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Property-Dower as Interest in Land Entitling Wife To Obtain Share of Proceeds from Condemnation of Husband's Land [Shelton v. Shelton, S. C. 1954].

CASE COMMENTS

CONSTITUTIONAL LAW—EFFECT OF FOURTEENTH AMENDMENT AS ACCORDING A PRIVILEGE AGAINST SELF-INCRIMINATION. [United States Supreme Court]

It has long been understood as a general proposition that under the Constitution of the United States no person may be compelled to testify against himself.[1] The so-called "presumption of innocence" which prevails in all jurisdictions, federal and state, seems to be founded on the same basic idea. The meaning of this presumption, of course, is that in a criminal trial the prosecution has the burden of proving guilt.[2]

This burden on the prosecution, however, could be easily met if the person accused could be thrown on a rack and forced by physical pain to tell all he knows.[3] But since even innocent men would be likely to "confess" to crimes charged in order to escape physical pain, it would follow that such "confessions" would be unreliable. To guard against even the possibility of such indignities, all states have provisions in their constitutions granting defendants, witnesses, and persons questioned some protection against self-incrimination. The Fifth Amendment to the Federal Constitution, applicable as against the federal government, provides that "No person... shall be compelled in any criminal case to be a witness against himself...."[4] Or as commonly stated: Every person has a privilege against being forced to give answers to questions which are self-incriminatory. But whether or not the Fourteenth Amendment incorporates the Fifth Amendment privilege so as to make it applicable to the states has been much disputed. The Supreme Court of the United States, in *Palko v. Connecticut*,[5] by

[1]For a history of the development of the self-incrimination clause see Corwin, The Supreme Court's Construction of the Self-Incrimination Clause (1930) 29 Mich. L. Rev. 1.

[2]United States v. Morley, 99 F. (2d) 683 (C. C. A. 7th, 1938), cert. denied Morley v. United States, 306 U. S. 631, 59 S. Ct. 463, 83 L. ed. 1033 (1939); United States v. Vigorito, 67 F. (2d) 329 (C. C. A. 2nd, 1933), cert. denied Vigorito v. United States, 290 U. S. 705, 54 S. Ct. 373, 78 L. ed. 606 (1933); United States v. Gooding, 25 U. S. 460, 6 L. ed. 693 (1827).

[3]In 1487 the Star Chamber was vested with authority to compel defendants to testify under oath, and pursuant to this power torture was frequently employed. Corwin, The Supreme Court's Construction of the Self-Incrimination Clause (1930) 29 Mich. L. Rev. 1, 5.

[4]U. S. Const., Amend. V.

[5]302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

a divided decision has held that it did not. However, the question does not seem to be a dead one.[6] The Supreme Court has never decided whether the Fourteenth Amendment alone provides as against the states a privilege against self-incrimination.[7] If it does, however, the Court has not accorded it the high place given to the Fifth Amendment privilege.[8]

In the recent case of *Regan v. New York*[9] the Supreme Court was confronted with this problem of whether the Federal Constitution provides, as against the states, a privilege against self-incrimination. The Court divided six to two, with the majority failing to face the question squarely and instead deciding other issues involved and treating the answers to those other issues as sufficient to dispose of the case. It is submitted that the majority, in its attempt to avoid the Fourteenth Amendment self-incrimination issue, seems to have obliquely weakened the Fifth Amendment self-incrimination privilege.

Regan was appointed a police officer in the Police Department of the City of New York in 1942 and served in that capacity until March 27, 1951, at which time he resigned. During this period he was assigned as a plain-clothesman and charged with the duty of enforcing the state's gambling laws. Shortly before he resigned, Regan was called to testify before a grand jury. He appeared as directed, but prior to appearing before the grand jury he was given a printed form constituting a waiver of his state-granted immunity from prosecution for crime, based on answers he might give to questions asked by the grand jury.[10] After being told that unless he signed the waiver he would lose

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[6]See Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority (1954) 22 U. of Chi. L. Rev. 1. Also see Fairman, A Reply to Professor Crosskey (1954) 22 U. of Chi L. Rev. 144.

[7]See concurring opinion in Regan v. New York, 75 S. Ct. 585, 589 (1955). However, the language in Adamson v. California, 332 U. S. 46 at 53, 67 S. Ct. 1672 at 1675, 91 L. ed. 1903 at 1909 (1947), Palko v. Connecticut, 302 U. S. 319 at 323, 58 S. Ct. 149 at 151, 82 L. ed. 288 at 291 (1937), and Twining v. New Jersey, 211 U. S. 78 at 113, 29 S. Ct. 14 at 26, 53 L. ed. 97 at 112 (1908) indicates that the Fourteenth Amendment does not provide this privilege, but this was merely dictum.

[8]Compare Blau v. United States, 340 U. S. 159, 71 S. Ct. 223, 95 L. ed. 170 (1950) (which held that the Fifth Amendment accorded an unqualified privilege to remain silent) with Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908) (where trial judge, in a state criminal proceeding was permitted to instruct the jury that it might draw an unfavorable inference from the failure of a defendant to comment on the prosecutor's evidence), and Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903 (1947) (where state law permitted prosecutor and trial judge to comment on the accused's failure to take the stand.)

