 Ill. (2d) 504, 128 N. E. (2d) 609, 610 (1955). However, the court's decision against recovery was based on the position of the husband-father as a beneficiary under the Wrongful Death Statute, with no especial significance given to the fact that he was also a defendant. The action also included one count for damages for personal injury to another son who survived the accident, and the court ruled against that count on the basis of the common law rule that a child cannot sue his parent for personal torts.

[9]6 Ill. (2d) 504, 128 N. E. (2d) 609, 611 (1955).

[10]310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923).

[11]It is to be noted, however, that the above rule was not followed in some of the earlier Illinois cases in the lower appellate courts. For example: Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385 (1903); Chicago City R. Co. v. McKeon, 143 Ill. App. 598 (1908); Haas v. Hines, 219 Ill. App. 524 (1920). See Note (1948) 2 A. L. R. (2d) 785, 800. In Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424, 102 N. E. 819 (1913) the court, in reviewing the past cases in Illinois, admitted that the above cases had held contra to the rule denying recovery, but cited numerous other Illinois cases which had firmly established that rule as controlling. Relying upon the doctrine of stare decisis, the court stated that the question was a closed one and again denied recovery because of the contributory negligence of a beneficiary. This case seems to be the one most cited by the later Illinois decisions as closing the question.

observed that if the question were an open one, arguments against the rule would be entitled to serious consideration.

Where the contributorily negligent party is the *only* person who could qualify as a beneficiary under a Wrongful Death Act, the great weight of authority refuses to allow recovery.[12] The rule has been said to be founded on public policy, the principle being that no one shall profit by his own wrong.[13] Some courts have expressed opposition to this rule, reasoning that the death statutes, strictly or literally construed, contain no prohibition against recovery by a contributorily negligent beneficiary, and that the only condition for the right of recovery under the statutes is that the deceased person could have maintained an action, had death not intervened.[14] It is to be noted that other cases have permitted recovery under these circumstances, where the statute under which the action was brought made the recovery by the administrator a part of the estate of the decedent, so that the parent or other beneficiary was entitled to the recovery not in his own right as statutory beneficiary but as distributee of the estate under the statute of descent and distribution.[15]

Where the contributorily negligent party is *only one of two or more beneficiaries* under a Wrongful Death Act, various courts have adopted three conflicting views. Some jurisdictions have reached the same result as the Illinois court, barring recover in toto because of the contributory negligence of one beneficiary. However, apparently no other court now bases this result on the reasoning adopted in the *Nudd* case that the statute creates only a single cause of action in which the

---

[12]People v. Seamon, 249 Ala. 284, 31 S. (2d) 88 (1947); Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 Pac. 401, 23 A. L. R. 661 (1921); Willy v. Atchison, T. & S. F. R. Co., 115 Colo. 306, 172 P. (2d) 958 (1946); Burton v. Sparlock's Adm'r, 294 Ky. 336, 171 S. W. (2d) 1012 (1943); Leninhan v. Boston & M. R. R., 260 Mass. 28, 156 N. E. 857 (1927); Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517 (1906); Harton v. Forest City Tel. Co., 141 N. C. 455, 54 S. E. 299 (1906); Vinnette v. Northern Pac. Ry. Co., 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328 (1907); Hammack v. Hope Natural Gas Co., 104 W. Va. 344, 140 S. E. 1 (1927).

[13]See Star Fire Clay Co. v. Budno, 269 Fed. 508, 511 (C. C. A. 6th, 1920); Lee v. New River & Pocahontas Consol. Coal Co., 203 Fed. 644, 647 (C. C. A. 4th, 1913); Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 Pac. 401, 406 (1921); Davis v. Seaboard Air Line Ry., 136 N. C. 115, 48 S. E. 591, 592 (1904); Wolf v. Lake Erie & W. R. Co., 55 Ohio St. 517, 45 N. E. 708, 710 (1896).

[14]Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); Consolidated Traction Co. v. Hone, 59 N. J. L. 275, 35 Atl. 899 (1896); McKay v. Syracuse Rapid Transit Ry. Co., 208 N. Y. 359, 101 N. E. 885 (1913).

[15]Miles v. St. Louis, I. M. & S. R. Co., 90 Ark. 485, 119 S. W. 837 (1909); Wilmot v. McPadden, 78 Conn. 276, 61 Atl. 1069 (1905); Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545 (1889); Bloomquist v. City of La Grande, 120 Ore. 19, 251 Pac. 252 (1926).

jury can award only a single gross amount.[16] The other courts barring recovery completely have instead grounded their decisions on imputation of negligence,[17] or on the somewhat anomalous conclusion that the defense of contributory negligence was not meant to be taken from the defendant by the statute.[18] It was these decisions which the *Hazel* case cited in support of its rule, despite the fact that they are based on entirely different reasoning.[19]

Other courts have taken the opposite extreme view that full recovery shall be allowed despite the contributory negligence of one or several beneficiaries where there are other beneficiaries who were not contributorily negligent.[20] The courts reaching this result rely on the grounds that: (1) the statute does not provide that the action should be barred as such, and to hold so would be adding to the statute by judicial legislation; and (2) since the only condition of the right of recovery is that the deceased could have recovered for such injury had he survived, the right of recovery will not be barred by

---

[16]Although this is the reasoning for which the Hazel case is cited, the court there also gives another reason in its decision for barring the recovery: "The reason that the negligence of the parent of an infant decedent, or of any beneficiary, is a bar to the action of the administrator, is that, the action being for damages caused to the beneficiary by the negligence of the defendant, it has been the theory of the common law in every such case that the contributory negligence of the person suffering the damages is a complete defense to the person negligently causing the injury." Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 395, 30 A. L. R. 491, 496 (1923). See note 6, supra. The above line of reasoning was applied in Tucker v. Draper, 62 Neb. 66, 86 N. W. 917 (1901).

[17]Toner's Adm'r v. South Covington & C. St. Ry. Co., 109 Ky. 41, 58 S. W. 439 (1900) (in action by father as administrator to recover damages for death of infant son, contributory negligence of mother was imputed to plaintiff, who was not himself negligent); Darbrinsky v. Pennsylvania Co., 248 Pa. 503, 94 Atl. 269 (1915) (contributory negligence of one parent barred recovery by other parent for death of their minor child, negligence of parent in charge of child being imputed to parent who sought to recover).

[18]Passamaneck v. Louisville Ry. Co., 98 Ky. 195, 32 S. W. 620 (1895) (plaintiff contended that statute made plea of contributory negligence no longer available; court ruled that it was not design of constitutional convention to deprive defendant of right to plead contributory negligence).

[19]Before citing the cases listed above as following the Illinois rule, the court stated: "The negligence of the parents will bar the action,... not because of imputed negligence, and not because of the reason suggested in some of the decisions that no man may profit by his own wrong." Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 395, 30 A. L. R. 491, 496 (1923).

