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Evidence-Validity of Statute Making Illegally Obtained Evidence Admissible in Gambling Prosecution in One County of State [Salsburg v. Maryland, U S. Sup. Ct. 1954].

CASE COMMENTS

CONSTITUTIONAL LAW—POWER OF PUBLIC SCHOOL BOARD TO DISCHARGE TEACHERS INVOKING PRIVILEGE AGAINST SELF INCRIMINATION IN COMMUNIST INVESTIGATION. [Massachusetts and New York]

Since the conclusion of World War II, a vital civil rights controversy has arisen out of a clash between enforcement of the governmental policy of removing Communists from the educational field and the protection of the individual's constitutional right against compulsory self-incrimination. In recent cases, this conflict of interests has been presented to the courts as a result of a discharge of public school teachers because of their having invoked the privilege against self-incrimination to avoid answering questions about their Communist affiliations and activities.

The Massachussetts Supreme Court, in *Faxon v. School Committee of Boston*,[1] upheld the discharge of a public school teacher by a school committee for his assertion of the constitutional right against self-incrimination in federal legislative hearings, in the face of questions concerning his membership in, and activities on behalf of, the Communist Party. The school committee complied with statutory procedural requirements of notice, charges and hearing, so that the fundamental question was whether a teacher employed "at discretion," as was petitioner, can be dismissed for asserting his constitutional right not to answer the questions.

The law of Massachusetts was stated to be that a school committee's power to discharge teachers extends to any ground which is not "arbitrary, irrational, unreasonable, or irrelevant to the committee's task of building up and maintaining an efficient school system."[2] Thus, the court substantially adopted the standard phraseology under which this rule is applied by state and federal cases—i.e., that any discharge is constitutional which has a reasonable relation to fitness.[3] It was then decided that dismissal of teachers who successfully claim the privilege against self-incrimination before a United States Senate com-

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[1]120 N. E. (2d) 772 (Mass. 1954).

[2]Faxon v. School Committee of Boston, 120 N. E. (2d) 772, 774 (Mass. 1954).

[3]See, e.g. Adler v. Board of Education of City of New York, 342 U. S. 485 at 493, 72 S. Ct. 380 at 385, 96 L. ed. 517 at 524 (1952); Argenta Special School Dist. v. Strickland, 152 Ark. 215, 238 S. W. 9 at 10 (1922); Stiver v. State, 211 Ind. 380, 1 N. E. (2d) 1006 at 1008 (1936), rehearing denied, 211 Ind. 380, 7. N. E. (2d) 183 (1937); Cooke v. Dodge, 164 Misc. 78, 299 N. Y. Supp. 257 at 262 (1937).

mittee when asked about their affiliation with the Communist Party, is within the power of the school committee because of popular objection to the retention of such teachers and the consequent undesirable effects upon the school system. To the contention that such dismissals violate the Due Process Clause of the Fourteenth Amendment through "derogation" of the privilege against compulsory self-incrimination contained in the Fifth Amendment, the Massachusetts court, on the basis of both state and federal cases, reasoned that public employment it not a matter of right, but may be conditioned upon a waiver of certain constitutional rights so that public confidence in the school system may be preserved.

Discharges under similar circumstances were also upheld recently by the New York Court of Appeals in *Daniman v. Board of Education of City of New York*.[4] In that case, public school and college teachers were found to have been properly discharged by operation of a self-executing New York City charter provision which terminates the employment of a city employee who refuses, on the ground of self-incrimination, to answer any question put by any authorized legislative committee if relating to his official conduct. The New York court relied on *Adler v. The Board*[5] and *McAuliffe v. Mayor*[6] in reaching its decision that the condition which the city charter placed upon public employment was a reasonable one.[7]

The way was prepared for the *Faxon* and *Daniman* decisions by the United States Supreme Court in the *Adler* case, which ruled that persons have no right to work for the state in the school system on

[4]Daniman v. Board of Education of City of New York, 306 N. Y. 532, 119 N. E. (2d) 373 (1954). In a memorandum decision the New York Court of Appeals later denied motions for reargument of this case. The court also denied motions to amend the remittitur to the effect that a question under the Federal Constitution had been passed upon by the Court of Appeals, except as to one teacher, Slochower, who was the only petitioner to present such a question to that court. Daniman v. Board of Education, 307 N. Y. 806, 121 N. E. (2d) 629 (1954). Slochower appealed to the United States Supreme Court sub nom Slochower v. Board of Higher Education of City of New York, and probable jurisdiction has been noted. 23 U. S. L. Week 3198 (Feb. 8, 1955).

[5]Adler v. Board of Education of City of New York, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517 (1952).

[6]McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N. E. 517 (1892).

[7]In the Daniman case, the dissent by Judge Desmond argued that teachers are not "employees" of the city within the meaning of the Charter, and that the words "any legislative committee" were not intended to include federal legislative committees. The majority opinion dwelt primarily upon the applicability of the Charter provision to public school and college teachers, finding such teachers to be public employees as there described. 306 N. Y. 532, 119 N. E. (2d) 373 (1954).

their own terms, but only on the reasonable terms laid down by the proper state authorities. This is not to say, however, that a public servant can be excluded from his job arbitrarily. Phrased affirmatively, in *Wieman v. Updegraff,* it was said that "constitutional protection [under the Due Process Clause of he Fourteenth Amendment] does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[8] Further, in upholding the discharge of public employees, including teachers, for refusal to answer proper questions and for other reasons, state and federal courts have been consistently influenced by the principle announced by the Massachusetts Supreme Court through Justice Holmes in *McAuliffe v. Mayor:* "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."[9] This appraisal of the status of a public employee has been said to indicate that public employment is merely a privilege.[10] However, as suggested by Justice Frankfurter in his separate opinion in *Garner v. The Board,*[11] an individual's interest in public employment seems to be neither a privilege nor a right but stands between the two, since the power to discharge does exist but is subject to limitations. The correct terminology is somewhat an academic matter to the public employee in view of the working rule set forth in the *Adler* case, that a condition on the obtaining or continuing of public employment is constitutional so long as it is not arbitrary.

The feature of the *Faxon* and *Daniman* cases which distinguishes them from earlier cases regarding discharge of public school teachers is that the right to discharge for refusal to answer certain questions is therein opposed by the previously unexercised right of the teacher

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[8]344 U. S. 183, 192, 73 S. Ct. 215, 219, 97 L. ed. 216, 222 (1952).

[9]155 Mass. 216, 29 N. E. 517 (1892).

[10] Note (1953) 101 U. of Pa. L. Rev. 1190 at 1196. A teacher's employment in the public schools was designated a "privilege" in Board of Education of City of Los Angeles v. Wilkinson, 125 Cal. App. 127, 270 P. (2d) 82 (1954).

[11]Garner v. Board of Public Works of City of Los Angeles, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951). Justice Frankfurter concurred in part and dissented in part.

under the Federal Constitution to refuse to answer those questions.[12] The two forces operate in opposite directions, the former toward securing an answer, the latter toward withholding an answer. In the *Daniman* case, in fact, the exercise of the latter privilege is specified in the New York City charter as the very reason for discharge. Thus, a major problem has now been presented as to whether the right of the state to require disclosure by an employee of matters relating to his fitness or the right of the employee to avoid self-incrimination should prevail.

The only mention of this problem in the *Daniman* decision by the Court of Appeals of New York was in the passing comment that the majority in the Appellate Division had found "that the Charter provisions do not abridge the constitutional privilege against self-incrimination."[13] In support of its terse declaration of that ruling, the Appellate Division had cited *Canteline v. McClellan*[14] and the *McAuliffe* case. In the *Canteline* case, it was decided by the New York Court of Appeals that police officers may be discharged for refusing to waive the right against compulsory self-incrimination in grand jury proceedings, in accordance with the New York Constitution which provided for such discharge as an express limitation upon the conventional right against self-incrimination. The question of abridgement of the constitutional right does not appear, therefore, to have arisen in the *Canteline* case since authority for the discharge was contained as part of the total constitutional description of the right itself. The *Daniman* case marks a direct extension of the *McAuliffe* doctrine, which involved a policeman's duty to refrain from talking politics, to cover

[12]In other cases involving the discharge of public school teachers for refusal to divulge information, neither the right against self-incrimination nor any other state or federal constitutional right appears to have been successfully invoked. Garner v. Board of Public Works of City of Los Angeles, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951); Steinmetz v. California State Board of Education, 271 P. (2d) 614 (Cal. App. 1954); Board of Education of City of Los Angeles v. Wilkinson, 125 Cal. App. 127, 270 P. (2d) 82 (1954); Adler v. Wilson, 282 App. Div. 418, 123 N. Y. S. (2d) 655 (1953). However, in at least one case not involving a teacher, assertion of one's exemption from self-incrimination in answer to questions concerning subversive activities has been the basis for the discharge of a public employee. Koral v. Board of Education of New York City, 197 Misc. 221, 94 N. Y. S. (2d) 378 (1950) (engineer employed by school board). In order that the infringement of one's right against self-incrimination be in question at all, it is prerequisite that the right was explicitly and personally claimed at the proper time. Rogers v. United States, 340 U. S. 367, 71 S. Ct. 438, 95 L. ed. 344 (1951); United States v. Monia, 317 U. S. 424, 63 S. Ct. 409, 87 L. ed. 376 (1943).

[13]306 N. Y. 532, 119 N. E. (2d) 373, 378 (1954).

[14]282 N. Y. 166, 25 N. E. (2d) 972 (1940).

the requirement that a teacher waive his right against compulsory self-incrimination.

In the *Faxon* case the contention that "the action of the school committee is unconstitutional as in derogation of the privilege against self incrimination"[15] was considered at great length. As to state constitutionality, that contention was held answered by the principle of the *McAuliffe* case. In support of federal constitutionality the court in *Faxon* goes on to say that *United Public Workers of America v. Mitchell*[16] should be conclusive, and if not, *Garner v. The Board*[17] is indistinguishable and controlling. The *United Public Workers* case upheld the Hatch Act which prohibits government employees from exercising the constitutional right of citizens generally to engage in active political party work, and the Massachusetts court concluded that the right against compulsory incrimination does not stand "on any higher ground in a democracy than the right to take an active part in elections."[18] The reference to the *Garner* case draws upon the right of a state agency to inquire into matters relating to fitness, which right was there determined to support an affidavit requirement regarding Communist affiliation.

In determining that refusal to answer certain questions is sufficient ground for discharge from government employment, the crucial issue would seem to be the *source* of the right to require an answer. It is submitted that the basic source of this right is the effect on fitness which attends the failure to answer such questions. This matter was touched upon in the *Faxon* case by the statement: "The school committee could find that under existing conditions the harm was done by the mere public refusal to testify. . . ."[19]—an obvious reference to the public disfavor currently attached to invoking the exemption from self-incrimination, especially in matters relating to Communism.[20] It has been

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[15]120 N. E. (2d) 772, 774 (Mass. 1954).

[16]330 U. S. 75, 67 S. Ct. 556, 91 L. ed. 754 (1947).

[17]341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951). The matter of discharge of public employees for refusal to disclose information came up in this case concerning a Los Angeles oath and affidavit requirement. The oath was an affirmance of past and present loyalty, while the affidavit was a sworn statement as to whether or not the affiant had ever had Communist affiliations. The Court upheld the oath by a five-to-four majority and the affidavit by seven-to-two.

[18]Faxon v. School Committee of Boston, 120 N. E. (2d) 772, 775 (Mass. 1954).

[19]120 N. E. (2d) 772, 776(Mass. 1954).

[20]This condition was discussed generally elsewhere in the Faxon opinion as follows, in part: "It cannot be doubted that multitudes of people in this community regard with abhorrence the Communist Party. . . . Nothing the Court can do or say will prevent the public from drawing its own inferences from refusals to testify." 120 N. E. (2d) 772, 774 (Mass. 1954).

said that a teacher's conduct which evokes "the dislike, disrespect and contempt of the pupils, the parents and the public" is such that it "can, therefore, reasonably be said to have a very material and quite detrimental bearing on her fitness, efficiency and influence in the school room as a teacher."[21] Hence, the discharge for refusal to answer on the grounds of possible self-incrimination falls within the accepted doctrine that a discharge is valid on any ground having reasonable relation to fitness, and this would be true without regard to the relation of the context of the question asked to fitness, in view of the public reaction following from the teacher's refusal to answer. This explanation derives support from the United States Supreme Court's remarks in the *Adler* case, in confirming the result of the *Garner* case: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."[22] In the *Garner* case itself, the Court took the position that a state agency has in common with private industry the right to inquire into matters of employee fitness, and that past conduct and loyalty reasonably relate to such fitness. The natural assumption is apparently made by the Court that a duty of the teacher to answer is concomitant with the right of employer to inquire.[23]

To summarize, two justifications have been presented in favor of the existence of the public school teacher's duty to answer certain questions in order to obtain or retain employment: First, the state em-

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[21]Hayslip v. Bondurant, 194 Tenn. 175, 250 S. W. (2d) 63, 66 (1952).

[22]Adler v. Board of Education of City of New York, 342 U. S. 485, 493, 72 S. Ct. 380, 385, 96 L. ed. 517, 524 (1952).

[23]A California district court of appeals, in a case decided shortly before the Faxon case, furnished another justification for the duty of a teach to cooperate with the state in responding to inquiries into loyalty. In upholding a discharge of a public school teacher for refusing to answer questions before a state legislative committee as to her membership in the Communist Party, the court said:

"In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of the government '... to bite the hand that feeds it.' The men and women of America who pay their salaries have a right to know whether or not any of their employees are communists." Board of Education of Los Angeles v. Wilkinson, 125 Cal. App. 127, 270 P. (2d) 82, 86 (1954).

ployer, like a private employer, is entitled to the information requested; and, secondly, contumacious teachers have no place in school systems because of the public antipathy which they arouse.

It should be emphasized that the right to discharge a public employee *for refusal to answer* questions regarding membership in the Communist Party must be distinguished from the right to discharge *for membership itself.* Discharge on the basis of organizational membership is supportable only if the subversive purposes of the organization were known to employee while he belonged to it.[24] To sustain a discharge for refusal to answer, however, the questions asked need only relate to fitness. The mere fact of membership in the Communist Party re-

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[24]This requirement of scienter has been illustrated by an interesting sequence of United States Supreme Court cases. First, in Gerende v. Board of Sup'rs of Elections of Baltimore City, 341 U. S. 56, 71 S. Ct. 565, 95 L. ed. 745 (1951), the Court held constitutional a Maryland requirement that each candidate for public office file an affidavit to the effect that, among other things, he had not been a member of any group engaged in an attempt to overthrow the government. That decision, according to Wieman v. Updegraff, 344 U. S. 183 at 189, 73 S. Ct. 215 at 218, 97 L. ed. 216 at 221 (1952), was based on an oral statement by the Attorney General of Maryland to the Court that he would advise the proper authorities to accept the oath of a candidate to the effect that "he is not knowingly a member of" a proscribed organization, and upon the Court's interpretation of a Maryland decision to the effect that such an oath would be sufficient.

Subsequently, in Garner v. Board of Public Works of City of Los Angeles, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951), the Court assumed scienter to be implicit in a California test oath disclaiming the employee's membership in certain groups organized against the government where there was no indication that a contrary construction had been, or would be, placed upon the oath by the California courts.

Later, in Adler v. Board of Education of City of New York, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517 (1952), New York's Feinberg Law, providing that membership in certain organizations should be prima facie evidence of disqualification for office in the New York public schools, was upheld by the Court in view of the construction placed on the statute by the New York courts that knowledge of organizational purpose is necessary before it may apply.

Finally, in Wieman v. Updgraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216 (1952), an Oklahoma oath which was substantially the same as that in the Garner case—i.e., a simple denial of affiliation with certain groups, was struck down by the Court. The Garner case had been decided after the petitioners in the Wieman case had failed to take the Oklahoma oath, but before the Oklahoma Supreme Court held against them. The United States Court therefore made the following conclusions: "... with our decision in Garner before it, the Oklahoma Supreme Court refused to extend to appellants an opportunity to take the oath. In addition, a petition for rehearing which urged that failure to permit appellants to take the oath as interpreted deprived them of due process was denied. This must be viewed as a holding that knowledge is not a factor under the Oklahoma statute.... Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." 344 U. S. 183, 189, 73 S. Ct. 215, 218, 97 L. ed. 216, 221 (1952).

lates to fitness since only by disclosure of this fact will the public authorities be enabled to make further critical inquiry as to whether the membership was knowing or innocent. The public school teacher or other public employee who is being questioned by officials about his Communist affiliations has two choices: he may answer or he may refuse to answer. If he refuses, his discharge is warranted. If he answers, then under the decision in *Wieman v. Updegraff*,[25] he is secure from discharge unless it is discovered by further questioning that his membership is a knowing one, which fact raises a presumption of unfitness.[26]

EDWARD E. ELLIS

CRIMINAL LAW—EFFECT OF MARRIED WOMAN'S ACTS ON HUSBAND'S LIABILITY FOR LARCENY OF WIFE'S PROPERTY. [New York]

At common law the husband cannot be guilty of larceny of the property of his wife because of the legal relationship existing between them.[1] Under the concept of unity of husband and wife, it is reasoned

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[25]344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216 (1952).

[26]In Garner v. Board of Public Works of City of Los Angeles, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951), the matter of scienter was made clear by the fact that both an affidavit and an oath were there involved. The former resembled a question in that it required a statement as to whether or not the affiant was, or had been, a member of he Communist Party or the Communist Political Association. The oath, however, was a prescribed form which negatived, among other things, one's membership in any group advocating the overthrow of the government by force or violence. The only way to "answer" such an oath is to swear to it as it stands, and the exclusion from employment which thus operates on those unable to take it truthfully must be justified by a reasonable, non-discriminatory relation of the terms of the oath to one's fitness for the employment. Such a relation cannot exist between organizational membership and employment unless knowledge of the purposes of the organization concurred with that membership. The affidavit requirement, however, operated as an exclusion from employment upon no one except those who flouted, by refusing to disclose the information, the right of the state to inquire into matters relating to their fitness. The Court there said, "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." 341 U. S. 716, 720, 71 S. Ct. 909, 912, 95 L. ed. 1317, 1322 (1951). That question was before the Court in Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. (1952), which said that discharge for membership without knowledge of organizational purpose is unconstitutional. The Garner decision, in upholding the affidavit requirement, thus amounts to a recognition of the state's right to know deficiencies of its employees which fall short of constituting grounds for discharge.

[1]Watkins v. State, 60 Miss. 323 (1882); Walker v. Reamy, 36 Pa. 410 (1860); State v. Parker, 3 Ohio Dec. Reprint 551 (1882); Rex v. Creamer, [1919] 1 K. B. 564 at 569; Madden, Domestic Relations (1931) § 70. For the same ruling in a community property state, see Overton v. State, 43 Tex. 616 (1875); de Funiak, Principles of Community Property (1943) § 154.

that one cannot steal from the other; and under the common law rule that title to the woman's personal property,[2] which she possesses at the time of the marriage or acquires during the marriage, vests exclusively in her husband,[3] the husband has no opportunity to commit larceny of his wife's goods since she literally has no property susceptible to theft. It is to be noted that the reciprocal rule that the wife cannot steal the property of her husband is not sustained by the merger of property theory, but the courts have considered the unity of spouses resulting from the marital relationship as sufficient to support the rule.[4]

However, a few earlier cases have indicated that in certain exceptional situations, the common law rule does not apply. For instance, where the wife has committed adultery and induced her paramour to steal from her husband, both may be guilty of the crime of larceny.[5] Futhermore, other courts have contended that if the wife has deserted the husband or if the spouses are separated, the wife may be guilty of larceny of the husband's goods wrongfully taken when leaving.[6]

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[2]Personal property here should be distinguished from a wife's paraphernalia such as her wearing apparel and personal ornaments. Like other personalty, they belonged to the husband at common law, but if not disposed of by him during his lifetime, they become her absolute property. Tipping v. Tipping, 1 P. Wms. 729, 24 Eng. Rep. 589 (1721).

[3]Madden, Domestic Relations (1931) § 28. But the husband may waive his right and permit the wife to own and control such personalty as her separate estate. Boldrick v. Mills, 29 Ky. Law Rep. 852, 96 S. W. 524 (1906).

[4]State v. Banks, 48 Ind. 197 (1874); Lamphier v. State, 70 Ind. 317 (1880); Reg. v. Tollett, Car. & M. 112, 174 Eng. Rep. 432 (1841); Reg. v. Kenny, L. R. 2 Q. B. Div. 307, 3 Am. Crim. Rep. 448 (1877). "By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 Bl. Comm. 442; 2 Bl. Comm. 433.

An exception to this rule of unity was made with regard to crimes of personal violence between the spouses. The criminal law normally applies in that situation as if the marriage relationship did not exist. 3 Vernier, American Family Laws (1935) 162.

[5]See, as to the paramour, State v. Banks, 48 Ind. 197, 199 (1874); Rex v. Tolfree, 1 Moody, Cr. Cas. 243, 168 Eng. Rep. 1257, 1258 (1829); Reg. v. Tollett, Car. & M. 112, 174 Eng. Rep. 432 (1841): In Reg. v. Featherstone, 1 Dearsly 369, 6 Cox Cr. Cas. 376, 169 Eng. Rep. 764, 765 (1854), Lord Campbell said: "The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of a wife, and her property in her husband's goods ceases." Also, see Madden, Domestic Relations (1931) 226.

[6]Rex v. James, [1902] 1 K. B. 540; Rex v. Creamer, [1919] 1 K. B. 564 (following § 36 of Larceny Act of 1916 which provides that no proceedings under the act

In both of these situations the marriage has in fact been disrupted, but in neither has the marital unity been legally dissolved, and the courts therefore had to ignore the concept of legal unity in order to conclude that one spouse could be guilty of stealing from the other. Perhaps this is some indication that the basic reason why the courts generally continued to hold to the rule that a husband cannot steal from his wife lay not in the unity theory but in the fact that the husband was the legal owner of all property of both spouses—and in the desire of the courts to preserve domestic tranquility by refusing to recognize as unlawful certain acts of the spouses directed toward one another. If this be so, then it may well be argued that the true bases for the common law rule have been destroyed in that: First, it is usually clear that the marital ties have already been irretrievably broken by the time charges of larceny between spouses are brought to the stage of a criminal prosecution; and secondly, Married Woman's Statutes[7] have been widely adopted making the wife capable of owning property independently of the husband.

While varying in detail, the Married Woman's Acts generally give the wife a number of rights which she did not have at common law by providing that she may make contracts and sue and be sued as a single woman. Some statutes go further and expressly allow the wife to sue her husband for torts to the person. But of greater significance in the present discussion is the fact that one of the main purposes of such legislation is to allow married women to acquire and hold as their own both real and personal property,[8] and thereby the common law concept of merger of the wife's property into that of the husband has

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shall be taken by a husband against his wife while they are living together unless property has been wrongfully taken by the wife when leaving or deserting). See Overton v. State, 43 Tex. 616, 618 (1875), where the court indicated that where there was a distinct and definite separation between spouses, and where the husband has abandoned or surrendered possession of the property, then he may be found guilty of larceny of such property.

[7]Mississippi, in 1839, was the first state to pass a married woman's property statute. Maine, in 1844, was the first northern state to pass such legislation. On the early development of the movement, see Goebel, Cases and Materials on the Development of Legal Institutions (1946) 553 et seq. For a comparison of the law before and after the passage of a married woman's statute, see Note (1948) 32 Minn. L. Rev. 262.

[8]A typical statute is New York Domestic Relations Law (1950) § 50: "Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts."

been abrogated. However, even after the widespread enactment in the latter part of the nineteenth and early twentieth centuries of this legislation, most courts have continued to adhere to the rule that a husband cannot commit larceny against the separate property of the wife.[9] They reason that the concept of marital unity still exists[10] and that the ultimate purpose of the common law rule to preserve the peace and sanctity of the family is still in effect. It is their contention that to allow one spouse to bring criminal charges against the other would tend only to create another means of weakening the stability of married life, and that whatever tends to undermine the family seeks to destroy the foundation of society.[11]

These courts further contend that since the Married Woman's Acts do not explicitly provide that the husband may be guilty of larceny from his wife, the language of the statutes should not be construed as changing the applicable criminal law. It is argued that neither the effect of the Married Woman's Acts nor the scope of the criminal law can be expanded by implication, especially in derogation of the common law.[12] On such basis, the Minnesota court in *State v. Arnold*[13] took the position that the purpose of the married woman's

[9]Thomas v. Thomas, 51 Ill. 162 (1869); State v. Arnold, 183 Minn. 313, 235 N. W. 373 (1931); People ex rel. Troare v. McClelland, 146 Misc. 545, 263 N. Y. Supp. 403 (1933); State v. Phillips, 85 Ohio St. 317, 97 N. E. 976, 40 L. R. A. (N. S.) 142 (1912).

[10]In Heffernan v. Milwaukee Mechanics' Ins. Co., 33 Ohio App. 207, 169 N. E. 33, 34 (1929), where the insurance company sought to recover money paid to the wife for an automobile stolen by the husband, the court stated, in a very conservative expression of opinion, "that notwithstanding the vast latitude in the rights of women, so far as contracting and being contracted with, and so far as owning property separate and independent of her husband, are concerned, the fiction still remains that, so far as criminal acts are concerned, the husband could not steal from the wife, nor the wife from the husband, for, however incongruous the relations may be, however strained, however long they may have lived apart from each other, however much they may contract and enforce contracts between themselves, they are in the eyes of the law one, and the property of the one is the property of the other, to the extent, at least, that one of the parties cannot be found guilty of stealing from the other."

[11]State v. Phillips, 85 Ohio St. 317, 97 N. E. 976 (1912).

[12]Snyder v. People, 26 Mich. 106 (1872); People ex rel. Troare v. McClelland, 146 Misc. 545, 263 N. Y. Supp. 403 (1933); State v. Phillips, 85 Ohio St. 317, 97 N. E. 976 (1912); Heffernan v. Milwaukee Mechanics' Ins. Co., 33 Ohio App. 207, 169 N. E. 33 (1929). It is accepted law that criminal statutes should be narrowly construed especially if they are in derogation of the common law. People v. Phyfe, 136 N. Y. 554, 32 N. E. 978 (1893); Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. (2d) 350 (1949); Bloomfield v. Brown, 67 R. I. 452, 25 A. (2d) 354, 141 A. L. R. 170 (1942).

[13]182 Minn. 313, 235 N. W. 373 (1931); see Note (1931) 15 Minn. L. Rev. 589. The decision has become a leading case and has drawn a considerable amount of

legislation is to protect and extend the rights of the married woman, and not to create public offenses. The reasoning employed was that if the legislature desired to create the crime of larceny in cases of this character, it had the undoubted power to do so, but a failure of action indicates an absence of intention. Notwithstanding the declaration of the statute that "every person" who does the proscribed acts "shall be guilty of larceny,"[14] the court concluded that the use of this phraseology did not include the defendant spouse—another example of the refusal to create a crime by implication.

Demonstrating the continuing vigor of this point of view is the recent New York case of *People v. Morton*.[15] Here, the husband was indicted for grand larceny for theft of personal property of his wife, and consequent to a motion by the defendant upon the grand jury minutes to dismiss the indictment, an issue was raised as to whether the facts as stated in the indictment charged the defendant with the commission of a crime. In granting the motion for dismissal, the court, after restating the basis for the common law rule, considered the legislative enactments abolishing disabilities imposed upon a married woman as creating and enlarging only special *civil* rights and liabilities and " not creat[ing] criminal responsibility where none such existed at common law."[16] Here again the larceny statute was held not to encompass within its provisions an offense by either husband or wife against the other.[17]

This conservative viewpoint, however, has not gone unchallenged. It is met with the contrary reasoning of several courts that since the

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comment and criticism. Position criticized in Note (1940) 25 Iowa L. Rev. 351 at 356-360; discussed in Note (1941) 16 St. John's L. Rev. 78 at 82-83; Note (1948) 32 Minn. L. Rev. 262 at 289-290.

[14]"... every person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person ... steals such property, and shall be guilty of larceny." Minn. Stat. (Mason, 1927) § 10358.

[15]204 Misc. 1063, 127 N. Y. S. (2d) 246 (1954).

[16]204 Misc. 1063, 127 N. Y. S. (2d) 246, 247 (1954).

[17]The court in the principal case based its decision heavily on a narrow construction of criminal statutes and on the concept that every citizen should be given unequivocal notice before conduct on his part can be a means of depriving him of his liberty. It is of further significance to note the action of the New York legislature in regard to compulsory prostitution. Penal Law § 2460, is titled "Compulsory Prostitution of Women" with the statute describing the victims as "women," "girls," or "females." Nonetheless, a separate section, Penal Law § 1090, was enacted, describing the crime of "Compulsory Prostitution of Wife." It would be consistent, therefore, to construe the larceny statute of New York as not pertaining to spouses in their relationship with one another.

Married Woman's Acts have swept away virtually all of the incidents which gave rise to the doctrines of unity of spouses and merger of property, there is no basis for continuing to imply an immunity as between spouses in the criminal law field.[18]

The precursor of cases which represent this more modern policy is *Beasley v. State*,[19] in which the Indiana court interpreted the Married Woman's Acts as emancipating the wife from almost all of her common law disabilities. It was concluded that statutes granting the wife the right of ownership of her separate property should logically be interpreted as providing as well for the protection of her property. In regard to the application of the larceny statutes, this court reasoned that a husband may steal from his wife "where the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation."[20] By previous judicial decision, it has been determined that a husband was guilty of arson when he burned the dwelling of his wife,[21] and since both larceny and arson are crimes against property, it was a simple exercise in judicial reasoning to conclude that a husband may also perpetrate the crime of larceny of the wife's goods.

Other courts following this point of view have considered the sweeping scope of the statutes relative to a wife's separate property rights and have concluded that this legislation seems to have abandoned the traditional proposition that this is a "man's world."[22] Emphasiz-

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[18]Hunt v. State, 72 Ark. 241, 79 S. W. 769 (1904); State v. Herndon, 158 Fla. 115, 27 S. (2d) 833 (1946); State v. Koontz, 124 Kan. 216, 257 Pac. 944 (1927).

[19]138 Ind. 552, 38. N. E. 35 (1894). This case was decided just thirteen years after the passage of the Married Woman's Act in Indiana. Seven years prior to these statutory enactments, State v. Banks, 48 Ind. 197 (1874) was decided following the common law rule. There was no specific mention in the Beasley case of the Banks decision, but the court does seem to overrule the prior case by implication when it states: "Prior to the enactment of the several sections of the statutes of this state, the common-law fiction prevailed of the legal unity of husband and wife ... but the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife." Beasley v. State, 138 Ind. 552, 38 N. E. 35, 36 (1894).

[20]138 Ind. 552, 38 N. E. 35, 37 (1894).

[21]Garrett v. State, 109 Ind. 527, 10 N. E. 570 (1887). But compare Snyder v. People, 26 Mich. 206 (1872), where the question was whether the married woman's legislation had changed the common law rule that a husband who is living with his wife and who is in possession jointly with her of a dwelling house which she owns, can be guilty of arson in burning it. In deciding that the common law rule had not been abrogated by statute, the court concluded that the husband resides in the dwelling by right, as part of the legal unity known to law as a family, and although the property was hers, the residence was equally his.

[22]Whitson v. State, 65 Ariz. 395, 181 P. (2d) 822 (1947); People v. Graff, 59 Cal. App. 706, 211 Pac. 829 (1923).

ing the moral necessity for such decisions, the Florida court in *State v. Herndon* stated:

> "... it is [the court's] duty to harmonize constitutional and statutory precepts with reason and good conscience, otherwise they may become ridiculous when applied to changing concepts....
> "[The common law rule] has not only been abrogated by law it has been abrogated by custom, the very thing out of which the common law derived."[23]

Following another line of thought, some courts contend that the argument that the common law rule is essential for the preservation of the marriage and the harmony of the home is untenable because once a situation has arisen in which one spouse is making serious criminal accusations against the other, any chance for the preservation of the marriage has already been virtually destroyed.[24]

A controversy involving a similar problem of interpretation of the Married Woman's Acts has long been raging as regards the right of a wife to sue her husband for personal torts. Many statutes have granted to women the right to sue and be sued in their own name but have not expressly provided for suit against the husband, and the courts have been troubled, as in the larceny cases, with the issue of whether the legislature's intent was to authorize suits between spouses. Until 1910, the year of the Supreme Court decision in *Thompson v. Thompson*,[25] it appears that no jurisdiction in this country permitted

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[23]158 Fla. 115, 27 S. (2d) 833, 835 (1946).