[9]75 S. Ct. 585 (1955).

[10]See New York Consolidated Laws Service, Penal Law, § 381, which provides: "...no person shall be prosecuted or subjected to any penalty or forfeiture for

his job as a policeman,[11] Regan signed the form.[12] On October 22, 1952, almost 22 months after he resigned as a policeman, Regan was again called before the grand jury, and was asked: ' "While you were a plain clothesman in the Police Department of the City of New York did you accept or receive any bribes from bookmakers or other gamblers?" '[13] Upon his refusal to answer on the ground that his answer might tend to incriminate him, he was taken before a judge who

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or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial." To the same effect see also Penal Law § 584 and § 996 relating to conspiracy and gambling respectively.

[11]Regan was required to sign this waiver under § 903 of the New York City Charter which provides: "If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Also see N. Y. Const. (1952) Art. I, § 6: "... any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

[12]The waiver of immunity read as follows: " 'I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, ... of The City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry or legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

" 'I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(signed) Michael J. Regan'."

(Witnessed and notarized.)

Regan v. New York, 75 S. Ct. 585, n. 4 (1955).

[13]Regan v. New York, 75 S. Ct. 585, 587 (1955).

ruled that the waiver of immunity he had previously signed was valid and that he must answer the question. Brought again before the grand Jury, Regan persisted in his refusal to answer, claiming a privilege against self-incrimination under the New York Constitution and the Federal Constitution. He was indicted for criminal contempt, tried by a jury, convicted and sentenced to twelve months in jail. On appeal the conviction was affirmed.[14] The Supreme Court of the United States granted certiorari,[15] but subsequently affirmed the decision of the New York court.

The majority opinion, written by Justice Reed, takes the position that even if the Federal Constitution accords a privilege against self-incrimination which is applicable to the states, the immunity from prosecution provided by New York statute removed any justification which Regan had for not testifying. The majority then treated questions of the existence of the privilege and of the validity of the waiver of the state immunity as separate and unrelated questions. Even then it was not decided whether the waiver was valid or invalid. Instead, validity and invalidity were assumed in the alternative. If the waiver is invalid, the opinion states, then Regan still has the protection of the state immunity, and so he had no excuse for not answering.[16] And if the waiver is valid, the opinion states, then it must have been voluntary, and if voluntary, then Regan cannot complain that when he answers the question he will no longer have the protection of the state immunity from prosecution.[17]

It is submitted that the majority reasoning erroneously failed to relate the question of whether the privilege against self-incrimination can be removed by granting an immunity from prosecution to the question of the effect on the privilege wrought by a waiver of the immunity from prosecution. The majority either: (1) assumes *sub silenio* that a federal privilege against self-incrimination, whatever the place in the Constitution the privilege originates, may be validly waived far in

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[14]People v. Regan, 282 App. Div. 775, 122 N. Y. S. (2d) 478 (1953), affirmed 306 N. Y. 747, 117 N. E. (2d) 921 (1954).

[15]Regan v. New York, 347 U. S. 1010, 74 S. Ct. 869, 98 L. ed. 1134 (1954).

[16]For a discussion of the validity of an immunity statute, see Note (1954) 2 Albany L. Rev. 173, which states that an immunity statute is valid as a substitute for the privilege so long as it affords protection co-extensive with the protection afforded by the privilege it replaces.

[17]The majority justifies not finally deciding the question of validity of the waiver on the ground that it will be soon enough to decide this when Regan is prosecuted for crime based on his answers to grand jury questions. It is reasoned that if the waiver is found valid at that time, then the prosecution would not offend the Federal Constitution, and if found invalid, then Regan would have his state immunity at the very time he needs it.

advance of any need for the protection afforded by that privilege; or (2) holds that what may not be accomplished in one step may be accomplished in two steps—by replacing the constitutional privilege with a statutory immunity and then requiring a waiver of the immunity. If it was the assumption that the privilege could not be waived before the questions were asked, then it seems to be questionable to say that if an immunity is given by one hand and a waiver of that immunity is taken with the other hand, the privilege has vanished.

In *Brown v. Walker*[18] the Supreme Court held that the Fifth Amendment privilege against self-incrimination could not be invoked against the federal government if the one claiming the privilege had been granted an immunity from prosecution which was as complete a protection as the privilege. The majority in the *Regan* case cited *Brown v. Walker* for the proposition that a complete state immunity from state prosecution also removes the justification for invoking against the state a federal privilege against self-incrimination.[19] However, the majority seemed to go further and treat the immunity from prosecution as a substitute for the privilege, which strictly speaking seems not to be the case. It may have been this apparent treatment which caused the majority to proceed on the theory that once the immunity came into the picture, the privilege had no relevance thereafter regardless of the later history of the immunity. The theory behind recognition of immunity as removing the justification for a privilege seems to be that if there is an immunity from prosecution nothing said can be incriminatory since there can be no prosecution under any criminal statute.[20] Thus, the evil the privilege is aimed to prevent would be as completely removed by the immunity as it would be by the privilege itself. If under the majority's assumption of validity of the waiver, the state-granted immunity will no longer prevent prosecution, then there is need for the privilege against giving self-incriminatory answers.