[20]Southern Ry. Co. v. Shipp, 169 Ala. 327, 53 So. 150 (1910); Miles v. St. Louis I. M. & S. R. Co., 90 Ark. 485, 119 S. W. 837 (1909); Wilmot v. McPadden, 78 Conn. 276, 61 Atl. 1069 (1905); Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 396, 20 S. E. 550, 26 L. R. A. 553 (1894); Wymore v. Mahaska County, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545 (1889); O'Conner v. Benson Coal Co., 301 Mass. 145, 16 N. E. (2d) 636 (1938); Danforth v. Emmons, 124 Me. 156, 126 Atl. 821 (1924); Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920).

contributory negligence of any beneficiary.[21] Most courts adhering to this view, however, do not attempt to justify the resulting violation of the public policy against permitting a person to profit by his own wrong.[22]

The explanation for these conflicting results reached by the courts does not lie in different wording of the Wrongful Death Acts, but rather in the differing interpretations the courts have placed on the basically similar statutes.[23] This fact is most forcefully demonstrated in *Lindley v. Sink*,[24] where the Indiana court considered the Illinois rule of the *Hazel* case[25] and refused to follow it, stating that even though the Indiana statute, like the Illinois statute, creates a single action based on a single wrong, and though the separate beneficiaries may not maintain separate actions, and though the sum recoverable is assessed as one gross sum, it does not follow that contributory negligence of one of the beneficiaries will defeat the entire action and thereby deprive the innocent beneficiaries of the compensation which is provided for by the statute. Instead, the court concluded: "Each of the beneficiaries has an individual interest in the damages recoverable under the statute. Such individual interest cannot be affected by the independent action of one of the other beneficiaries."[26]

The majority of jurisdictions, rejecting both the no-recovery and full-recovery rules, have taken the intermediate view that although the contributory negligence of one or more, but not all, of the bene-

[21]O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N. E. (2d) 636, 637 (1938) ("There is no way in which damages can be either wholly denied or reduced because of the contributory negligence of one or more out of a group of beneficiaries without violating the statute."); Danforth v. Emmons, 124 Me. 156, 126 Atl. 821 (1924) (contributory negligence of beneficiary is no bar, for to make it so would be to read into the statute a new condition).

[22]See also McKay v. Syracuse Rapid Transit Ry. Co., 208 N. Y. 359, 364, 101 N. E. 885, 886 (1913) where the court rejected the policy and allowed recovery to a sole beneficiary who was contributorily negligent.

[23]The Illinois statute states: "... the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death...." Ill. Stat. Ann. (Smith-Hurd, 1936) c. 70, § 2. Compare Me. Rev. Stat. (1930) c. 101, § 10: "The jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought...."; Miss. Code (1930) c. 12, § 510: "... the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration ... all damages of every kind to any and all persons interested in the suit." As stated, the Illinois rule is exactly opposite to the rule as set down by the Maine and Mississippi courts.

[24]218 Ind. 1, 30 N. E. (2d) 456, 2 A. L. R. (2d) 772 (1940).

[25]Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923).

[26]218 Ind. 1, 30 N. E. (2d) 456, 461, 2 A. L. R. (2d) 772, 782 (1940).

ficiaries named by statute will not defeat a cause of action for death so as to bar all recovery, the amount of recovery will be reduced to the extent of the contributorily negligent beneficiary's share in the recovery.[27] The reasoning in these cases generally has been that the negligence of one beneficiary will not be imputed to an innocent beneficiary so as to bar the entire right of action, but that a guilty person shall not be allowed to profit by his own wrong. In such a case, the usual procedure is either to instruct the jury to return a verdict for the shares of the innocent beneficiaries only, or to have the jury return a verdict for the full amount, with the court reducing that award by the amount of the share of the negligent beneficiary before judgment is entered.[28]

While this intermediate approach is more satisfactory than either of the two extreme views, there is yet another alternative which may provide an even better result—that of allowing the full measure of damages to be assessed against the primary wrongdoer and then dividing the total award among the innocent beneficiaries only. By this means the negligent beneficiary is precluded from benefiting from his own wrong, while at the same time the primarily guilty party is precluded from obtaining the windfall of having his liability diminished merely because he was fortunate enough to have his negligent conduct take effect on a victim at a time when the latter was in company with a statutory beneficiary who was also acting negligently. While this view is subject to the objection that the innocent beneficiary would receive more than the jury apportioned as his compensation for the loss, this objection seems to be neutralized by the fact that the actual loss suffered is too indefinite to be calculated with great certainty, and also that the low statutory limits of recovery often prevent a beneficiary from recovering the full loss he has suffered.

---

[27]Southern Pac. Co. v. Day, 38 F. (2d) 958 (C. C. A. 9th, 1930); Phillips v. Denver City Tramway Co., 53 Colo. 458, 128 Pac. 460 (1912); Cruse v. Dole, 155 Kan. 292, 124 P. (2d) 470 (1942); Mattfeld v. Nester, 226 Minn. 106, 32 N. W. (2d) 291 (1948); Pearson v. National Manufacture & Stores Corp., 219 N. C. 717, 14 S. E. (2d) 811 (1941); Anderson v. Memphis Street Ry. Co., 143 Tenn. 216, 227 S. W. 39 (1921); City of Danville v. Howard, 156 Va. 32, 157 S. E. 733 (1931); Stogdon v. Charleston Transit Co., 126 W. Va. 286, 32 S. E. (2d) 276 (1944); Restatement, Torts (1934) § 493.

[28]Cleveland, C., C. & St. L. Ry. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158 (1909); Humphreys v. Ash, 90 N. H. 223, 6 A. (2d) 436 (1939). In Mattfeld v. Nester, 226 Minn. 106, 32 N. W. (2d) 291, 308 (1948), the court said that the proper practice is to require the jury by general verdict to assess the entire damages for loss of the life to all the beneficiaries, and to determine by special verdict whether any beneficiary of the recovery was guilty of contributory negligence, and then to deduct from the general verdict the amount of the special verdict if the latter is against the beneficiary.

It appears clear that the courts, through construction of the Wrongful Death Statutes now in force, can readily attain the desirable result of granting recovery to innocent beneficiaries while barring the guilty beneficiary, as the statutes are generally ambiguous on this issue. They neither specify that a negligent beneficiary shall or shall not recover nor that the negligence of one beneficiary does or does not bar all recovery. Surely the legislative purpose is served by imposing liability on the primary wrongdoer in order to provide recovery for the innocent beneficiaries.

However, where courts have closed the question in their states by becoming steadfastly committed to the Illinois rule, the legislatures should amend the Acts to provide for this situation specifically. Such a course has already been followed in Ohio, where the statute relating to actions for wrongful death formerly provided for the assessing of damages in a lump sum for the beneficiaries jointly. This statute was subsequently amended so as to require the jury to award separately such damages as it might think appropriate to the pecuniary injury suffered by each person for whose benefit the action was brought.[29] Under this provision, subsequent Ohio cases have ruled that contributory negligence is available as a defense against those beneficiaries who by their negligence contributed to the death of the deceased, but not against those who were not guilty of such negligence.[30]

LAURIER T. RAYMOND, JR.

TORTS—RIGHT OF PRIVACY AS SUBJECT TO QUALIFIED PRIVILEGE OF TELEVISION NEWS BROADCASTER. [Florida].

When the right to privacy began to receive serious recognition as a legally enforceable right about the turn of the century,[1] the only

---

[29]Ohio Rev. Stat. (Baldwin, 1955) c. 2125.02.