[24]Following the passage of the Married Woman's Acts, the conclusiveness of the doctrine of marital unity was to some extent disrupted. As a result, courts continuing to follow the common law rule have had to consider this unity as consisting in the social institution of marriage. State v. Arnold, 182 Minn. 313, 235 N. W. 373 (1931). It seems, however, that the social aspects of unity are no longer existent when one spouse has stolen from the other. This appears to be a practical conclusion; yet few courts have found it advantageous to sponsor such an argument in criminal cases because it has no formal legal foundation. However, in People v. Graff, 59 Cal. App. 706, 211 Pac. 829, 831 (1923), the court stated: "We cannot believe that such events can be so smothered in the family circle that no ripple, or that but a slight ripple, will disturb the serenity of the home. A spouse will not lightly forgive a robbery committed against him by his marital partner, and a home in which one of the partners will steal the property of the other cannot be regarded as one resting on a particularly solid foundation."

In the analogous situation of allowing civil suits between the spouses for personal torts, it seems the courts have been less reluctant to point out the present instability of the marriage. Johnson v. Johnson, 201 Ala. 41, 77 So. 335, 6 A. L. R. 1031 (1917) (wife sued her husband for assault); Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189 (1914) (wife recovered for injuries received from gunshot wound maliciously inflicted by her husband).

[25]218 U. S. 611, 31 S. Ct. 111, 54 L. ed. 1180, 30 L. R. A. (N. S.) 1153 (1910), discussed in Notes (1911) 9 Mich L. Rev. 440; (1910) 24 Harv. L. Rev. 403; (1913) 22 Yale L. J. 250.

such a suit.[26] Although this case followed precedent, the view expressed in the dissenting opinion seems to have created the first inducement to oppose the majority rule,[27] and a distinct division of authority now exists on the question.[28] The arguments advanced and the language used by the courts to justify or reject the continued application of the common law rule in regard to a tort liability are quite similar to those found in the decisions dealing with the larceny controversy.

In regard to both criminal and tort liability between spouses, the probable majority of jurisdictions are still reluctant to abrogate the common law rules without an express legislative mandate.[29] By rejecting the more modern viewpoint and by clinging to outmoded legal concepts, the New York court in the principal case reached a result in accord with this majority but inconsistent with several expressions of other New York courts which have stressed the need for liberal interpretation of the Married Woman's Acts.[30]

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[26]Notes (1911) 9 Mich. L. Rev. 440; (1913) 22 Yale L. J. 250, 251.

[27]See Thompson v. Thompson, 218 U. S. 611, 619, 31 S. Ct. 111, 113, 54 L. ed. 1180, 1183, 30 L. R. A. (N. S.) 1153, 1157 (1910). Justice Harlan, with whom Justices Holmes and Hughes concurred, delivered the dissenting opinion and pointed out that since the District of Columbia statute granted to the wife the right to sue for personal torts as if she were unmarried, there is no need for statutory construction to preclude the husband from being a tortfeasor. In other words, if a woman may sue a man for personal torts committed against her before marriage, she may sue that same man if he should later become her husband. In accord with this view see: Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185 (1914), where the Connecticut Married Woman's Act was construed to authorize an action by the wife against her husband for assault and battery and false imprisonment, although the statute did not expressly authorize such action; Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), 181 N. C. 66, 106 S. E. 149 (1921), the first case in this country in which the tort sued upon was infection with venereal disease; Fiedler v. Fiedler, 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189 (1914).

[28]See Notes (1949) 6 Wash. & Lee L. Rev. 213 and (1952) 9 Wash. & Lee L. Rev. 235 for discussions of various aspects of this controversy.

[29]See cases cited note 9, supra, as to criminal liability. Prosser, Torts (1941) 901, as to tort liability.

[30]People ex rel. Rossiter v. Rossiter, 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940), where the court contended that the legislature never intended to impose such a limitation on the rights of a woman to protect her property; People ex rel. Mattiello v. Mattiello, 200 Misc. 619, 110 N. Y. S. (2d) 359, 360 (1951), where the husband was found guilty of larceny after driving off with his wife's Cadillac, the court stated: "Logic, realism and the economics of our day support the view that a married woman may not only own property individually and separately from the husband, but as the owner of property is entitled to all the protection that the various laws extend to all other individuals." See People ex rel. Carr v. Martin, 286 N. Y. 27, 35 N. E. (2d) 636, 637 (1941), where under facts similar to the principal case, but with the court proceeding on the issue of the jurisdiction of the lower court to issue a writ of habeas corpus, the question of larceny between spouses was not

In view of the widening divergence of opinion among the courts as to whether the Married Woman's Acts should be construted as making the husband guilty of larceny against the wife's property and liable for injuries to her person, it is time for the legislatures to take note of the ambiguities in the statutes and to enact revisions to clarify this phase of the law. Until such time as the statutes are amended, however, the courts should recognize the incongruity of the rule of construction which attributes to the legislatures the intention to grant wives the right to own separate property but to permit the husbands to steal it with impunity.

NICHOLAS G. MANDAK

DOMESTIC RELATIONS—MARRIAGE IN STATE AS BASIS FOR JURISDICTION OF EX PARTE DIVORCE ACTION WHEN NEITHER SPOUSE IS DOMICILED IN STATE. [New York]

Within the past year, the United States Court of Appeals for the Third Circuit in *Alton v. Alton*[1] was presented with the issue of whether the domicile of at least one of the parties is a necessary prerequisite under the United States Constitution to the exercise of divorce jurisdiction when both parties are before the court. The Supreme Court granted certiorari, but the case was later dismissed as moot. The issue was again presented to the Third Circuit Court in the case of *Granville-Smith v. Granville-Smith* and dealt with in a per curiam opinion which said: "This case is the same with regard to all operative facts and principles of law as *Alton v. Alton*.... That decision must govern this."[2] The Supreme Court has granted certiorari.[3]

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discussed. However, the court unequivocally pronounced in dictum that the women's emancipatory acts have so changed the status of husband and wife that few vestiges are left of the common law concept of unity of spouses or of the husband's right to possess and control his wife's chattels.

[1]207 F. (2d) 667 (C. A. 3d, 1953), noted (1954) 11 Wash. & Lee L. Rev. 200. Certiorari was granted, 347 U. S. 911, 74 S. Ct. 478, 98 L. ed. (advance p. 352) (1954), and the case was argued on April 7, 1954, but was dismissed on June 1, 1954 as moot because the husband had by then obtained a valid divorce in Connecticut. In dissenting, Justice Black was of the opinion that the wife was entitled to have her case tried in the Virgin Islands, since under the holding of Williams v. North Carolina the Connecticut divorce would not necessarily protect the wife from a conviction of bigamy in the Virgin Islands or elsewhere. 347 U. S. 965, 745 S. Ct. 774, 98 L. ed. (advance p. 660) (1954).

[2]214 F. (2d) 820 (C. A. 3d, 1954).

[3]Cert. granted, 23 U. S. L. Week 3082, October 14, 1954.

In the *Alton* case the wife, who had previously lived in Connecticut, after six weeks residence in the Virgin Islands filed suit for a divorce. The husband entered a general appearance, which satisfied the jurisdictional requirements of the Virgin Islands statute.[4] The United States District Court for the Virgin Islands asked the wife for further proof of her domicile, but she gave none, relying on the statute. The District Court then dismissed the case for want of jurisdiction and the Court of Appeals affirmed that action, by a vote of four to three.

In the recent case of *David-Zieseniss v. Zieseniss*[5] a New York Supreme Court held that it had jurisdiction of an *ex parte divorce* action, although neither party was domiciled within the state, under Section 1147 of the Civil Practice Act which states: "In either of the following cases, a husband or wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery: ... Where the parties were married within this state."[6] The complaint did not allege that either party was a resident of New York, so that New York divorce jurisdiction could only be based on the fact of marriage within the state. The husband, who was in France, was served by publication, and an order was made sequestrating his property and appointing a receiver. The husband moved to vacate the orders of publication and sequestration, contending that Section 1147 of the Civil Practice Act does not mean what it says, and that if it does, then it is clearly unconstitutional.

In *Barber v. Barber*,[7] the first New York case in which this clause of the Civil Practice Act was construed, the Supreme Court of New York in overruling the argument for a literal construction of the clause, said: "The presumption is against the construction contended for. In view of this fact, and of the evil results to follow such construction ... I

[4]Bill No. 55, 17th Legislative Assembly of the Virgin Islands passed May 19, 1953, amending Section 9 of the Divorce Law of 1944 which states: "Notwithstanding the provisions of Section 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

[5]205 Misc. 836, 129 N. Y. S. (2d) 649 (1954).

[6]N. Y. Practice Manuel (Clevenger, 1954) § 1147.

[7]89 Misc. 519, 151 N. Y. Supp. 1064 (1915).

think the mere fact of the marriage within the state, irrespective of the residence of the parties, is not sufficient to confer jurisdiction."[8] And in *Huneker v. Huneker*,[9] a later case with facts similar to those of the principal case, a New York Supreme Court, after citing *Barber v. Barber* with approval, went on to say that inasmuch as hundreds of service men who were neither residents of the state nor intending to reside in New York, were getting married every week in New York, it would be contrary to public policy to allow one of the spouses to come back into the state later and obtain a divorce merely on the ground that the marriage was performed within the state. Thus it would appear from the earlier New York decisions on this point that, contrary to the principal case, the lower New York courts have been dubious of the validity of Section 1147 and have tried to avoid the issue by asserting that it does not mean what it says.

In *Becker v. Becker*,[10] an annulment case, a New York Supreme Court, drawing an analogy between jurisdiction for divorce and annulment, implied that since marriage within the state in itself is sufficient to confer jurisdiction in annulment cases it should likewise be sufficient in divorce cases.[11] This was apparently the law at the time the *Becker* case was decided under Section 1743 of the Civil Practice Code, but it is not the law in New York today. Under Section 1165-a of the Civil Practice Act, domicile is required to annul a marriage. The Restatement of Conflicts provides that "A state can exercise through its courts jurisdiction to nullify a marriage from its beginning under the same circumstances which would enable it to dissolve the marriage by divorce."[12]

In the principal decision, the court not only adopted a literal in-

[8]89 Misc. 519, 151 N. Y. Supp. 1064, 1067 (1915).

[9]57 N. Y. S. (2d) 99 (1945).

[10]58 App. Div. 374, 69 N. Y. Supp. 75 (1901).

[11]From a bare reading of the opinion it may appear that the court is merely pointing out that the New York statute specifically provides that the New York courts have jurisdiction to decree divorce of parties married in the state even though neither resides in the state. However, it must be remembered that other New York courts have not been willing to apply this provision of the statute literally, and have required residence as a basis of jurisdiction. In the Becker case, the court was indirectly refuting the idea that residence is essential, on the basis of the analogy to annulment jurisdiction. Since under the statute the fact that the marriage was celebrated in the state is sufficient to confer jurisdiction on New York courts to *annul* the marriage even though the parties do not reside in New York, then marriage within the state should also confer jurisdiction on New York courts to *divorce* the parties even though they do not reside in New York, as the statute makes the same provision regarding both divorce and annulment.

[12]Restatement, Conflict of Laws (1934) § 115.

terpretation of the statute, but also advanced reasoning to justify the provision for divorce jurisdiction of the state of the marriage. It argued that, "the validity of a marriage is determined by the law of the place where it is contracted... and as the law of that place determines the validity of the marriage, I cannot see why that place is not, also, at least an appropriate place for determining whether or not and for what causes that marriage may be dissolved. For a variety of other purposes, also, the law of the place where a marriage takes place determines many of the rights and obligations of the parties, as, for example, the rights each acquires in the property which the other had and thereafter acquires."[13] The court appears here to be putting forward a tacit contract theory of marriage in respect to divorce jurisdiction, though this is a unique application of the theory inasmuch as it had previously only been associated with the marital property rights of the parties. The concept of a tacit contract "is founded on an idea... that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go."[14] The leading English case expounding this theory is *De Nicols v. Curlier*,[15] wherein the parties were domiciled and married in France, and had made no express agreement as to what law was to govern their respective property rights. The court held that they impliedly contracted with reference to French law, and even though the parties had moved to England, their property rights were still governed by French law.

The majority of American jurisdictions today have rejected the tacit contract idea and hold that the law of the domicile at the time the property is acquired governs.[16] The leading American case on the subject is *Saul v. His Creditors*,[17] which in rejecting the tacit contract theory, ruled that the law of the place of marriage can govern only in so far as it could bind the parties and also stated: "The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted; if it was real,

[13]205 Misc. 836, 129 N. Y. S. (2d) 649, 655 (1954).

[14]Saul v. His Creditors, 5 Mart. (N. S.) (4 La. Ann.) 569, 599 (1827). For complete discussion of the tacit contract theory see Story, Conflict of Laws (6th ed. 1865) 218 ff.

[15][1900] 2 Ch. Div. 410.

[16]Birmingham Waterworks Co. v. Hume, 121 Ala. 168, 25 So. 806, 77 Am. St. Rep. 43 (1899); Muus v. Muus, 29 Minn. 115, 12 N. W. 343 (1882); In re Majot's Estate, 199 N. Y. 29, 92 N. E. 402 (1910).

[17]5 Mart. (N.S.) (4 La. Ann.) 569 (La. 1827).

and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was to have known its limitation, as well as its nature, and to have had the one as much in view as the other."[18] Thus, the Supreme Court of Louisiana held that the law of the domicile would govern gains acquired from separate property removed from a common law state into a community property state. The fallacy in the tacit contract theory is that it assumes knowledge of legal relations which the average layman does not possess. Also even in jurisdictions in which it has been adopted, it has not been applied to other situations in which it would have been just as appropriate as it is in regard to marital property.[19] The tacit contract theory is rejected in the Restatement of Conflicts, which declares that: "Interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired."[20]

The court in the principal case found further justification for the statute vesting divorce jurisdiction in the courts of the state of the marriage in stating that "if in lieu of domicile there could be substituted, as the foundation of divorce jurisdiction, the definite, certain, easy to prove and unchanging fact of place of marriage, there would be no migratory divorce, and the perplexing confusion and uncertainty which attend it would disappear."[21] Some jurisdictions have held that the state where the marriage is performed has jurisdiction to annul, notwithstanding the fact that both parties might be non-residents.[22] Other jurisdictions and the Restatement of Conflicts[23] treat the requisite for jurisdiction to annul as being domicile, as in divorce cases. The great weight of authority today supports this latter view,[24] the

[18]Saul v. His Creditors, 5 Mart. (N.S.) (4 La. Ann.) 569, 603 (La. 1827).

[19]"If one dies without a will, we do nat say he tacitly accepted the statute of distributions, but that the statute governs because he died intestate. If one commits a battery upon another, his liability to pay damages is not a matter of contract, tacit or otherwise, but a legal obligation imposed regardless of his consent." Goodrich, Conflict of Laws (3rd ed. 1949) 387.

[20]Restatement, Conflict of Laws (1934) § 290.

[21]David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N. Y. S. (2d) 649, 657 (1954).

[22]Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864 (1929); Becker v. Becker, 58 App. Div. 374, 69 N. Y. Supp. 75 (1901) [According to Huneker v. Huneker, 57 N. Y. S. (2d) 99 at 100 (1945), the Becker case was overruled by Powell v. Powell, 211 App. Div. 750, 208 N. Y. Supp. 153 (1925)]; McDade v. McDade, 16 S. W. (2d) 304 (Tex. Civ. App. 1929).

[23]Restatement, Conflict of Laws (1934) § 115.

[24]Hamlet v. Hamlet, 242 Ala. 70, 4 S. (2d) 901 (1941); Davis v. Davis, 119 Conn. 194, 175 Atl. 574 (1934); Hanson v. Hanson, 287 Mass. 154, 191 N. E. 673 (1934); Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. 355 (1912).

reasoning being that in annulment suits the domiciliary state has the prime interest in the parties,[25] and as in divorce actions a status is involved.[26] The view that the state where the marriage was performed is the proper jurisdiction to annul has generally been rejected because of its obvious inconveniences,[27] for even if the plaintiff did bring suit in the state of celebration there is no way to force a non-resident defendant to appear, because "the courts are practically unanimous in holding that such jurisdiction may not be exercised under a constructive service of process upon the nonresident defendant by publication or personally without the state."[28]

It does not necessarily follow that because some jurisdictions hold that the state of celebration has jurisdiction to annul it could also have jurisdiction to divorce. The basic concept of annulment and divorce are not the same. Divorce is the dissolution of a concededly valid marriage because of some subsequent act, while in an annulment the court is in legal effect saying that no valid marriage ever took place because of some prior acts or conditions.[29] "The divorce decree, in short, cuts off and destroys the ill-favored marriage plant, annulment tears it up by the roots."[30] Thus, it is clear that the legal effect of the two are not the same. A declaration of nullity is more drastic in that it affects events which occurred between the time of the marriage and the declaration of nullity.[31]

Since annulment and divorce are based on entirely different concepts, the basis of jurisdiction would not necessarily be the same in the two types of cases. The whole issue of jurisdiction over the individual in annulment cases centers around the issue of whether the action is one in personam or in rem.[32] By the weight of authority it is treated

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[25]Goodrich, Conflict of Laws (3rd ed. 1949) 418: "...[it] is the state of the domicile which has the greatest interest in the domestic relations of its citizens." Goodrich in a previous article was one of the chief advocates of the view that the state of celebration ought to have jurisdiction. Goodrich, Jurisdiction to Annul a Marriage (1919) 32 Harv. L. Rev. 806.

[26]In re Crump's Estate, 161 Kan. 154, 166 P. (2d) 684 at 688 (1946); Callow v. Thomas, 322 Mass. 550, 78 N. E. (2d) 637 at 639 (1948); Barney v. Cunves, 68 Vt. 51, 33 Atl. 897 at 898 (1895).

[27]Stumberg, Conflict of Laws (2nd ed. 1951) 322.

[28]Note (1940) 128 A. L. R. 61, 73.

[29]1 Beale, Conflict of Laws (1935) § 115.1; Stumberg, Conflict of Laws (2nd ed. 1951) 321.

[30]Goodrich, Jurisdiction to Annul a Marriage (1919) 32 Harv. L. Rev. 806, 807.

[31]For examples, see Goodrich, Jurisdiction to Annul a Marriage (1919) 32 Harv. L. Rev. 806, 807. See McMurray and Cunningham, Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country (1930) 18 Calif. L. Rev. 105, 113 for a discussion on applying the doctrine of "relating back."

[32]Note (1940) 128 A. L. R. 61, 73.

as an action in personam for which the court must have personal jurisdiction over both parties.[33] As a matter of logic this would appear to be true, for the court in any event would be applying the law of the place of celebration, and not the law of the forum as in divorce actions.[34] Where both parties are before the court there appears to be little ground for complaint as to due process, but where there is constructive service on a non-resident, if the action is considered to be in personam, it would be a violation of due process.[35] However, if the action is deemed an in rem action like divorce, then constructive service on a non-resident defendant would be good.[36] The Restatement of Conflicts, not distinguishing between divorce and annulment, recognizes this problem as follows: "Two interests are involved in the granting of a divorce; that of the state of domicile in the existence of the status and that of the defendant spouse in the plaintiff spouse. Since the result of the action is to deprive the defendant spouse of his interest in the other spouse, the court must in some way acquire jurisdiction over that interest."[37] However, a divorce proceeding is generally conceded to be an in rem action for jurisdictional purposes, and the law of the forum governs whether or not a marriage is to be dissolved.[38] Thus

[33]The majority reasons that since an action of annulment is for the purpose of determining whether or not a valid marriage ever existed, there is no "res" upon which the court can act; therefore the action being in the nature of an in personam action, the court must have personal jurisdiction over the defendant. Owen v. Owen, 257 P. (2d) 581 (Colo. 1953); Gayle v. Gayle, 301 Ky. 613, 192 S. W. (2d) 821 (1946); Pepper v. Shearer, 48 S. C. 492, 26 S. E. 797 (1897).

[34]The courts are generally in accord that the law to be applied in determining the validity of the marriage in annulment cases is the law of the state where the marriage was performed. McDonald v. McDonald, 6 Cal. (2d) 457, 58 P. (2d) 163, 104 A. L. R. 1290 (1936); Levy v. Levy, 309 Mass. 230, 34 N. E. (2d) 650; Noble v. Noble, 299 Mich. 565, 300 N. W. 885 (1941). Also see Restatement, Conflict of Laws (1934) § 115, comment b.

[35]Under the doctrine of Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877) in order to satisfy due process in in personam actions the court must have personal jurisdiction over the defendant; constructive service is not sufficient.

[36]The difference between this view and the majority seems to be based on different reasoning as to what is involved. The majority of the courts believes that what plaintiff is asking for is a determination of a personal right—that is, to have the marriage declared void as to him—while under the minority view the courts reason that the plaintiff is asking for a determination of his status, the action thereby being classified as in rem. Buzzi v. Buzzi, 91 Cal. App. 823, 205 P. (2d) 1125 (1949); Bing Gee v. Chan Gee, 89 Cal. App. 877, 202 P. (2d) 360 (1949); Piper v. Piper, 46 Wash. 671, 91 Pac. 189 (1907).

[37]Restatement, Conflict of Laws (1934) § 113, comment a. It must be remembered that the Restatement makes no distinction between divorce and annulment for jurisdictional purposes.

[38]Zieper v. Zieper, 14 N. J. 551, 103 A. (2d) 366 (1954); Tonti v. Chadwick, 1 N. J. 531, 64 A. (2d) 436 (1949); Sasse v. Sasse, 41 Wash. (2d) 363, 249 P. (2d) 380 (1953). Also see Goodrich, Conflict of Laws (3rd ed. 1949) § 128.

domicile in ex parte divorce proceedings is essential in order to satisfy due process, for without it the court would have no jurisdiction either in personam or in rem.

JOSEPH H. CHUMBLEY

EVIDENCE—ADMISSIBILITY IN PROSECUTION FOR DRUNKEN DRIVING OF ACCUSED'S REFUSAL TO SUBMIT TO BLOOD TEST. [Virginia]

Recognizing that the intoxicated driver of an automobile is a menace to the public on the highways, many state legislatures have enacted statutes which severely penalize intoxicated drivers.[1] But such statutes will aid in keeping the highways safe only if they can be effectively enforced, and enforcement can only be accomplished when evidence is available to prove that the degree of intoxication of the accused was sufficient to sustain a conviction. Science has perfected the blood test to the point where it is sufficiently reliable as a strong indication of intoxication,[2] but the use of this means of obtaining evidence may be thwarted by the refusal of the accused in a criminal prosecution to submit to a blood test. In such a situation a problem arises as to whether the fact of the accused's refusal to take the test is admissible in a criminal prosecution as evidence of his guilt.

In *Gardner v. Commonwealth*,[3] a case of first impression in the jurisdiction, the Supreme Court of Appeals of Virginia has recently held that the refusal of the accused, when requested by the arresting officer, to submit to a blood test to determine the amount of alcohol in his system was admissible in evidence.[4] A police officer, having seen defendant driving his automobile from side to side of the two

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[1]See statutes applied in: Helmer v. Superior Court of Sacramento County, 48 Cal. App. 140, 191 Pac. 1001 (1920); State v. Lorey, 197 Iowa 522, 197 N. W. 446 (1924); Commonwealth v. Black, 230 Ky. 677, 20 S. W. (2d) 741 (1929); People v. Nester, 275 N. Y. 628, 11 N. E. (2d) 790 (1937); State v. Jones, 181 N. C. 543, 106 S. E. 827 (1921); Commonwealth v. Ellett, 174 Va. 403, 4 S. E. (2d) 762 (1939). 9-10 Huddy, Encyclopedia of Automobile Law (1931) § 15.

[2]State v. Duguid, 50 Ariz. 267, 72 P. (2d) 435 (1937); Commonwealth v. Capalbo, 380 Mass. 376, 32 N. E. (2d) 225 (1941). 11 N. Y. Consol. L. Serv. (Baker, Voorhis, 1952) Vehicle and Traffic Law § 70 (5). 4 Va. Code Ann. (Michie, 1954 Supp.) § 17-75.1. Notes (1945) 159 A. L. R. 209; (1940) 127 A. L. R. 1513; (1953) 39 Va. L. Rev. 215; (1954) 11 Wash. & Lee L. Rev. 211.

[3]195 Va. 945, 81 S. E. (2d) 614 (1954).

[4]However, the conviction of the defendant was reversed on another ground. The trial court permitted an erroneous instruction, which defined intoxication too broadly, to go to the jury with prejudicial effect against the defendant.

north-bound lanes of the highway, arrested him for driving while intoxicated.[5] Defendant immediately denied that he was intoxicated. At the scene of the arrest, again while he and the officer were enroute to a justice of the peace to obtain a warrant, and again after he had been taken to jail, defendant was asked by the officer if he would like to submit to a blood test, and the defendant refused each offer. In the trial court, over defendant's objection, the officer was allowed to testify that defendant had refused to submit to the blood test. Defendant contended that the admission of the officer's testimony was a violation of Section Eight of the Virginia Constitution, which provides that an accused shall not "be compelled in any criminal proceeding to give evidence against himself." However, the Court of Appeals ruled that such evidence was admissible as an attending circumstance of the arrest pointing toward defendant's guilt. The constitutional prohibition against self-incrimination was held to be inapplicable in situations in which the testimony to which accused objected was not a statement made by him as a witness in any judicial or quasi-judicial proceedings. The court specifically relied upon its earlier decision in *Owens v. Commonwealth,* which asserted the theory that the privilege extends only to testimonial compulsion in court.[6]

The evidence of the accused's refusal to submit to a blood test in the principal case was held to be relevant and pertinent, as it tended to show that within his own mind he believed he was guilty. The rule has been stated that: "Any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him."[7] It is obvious that the inward feeling of guilt, though it may be inferred only from outward conduct, is strong evidence against the accused. Certain circumstances tend strongly to show the feeling of guilt, and the fact-finders should be allowed to consider them and draw inferences therefrom. However, inferences drawn from an accused's conduct are often erroneous due to the unsolved, intricate mechanisms of the human mind.[8] In determining what circumstances

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[5]4 Va. Code Ann. (Michie, 1950) § 18-75.

[6]186 Va. 689, 43 S. E. (2d) 895 (1947). The Owens case involved a prosecution for grand larceny, in which the court fully discussed the theory of tacit admissions and held that the constitutional prohibition against self-incrimination was not thereby violated.

[7]McAdory v. State, 62 Ala. 154, 159 (1878).

[8]"No one doubts that the state of mind which we call 'guilty consciousness' is perhaps the strongest evidence... that the accused is indeed the guilty doer;

reasonably tend to indicate consciousness of guilt, the general doctrine of relevancy should be considered.[9]

The criterion of relevancy is whether the "evidence . . . tends to cast any light upon the subject of the inquiry."[10] The conduct of the accused, his demeanor, his attitude and relations toward the crime, and his voluntary oral or written admissions of guilt are relevant, and any statement or conduct tending to indicate a consciousness of guilt when he is charged with or suspected of crime, or thereafter, is admissible as a circumstance against him.[11] The following actions of accused persons have been classed as circumstances relevant to a showing of a consciousness of guilt: flight,[12] concealment of identity,[13] endeavor to escape after arrest,[14] incriminating demeanor when arrested,[15] contradictory statements made to conceal the true facts,[16] and reluctance to have one's shoe measured for the purpose of comparison with tracks near the scene of the crime.[17] Further, it has been held that accused's refusal to submit to an intoximeter test when requested to

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nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence. But, in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary." 2 Wigmore, Evidence (3rd ed. 1940) § 273.

[9]"The evidencing of this mental condition raises different and more complicated questions as to the significance of conduct; hence a consideration of the state of the law upon the various uses of the present sort of evidence can best be made in connection with the rules of conduct-evidence." 1 Wigmore, Evidence (3rd ed. 1940) § 172.

[10]State v. Page, 215 N. C. 333, 1 S. E. (2d) 887, 888 (1939).

[11]Holmes v. State, 29 Ala. App. 594, 199 So. 736 (1941); Ramirez v. State, 55 Ariz. 441, 103 P. (2d) 459 (1940); People v. Moore, 70 Cal. App. (2d) 158, 160 P. (2d) 857 (1945); State v. Benson, 230 Iowa 1168, 300 N. W. 275 (1941); State v. Caliendo, 136 Me. 169, 4 A. (2d) 837 (1939); Commonwealth v. Vallone, 347 Pa. 419, 32 A. (2d) 889 (1943).

[12]United States v. Heitner, 149 F. (2d) 105 (C. C. A. 2d, 1945); People v. Hoyt, 20 Cal. (2d) 306, 125 P. (2d) 29 (1942); State v. Hedinger, 126 N. J. L. 288, 19 A. (2d) 322 (1941); Bowie v. Commonwealth, 184 Va. 381, 35 S. E. (2d) 345 (1945).

[13]People v. Waller, 14 Cal. (2d) 693, 96 P. (2d) 344 (1939); State v. Shoup, 226 N. C. 69, 36 S. E. (2d) 697 (1946). See State v. Lambert, 104 Me. 394, 71 Atl. 1092, 1093 (1908).

[14]State v. Wilson, 172 Ore. 373, 142 P. (2d) 680 (1943); State v. Mayle, 136 W. Va. 936, 69 S. E. (2d) 212 (1952).

[15]Holmes v. State, 29 Ala. App. 594, 199 So. 736 (1941); State v. Dennis, 119 Iowa 688, 94 N. W. 235 (1903); Commonwealth v. Vallone, 347 Pa. 419, 32 A. (2d) 889 (1943).

[16]People v. Gentekos, 118 Cal. App. 177, 4 P. (2d) 964 (1931); State v. Golden, 67 Idaho 497, 186 P. (2d) 485 (1947).

[17]State v. Brown, 168 Mo. 449, 68 S. W. 568 (1902).

do so by an arresting officer was an action by which he revealed a consciousness of guilt of drunken driving.[18] The Virginia court in the *Gardner* case felt that the accused's refusal to submit to a blood test was a relevant circumstance indicating a consciousness of guilt on his part.

Although the accused's refusal to submit to a blood test may be evidence that shows a consciousness of guilt, it is not necessarily strong evidence of that fact. Experience demonstrates that no fixed relations of inferences can be drawn from the same type of conduct in different persons because such conduct is often the result of exactly opposite psychological conditions.[19] Thus there is a grave danger that the jury will be misled unless an alternative explanation of his conduct is advanced by the accused.

It has been suggested that the admissibility of evidence of accused's refusal to submit to a blood test could be based upon the theory of implied admissions.[20] The general rule is that when an incriminating statement is made in the presence of the accused and he remains silent, failing to object to or deny such accusation, both the accusation and his failure to deny it are admissible in a criminal prosecution against him as evidence of his acquiescence in truth of the charge.[21] The analogy

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[18]People v. McGinnis, 267 P. (2d) 458 (Cal. App. 1953).

[19]"The conduct of one accused of crime is the most fallible of all competent testimony. Those emotions or acts which might be produced in one person by a sense of guilt, or by the stings of conscience, might be exhibited by another, differently constituted, by an overwhelming sense of shame, and the degradation consequent upon a criminal accusation. The same cause producing opposite effects in different persons, owing to weakness or strength of nerve, and other inexplicable moral phenomena." Smith v. State, 9 Ala. 990, 995 (1846).

For an expansive discussion on the theory of consciousness of guilt see: Hutchins and Slesinger, Some Observations on the Law of Evidence—Consciousness of Guilt (1929) 77 U. of Pa. L. Rev. 725.

[20]People v. McGinnis, 267 P. (2d) 458 (Cal. App. 1953); State v. Benson, 230 Iowa 1168, 300 N. W. 275 (1941), noted (1942) 40 Mich. L. Rev. 907.

[21]Love v. State, 69 Ga. App. 411, 25 S. E. (2d) 827 (1943); Commonwealth v. Cavedon, 301 Mass. 307, 17 N. E. (2d) 183 (1938); State v. Brown, 209 Minn. 478, 296 N. W. 582 (1941); Commonwealth v. Karmendi, 325 Pa. 63, 188 Atl. 752 (1937); Winfree v. State, 174 Tenn. 72, 123 S. W. (2d) 827 (1939).

"The basis of such rule is that the natural reaction of one accused of the commission of a crime or of implication therein is to deny the accusation if it is unjust or unfounded. The hearsay character of the incriminating statement made to the accused would render it inadmissible, except for the fact that the statement is not offered in evidence as proof of a fact asserted but as a predicate to the showing of the reaction of the accused thereto. Caution must be exercised, however, in receiving evidence of a statement made to the accused and his failure to deny it. In order that the silence of one accused of crime following a statement of a fact tend-

drawn is that the officer's request that defendant submit to a blood test is the accusation, and the accused's refusal to submit is similar to remaining silent.[22] Thus, if the general rule is strictly adhered to, such evidence would be admissible as an implied admission.