Although it could be hardly contended that the Federal Constitution prevents a state from requiring, as a condition to state employment, that a state-granted immunity be waived,[21] surely such state

[18]161 U. S. 591, 16 S. Ct. 644, 40 L. ed. 819 (1896).
[19]Regan v. New York, 75 S. Ct. 585, 587 (1955).
[20]See Note (1954) 2 Albany L. Rev. 173.
[21]A distinction must be drawn between upholding the validity of a waiver of constitutional protection and the compulsion to answer incriminating questions:
(1) sustaining a waiver is possibly proper in the area of job security—i.e., if the privilge has been waived, there can clearly be no claim that constitutional

action can not be allowed to defeat a privilege granted by the Federal Constitution. This was the position taken in the dissenting opinion written by Justice Black in the *Regan* case. The majority opinion seems to be based on the opposite view, however, since once it is decided that the assumption of validity of the waiver of the state-granted immunity makes that immunity unavailable for protection from state prosecution, it is concluded that Regan cannot complain since it was his voluntary act. The subsequent availability of a federal-granted privilege was ignored and, as pointed out, this silence was probably based on the view that the state immunity-waiver activity destroyed any privilege which had existed.[22]

It may be, however, that there is agreement among the majority to no greater extent than that the privilege, if available, was claimed too soon—that is, that the privilege could not be asserted to enable him to refuse to answer the questions, but rather should be asserted to prevent the answers from being introduced in evidence against him at such later time as he might be prosecuted for crimes revealed by his answers. This possibility seems to be indicated by the concurring opinion written by Chief Justice Warren, who was joined by Justice Clark, both of whom also joined in Justice Reed's majority opinion.[23]

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rights are violated when one is fired because he nevertheless claimed the privilege—

(2) but it does not follow that after no job is involved the same reasoning applies to prosecution for contempt of court for having claimed the privilege. As Justice Holmes stated: "The petitioner may have a constitutional right to talk politics, but he had 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 were offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control." McAuliffe v. Mayor, 155 Mass. 216, 29 N. E. 517 (1892). See note (1955) 12 Wash. & Lee L. Rev. 60.

[22]Of course the majority would probably answer that if the federal privilege had been destroyed, Regan was responsible, not the state. But, as pointed out, if this is so, it means that a state can require as a condition to employment the direct "voluntary" destruction of federal privileges before they are needed without going through the motions of first granting an immunity and requiring that the immunity be "voluntarily" waived as a condition to employment by the state.

[23]Without Chief Justice Warren and Justice Clark, the Reed opinion would have been the opinion of only three Justices. Eight Justices participated; two dissented and Justice Frankfurter concurred only in the result of the decision.

The concurring opinion states that if New York attempts to prosecute Regan for crime based on incriminatory answers he may give, the Equal Protection Clause of the Fourteenth Abendment may be violated on the ground that the immunity statute is not being applied uniformly. Regan v. New York, 75 S. Ct. 585, 589 (1955).

It is is an underlying consideration of the concurring opinion that the only effect of the privilege is that any testimony given under pain of going to jail for refusing to answer may, in a prosecution for crime based on answers, be excluded from evidence as coerced, then still another difference is thought to exist between the privilege invocable against the federal government and the privilege invocable against the state government. This difference turns on whether the right is only to exclude from evidence testimony coerced in violation of the privilege or whether the right is also to remain silent in reliance on the privilege. It is well established that the Fifth Amendment privilege, as against the federal government, includes, in addition to the right exclusion, the right to remain silent.[24] It is equally well established that a coerced confession may not be used in state prosecutions.[25] The latter exclusion, however, has been based on the Court's concept of "fair play" and not a concept of privilege violation. It has been said that due process "forbids compulsion to testify by fear of hurt, torture or exhaustion,"[26] or, stated another way, that a state may not substitute "trial by ordeal" for a court trial.[27] And as pointed out by the dissent in the *Regan* case, "it is certainly coercion to throw a man into jail unless he agrees to testify against himself."[28] If there is a federal privilege against self-incrimination which is applicable to the states, as is indicated by the *Regan* concurring and dissenting opinions and is assumed by the *Regan* majority opinion, then the privilege offers no real protection unless it accords a right to stand silent. It offers little solace to a person to tell him that, under the Federal Constitution, testimony coerced from him by a state may not be used against him in state prosecutions, but that the Federal Constitution does not prevent the state from throwing him in jail for refusing to succumb to the coercion. The dissenting opinion takes a position which offers the only

[24]Blau v. United States, 340 U. S. 159, 71 S. Ct. 223, 95 L. ed. 170 (1950); Arndstein v. McCarthy, 254 U. S. 71, 41 S. Ct. 26, 65 L. ed. 138 (1920); Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. ed. 1110 (1892); United States v. Burr, 25 Fed. Cas. 38, No. 14692e (C. C. D. Va. 1807).