[30]Cleveland, C., C. & St. L. Ry. Co. v. Grambo, 103 Ohio St. 471, 134 N. E. 648, 20 A. L. R. 1214 (1921); Wolf v. Lake Erie & W. R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812 (1896).

[1]The right to privacy as a distinct legal right was first proposed in Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193. The authors reasoned that no new legal principle was involved, but that social, political and and economic changes demanded a redefining of a legal principle which had long been recognized and protected in the common law either on the ground of protection of a property right or a contract right or on the ground of a breach of an implied trust or confidence. The authors stated that the principle which is the foundation of the right to privacy is in reality not that of private property, but that of an inviolate personality. "This development of the law was inevitable. The in-

means of communication involved was the printed word. Therefore, the concepts regarding the nature of the right, the scope of its protection, and the justifications for the invasion of the right[2] centered around newspaper and magazine publications. Once the law had recognized the right of the individual to be free from unwarranted publicity,[3] it was inevitable that new problems would arise as new media for dissemination of information developed. With the successive advent of motion pictures, radio and more recently, television, the courts have had to adapt the established principles of the law of privacy to modern news-dissemination methods.

This procedure has recently been extended by the Florida court in *Jacova v. Southern Radio and Television Co.*[4] Plaintiff had entered

---

tense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature." Warren and Brandeis, The Right to Privacy (1890) 7 Harv. L. Rev. 193, 195.

While the authors admitted that there were no decided cases in which the right to privacy was distinctly recognized, they asserted that there were many cases from which it would appear that the right really existed, although the decision in each case was upon other grounds when the plaintiff was granted relief. The cases especially referred to were Yovatt v. Winyard, 1 J. & W. 394 (1820); Prince Albert v. Strange, 2 De Gex & Sm. 652 (1849); Tuck v. Priester, 19 Q. B. D. 639 (1887); Pollard v. Photographic Co., 40 Ch. Div. 345 (1888).

[2]For a summary of the general principles which seem to run through the decisions see Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 at 92 (1931).

[3]Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 at 970 (1927). The right to privacy has been variously defined as the right: "to be let alone," Cooley, The Law of Torts (2nd ed. 1880) 29; "to live a life of seclusion," Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68, 70, 69 L. R. A. 101, 104 (1905); "to live without unwarranted interference by the public about matters with which the public is not necessarily concerned," Banks v. King Features Syndicate, 30 F. Supp. 352, 353 (S. D. N. Y. 1939); "to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities," McGovern v. Van Riper, 137 N. J. Eq. 24, 43 A. (2d) 514, 518 (1945) aff'd 137 N. J. 548, 45 A. (2d) 842 (1946). For other definitions see 37A W. & P. (Perm. ed.) 395. The diversity of fact situations and the relatively undeveloped state of the law in this field make the right incapable of exact definition, yet there seems to be a prevading element, common to all the cases, of outraging the victim's feelings by depriving him of the privacy which most normal persons desire and have a right to demand.

The following statement of the essential elements of an action for invasion of privacy has been formulated: "(1) private affairs in which the public has no legitimate concern; (2) publication of such affairs; (3) unwarranted publication, that is, absence of any waiver or privilege authorizing it; and (4) publication such as would cause mental suffering, shame or humiliation to a person of ordinary sensibilities." Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 831 (D. C. D. C. 1955).

[4]83 S. (2d) 34 (Fla. 1955).

a cigar store in a hotel to buy a newspaper, and while he was in the store it was raided by police who suspected it was a gambling establishment. During the course of the raid two detectives pushed plaintiff against a wall and interrogated him. Moving pictures were taken of the incident and shown on a television news program the following day. Plaintiff's face was clearly recognizable in the telecast, as the portion of the film showing him was on the screen for about 15 seconds. Though plaintiff was not mentioned by name, immediately after the picture in the telecast showing him being interrogated by persons identified as police officers, the narrator described the arrest of one of the gamblers and of a bellboy in the hotel on bookmaking charges. Plaintiff brought an action against the television company for violating his right of privacy and for identifying him as a gambler. The trial court granted summary judgment in favor of defendant, and its decision was affirmed by the Supreme Court of Florida. The latter tribunal stressed the role of a television station as a disseminator of news, pointing out that it can best serve the legitimate public interest in that capacity only if it is free from "unreasonable restraints" upon its reporting. It was therefore held that, like newspapers, radio and motion pictures, the television company has a qualified privilege, which gives it the right to use in its telecast the name or photograph of a person who has become an "actor" in a newsworthy event. The privilege was was found to apply and thus to bar the plaintiff's recovery, because even though he was an unwilling "actor" in such an event—the role having been thrust upon him by the mistake of the police officers—the fact was that he was in a public place and present at a scene where news was in the making. It was further held that the privilege had not been abused, since there was nothing humiliating or embarrassing in the role played by plaintiff as one shopping at a newsstand; nor was there anything that would offend a person of ordinary sensibilities, since there was no reasonable inference that plaintiff was identified as a gambler.

The *Jacova* case is the first decision on the precise point of invasion of privacy by means of a television *news* program, but in developing the law in this field, it appears that the courts will follow the pattern of the reasoning in the principal decision, by drawing analogies to the qualified privilege that has been recognized in respect to other communication media. Under this privilege the right of privacy is subject to the qualifications that the publication of matters of legitimate public concern not be inhibited,[5] and that a person may, by

[5]"The right to privacy does not prohibit any publication of matter which is of public or general interest." Warren and Brandeis, The Right ot Privacy (1890) 4

his acts, achievements, or mode of life become a public figure, and thereby waive or lose, to some extent, the right to privacy which would otherwise be his.[6]

Basically the qualified privilege that is accorded to communication media is a recognition of the need for protecting the freedom of the press.[7] It is argued that a free press which disseminates news is necessary to keep the public informed, and an informed public is necessary to safeguard against tyranny.[8] However, the privilege seems to have

---

Harv. L. Rev. 193, 214. Accord: Elmhurst v. Shoreham Hotel; 58 F. Supp. 484 at 485 (D. C. D. C. 1945) aff'd 153 F. (2d) 467 (C. A. D. C., 1946); Smith v. Doss, 251 Ala. 250, 37 S. (2d) 118 at 120 (1948); Smith v. Surratt, 7 Alaska 416 (1926); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 at 496 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 at 973 (1929); Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 at 755 (1940). See Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133, 138 (1945).

[6]"The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193, 215. Accord: Donahue v. Warner Bros. Pictures, 194 F. (2d) 6 at 12 (C. A. 10th, 1952); Corliss v. E. W. Walker Co., 64 Fed. 280 at 282, 31 L. R. A. 283 at 286 (C. C. D. Mass. 1894); Smith v. Doss, 251 Ala. 250, 37 S. (2d) 118 at 120 (1948); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 at 496 (1939); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 at 72, 69 L. R. A. 101 at 106 (1905); Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 at 753 (1940); See Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133, 138 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91, 93 (1931).

[7]"The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested.... Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct...."Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 74, 69 L. R. A. 101, 108 (1905).

[8]"... the white light of publicity safeguards the public,... free disclosure of truth is the best protection against tyranny.... The advance of civilization depends upon the dissemination of knowledge, and society has an absolute right to be informed on matters bearing upon its protection and education." Nizer, The Right of Privacy (1941) 39 Mich. L. Rev. 526, 528.