However, when, as in the *Gardner* case, an accused is confronted with the charge *while under arrest,* the courts have modified the application of the implied admissions rule. Some hold that the mere fact of arrest is sufficient to render inadmissible any testimony to the effect that the accused failed to deny the charges made in his presence,[23] because when a man is under arrest, whether innocent or guilty, it is more conducive to his welfare to remain silent.[24] His silence in the face of such accusations is explained, not by the fact that he acquiesces in the truth of the statement, but by the fact that he stands upon his constitutional right to remain silent as the best way out of his predicament.[25] Other courts have held that the mere fact of arrest alone is not sufficient to render the testimony inadmissible but rather that such fact should be considered along with other circumstances in determining whether the accused was merely afforded an opportunity to deny or whether he was naturally called upon to do so.[26]

The analogy of the problem in the principal case to the implied admission theory is not altogether sound. The officer's request that the defendant take the blood test is not necessarily an accusation of

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ing to incriminate him may have the effect of a tacit admission, he must have heard the statement and have understood that he was being accused of complicity in a crime, the circumstances under which the statement was made must have been such as would afford him an opportunity to deny or object, and the statement must have been such, and made under such circumstances, as would naturally call for a reply. The test is whether men similarly situated would have felt themselves called upon to deny the statements affecting them in the event they did not intend to express acquiescence by their failure to do so." 20 Am. Jur. 483. Owens v. Commonwealth, 186 Va. 689, 43 S. E. (2d) 895 (1947).

[22]State v. Benson, 230 Iowa 1168, 300 N. W. 275 (1941). It could also be argued that defendant's refusal to submit to a blood test is analogous to his denial of guilt. Then the testimony would be inadmissible because it would be hearsay. Pinn v. Commonwealth, 166 Va. 727, 186 S. E. 169 (1936).

[23]State v. Ferrone, 97 Conn. 258, 116 Atl. 336 (1922); Diblee v. State, 202 Ind. 571, 177 N. E. 261 (1931); People v. Pignataro, 263 N. Y. 229, 188 N. E. 720 (1934); State v. McKenzie, 184 Wash. 32, 49 P. (2d) 1115 (1935).

[24]People v. Rutigliano, 261 N. Y. 103, 184 N. E. 689 (1933); 20 Am. Jur. 486.

[25]Towery v. State, 13 Okla. Crim. Rep. 216, 163 Pac. 331 (1917); 20 Am. Jur. 486.

[26]People v. Amaya, 134 Cal. 531, 66 Pac. 794 (1901); State v. Won, 76 Mont. 509, 248 Pac. 201 (1926); State v. Booker, 68 W. Va. 8, 69 S. E. 295 (1910); Note (1930) 80 A. L. R. 1259.

For further references concerning tacit admissions see: Notes (1932) 80 A. L. R. 1235; (1938) 115 A. L. R. 1510.

intoxication. It can just as well be regarded as offering an opportunity to the accused to prove that he is not intoxicated. Even if the request to take the test is regarded as an accusation of intoxication, the defendant did not remain silent in the face of the accusation, but rather vocally denied it. To say that he made an implied admission by refusing to take the test is to say that the only way he could make a denial was to submit to the test. This is not true, for he exercised another means of denying—i.e., by oral statements that he was not drunk.

If the evidence of defendant's refusal to submit to a blood test is considered to be admissible because it shows a consciousness of guilt or because it is an implied admission, the problem still remains as to whether the admission of such evidence would violate defendant's constitutional privilege against self-incrimination. It is said that: "The privilege protects a person from any disclosure *sought by legal process against him as a witness.*"[27] However, in *State v. Gatton*,[28] involving the same problem was the *Gardner* case, the Ohio court ruled that since the constitutional prohibition against self-incrimination relates only to disclosures by utterances, and since the testimony of accused's refusal to take the test was given by the arresting officer, no violation of accused's privilege was involved. To state the argument differently, the essence of the privilege is freedom from testimonial compulsion—i.e., that the accused cannot be forced to testify against himself in the course of a judicial proceeding—and that in situations like that of the principal case the defendant is not required to give testimony during his trial.[29] Further, the court in the *Gardner* case indicated that such evidence as the defendant provides by his refusal to take the test was *voluntarily* given by him.[30] Thus, some courts have answered the constitutional argument by limiting the scope of the privilege, or by ruling that the testimony was not that of the accused, or by asserting that the evidence was voluntarily given.

However, whether or not defendant is required to testify against

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[27]8 Wigmore, Evidence (3rd ed. 1940) 363.

[28]60 Ohio App. 192, 20 N. E. (2d) 265 (1938).

[29]Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932); O'Brien v. State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323 (1890); Owens v. Commonwealth 186 Va. 689, 43 S. E. (2d) 895 (1947).

[30]"The defendant was not forced to testify, nor was he compelled to take the stand in his own behalf. The objectionable evidence was given by a witness for the Commonwealth in describing the incidents of the arrest, the condition of the defendant, and his declarations voluntarily made." Gardner v. Commonwealth, 195 Va. 945, 950, 81 S. E. (2d) 614, 617 (1954).

himself in the technical sense, the fact remains that unreliable inferences are permitted to be drawn against him at his trial, and that as a result of the rule making his refusal to take the test admissible in evidence, an accused has no real means of protecting himself against prejudice when an arresting officer suggests that he take an intoxication test. If he takes the test, it may indicate intoxication; and if he does not take it, his refusal is admissible to show a consciousness of guilt.

In the *Gardner* case, the Virginia court relied almost entirely on the *Gatton* case[31] and the Iowa case of *State v. Benson*[32] as authority for the proposition that evidence of the accused's refusal to submit to a blood test is admissible in a criminal prosecution. However, it must be noted that in both Ohio and Iowa the prosecuting attorney is allowed to comment on the fact that the accused does not take the stand and testify,[33] while in Virginia such comment is not allowed, and the jury is not permitted to draw inferences from accused's failure to testify.[34] That this difference in the law of the jurisdictions is significant is confirmed by the Iowa court's reasoning that defendant's refusal to submit to a blood test is analogous to his refusal to testify, and that since his refusal to testify can be considered, it follows that his refusal to submit to a blood test can also be considered.[35] If this approach to

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[31]In a prosecution for operating a motor vehicle while intoxicated, evidence that accused had refused to submit to a blood test to determine the amount of alcohol in his system when arrested was admissible, as against the contention that the admission of such evidence contravened his constitutional right not to be compelled to give evidence against himself. State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1938).

[32]In a prosecution for driving a motor vehicle while intoxicated, evidence of accused's refusal to submit to a blood test was held admissible as it showed his attitude or relation toward the crime. There was no provision in the state constitution prohibiting self-incrimination, and the state due process clause was not regarded as rendering the testimony inadmissible. 230 Iowa 1168, 300 N. W. 275 (1941).

[33]"No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel." Ohio Const. (1851) Art. 1, § 10. The basis for the rule in Iowa is found in: state v. Ferguson, 226 Iowa 361, 283 N. W. 917 (1939); State v. Stennett, 220 Iowa 388, 260 N. W. 732 (1935).

[34]"... but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney." 4 Va. Code Ann. (Michie, 1950) § 19-238.

[35]State v. Benson, 230 Iowa 1168, 300 N. E. 275 (1941). Also, the Iowa court indicated that although the basis for the decision of the Gatton case "is not the same as that given by us, the decision can be readily reconciled with our own." 230 Iowa 1168, 300 N. W. 275, 277 (1941). If the Gatton case can be reconciled with the

the question were to be applied in Virginia cases, the court would be compelled to reason that since the fact that defendant refused to testify cannot be introduced in evidence or considered by the jury, his refusal to submit to a blood test, likewise, cannot be introduced or considered.

Further authority for the exclusion of accused's refusal to take the intoxication test is derived from the recently enacted Section 18-75.1 of the Virginia Code,[36] which provides that in a criminal prosecution for driving while intoxicated, though the accused is not required to submit to a blood test, he may request in writing to take one, but the failure of defendant to request a blood test shall not be evidence of his guilt nor the subject of comment at the trial. It must be obvious that if, under the *Gardner* case rule, evidence of defendant's refusal at the officer's request is admissible, then in any case in which defendant does not request a blood test, the officer could evade the effect of the latter clause of the statute by merely asking defendant if he would submit. If defendant refused, the evidence of his reluctance to submit would then be admissible, and the legislature's intended protection of the accused's choice not to take the test would thereby be circumvented. Thus, it appears that in order to assure that his rights under both the statute and the common law rules of evidence will be protected, evidence of accused's refusal to submit to a blood test when charged with driving while intoxicated should be held inadmissible.

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Benson case because in both states the prosecuting attorney is allowed to comment on the accused's refusal to testify, then it can neither be reconciled with nor be pertinent authority for the decision of the Virginia court in the Gardner case.

[36]The statute, quoted below, was approved by the General Assembly on April 3, 1954. Va. Acts (1954) c. 406. The effective date of the statute is ninety days after the adjournment of the session of the General Assembly at which it was enacted. 1 Va. Code Ann. (Michie, 1950) § 1-12. Thus, the statute was not in effect when the Gardner case was decided on May 3, 1954. 4 Va. Code Ann. (Michie, 1954 Supp.) § 18-75.1: "In any criminal prosecution under § 18-75, no person shall be required to submit to determination of the amount of alcohol in his blood at the time of the alleged offense as shown by chemical analysis of his blood, breath, or other bodily substance, but should the accused request in writing such a determination the arresting authorities shall render full assistance in obtaining such a determination. There shall be no formal requirements for the rewriting....

"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The results of a determination which are properly obtained shall be admissible as other evidence relating to the intoxication of the accused. The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

EVIDENCE—APPLICATION OF FEDERAL WIRE TAPPING STATUTE TO RECORDING AUTHORIZED BY INFORMER WITHOUT CONSENT OF ACCUSED. [Federal]

Within the past few decades, the employment of various wire tapping devices by law enforcement agencies to obtain evidence of criminal activities has created a new phase of the old legal controversy concerning the use of illegally obtained evidence to secure convictions in criminal prosecutions. The ancient rule of the common law that evidence will be received without regard to the method by which it is obtained[1] has been applied by the American state courts for well over a century[2] in numerous decisions involving the illegal obtention of evidence by private individuals[3] and public officers.[4] The reason generally assigned for ignoring the method by which the evidence was obtained was that the court would not halt a trial to determine the "collateral" issue of the legality of the means of obtaining the evidence, this issue having no bearing on the final outcome of the case.[5]

In 1886 the Supreme Court of the United States began to deviate from the common law rule,[6] and finally in 1914, in *Weeks v. United*

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[1]See Olmstead v. United States, 277 U. S. 438 at 462, 48 S. Ct. 564 at 567, 72 L. ed. 944 at 950 (1928); Rosenzweig, The Law of Wiretapping (1947) 32 Corn. L. Q. 514 at 515. This is thought to be one of the oldest rules of the common law. Note (1911) 136 Am. St. Rep. 135 at 137.

[2]One of the earliest American cases to adopt this common law rule was Commonwealth v. Dana, 2 Metc. 329, 337 (Mass. 1841), where it was observed: "If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question."

[3]Imboden v. People, 40 Colo. 142, 90 Pac. 608 at 620 (1907); Commonwealth v. Everson, 123 Ky. 330, 96 S. W. 460 (1906); State v. Mathers, 64 Vt. 101, 23 Atl. 590 (1892).

[4]People v. Cotta, 49 Cal. 166 (1874); State v. Flynn, 36 N. H. 64 (1858).

[5]Note (1911) 136 Am. St. Rep. 135, 142.

[6]In Boyd v. United States, 116 U. S. 616 at 641, 6 S. Ct. 524 at 534, 29 L. ed. 746 at 752 (1886) there appeared dicta to the effect that evidence seized by an unlawful search and seizure would be equivalent to compelling a person to be a witness against himself within the meaning of the Fifth Amendment. This conclusion was reached without any discussion of the common law rule of admissibility of illegally obtained evidence. For general discussion of cases leading up to the Weeks case see, Rosenzweig, The Law of Wiretapping (1947) 32 Corn. L. Q. 514 at 518-523.

States,[7] the Court invoked the Fourth Amendment[8] to bar the admission of evidence seized from the accused's house by a United States marshall without benefit of a warrant. In the opinion it was observed that "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 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, . . . might as well be stricken from the Constitution."[9] Though held not to be binding on the states,[10] the rule of the *Weeks* case has been reiterated in subsequent Supreme Court decisions[11] involving illegal searches and seizures by federal officers.[12]

It was in this setting that the first wire tapping case was presented to the Supreme Court in 1928. In *Olmstead v. United States*[13] the

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[7]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

[8]"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 thing to be seized." U. S. Const. Amend. IV.

[9]Weeks v. United States, 232 U. S. 383, 393, 34 S. Ct. 341, 344, 58 L. ed. 652, 656 (1914).

[10]The Court has declared that the Due Process Clause of the Fourteenth Amendment, which is applicable to the States, does not include the guaranties against an unlawful search and seizure, and therefore the Due Process Clause does not require that illegally obtained evidence be excluded from state court trials. Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949).

[11]Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925). Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647 (1921) held that the surreptitious removal of papers from the office of the defendant by a federal agent constituted an illegal search and seizure and that the admission of the papers in evidence violated the defendant's rights under the Fifth Amendment. In Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319 (1920) the Court extended the rule of the Weeks case by holding that the unlawful act not only vitiates the evidence seized but extends to all other evidence discovered as a result of the unlawful act. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." 251 U .S. 385, 392, 40 S. Ct. 182, 183, 64 L. ed. 319, 321 (1920).

[12]One significant limitation on the rule of the Weeks case is that the evidence will be banned only if illegally obtained by a federal agent. The Fifth Amendment is directed at the federal government. This, in essence, was the holding of Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. ed. 1048 (1921), demonstrating that the common law rule retains its vitality outside the constitutional periphery.

[13]277 U. S. 438, 48 S. Ct. 564, 72 L. ed. 944 (1928). The defendants were convicted of a conspiracy to violate the National Prohibition Act. The facts disclosed that the evidence leading to their conviction had been secured largely by intercepting messages on the telephone of the conspirators by four federal prohibition officers. The tapping was accomplished without trespass on the property of the defendants.

Court was squarely faced with the question of whether evidence obtained by federal law enforcement officers by tapping the telephone wires of an accused constituted an illegal search and seizure within the purview of the Fourth Amendment. Conceding that the evidence was not obtained in conformity to the "highest ethics," the Court in a 5 to 4 decision held the evidence admissible because "The 4th Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants."[14] Justice Holmes, in a vigorous dissent, characterized wire tapping as "dirty business" and declared that it is "less evil that some criminals should escape than that the Government should play an ignoble part."[15] The *Olmstead* decision emphasized the Court's dedication to the common law rule in the area in which no constitutional infraction is involved which would bring the disputed evidence within the rule of the *Weeks* case, and further pointed out that any restriction upon the common law rule must come from Congress.[16]

In 1934 Congress reacted to the *Olmstead* decision by enacting the Federal Communications Act, Section 605 of which provided in part as follows:

> "... and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person...."[17]

During the past two decades, this broadly phrased measure has been the subject of two opposing lines of interpretation which have

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[14]Olmstead v. United States, 277 U. S. 438, 464, 48 S. Ct. 564, 568, 72 L. ed. 944, 950 (1928).

[15]Olmstead v. United States, 277 U. S. 438, 470, 48 S. Ct. 564, 575, 72 L. ed. 944, 953 (1928). Justice Brandeis' dissent, which is a legal classic, urged that the Fourth and Fifth amendments should not be construed so literally as to permit a breach of the right of privacy which they were framed to safeguard. "And it is also immaterial that the intrusion was in the aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." 277 U. S. 438, 479, 48 S. Ct. 564, 572, 72 L. ed. 944, 957 (1928).

[16]"Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence." Olmstead v. United States, 277 U. S. 438, 465, 48 S. Ct. 564, 568, 72 L. ed. 944, 951 (1928).

[17]48 Stat. 1103 (1934), 47 U. S. C. § 605 (1946).

been illustrated once again in two recent decisions of the United States District Court for the District of Columbia. The first of these cases, *United States v. Sullivan*,[18] concerned the admissibility of a recorded conversation secured by government agents while the accused was in conversation with an informer. The record was made at the informer's end of the line with his knowledge and consent. Judge Holtzoff, relying upon *United States v. Yee Ping Jong*,[19] held the evidence was admissible, since consent of one of the parties to the conversation is sufficient authorization within the meaning of Section 605, and since there was no interception but a mere recording at one end of the line.

Shortly thereafter, in *United States v. Stephenson*,[20] Judge Pine, also of the United States District Court for the District of Columbia, differed sharply with Judge Holtzoff's conclusions. This case, like the *Sullivan* case, involved the recording of accused's conversation with an informer who had initiated the call.[21] The accused had no notice that the conversation was being recorded and did not authorize it. The court, adopting Judge Hand's opinions in *United States v. Polakoff*,[22] held: (1) that the conduct of the informer constituted an interception within the meaning of Section 605; and (2) that the privilege conferred by Section 605 is mutual and therefore both parties must consent to the interception of any part of their conversation.

Thus, these two decisions vividly represent the continuing controversy between the proponents of the strict regard for personal rights and those chiefly concerned with the enforcement of the criminal law. The result in the *Sullivan* case, which represents a triumph for

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[18]116 F. Supp. 480 (D. C. D. C. 1953).

[19]26 F. Supp. 69 (W. D. Pa. 1939). The court supported its adherence to the Yee Ping Jong case by inferring that the Supreme Court had adopted that case in Goldman v. United States, 316 U. S. 129, 62 S. Ct. 993, 86 L. ed. 1322 (1942). In the Goldman case, the Yee Ping Jong case was cited as authority for the court's definition of "intercept." See note 33, infra. Judge Chase of the Second Circuit was also of the opinion that the Supreme Court had adopted the conclusion of the Yee Ping Jong case. See Reitmeister v. Reitmeister, 162 F. (2d) 691 at 697 (C. C. A. 2d, 1947).

[20]121 F. Supp. 274 (D. C. D. C. 1954).

[21]Unlike the Sullivan case in which the recording was made by a government agent who had caused the informer to call the accused, the recording in the Stephenson case was made by one Parsons, one of the parties to the conversation, who afterwards provided the prosecution with a transcript of the recording and the actual recording. The court found that the ban of Section 605 was broad enough to include Parsons, and that its interdiction was not aimed only at strangers or parties other than the participants in telephone conversation.

[22]112 F. (2d) 888 (C. C. A. 2d, 1940).

federal law enforcement agencies, is predicated largely upon a tortured technical distinction, while the *Stephenson* case purports to follow the purpose of the statute in enforcing the right of privacy. Both points of view can be sustained by earlier decisions construing the Federal Communications Act. Three years after the passage of the Communications Act the Supreme Court, in *Nardone v. United States*,[23] ruled that Section 605 forbids government agents to tap wires and divulge the information thus secured in court. Justice Roberts in the majority opinion frankly acknowledged that the history of Section 605 gave no indication that Congress was dealing with a controversial rule of evidence.[24] However, the Court was of the opinion that Congress had outlawed what was otherwise logically relevant proof because it was "inconsistent with ethical standards and destructive of personal liberty."[25]

In the years that have followed, subsequent decisions of the Court have served to amplify and at times confuse the rule of the *Nardone* case. In the next wire tapping case, the Court ruled that Section 605 not only bars evidence obtained as a direct result of wire tapping, but also the "fruit of the poisonous tree"[26]—i.e., derivative evidence obtained as a result of having intercepted the message. During the same term, *Weiss v. United States*[27] further extended the prohibitions

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[23]302 U. S. 379, 58 S. Ct. 275, 82 L. ed. 314 (1937). One lower federal court had earlier ruled on the admissibility of evidence under Section 605 without discussing the point. See Smith v. United States, 91 F. (2d) 556 (App. D. C. 1937). In the interim between the passage of Section 605 and the Supreme Court decision in the Nardone case, the Federal courts sustained the admission of wire tap evidence on the authority of the Olmstead case. See, United States v. Genello, 10 F. Supp. 754 (N. D. Pa. 1935); United States v. Jenello, 78 F. (2d) 1020 (C. C. A. 3d, 1935).

[24]The Court pointed out that during 1932, 1933, and 1934 there was no discussion of the matter of wire tapping in Congress. "It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communications to the newly constituted Federal Communications Commission." Nardone v. United States, 302 U. S. 379, 382, 58 S. Ct. 275, 277, 82 Ld ed. 314, 316 (1937).

[25]Nardone v. United States, 302 U. S. 379, 384, 58 S. Ct. 275, 277, 82 L. ed. 314, 317 (1937).

[26]Nardone v. United States, 308 U. S. 338, 341, 60 S. Ct. 266, 268, 84 L. ed. 307, 311 (1939). This was an appeal from a conviction secured in a new trial of the same offenders involved in the "first" Nardone case. This decision imported into the law of wire tapping the same ruling that had previously been enunciated in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319 (1920) as to evidence seized by an illegal search and seizure in contravention of the Fourth Amendment—i.e., the unlawful act vitiates the evidence seized and all evidence traceable to it. See note 11, supra.

[27]308 U. S. 321, 60 S. Ct. 269, 84 L. ed. 298 (1939).

of Section 605 by barring the admission of intrastate communications.[28] In the *Weiss* case the prosecution contended, among other things, that Section 605 did not bar the disputed evidence since some of the defendants who participated in the calls authorized the admission of their conversations in evidence. The Court ruled that the calls were not "authorized by the sender" within the meaning of Section 605 because the witnesses were compelled to testify by the fact that their conversations were known to the government, and the witnesses were induced to testify by grant of special favors.

In *Goldstein v. United States* the Court in a 5 to 3 decision ruled that one not a party to an intercepted message has no standing to invoke Section 605.[29] And on the same day *Goldman v. United States*[30] held that the divulgence of a person's telephone conversation overheard as it is spoken into the transmitter does not constitute a violation of the Communications Act. In that case, instead of tapping the accused's telephone wires, the Government agents working in a room adjoining that of the accused, placed a device called a detectaphone against the partition. By means of this device the agents overheard the accused speaking into the telephone. The Court, by way of dictum, stated that the word "interception," as used in Section 605, "does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver."[31] Cited as authority for this statement was *United States v. Yee Ping Jong*,[32] one of the two lower court decisions which had considered the meaning of "interception" as used in Section 605 prior to the *Goldman* case.

The *Yee Ping Jong* case involved a recording of a conversation between an informer and the accused by means of a device attached to the telephone wire inside the informer's house. Judge Gibson of

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[28]This was, of course, a logical extenuation of the doctrine of the Nardone case. An opposite result would have nullified Section 605, since the great majority of all calls are intrastate.

[29]The court reasoned by analogy that since one not a victim of an illegal search and seizure cannot be heard to protest against the admission of evidence seized in violation of the Fourth Amendment, "no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." Goldstein v. United States, 316 U. S. 114, 121, 62 S. Ct. 1000, 1004, 86 L. ed. 1312, 1318 (1942).

[30]316 U. S. 129, 62 S. Ct. 993, 86 L. ed. 1322 (1942).

[31]Goldman v. United States, 316 .U S. 129, 134, 62 S. Ct. 993, 995, 86 L. ed. 1322, 1327 (1942).

[32]26 F. Supp. 69 (W. D. Pa. 1939).

the Western District of Pennsylvania held that the recording of the conversation did not constitute an "interception"[33] within the meaning of Section 605 and was therefore admissible at the trial. His reasoning was that the recording "was not obtained by a tapping of the wire... but was, in effect, a mere recording of the conversation at one end of the line by one of the participants."[34]

Judge Learned Hand of the Second Circuit reached an opposite result in *United States v. Polakoff*[35] which involved a recording over a telephone extension of a conversation between an informer and the accused. The prosecution urged the admissibility of the recording on the grounds that the informer, as "sender," had authorized its admission, and that, in any event, the recording of the conversation did not constitute an "interception." Both contentions were rejected. As to the first, Judge Hand reasoned that every telephone conversation, like other conversations, is antiphonal—i.e., each party is alternately sender and receiver—and that it would deny all significance to the privilege accorded by the statute to allow one party to surrender the other's privilege. Further, it would be extremely unrealistic to hold that each party had the power to consent to the interception of merely what he said, for "in the interchange each answer may, and often does, imply by reference some part of that to which it responds;"[36] therefore, both parties must consent to the interception in order to make the communication admissible in evidence. Moreover, the court, while noting that there was a technical distinction between the case before it and those previously decided by the Supreme Court,[37] ruled

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[33]"The manner in which the conversation in question was recorded does not seem to present such an interception as is contemplated by the quoted statute. Webster's New International Dictionary defines the verb 'intercept' in part as follows: 'To take or seize by the way, or before arrival at the destined place'." United States v. Yee Ping Jong, 26 F. Supp. 69, 70 (W. D. Pa. 1939). In Goldman v. United States, 316 U. S. 129, 134, n. 8, 62 S. Ct. 993, 995, n. 8, 86 L. ed. 1322, 1327, n. 8 (1942) the Yee Ping Jong case is cited as authority for the following statement: *"As has been rightly held,* this word [intercept] indicates the taking or seizure by the or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver." [italics supplied]

[34]United States v. Yee Ping Jong, 26 F. Supp. 69, 70 (W. D. Pa. 1939).

[35]112 F. (2d) 888 (C.C.A. 2d, 1940).

[36]United States v. Polakoff, 112 F. (2d) 888, 889 (C. C. A. 2d, 1940).

[37]Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. ed. 298 (1939); Nardone v. United States, 308 U. S. 338, 60 S. Ct. 266, 84 L. ed. 307 (1939); Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. ed. 314 (1937). In these three cases the government agents had physically interposed some tapping device in the communications circuit, whereas in the Polakoff case the recording machine had been affixed to an extension telephone.

that the recording did constitute an "interception" within the mean- of Section 605, since the action of the agents clearly violated the *purpose* of the statute, which was to prevent breaches of the right of privacy.[38]

Although the recent ruling in the *Sullivan* case that the challenged recording was admissible because its making did not constitute an "interception," and because the introduction was authorized by the sender, appears to circumvent the plain language and purpose of Section 605, each of the reasons assigned finds some support in decisions of the Supreme Court. It is certainly arguable that in the *Goldman* case the Supreme Court, by citing with approval the technical construction of "intercept" which Judge Gibson had invoked in *Yee Ping Jong* to avoid the prohibition of Section 605, adopted a restrictive interpretation of that word and thereby limited the scope of the statute.[39] However, since the *Goldman* case did not involve an apparatus attached to a telephone wire, but dealt rather with a situation clearly outside the ban of the statute, the approval of the technical definition of the word "intercept" is mere dictum. If the Court in a direct holding were to adopt this technical construction of Section 605, it would constitute a definite limitation on the broad prohibition originally given to the statute in the *Nardone* case, for as a later decision has stated, the *Nardone* decision "was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being."[40]

Judge Holtzoff's holding that one party to a conversation may consent to its interception[41] is also supported by authority. In *Weiss*

[38]"The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts." United States v. Polakoff, 112 F. (2d) 888, 889 (C. C. A. 2d, 1940).

[39]Judge Chase of the Second Circuit was of this opinion: "Because I do not believe that our decision in United States v. Polakoff... has survived that of the Supreme Court in Goldman v. United States,... I do not think that Sec. 605 of Title 47 U. S. C. A., can now be given the meaning and scope then attributed to it." Reitmeister v. Reitmeister, 162 F. (2d) 691, 697 (C. C. A. 2d, 1947).

[40]Nardone v. United States, 308 U. S. 338, 340, 60 S. Ct. 266, 267, 84 L. ed. 307, 311 (1939).

[41]On the point of consent, Judge Holtzoff adopted the following language from United States v. Lewis, 87 F. Supp. 970, 973 (D. C. D. C. 1950) which purported to adopt the view of Judge Gibson in the Yee Ping Jong case: "In my opinion the statute is violated if a third person, unbeknownst to either party to the conversation,

v. United States[42] the Supreme Court held that the divulgence of the accused's conversation had not been authorized as contended by the prosecution, because the consent had not been voluntarily obtained. However, it is implicit in the decision that any one party to a conversation may consent to its interception and divulgence if the consent is gained voluntarily.[43]

Thus, technically, the *Sullivan* decision is sound. However, it appears that the *Stephenson* decision more nearly accords with the original tenor of Supreme Court decisions in this field. In the *Nardone* case, the Court unequivocally placed wire tapping within the ban of Section 605[44] and thereby conferred an unqualified privilege of privacy upon the participants in telephone conversations.[45] The technical construction given to Section 605 by the *Sullivan* case disputes this privilege and thereby stultifies the "broad considerations of morality and public well being"[46] which sustain the *Nardone* deci-

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listens to what passes over the line and then divluges what he has heard, or, if the third person causes the conversation to be recorded by a mechanical or electrical device, without the knowledge of either party to the conversation, and then discloses what has been recorded. I hold that it is not a violation of the Statute if the conversation is recorded, manually, mechanically, or electrically, at the instance of or with the consent or knowing acquiescence of one of the parties to it." United States v. Sullivan, 116 F. Supp. 480, 483 (D. C. D. C. 1953). The fallacy of this holding is obvious. In the first sentence the court says that a recordation of a conversation by a third party unknown to either party to the conversation, violates the statute. It is a violation because (1) there is an interception and (2) the interception and divulgence have not been authorized by a party to the conversation. In the second sentence the court states that the same conduct does not amount to a violation of the statute if one party to the conversation knows or consents to the recording. However, the court, in its eagerness to conclude that one party to a conversation may consent to its interception and divulgence, tacitly admits that the recording of the conversation is an *interception* contrary to the express holding of the Yee Ping Jong case.

[42]308 U. S. 321, 60 S. Ct. 269, 84 L. ed. 298 (1939).

[43]"The Act contemplates voluntary consent and not enforced agreement to publication.... This divulgence was not consented to by *either of the parties* to any of the telephone conversations." Weiss v. United States, 308 U. S. 321, 330, 60 S. Ct. 269, 272, 84 L. ed. 298, 303 (1939). [italics supplied] There is no suggestion in the opinion that Section 605 requires the consent of both parties to a conversation.

[44]"... the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person'*." Nardone v. United States, 302 U. S. 379, 382, 58 S. Ct. 275, 276, 82 L. ed. 314, 316 (1937).

[45]Dean Wigmore vehemently rejected the "unguarded language of the opinion in Nardone v. United States" for recognizing a privilege and called for its early repudiation. 8 Wigmore, Evidence (3rd ed. 1935) 544.

[46]Nardone v. United States, 308 U. S. 338, 340, 60 S. Ct. 266, 267, 84 L. ed. 307, 311 (1939).

sion. This evasion of the prohibitions of Section 605 by such strained technical artifice drains the statute of its vitality and meaning, and, as Justice Frankfurter has observed, "A decent respect for the policy of Congress must save us from imputing to it [Section 605] a self-defeating, if not disengenuous purpose."[47]

The *Sullivan* and *Stephenson* decisions succinctly demonstrate the need for a decisive interpretation of the scope and purpose of Section 605. Unquestionably this conflict cannot be resolved at the lower federal court level; the solution must eventually come from either the Supreme Court or Congress. If the Supreme Court is presented with an opportunity to pass upon the issue presented by these cases, it should either reaffirm the broad policy ban of the *Nardone* decision or candidly admit that it has modified its attitude towards the use of certain evidence obtained by wire tapping. In deciding whether the conduct in question in these cases is prohibited by Section 605, the Court should avoid any mechanical definition of wire tapping, since any such definition will necessarily be incomplete and complex due to the great variety of devices and methods of wire tapping. Since, however, the controversy stems from the interpretation of a statute, it seems that supplemental legislation by Congress would be the most effective solution.[48] Obviously Congress cannot foresee and provide for every possible situation that may arise under such a statute, but by clearly defining the scope and purpose of its legislation it can provide guidance to courts faced with problems of statutory construction.

WILLIAM R. COGAR

EVIDENCE—VALIDITY OF STATUTE MAKING ILLEGALLY OBTAINED EVIDENCE ADMISSIBLE IN GAMBLING PROSECUTION IN ONE COUNTY OF STATE. [United States Supreme Court]

Persuasive reasoning has been advanced to support both the common law and federal rules as to the admissibility of evidence obtained by illegal search and seizure. At common law, the evidence is admitted

[47]Nardone v. United States, 308 U. S. 338, 341, 60 S. Ct. 266, 267, 84 L. ed. 307, 311 (1939).