[25]Rochin v. California, 342 U. S. 165, 72 S. Ct. 205, 96 L. ed. 183, 25 A. L. R. (2d) 1396 (1952); Watts v. Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. ed. 1801 (1949); Turner v. Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352, 93 L. ed. 1810 (1949); Harris v. South Carolina, 338 U. S. 68, 69 S. Ct. 1354, 93 L. ed. 1815 (1949); Haley v. Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. ed. 224 (1948); Lee v. Mississippi, 332 U. S. 742, 68 S. Ct. 300, 92 L. ed. 330 (1948); Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936).

[26]Adamson v. California, 332 U. S. 46, 54, 67 S. Ct. 1672, 1677, 91 L. ed. 1903, 1910 (1947).

[27]Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936).

[28]Regan v. New York, 75 S. Ct. 585, 590 (1955).

real protection of a privilege against self-incrimination: that the right to stand silent when incriminatory questions are asked should not depend on whether state or federal officials are doing the questioning.

In *Rogers v. United States*[29] the Supreme Court has previously held that the privilege against self-incrimination is claimed too late if it is not claimed when questions are first asked. The *Regan* case seems to have created a dilemma for witnesses, since the privilege may be also claimed too soon, even though claimed when questions are first asked. As pointed out by Justice Black in his dissent in the *Rogers* case: "On the one hand, they [witnesses] risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."[30]

It would seem that the Court should have faced the question of whether the Federal Constitution provides a privilege against self-incrimination as applicable to the states. It should have tested the incriminatory nature of the question asked as of the time when the questions were asked. If at that time there existed a complete state immunity from state prosecution based on the answers, then there would be no justification for claiming a privilege since there could be no possible incrimination. On the other hand, if there was no immunity at that time, then there could be incrimination. Any past immunity which is not available at the time questions are asked should not control, since otherwise a device to defeat the privilege is available to the states, and logically this device cannot be denied to the federal government. In avoiding the basic question of existence of a privilege applicable to the states, the Court seems to have weakened the privilege applicable to the federal government.

BEVERLY G. STEPHENSON

CRIMINAL LAW—WAIVER OF RIGHT OF ACCUSED TO BE PRESENT AT HIS TRIAL. [Pennsylvania]

Historically, the presence of the accused at his own trial has been considered such an important right as to have been called a necessary

[29]340 U. S. 367, 71 S. Ct. 438, 95 L. ed. 344 (1951).

[30]Rogers v. United States, 340 U. S. 367, 378, 71 S. Ct. 438, 444, 95 L. ed. 344, 351 (1951).

factor in the administration of justice.[1] However, the question of the scope of this right continues to be brought before the courts, as in the recent Pennsylvania case of *Commonwealth v. Diehl*.[2] Diehl was charged with shooting maliciously into a crowded tavern, and then engaging in a running gun battle with the police. The case was submitted to the jury late in the afternoon, at which time the court reporter, the defendant, and counsel for both prosecution and defense left the courtroom. After nine hours of deliberation, the jury returned. At the request of the judge, defense counsel had arrived at the court, but no effort was made to reach defendant, who was out on bail although apparently available. Then the judge told the jurors that there were no facilities for housing them, after which several questions and answers were interchanged by the court and the jury. The jury retired again and shortly reached a verdict of guilty, which was returned to and accepted by the court, again without the defendant being present. Defendant was then summoned for judgment, and sentence was imposed. Counsel for defendant did not make any protest concerning defendant's absence at these proceedings; but on appeal to the Supreme Court of Pennsylvania, the question was raised whether the defendant could waive his right to be present, and if so, whether his own conduct or the failure of his counsel to object, constituted such waiver.

Practically all the courts holding that the accused has the right to be present at his trial base their decisions on one of two grounds: first, that the defendant may face the jury and have the opportunity to

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[1]There is ample precedent for holding this right to exist. When trial by ordeal and battle were common, there was a necessity for the presence of the accused that he might do battle or undergo the ordeal. Commonwealth ex rel. Milewski v. Ashe, 363 Pa. 596, 70 A. (2d) 625 (1950); Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases (1916) 16 Col. L. Rev. 18 at 19. From this, as well as from ancient Hebrew jurisprudence, the common law derived the right. Commonwealth ex rel. Milewski v. Ashe, supra; Mendelsohn, Criminal Jurisprudence of the Ancient Hebrews § 111. Today, the right is expressed variously as emanating from the common law: Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250, 96 L. ed. 500 (1912); Gore v. State, 52 Ark. 285, 12 S. W. 564 (1889); State v. Hurlbut, 1 Root 90 (Conn. 1784); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); Prine v. Commonwealth, 18 Pa. 103 (1851); from statutes in at least 12 states, said to be declaratory of the common law, Fed. Rules Crim. Proc. No. 43 [see list of statutes in Amer. Law Inst., Code Crim. Proc. (1930) c. 14, § 287; interpreted in: Sneed v. State, 5 Ark. 431 (1843); State v. Gorman, 113 Minn. 401, 129 N. W. 589 (1911); Scott v. State, 113 Neb. 657, 204 N. W. 381 (1925)]; and from constitutions, both state, Notes (1950) 23 Temp. L. Q. 151 at 152; (1941) 14 So. Cal. L. Rev. 473 at 474, and federal, Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892); Commonwealth ex. rel. Turk v. Ashe, 167 Pa. Super. 323, 74 A. (2d) 656 (1950).