The Jacova case quoted Thomas Jefferson: "The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure. *No government ought to be without censors:* and where the press is free no one ever will." 83 S. (2d) 34, 40 (Fla. 1955).

been extended beyond the dissemination of "news," to include also "information" and "education."[9]

Efforts to determine the scope of this qualified privilege to invade the privacy of an individual have not produced definite conclusions. The courts have utilized a number of tests, the first of which was the "property right" test, under which the courts considered it necessary to find some element of an individual's personality which could be classed as a "property right" on which to base recovery.[10] Although this view represented an advance beyond refusal to recognize the right at all, it has been said to be too restrictive to afford adequate recovery for privacy invasions.[11]

In attempting to broaden the base for recovery, the courts moved to the "public figure" test,[12] the general idea being that a public figure has "waived any existing right of privacy."[13] In its early application the term "public figure" was limited to those occupying or seeking a public office.[14] Under this view it was intended that publications should be repressed which concern the individual's private life in aspects having no legitimate relation to or bearing upon any act

---

[9]Donahue v. Warner Bros. Pictures, 194 F. (2d) 6, 11 (C. A. 10th, 1952); Gill v. Curtis Pub. Co., 38 Cal. (2d) 273, 239 P. (2d) 630, 634 (1952); Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N. Y. S. (2d) 553, 559 (1951).

[10]Cases finding a property right in some aspect of plaintiff's personality are: Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911) (picture); Edison v. Edison Polyform Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907) (name and picture). Cf. Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219 (1899); Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902).

[11]Note (1940) 40 Col. L. Rev. 1283. A federal court, in Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N. D. Cal. 1939), branded this approach a fiction.

[12]"The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but when an individual becomes a public character the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public." Corliss v. E. W. Walker Co., 64 Fed. 280, 282 (C. C. D. Mass. 1894). Accord: O'Brien v. Pabst Sales Co., 124 F. (2d) 167 at 170 (C. C. A. 5th, 1942) cert. den. 315 U. S. 823, 62 S. Ct. 916, 86 L. ed. 1220 (1942); Smith v. Doss, 251 Ala. 250, 37 S. (2d) 118 at 120 (1948); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 at 138 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 at 93 (1931).

[13]Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491, 496 (1939). Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911) held that the waiver, or consent, could be expressed or implied, as if one should become engaged in public affairs or otherwise have excited public interest by his course of conduct.

[14]Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193. See note 6, supra.

done by that person in a public or quasi-public capacity.[15] However, the "public figure" concept was later extended to include persons who were held to have impliedly consented to publicity for reasons other than association with public office or public duties.[16] The reasoning behind such a broad denial of recovery of one found to be a "public figure" seems to be unsound, since it makes the unwarranted assumption that when a person comes into the public eye for any reason whatever, he has thereby waived his right to privacy.[17] Although an individual's position in the community is given consideration in determining whether the publication is within the scope of qualified privilege enjoyed by communication media, the "public figure" test standing alone seems to be inadequate today.[18]

One legal writer has argued that the true distinction in regard to the scope of the qualified privilege is not between public and private figures, but between matters of public and private interest.[19] In accord with this reasoning, some courts have adopted the "public interest"

---

[15]"In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi-public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity." Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193, 216.

[16]O'Brien v. Pabst Sales Co., 124 F. (2d) 167 (C. C. A. 5th, 1942) (football player); Corliss v. E. W. Walker Co., 64 Fed. 280 (C. C. D. Mass. 1894) (inventor); Smith v. Surratt, 7 Alaska 416 (1926) (explorer); Cohen v. Marx, 94 Cal. App. (2d) 704, 211 P. (2d) 320 (1949) (prize fighter); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939) (woman who had committed suicide).

[17]A good example is Sidis v. F-R Pub. Corp., 113 F. (2d) 806 (C. C. A. 2nd, 1940) cert. den. 311 U. S. 711, 61 S. Ct. 391, 85 L. ed. 462 (1940). Plaintiff had been a famous child prodigy who had lectured to disinguished mathematicians at eleven and graduated from Harvard at sixteen. In later life he had sought to live as unobtrusively as possible, had developed a passion for privacy, and in an attempt to conceal his identity had taken a job as an obscure clerk and lived in a single room in a shabby district. *New Yorker* featured him in a biographical sketch under the heading "Where Are They Now?" Plaintiff was denied recovery for invasion of privacy. The court conceded that under the strict standards suggested by Warren and Brandeis, plaintiff's right of privacy would have been invaded, in that plaintiff was neither politician, political administrator, nor statesman. Although characterizing the article as being "merciless in its dissection of intimate details of its subject's personal life....", the court nevertheless stated that "The work possesses great reader interest, for it is both amusing and instructive, but it may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life." 113 F. (2d) 806, 807. The court held that it would allow limited scrutiny of the private life of "any person who has achieved, or has had thrust upon him, the questionable and undefinable status of a public figure." 113 F. (2d) 806, 809.

[18]Nizer, The Right of Privacy (1941) 39 Mich. L. Rev. 526, 540.

[19]Nizer, The Right of Privacy (1941) 39 Mich. L. Rev. 526, 556.

test as the basis for their decisions as to whether a publication is privileged.[20] Although the cases indicate lack of agreement regarding the definition of "public interest,"[21] the general principle seems to be that if a publication is "newsworthy" it is privileged. The right of the public to be informed of newsworthy events is held paramount, and the right of the individual to lead a private life is subordinated. Courts have been rather liberal in construing the term "newsworthy," and, in dealing with newspaper publications, have interprted almost any article as "news," regardless of whether it was printed in the news columns, feature pages, or magazine section.[22] It does not matter that the individual who seeks recovery for invasion of privacy was an *involuntary* participant in some newsworthy event, since persons who unwillingly come into the public eye are subject to the same limitations on their right to be let alone as is the "public figure."[23] Until such persons have "reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."[24] Furthermore, a long lapse of time between occurrence and publication does not necessarily destroy the "newsworthiness" of an event, and correspondingly does not destroy the privilege to report it, since the details of the incident may still be matters of legitimate public interest.[25]

Since the courts have been unable to formulate a working definition of "newsworthy," and since it does not follow that a publication in which the public has an actual interest is necessarily one in which it has a legitimate concern, the public interest test seems to be of little value. In addition to being vague and uncertain, its application unduly

---

[20]Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (E. D. N. Y. 1936); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929); Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940).

[21]Restatement, Torts (1939) § 867, Comment c, seems to imply that matters which satisfy the curiosity of the public are properly in the public interest. Cf. Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491, 494 (1939): "It might appropriately be observed that 'public or general interest' as used in the foregoing opinion is not to be confused with mere curiosity," Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (S. D. N. Y. 1936): "...what is news of public interest will vary with the circumstances involved."

[22]Nizer, The Right of Privacy (1941) 39 Mich. L. Rev. 526, 542.

[23]Leverton v. Curtis Pub. Co., 192 F. (2d) 974 (C. A. 3rd, 1951); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. C. Minn. 1948); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 419 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964 (1927).

[24]Restatement, Torts (1939) § 867 Comment c.

[25]Prosser, Torts (2nd ed. 1955) 644.

magnifies the "interests" of the public and gives too little consideration to the effect on the individual.