[48]For suggested remedial legislation, See, Brownell, The Public Security and Wiretapping (1954) 39 Corn. L. Q. 195; Westin, The Wiretapping Problem: An Analysis and a Legislative Proposal (1952) 52 Col. L. Rev. 165; Note (1950) 2 Stan. L. Rev. 744.

on the theory that the evidence itself is not bad and if it were not admitted many guilty persons would go free.[1] Courts which have followed this theory, of course, hold that no constitutional provisions have been violated. The federal courts have rejected illegally obtained evidence since the decision in *Weeks v. United States*,[2] in which the Supreme Court held that to admit such evidence would be violative of the Fourth Amendment guaranty of immunity from unlawful search and seizure. On the other hand, in 1949 it was established in *Wolf v. Colorado*[3] that the states may, without violating the constitutional rights of the accused, admit evidence obtained by illegal search and seizure, as long as they do not affirmatively sanction its obtention in this manner. At the time of the *Wolf* decision thirty states rejected the *Weeks* doctrine and seventeen states were in agreement with it.[4]

In 1929, the State of Maryland, which had theretofore rejected the *Weeks* doctrine, passed the Bouse Act[5] which provided that illegally obtained evidence should not be admissible in the prosecutions of misdemeanors, thereby substantially adopting the federal rule with regard to such prosecutions. In 1951, an amendment[6] to the Bouse Act was adopted which exempted Anne Arundel County from its operation in the prosecutions of certain gambling misdemeanors. As a result, part of the state is governed by the federal rule and part of the state by the common law rule; and even in the latter part, some gambling misdemeanors are prosecuted under one rule of evidence, while other gambling misdemeanors are prosecuted under a different rule.

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[1]In People v. Defore, 242 N. Y. 13, 150 N. E. 585, 589 (1926) Judge Cardozo stated: "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society." Also State v. Turner, 82 Kan. 787, 109 Pac. 654 at 657 (1910).

[2]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

[3]338 U. S. 25 at 30, 69 S. Ct. 1359 at 1362, 93 L. ed. 1782 at 1787 (1949). The court stated that equally effective means were available to protect a person's right to privacy and thus satisfy the Due Process Clause. The offending officers are subject to the common law remedy of damages, and statutes provide for criminal punishment.

[4]See Wolf v. Colorado, 338 U. S. 25, 38, 69 S. Ct. 1359, 1367, 93 L. ed. 1782, 1791 (1949).

[5]Md. Code Ann. (Flack, 1947 Supp.) Art. 35, Sec. 5: "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure...." Lawrence v. Maryland, 103 Md. 17, 63 Atl. 96 at 102 to 104 (1906) exemplifies Maryland decisions applying the common law rule prior to the passage of the Bouse Act.

[6]Md. Laws (1951) c. 704: "Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel county in prosecution of any person for a violation of the gambling laws as contained in sections 288 to 307...."

In the recent case of *Salsburg v. Maryland*,[7] defendant was accused of a gambling misdemeanor covered by the amendment, and a conviction was obtained by the use of evidence that had been obtained by illegal search and seizure. Conceding that the legislature had the power to choose either of the two rules if applied uniformly, defendant contended in the original proceding that the Maryland statute was unconstitutional as denying him the equal protection of the law by allowing illegally obtained evidence to be admitted in one county and not in another, and also for the reason that the evidence is made inadmissible in other prosecutions of substantially the same nature in Anne Arundel County. Defendant further contended that the amendment is invalid because it affirmatively sanctions illegal searches and seizures. The majority of the United States Supreme Court affirmed the conviction, sustaining the validity of the statute, though Justice Douglas dissented, reasserting his earlier argument that the Due Process Clause of the Fourteenth Amendment and the Fourth Amendment guaranty of immunity from illegal search and seizure preclude the use of this evidence.[8]

The opinion of the majority, being made up of several unrelated and sometimes seemingly contradictory assertions, is somewhat confusing. The Court began by stating that "Whatever may be our view as to the desirability of the classifications, we conclude that the 1951 amendment is within the liberal legislative license allowed a state in prescribing rules of practice."[9] It then observed that even though a law is illogical and unscientific, it may still be valid.[10] This reference was followed by the statement that "The Equal Protection Clause relates to equality between persons as such rather than between areas."[11] If this statement be true, then the Court's preceding and subsequent discussion of the reasonableness of classification is irrelevant, since reasonableness is a requisite only in situations where the Equal Protection Clause does apply.[12] After asserting that the

[7]346 U. S. 545, 74 S. Ct. 280, 98 L. ed. (advance p. 207) (1954), aff'g Salsburg v. State, 201 Md. 212, 94 A. (2d) 280 (1953).

[8]346 U. S. 545, 554, 555, 74 S. Ct. 280, 285, 98 L. ed. (advance pp. 207, 213) (1954). Justice Douglas advanced this argument in his dissent in Wolf v. Colorado, 338 U. S. 25, 40, 41, 69 S. Ct. 1359, 1372, 93 L. ed. 1782, 1792 (1949).

[9]346 U. S. 545, 549, 74 S. Ct. 280, 282, 98 L. ed. (advance pp. 207, 211) (1954).

[10]Dominion Hotel, Inc. v. State of Arizona, 249 U. S. 265, 39 S. Ct. 273, 63 L. ed. 597 (1919); Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 33 S. Ct. 441, 57 L. ed. 730 (1913).

[11]346 U. S. 545, 551, 74 S. Ct. 280, 283, 98 L. ed. (advance pp. 207, 211) (1954).

[12]The only instances in which a discussion of reasonableness of classification has been found are those dealing with the question of whether the Equal Protection

state legislature may constitutionally determine rules of evidence for each of its local subdivisions, the Court returned to the factor of reasonableness by holding that defendant did not carry the burden of showing the classification to be unreasonable. In answer to the defendant's contention that the amendment of 1951 affirmatively sanctioned illegal searches and seizures in violation of the Due Process Clause, the Court simply declared that the text of the statute did not suggest approval and that it offered no immunity to offending searchers and seizers.

In support of the principle that the Equal Protection Clause relates to persons and not to areas, the Court relied heavily on *Missouri v. Lewis*.[13] That case sustained a state statute which required that in the city of St. Louis and four named counties, appeals in all except a few specified types of cases[14] were to be made to the St. Louis Court of Appeals and not to the Supreme Court of Missouri as was done in the other counties of the state. The basis of the decision was that "[the Equal Protection Clause] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."[15]

However, the decision in the *Lewis* case may not be absolutely controlling in the principal case because the Missouri legislation was aimed at facilitating court *procedure* for all persons, while the Maryland legislation was aimed at facilitating *convictions* of persons accused of one special offense in one particular part of the state. The Maryland statute was much more limited in its coverage than was the Missouri statute. It is important to note that the *Lewis* case dealt with procedure from the standpoint of access to the courts and not with the type evidence to be admitted. Admittedly, rules of evidence are procedural,[16] but they obviously tend to have a more substantial effect on the outcome of the case than do rules of court mechanics. The Missouri court

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Clause of the 14th Amendment has been violated. The following authorities verify this point: Loftin v. Crowley's, Inc., 150 Fla. 836, 8 S. (2d) 909 (1942); Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465 (1927); Brannon, The Fourteenth Amendment (1901) 323; Corwin, The Constitution of the United States of America (1953) 1145.

[13]101 U. S. 22, 25 L. ed. 989 (1879).

[14]Cases involving a sum greater than $2,500, cases involving a construction of the Constitution of the United States, and some other cases of special characteristics.

[15]101 U. S. 22, 31, 25 L. ed. 989, 992 (1879).

[16]Levy v. Steiger, 233 Mass. 600, 124 N. E. 477 (1919); Restatement, Conflict of Laws (1934) §§ 585, 597.

hinted at a reasonableness requirement when it observed that "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions."[17] It would be a strikingly different situation if the Maryland statute had established a different court system for persons accused of gambling misdemeanors; the *Lewis* case would be much stronger authority for such action.

The Court also cited *Mallett v. North Carolina*[18] and *Hayes v. Missouri*[19] in support of its holding that the Equal Protection Clause relates to persons and not to areas. There again, however, the legislation had dealt with the question of different court procedures for different areas rather than with the substantially different question of admissible evidence.

The decisions in the only cases found dealing with different rules of evidence for different areas have not been decided on the theory that the Equal Protection Clause does not apply. In *Commissioner of Public Welfare v. Torres*,[20] a New York intermediate court held that a statute which required corroboration on the subject of access in paternity proceedings in the city of New York but did not require it elsewhere was unconstitutional as in contravention of the Equal Protection Clause of the Fourteenth Amendment. The classification was found to be unreasonable since the evil which the statute sought to combat existed in other parts of the state as well as in New York City.[21]

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[17]101 U. S. 22, 32, 25 L. ed. 989, 992 (1879).

[18]181 U. S. 589, 21 S. Ct. 730, 45 L. ed. 1015 (1901). This case dealt with appeals being allowed to the State Supreme Court from one district and not being allowed from another district after the granting of a new trial to an accused person.

[19]120 U. S. 68, 7 S. Ct. 350, 30 L. ed. 578 (1887). This case involved a statute which allowed fifteen peremptory challenges in jury trials in towns of over 100,000 persons and only eight such challenges elsewhere.

[20]263 App. Div. 19, 31 N. Y. S. (2d) 101 (1941).

[21]263 App. Div. 19, 31 N. Y. S. (2d) 101, 103, 104 (1941). The respondent contended that "the legislature could properly consider conditions peculiar to life in a great city and because of the fact that persons in such a congested area can carry on activities about which their neighbors know nothing, the problem of getting persons to testify falsely in filiation proceedings is less difficult than in smaller communities, . . ." The court stated, however, that "It has been held that criminal laws are not necessarily unconstitutional even if they bear unequally on persons in different parts of the state where the evil that the Legislature has in view exists only in the great cities and not in rural districts. . . . But the discrimination herein cannot reasonably be construed as affecting an evil that exists only in one city of

The decision clearly rests on the court's assumption that the Equal Protection Clause does apply to area classification. The same result was reached in another decision of an Appellate Division Court with regard to a statute which admitted testimony of mothers as to non-access in the city of New York but not elsewhere.[22]

Thus, it would seem that while the Equal Protection Clause does not apply to areas as such, yet when different treatment of different areas results in discrimination against people in one area as compared to people of other areas, then the Equal Protection Clause is violated unless there is a reasonable basis for treating different people differently.

The rule that classification must not be capricious or arbitrary, but must be reasonable and natural, is fundamental,[23] but the diffculty arises in its application. The Court in the *Salsburg* case did not go into this question at length because the burden of establishing that the law is unreasonable was not on the attorney-general,[24] and the Court ruled that defendant did not overcome the presumption of reasonableness. The main requisite is that there must be some reasonable relation between the classification and the object sought to be accomplished.[25] This "reasonable relation" test seems to dissolve into

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the state and has no existence in all other parts of the state." The situation in the Salsburg case seems to be closely analogous to this situation. The evil of gambling certainly exists in other counties than Anne Arundel.

[22]Com'r of Public Welfare v. Ladutko, 256 App. Div. 775, 11 N. Y. S. (2d) 747 (1939).

[23]Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838, 81 L. ed. 1223 (1937); Old Dearborn Distributing Co. v. Seagram—Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109, 106 A. L. R. 1476 (1936); Atchison T. & S. F. Rd. Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909 (1899); 12 Am. Jur., Const. Law § 480.

[24]Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 55 S. Ct. 538, 79 L. ed. 1070 (1935); Middleton v. Texas Power & Light Co., 249 U. S. 152, 39 S. Ct. 227, 63 L. ed. 527 (1919); Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. ed. 369 (1911); Atchison T. & S. F. Rd. Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909 (1899).

[25]Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183 at 197, 57 S. Ct. 139 at 146, 81 L. ed. 109 at 121, 106 A. L. R. 1476 at 1485 (1936) (classification giving owners of goods identified by trademarks, brands or names privileges with regard to contract provisions as to resale prices, which were not given to owners of unidentified goods, held to be reasonable as object was to afford remedy for injury to the good will which can result to owners of identifiable goods); Colgate v. Harvey, 296 U. S. 404 at 423, 56 S. Ct. 252 at 256, 80 L. ed. 299 at 307, 102 A. L. R. 54 at 61 (1935) (statute imposing tax on dividends earned outside the state and exempting dividends earned within the state held to be based on reasonable classification, because its effect was to equalize taxes since the domestic corporations had to pay state franchise taxes); Atchinson, T. & S. F. Rd. Co. v. Matthews, 174 U. S.

a simple "relation" test—i.e., if *any relation* can be found between the classification and the object to be accomplished, the courts tend to hold the relation reasonable. The presumption that the legislature acts reasonably is a strong one, and "the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subject to criticism."[26] On this basis, the classification dealing with two types of gambling misdemeanors in two different ways might be deemed by the courts as satisfying the test when it is shown that the difficulty of obtaining evidence varies with the two offenses. Also, on this basis it might be found that the classification between areas was reasonable due to the fact that there were more gamblers present in one area than the other. Neither of the above classifications, however, seem to be "reasonable," even though there are some reasons for them.[27]

The Supreme Court observed that there was no doubt that Maryland could, under the home-rule law, let each county determine which rule of evidence it would apply, and thus the State might itself determine such an issue for each of its local subdivisions. Local home-rule charters are subject to the constitution and to the public general laws.[28] The Maryland Constitution, as well as many other state constitutions,[29] provides that "the General Assembly shall pass no special law for any case for which provision has been made by an existing

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96 at 104, 19 S. Ct. 609 at 612, 43 L. ed. 909 at 912 (1899) (statute which gave plaintiff right to recover attorney's fees from railroads that negligently set fire to property of plaintiff and which did not apply to other negligent corporations, held to be based on valid classification, under police power of state to make railroads more careful since they were cause of most such fires).

[26]Middleton v. Texas Power & Light Co., 249 U. S. 152, 158, 39 S. Ct. 227, 229, 63 L. ed. 527, 531 (1919).

[27]Examples of cases where classification was held to be unreasonable: State v. Pate, 47 N. M. 182, 138 P. (2d) 1006 (1943) (statute, which provided that nonresident motorists who are gainfully employed must obtain licenses and those who are not gainfully employed do not have to obtain licenses for three months, was in violation of the Equal Protection Clause as it was discrimination between nonresident motorists and not valid classification); Malone v. Williams, 118 Tenn. 390, 103 S. W. 798 (1907) (statute that dealt with distress sale of property of delinquent taxpayers in city of Memphis in stricter manner than with other delinquent taxpayers was held to be unconstitutional as class legislation as there was no good reason for discrimination); State v. Neveau, 237 Wis. 85, 294 N. W. 796 (1940) (provision of statute relating to unfair competition and trade practices in barber trade that statute should not apply to any county having population of 30,000 or less was held void as making improper classification, because business of barbering in these cities is no different than that in more populous counties).

[28]Md. Const. (1867) Art. XI A, § 1.

[29]Ark. Const. (1874) Art. 5, § 25; Ill. Const. (1870) Art. IV, § 22; Ind. Const. (1851) Art. 4, §§22, 23; Pa. Const. (1874) Art III, § 7.

general law,"[30] and the Maryland court has held many times that *special* laws, as opposed to *local* laws,[31] are not allowed when there is a general law on the subject.[32] In the *Salsburg* case, the Bouse Act was a general law and the 1951 amendment was a special one. In theory it was to be applied to all persons within the area, but in practice it was aimed at gamblers as a class. It is unconstitutional to divide one class into two parts and then have one governed by a different set of rules than the other.[33] This statute takes the class of persons who violate misdemeanor gambling laws and divides it into two classes with different rules of evidence applying to each.

The Court relied on two Maryland cases which are distinguishable from the principal case as they involve *local* laws as opposed to *special* ones.[34] The Court also cited the Arkansas case of *Fort Smith Light & Tractor Co. v. Board of Improvement*[35] in support of its ruling. Arkansas has a constitutional provision similar to that of Maryland,[36] but the act in question was in the form of a general law, though it actually

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[30]Md. Const. (1867) Art. III, § 33.

[31]"Local laws 'apply to all persons within the territorial limits prescribed by the act,' while a special law applies to particular persons or things of a class." State v. Baltimore & O. R. Co., 113 Md. 179, 77 Atl. 433, 435 (1910).

[32]Crisfield v. Chesapeake & P. T. Co., 131 Md. 444, 102 Atl. 751 (1918) (general law regulated telephone rates throughout the state; a later law, which gave one city power to regulate their own rates, was held to violate Md. Const., Art. III, § 33); State v. Baltimore & O. R. Co., 113 Md. 179, 77 Atl. 433 (1910) (act of the legislature which required railroad to place safety gate at one particular crossing was held to violate Md. Const., Art. III, § 33); Baltimore v. Starr Church, 106 Md. 281, 67 Atl. 261 (1907) (where there was general law dealing with tax exemptions, law which exempted specific piece of church property was in conflict with Md. Const., Art. III, § 33).

[33]Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465 (1927) (A statute granted eminent domain powers to chautauqua associations which had been in existence fifteen years, had annual programs of not less than sixteen days and had leased timber lands for fifteen years. Those powers were not granted to other chautaugua associations, and the statute was declared unconstitutional as not based on a reasonable classification.); State v. Walsh, 136 Mo. 400, 37 S. W. 1112 (1896) (A statute which made it illegal to make book and sell pools at any other place than on the premises of a race track was held to be unconstitutional). Contra: New York v. Bennett, 113 Fed. 515 (C. C. S. D. N. Y. 1902).

[34]Neuenschwander v. Sanitary Commission, 187 Md. 67, 48 A. (2d) 593 (1946) (A law relating to notice of suit to municipal corporation after injury exempted several counties from its operation. It was held to be a *local* law); Stevens v. State, 89 Md. 669, 43 Atl. 929 (1899) (A law made it an offense to have certain type game in one's possession in certain areas and not in others. Here, there was no general law for this law to be in conflict with and also this law was held to be a local one).

[35]274 U. S. 387, 47 S. Ct. 595, 71 L. ed. 1112 (1927).

[36]Ark Const. (1874) Art. 5, § 25.

applied only to one city. Thus, there was no special law enacted where a general law was applicable.[37]

It is well established that an affirmative sanction of illegal search and seizure is violative of the Due Process Clause of the Fourteenth amendment;[38] but since offending searchers and seizers were offered no protection or immunity by the Maryland statute, the Court rejected the contention of defendant that the legislation gave such affirmative sanction. It would seem, however, that the obvious effect of the statute is to *encourage* illegal searches and seizures.[39] Originally Maryland followed the common law rule admitting illegally obtained evidence. Then the legislature by passing the Bouse Act saw fit to change the rule that had been established by the courts. At this stage the policy of the state was dogmatically declared to be opposed to the admission of illegally obtained evidence. Still later, by amendment, the legislature withdrew Anne Arundel County from the scope of the act. The effect of the action of the legislature must be to suggest to law enforcement officers that the state does not object to the obtaining of evidence by illegal means in the specified county for the specified types of prosecutions. The legislature affirmatively sanctioned the *use* of such evidence, and it certainly cannot be used unless it is first obtained.

The mere fact that gambling is more prevelant in one county than in the others does not seem to justify this drastic legislation. Since it is doubtful that the gamblers will change professions, one of the effects of the act may well be that they will change locations. This prospect is borne out by the Court in its statement that the increased gambling in Anne Arundel County could be attributed to the fact that neighboring Baltimore had become so strict as to drive gambling operations into adjoining areas. Thus, one county's problems are pushed on to another county, which might result in another amendment making illegally obtained evidence admissible in the second county. Ultimately

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[37]The excessive use of special and local laws does not seem desirable. This problem was recognized by the Indiana court when it stated: "The present legislative tendency toward special and local legislation under the guise and verbiage of general laws should be checked, by the legislature itself, or by the courts if it fails to do so; otherwise the body of the law will revert to the chaotic condition which existed under the old constitution of 1816...." Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 469 (1927).

[38]"Accordingly, we have no hesitation in saying that were a state affirmatively to sanction police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." Wolf v. Colorado, 338 U. S. 25, 28, 69 S. Ct. 1359, 1361, 93 L. ed. 1782, 1786 (1949).

[39]Note (1953) 33 B. U. L. Rev. 410, 413.

the general law would be stripped of all effect. Also, the uniformity provisions of state constitutions would become meaningless and impotent as it would be possible for the legislatures to enact laws for each individual county, city, town or even smaller political subdivision, justified, not by reasonableness, but by the rationale of the principal case.

JOHN F. KAY, JR.

FEDERAL PROCEDURE—VENUE OF ORIGINAL ACTION AS SUPPORTING THIRD-PARTY PROCEEDING NOT MAINTAINABLE AS INDEPENDENT ACTION. [Federal]

Though the Federal Rules of Civil Procedure were promulgated for the purposes of simplifying federal court procedure and of providing for the adjudication of all facets of a controversy in a single suit,[1] problems of jurisdiction and venue presented by these Rules have threatened to reduce the ability of the courts to give effect to the latter purpose. One area of controversy centers around the problem of whether the venue of an original action is sufficient to support a third-party proceeding which could not be maintained as an independent action because of improper venue. Neither the cases nor the legal writers are in accord on this point. One group of authorities, the "strict constructionists," maintains that a third-party proceeding provided for under Rule 14[2] must comply with jurisdictional and venue requirements as if it were an original action.[3] The cases following this view rely in part on Rule 82 which states that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the district courts... or the venue of actions therein."[4] The second group, "the liberal constructionists," holds that third-party proceedings do not need independent grounds of jurisdiction and

[1]This intention is evidenced in Rule 1, which states in part that the rules "shall be construed so as to secure the just, *speedy*, and *inexpensive* determination of every action." [italics supplied.]

[2]Rule 14(a) provides in part that "a defendant may move... for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff or part of the plaintiff's claim against him."

[3]Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. C. Conn. 1939); King v. Shepherd, 26 F. Supp. 357 (W. D. Ark. 1938); Willis, Five Years of Federal Third-Party Practice (1943) 29 Va. L. Rev. 981.

[4]King v. Shepherd, 26 F. Supp. 357, 358 (W. D. Ark. 1938).

venue because they are ancillary to the original proceeding and are supported by the jurisdiction and venue[5] of that proceeding.

The latest case to pass on this problem is *United States v. Acord*,[6] decided by the United States Court of Appeals for the Tenth Circuit. Plaintiff, Acord, a resident of the Eastern District of Oklahoma, brought an action in the Federal District Court for the Western District of Oklahoma against the Chicago, Rock Island, and Pacific Railroad for injuries sustained when he was struck by a mail pouch thrown from one of its trains passing through the Eastern District of Oklahoma.[7] The pouch was thrown by a mail clerk employed by the United States, but suit was brought against the Railroad on the theory that its station agent was negligent in failing to warn Acord of the danger. The Railroad filed a third-party complaint against the United States, seeking indemnity for all sums that might be adjudged against it in favor of Acord. The United States moved to dismiss the third-party complaint on the ground that under the Federal Tort Claims Act, upon which the claims for idemnity were based, the venue was in the Eastern District and not in the Western District of Oklahoma.[8] The motion was overruled, the case was tried by the court without a jury, and the court entered judgment in favor of Acord against the

[5]Moncrief v. Pennsylvania R., 73 F. Supp. 815 (E. D. Pa. 1947); United States v. Acord, 209 F. (2d) 709 (C. A. 10th, 1954). The cleavage on this question is pointed up most graphically by two cases arising out of the same air accident—Morrell v. United Air Lines Transport Corp., 29 F. Supp. 757 (S. D. N. Y. 1939) and Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. C. Conn. 1939)—in both of which the defendant airline impleaded the United Air Craft Corp., and the Bethlehem Steel Co., praying that it be allowed to recover from these third-party defendants such amounts as it may be compelled to pay as damages for the death of the passengers. In the former of these two cases, a New York Federal district court held that the third party proceeding was "ancillary," and, therefore, the venue requirements of an independent action need not be met. In the latter, the Connecticut federal district court, after admitting that th action was "ancillary" for jurisdictional purposes reached the conclusion that the third-party claim Under Rule 14(a) must meet the requirements of an independent action.

[6]209 F. (2d) 709 (C. A. 10th, 1954).

[7]The venue was properly laid in this action. 62 Stat. 935 (1948), 28 U. S. C. A. § 1391(a) (1950) provides that "a civil action wherein jurisdiction is founded only on diversity of citizenship may. . . be brought only in the judicial district where all the plaintiffs or all the defendants reside." The jurisdictional basis of this action is diversity of citizenship, and the Western District of Oklahoma is the residence of the defendant.

[8]62 Stat. 937 (1948), 28 U. S. C. A. § 1402(b) (1950) provides that "Any civil action on a tort claim against the United States . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred in that district. Here the plaintiff was a resident of the Eastern District of Oklahoma, and the act of omission complained of occurred in that district.

Railroad, and in the third-party proceeding, against the United States in favor of the Railroad in the amount awarded Acord.

On appeal by the United States, the Court of Appeals held that inasmuch as the third-party proceeding against the United States was ancillary to the principal action against the Railroad, the venue in the principal action would support the third-party proceeding, notwithstanding the requirement of the Federal Tort Claims Act that venue of actions thereunder shall be the judicial district wherein the plaintiff resides or wherein the act or omission complained of occurs.[9] Judge Bratton dissented on the grounds that the decision of the court nullifies the controlling special statute and gives no effect whatever to Rule 82.[10]The Supreme Court denied certiorari.[11]

The pivotal issue presented is whether a third-party proceeding such as the one in the principal case is ancillary or whether it is an independent action in which compliance with venue requirements is necessary. The commentators generally agree that as to intervention of right,[12] compulsory counterclaims,[13] and third-party claims,[14] no independent ground of jurisdiction, as distinguished from venue, is required. However, the cases so holding do not afford much aid to an analysis of the ancillary concept since many of them have been content merely to invoke the term "ancillary" as some kind of "magic word," without attempting to explore its meaning.[15]

The foundation of third-party practice lies in the common law doctrine of "vouching to warranty."[16] This device was employed in the situation in which A sold land to B with a warranty of title, and C, a stranger, sued to recover the land. Under such circumstances, B could vouch A in as warrantor and request that he defend the action brought by C. If the vouchee came in as he was requested to do, no independent jurisdictional grounds were required as to him since he

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[9]The judgment of the district court was reversed, however, on the ground that under applicable Oklahoma law there is no contribution nor indemnity between joint tort-feasors.

[10]See United States v. Acord, 209 F. (2d) 709, 716 (C. A. 10th, 1954).

[11]Certiorari denied, 347 U. S. 975, 74 S. Ct. 786, 98 L. ed. 1114 (1954).

[12]4 Moore, Federal Practice (2d ed. 1950) § 24.18; Notes (1951) 64 Harv. L. Rev. 968, 974; (1940) 13 So. Cal. L. Rev. 466, 470.

[13]3 Moore, Federal Practice (2d ed. 1948) § 13.15; Notes(1951) 64 Harv. L. Rev. 968, 972; (1940) 13 So. Cal. L. Rev. 466, 470.

[14]See 3 Moore, Federal Practice (2d ed. 1948) § 14.26 at 496 for an exhaustive list of authorities so holding.

[15]See Willis, Five Years of Federal Third-Party Practice (1943) 29 Va. L. Rev. 981, 999.

[16]3 Moore, Federal Practice (2d ed. 1948) § 14.02.

would be bound by the outcome of the action regardless of whether or not he availed himself of B's request.

By analogy to intervention, there seems to be a further basis for regarding a third-party claim as ancillary. In a typical case of intervention of right, a third-party is allowed to come in without alleging independent grounds of jurisdiction and venue, for by hypothesis he should be in the action because he will be bound by the outcome.[17] Since the intervenor is almost forced to come in to protect his rights, he would never object to the venue as applied to him. One of the parties already in court might object but would not be successful in so doing since Rule 24(a) of the Federal Rules provides that a party shall be permitted to intervene when he may "be bound by a judgment in the action." Superficially it may appear that intervention and "vouching to warranty" differ from a third-party practice case in that both the warrantor in the "vouching to warranty" situation and the intervenor in intervention seemingly come in of their own volition while in a third-party practice case, the third-party defendant has no alternative. This difference is more apparent than real, however, for in the former two cases, regardless of the permissive language used, the third-party is bound by the results whether he comes into the action or not, and so, in effect, he is forced into the action to protect his rights.

It would seem, however, that the underlying basis for holding that one proceeding is ancillary to another is the similarity of the subject matter of the two proceedings, rather than the identity, number, and relationship of the parties involved.[18] Speaking in a compulsory counterclaim case, the Court of Appeals for the Second Circuit has asserted that it is a "well established principle that a Federal court has 'ancillary' jurisdiction to complete adjudication of interrelated matters where its jurisdiction has once been competently invoked."[19] The matters involved in a third-party proceeding are closely related to the main claim and may fairly be considered as ancillary to it; and this conclusion is not weakened because the new parties are brought into the overall proceeding, for "it has long been established that ancillary

[17]An example of an intervention of right is found in the case of United States v. C. M. Lane Lifeboat Co., 25 F. Supp. 410 (E. D. N. Y. 1938). In that case the government brought suit to recover on a bond. The party who had agreed to indemnify the surety was allowed an intervention of right because he would be bound by a judgment against the surety.

[18]Note (1940) 53 Harv. L. Rev. 449, 456.

[19]Lesnik v. Public Industrials Corp., 144 F. (2d) 968, 973 (C. C. A. 2d, 1944).

jurisdiction over the subject matter may obtain even though the supplemental proceeding brings in new parties."[20] Moreover, it has been noted that although a third-party suit is not always "in aid of" the main action, it is always "subordinate to" the main action, thereby bringing it within the dictionary definition that ancillary means "subordinate to or in aid of" another action.[21]

It is submitted that the arguments which support the holding that a third-party proceeding is ancillary for jurisdictional purposes, are at least equally valid with regard to venue.[22] In this connection, it should be noted that lack of proper venue can be waived, whereas the requirement for federal jurisdiction cannot. It may be argued, therefore, that if a third-party action is exempt from the basic jurisdictional requirements which otherwise must be met, exemption should even more surely follow in regard to venue, the requirements of which can be waived by the defendant.

There can be no doubt that to apply the ancillary concept in the field of third-party practice does involve an extension of its scope from the traditional, restricted usage in actions of addition and substitution,[23] but it has been appropriately observed that "however well settled may be the general principle of federal ancillary jurisdiction, nevertheless, it is sufficiently... 'amorphous' to afford a justification for a considerable amount of desirable procedural reform."[24] Some authorities regard this extension of the ancillary concept as unwarranted[25] because it operates to deprive a person of his statutory right

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[20]Lewis v. United Air Lines Transport Corp. 29 F. Supp. 112, 115 (D. C. Conn. 1939).

[21]Schram v. Roney, 30 F. Supp. 458, 461 (E. D. Mich. 1939).

[22]"It seems difficult to discern why a proceeding which is regarded as ancillary for the purposes of jurdiction should not likewise be ancillary for all other purposes, including venue." Holtzoff, Some Problems Under Federal Third-party Practice (1941) 3 La. L. Rev. 408, 416. See also 3 Moore, Federal Practice (2d ed. 1948) § 14.28; Notes (1954) 40 Va. L. Rev. 628; (1948) 46 Mich. L. Rev. 1069; (1951) 64 Harv. L. Rev. 968; (1940) 13 So. Cal. L. Rev. 466; (1940) 26 Va. L. Rev. 376.

[23]In these cases it has been held that where a defendant of the same state as the plantiff is added or substituted, the court, having jurisdiction of the principal action, will not be divested of that jurisdiction by virtue of the addition or substitution, even though in an original action between the parties the court would not have jurisdiction on the basis of diversity. Phelps v. Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 820 (1886); Hardenberg v. Ray, 151 U. S. 112, 14 S. Ct. 305, 38 L. ed. 93 (1894); Alexander v. Hillman, 296 U. S. 222, 56 S. Ct. 204, 80 L. ed. 192 (1935); Harris v. Hess, 10 Fed. 263 (C. C. S. D. N. Y. 1882); United States v. American Surety Co., 25 F. Supp. 700 (E. D. N. Y. 1938).

[24]Lesnik v. Public Industrials Corp., 144 F. (2d) 968, 974 (C. C. A. 2d, 1944).