[2]378 Pa. 214, 107 A. (2d) 543 (1954).

poll it;[3] secondly, that the presence of the accused is required by a public interest in the life and liberty of its citizens.[4] The right to poll the jury is an ancient one. It is based on fundamental considerations of fairness in giving the accused the opportunity to know what is happening, and to assure himself that the verdict is that of each of the jurors. It is a matter of common knowledge that a certain psychical effect is produced upon the jurors by compelling them to render their verdict separately while face-to-face with the accused. The polling practice minimizes the danger of a juror being intimidated by his fellow jurors or others,[5] and there have been instances in which a jurior has changed his vote when polled by the defendant.[6]

If the requirement of presence is primarily for the benefit of the accused, there can be no objection to the court's allowing him to waive it. Indeed, courts have done so in certain types of cases on this theory.[7] Courts which have refused to recognize that the defendant may waive

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[3]Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250, 56 L. ed. 500 (1912); Ah Fook Chang v. United States, 91 F. (2d) 805 (C. C. A. 9th, 1937); State v. Hughes, 2 Ala. 102 (1841); Frank v. State, 142 Ga. 741, 83 S. E. 645 (1914); Barton v. State, 67 Ga. 653 (1881); State v. Way, 76 Kan. 928, 93 Pac. 159 (1907); State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888); Frey v. Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047 (1895); State v. Hope, 100 Mo. 347, 13 S. W. 490 (1890); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887); People v. La Babera, 249 App. Div. 254, 292 N. Y. Supp. 518 (1936), aff'd 274 N. Y. 339, 8 N. E. (2d) 884 (1937); Sargent v. State, 11 Ohio 472 (1842); Commonwealth ex rel. Milewski v. Ashe, 363 Pa. 596, 70 A. (2d) 625 (1950); Derden v. State, 56 Tex. Crim. 396, 120 S. W. 485 (1909); Stoddard v. State, 132 Wis. 520, 112 N. W. 453 (1907).

[4]Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892); Davis v. State, 258 Ala. 288, 62 S. (2d) 224 (1952); Gore v. State, 52 Ark. 285, 12 S. W. 564 (1889); People v. Guareno, 22 Cal. App. (2d) 82, 70 P. (2d) 504 (1937); Smith v. People, 8 Colo. 457, 8 Pac. 920 (1885); State v. Hurlbut, 1 Root 90 (Conn. 1784); Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896); Maurer v. People, 43 N. Y. 1 (1870); Prine v. Commonwealth, 18 Pa. 103 (1851); Andrews v. State, 2 Sneed 550 (Tenn. 1855); State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901).

[5]Sargent v. State, 11 Ohio 472 (1842); Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases (1916) 16 Col. L. Rev. 18 at 23.

[6]Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases (1916) 16 Col. L. Rev. 18 at 23.

[7]Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250, 56 L. ed. 500 (1912); Ah Fook Chang v. United States, 91 F. (2d) 805 (C. C. A. 9th, 1937); Nobel v. United States, 294 Fed. 689 (D. C. Mont. 1923), aff'd 300 Fed. 689 (C.C.A. 9th, 1924); State v. Hughes, 2 Ala. 102 (1841); Barton v. State, 67 Ga. 653 (1881); State v. Maxwell, 151 Kan. 951, 102 P. (2d) 109 (1940); Frey v. Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047 (1895); State v. Hope, 100 Mo. 347, 13 S. W. 490 (1890); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); People v. La Barbera, 249 App. Div. 254, 292 N. Y. Supp. 518 (1936), aff'd 274 N. Y. 339, 8 N. E. (2d) 884 (1937); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887); Sargent v. State, 11 Ohio 472 (1842); Fight v. State, 7 Ohio 180 (1835); Commwealth ex. rel. Milewski v. Ashe, 363 Pa. 596, 70 A. (2d) 625 (1950); Stoddard v. State, 132 Wis. 520, 112 N. W. 453 (1907).

his right to be present have uniformly done so on the theory that the public has an interest in protecting the life and liberty of each of its members, which interest would be subverted by allowing the return of the verdict in the absence of the accused.[8] In capital cases, this public interest has generally been found to be so strong that the defendant is not allowed to waive the right as a personal privilege.[9] But in misdemeanor cases, this general interest in life and liberty of all citizens is not regarded as important enough to prevent the defendant or his counsel from waiving the right to be present at the rendition of the verdict.[10]

The courts have not been wholly consistent in non-capital felony cases and have treated them variously as the same as capital cases, so that the privilege of waiver is denied,[11] or as the same as misdemeanor cases in which event waiver is permitted.[12] In refusing to reverse convictions because of a defendant's absence from the trial, courts have

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[8]Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892); Cook v. State, 60 Ala. 39 (1877); Smith v. People, 8 Colo. 457, 8 Pac. 920 (1885); State v. Hurlbut, 1 Root 90 (Conn. 1784); Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896); Maurer v. People, 43 N. Y. 1 (1870); Prine v. Commonwealth, 18 Pa. 103 (1851); Andrews v. State, 2 Sneed 550 (Tenn. 1855); State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901).