A fourth test, which has more recently been adopted by some courts, is the so-called "mores" test.[26] Use of this test puts more emphasis on the effect of the publication on the individual; it uses "public interest" as *one* factor, but not the only factor in determining whether the publication constitutes an actionable invasion of privacy. Courts which apply this test look to see if the publication was such as would offend a person of "ordinary sensibilities"[27] or "would tend to outrage public tolerance."[28] The language used by the court in *Koussevitzky v. Allen, Towne & Heath, Inc.*,[29] indicates the focal point of judicial inquiry. In that case defendant, without authorization, wrote and was about to publish a biography of plaintiff, a well-known figure in the field of music. Plaintiff sought but was denied injunctive relief. "There is nothing repugnant to one's sense of decency or that takes the book out of the realm of the legitimate dissemination of information on a subject of general interest."[30] The "mores" test, though only a refinement of the "public interest" test, would seem to be a more realistic approach to a balancing of the conflicting rights of the public and of the individual.

In the few cases in which charges of violation of the right of privacy in television programs have been made, this problem of balancing the public and private interests has rarely been considered by the courts. Three of the cases decided to date were brought by performers in athletic events—two by professional boxers[31] and one by a group of aquatic stars.[32] All three plaintiffs were denied recovery on the ground of waiver of their right of privacy by voluntarily performing in a public place, even though the television presentation of their performance which constituted the alleged invasion of privacy occurred at a later time and was unauthorized.[33] All three of the pub-

---

[26]Leverton v. Curtis Pub. Co., 192 F. (2d) 974 (C. A. 3rd, 1951); Gill v. Curtis Pub. Co., 38 Cal. (2d) 273, 239 P. (2d) 630 (1952); Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N. Y. S. (2d) 779 (1947).

[27]Cason v. Baskin, 155 Fla. 198, 20 S. (2d) 243, 251 (1945).

[28]Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N. Y. S. (2d) 779, 784 (1947).

[29]188 Misc. 479, 68 N. Y. S. (2d) 779 (1947).

[30]188 Misc. 479, 68 N. Y. S. (2d) 779, 784 (1947).

[31]Ettore v. Philco Television Broadcasting Corp., 126 F. Supp. 143 (E. D. Pa. 1954); Chavez v. Hollywood Post No. 43 American Legion (Cal. Super. Ct.) oral opinion quoted in 16 U. S. L. Wk. 2362 (3 Feb. 1948).

[32]Peterson v. KMTR Radio Corp., (Cal. Super. Ct.) 18 U. S. L. Wk. 2044 (26 July 1949).

[33]In the Ettore case, the court held that since plaintiff had no cause of action for violation of his right to privacy at common law, he had no right of recovery

lications were of matters of public interest, and in none of them were the plaintiffs presented in an unfavorable light, nor were their private lives exposed to public attention. On the contrary, the television viewers saw exactly what the performers, by voluntarily appearing before the public, indicated they wanted the public to see.

Bernstein v. National Broadcasting Co.[34] is more closely related to the typical privilege problem. There, plaintiff had at one time been a "public figure," having been convicted of murder and later pardoned through the efforts of a newspaper reporter who produced evidence showing that plaintiff was innocent. Twenty years after the trial, defendant featured the story in a fictionalized version in a television program, the reporter's real name being used but a fictitious name being substituted for plaintiff's. The court held that there was no actionable invasion of privacy, since the facts of plaintiff's past life were not private affairs but a matter of public record and a matter of public or general interest and therefore privileged. However, in dictum the court recognized the other side of the problem—the effect of the publication on the plaintiff—but stated that it would be inclined to rule, as a matter of law, that the telecast was not offensive to one of ordinary sensibilities in plaintiff's position.[35]

It appears that the public interest factor in the *Bernstein* case was weighed too heavily against the right of the plaintiff. The television program was not news dissemination, but was intended to entertain, and it was this entertainment value that prompted the program's sponsor to pay for the defendant's presentation of it. The public's entertainment and the defendant's profit was attained at the expense of the plaintiff, and it seems questionable that the enlightenment received by the public was of a nature which justifies the invasion of the privacy of the plaintiff by resurrecting the twenty-year-old crime.

The *Jacova* decision seems to be on much sounder ground. The court's reasoning was in line with the "mores" test, considering the effect of the publication on both the public and the plaintiff. The newsworthy event was one of present significance; the public has a legitimate interest in current developments in crime-fighting; and television should be allowed to stimulate this interest without risk of liability for incidental private inconveniences, even in regard to a person who was an involuntary and unwilling actor in the event.

---

under the Right of Privacy section of the New York Civil Rights Law, 126 F. Supp. 143 at 149 (E. D. Pa. 1954). Plaintiff, a professional athlete, was held to have no property right in his performance, in the absence of a provision in his contract with the boxing club or his promoter.

[34]129 F. Supp. 817 (D. C. D. C. 1955).

[35]See 129 F. Supp. 817, 835 (D. C. D. C. 1955).

However, the scope of the privilege accorded the television and radio producers may well be too broad, for a distinction should be drawn between profit-making entertainment programs and articles on the one hand, and newscasting and other legitimate information programs on the other. In the former classification, the motive is purely to make money, and it seems unreasonable that under the guise of the freedom of the press, the publisher should be allowed to expose for public consumption the details of the private life of an individual without his consent, merely because his private life is interesting enough to attract viewers or listeners. Making the publication media liable for such invasions of privacy would not only serve to recompense the individual injured but might also act as a deterrent to future unjustified invasions of privacy. With respect to the latter classification of legitimate news and information, however, the public has a justifiable interest in the publication and should be protected in its right to have such publications continue without restraints. The problem of protecting the freedom of the press will become particularly acute in dealing with "on the spot" telecasts in which the transmission to the public is instantaneous and there is no opportunity for editing and revising. However, a "canned" telecast should be subject to the same limitations as to privilege in invasion of privacy as a newspaper or motion picture, since there is ample opportunity to prevent the commission of a legal wrong.

ROBERT G. MCCULLOUGH

TORTS—TIME AT WHICH STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST ACTION FOR DAMAGES FOR MALPRACTICE. [Ohio]

In evolving a rule as to when the statute of limitations begins to run on the right of a patient to sue a medical practitioner for damages for improper professional treatment, the courts and legislatures have been faced with a sharp conflict in policy. The "policy of protecting a doctor against the danger of stale lawsuits involving the danger of missing witnesses and the danger of errors in memory in recollecting pertinent facts... [and] the policy of allowing recourse to the courts to persons claiming injury because of... alleged acts of continuing negligence... [or,] alleged acts of substandard medical care, amounting to fraudulent concealment or constructive fraud"[1] have continually

[1]Lindquist v. Mullen, 45 Wash. (2d) 675, 277 P. (2d) 724, 733 (1954); Miller, The Contractual Liability of Physicians and Surgeons [1953] Wash. U. L. Q. 413: Note (1946) 21 St. John's L. Rev. 77.

been weighed against each other. With a view to serving one or the other of these policies or to achieving a compromise between the two, different jurisdictions have adopted divergent rules of law.