[25]King v. Shepherd, 26 F. Supp. 357 (W. D. Ark. 1938); Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. C. Conn. 1939). See Tullgren v. Jasper, 27

to be sued only in a certain district,[26] and because it involves a contravention of the express prohibition of Rule 82.[27] To these criticisms of a liberal interpretation of Rule 14, its defenders answer that a third-party residing outside of the district in which the action is brought suffers no greater hardship in making his defenses there than that which must be borne by a non-resident defendant in an original action.[28] In addition they point to the fact that the third-party still has the protection of Rule 4(f) which provides that he must be served with process within the state.[29] To be sure, these particular factors are irrelevant to the legal argument, but from a practical standpoint they insure the non-resident defendant of a measure of protection.[30]

It should be noted that no attempt has been made in this discussion to treat that provision of Rule 14 which makes it possible for an original plaintiff to assert a claim against a third-party defendant.[31] In this situation most courts require independent grounds of jurisdiction and venue, at least where the third party defendant is of the same citizenship as the plaintiff. As one court has stated: "It is difficult to comprehend why this Court should now have jurisdiction over a claim of a New York plaintiff against a New York defendant after they are brought together through the circuitous means of a third party complaint and then an amended main complaint... to accept jurisdiction herein might open the door to circumvention of the diversity rule by use of a friendly original defendant."[32] There is some authority

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F. Supp. 413, 418 (D. C. Md. 1939); Willis, Five Years of Federal Third-party Practice (1943) 29 Va. L. Rev. 981.

[26]Willis, Five Years of Federal Third-Party Practice (1943) 29 Va. L. Rev. 981.

[27]This is the view taken by the dissent in the principal case. United States v. Acord, 209 F. (2d) 709, 717 (C. A. 10th, 1954): "But Rule 82 provides that the rules shall not be construed to extend the jurisdiction of the district court or the venue of actions. Since the plaintiff resides in the Eastern District of Oklahoma and the tort occurred in that district, it seems clear to me that to sustain jurisdiction of the court in the Western District of Oklahoma to entertain the third-party complaint... gives no effect whatever to Rule 82."

[28]3 Moore, Federal Practice (2d ed. 1948) § 14.28 at 504.

[29]Willis, Five Years of Federal Third-Party Practice (1943) 29 Va. L. Rev. 981 at 1009; 3 Moore, Federal Practice (2d ed. 1948) § 14.28 at 504; Note (1940) 13 So. Cal. L. Rev. 466 at 473.

[30]A further practical consideration of great significance lies in the fact that the complete adjudication in one action of all claims centering around a single occurence "renders the Federal courts some valuable assistance in their struggle against crowded dockets." See Note (1954) 40 Va. L. Rev. 628, 630.

[31]F.R.C.P., Rule 14 (a) provides in part that "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff...."

[32]Hoskie v. Prudential Insurance Co., 39 F. Supp. 305, 306 (E. D. N. Y. 1941).

that the same view should be taken as to venue,[33] but Professor Moore contends that there is a clear distinction between venue and jurisdiction in such a case.[34]

The decision of the majority in the principal case seems to be sustainable on every ground of consideration. As has been pointed out, there is a sound basis for extending the concept of ancillary jurisdiction to third-party practice even though it does involve some broadening of the scope of federal ancillary jurisdiction. On the other hand, those favoring a restrictive interpretation have advanced strong arguments. There is still a conflict on this point although the weight of authority, including several recent cases,[35] favors the expansion view taken by the majority in the principal case. Added support is gained from the decision in *Lesnik v. Public Industrials Corp.*,[36] a recent counter-claim case, wherein it was held on facts almost identical to the *Acord* case, that where a party asserting a compulsory counterclaim seeks to bring in additional parties, no compliance with venue is necessary between the counter-claimant and the added party.

In relation to the status of the authorities on this question, as recently as 1948 it was observed that: "It is unusual that a problem that has caused so much comment among writers and has supplied quite a fund of decisions in the district courts has not received fuller treatment on the appellate level."[37] For this reason it is to be regretted that the Supreme Court denied certiorari in this case[38] as here was an opportunity to settle a point which has been the subject of much controversy.[39]

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[33]Habina v. Henry & Co., 8 F. R. D. 52 (S. D. N. Y. 1948).

[34]3 Moore, Federal Practice (2d ed.) 1948 § 14.28 at 507.

[35]Leatherman v. Star, 94 F. Supp. 220 (E. D. Tenn. 1950) (the United States could be impleaded as a third-party defendant even though the venue of the third-party action would not have supported an original proceeding); Moncrief v. Pennsylvania R., 73 F. Supp. 815 (E. D. Pa. 1947). For a complete listing of all cases decided on this point see 3 Moore, Federal Practice (2d ed. 1948) § 14.28.

[36]144 F. (2d) 968 (C. C. A. 2d, 1944).

[37]Note (1948) 46 Mich. L. Rev. 1069, 1079.

[38]While the Supreme Court could not grant certiorari on the basis of two courts of appeals being in conflict, it could have granted it on the basis of a court of appeals having decided "an important question of federal law which has not but should be settled by . . . the Court." Rules of Supreme Court Relating to Appeals and Certiorari, Rule 15.

[39]Rule 14 has been a troublesome one in the courts, and questions as to the propriety of procedure under it have been frequent." Judge McGranery in Moncrief v. Pennsylvania R., 73 F. Supp. 815 (E. D. Pa. 1947).

PROCEDURE—APPLICATION OF RES JUDICATA TO FINDINGS IN PRIOR LITIGATION NOT ESSENTIAL TO DISPOSITION OF THAT CASE. [Virginia]

The doctrine of res judicata, grounded in the policies of protecting the defendant from harassment by, and the courts from the burden of, multiplicity of litigation, and designed to delimit relitigation of issues and facts previously adjudicated,[1] declares that "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."[2] While the rule as stated would seem relatively simple in application, the endeavors of the courts to interpret res judicata in consonance with the equitable exigencies of each case has resulted in a large number of exceptions to the general rule.[3] In fact, these exceptions

[1]A terse statement of one of these factors is that "the interest of the state requires that there be an end to litigation...." Reed v. Allen, 286 U. S. 191, 198, 52 S. Ct. 532, 533, 76 L. ed. 1054, 1057 (1932). Another similar statement in a broader vein is that: "...of the two principles which it [res judicata] comprehends, the protection from the annoyance of repeated litigation, which the individual suitor is afforded, is, after all only an incident of the first principle, that the best interests of society demand that litigation be concluded....Economy of the time of the courts is one of the obviously beneficial results of the doctrine...but the broader and even more important aspect of the public policy of res Judicata is its promotion of peace and quiet in the community through the creation of certainty in the relations of men." Von Moschzisker, Res Judicata (1929) 38 Yale L. J. 299, 300. "The doctrine of res judicata is primarily one of public policy and only secondarily of private benefit to the individual litigants. It has its roots in the maxim that it concerns the public that there be an end to litigation...." Buromin Co. v. National Alumniate Corp., 70 F. Supp. 214, 217 (D. C. Del. 1947). Adams v. Pearson, 411 Ill. 431, 104 N. E. (2d) 267, 273 (1952), sets forth the two policies, protection for the defendant and the courts, as separate and distinct.

[2]30 Am. Jur., Judgements § 161.

[3]There are various means by which the courts may avoid application of the res judicata principle, even though theoretically res judicata should apply wherever a subsequent suit involves the same cause of action and the same parties:

(a) it may be found that more than one cause of action arose from the same facts. Troxell v. Delaware R. R. Co., 227 U. S. 434, 33 S. Ct. 274, 57 L. ed. 586 (1913). This technique is used where separate rights are found to exist under different statutes, or under a statute and the common law. In Carter v. Hinkle, 189 Va. 1, 52 S. E. (2d) 135 (1949) it was held that plaintiff could bring one action for property damage and a second action for personal injuries arising from the same accident. Thus, plaintiff was put in the position of getting two recoveries at the expense of proving his case but once. Such is the minority American rule, founded on the fact that normally, in the states allowing two causes of action, the statutes of limitations for the two actions are different, the claim for property damage survives death of either party while the claim for personal injuries does not, and the claim for property damage is assignable while claim for personal injuries is not. The advantage of this minority approach (called the New York rule) is that serious

have reached such proportion and sublety as to make the employment of res judicata a task which the courts seem at times to find very perplexing.

An investigation of the present status of the res judicata principle and the difficulties the courts experience in applying it can be effected to some extent by an analysis of the recent Virginia case of *Petrus v. Robbins*.[4] While operating her husband's automobile, Mrs. Petrus collided with Robbins' automobile and sustained personal injuries. Both vehicles were damaged. As a consequence, Robbins instigated suit in the Civil and Police Court against Mrs. Petrus for property damage. Prior to the trial of that suit, Mrs. Petrus instituted the present action in the Corporation Court for personal injuries, and her husband joined her in the action by suing for damage to his automobile. In Robbins' action in the Civil and Police Court, Mrs. Petrus filed an answer and a counterclaim in which she demanded judgment for the damage to her husband's automobile only. At the Civil and Police Court trial, Mrs. Petrus admitted that she was not the owner of the vehicle, and Robbins moved that the counterclaim be dismissed,

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bodily ailments from an injury may not appear until after the property suit is concluded. The majority, or the Minnesota rule, is that two law suits upon the substantially the same facts between identical parties is abhorrent to the courts because not only could both claims be readily determined in one lawsuit without inconvenience to the court, jury, litigants, or attorneys, but also all concerned in the litigation would be saved time and expense of a second suit. For further discussion of this general problem of one or two causes of action arising from one incident see Notes (1950) 3 Okla. L. Rev. 444; (1954) 35 A. L. R. (2d) 1377.

(b) the courts may find that a prior action involved the election of a non-existent remedy. Norwood v. McDonald, 142 Ohio St. 299, 52 N. E. (2d) 67 (1943); Missildine v. Miller, 231 Iowa 371, 1 N. W. (2d) 110 (1941).

(c) the various equities involved may preclude invocation of res judicata. Gentry v. Farruggia, 132 W. Va. 809, 53 S. E. (2d) 741, 742 (1949). In Adams v. Pearson, 411 Ill. 431, 104 N. E. (2d) 267, 273 (1952), Justice Schaefer stated: "We do not hold, as has been held, that exceptions to the application of the rule against splitting a cause of action should be regularly recognized 'as the evident justice of the particular case requires.' ... This case, in which both parties would be barred by ordinary application of the rules of *res judicata* with an unsatisfactory and perhaps inequitable result, presents a unique and non-recurrent situation. The policies which underlie the doctrine of *res judicata* ... are not applicable to the peculiar facts here involved." Res judicata was not applied, although the parties and issues were identical with those in the prior action. See Note (1952) 101 U. of Pa. L. Rev. 297.

(d) Spilker v. Hankin, 188 F. (2d) 35 (C. A. D. C. 1951), pointed out that the discretion possessed by the courts to create exceptions to res judicata by holding that the inviolability of the fiduciary nature of the attorney-client relationship is more important to the public than universal, consistent application to res judicata.

[4]195 Va. 861, 80 S. E. (2d) 543 (1954), rehearing 196 Va. 322, 83 S. E. (2d) 408 (1954).

but no ruling was made at that time on this motion. The Civil and Police justice found that both parties were negligent and accordingly denied the counterclaim, dismissed the proceedings, and entered judgment on the warrant in favor of the defendant, Mrs. Petrus. This judgment became final. Subsequently, in the action in the Corporation Court the defendant Robbins filed a plea of res judicata. The Corporation Court sustained the plea and dismissed the complaint, but on appeal it was held that the lower court was in error, and the decision there was reversed and remanded. The Supreme Court of Appeals reasoned that since the plaintiff was not the owner of the automobile, her counterclaim for property damage should have been dismissed. Thus, the trial court's finding, in its denial of the counterclaim, that Mrs. Petrus was negligent was unnecessary to the disposition of the case, and so was not res judicata in a subsequent action by her for compensation for personal injuries. Upon the instance of Robbins' petition for rehearing, however, the Supreme Court of Appeals decided that a gratuitous bailee does have a cause of action in this situation, and the court thus saw reason to reverse its earlier ruling and find the issue of negligence to have been litigated conclusively in the lower court.

The circumstances surrounding the principal case have within them at least one involvement not to be encountered in the normal scope of res judicata. That is to say, the doctrine customarily refers to the effect of a judgment as a bar to the prosecution of a second action upon the *same* claim, demand, or cause of action between the *same* parties,[5] whereas in the *Petrus* case situation the second suit was an

[5]The Supreme Court accepted the rule of res judicata as being basically as stated in Johnson Co. v. Wharton, 152 U. S. 252 at 257, 14 S. Ct. 608 at 610, 38 L. ed. 429 at 432 (1894). Quoting from Smith v. Kernochen, 7 How. 198, 217 (U. S. 1849), the Court said: " 'The case, therefore, falls within the general rule, that a judgment of a court of concurrent jurisdiction directly upon the point is as a plea, as a bar, or as evidence conclusive between the same parties or privies upon the same matters when directly in question in another court'." At 30 Am. Jur., Judgments § 161, this statement is found: "To adopt the language of the English court in announcing the doctrine in an early case, which has been frequently repeated by the courts, the judgment of a court of concurrent jurisdiction, directly upon the point, is a plea, a bar, or as evidence, conclusive, between the *same* parties, upon the *same* matter, directly in question in another court." [italics supplied.] More recent cases reflect the normal lawyer's conception of res judicata: Hammitt v. Straley, 338 Mich. 587, 61 N. W. (2d) 641 at 647 (1953) (holding that a judgment, in order to constitute a bar to a claim in a subsequent action, must have been rendered upon the merits, upon the *same* matter in issue, and between the *same* parties or their privies); Mansker v. Dealers Transport Co., 160 Ohio St. 255, 116 N. E. (2d) 3 at 6 (1953) (indicating that the doctrine of res judicata rests on the principles that the *same* person should not be vexed twice over the *same* dispute, and that litigation should end).

assertion by Mrs. Petrus of a *different* cause of action than that which she had asserted previously. Thus, the basic issue posed by the *Petrus* case is one of ascertaining what findings in the prior case are binding in this subsequent litigation. Inasmuch as the Virginia court on appeal and rehearing[6] dealt exclusively with this aspect of the res judicata principle (making unnecessary any consideration of the effect of the husband's entry into the second suit),[7] the specific point of interest is the ultimate holding that Mrs. Petrus' negligence, as found in the lower court, precludes a second suit on a different cause of action arising from the same accident.

The phase of the res judicata problem which is here basically in issue is considered in legal nomenclature as "collateral estoppel." This doctrine arose apart from res judicata, but it is now considered only a a facet of the broad generic res judicata concept.[8] A victim of varying

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[6]195 Va. 861, 80 S. E. (2d) 543 (1954), rehearing 196 Va. 322, 83 S. E. (2d) 408 (1954).

[7]The complication which would have arisen from the husband's entry into the suit could have come about only if the court had decided that the negligence of Mrs. Petrus had been properly decided in the lower court. The problem would then be one of determining whether the husband was in sufficient privity with his wife as to be bound by the prior adjudication as to her negligence, thus being precluded from pursuing this action for property damages.

The general rule is that while in a situation in which both bailor and bailee in successive suits attempt to recover for injury to the bailed property, privity between them may exist based upon their common interest in the bailed chattel, no common liability of bailor and bailee for injury caused by the bailed chattel is recognized for the purpose of giving them the relation of privies.

Thus, a judgment against the bailee of a motorbus entered in an action by a third person for the damage to the latter's automobile caused in a collision with the motorbus, to which action the bailor of the bus was not a party, was held not be constitute a bar to an action brought by the bailor against the third person for damages to the bus caused in the same accident: Hudson Transit Corp. v. Antonucci, 61 A. (2d) 180, 4 A. L. R. (2d) 1374 (N. J. 1948). Collateral estoppel was there held inapplicable, as there was no such identity or privity of parties as to render the former judgment conclusive of the issue of negligence. It was said that the judgment invoked as a bar was not one in favor of the bailee for the injury to, but against the bailee for damage caused by, the bailed chattel. Accord: Hornstein v. Kramer Bros. Freight Lines, 133 F. (2d) 143 (C. C. A. 3d, 1943), reversing 41 F. Supp. 847 (W. D. Pa. 1941).

[8]Caterpillar Tractor Co. v. International Harvester Co., 120 F. (2d) 82 (C. C. A. 3d, 1941) discussed a collateral estoppel problem as thought it was purely one of res judicata; Scott, Collerateral Estoppel by Judgment (1942) 56 Harv. L. Rev. 1, 2; Restatement, Judgments (1942) § 68, Comment a, which reads *"a. Merger, bar and collateral estoppel.* It is important to distinguish the effect of a judgment as a merger of the original cause of action in the judgment or as a bar to a subsequent action upon the original cause of action from its effect by way of collateral estoppel in a subsequent action between the parties based on a different cause of action." It is thus seen that res judicata and collateral estoppel are treated together, though distinguished of necessity, by the American Law Institute.

terminology, the doctrine has been masqueraded before the courts and in decisions under such aliases as "estoppel by record,"[9] "estoppel by findings,"[10] "estoppel by verdict,"[11] and "estoppel by judgment,"[12] among others. A general statement of the doctrine of collateral estoppel is that parties are precluded from relitigating issues that have been litigated and decided *of necessity* in a prior suit on a different cause of action.[13] Conversely, issues which *might have been raised* in a prior litigation, *but were not,* are not conclusively determined for the purpose of a subsequent trial between the parties involving a second and different cause of action.[14] Thus, while those issues *necessarily* litigated and determined in the prior cause may not be relitigated in the second action, the parties are not precluded from relying upon new claims or

[9]This is one of the most ambiguous terms applied. United States v. Accardo, 113 F. Supp. 783, 786 (D. C. N. J.) aff'd 208 F. (2d) 632 (C. A. 3d. 1953), used the term to indicate that an alien's plea of guilty in a prosecution constituted an estoppel of record in subsequent proceedings for revocation of his naturalization. Millar, The Historical Relation of Estoppel by Record to Res Judicata (1940) 35 Ill. L. Rev. 41, traces the development of collateral estaoppel, and points to derivation of that term from the Germanic principle that it was the "record" which gave rise to the preclusion. The "estoppel by record" term has been used in an inclusive sense where the author described estoppel by former judgment as preventing relitigation of the same cause of action and estoppel by verdict as the rule "that a point once determined between the same parties or those under whom they claim, may be relied upon as an estoppel in any cause of action." Bigelow, Law of Estoppel (6th ed. 1913) 10.

[10]Turner v. Bragg, 117 Vt. 9, 83 A. (2d) 511, 512 (1951).

[11]Goodman v. McLennan, 334 Ill. App. 405, 80 N. E. (2d) 396, 406 (1948); Hierl v. McClure, 238 Minn. 335, 56 N. W. (2d) 721, 723 (1953). Illinois courts use the term "estoppel by judgment" to describe the effect of merger or bar in res judicata and the term "estoppel by verdict" to describe the effect of collateral estoppel—e.g., Skidmore v. Johnson, 334 Ill. App. 347, 79 N. E. (2d) 762, 769 (1948).

[12]Gordon v. Gordon, 59 S. (2d) 40, 43 (Fla. 1952), cert. denied 344 U. S. 878 (1952); Robertson v. Robertson, 61 S. (2d) 499, 502 (Fla. 1952), using "estoppel by judgment" to describe preclusive effect in a second and different cause of action.

[13]Partmar Corp. v. Paramount Pictures Theaters Corp., 347 U. S. 89, 74 S. Ct. 414, 98 L. ed. 301 (1954), rehearing denied 347 U. S. 931, 74 S. Ct. 527, 98 L. ed. 433 (1954); United States v. Cathcard, 70 F. Supp. 653 (D. C. Neb. 1946); Buromin Co. v. National Aluminate Corp., 70 F. Supp. 214, 218 (D. C. Del. 1947); Equitable Life Assur. Soc. v. Gillan, 70 F. Supp. 640, 646 (D. C. Neb. 1945); Stone v. William Steinen Mfg. Corp., 70 A. (2d) 803 (N. J. 1949); Talbot v. Power Co., 152 Va. 864, 148 S. E. 869 (1929); Restatement, Judgments (1942) §§ 68, 70.

[14]Northern Trust Co. v. Essaness Theater Corp., 103 F. Supp. 954 (N. D. Ill. 1952); Buromin Co. v. National Aluminate Corp., 70 F. Supp. 214 (D. C. Del. 1947); Gordon v Gordon, 59 S. (2d) 40 (Fla. 1952), cert. denied, 344 U. S. 878 (1952). The burden of establishing that issues presented in the subsequent action were actually litigated and decided in the prior proceedings rests upon the party contending that collateral estoppel precluded reinquiry. Peckham v. Family Loan Co., 196 F. (2d) 838 (C. A. 5th, 1952).

defenses not previously litigated between them.[15] Inherent in these broad statements are several troublesome problems,[16] each involving definition of part of the phrase "issues necessarily litigated and determined." The varying interpretations given this nebulous phrase by the courts may be explained by the proposition that the doctrine of collateral estoppel is sufficiently flexible to adapt itself to the achieving of justice under any given set of circumstances.[17]

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[15]E. g., Gordon v. Gordon, 59 S. (2d) 40 (Fla. 1952) cert. denied, 344 U. S. 878, 73 S. Ct. 165, 97 L. ed. 680 (1952). The Virginia courts have also held that in a plea of collateral estoppel it is essential that the identical question upon which it is invoked was in issue in the former proceeding. C & O Ry. Co. v. Rison, 99 Va. 18 at 34-35, 37 S. E. 320 at 325 (1900). Also in that general vein: Sawyer v. City of Norfolk, 136 Va. 66, 116 S. E. 245 (1923); Shumate v. Supervisors, 84 Va. 574, 5 S. E. 570 (1888).

[16](a) The problem of defining the content of the "issue" previously determined makes it necessary to analyze the scope of the prior decision to ascertain the presence or absence of identity of issues in the prior and subsequent actions. The attempt to define the "issue" determined in the prior action is somewhat analogous to the problem posed in determining what constitutes a cause of action. Restatement, Judgments (1942) § 68, comment a.

(b) There is also the problem of determining what is required in the way of "actual litigation." Thus, matters put in issue by the pleadings of both parties but not actually litigated during the trial may be given conclusive effect if such issues were necessary to the ultimate judgment. Equitable Life Assur. Soc. v. McKeithen, 130 Fla. 568, 178 So. 127 (1938).

(c) It is apparent that in the determination of some cases not all matters litigated nor all findings of the court are "necessary" to the decision. Those matters brought into controversy which are collateral and not needed to support the decision are not conclusively determined for the purpose of the second suit. E. g., Guardianship of Leach, 30 Cal. (2d) 297, 182 P. (2d) 529 (1947); Turner v. Bragg, 117 Vt. 9, 83 A. (2d) 511 (1951). But see Equitable Life Assur. Soc. v. Gillan, 70 F. Supp. 640, 649 (D. C. Neb. 1945) (a prior decision of the state court in favor of an insured was predicated on an estoppel resulting from the insurers' previous actions. Nevertheless, the opinion of the court in that preceding case "finding" that the insured had fraudulently procured the policy was stated by the federal district court, in deciding subsequent litigation, to be "deliberate, purposeful and courageous and not to be denied effectiveness" in a subsequent action.)

The United States Supreme Court has stated that the estoppel extends to all questions "distinctly put in issue and directly determined," and the court found in the case from which the quote is derived that the verdict on a prior conviction of conspiring to restrain trade in violation of the Sherman Act determined actual coercion as well as conspiracy. Emich Motors v. General Motors Corp., 340 U. S. 558, 569, 71 S. Ct. 408, 414, 95 L. ed. 534, 544 (1951). The United States Court of Appeals in a previous decision on the same case required that the point in issue be "essential" to the first judgment, and not merely evidentiary, and therefore, gave prima facie effect only on the issue of conspiracy. 181 F. (2d) 70, 75 (C. A. 7th, 1950).

[17]"... when the circumstances are different [from the normal litigation in the courts] so that application of the doctrine in all its rigor is inappropriate, the doctrine may be relaxed in any desired degree without destroying its essential service. The doctrine need not be applied altogether or rejected altogether." Davis, Admin-

It was originally thought proper that the application of collateral estoppel should be restricted to "the determination of the facts in issue," and that it should not extend to "merely evidentiary facts."[18] Through the influence of Judge Learned Hand,[19] judicial opinion, as reflected in the American Law Institute's Restatement of the Law, was revised to indicate that the "rules stated" are applicable to the determination of "those facts upon whose combined occurrence the law raises the duty or the right in question [ultimate facts] but not to the determination of merely evidentiary or mediate facts"[20] supporting the ultimate fact. This revision was construed by Judge Hand to mean that findings of ultimate facts in a prior action should be conclusive only as to ultimate facts in the subsequent action, not decisive as to mere evidentiary facts in the second suit.[21] In a less technical vein, the possibility has been suggested that the doctrine be limited to those instances where the preclusive effect in subsequent actions reasonably may be foreseen.[22] Apparently, under such a test, the findings in an action for property damage from an automobile accident would not be binding in a later action for personal injuries from the same accident, which injuries had not been known at the time of the initial litigation.

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istrative Law (1951) 612. In connection with the applicability of the doctrine to findings of administrative boards see Notes (1953) 20 U. of Chi. L. Review 570; (1953) 39 Va. L. Rev. 1097 [comment on Evans v. Monaghan, 282 App. Div. 382, 123 N. Y. S. (2d) 662 (1953)].

[18]Restatement, Judgments (1942) § 68, comment p.

[19]The noted jurist expressed his views on the subject in The Evergreens v. Nunan, 141 F. (2d) 927, 928 (C. C. A. 2d, 1944), cert. denied, 323 U. S. 720 (1944): "... a 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurence the law raises the duty, or the right. The first ... we shall ... call an 'ultimate' fact; the second, a 'mediate datum'."

[20]Restatement, Judgments (1948 Supp.) 336.

[21]The Evergreens v. Nunan, 141 F. (2d) 927, 929 (C. C. A. 2d, 1944), cert. denied, 323 U. S. 720 (1944). Judge Hand noted that where the preclusion is limited to facts ultimate in the second suit "the field is at least somewhat restricted, particularly because the causes of action to which it can apply are apt to be already in existence." He thus indicated that: "What jural relevance facts may acquire is often impossible even remotely to anticipate."

[22]Also a doctrine pronounced by Judge Hand in The Evergreens v. Nunan, 141 F. (2d) 927 at 929 (C. C. A. 2d, 1944), cert. denied, 323 U. S. 720 (1944). The desirability of such a test is manifest if it is apparent that the coercive effect of forcing litigants to a full-scale effort over minor disputes acts to increase rather than contract the extent of litigation.

Thus, it is suggested that "where the subsequent litigation does not arise out of the same transaction or was not reasonably foreseeable" collateral estoppel should not apply. Developments in the Law—Res Judicata (1952) Harv. L. Rev. 818, 841.

An application of the preceding principles to the *Petrus* decision, keeping in mind their attributes of flexibility to accomplish justice, suggests that the Virginia Court of Appeals, in its original decision, relied upon a very strict interpretation of what constitutes an "ultimate" factual determination within the purview of collateral estoppel. Of the trial court's holding in the first action that Mrs. Petrus was negligent, the Court of Appeals in its first decision, quoting from Corpus Juris Secundum, said: " 'General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits; nor does a remark made obiter or arguendo operate as an estoppel on the point averted to'."[23] The application which the court obviously made of the quote was that the finding of Mrs. Petrus' negligence was mere dictum, not determinative of her conduct as it might be brought in issue before any other tribunal. As previously shown, the Restatement of the Law of Judgments is phrased in the same general language as the original holding in the principal case to the effect that a finding is res judicata only when it is essential to the judgment rendered,[24] and under this rule the finding of negligence on the part of Mrs. Petrus in the prior case must be considered mere surplusage, because the decision in her favor was based on the negligence of Robbins alone. The strange result to which the original holding gave rise is that in the earlier case involving Robbins and Mrs. Petrus, the negligence of Mrs. Petrus, upon which Robbins' cause of action was grounded, was not finally determined even though the court expressly found her negligent. That is to say, Mrs. Petrus would have remained free to contend in the principal case, or any other subsequent case, that she was free from negligence in the accident. The question arising would appear to be whether final judgment based on the negligence of plaintiff Robbins should reduce the determination of the primary issue of Robbins' action against Mrs. Petrus—i.e., the negligence of Mrs. Petrus—to the status of dictum. Apparently, the reasoning of the Supreme Court of Appeals was that the judgment was only *against Robbins* on his claim for property damage, and that the trial court need not have found Mrs. Petrus negligent in order to defeat Robbins' claim if it appeared Robbins was also negligent. The Supreme Court of Appeals appears to have initially overlooked, however, that the lower court's failure to dismiss the counterclaim immediately, however erroneous that ruling might

[23]Petrus v. Robbins, 195 Va. 861, 867, 80 S. E. (2d) 543, 547 (1954). The court was quoting from 50 C. J. S., Judgments § 726, p. 215.

[24]Restatement, Judgments (1942) § 68 (1).

have been, left the negligence of Mrs. Petrus very much in issue in the prior hearing in regard to Robbins' liability on the counterclaim, and that the parties were therefore given ample *reason* and *opportunity* to litigate conclusively the issue of negligence.

Though it was actually aside from the collateral estoppel aspect of *Petrus v. Robbins,* the focal point—and the one which prompted the rehearing—of the original decision of the court was the necessary implication in that holding that a gratuitous bailee could not maintain a cause of action for damage to a bailed chattel while in his possession[25]—for the original holding was sustainable only so long as Mrs. Petrus' counterclaim in the Civil and Police Court was deemed improper. As such a ruling would have been wholly out of consonance with the prevailing view,[26] the Court of Appeals on the rehearing was explicit in specifying the Virginia law to allow a bailee in possession to sue and recover for wrongful damage or destruction by another of the bailed property.

It is to be noted, however, that the court did not recant its original ruling as to what findings of fact would justify invoking collateral estoppel. Yet, one statement of the Virginia law on that subject made in the second opinion in the principal case was: " 'Where

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[25]The Supreme Court of Appeals in its first opinion said in this regard: "The Justice of the Civil and Police Court should have dismissed the counterclaim of Mrs. Petrus, since there was no necessity for him to give it any consideration. *She had no cause of action for damages* to the automobile either in that court or in the Corporation Court. Her claim was not susceptible of proof, and did not present any issue subject to adjudication." 195 Va. 861, 869, 80 S. E. (2d) 543, 548 (1954) (italics supplied).

If the dogmatic fashion in which the Court here denied a cause of action for damages to a gratuitous bailee of a damaged chattel had been allowed to stand, the conclusion is inescapable that one of two results would stem from the holding: (1) a wife in Virginia could not be considered a gratuitous bailee of her husband's vehicle, or, (2) a gratuitous bailee no longer would have a cause of action in Virginia for damage by a third person to the chattel while in the bailee's possession. The failure of the Court to amplify the meaning of its decision relative to bailments poses the query of whether the Court considered that aspect of the case. The decision on rehearing proves that if counsel had argued that facet of the case before the court, the initial decision would have been different.

[26]In Harris v. Howerton, 169 Va. 647, 661, 662, 194 S. E. 692, 698 (1938), the Court, through the opinion of Justice Spratley (who wrote the first opinion in the Petrus case), said: "It seems to be well settled that a bailee of personal property may recover compensation for any wrongful injury to the article while bailed in his possession." 3 R. C. L. 127, 6 C. J. 1168, 6 Am. Jur. 419 [now 430]. Accord: New England Box Co. v. C. & R. Construction Co., 313 Mass. 696, 49 N. E. (2d) 121, 150 A. L. R. 152 (1943) (where mere possession was sufficient); Jordan v. Phoel, 36 N. Y. S. (2d) 176 (1942); Mitchell v. Vande, 169 Misc. 63, 289 N. Y. Supp. 1033 (1936). See Smyth v. Fidelity & Deposit Co. of Maryland, 326 Pa. 391, 192 Atl. 640, 644, 111 A. L. R. 481, 486 (1937).

there has been litigation which has in fact determined the point in the controversy, and there has been a final judgment, the judgment is conclusive. Where the subject-matter is identical and the evidence is the same, the question cannot be reopened'."[27] If such is to be accepted as a correct statement of the Virginia law of collateral estoppel, it is difficult to understand why its application to the principal case would not make the finding of negligence binding upon Mrs. Petrus, irrespective of the validity of her counterclaim.

The conclusion seems inevitable that if the doctrine of collateral estoppel is to perform its intended function of minimizing litigation, it must be clarified substantially. The instant case is ample demonstration that the technicalities of the principle are capable of so clouding the basic and controlling issues of litigation as to perpetrate miscarriages of justice.[28]

WILLIAM B. POFF

STATUTE OF FRAUDS—RIGHT OF VENDOR TO COLLECT ON CHECK GIVEN AS DOWN PAYMENT ON ORAL LAND SALE CONTRACT REPUDIATED BY VENDEE. [Arkansas]

Whether the Statute of Frauds is regarded as rendering an oral contract for the sale of land void or merely voidable, it is generally agreed that the vendor cannot by legal action either compel the vendee

[27]196 Va. 322, 329, 83 S. E. (2d) 408, 412 (1954) quoting from Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 99, 140 S. E. 314, 319, 57 A. L. R. 490, 497 (1927).