[9]Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892); State v. Hughes, 2 Ala. 102 (1841); Davidson v. State, 108 Ark, 191, 158 S. W. 1103 (1913); Frank v. State, 142 Ga. 741, 83 S. E. 645 (1914); State ex rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. (2d) 126 (1949); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); Maurer v. People, 43 N. Y. 1 (1870); Lee v. State, 144 Tex. Crim. 135, 161 S. W. (2d) 290 (1942); State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901).

[10]Cole v. State, 35 Okla. Crim. 50, 248 Pac. 347 (1926).

[11]Wells v. State, 147 Ala. 140, 41 So. 630 (1906); Cook v. State, 60 Ala. 39 (1877); Sneed v. State, 5 Ark. 431 (1843); Smith v. People, 8 Colo. 457, 8 Pac. 920 (1885); Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896); State v. Reed, 65 Mont. 51, 210 Pac. 756 (1922); Sargent v. State, 11 Ohio 472 (1842); Andrews v. State, 2 Sneed 550 (Tenn. 1855). In an early decision it was said: "... the defendant must appear, or there will be no propriety in receiving the verdict." State v. Hurlbut, 1 Root 90 (Conn. 1784). Also see, Lewis v. United States, 146 U. S. 370, 372, 13 S. Ct. 136, 138, 36 L. ed. 1011, 1012 (1892).

[12]Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250, 56 L. ed. 500 (1912); Ah Fook Chang v. United States, 91 F. (2d) 805 (C. C. A. 9th, 1937); Nobel v. United States, 294 Fed. 689 (D. C. Mont. 1923); aff'd 300 Fed. 689 (C. C. A. 9th, 1924); Wells v. State, 147 Ala. 140, 41 So. 630 (1906); Cook v. State, 60 Ala. 39 (1877); Gore v. State, 52 Ark. 285, 12 S. W. 564 (1889); Summeralls v. State, 37 Fla. 162, 20 So. 242 (1896); Barton v. State, 67 Ga. 653 (1881); State v. Way, 76 Kan. 928, 93 Pac. 159 (1907); State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888); State ex rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. (2d) 126 (1949); State v. Gorman, 113 Minn. 401, 129 N. W. 589 (1911); State v. Crocket, 90 Mo. 37, 1 S. W. 753 (1886); Ex parte Hodge, 24 N. J. Super. 564, 95 A. (2d) 156 (1953); Fight v. State, 7 Ohio 180 (1835); Prine v. Commonwealth, 18 Pa. 103 (1851); Andrews v. State, 2 Sneed 550 (Tenn. 1855). Also see Amer. Law Inst., Code of Crim. Proc. (1930) c. 14, § 287.

been influenced by other considerations than merely their conclusion as to the personal nature of the right to be present. Thus, when defendant was free on bail, it has been said that it is defendant himself, rather than the court, who has actual command over his person.[13] Further, the position is taken that the defendant should not be allowed to take advantage of his own wrongdoing in being absent from the courtroom when he has obligated himself to be present, and secured the obligation by the posting of bail.[14]

The Pennsylvania court in the *Diehl* case recognized the right of defendant to be present at his trial, but it accepted the view that the right could be waived in non-capital felony cases. The majority then went on to decide that the action of the defendant in leaving the courtroom with counsels and officers of the court when the case was submitted to the jury at the close of the day, and in failing to reappear—even without having been notified of the return of the jury at an unusual hour—constituted waiver of his right. The dissenting opinion took the view that defendant's absence was justified, and that he was not bound to return at the unusual hour or be absent at his own peril unless notified to return. The history of the right in Pennsylvania is interesting. In *Prine v. Commonwealth*,[15] the earliest Pennsylvania decision, counsel attempted to waive presence of the accused at the

[13]If defendant is incarcerated, clearly the court has command over his person. The court orders defendant to be brought to the trial, and this command is executed by the various officers of the court. If the court fails to order defendant to be brought to trial, all defendant's pleading with the jailer will be of no avail, and he will remain absent despite his protests. Yet, if defendant is on bail, it is he, not the judge, who has actual physical command over his person. Except insofar as he is influenced by the court's demand to attend, he is able to stay away at his pleasure. Nobel v. United States, 294 Fed. 689 (D. C. Mont. 1923), aff'd 300 Fed. 689 (C. C. A. 9th, 1924) Cook v. State, 60 Ala. 39 (1877); People v. Weinstein, 298 Ill. 264, 131 N. E. 631 (1921); State v. Maxwell, 151 Kan. 951, 102 P. (2d) 109 (1940); Frey v. Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047 (1895); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); Scott v. State, 113 Neb. 657, 204 N. W. 381 (1925); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887); Fight v. State, 7 Ohio 180 (1835); Lee v. State, 144 Tex. Crim. 135, 161 S. W. (2d) 290 (1942); State v. Biller, 262 Wis. 472, 55 N. W. (2d) 414 (1952); Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921).