Undoubtedly the weight of authority is to the effect that the statute of limitations governing actions based *solely* on the malpractice of the physician begins to run from the date of the wrongful act or omission rather than from the date at which resulting damage develops or at which the cause of damage may be reasonably discovered by the injured party.[2] In support of this rule the courts have reasoned that the statute of limitations must begin to run when the cause of action accrues, and that the cause of action accrues when the original injury is inflicted; therefore, later injurious developments merely attach themselves to the primary cause of action, thereby becoming elements for consideration in the award of damages. It has been argued that to toll the running of the statute until the injury and its cause became fully discovered would lead to an intolerable situation: "Recognition of... [such a] rule would permit a plaintiff, affected with some malady, to trace that malady to an original cause alleged to have occurred years and years ago. No practicing physician or dentist would ever be safe. The origin of disease is involved in uncertainty at best. While hardships may arise in particular cases by reason of this ruling, a contrary ruling would be inimical to the repose of society and [would] promote litigation of a character too uncertain and too speculative to be encouraged."[3] Although the majority view appears to be sound in theory, hardships resulting from its application cast doubt on its practical fairness.

An excellent demonstration of the objectionable features of the majority view is found in the recently published Ohio decision of *Swankowski v. Diethlem*[4] in which plaintiff alleged: that defendant physician, employed to perform an operation, negligently permitted

---

[2]Pickett v. Aglinsky, 110 F. (2d) 628 (C. C. A. 4th, 1940); Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Giambozi v. Peters, 127 Conn. 380, 16 A. (2d) 833 (1940); Ogg v. Rabb, 181 Iowa 145, 162 N. W. 217, L. R. A. 1918C, 981 (1917); Graham v. Updegraph, 144 Kan. 45, 58 P. (2d) 475 (1936); Carter v. Harlan Hospital Assoc., 265 Ky. 452, 97 S. W. (2d) 9 (1936); Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83, L. R. A. 1917C, 1169 (1917); Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929); Schmidt v. Esser, 183 Minn. 354, 236 N. W. 622, 74 A. L. R. 1312 (1931); Wilder v. St. Joseph's Hospital, 82 S. (2d) 651 (Miss. 1955); Weinstein v. Blanchard, 109 N. J. L. 632, 162 Atl. 601 (1932); Conklin v. Draper, 241 N. Y. Supp. 529, aff'd 254 N. Y. 620, 173 N. E. 892 (1930); Bernath v. LeFever, 325 Pa. 43, 189 Atl. 342 (1937); Albert v. Sherman, 167 Tenn. 133, 67 S. W. (2d) 140 (1934); McCoy v. Stevens, 182 Wash. 55, 44 P. (2d) 797 (1935); 70 C. J. S., Physicians and Surgeons § 60.

[3]Albert v. Sherman, 167 Tenn. 133, 67 S. W. (2d) 140, 142 (1934).

[4]98 Ohio App. 271, 129 N. E. (2d) 182 (1953) (opinions not published until Nov., 1955).

a surgical needle to remain in plaintiff's abdomen after the incision had been closed; that seven years after the negligent operation the needle was removed in a correctional operation by another physician; that during the interval between operations, defendant had " 'knowingly, intentionally and fraudulently' failed to remove said needle and knowingly permitted it to remain in the abdomen of plaintiff with intent to deceive plaintiff"; and that plaintiff did not learn of the cause of his trouble until twelve days before the correctional operation was to be performed. Plaintiff argued that the statute of limitations governing fraudulent conduct should prevail, thus allowing the action to be brought within four years after the fraud was discovered. However, the trial court sustained defendant's demurrer on the ground that the one year statute of limitations governing malpractice had run. The appellate court in affirming this ruling reasoned that "the petition of plaintiff, when taken by the four corners, sets up a cause of action in malpractice, and the allegations of fraudulent misrepresentation and intentional concealment of the fact that the needle had been intentionally left in the abdomen of plaintiff do not transmute or change the cause of action from one in malpractice to one in deceit."[5]

The fundamental defect in the application of this rule is that the courts, in an effort to protect doctors against harassing litigation by those who have failed to act with reasonable promptness, have precluded patients from recovering in many cases in which, from the nature of the malpractice committed, the patient does not have any information on which to bring suit within the time allowed. "It imposes an improper burden to hold that in order to prevent the statute from running against his right of action, the patient must sue while he is following the advice of his physician or surgeon and upon which he relies all the time."[6] What is to be desired is a rule which interprets statutes of limitations so as to prevent suits by those who have slept on their rights without reasonable cause, but allows suits by those

[5]Swankowski v. Diethlem, 98 Ohio App. 271, 129 N. E. (2d) 182, 185 (1953). The Ohio court attempted to distinguish between a right of action and a cause of action before reaching the conclusion that resulting injuries attach themselves to the original cause of action. The court said: "A right of action... is grounded on a 'primary legal right in plaintiff, a corresponding primary legal duty of defendant to observe that right, and a breach of that duty by defendant,' by reason of which the plaintiff sustained damages. In contrast with a right of action..., a cause of action has been defined as comprising 'every fact necessary to the right of relief prayed for'.... The form or right of action should not be confused with the cause of action. They are not interchangeable." 98 Ohio App. 271, 129 N. E. (2d) 182, 184 (1953). However, this type of distinction apparently has no particular significance in this field.

[6]Note (1944) 38 Ill. L. Rev. 323, 325.

who could not reasonably have been expected to prosecute the action more promptly. Arguing for such a compromise position, the dissent in the *Swankowski* case pointed out that a new issue should arise when it appears that the plaintiff's failure to bring his suit sooner is due to his lack of knowledge of the original wrong, that condition resulting from the concealment of material facts by the defendant. The cause of action then becomes one in fraud and deceit practiced upon a patient for the purpose of taking advantage of the statute limiting the time in which the action for malpractice may be commenced; and one who, standing in a fiduciary relation, conceals or fails to make full disclosure of pertinent facts within his knowledge, knowing the other party to be ignorant of those facts, is guilty of fraud.[7]

Modern authorities are quite generally in accord with the general principle advocated by the *Swankowski* dissent that there can be an action for fraudulent concealment as distinguished from an action for malpractice alone. Many decisions have sustained suits brought on the fraud theory, if instituted within the statutory period following the patient's discovery of the malpractice.[8] However, some few courts follow the practice of the Ohio court in the principal case by rigidly applying the general rule that the cause of action for malpractice accrues when the injury is inflicted, even though the patient alleges intentional concealment of the wrong by the doctor.[9]

Even in those jurisdictions which allow the patient to avoid the strict statute of limitations rule applied to malpractice cases by bringing suit on the theory of fraudulent concealment of the original malpractice, plaintiffs are still faced with the problem of ascertaining what allegations are necessary to support such a case of fraudulent concealment. It has been said in this regard that "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent."[10] Thus, it has been held that concealment

---

[7]"It seems to me... to be inconceivable that fraud, if proved as alleged, would not effectually toll the running of the statute of limitations in this case." Swankowski v. Diethlem, 98 Ohio App. 271, 129 N. E. (2d) 182, 188 (1953).