[28]An interesting sidelight in the Petrus v. Robbins decision was the comment of the court concerning its earlier decision of Carter v. Hinkle, 189 Va. 1, 52 S. E. (2d) 139 (1949). There the court was called upon to decide whether one who has suffered both damage to his property and injury to his person as the result of a single wrongful act may maintain two separate actions therefor, or whether a judgment obtained in the first action is a bar to the second. Over the dissent of two Justices, the American minority rule on the subject was adopted, whereby the injured party has two separate and distinct causes of action, one for the property damages and one for personal injuries, and judgment in favor of the injured party on his property damage action is not a bar to a later action for personal injuries. Obviously that case was not controlling in the Petrus situation, but it was originally contended by counsel for Robbins that the decision was in point and should be overruled. The Supreme Court of Appeals was thereby given an opportunity at least to express itself as not wholly satisfied with the Carter v. Hinkle rule, and Virginia attorneys in the future would not seem far amiss in attempting to have the decision supplanted; the case does not seem presently in judicial favor in this state. For example, the court quoted approvingly from Rhode Island and New Jersey cases which applied collateral estoppel in situations comparable to Carter v. Hinkle. See: 196 Va. 322, 330, 331, 83 S. E. (2d) 408, 413 (1954).

to pay the purchase price or recover damages for his failure to perform the contract.[1] However, where the vendee, pursuant to a contract not conforming to the requirements of the Statute of Frauds, has voluntarily paid part of the purchase price or given earnest money before repudiating the contract, and the vendor remains ready, willing and able to perform, the majority of the courts do not allow the vendee to recover the part of the purchase price or the earnest money already paid.[2] This result is reached in jurisdictions in which the contract is held to be void,[3] as well as those in which it is only voidable.[4] The rationale of these decisions is that since the vendor is willing to convey, there has been no failure of consideration, and consequently there is no basis upon which the law can imply a promise by the vendor to repay the money received,[5] as it does where the vendor is the one who repudiates the partly performed contract.[6] In the words of an early New York case: "The payment was a voluntary one, made with a full knowledge of the facts... the money was not received as a loan; but as a payment; and so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as debtor."[7] It is further argued that since the contract, though void under the Statute of Frauds, is not illegal, immoral or in violation of public policy, and since the partial performance has been carried out without fraud or mistake, the courts should leave the parties in the position which their own voluntary performance has placed them.[8]

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[1]In re Robert's Estate, 202 Minn. 217, 277 N. W. 549 (1938); Lloyd v. Smith, 150 Va. 132, 142 S. E. 363 (1928); Brown v. Gray, 68 W. Va. 555, 70 S. E. 276 (1911). See note 18, infra, for a possible qualification to this generally accepted rule.

[2]Keystone Hardware Corp. v. Tague, 246 N. Y. 79, 158 N. E. 27, 53 A. L. R. 610 (1927); Lanham v. Reimann, 177 Ore. 193, 160 P. (2d) 318 (1945); Jackson v. Frier, 118 S. C. 449, 110 S. E. 676 (1922); Cook v. Griffith, 76 W. Va. 799, 86 S. E. 879 (1915); Thomas v. Brown, 1, Q. B. D. 714 (1876); 2 Corbin, Contracts (1950) § 332.

[3]Rochlin v. P. S. West Const. Co., 234 N. C. 443, 67 S. E. (2d) 464 (1951); Schechinger v. Gault, 35 Okla. 416, 130 Pac. 305 (1913); Woodward, The Law of Quasi Contracts (1913) § 99; Note (1952) 30 N. C. L. Rev. 292.

[4]Perkins v. Allnut, 47 Mont. 13, 130 Pac. 1 (1913); Keystone Hardware Co. v. Tague, 246 N. Y. 79, 158 N. E. 27, 53 A. L. R. 610 (1927); Thomas v. Brown, 1 Q. B. D. 714 (1876); Woodward, The Law of Quasi Contracts (1913) § 98.

[5]Collier v. Coates, 17 Barb. 471 (N. Y. 1854); Abbott v. Draper, 4 Denio 51 (N. Y. 1847).

[6]Hilker v. Curdes, 77 Ind. App. 466, 133 N. E. 851 (1922); Barrett v. Greenall, 139 Me. 75, 27 A. (2d) 599 (1942); Smith v. Dunn, 165 Ore. 418, 107 P. (2d) 985 (1940).

[7]Abbott v. Draper, 4 Denio 51, 54 (N. Y. 1847).

[8]Collier v. Coates, 17 Barb. 471, 475 (N. Y. 1854): "And as long as the defendant [vendor] is willing to do what he agreed to do, in consideration of the pay-

There is a minority line of decisions which allows the vendee to recover his payments or earnest money, on the ground that the contract is void and can be the foundation for no legal rights whatsoever.[9] The reason advanced for this view in jurisdictions where the contract is merely voidable, is that there is a lack of mutuality of obligation and remedy because the vendor could not have been required to convey the land, and therefore it would be inequitable for the vendor to retain the benefits of the vendee's partial performance for which the vendor gave nothing in return.[10]

An intermediate ground suggested by the Restatement of Contracts,[11] a leading writer,[12] and a few cases,[13] is that the defaulting vendee should not be liable to the vendor for more than the amount of damages which the vendor has suffered from the vendee's breach, and the burden of proof should be placed on the defaulting vendee to prove that the damages were less than the part payment.[14]

In the recent case of *Sturgis v. Meadors*[15] the Arkansas court, which had previously, by way of dictum, approved the majority view denying the vendee's right of recovery of the purchase price already

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ment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement. . . ."

[9]Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311 (1873); Reedy v. Ebsen, 60 S. D. 1, 242 N. W. 592, 594 (1932): "This court, as before stated, is committed to a literal construction of the statute of frauds. A contract within the statute is not merely voidable, but is in all respects a nullity." Affirmed on rehearing, 61 S. D. 54, 245 N. W. 908 (1932). Merten v. Koester, 199 Wis. 75, 225 N. W. 750 (1929); Durkin v. Machesky, 177 Wis. 595, 188 N. W. 97 (1922); Thomas v. Sowards, 25 Wis. 631 (1870); Brandeis v. Neustadtl, 13 Wis. 158 (1860). Note (1932) 31 Mich. L. Rev. 286. [Though not overruled, the Wisconsin cases are of doubtful authority due to the recent case of Schwartz v. Syver, 264 Wis. 526, 59 N. W. (2d) 489 (1953)]. Hooper v. First Exch. Nat. Bank, 53 F. (2d) 593 (C. C. A. 9th, 1931) (applying Washington State law). Contra: Johnson v. Puget Mill Co., 28 Wash. 515, 68 Pac. 867 (1902).

[10]Nelson v. Shelby Mfg. Co., 96 Ala. 515, 11 So. 695 (1892); Brown v. Pollard, 89 Va. 696, 17 S. E. 6 (1893). The Virginia court cited and approved Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311 (1873). However, the Virginia case is of doubtful authority due to the later case of White v. Alleghany Mountain Corp., 159 Va. 394, 165 S. E. 505 (1932), which cited with approval Cook v. Griffith, 76 W. Va. 799, 86 S. E. 879 (1915) which is contra to Brown v. Pollard and Scott v. Bush.

[11]Restatement, Contracts (1932) § 355 (4), Illustration 8. However, Restatement, Contracts (1932) § 357 (2) and Illustration 6 seem to be in conflict with § 355 (4); but in § 357 (2) earnest money rather than part payment is mentioned, which may account for the difference.

[12]Corbin, The Right of a Defaulting Vendee to the Restitution of Instalments Paid (1931) 40 Yale L. J. 1013.

[13]Schwartz v. Syver, 264 Wis. 526, 59 N. W. (2d) 489 (1953). See Massaro v. Bashara, 91 Ohio App. 475, 108 N. E. (2d) 850, 853 (1951).

[14]Schwartz v. Syver, 264 Wis. 526, 59 N. W. (2d) 489 (1953).

[15]266 S. W. (2d) 81 (Ark. 1954).

paid,[16] was faced with an unusual issue regarding the rights of a vendee repudiating a land sale contract which was void under the Statute of Frauds. The defendant vendee agreed to purchase the vendor's farm for $26,000, and as part payment gave his check for $1,000 to be applied to the purchase price if the sale was completed, but to be forfeited in the event the vendee failed to perform the agreement. A contract was signed but it was invalid for reasons not material to the present controversy, and before the check was cashed or negotiated, payment was stopped by the vendee. In the vendor's suit to recover $1,000 from the vendee, the original complaint was based on the written contract, but after defendant entered a motion alleging the invalidity of the contract, plaintiff amended the complaint to allege the oral contract and the vendor's willingness to convey. Defendant's demurrer and motion for directed verdict were overruled, and judgment was rendered in the trial court for the plaintiff. On appeal, the Supreme Court of Arkansas affirmed the judgment, with two Justices dissenting.

Both factions of the court agreed that the oral contract was void under the Arkansas Statute of Frauds, but the majority denied that the vendor was here "attempting to enforce performance of a contract."[17] Ignoring the fact that the vendor was the plaintiff in the action, and that the complaint was based on the oral contract to sell land, the majority proceeded to treat the case as one in which a defaulting vendee was seeking to recover cash payments made on the purchase price from a vendor willing and able to perform.

The dissenting Justices contended that the situation of the parties was not the same as where a defaulting vendee attempts to regain his part payment, since payment of the check was stopped before it was cashed. They asserted that: "Narrowed down to its essentials, this is an attempt by the vendor to enforce a single clause—the promise to pay earnest money—contained in an invalid contract for the sale of land. The vendee relies, not offensively but defensively, upon the statute of frauds, as he has a perfect right to do."[18]

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[16]See Venable v. Brown, 31 Ark. 564, 566 (1876).

[17]Sturgis v. Meadors, 266 S. W. (2d) 81, 83 (Ark. 1954).

[18]See Sturgis v. Meadors, 266 S. W. (2d) 81, 84 (Ark. 1954). Several references in the majority opinion suggest that the court took the position that the Statute of Frauds is for the protection of the vendor only and that he alone can assert the unenforceability of an oral contract. If the majority actually meant to base its decision on such a view, it acted contrary to the great weight of authority, Fraser v. Jarrett, 153 Ga. 441, 112 S. E. 487 (1922); Central Land Co. v. Johnston, 95 Va. 223,

The court's treatment of the principal case is in effect an assertion that the giving of a check is the same as a cash payment, a position which cannot be reconciled with the universal rule applied in other circumstances that a check is merely conditional payment unless a contrary intention is shown.[19] The Arkansas court had previously declared: "It is settled law that giving a promissory note for a debt is not payment of the debt, unless, by agreement of the parties, the note is taken in payment of the debt."[20] Accepting the fact that a

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28 S. E. 175 (1897); Brown v. Gray, 68 W. Va. 555, 70 S. E. 276 (1911), as well as an earlier Arkansas decision, Jones v. School Dist., 137 Ark. 414, 208 S. W. 798 (1919).

Statutes often specify that in order to be enforceable the contract must be in writing and signed "by the party to be charged thereon." Most courts have interpreted this and similar phraseology as meaning that the obligation of the contract cannot be enforced against the party *defendant,* be he *vendor* or *vendee,* if there is no writing signed by that party. Central Land Co. v. Johnson, 95 Va. 223, 28 S. E. 175 (1897). Thus, the vendee can assert the statute in defense to a suit to collect the purchase price which he agreed to pay under the oral contract, just as the vendor can defend under the statute when sued for damages for failure to convey. It is true that some Statutes of Frauds specify that only the vendor is required to sign a written contract to make it enforceable. Pangburn v. Sifford, 216 Mich. 153, 184 N. W. 512 (1921); Krohn v. Dustin, 142 Minn. 304, 172 N. W. 213 (1919); Campbell v. Kewanee Finance Corp., 133 Neb. 887, 277 N. W. 593 (1938). Furthermore, a few courts have interpreted "the party to be charged thereon" to mean that the *vendor,* and only he, is required to sign the contract to make it enforceable. Benjamin v. Dinwiddie, 226 Ky. 106, 10 S. W. (2d) 620 (1928); Patterson v. Davis, 28 Tenn. App. 571, 192 S. W. (2d) 227 (1946). However, Professor Williston has questioned whether this view is adhered to in such a manner as to leave the vendee without any right to invoke the Statute of Frauds. "How far this may involve the consequence that the vendor can always enforce an executory contract against the purchaser, because of his ability to write a memorandum of the bargain and sign it himself is not always made clear, but probably it would generally, if not universally, be necessary that the purchaser should have indicated his assent to the writing either by accepting it or otherwise." 2 Williston, Contracts (Rev. ed. 1936) 1689. The following cases tend to support Professor Williston's conclusion. National Bank of Kentucky v. Louisville Trust Co., 67 F. (2d) 97 (C. C. A. 6th, 1933); Dickenson v. Wright, 56 Mich. 42, 22 N. W. 312 (1885); Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22 (1888). If the Statute of Frauds is for the protection of either party to the contract, then the argument of the majority of the court in the principal case to the effect that the vendee becomes a wrongdoer by pleading the statute in defense against an attempt by the vendor to collect the purchase price is untenable. If the statute makes the contract unenforceable against him because it is not in writing, then surely he is not at fault in asserting the privilege which the statute affords him to refuse to perform the contract.

[19]Bank of Hatfield v. Bruce, 164 Ark. 576, 262 S. W. 665 (1924); Hume v. Indiana Nat. Life Ins. Co., 155 Ark. 466, 245 S. W. 19 (1922); Publicker Comm. Alcohol Co. v. Harger, 129 Conn. 655, 31 A. (2d) 27 (1943); Hunter v. Hunter, 327 Mo. 817, 39 S. W. (2d) 359 (1931); Pennick v. American Nat. Bank, 226 Ore. 615, 268 Pac. 1012 (1928); 8 C. J. 568.

[20]Starling v. Hamner, 185 Ark. 930, 50 S. W. (2d) 612, 614 (1932).

check is only conditional payment, it follows that the dissenting Justices were correct when they stated: "Even though the check is negotiable it is of course subject to defenses as between the original parties to the instruments. Hence, in this case, the fact that the vendee's promise is evidenced by an uncashed check rather than by the invalid agreement itself adds no strength to the vendor's position."[21]

However, at least three other courts are in accord with the reasoning in the *Sturgis* case that the same principles apply to the vendor's suit on the vendee's check as to a defaulting vendee's suit to recover his cash part payment made pursuant to an oral land sale contract.[22] Those cases are still open to the objection that a check is only conditional payment, and further they might be distinguished from the *Sturgis* case, since in those cases the oral contracts were only voidable.[23] Approximately the same number of courts have denied recovery to the vendor on the oral contract on the ground that there is a lack of mutuality of obligation and remedy.[24] This reasoning is obviously not compelling when the vendor has alleged that he is ready and willing to convey the property.[25]

In most of the cases with fact situations similar to *Sturgis v. Meadors,* the vendor has brought his action, not on the oral land sale contract, but on the check, and has alleged the oral contract merely as consideration for the check. By proceeding on this theory the vendor has precluded the vendee from pleading the Statute of Frauds, since the check is not a contract for the sale of land. The vendee's

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[21]See Sturgis v. Meadors, 266 S. W. (2d) 81, 84 (Ark. 1954).

[22]Garbarino v. Union Savings & Loan Ass'n, 107 Colo. 140, 109 P. (2d) 638, 642, 132 A. L. R. 1480, 1485 (1941): "Obviously here the defendant [Vendee] is in the same position, legally, as if he was [sic] seeking to recover $1,000 paid on the purchase price, instead of resisting payment of the check given for such purpose." McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468 (1842); Jones v. Jones, 6 M & W 84, 161 Eng. Rep. 331 (1840); Williams, Availability by Way of Defence of Contracts Not Complying With the Statute of Frauds (1934) 50 L. Q. Rev. 532.

[23]Whether the oral land sale contract under the Statute of Frauds is void or voidable seems to be more of a difference in terminology than substance; however, the defaulting vendee has a better chance to prevail where the oral contract is void rather than voidable. Woodward, The Law of Quasi Contract (1913) § 99.

[24]Hooper v. First Exch. Nat. Bank, 53 F. (2d) 593 (C. C. A. 9th, 1931); Kraak v. Fries, 21 D. C. 100, 18 L. R. A. 142 (1892); Ryan v. Dunphy, 4 Mont. 342, 1 Pac. 710 (1882). See Lewis v. Starlin, 267 P. (2d) 127, 130 (Mont. 1954); Brown v. Pollard, 89 Va. 696, 17 S. E. 6, 8 (1893).

[25]Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861, 862 (1922): "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule to-day." Walsh, Equity (1930) §§ 68, 69, 70.

defense is that there has been a failure of consideration because the oral land sale contract did not conform to the requirements of the Statute of Frauds, but most courts have regarded the contract as sufficient consideration for the check,[26] and have allowed the vendor to recover even where the contract is considered void.[27] However, under the principles of ordinary contract law, a void contract is not consideration for another contract,[28] whereas a voidable contract is.[29] The Kentucky court, which does not allow a defaulting vendee to recover his part payment when paid in cash,[30] has handed down the only decisions found denying the vendor recovery on the check on the ground that the void oral land sale contract was not sufficient consideration.[31] In a few cases the vendor has made the error of proceeding on the theory that the check was a sufficient memorandum to satisfy the Statute of Frauds,[32] but the courts have universally decided that a check or note given in connection with the sale of land,

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[26]Schierman v. Beckett, 88 Ind. 52 (1882); Fletcher v. Lake, 121 Me. 474, 118 Atl. 321 (1922); Phelan v. Carey, 222 Minn. 1, 23 N. W. (2d) 10 (1946); Little v. Dyer, 181 Minn. 487, 233 N. W. 7 (1930); Ott v. Garland, 7 Mo. 28 (1841); Murman v. Manning, 125 Misc. 830, 211 N. Y. Supp. 575 (1924); Fleischman v. Plock, 19 Misc. 649, 44 N. Y. Supp. 413 (1897); Barton v. Simmons, 129 Ore. 457, 278 Pac. 83 (1929); Wilkinson v. Sweet, 93 S. W. 702 (Tex. Civ. App. 1906); Crutchfield v. Donathon, 49 Tex. 691, 30 Am. Rep. 112 (1878); 2 Corbin, Contracts (1950) § 286; Brown, Statute of Frauds (5th ed. 1895) § 122b; Note (1946) 30 Minn. L. Rev. 647.

[27]Phelan v. Carey, 222 Minn. 1, 23 N. W. (2d) 10 (1946); Little v. Dyer, 181 Minn. 487, 233 N. W. 7 (1930); 2 Corbin, Contracts (1950) § 286.

[28]Blair Engineering Co. v. Page Steel & Wire Co., 288 Fed. 662 (C.C.A. 3rd, 1923); Houff v. Paine, 172 Va. 481, 2 S. E. (2d) 313 (1939); Restatement, Contracts (1932) § 80, Illustration (3); 1 Williston, Contracts (Rev. ed. 1936) § 103E.

[29]Wright v. Buchanan, 287 Ill. 468, 123 N. E. 53 (1919); Pinner v. Leder, 115 Misc. 512, 188 N. Y. Supp. 818 (1921); Trevillian v. Bullock, 185 Va. 958, 40 S. E. (2d) 920 (1947); Restatement, Contracts (1932) § 84 (e), Illustration (8). For a further discussion on the conflicting views as to what amounts to consideration see: Arant, Suretyship (1931) § 30; Beutel's Brannan, Negotiable Instrument Law (7th ed. 1948) § 25; 1 Corbin, Contracts (1950) § 140; Williston, Contracts (Rev. ed. 1936) §§ 103B, 103E, 104. See: Corbin, Non-Binding Promises as Consideration (1926) 26 Col. L. Rev. 550.

[30]Watkins v. Wells, 303 Ky. 728, 198 S. W. (2d) 662, 169 A. L. R. 185 (1946).

[31]Reese v. Bailey, 199 Ky. 504, 251 S. W. 633 (1923); Duteil v. Mullins, 192 Ky. 616, 234 S. W. 192, 20 A. L. R. 361 (1921); Fite v. Orr's Assignee, 8 Ky. L. Rep. 349, 1 S. W. 582 (1886). Montana might be added due to Eccles v. Kendrick, 80 Mont. 120, 259 Pac. 609 (1927). Cf. Ryan v. Dunphy, 4 Mont. 342, 1 Pac. 710 (1882). There are a few decisions that seem to indicate that if the vendee were in possession of the land there would be sufficient consideration for the note. Gillespie v. Battle, 15 Ala. 276 (1849); Rhodes v. Storr, 7 Ala. 346 (1845); Curnutt v. Roberts, 11 B. Mon. (50 Ky.) 42 (1850). Contra: Bates v. Terrell, 7 Ala. 129 (1844).

[32]Killarney Realty Co. v. Wimpey, 30 Ga. App. 390, 118 S. E. 581 (1923); Davis v. Dilbeck, 232 S. W. 927 (Tex. Civ. App. 1921).

which contains no reference to the essential terms of the contract of sale, does not constitute a sufficient memorandum.[33] The importance of basing the suit on the proper theory is indicated by the decisions of the Texas court, which has allowed the vendor to recover when he brought his action on the check and alleged the oral land sale contract as consideration,[34] but refused to allow him to recover when he merely alleged that the check was a sufficient memorandum to satisfy the Statute of Frauds.[35]

Even if the check is to be regarded as the equivalent of a cash payment so that the case is to be governed by the same rules which apply when a vendee is seeking to recover his cash payments, it is still arguable that the vendee should not be liable to the vendor for more than the amount of the damages which the vendor has suffered from the vendee's breach of the oral land sale contract.[36] The vendor's recovery would then be limited to the extent of his damages, but in no case would recovery be greater than the amount of the check, and the defaulting vendee should bear the burden of proving the damages to be less than that amount.[37] Where, as in the principal case, the contract contained an express agreement that the vendee shall forfeit the part payment in case of default, the parties have attempted to provide for liquidation damages.[38] If the contract had conformed to the Statute of Frauds and the vendor had chosen not to seek specific performance but rather to keep the payment as damages for the breach, the vendee would have had an opportunity to avoid the forfeiture by showing that the damages provided for by the contract were so unreasonable as to amount to a penalty.[39] In situations

[33]Allen v. Thompson, 169 Ark. 169, 273 S. W. 396 (1925); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926); Notes (1944) 153 A. L. R. 1112 at 1119; (1922) 20 A. L. R. 363 at 367.

[34]Wilkinson v. Sweet, 93 S. W. 702 (Tex. Civ. App. 1906); Crutchfield v. Donathon, 49 Tex. 691, 30 Am. Rep. 112 (1878).

[35]Davis v. Dilbeck, 232 S. W. 927 (Tex. Civ. App. 1921).

[36]Schwartz v. Syver, 264 Wis. 526, 59 N. W. (2d) 489 (1953); Restatement, Contracts (1932) § 355 (4); Corbin, The Right of a Defaulting Vendee to the Restitution of Instalments Paid (1931) 40 Yale L. J. 1013.

[37]Schwartz v. Syver, 264 Wis. 526, 59 N. W. (2d) 489 (1953).

[38]Gregory v. Nelson, 147 Kan. 682, 78 P. (2d) 889 (1938); Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311 (1873); Shields v. Early, 132 Miss. 282, 95 So. 839 (1923); Pippin Bros. v. Thompson, 292 S. W. 618 (Tex. Civ. App. 1927); 3 Sedgwick, Damages (9th ed. 1920) § 1026.

[39]Federal Land Bank v. Bridgeforth, 233 Ala. 679, 173 So. 66 (1937); Moumal v. Parkhurst, 89 Ore. 248, 173 Pac. 669 (1918); 1 Sedgwick, Damages (9th ed. 1920) §§ 405, 407.

like the principal case, the vendee certainly should not be placed in a worse position merely because the contract was oral.

Though the *Sturgis* case is one of the few decisions which allows the vendor to recover by pleading the oral land sale contract, the *result* reached is in accord with the weight of authority, and perhaps the Arkansas Court was justified in not denying recovery to the vendor merely because he had sought relief on the wrong theory. However, the court would have been on much sounder ground if, rather than treating the case as an action by the vendee to recover cash payments made on the purchase price, it had recognized it as the equivalent of an action by the vendor on the check with the oral contract being asserted only as consideration for the check. Under such a theory of action the courts can, ignoring the artifical distinction between void and voidable contracts, appropriately allow recovery in the amount of the check unless that sum is so unreasonably large as to constitute a penalty for failure to perform the oral contract.

RICHARD E. HILL

SURETYSHIP—RIGHT OF SURETY OF BANK AGAINST LOSS FROM FORGERY TO RECOVER ON SUBROGATION THEORY AGAINST DEPOSITORY BANK GUARANTEEING FORGED INDORSEMENTS ON CHECKS. [New Jersey]

In the recent case of *Standard Accident Insurance Co. v. Pellecchia,*[1] the New Jersey Supreme Court has followed a growing trend of authority which allows an indemnitor under fidelity bonds securing a bank against loss from forgery to recover through subrogation from a second bank which has guaranteed a forged endorsement on a check. For several years while plaintiff's fidelity bonds were in effect, the vice-president and counsel of the defrauded obligee bank had looted it of over $800,000, although in this action only some $500,000 was involved. Fifteen checks drawn by the obligee bank upon itself and payable to the order of persons who were later discovered to be fictitious and non-existent were endorsed by the defrauding officer in the names of the payees for deposit in the defendant bank. These deposits were credited to the officer's checking account in the defendant bank, but he soon withdrew the stolen funds. In the meantime, defendant bank, having stamped the checks "prior endorsements guaranteed," forwarded them for collection to the obligee bank, which

[1] 15 N. J. 162, 104 A. (2d) 288 (1954).

credited defendant bank with the amounts they represented. When the peculations were discovered, plaintiff indemnitor paid $200,000, the total extent of liability under the fidelity bonds. Later the obligee bank compromised for $175,000 whatever claim the obligee might have against defendant bank on the latter's contractual guaranty of the defrauding officer's endorsements. Plaintiff indemnitor refused to be bound by that settlement and instituted this action against defendant bank,[2] claiming to be subrogated to the rights of its obligee against defendant bank to the extent of the $200,000 paid the obligee under the fidelity bonds.

The trial court granted defendant bank's motion for summary judgment,[3] declaring that the right of subrogation "is not coextensive with the right of the obligee"[4] against defendant bank but exists only when the indemnitor shows that the "third person" (defendant bank) was a *tortfeasor* with respect to the obligee and that defendant bank was innocent in equity. Plaintiff's claim was denied on the ground that the "right of subrogation... is conditional, and the condition, namely, a superior equity to that of [defendant bank], is nowhere demonstrated in the pleadings, proof or inferences therefrom."[5] An appeal was certified to the Supreme Court of New Jersey, which reversed the summary judgment and remanded the case for trial.[6] Concluding that there were three possible solutions where a surety's action in subrogation against a "third person" is based on the latter's contractual liability to the insured,[7] the Supreme Court adopted the

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[2]"The trial court's ruling that as a matter of law the settlement of [defendant bank] with [obligee bank] and the subsequent release of [defendant bank] by [obligee bank] do not constitute a bar to the action by [plaintiff] is sound." 15 N. J. 162, 104 A. (2d) 288, 295 (1954).

[3]Standard Accident Ins. Co. v. Pellecchia, 27 N. J. Super. 189, 98 A. (2d) 706 (1953).

[4]27 N. J. Super. 189, 98 A. (2d) 706, 710 (1953).

[5]27 N. J. Super. 189, 98 A. (2d) 706, 711 (1953).

[6]15 N. J. 162, 104 A. (2d) 288 at 295 (1954).

[7]"(1) To prohibit recovery by the surety against the third person, who is thus in effect given the benefit of insurance on which he has not paid any premium and where there is no direct contractual or other relationship between him and the surety.

"(2) To allow the insured to recover from both the surety and the third party and thus to be doubly indemnified—a situation which the law has always deemed contrary to public policy not only by reason of its unfairness but because of its incitement to fraud.

"(3) To give the surety the benefit of the contractual obligation of the insured against the third party by allowing subrogation." 15 N. J. 162, 104 A. (2d) 288, 302 (1954). These were among four possible alternative solutions suggested by disputes between sureties and third persons whose liability to insured parties rests

view which "gives the surety the benefit of the insured's contractual rights against the third person,"[8] because such a view (a) gives force to the contractual relations and (b) is in accord with the rules of subrogation in "all other forms of insurance."[9]

The recognized principle that a drawee bank which pays a check without knowledge that the endorsement of the payee has been forged may recover the sum paid from the collecting bank which had guaranteed or warranted the prior endorsement thereon[10] has been extended to protect the bank which has issued a cashier's check or draft drawn upon itself.[11] Even the negligence of the drawer whereby payment on the instrument was made proximately possible is no defense to an action by the drawee bank against the collecting bank, since the drawee's payment was induced by the collecting bank's false warranty of the fraudulent endorsement.[12] In all such cases the forger should be pursued by the collecting bank which warranted his endorsement, rather than by the drawee bank which relied on the warranty for the correctness of the endorsements.[13] The courts have described the liability of the collecting bank for losses suffered by sub-

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upon rules of law independent of contract or upon a contract whose purpose is not suretyship. Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance (1934) 47 Harv. L. Rev. 976 at 977-978.

[8]15 N. J. 162, 104 A. (2d) 288, 302 (1954).

[9]15 N. J. 162, 104 A. (2d) 288, 302 (1954). The right of subrogation exists in all types of indemnity insurance contracts, including liability, theft, and guaranty policies, upon the theory that the insured is under no circumstances entitled to receive any profit by reason of insurance and should not recover for the loss from both the insurer and the person primarily liable to the insured for the loss. However, the right of subrogation does not exist in life and accident insurance policies because these are not contracts of indemnity. See 2 Richards, Insurance (5th ed. 1952) 656; Vance, Insurance (3rd ed. 1951) 104, 790. The insurer is subrogated to claims against tortfeasors whose actions were the legal cause of the insured's loss, and the opinion in the principal case shows the evolution of subrogation upon the contractual obligations of a third person in favor of the insured. See 15 N. J. 162, 104 A. (2d) 288 at 296-299 (1954); Campbell, Non-Consensual Suretyship (1935) 45 Yale L. J. 69; King, Subrogation Under Contracts Insuring Property (1951) 30 Tex. L. Rev. 62; Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance (1934) 47 Harv. L. Rev. 976; 2 Richards, Insurance (5th ed. 1952) §§ 185, 189-193; Vance, Insurance (3rd ed. 1951) 786.

[10]American Exch. Nat. Bank v. Yorkville Bank, 122 Misc. 616, 204 N. Y. Supp. 621 at 625 (1924). See 5B Michie, Banks and Banking (2d ed. 1950) §§ 266, 294.

[11]Hartford-Connecticut Trust Co. v. Riverside Trust Co., 123 Conn. 616, 197 Atl. 766 at 771 (1938). See 5B Michie, Banks and Banking (2d ed. 1950) 47, 158.

[12]State Bank v. Mid-City Trust & Sav. Bank, 232 Ill. App. 186 (1924). See 5B Michie, Banks and Banking (2d ed. 1950) 160-161.

[13]Home Ind. Co. v. State Bank, 233 Iowa 103, 8 N. W. (2d) 757 (1943). See 5B Michie, Banks and Banking (2d ed. 1950) 45-46.

sequent endorsees as "absolute,"[14] and it has been suggested that in accepting the forged instrument the collecting bank is guilty of the "first fault."[15]

However, the policy of the law is to protect the depositor-drawer above all endorsees of a fraudulently endorsed check, including the drawee bank.[16] The relationship that exists between a depositor and a depository bank is usually one of creditor and debtor, since the depositor has given up money in return for a chose in action against the bank.[17] Because the depository bank has contracted with the depositor to pay over the latter's claim against it only in accordance with his directions, it is generally held that the drawee bank pays a forged check at its peril.[18] When the drawee honors a check, it is paying out its own money and not that of the depositor.[19] The drawee bank must ascertain the validity of all signatures, including the endorsements of the payee and other endorsers, and even though it relies upon the warranties of the collecting bank as to the correctness of the payee's endorsement, if that endorsement is fraudulent, the drawee must recredit the drawer's account in fulfillment of the drawee's promise to pay only in accordance with the drawer's instructions.[20]

In the absence of an agreement to the contrary, where a trustee or other fiduciary deposits a trust fund in a bank, the ordinary relation

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[14]Manufacturers' Trust Co. v. Harriman Nat. Bank Trust Co., 146 Misc. 551, 262 N. Y. Supp. 482 (1932).