[14]The defendant, on being admitted to bail, gives his promise that he will appear whenever the court has need of him, and his bail is security for this promise. If defendant then fails to appear when it is his duty to do so, he thereby breaks his promise, becomes a wrongdoer, and upon proper court order, he forfeits his bail. This is especially important in cases where defendant flees.Gore v. State, 52 Ark. 285, 12 S. W. 564 (1889); Barton v. State, 67 Ga. 653 (1881); State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888); State ex rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. (2d) 126 (1949); State v. Gorman, 113 Minn. 401, 129 N. W. 589 (1911); State v. Hope, 100 Mo. 347, 13 S. W. 490 (1890); State v. Vanella, 40 Mont. 326, 106 Pac. 364 (1910); Stoddard v. State, 132 Wis. 520, 112 N. W. 453 (1907).

[15]18 Pa. 103 (1851).

return of the verdict. The court emphatically denied any such power saying: "It is undoubtedly error to try a person for a felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence."[16] In *Lynch v. Commonwealth*,[17] decided a quarter of a century later, in a trial for larceny defendant left the courtroom just before the jury came in, and on being called, failed to appear. The court held that his actions constituted voluntary waiver of his right to be present. Though the majority in the *Diehl* case appears to have accepted the *Lynch* case as controlling, the reasoning there was considerably different from the interpretation placed upon it by the majority in the principal case. The *Lynch* decision turned on the theory that since at the time of the decision, the only "felonies" in Pennsylvania were crimes which had been punishable by death when William Penn died, and since larceny was not punishable by death at the time due to Penn's opposition to the extension of the death penalty, it was not a felony, but a lesser crime which did not carry with it sufficient public interest to prevent waiver of the right. In such lesser crimes, the right was said to be personal only, and the accused could be permitted to waive it.[18] This case did not, as the present court seemed to think, hold that a defendant accused of a *felony* could waive his right to be present at the rendition of the verdict.

Assuming, however, that defendant can waive his right to be present, the reasoning of the principal case is open to question on the court's interpretation of what constitutes "voluntary waiver." A "waiver" is the voluntary relinquishment of a known right. It is "essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts. . . ."[19] There must be a "knowing" waiver,

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[16]Prine v. Commonwealth, 18 Pa. 103, 104 (1851).

[17]88 Pa. St. 189 (1878).

[18]Lynch v. Commonwealth, 88 Pa. St. 189 (1878), followed on same reasoning in: Ex parte Hodge, 24 N. J. Super. 564, 95 A. (2d) 156 (1953); Jackson v. State, 49 N. J. L. 252, 9 Atl. 740 (1887).

[19]Freedman v. Fire Ass'n of Philadelphia, 168 Pa. St. 249, 32 Atl. 39, 40 (1895). That the doctrine is as broad in criminal cases as in civil cases is pointed out in Attorney General ex rel. O'Hara v. Montgomery, 275 Mich. 504, 267 N. W. 550, 558 (1936) when it is also said: "A waiver is an intentional relinquishment of a known right with knowledge of its existence and an intention to relinquish it." Hohag v. Northland Pine Co., 147 Minn. 38, 179 N. W. 485 (1920); S. & E. Motor Hire Corp. v. New York Indemnity Co., 225 N. Y. 69, 174 N. W. 65 (1930).

Freedman v. Fire Ass'n of Philadelphia, supra at 41: (Being essentially a matter of intention, "no act would be evidence of a waiver unless done with know-

for no waiver is "voluntary" in the legal sense unless the one who is said to have waived his right had knowledge of all material facts. Therefore, before the defendant in the principal case could properly be held to have waived his right by failing to appear, it was imperative that he have the information that the court was about to give additional instructions or receive the verdict.[20] The primary duty to impart this information to the defendant is apparently on the court;[21] and a secondary duty lies on the prosecuting attorney, as guardian of the public interest, to bring the facts to the defendant's attention unless, of course, defendant has already manifested his intention to

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ledge. . . ."); Decker v. Sexton, 19 Misc. 59, 43 N. Y. Supp. 167, 171 (1896): ("Waiver implies as election of the party . . . to forego some advantage which he might, at his option, have demanded or insisted upon . . . and must be by one in possession of full knowledge of the material facts, and with intent to waive."). The existence of the intention to waive may, of course, be effected by the omission or failure of a party to assert in his behalf an existing right, but this inference can only arise if the act of omission was preceded by a notice. Federal Life Ins. Co. v. Whitehead, 73 Okla. 71, 174 Pac. 784 (1918).