[8]Burton v. Tribble, 189 Ark. 58, 70 S. W. (2d) 503 (1934); Tabor v. Clifton, 63 Ga. App. 768, 12 S. E. (2d) 137 (1940); Perrin v. Rodriquez, 153 So. 555 (La. App. 1934) (court emphasized that concealment was not intentional); Hudson v. Shoulders, 164 Tenn. 70, 45 S. W. (2d) 1072 (1932); Thompson v. Barnard, 142 S. W. (2d) 238 (Tex. Civ. App. 1940); Petler v. Robinson, 81 Utah 535, 17 P. (2d) 244 (1932); Note (1943) 144 A. L. R. 210.

[9]Graham v. Updegraph, 144 Kan. 45, 58 P. (2d) 475 (1936); Lindquist v. Mullen, 45 Wash. (2d) 675, 277 P. (2d) 724 (1954).

[10]De Haan v. Winter, 258 Mich. 293, 241 N. W. 923, 924 (1932).

by mere silence is not fraudulent even though the doctor knew or should have known of the cause of action, but that to constitute fraud there must have been an affirmative act designed to prevent the patient from bringing a timely action.[11] However, some more liberal jurisdictions take the view that because of the relationship of trust and confidence existing between patient and physician, the latter's mere silence and failure to disclose to the patient the fact of injury done him may constitute fraudulent concealment,[12] and thus the plaintiff need not allege or prove deliberate affirmative action on the practitioner's part to hinder the discovery. This liberal view seems preferable for although "the Statute of Limitations was designed to protect the physician and surgeon from stale and fraudulent claims, ... when the doctor's own concealment delays the tort action thereby preventing recovery, he should not then be able to take advantage of his fraud and be allowed to assert the Statute of Limitations as a shield. Certainly that is not the purpose of the statute."[13] It has been pointed out that the courts should admit the application of an estoppel principle in this situation: "Fraudulent concealment of a cause of action is not, however, a new and separate cause of action in itself. It merely estops the guilty party from asserting or relying upon the defense of limitations until this fraud was, or could by the exercise of reasonable diligence have been, discovered by the plaintiff."[14]

In order to relieve the plaintiff of the serious burden of alleging and proving fraudulent concealment of either an affirmative or passive nature, a substantial number of courts have recognized two alternative theories for recovery in malpractice cases. In some instances it has been reasoned that a suit for breach of the implied contract between patient and physician differs from a suit for malpractice, whereas in other instances a distinction has been drawn between a suit for malpractice and one for malpractice involving alleged continuing negligence.[15]

---

[11]Pickett v. Aglinsky, 110 F. (2d) 628 (C. C. A. 4th, 1940) (applying West Virginia law); Carter v. Harlan Hosp. Assoc., 256 Ky. 452, 97 S. W. (2d) 9 (1936); Bernath v. Le Fever, 325 Pa. 43, 189 Atl. 342 (1937). See, De Haan v. Winter, 258 Mich. 293, 241 N. W. 923, 924 (1932); Albert v. Sherman, 167 Tenn. 133, 67 S. W. (2d) 140 (1934); Carrell v. Denton, 138 Tex. 145, 157 S. W. (2d) 878 (1942).

[12]Tabor v. Clifton, 63 Ga. App. 768, 12 S. E. (2d) 137 (1940); Thompson v. Barnard, 142 S. W. (2d) 238 (Tex. Civ. App. 1940). See, Groendal v. Westrate, 171 Mich. 92, 137 N. W. 87, 88 (1912); Note (1944) 38 Ill. L. Rev. 323.

[13]Note (1944) 38 Ill. L. Rev. 323, 325.

[14]Thompson v. Barnard, 142 S. W. (2d) 238, 241 (Tex. Civ. App. 1940). Note (1944) 38 Ill. L. Rev. 325: "Inherent in these cases, although not ordinarily discussed is the doctrine of estoppel."

[15]See notes 17 and 18, infra.

Under these theories the plaintiff need only allege and prove negligence on the physician's part.

Curiously enough, the Ohio court in an earlier decision has expressly relied on the former of these two theories as a means of avoiding the short statute of limitations. In 1952 the Supreme Court of Ohio[16] quoted with approval an earlier case in which it had declared: "The relation of surgeon and patient is one arising out of contract, express or implied. The surgeon is not an insurer or guarantor, but does agree to exercise the average degree of skill, care, and diligence exercised by members of the same profession in the given situation.... In an action for a breach of the contract in such a case, the statute of limitations does not begin to run until the contract relation is terminated."[17] It is important to bear in mind that the plaintiff in the principal case did not allege continuing treatment.

Although the breach of contract theory is established in some jurisdictions in cases in which there is continued treatment by the negligent physician, it is said that most liberal courts rely on the theory of continuing negligence.[18] Those courts explain that the failure to remove a foreign substance during the period of subsequent treatment is such continuing negligence that the cause of action accrues only at the

---

[16]De Long v. Campbell, 157 Ohio St. 22, 104 N. E. (2d) 177, 179 (1952). The Supreme Court of Ohio has wavered on the question of whether the statute of limitations relating to malpractice begins to run at the time the alleged act of malpractice was actually performed or when the relation of physician and surgeon terminates. At first, it was held by a divided court that the statute did not begin to run until the professional relation of physician and patient had ceased. Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639 (1902). This doctrine was subsequently disapproved and the dissenting opinion in the Gillette case—to the effect that the statute begins to run at the date of the negligent act or omission—was approved. McArthur v. Bowers, 72 Ohio St. 656, 76 N. E. 1128 (1905). When the question again came before the court, the Gillette case was approved and followed and the McArthur case disapproved, and it was held that the statute does not begin to run until the contract relation is terminated. Bowers v. Santee, 99 Ohio St. 361, 124 N. E. 238 (1919). The De Long case, supra, seems firmly to establish the position of the court at this time.

[17]Bowers v. Santee, 99 Ohio St. 361, 124 N. E. 238 (1919). Accord Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923); Giambozi v. Peters, 127 Conn. 380, 16 A. (2d) 833 (1940); Miller, The Contractual Liability of Physicians and Surgeons (1953) Wash. U. L. Q. 413 ("Malpractice in the pertinent legal literature is intrinsically bound up with the idea of breach of implied contract.") See, Hickey v. Slattery, 103 Conn. 716, 131 Atl. 558, 559 (1926); Wilder v. Haworth, 187 Ore. 688, 213 P. (2d) 797, 800 (1950); Note (1941) 16 St. John's L. Rev. 101, 104 (attempting to interpret a New York decision as applying the contractual distinction). Ohio view criticized: Note (1923) 37 Harv. L. Rev. 272.