[15]Farmers' Nat. Bank v. Farmers' & Traders' Bank, 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77 (1914). See Star Fire Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442 at 447 (1880).

[16]Lieber v. Fourth Nat. Bank, 137 Mo. App. 158, 117 S. W. 672, 678 (1909): "The very fact that the defendant paid these checks was an assurance on which the plaintiff had a right to rely that the defendant bank had assured itself of the genuiness of every one of the preceding indorsements. . . ." Accord: Union Trust Co. v. Soble, 192 Md. 427, 64 A. (2d) 744 (1949). However, the depositor must have exercised due diligence in the matter of examining his cancelled checks and in giving the bank timely notice of the forgery, or the bank need not recredit the depositor's account when the fraudulent endorsement is uncovered. City of Indianapolis v. National City Bank, 80 Ind. App. 677, 141 N. E. 249 (1923). See generally 5B Michie, Banks and Banking (2d ed. 1950) §§ 276, 277a, 280-286.

[17]Ellis Weaving Mills, Inc. v. Citizens & Southern Nat. Bank, 91 F. Supp. 943 (W. D. S. C. 1950); Henderson v. Lincoln Rochester Trust Co., 198 Misc. 82, 100 N. Y. S. (2d) 840 (1950).

[18]Home Ind. Co. v. State Bank, 233 Iowa 103, 8 N. W. (2d) 757 (1943); Greenville Nat. Exch. Bank v. Nussbaum, 154 S. W. (2d) 672 (Tex. Civ. App. 1941).

[19]Pennsylvania Co. v. Federal Reserve Bank, 30 F. Supp. 982 (E. D. Pa. 1939); First Nat. Bank v. Pease, 168 Ill. 40, 48 N. E. 160 (1897).

[20]Atlanta Nat. Bank v. Burke, 81 Ga. 597, 7 S. E. 738, 2 L. R. A. 96 (1888); Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909).

of creditor and debtor is established between the depositing fiduciary and the bank,[21] although the trust attaches to the chose in action held by the fiduciary against the bank.[22] While the depository bank will not ordinarily be liable to the beneficial owners of the trust deposit for a diversion thereof by the fiduciary for his personal benefit,[23] it may be liable for a breach of the contract of deposit[24] or for participation in the breach of trust if it applies the fund to the payment of the fiduciary's individual debt to the bank or if it assists the fiduciary to accomplish a diversion with knowledge or notice that the fraud is being committed.[25] Thus the liability of the depositories of trust funds arises from their participation in the breach of trust with the fiduciary.

Despite the clarity of the legal principles which are applicable in the described situations, the great majority of courts, in invoking the equitable doctrine of subrogation, do not necessarily follow these principles when the insurer of the defrauded party is seeking recovery for its payment of the loss to the insured. Treating the defrauding forger or the embezzling fiduciary as primarily responsible to the defrauded obligee, the courts agree that the surety or indemnitor is subrogated to all of the legal rights of the obligee against *the fraudulent principal* as soon as the total loss to the obligee has been recovered.[26] However, under the majority view, the right of subrogation will not be enforced against *a third person,* such as a depository bank or a collecting bank or other subsequent endorser of negotiable paper, where the equities of the third person are superior or even equal to

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[21]In re Battani, 6 F. Supp. 376 (E. D. Mich. 1934). See 5A Michie, Banks and Banking (2d ed. 1950) 131.

[22]Cady v. South Omaha Nat. Bank, 46 Neb. 756, 65 N. W. 906 (1896). See 5A Michie, Banks and Banking (2d ed. 1950) 132-133.

[23]American Sur. Co. v. Waggoner Nat. Bank, 13 F. Supp. 295 (N. D. Tex. 1934); Bank of Hartford v. McDonald, 107 Ark. 232, 154 S. W. 512 (1913).

[24]Martin v. First Nat. Bank, 51 F. (2d) 840 (D. C. Minn. 1931); Charleston Paint Co. v. Exchange Banking & Trust Co., 129 S. C. 290, 123 S. E. 830 (1924). See 5A Michie, Banks and Banking (2d. ed. 1950) § 57a.

[25]Childs v. Empire Trust Co., 54 F. (2d) 981 (C. C. A. 2d, 1932); Cocke's Adm'r v. Loyall, 150 Va. 336, 143 S. E. 881 (1928). See Restatement, Trusts (1935) § 324.

[26]American Sur. Co. v. Robinson, 53 F. (2d) 22, 23 (C. C. A. 5th, 1931): "It [subrogation] is freely applied in favor of a surety who discharges his principal's obligation, or makes good his default. It operates to enable the surety to enforce all his principal's rights of reimbursement against others, and all the rights of the creditor against the principal and all securities held for the obligation." Accord: United States F. & G. Co. v. First Nat. Bank, 172 F. (2d) 258 (C. A. 5th, 1949), noted (1949) 35 Va. L. Rev. 647; Louisville Trust Co. v. Royal Ind. Co., 230 Ky. 482, 20 S. W. (2d) 71 (1929); Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265, 4 A. L. R. 510 (1919).

those of the surety or indemnitor in respect to the liability.[27] Thus, the right of the surety or indemnitor to recover against third persons through equitable subrogation is not coextensive with the conceded right of the obligee himself to recover against these parties in a suit at law.[28]

When the trial judge finds that the equities between the surety and the third person are "equal," the capricious choice of the obligee in selecting the source of his recovery as between the surety and the third person will govern, for the courts will deny subrogation to the party selected by the obligee to reimburse him for his loss, upon the notion that "equality of equities is fatal to subrogation."[29] The courts which adopt the majority view are in accord that the equities of the third person are not equal or superior to those of the surety when the third person's conduct with respect to the obligee includes "tort-feasance and conduct in the nature thereof, including fraud, negligence, culpable knowledge, conspiratorial participation, implied knowledge or even omission of duty"[30] and in those cases allow the surety to recover against the third person.[31] But where the third person

[27]United States F. & G. Co. v. First Nat. Bank, 172 F. (2d) 258 (C. A. 5th, 1949); Washington Mechanics' Sav. Bank v. District Title Ins. Co., 62 App. D. C. 194, 65 F. (2d) 827 (1933); New York Title & Mort. Co. v. First Nat. Bank, 51 F. (2d) 485, 77 A. L. R. 1052 (C. C. A. 8th, 1931); American Sur. Co. v. Citizens' Nat. Bank, 294 Fed. 609 (C. C. A. 8th, 1923); Meyers v. Bank of America Nat. Trust & Sav. Ass'n, 11 Cal. (2d) 92, 77 P. (2d) 1084 (1938), noted (1938) 27 Calif. L. Rev. 88, (1939) 12 So. Cal. L. Rev. 490; National Cas. Co. v. Caswell & Co., 317 Ill. App. 66, 45 N. E. (2d) 698 (1942); Southern Sur. Co. v. Tessum, 178 Minn. 495, 228 N. W. 326, 66 A. L. R. 1136 (1929); Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 S. (2d) 384 (1944); Green v. Ruffin, 197 N. C. 345, 102 S. E. 634 (1920). See generally Stearns, Suretyship (5th ed. 1951) § 11.3.

[28]United States F. & G. Co. v. First Nat. Bank, 172 F. (2d) 258, 263 (C. A. 5th, 1949): "Subrogation is an equitable remedy, and, while a surety may become subrogated to the rights and remedies of the creditor against the principal, he stands, in respect to the right of recovery against a third person, upon a different footing from that upon which he would stand with respect to the right to recover from a principal." Accord: Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N. W. 265, 4 A. L. R. 510 (1919); National Sur. Corp. v. Edwards House Co., 191 Miss. 884, 4 S. (2d) 340, 137 A. L. R. 697 (1941); American Bonding Co. v. State Sav. Bank, 47 Mont. 332, 133 Pac. 367, 46 L. R. A. (N. S.) 577 (1913).

[29]Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance (1934) 47 Harv. L. Rev. 976, 979. Accord: Washington Mechanics' Sav. Bank v. District Title Ins. Co., 62 App. D. C. 194, 65 F. (2d) 827 (1933); Meyers v. Bank of America Nat. Trust & Sav. Ass'n, 11 Cal. (2d) 92, 77 P. (2d) 1084 (1938). See American Sur. Co. v. Citizens' Nat. Bank, 294 Fed. 609 at 616 (C.C.A. 8th, 1923).

[30]Standard Acc. Ins. Co. v. Pellecchia, 27 N. J. Super. 189, 98 A. (2d) 706, 711 (1953).

[31]Anacostia Bank v. United States F. & G. Co., 73 App. D. C. 388, 119 F. (2d) 445, 134 A. L. R. 995 (1941); Fidelity & Dep. Co. v. Citizens Nat. Bank, 100 F. (2d)

has engaged in no conduct toward the obligee which can be catagorized as tortious, most courts would deny the surety the right to be subrogated to the remedies at law of the obligee against such a third person whose only obligation to the obligee is founded in principles of contract.[32]

807 (C. C. A. 5th, 1939); Burke Grain Co. v. St. Paul-Mercury Ind. Co., 94 F. (2d) 458 (C. C. A. 8th, 1938); Fidelity & Dep. Co. v. Bank of Smithfield, 11 F. Supp. 904 (E. D. Va. 1932); Fidelity & Dep. Co. v. Cowan, 184 Ark. 75, 41 S. W. (2d) 748 (1931); Indemnity Ins. Co. v. Sampson, 40 Cal. App. (2d) 119, 104 P. (2d) 374 (1940); Dantzler Lumber & Export Co. v. Columbia Cas. Co., 115 Fla. 541, 156 So. 116, 95 A. L. R. 258 (1934); Fidelity & Cas. Co. v. Heitman Trust Co., 317 Ill. App. 256, 46 N. E. (2d) 155 (1942); Randell v. Fellers, 218 Iowa 1005, 252 N. W. 787 (1934); Baker v. McIntosh, 294 Ky. 527, 172 S. W. (2d) 29 (1943); American Bonding Co. v. National Mechanics' Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466 (1903); National Sur. Co. v. Webster Lumber Co., 187 Minn. 50, 244 N. W. 290 (1932); United States F. & G. Co. v. First State Bank, 116 Miss. 239, 76 So. 747 (1917); Empire State Sur. Co. v. Cohen, 93 Misc. 299, 156 N. Y. Supp. 935 (1916); Maryland Cas. Co. v. Gough, 146 Ohio St. 305, 65 N. E. (2d) 858 (1946); Akers v. Gillentine, 191 Tenn. 35, 231 S. W. (2d) 369 (1948); Fenner v. American Sur. Co., 156 S. W. (2d) 279 (Tex. Civ. App. 1941); Webb v. United States F. & G. Co., 165 Va. 388, 182 S. E. 577 (1935); United States F. & G. Co. v. Hood, 122 W. Va. 157, 7 S. E. (2d) 872 (1940).

[32]American Sur. Co. v. Bank of California, 133 F. (2d) 160 (C. C. A. 9th, 1943); New York Title & Mort. Co. v. First Nat. Bank, 51 F. (2d) 485, 77 A. L. R. 1052 (C. C. A. 8th, 1931); National Sur. Co. v. Arosin, 117 C. C. A. 313, 198 Fed. 605 (C. C. A. 8th, 1912), later appeal in National Sur. Co. v. State Sav. Bank, 84 C. C. A. 187, 156 Fed. 21 (C. C. A. 8th, 1907); Jones v. Bank of America Nat. Trust & Sav. Ass'n, 49 Cal. App. (2d) 115, 121 P. (2d) 94 (1942); National Cas. Co. v. Caswell & Co., 317 Ill. App. 66, 45 N. E. (2d) 698 (1942); Baker v. American Sur. Co., 181 Iowa 634, 159 N. W. 1044 (1916); Commonwealth, for the use of Coleman v. Farmers Dep. Bank, 264 Ky. 839, 95 S. W. (2d) 793 (1936); Southern Sur. Co. v. Tessum, 178 Minn. 495, 228 N. W. 326, 66 A. L. R. 1136 (1929); Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 S. (2d) 384 (1944); American Bonding Co. v. State Sav. Bank, 47 Mont. 332, 133 Pac. 367, 46 L. R. A. (N. S.) 557 (1913); Fidelity & Dep. Co. v. Atherton, 47 N. M. 443, 144 P. (2d) 157 (1944); Western Sur. Co. v. Walker, 44 S. D. 112, 182 N. W. 635, 24 A. L. R. 1519 (1921); United States F. & G. Co. v. Home Bank for Savings, 77 W. Va. 665, 88 S. E. 109 (1916).

The right of a fidelity insurer which had paid the insured a loss resulting from the forgery of checks by the employee and payment thereof by a bank in which the insured carried his deposits to recover from the bank has been sustained under an assignment by the insured to the insurer of the former's cause of action against the bank. Grubnaw v. Centennial Nat. Bank, 279 Pa. 501, 124 Atl. 142 (1924). Accord: National Sur. Co. v. Bankers Trust Co., 210 Iowa 323, 228 N. W. 635 (1930); Metropolitan Cas. Ins. Co. v. First Nat. Bank, 261 Mich. 450, 246 N. W. 178 (1933). However, the weight of authority sustains the proposition that a written or oral assignment adds nothing whatever to the substantive rights of the surety. American Sur. Co. v. Lewis State Bank, 58 F. (2d) 559 (C. C. A. 5th, 1932); New York Title & Mort. Co. v. First Nat. Bank, 51 F. (2d) 485, 77 A. L. R. 1052 (C. C. A. 8th, 1931), noted (1932) 30 Mich. L. Rev. 800; Meyers v. Bank of America Nat. Trust & Sav. Ass'n, 11 Cal. (2d) 92, 77 P. (2d) 1084 (1938); Louisville Trust Co. v. Royal Ind. Co., 230 Ky. 482, 20 S. W. (2d) 71 (1929); Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 S. (2d) 384 (1944); American Bonding

The holding of the New Jersey Supreme Court that as between the surety and the "innocent third person" the surety should prevail without the necessity of proving a superior equity represents a growing minority rule in American decisions wherein equitable subrogation is invoked.[33] In many of these decisions no reference is made to the lack of fault or tortious conduct on the part of the third person against whom subrogation is allowed. Occasionally it is suggested that any bank, particularly a collecting bank, which accepts a check without requiring the identification of the presentor is negligent or fails to meet the standard of care which the law requires.[34] The fact that the indemnitor or surety was paid to assume the risk of loss is not mentioned or is discounted by the contention that the bond premiums are computed upon the expectancy that a recovery over is possible in many cases.[35] Beyond this, the principal case intimated that the loss of the defendant bank will ultimately fall upon its own insurer, which bonded the bank against loss through negligent acts of employees.[36] At least

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Co. v. State Sav. Bank, 47 Mont. 332, 133 Pac. 367, 46 L. R. A. (N.S.) 557 (1913). For a discussion of the conflicting results of these two lines of authority, see Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance (1934) 47 Harv. L. Rev. 967 at 981-982.

[33]Boserine v. Maryland Cas. Co., 112 F. (2d) 409 (C. C. A. 8th, 1940); First Nat. Bank v. American Sur. Co., 71 Ga. App. 112, 30 S. E. (2d) 402 (1944); First & Tri-State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 102 Ind. App. 361, 200 N. E. 449 (1936); Home Ind. Co. v. State Bank, 233 Iowa 103, 8 N. W. (2d) 757 (1943); Royal Ind. Co. v. Poplar Bluff Trust Co., 223 Mo. App. 908, 20 S. W. (2d) 971 (1929); Maryland Cas. Co. v. Chase Nat. Bank, 153 Misc. 538, 275 N. Y. Supp. 311 (1934); National Sur. Co. v. National City Bank, 184 App. Div. 771, 172 N. Y. Supp. 413 (1918); Liberty Mutual Ins. Co. v. First Nat. Bank, 151 Tex. 12, 245 S. W. (2d) 237 (1951). Although assignments of the insured parties' claims were executed in some of these cases, the recoveries were not conditioned upon this fact as they were in the cases following the doctrine of the Grubnaw case. See note 32, supra.

[34]"I cannot find that the bank has a superior equity. There are only two parties at fault here, [the forger] and the bank [depository]." Dissenting opinion of Justice Alexander in Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 S. (2d) 384, 394 (1944). See also the dissenting opinion of Chief Justice Smith, 196 Miss. 50, 16 S. (2d) 384 at 392-393 (1944).

[35]Standard Acc. Ins. Co. v. Pellecchia, 15 N. J. 162, 104 A. (2d) 288 at 302 (1954). While the fact of compensation is not generally held to diminish the rights of a compensated surety as compared with a gratuitous surety—e.g., Bench Canal Drainage Dist. v. Maryland Cas. Co., 278 Fed. 67 at 80 (C. C. A. 8th, 1921)—some opinions stress the fact of compensation in weighing the respective equities of the surety and the third person. "The surety may have taken into consideration the heretofore assumed right of the insurer to recover... and determined the premiums accordingly." Note (1939) 12 So. Cal. L. Rev. 490, 492. But see 2 Richards, Insurance (5th ed. 1952) 184-185, especially n. 11.

[36]15 N. J. 162, 104 A. (2d) 288 at 303 (1954).

one court has suggested that the depository bank is not a "third person" as to the depositor but is the principal or primary party liable to the depositor when it debits his account with a fraudulently endorsed check.[37] Furthermore, some courts now treat both suretyship contracts for the fidelity of employees and policies which guarantee bank deposits or secure banks against loss through forgery the same as ordinary indemnity contracts.[38] As discussed before, in the case of most indemnity policies, the indemnitor, upon payment of the loss, is subrogated to any legal rights—including contract rights—which belong to the insured at the time of the loss by virtue of which he might have compelled another to make compensation in whole or in part for such a loss.[39] In general, the minority view places emphasis upon the liability of the depository or collecting bank to the insured which exists at law,[40] the argument being that unless subrogation is allowed the plain policy of the law will be thwarted, and the bank which is contractually liable to the insured will escape liability when, but for the single fact that the insured carried a fidelity policy or depositor's insurance, the bank would have had to suffer the initial loss.[41]

The majority rule creates extremely varied results when it is applied to the three situations described earlier. Usually the surety of a fiduciary or public officer, upon payment of the loss brought about by the infidelity to the beneficiaries, is allowed to recover against the depository bank which participated in the breach of trust, the same as the beneficiaries might have proceeded against the depository in the first instance. Thus, the result under the majority view of equitable subrogation that the equities of the surety are superior to those of the bank corresponds to the result at law that the participant in the infidelity should respond for the loss. Where the surety or insurer of a bank depositor, after payment by the depository

[37]First Nat. Bank v. American Sur. Co., 71 Ga. App. 112, 30 S. E. (2d) 402 at 407 (1944).

[38]See the opinion in the principal case, 15 N. J. 162, 104 A. (2d) 288 at 302 (1954). Accord: Boserine v. Maryland Cas. Co., 112 F. (2d) 409 at 414 (C. C. A. 8th, 1940).

[39]See note 9, supra.

[40]See principal case and cases cited in note 33, supra.

[41]Standard Acc. Ins. Co. v. Pellecchia, 15 N. J. 162, 104 A. (2d) 288 at 303 (1954). See dissenting opinion of Justice Alexander in Oxford Production Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 S. (2d) 384, 394 (1944): "... equity should follow the law and recognize the legal principles, and enforce them as such."

bank of fraudulently endorsed checks, seeks subrogation to the rights of the insured against the depository bank, the result under the majority view which denies subrogation might also be justified as in harmony with the principles of law. As pointed out, in paying fraudulently endorsed checks, the drawee bank gives up its own money, and not that of the depositor, whose claim against the drawee remains unaffected, unless the drawer was negligent or is estopped to set up the forgeries. Since the depositor has suffered no loss, there was no occasion for his surety or indemnitor to honor any claim and hence no basis for allowing subrogation. On the other hand, if the drawer was negligent, as for example in not promptly notifying the drawee bank that its payee had not received the check although someone had cashed it after forging the payee's signature, and the depository bank is not obliged to recredit the drawer's account, the drawer's insurer should not be subrogated, and is not under any view. The true reason for that result should be that since the *drawer* could not recover against the depository bank, the *insurer,* having no greater rights than the insured drawer, may not recover the loss which it was required to pay the insured from the depository bank. Although the result is correct, many courts reason upon the theory that the insurer's "equities" are not superior to those of the depository bank, when actually the depository bank is not liable at law to anyone for the loss. Finally, under facts similar to those in the principal case, when an insurer of the drawer or drawee bank seeks equitable subrogation to the rights of the insured against the collecting bank or endorser which warranted the forger's endorsement, the application of the majority view which denies subrogation leads to a result which is squarely contrary to the rule of law that the warrantor of the endorsement, even though he acted without negligence, should suffer the loss and pursue the forger. On the other hand, sensing that the results under equitable subrogation and at law should be harmonious and that differing conclusions would lead to inequitable results, the New Jersey court and those jurisdictions which support the minority view that subrogation should be allowed feel that tortious or unconscionable conduct is not the only basis for liability in subrogation suits and that contractual obligations are as deserving of enforcement in equity as at law.

MARVIN H. ANDERSON

TORTS—LIABILITY OF OWNER LEAVING AUTOMOBILE UNATTENDED IN VIOLATION OF STATUTE FOR INJURIES CAUSED BY NEGLIGENCE OF UNAUTHORIZED DRIVER. [Illinois]

Common experience has demonstrated that when drivers leave automobiles unattended in public places without taking the ordinary precautions of stopping the engine, locking the ignition, removing the key, and locking the doors, they should reasonably foresee the possibility that unauthorized persons, such as thieves or irresponsible juveniles and adults, may tamper with or drive away in the automobiles. Often such unauthorized use of automobiles leads to drastic results in property damage,[1] personal injuries,[2] and fatalities,[3] because those who take it upon themselves to operate motor vehicles without permission are often incapable of driving or are unappreciative of, or indifferent to, the damage which may result if the vehicles are not carefully operated. Frequently the intermeddling drivers are insolvent or otherwise incapable of compensating parties who have suffered damages occasioned by the fault of the drivers.

Consequently, the courts for over fifty years have been faced with the problem of whether to compensate the injured plaintiff by imposing liability on the owner of the automobile when an unauthorized driver is at fault in causing harm to plaintiff's person or property. As early as 1903 a New York court was confronted with this dilemma in the case of *Berman v. Schultz*,[4] where, during the absence of the owner, several boys played about his parked automobile, causing the machine to move and strike the plaintiff's horse and wagon. The court ruled that "[i]t was the duty of the defendant to exercise such care as a person of ordinary prudence would use under the circumstances;"[5] but it was decided that defendant met this duty by turning off the motor and setting the brake, and that the proximate cause of the injury complained of was the intervening act of a third party.[6]

Through the years the courts have generally continued to deny recovery from the car owner on the theory that the unauthorized driver's acts are independent, intervening acts which are not reasonably

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[1]Pesaty v. James A. Hearn & Son, Inc., 202 N. Y. Supp. 264 (1923); Frashella v. Taylor, 157 N. Y. Supp. 881 (1916).

[2]Dostie v. Wellman, 144 Me. 36, 63 A. (2d) 926 (1949); Roberts v. Lundy, 301 Mich. 726, 4 N. W. (2d) 74 (1942); Walter v. Bond, 292 N. Y. 574, 54 N. E. (2d) 691 (1944); Mann v. Parshall, 229 App. Div. 366, 241 N. Y. Supp. 673 (1930).

[3]Midkiff v. Watkins, 52 S. (2d) 573 (La. App. 1951).

[4]84 N. Y. Supp. 292 (1903).

[5]84 N. Y. Supp. 292, 293 (1903).

[6]See 2 Restatement, Torts (1934) § 448.

foreseeable and which necessarily break the chain of causation between the negligent act of the car owner and the resulting injury to the plaintiff.[7]

The increase in automobile thefts in recent years, together with the increased destructiveness of modern automobiles when recklessly driven, have led to legislation designed to compel car owners to exercise a greater degree of care when they leave their vehicles unattended. A statute of this nature in Illinois provides: "(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway. (b) No person shall operate or drive a motor vehicle who is under fifteen years of age."[8]

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[7]Castay v. Katz & Besthoff, Ltd., 148 So. 76 (La. App. 1933); Anderson v. Thiesen, 231 Minn. 369, 43 N. W. (2d) 272 (1950), noted (1950) 35 Minn. L. Rev. 81; see 2 Restatement, Torts (1934) § 448.

However, some of the later decisions have indicated that the intermeddling acts of a third party may be regarded as a foreseeable risk. Spanko v. Spitalnick, 101 N. J. L. 5, 127 Atl. 663 (1925); Tierney v. New York Dugan Bros., Inc., 288 N. Y. 16, 41 N. E. (2d) 161, 140 A. L. R. 534 (1942) (truck left with safety switch unlocked, and children playing nearby set truck in motion; question of due care was submitted to the jury); Bullock v. Dahlstrom, 46 A. (2d) 370 (D. C. App. 1946) (though automobile may not have been left "unattended" within meaning of statute, recovery was allowed on other grounds: that leaving the taxicab with a strange passenger in it and the key in the ignition was negligence, and such negligence was the proximate cause of the collision that followed). Liability may be imposed when the owner acted in an extremely careless manner in leaving automobile under conditions inviting intermeddling, as in Lomano v. Ideal Towel Supply Co., 25 N. J. Misc. 162, 51 A. (2d) 888 (1947), where an unattended truck was entered by ten-year old boys who backed it into plaintiff. Liability was predicated upon the driver's carelessness in leaving the vehicle susceptible to interference by third parties when he knew that on several previous occasions children had meddled with defendant's trucks left unattended in that area.

[8]Ill. Ann. Stat. (Smith-Hurd, 1950) c. 95 1/2, § 189. This statute embodies the substance of the Uniform Act Regulating Traffic on Highways, Art. XIV, § 52, one of four separate acts which comprise the Uniform Motor Vehicle Code, first approved by the National Conference of Commissioners on Uniform State Laws in 1926 and revised in 1930. The Uniform Act provides: "No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor of said vehicle, and when standing upon any perceptible grade without turning the front wheels of such vehicle to the curb or side of the highway." 11 Uniform Laws Ann. (Thompson, 1938) 50. It would seem that any application of this type of statute in the courts to civil liability for acts of a thief would have to be based on the intention of the legislature of the individual state, rather than on any intention to that effect demonstrated by the National Conference of Commissioners on Uniform State Laws. For a list of states which have adopted the statute with the section requiring the driver to lock the ignition and remove the key,

The courts have the difficult duty of ascertaining whether the legislature, in enacting a statute which embodies such requirements and provides only a criminal sanction, intended that violation thereof would also render the owner civilly liable for the injuries caused by the acts of intermeddling drivers. In the recent Illinois case of *Ney v. Yellow Cab Co.*,[9] plaintiff alleged that defendant taxicab owner violated the statute by negligently permitting its taxicab to remain unattended on a Chicago street without locking the ignition and removing the key, and that as a result, a thief stole the vehicle and, while in flight, ran into and damaged plaintiff's automobile. Defendant moved to dismiss the complaint on the theory that his acts or omissions in violation of the statute did not constitute actionable negligence and were not the proximate cause of the damage. The trial court entered judgment for plaintiff, which was affirmed in the appellate court and finally by the Illinois Supreme Court, with one Justice dissenting. The latter court analyzed the case as presenting the following issues: (a) What was the legislative intention as to the scope of the statute? (b) Was the violation of the statute the proximate cause of the injury? (c) Was the act of the thief an intervening, independent efficient force which broke the causual connection between the original wrong and the injury?

Although such statutes as that in effect in Illinois are enacted for the broad purpose of regulating traffic on the highways,[10] the legislatures have merely provided that failure to comply with any rule or regulation is a misdemeanor, punishable by either a fine or imprison-

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and those which do not have this "key" section, but which have the other requirements in regard to leaving an unattended vehicle, see Note (1954) 38 Marq. L. Rev. 99 at 105.

The Uniform Act Regulating Traffic on Highways and the other three uniform acts comprising the Uniform Motor Vehicle Code were declared obsolete in 1943 by the National Conference of Commissioners on Uniform State Laws. In 1946 the Conference endorsed the Uniform Vehicle Code Revised, which has been approved by the National Conference on Street and Highway Safety and the National Committee on Uniform Traffic Laws and Ordinances. This later model act embodies the same requirements for leaving an unattended motor vehicle as did the original uniform act, plus the provision requiring that the ignition be locked and the key removed. See Uniform Vehicle Code Revised (1954) Art. 9, § 11-1101, p. 110. The addition of the "key" provision, evidently copied from many state statutes, indicates that perhaps the authors of the model act intended that drivers should guard against the possible meddling of a thief, although the act contains no express provision regarding civil liability.

[9]2 Ill. (2d) 74, 117 N. E. (2d) 74 (1954).

[10]Uniform Act Regulating Traffic on Highways, Ill. Ann. Stat. (Smith-Hurd, 1950) c. 95 1/2, § 98.

ment or both.[11] In the principal case, defendant took the position that the statute is not an "antitheft measure," but instead, is purely a "traffic regulation," the violation of which could impose no civil liability on the owner of the vehicle for the misconduct of a thief. The plaintiff, however, contended that the statute is a safety measure for the benefit of the public, that its violation was prima facie evidence of negligence, and that reasonable persons might foresee that its violation could result in the consequences which occurred. The Supreme Court of Illinois, observing that "[l]abeling of the statute does not solve the problem,"[12] attempted to determine the legislative purpose by analyzing the various provisions of the act. It was conceded that the requirement that the brakes be set and the wheels turned to the curb on a grade is not a theft deterrent, but the further provision which prohibits minors under the age of fifteen from operating a vehicle was regarded as clearly showing that the legislature was thinking about danger to the public. Consequently, the court concluded that the entire section of the statute under review is a public safety measure passed for the "protection of life, limb and property by prevention of recognized hazards."[13] It is to be noted that the Massachusetts court has construed a similar statute[14] as an antitheft measure, but still denied recovery to the plaintiff on the ground that his injury was not the proximate result of the violation of the statute.[15] On the other hand, the District of Columbia court ruled, consistent with the principal case, that the purpose of the enactment is to protect the public from a thief's negligent management of a stolen automobile, and allowed plaintiff to recover for the injury sustained.[16] It would seem, therefore, as the Illinois court pointed out, that the label with which a court classifies the statute does not explain why

[11]Ill. Ann. Stat. (Smith-Hurd, 1950) c. 95 1/2, § 234(a) and (b).

[12]Ney v. Yellow Cab Co., 2 Ill. (2d) 74, 117 N. E. (2d) 74, 77 (1954).

[13]Ney v. Yellow Cab Co., 2 Ill. (2d) 74, 117 N. E. (2d) 74, 78 (1954). The dissenting Justice was disturbed that the "majority opinion is contradictory within itself," in that it first finds that the statute is not an antitheft measure but rather is a public safety regulation, but then declared that it was intended to prevent accidents caused by thieves while stealing automobiles. See 2 Ill. (2d) 74, 117 N. E. (2d) 74, 80 (1954).

[14]3 Mass. Laws Ann. (1954) c. 90 § 13: "No person having control or charge of a motor vehicle shall allow such vehicle to stand in any way and remain unattended without first locking or making it fast. . . ."

[15]Sullivan v. Griffin, 318 Mass. 359, 61 N. E. (2d) 330 (1945).

[16]Ross v. Hartman, 139 F. (2d) 14 (C. A. D. C. 1943), cert. denied, 321 U. S. 790, 64 S. Ct. 790, 88 L. ed. 1080 (1943), noted (1944) 92 U. of Pa. L. Rev. 467.

civil liability may or may not be predicated on a violation of such a provision.

The Illinois Court, having determined in the *Ney* case that the statute is a "public safety measure," the violation of which may give rise to civil liability, ruled: "The violation of the statute is *prima facie* evidence of negligence.... This in itself creates a liability"[17]—provided that the violation is the direct and proximate cause of the injury. Most American courts hold that violation of such a statute, which makes a certain course of conduct criminal, is *negligence per se*.[18] Under this view, if the jury in a civil action finds that defendant did the acts prohibited, or failed to do the acts required, by statute, then a finding of negligence is mandatory, as the legislature has already set the standard of due care.[19] Under the principal case view that a showing of violation of the statute establishes a *prima facie case of negligence,* if the defendant offers rebuttal evidence to show that his actions were reasonable under the circumstances,[20] the jury will decide the issue of negligence on the basis of all the evidence.[21] However, if the defendant makes no attempt to show that he exercised due care, some courts treat a prima facie case as having the same effect as a full presumption of negligence, in which event the jury must find defendant negligent if he fails to offer any rebutting evidence.[22] On the other hand, the majority of courts following the prima facie rule take the seemingly better view that a prima facie case creates only an inference of negligence and that the jury may, but is not required to, find defendant negligent if he fails to offer any rebutting evidence.[23]

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[17]2 Ill. (2d) 74, 117 N. E. (2d) 74, 78 (1954).