[18]"... a majority, perhaps, of the cases treat the action as one that is essentially tortious in its nature... growing out of the breach of duty incident to a consensual relation." 41 Am. Jur., Physicians and Surgeons § 120 (1942).

conclusion of the treatment, and that suit may be brought any time within the limitation period following termination of the treatment.[19]

Since both the breach of contract and continuing negligence theories seem equally logical and equally adequate to prevent a premature running of the statute of limitations,[20] the patient should be allowed to base his cause of action on the one which will enable him most readily to circumvent the short limitations period generally applicable to malpractice actions.[21] However, even then a complete solution to the problem presented in the *Swankowski* case could not be achieved, because the patient who ceases to use the physician after his

---

[19]Trombley v. Kolts, 29 Cal. App. (2d) 699, 85 P. (2d) 541 (1938); De Haan v. Winter, 258 Mich. 293, 241 N. W. 923 (1932); Thatcher v. De Tar, 351 Mo. 603, 173 S. W. (2d) 760 (1943); Williams v. Elias, 140 Neb. 656, 1 N. W. (2d) 121 (1941); Hotelling v. Walther, 169 Ore. 559, 130 P. (2d) 944 (1942); Peteler v. Robinson, 81 Utah 535, 17 P. (2d) 244 (1932). In Tortorello v. Reinfeld, 6 N. J. 58, 77 A. (2d) 240, 244 (1950) the New Jersey court defined the limits of application of this doctrine when it said: " 'The statute of limitations ordinarily runs against a physician or surgeon for damages due to malpractice from the time of the act of negligence or unskillful treatment, and not from the time of the consequential injury.' In the application of this rule the mere fact that the treatment follows or continues after a single act of negligence or breach of duty or that the confidential relationship of patient and physician continues thereafter does not postpone the running of the statute unless the physician or surgeon has been guilty of fraudulent concealment.... An exception is ordinarily made, however, where the injurious consequences arise from a continuing course of *negligent* treatment and not from single or isolated acts of negligence or breach of duty. In such a situation the statute does not ordinarily begin to run until the injurious treatment is terminated unless the patient discovered or should have discovered the injury before that time. The malpractice in such cases is regarded as a continuing tort...."

[20]However, some few jurisdictions have rejected both theories, in favor of rigid adherence to the general rule that the cause of action for malpractice accrues at the time of the original wrong. E. g., Becker v. Floersch, 153 Kan. 374, 110 P. (2d) 752 (1941); Lindquist v. Mullen, 45 Wash. (2d) 675, 277 P. (2d) 724 (1954).

[21]Hickey v. Slattery, 103 Conn. 716, 131 Atl. 558, 559 (1926): "The complaint is in two counts, the first relying upon the implied obligation of the defendant, arising out of his employment, to use proper skill and care; and the second resting upon the alleged negligence of the defendant in the way in which he set and cared for the arm. Undoubtedly, in such a case, the plaintiff might lay his action either in contract or tort.... The cause of action for negligence ... was barred.... That fact would not, however, bar the cause of action [in contract]; for two distinct causes of action may arise out of one delict, and where that occurs each is governed by the statute of limitations appropriate to it.

In Stokes v. Wright, 20 Ga. App. 325, 93 S. E. 27 (1917) where a previous judgment had been rendered against the plaintiff in an action of tort for injuries due to a negligent operation, the court barred a subsequent action for breach of contract based on the operation, stating: "... it is not so much a matter of res adjudicata, but an election of remedies.... When he elected to sue in tort and actually commenced his action for the tort, and prosecuted the same to an adverse decision, his right to sue on the contract was lost." For criticism of this view, see 5 Corbin, Contracts (1951) § 1220. What decision might be reached if the plaintiff's original petition alleges tort and he seeks to amend this petition to include contract, remains unanswered.

negligent act and who thereafter reasonably fails to discover the negligence for a time exceeding the limitation period imposed under any of the theories is still in a most unfortunate position. Any patient who brings an action for the injury within the limitation period after discovery but beyond the limitation period dating from termination of the patient-physician relationship is barred by the statute of limitations under even the more liberal theories of continuing negligence and breach of contract.

California and Louisiana have adopted the most direct means of protecting the interest of victims of malpractice.[22] "It is the general rule that in tort actions the statute commences to run from the date of the act causing the injury.... There is a recognized exception to this rule in California [and Louisiana] which is: That if a foreign substance is negligently left in the human body by a defendant, the statute of limitations does not commence to run until the plaintiff has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered it."[23] Thus, California and Louisiana have adopted a common sense rule which reaches the desired result of preventing suit by one who unreasonably failed to discover his cause of action or delayed filing his case, but at the same time allows suits by one who could not have reasonably prosecuted an action more promptly.[24] Unfortunately other state courts are reluctant to follow this worthy example. When the California viewpoint was urged on the Ohio court, it responded: "There is much persuasive force in this argument and claim, so far as justice is concerned.... [I]t is not our function, as we have said so many times, to disregard, by legislating, a legislative enactment."[25] In such jurisdictions, legislative reform seems to be the only solution, as the courts apparently feel that their own precedents in making an application of

---

[22]Ehlen v. Burrows, 51 Cal. App. (2d) 141, 124 P. (2d) 82 (1942); Pellett v. Sonotone Corp., 55 Cal. App. (2d) 158, 130 P. (2d) 181 (1942); Perrin v. Rodriquez, 153 So. 555 (La. App. 1934).

[23]Pellett v. Sonotone Corp., 55 Cal. App. (2d) 158, 130 P. (2d) 181, 182 (1942) (plaster left in plaintiff's ear after plaster cast had been made in order to fit a hearing aid).

[24]"California and Louisiana have adopted the 'discovery doctrine' as an exception to the general rule. It completely relieves the injured patient from any possible hardship since the limitation period does not commence to run until the patient discovers that a foreign substance has been left in his body.... Justification for this exception is based on the policy that a person should not be precluded from suit on a cause of action that he cannot possibly know exists." Note (1952) 13 Ohio St. L. J. 421, 422.

[25]De Long v. Campbell, 157 Ohio St. 22, 104 N. E. (2d) 177, 179 (1952).

the statutes of limitations have become part of that legislation.[26] Doubtless because of this reluctance, it was recommended in New York that a statute be drafted providing for: "(a) a one year limitation on [malpractice], which however, (b) will not accrue until the malpractice is discovered, but limited (c) to no more than six years."[27] Such a statute would effect a compromise in that it retains the shorter statutory period where the patient has the knowledge needed to bring the malpractice action promptly, but still protects the uninformed patient without the necessity of resorting to the fraud, continuing negligence, or implied contract theories as alternative bases for recovery.

The general rule governing malpractice is obviously in need of revision since under its application the honest and unartful doctor who dutifully discloses his improper treatment will be subjected to liability, while the dishonest and crafty doctor may be able to cover up his wrong until the limitation period has run.[28] Though a more liberal rule might possibly impose an occasional unwarranted recovery from a doctor, it has been pertinently observed that while most doctors are protected by malpractice insurance, there is no similar safeguard for most patients.[29]

SAMUEL L. DAVIDSON

---

[26]"Counsel for the plaintiff, on oral argument before this court, urged that we should ignore precedent and determine the question ... [of when the statute of limitations begins to run in a malpractice action where the patient fails to discover the injury] upon broad considerations of justice. But the constitutional authority of a court of law is limited to the interpretation and enforcement of the law as it is written." Wilder v. Haworth, 187 Ore. 688, 213 P. (2d) 797, 800 (1950).

[27]Note (1946) 21 St. John's L. Rev. 77, 80. This suggestion was made in Report of New York Law Revision Commission (1942) 135, but the recommended Act has not been adopted.

[28]Similar situations long ago gave rise to reform in the rule applied in ordinary fraud and deceit cases. South Sea Co. v. Wymondsell, 3 P. Wms. 143 (1732); Bosley v. National Machine Co., 123 N. Y. 550, 25 N. E. 990 (1890).

[29]Note (1946) 21 St. John's L. Rev. 77, 79.