[18]Ross v. Hartman, 139 F. (2d) 14 (C. A. D. C. 1943); Rosner v. Harrel Drilling Co., 261 S. W. (2d) 190 (Tex. Civ. App. 1953), following the Texas approach to statutory violation set out in Texas and Pac. R. Co. v. Baker, 215 S. W. 556, 557 (Tex. Cim. App. 1919); Osborne v. McMasters, 40 Minn. 103, 105, 41 N. W. 543, 544, 12 Am. St. Rep. 698 (1889); Note (1935) 19 Minn. L. Rev. 688.

[19]See Prosser, Torts (1941) 274; Morris, The Relation of Criminal Statutes to Tort Liability (1933) 46 Harv. L. Rev. 453.

[20]See 2 Ill. (2d) 74, 117 N. E. (2d) 74 at 80 (1954). The court suggests some examples of evidence of due care defendant might have offered: that he left a reliable person to watch the car for him, or left it in view of a police officer, or that the intervening third party drove the car carefully.

[21]Johnson v. Pendergast, 308 Ill. 255, 139 N. E. 407 at 409 (1923).

[22]Satterlee v. Orange Glenn School District, 29 Cal. (2d) 581, 177 P. (2d) 279 (1947); Landry v. Hubert, 101 Vt. 111, 141 Atl. 593 (1928).

[23]Harsha v. Bowles, 314 Mass. 738, 51 N. E. (2d) 454 (1943); Santa Maria v. Trotto, 297 Mass. 442, 9 N. E. (2d) 540, 111 A. L. R. 1253 (1937); Roberts v. Neil, 138 Me. 105, 22 A. (2d) 135 (1941); Evers v. Davis, 86 N. J. L. 196, 90 Atl. 677 (1914).

The Illinois court's position in this case is not clear, since in successive sentences it declares that "violation of the statute is *prima facie* evidence of negligence.... This in itself creates liability."[24] In previous cases also, Illinois courts have failed to take a definite stand on this issue. In *Ostergard v. Frisch*,[25] involving the same statute, the court based liability largely on causation rather than on the character of defendant's negligence in violating the statute. In *Cockrell v. Sullivan*,[26] another Illinois appellate court asserted that violation of this statute is prima facie evidence of negligence, but said: "The trial court erred in failing to find as a matter of law, that there was no evidence that defendant could reasonably foresee that harm might result to the property of another by reason of his violation of the statute in question."[27] Thus, it would seem that the intermediate Illinois courts have had a tendency to pass over the negligence aspect and to base liability on the causation factor. In the instant case, the Illinois Supreme Court cited its earlier decision in *Johnson v. Pendergast*,[28] in support of the statement that violation of a statute is prima facie evidence of negligence. Though the *Johnson* case expressly adopted that view, it seems to say that in the absence of any rebutting evidence the jury *must* find for the plaintiff on the negligence issue, thus treating the prima facie case as creating a full presumption of negligence.[29] Thus, since the opinion in the *Ney* case does not indicate that defendant offered any evidence of due care on his part, the statement that the prima facie case "in itself creates liability" may have been the court's way of saying that the negligence issue must be resolved against defendant.

Having decided that the statute is a basis for civil liability, and that negligence of the defendant can be found by the jury on the prima facie case established by showing violation of the statute, the court then proceeded to the question of whether defendant is liable for the

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[24]2 Ill. (2d) 74, 117 N. E. (2d) 74, 78 (1954).

[25]333 Ill. App. 359, 77 N. E. (2d) 537 (1948), noted (1949) 6 Wash. & Lee L. Rev. 133.

[26]344 Ill. App. 620, 101 N. E. (2d) 878 (1951).

[27]344 Ill. App. 620, 101 N. E. (2d) 878, 880 (1951).

[28]308 Ill. 255, 139 N. E. 407 (1923)

[29]"The existence of the prima facie case is provisional, and does not change the burden of proof, but only the burden of introducing further evidence. It means only that a determination of a fact shall be sufficient to justify a finding of a related fact in the absence of any evidence to the contrary. The only effect is to create the necessity of evidence to meet the prima facie case created, and which, if no proof to the contrary is offered, will prevail." Johnson v. Pendergast, 308 Ill. 255, 139 N. E. 407, 409 (1923).

specific injury to this plaintiff occurring under these special circumstances. Both the majority and dissenting Justices considered this issue from the proximate causation approach. The majority held that the statute does not require the court to rule, as a matter of law, that proximate causation did or did not exist, but that this question was properly left for the jury to determine under the foreseeability test. The dissent argued that the harm was caused by the intervention of an independent criminal agency, and that at common law the original negligence cannot be the proximate cause of the injury where such an independent agency intervenes. Apparently the dissenting Justice thought that this conclusion must be reached as a matter of law under the facts of this case. This view gains support from the decision in *Slater v. T. C. Baker Co.*,[30] where the Massachusetts Supreme Court, on very similar facts, sustained a directed verdict for the defendant on the ground that acts by a thief were intervening, independent acts which the defendant was not bound to anticipate. It would seem that the dissenting Justice in the *Ney* case and the Massachusetts court in the *Slater* case are still reluctant to require an automobile owner to contemplate criminal acts of another even though it is common knowledge that the number of car thefts is on the increase.[31]

On the other hand the District of Columbia court took a different approach to the question dealt with by the Illinois court in causation terminology. In *Ross v. Hartman*,[32] which was decided in the only other jurisdiction where recovery has been allowed under facts similar to those of the *Ney* case, it was denied that proximate causation is material. Instead of considering that issue, the court resorted directly to statutory construction to deal with the issue of whether the legislature intended the risk of the intervening acts of a thief to be included within the liability imposed by statute. Under this view if the plaintiff falls within that group of persons which the court finds the

[30]261 Mass. 424, 158 N. E. 778 (1927). The most recent Massachusetts case, Gailbraith v. Levin, 323 Mass. 255, 81 N. E. (2d) 560 (1948) found the owner of an unregistered car not liable for damages caused by a thief, expressly repudiating Malloy v. Newman, 310 Mass. 269, 37 N. E. (2d) 1001 (1941), which case was thought to have indicated a possible trend toward imposing liability on a car owner for the acts of an independent agency. Sullivan v. Griffin, 318 Mass. 359, 61 N. E. (2d) 330 (1945), also denied that injuries were a proximate result of the car owner's negligence.

[31]Note (1954) 38 Marq. L. Rev. 99, citing a publication of the Milwaukee Police Department showing car thefts to be rapidly increasing in frequency.

[32]139 F. (2d) 14 (C. A. D. C. 1943). In R. W. Clayton, Inc. v. Schaff, 169 F. (2d) 303 (C. A. D. C. 1948), cert. denied, 335 U. S. 871, 69 S. Ct. 168, 93 L. ed. 415 (1948), the dissenting judge branded this view as unsound and pledged his efforts to obtain its overruling.

statute is designed to protect and if the injury is that type which the court finds the statute is designed to prevent, liability will be imposed, irrespective of the fact that an independent agency intervened. The *Ross* decision went further than to require that the defendant foresee a specific dangerous situation; it imputed a general knowledge to the defendant that "every one knows now that children and thieves frequently cause harm by tampering with unlocked cars."[33]

Since the courts are in disagreement not only as to whether to allow recovery in a civil action for violation of this penal statute, but also as to the approach to the problem when they do allow recovery, it seems that the legislatures should make a clear declaration of intention in this regard. It would not be difficult to phrase the penal statutes so as to indicate whether civil liability is to be imposed on an automobile owner for the intermeddling of a third party resulting in personal or property injury to some member of the public. However, if the legislatures should express their intention to impose civil liability for a violation of the statute, it would seem that the Illinois approach would be the more feasible one to follow. This view would allow the defendant to offer evidence of due care, even though he had violated the statute, and to have this evidence considered in the determination of the negligence issue. Under the negligence per se approach there is an automatic finding for the plaintiff on the negligence issue if the hazard was of the nature the statute was designed to prevent. This allows the defendant only the defense that violation of the statute is not the legal cause of the injury.

BEVERLY G. STEPHENSON

TORTS—NECESSITY OF PROVING PROXIMATE CAUSATION TO OBTAIN RECOVERY FOR PERSONAL INJURIES UNDER RAILROAD FIRE STATUTE. [Oklahoma]

For a century, American courts and legislatures have been concerned with the problem of the liability of railroads for personal injuries resulting from fires originating on the railroad's right of way.[1]

[33]Ross v. Hartman, 139 F. (2d) 14, 15 (C. A. D. C. 1943). See Note (1944) 92 U. of Pa. L. Rev. 467 at 469.

[1]Seale v. Gulf, C. & S. F. Ry., 65 Tex. 274 at 280, 57 Am. Rep. 602 at 605 (1886). A statute was applied in Toledo, P. & W. Ry. v. Pindar, 53 Ill. 447 at 451, 5 Am. Rep. 57 at 59 (1870).

The rigid application of general common law principles to railroad fire cases has often left the injured party without adequate recovery for his losses because of the difficulties of the plaintiff in proving the fault of the defendant,[2] in rebutting the evidence of the defendant that the plaintiff's actions constituted contributory fault,[3] and in overcoming the reluctance of the courts to place liability for personal injuries on the railroads, inasmuch as such injuries could not be expected to follow from the original setting of a fire.[4]

In proving the fault of the railroad—ordinarily through negligent conduct—the plaintiff is at a disadvantage, because much of the necessary information regarding the method of conduct of the railway's operations is in the hands of the defendant and difficult for the plaintiff to acquire.[5] If the plaintiff overcomes this difficulty, he may still lose his case unless the court or jury can be convinced that he was free from contributory fault. Though a person whose property is threatened with fire is under a legal duty to act affirmatively to protect his property, yet if he takes unreasonable risks while so acting, he is barred from recovery for the personal injuries sustained thereby.[6]

The plaintiff must further establish that legal causation exists be-

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[2]See Goodgame v. Louisville & N. R. R., 218 Ala. 507, 119 So. 218 at 219 (1928); Reuter v. San Pedro, L. A. & S. L. R. R., 37 Cal. App. 277, 174 Pac. 927 at 928 (1918); Green & Flinn, Inc. v. Philadelphia & R. Ry., 32 Del. 72, 119 Atl. 837 at 839 (1921); Atlantic C. L. R. R. v. Olivent, 89 Ga. App. 403, 79 S. E. (2d) 435 at 436 (1953); Palmetto Moss Factory v. Texas & P. Ry., 145 La. 555, 82 So. 700 at 703 (1919); Young v. N. Y., N. H. & H. R. R., 273 Mass. 567, 174 N. E. 318 at 319 (1931); St. Louis, S. Ry. of T. v. Jones, 138 S. W. (2d) 577 at 578 (Tex. Civ. App. 1940).

[3]See Braden v. St. L.-S. F. R. R., 223 Ala. 659, 137 So. 663 at 664 (1931); Whitman v. Mobile & O. R. R., 217 Ala. 70, 114 So. 912 (1927); Berg v. Great N. Ry., 70 Minn. 272, 73 N. W. 648 at 649 (1897); Pegram v. Seaboard A. L. Ry., 139 N. C. 303, 51 S. E. 975 at 976 (1905); Allison v. St. L., S. Ry. of T., 257 S. W. 959 at 960 (Tex. Civ. App. (1924).

[4]See Braden v. St. L.-S. F. R. R., 223 Ala. 659, 137 So. 663 at 664 (1931); Whitman v. Mobile & O. R. R., 217 Ala. 70, 114 So. 912 (1927); Berg v. Great N. Ry., 70 Minn. 272, 73 N. W. 648 at 649 (1897); Allison v. St. L., S. Ry. of T., 257 S. W. 959 at 960 (Tex. Civ. App. 1924); Seale v. Gulf, C. & S. F. Ry., 65 Tex. 274 at 280, 57 Am. Rep. 602 at 605 (1886).

[5]Difficulties in proving fault involve, *inter alia,* such facts that fires often start at unfrequented places and that the fire may have started from some natural or foreign cause rather than from any fault of the railroad. Also, the practical difficulty that most of the available information is in the hands of the defendant railroad and the problem of explaining technical devices to the jury complicates plaintiff's task. Favorable presumptions may help the plaintiff just as circumstantial evidence aids him, but these are at most minor assists. See cases in note 2, supra.

[6]Illinois C. R. R. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819 (1907). See Logan v. Wabash Ry., 96 Mo. App. 461, 70 S. W. 734, 735 (1902); Bingham, Some Suggestions Concerning Legal Cause at Common Law (1909) 9 Col. L. Rev. 136 at 146.

tween the defendant's fault and his own injury. In doing so, he must not only meet the initial test of showing that the injuries were the natural consequence of the wrongful act,[7] but must also refute any claim that an "intervening cause" occurred to break the chain of legal causation. If an "intermediate cause disconnected from the primary fault and self operating" is proved by the defendant to have been the proximate cause of the plaintiff's harm, then the defendant's fault cannot be the "proximate" or legal cause of the plaintiff's injury.[8]

Recognizing that serious losses to property and persons were frequently being suffered without adequate compensation, the legislatures of nearly half of the states enacted statutes to reduce in some degree the obstacles to recovery against railroads for fire damage.[9] The extent to which such statutes may be applied in aid of plaintiff's attempt to recover for personal injuries suffered as a result of a railroad fire on his premises is indicated by the recent decision of the Oklahoma Supreme Court in *St. Louis-S. F. R. R. v. Ginn.*[10] One of defendant's trains in some unexplained manner had set fire to a meadow on plaintiff's farm. Plaintiff, having discovered the fire shortly after it was started, secured his tractor, and, in accordance with custom and prudence, plowed a "fire break" to contain the fire. After he had completed this operation, he was removing the tractor and plow to a safe place, when, without fault on his part, the tractor, plow, or some other portion of the apparatus struck a root or limb which flew up and hit him in the face and eye, severely injuring him. In the subsequent action for personal injuries, after plaintiff had introduced evidence, defendant demurred, but the trial court overruled the de-

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[7]Sira v. Wabash Ry., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386 (1895). Accord: Gregory v. Layton, 36 S. C. 93, 15 S. E. 352, 31 Am. St. Rep. 857 (1892).

[8]Milwaukee & St. P. Ry. v. Kellogg, 94 U. S. 469, 475, 25 L. ed. 256, 259 (1876). Courts soon receded from the position that plaintiff's act of attempting to save his property from the fire is an intervening cause, and admitted that if the injuries were sustained while plaintiff was acting reasonably in the performance of a duty to minimize damages, proximate causation was not interrupted. This approach seems to be founded on the doctrine that a responsible human act is not an intervening cause. Mead v. Chickasha Gas & Electric Co., 137 Okla. 74, 278 Pac. 286 (1929).

[9]These include, inter alia: 6 Ark. Stat. Ann. (Bobbs-Merrill, 1947) § 73-1014; Ill. Ann. Stat. (Smith-Hurd, 1954) c. 114, § 96; 10 Ind. Stat. Ann. (Burns, 1951) § 55-3504-3505; 1 Iowa Code (1946) § 479.126; 5 Mass. Ann. Laws (Michie, 1948) c. 160, § 234; 3 Mich. Comp. Laws (1948) § 466.16; 6 Miss. Code Ann. (Harrison, 1942) § 7805; 2 Mo. Rev. Stat. (1949) § 537.380; 2 N. H. Laws (1942) c. 300, § 1; 5 Ohio Rev. Code (Banks-Baldwin, 1954) § 4963.37; 2 Okla. Stat. (1941) tit. 2, § 748; 4 S. C. Code (1942) § 8362; 8 Va. Code Ann. (Michie, 1950) § 56-428; 1 Wis. Stat. (1947) § 192.44.

[10]264 P. (2d) 351 (Okla. 1953).

murrer. Defendant refused to produce further evidence, whereupon the court (jury having been waived) made its own findings and rendered judgment for plaintiff. On appeal, the Supreme Court of Oklahoma affirmed the judgment by a four to three decision, applying a state statute which provides that: "Any railroad company operating any line in this State shall be liable for all damages sustained by fire originating from the operation of its road."[11]

It is to be noted that the statute does not expressly mention the matter of proving fault of the railroad, or the inclusion of personal injuries within the railroad's liability, or the effect of proximate cause principles on the plaintiff's claim. However, the majority of the court resolved all of these ambiguities in favor of the plaintiff. Because of the positive language of the statute, the court apparently assumed that no showing of fault was needed to impose liability on the defendant. The opinion contains no specific statement that the railroad is liable without fault, but there is no reference to any proof that negligence of the defendant started the fire.[12]

The words in the statute, "shall be liable for all damages," are broad enough to justify the further assumption that the railroad should be held liable for personal as well as property injuries.[13] This view was indirectly supported by the court's reasoning that since plaintiff was under a legal duty to try to minimize the property damages, he should be compensated for personal injuries sustained while acting reasonably in the defendant's behalf. This phase of the opinion indicates a confusion of contributory negligence and proximate cause considerations, in that the personal injuries suffered were regarded by the court as legally "caused by" the fire so long as the plaintiff did

[11]2 Okla. Stat. (1941) tit. 2, § 748.

[12]The court points out that there is "no allegation or suggestion that the plaintiff was guilty of contributory negligence to any degree." 264 P. (2d) 351, 353 (Okla. 1953). In order to arrive at the problem of contributory negligence, the court must have passed over the problem of primary negligence, resolving it in the plaintiff's favor. However, the opinion does not point out specifically just what reasoning was used in handling the primary negligence issue.

[13]Similar statutes were interpreted to cover personal as well as property injuries in: Missouri P. R. R. v. Johnson, 198 Ark. 1134, 133 S. W. (2d) 33 (1939); Illinois C. R. R. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819 (1907); Illinois C. R. R. v. Thomas, 109 Miss. 536, 68 So. 773 (1915). See also Berg v. Great N. Ry., 70 Minn. 272, 73 N. W. 648 (1897) (statute was assumed to cover personal injuries although recovery was denied due to the contributory fault of defendant in undergoing great risks to save a haystack); Mellette v. Atlantic C. L. Ry., 181 S. C. 62, 186 S. E. 545, 547 (1936) (dictum to this effect, although recovery under the statute was denied, since counsel for plaintiff failed to except to the ruling of the trial court that the statute did not apply to personal injuries).

not undertake any unreasonable risk to his person while fighting the fire. That point having been made, the majority opinion ignores the further issue raised by the defense as to whether the specific injury was such a remote and unforeseeable consequence of the setting of the fire that the chain of legal causation had been broken. The majority opinion mentions the "equities" of the plaintiff's position in order to refute the defendant's claim that the injury was the result of an independent, intervening cause.[14] Presumably, the thought was that it would be unjust to deny plaintiff's recovery for personal injuries suffered in attempting to fulfill the legal duty imposed upon him to minimize damages from a railroad fire threatening his property. The court has evidently attempted to reach its concept of "ultimate justice," but the interposition of an "equitable" doctrine in a tort case so as to deny defendant the protection of the common law proximate cause rule can only be justified by the unexpressed assumption that the legislature had such an intention when it enacted the statute.

Three judges, however, delivered a vigorous dissent, denying that any "equitable considerations are involved,"[15] and maintaining that the only question before the court was whether the railroad's negligence was the proximate cause of the plaintiff's injury. Thus, the fire statute was interpreted by the dissent as working no change in common law proximate cause rules. In the view of the dissent, "independent events broke the chain of causation from the original wrongful act,"[16] in this case, because "it cannot be said... that one guilty of negligence is required to anticipate that injury may occur from some unknown and unidentified force not actively concerned with or identified as being a part of the result of defendant's negligence."[17] The dis-

[14]"Equitably the plaintiff should not be required to bear the loss resulting from his personal injuries." 264 P. (2d) 351, 353 (Okla. 1953).

[15]St. Louis-S. F. R. R. v. Ginn, 264 P. (2d) 351, 354 (Okla. 1953).

[16]St. Louis-S. F. R. R. v. Ginn, 264 P. (2d) 351, 354 (Okla. 1953). Justice Corn arrived at this conclusion by applying the facts to the definition quoted from 38 Am. Jur., Negligence § 68, which states: "An act which only furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus, where a negligent act creates a condition which is subsequently acted upon by another, unforseeable, independent, and distinct agency to produce the injury, the original act is the remote and not the proximate cause of the injury, even though the injury would not occur except for the act."

[17]St. L.-S. F. R. R. v. Ginn, 264 P. (2d) 351, 355 (Okla. 1953). It is conceivable that the court could have reached the result of holding defendant liable even by applying common law rules. In Missouri P. Ry. v. Johnson, 198 Ark. 1134, 133 S. W. (2d) 33 (1939), the trustees of a tuberculosis patient who had been in precarious health and who died as a result of inhaling smoke which had been blown by the

sent points out with some alarm that the rule of the majority opinion can be extended to make the railroad a "positive insurer of the safety and wellbeing of one who acts in response to the original negligence from the time the danger is apparent until he returns to the shelter of his own roof."[18]

In a few jurisdictions, the courts have indicated that the legislative intent in enacting railroad fire statutes was merely to relieve the plaintiff of the necessity of proving that the fire was caused through fault of the railroad, and that the plaintiff must still prove the other factors necessary for a recovery at common law, such as proximate

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wind and which originated from a railroad fire were allowed to recover for her additional medical bills and increased suffering. In this case, though a railroad fire statute existed at the time, the action was brought on a common law theory. The court found that proximate causation existed since the injuries sustained were a direct result of the fire and since there had been some risk of some harm to someone. The court reasoned that there was always risk of personal injury to someone from such a fire. Glanz v. Chicago, M. & St. P. Ry., 119 Iowa 611, 93 N. W. 575 (1903) applied Iowa Code (1897) § 2056, which *removed* a presumption of negligence placed upon the railroad for fires it originated [the presumption of negligence having resulted from an earlier statute, Iowa Code (1873) § 1289] and which restored the common law rules. The court held that plaintiff could recover for sickness resulting from overexertion sustained while fighting a railroad fire, since the sickness and overexertion were the proximate results of defendant's proven negligence. The court reasoned that there had been some risk of some harm to someone as a result of the negligent act of defendant and that plaintiff's acts in trying to prevent the spread of the fire were not such intervening causes as to bar recovery for such injuries.

However, most courts would conclude that such injuries are too remote to fall within the concept of proximate causation. In Seale v. Gulf, C. & S. F. Ry., 65 Tex. 274 (1886), the plaintiff's intestate died from burns received while fighting the fire. Although there was a definite, actual, causal connection between defendant's negligence and the death, the court held that no reasonable man should anticipate such a result, since it was extremely unlikely that it would occur. A demurrer to the complaint was sustained upon the theory that proximate causation had been interrupted. The same result was reached in Whitman v. Mobile & O. Ry., 217 Ala. 70, 114 So. 912 (1928), in which plaintiff injured herself by wrenching her back and shoulder while procuring buckets of water with which to fight the fire. This injury, it was held, was "not known by common experience to be naturally and reasonably in sequence and the injury does not according to the ordinary course of events follow from the act, they are not sufficiently connected to make the act a proximate cause." 217 Ala. 70, 114 So. 912 (1927). Nor was recovery allowed in Braden v. St. L.-S. F. Ry., 223 Ala. 659, 137 So. 663 (1931) for the injuries sustained by a fall from a ladder which plaintiff was climbing while attempting to put out a fire started by defendant railroad. The court stated that the complaint showed on its face that the act of defendant was not the proximate cause of plaintiff's injuries. None of these three cases turned on the contributory negligence doctrine; but, in all of them, especially in the Seale case, the injury was a more direct actual result of the fire than in the principal case. Yet, in each of them the court found that proximate causation was interrupted.

[18]St. Louis-S. F. R. R. v. Ginn, 264 P. (2d) 351, 355 (Okla. 1953).

causation.[19] In *Yazoo & M. V. R. R. v. Washington*,[20] the Mississippi court, impliedly overruling a case [21] decided two years before, held that the statute "in no way affects any liability for personal injuries,"[22] and therefore, an action for personal injuries or death had to be brought under the common law theory which includes proof of both negligence and proximate cause. Further, the Minnesota court in *Carr v. Davis*[23] held that, though under the railroad fire statute there is no necessity of proving negligence, the proximate causation rule is still applicable. The same court had previously declared that the railroad "may escape liability by showing that a new cause of plaintiff's injury intervened between the wrongful act and the final injurious result thereof, provided such intervening cause was not under the wrongdoer's control, could not by the exercise of reasonable diligence be anticipated as likely to occur, and except for which the injury would not have been done to plaintiff."[24]

On the other hand, a large number of the decisions have regarded the statutes as remedial in nature,[25] and would therefore concur with

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[19]See Yazoo & M. V. R. R. v. Washington, 113 Miss. 105, 73 So. 879 at 881 (1917); Union P. Ry. v. De Busk, 12 Colo. 294, 20 Pac. 752 at 755, 3 L. R. A. 350 at 352 (1889). In Lowden v. Shoffner Mercantile Co., 109 F. (2d) 956 at 958 (C. C. A. 8th, 1940), construing the Arkansas statute, and in Martin v. Railroad, 62 Conn. 331, 25 Atl. 239 at 240 (1892), the courts expressly found that proximate cause did exist, although they did not rule that the plaintiffs had to establish it for recovery. In the Martin case, the court said: "It will be presumed that the court below found as a fact that the injury was direct, and we cannot dispute that finding." 62 Conn. 331, 25 Atl. 239, 240 (1892). The question was held to be whether or not the company *caused* the damage to plaintiff. In Illinois C. R. R. v. Thomas, 109 Miss. 536, 68 So. 773, 775 (1915), where a question of concurrent causation was presented, the court found that the "setting out of the fire was *a* proximate cause of [plaintiff's] injury." A "concurrent negligence" statute allowed recovery in such a situation. It must be noted, however, that two years later, the Mississippi court reversed its position in Yazoo & M. V. R. R. v. Washington, 113 Miss. 105, 73 So. 879 (1917), see this comment, infra.

[20]113 Miss. 105, 73 So. 879 (1917).

[21]Illinois C. R. R. v. Thomas, 109 Miss. 536, 68 So. 773 (1915).

[22]113 Miss. 105, 73 So. 879, 881 (1917).

[23]159 Minn. 485, 199 N. W. 237 at 239 (1924).

[24]See Anderson v. Minneapolis, St. P. & S. S. M. Ry., 146 Minn. 430, 179 N. W. 45, 48 (1920).

[25]St. L.-S. F. R. R. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (1896); Lyman v. Boston & W. R. R., 58 Mass. 288 (1849); Hart v. Western R. R., 54 Mass. 99 (1847). See Eastern R. R. v. Relief Fire Ins. Co., 98 Mass. 420, 422 (1868); Note (1910) 35 L. R. A. (N. S.) 1017. The Mathews case indicated that the English common law rule of strict liability for fires set by railroads, unless clearly altered by statute, was not adopted by the courts in the New World, which, instead, placed such actions under the regular negligence rules. Statutes, such as that of Oklahoma, took the place of the common law rules of the courts on this side of the Atlantic with regard to railroad fires. Such statutes are remedial in nature. They place a

the principal case decision interpreting such a law liberally, as creating liability without fault for all damages actually flowing from the occurrence of the fire.[26] This liberal construction flows from the primary objects of the statutes, which are "to afford protection and indemnity ... against the dangers to which [one] ... is necessarily exposed from the conduct of the business which the railroad corporation is authorized by law to carry on for the benefit of the public and its own profit,"[27] and to relieve the injured party who is exposed to greater hazard "than ought to be left to the ordinary common law remedies."[28] In *Fraser-Patterson Lumber Co. v. Southern Ry.*,[29] a federal court, applying a South Carolina railroad fire statute, granted a motion to strike the defense of contributory negligence as an intervening cause. The court reasoned that at most contributory negligence was a concurrent cause which would not remove liability, since, "in an action brought under this statute, the question as to negligence, proximate cause or remote cause is eliminated, and the only inquiry is whether the case falls within the terms of the statute.[30] ... [U]nder the terms of the act, there can be no necessity for an inquiry as to whether the fire caused by the company or its agents was the proximate or remote cause of the [injury]."[31]

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special and exceptional liability upon railroads for any damages done to the property (or person) of another by fire communicated from locomotive engines; and, as such, it must clearly appear that those who invoke it, and those against whom it is invoked, are covered by its terms. Southern Ry. v. Power Fuel Co., 152 Fed. 917, 12 L. R. A. (N. S.) 472 (C. C. A. 4th, 1907); Hunter v. Columbia, N. & L. Ry., 41 S. C. 86, 19 S. E. 197 (1894).

[26]Hines v. Rittenberg, 262 Fed. 87 (C. C. A. 4th, 1919); Fraser-Patterson Lumber Co. v. Southern Ry., 79 F. Supp. 424 (W. D. S. C. 1948); Boston & M. R. R. v. Hartford Fire Ins. Co., 252 Mass. 432, 147 N. E. 904 (1925); Safford v. Boston & M. R. R., 103 Mass. 583 (1870); Midland V. R. R. v. Barton, 191 Okla. 359, 129 P. (2d) 1007 (1942); Hunter v. Columbia, N. & L. R. R., 41 S. C. 86, 19 S. E. 197 (1894); Thompson v. Richmond & D. R. R., 24 S. C. 366 (1866). See also Pittsburgh, C., C. & St. L. Ry. v. Chappell, 183 Ind. 141, 106 N. E. 403 at 405, Ann. Cas. 1918A, 627 at 630 (1914); Virginia Ry. v. London, 148 Va. 699, 139 S. E. 328 at 329 (1927).

[27]Eastern R. R. v. Relief Fire Ins. Co., 98 Mass. 420, 423 (1868).

[28]Lyman v. Boston & W. R. R., 58 Mass. 288, 291 (1849).

[29]79 F. Supp. 424 (W. D. S. C. 1948).

[30]79 F. Supp. 424, 425 (W. D. S. C. 1948).

[31]79 F. Supp. 424, 426 (W. D. S. C. 1948). "The terms of the law ... having eliminated all inquiry into the question of negligence and into the question of proximate and remote cause." Thompson v. Richmond & D. R. R., 24 S. C. 366, 368 (1866). The words, "by fire," in a South Carolina statute almost identical to the Oklahoma act were held to remove proximate cause considerations, and, if the fire originated from the railroad, the question was solely whether or not there was causation in fact, "for [the statute] ... declares in absolute terms, without any qualification, that the company shall be liable for [injury] ... by fire which originated ... [from the railroad]." 24 S. C. 366, 370 (1866).

Under the broad view of the statute as adopted in these latter cases, the decision in the principle case is legitimate if the legislature intended to modify or abrogate the common law rules of proximate causation as the Oklahoma court believed it did.[32] The fact that the railroads are in possession of extensive powers and privileges granted by the states and that the use of these powers and privileges is necessarily attended with dangers to persons and property along the line of the road may justify the imposition of a broad liability. It is not unjust for railroad companies to compensate all who suffer personal injuries and property damage from fires which the railroads originated, so long as the injured parties acted reasonably to save their property.

In the final analysis, the risk is not placed on the railroad merely because it is in a better financial position to bear the loss. "[I]n reality the risk is not wholly nor largely on them. They have the means of protecting themselves by insurance.... But, more than that, they have the means of indemnifying themselves, to some extent at least, by increased rates for passengers and freight. Presumptively, they adjust their tariff of charges in view of this liability."[33] By such means the risk of loss is passed on to those who ultimately bear it—the public, which through the legislature, levies this "indirect tax" upon itself to pay for these losses. Thus, the statute is designed to relieve the individual victim of the railroad fire from the hazards of litigation which may prevent him from recovering for his loss and to spread the cost of the loss over the entire public. The statutes may also stimulate the railroads to exercise a very high degree of care in operating trains and may promote efforts to improve five prevention appliances, thereby serving the public interest by avoiding needless destruction of property.[34]

GEORGE S. WILSON, III

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[32]Construing the same statute as that involved in the principal case, the Oklahoma court had previously held that expenses incurred in removal of cattle from a burned-over field, and in hauling them feed, were not too remote to be compensable. The court declared: "Where the law gives a remedy for a wrong done, the compensation should be equal to the injury sustained and the latter is the standard by which the former is to be measured and that the injured party is to be placed as nearly as may be in the situation which he would have occupied had not the wrong been done." Midland V. R. R. v. Barton, 191 Okla. 359, 129 P. (2d) 1007, 1010 (1942).

[33]Martin v. R. R. Co., 62 Conn. 331, 25 Atl. 239, 241 (1892).

[34]St. Louis-S. F. Ry. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (1896).

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