[20]State v. Way, 76 Kan. 928, 93 Pac. 159, 163 (1907): ("On all accounts reasonable exertion should always be made to procure the attendance of the defendant. . . .") State v. Muir, 32 Kan. 481, 4 Pac. 812 (1884); Strasheim v. State, 138 Neb. 651, 294 N. W. 433 (1940); State v. Shutzler, 82 Wash. 365, 144 Pac. 284 (1914);; Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921) (defendant was warned before he left courtroom). Also see, State v. Perkins, 40 La. Ann. 210, 2 So. 647, 648 (1888) (proclamation made for accused); Lynch v. Commonwealth, 88 Pa. St. 189, 194 (1878); State v. Aikers, 87 Utah 507, 51 P. (2d) 1052, 1056 (1935). Cf. Scott v. State, 113 Neb. 657, 204 N. W. 381 (1925); State v. Biller, 262 Wis. 472, 55 N. W. (2d) 414 (1952). The opinion of the Court in the principal case quotes Commonwealth ex rel. Milewski v. Ashe, 363 Pa. 596, 70 A. (2d) 625, 629 (1950), but fails to note the language there quoted which says: ". . . but even when a defendant in a felony case is at liberty he and his counsel should be given reasonable notice, if it is practicable so to do, that the jury is about to return its verdict." Commonwealth v. Diehl, 378 Pa. 214, 107 A. (2d) 543 at 545 (1954). In pointing out this defect in the analysis of the Milewski case, supra, the dissenting opinion observed: "It will be noted that the Chief Justice said that in felony cases (which this one is), the defendant *and* his counsel should be notified. The Chief Justice did not say the defendant *or* his counsel. Nor is there any representation in this case that it was not practicable to notify the defendant. Thus, this Milewski case is authority to the direct contrary of the principle for which the majority cites it." Commonwealth v. Diehl, supra at 551. In answer to the attempted explanation of the majority that the direction to notify counsel and defendant is merely advisory, it will be noted that the language in the Milewski case is not dictum, but rather appears in the conclusions—the holding of the court.

[21]State v. Way, 76 Kan. 928, 93 Pac. 159 (1907); State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888); Derden v. State, 56 Tex. Crim. 396, 120 S. W. 485 (1909); State v. Shutzler, 82 Wash. 365, 144 Pac. 284 (1914). Also see, Lynch v. Commonwealth, 88 Pa. St. 189, 194 (1878). Cf. Scott v. State, 113 Neb. 657, 204 N. W. 381 at 382 (1925) where it was said that though failure to notify defendant was technically erroneous, it was not prejudicial in that case.

waive, by flight or otherwise.[22] No one undertook to inform Diehl in the principal case, and no action of his had indicated an intention to waive his right in this regard.

The majority opinion stressed the fact that the defendant was represented by competent counsel, who failed to object to defendant's absence from court.[23] It must be remembered, however, that counsel merely "represents" the accused and cannot exercise the latter's personal rights without authorization. Thus, in every jurisdiction in which the question has been considered, it has been held that the right being personal to the defendant, in a non-capital felony case, counsel cannot waive it—even expressly—unless the affirmative assent of the accused appears.[24] Even in circumstances in which it is held that a defendant can waive his right to be present by his actions, his acts must be sufficient to show a specific intent to waive, for mere neglect, or unavoidable or unintentional conduct is usually insufficient.[25] "[A]n

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[22]Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892). Justice Musmanno, in his dissent in the principal case, declared: "The next person in public authority is the district attorney. He is a quasi-judicial officer and a responsibility devolves upon him as well as the judge to protect the constitutional rights of the defendant." Commonwealth v. Diehl, 378 Pa. 214, 107 A. (2d) 543, 548 (1954).

[23]"In the absence of such ... [objection] there was no violation of constitutional rights...." Commonwealth v. Diehl, 378 Pa. 214, 107 A. (2d) 543, 545 (1954).

[24]Diaz v. United States, 223 U. S. 442, 32 S. Ct. 250, 56 L. ed. 500 (1912); Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. ed. 1011 (1892); Wells v. State, 147 Ala. 140, 41 So. 630 (1906); People v. La Barbera, 249 App. Div. 254; 292 N. Y. Supp. 518 (1936) aff'd 274 N. Y. 339, 8 N. E. (2d) 884 (1937); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887); Cole v. State, 35 Okla. Crim. 50, 248 Pac. 347 (1926); Prine v. Commonwealth, 18 Pa. 103 (1851).

[25]Analysis of cases in which the question was raised as to whether or not certain conduct constituted waiver shows them to fall into a pattern. It is clear that flight by the defendant does constitute waiver. Gore v. State, 52 Ark. 285, 12 S. W. 564 (1889); Fight v. State, 7 Ohio 180 (1835). Too, if defendant has deliberately absented himself or otherwise manifested his intent to waive, the courts have easily found waiver. State v. Maxwell, 151 Kan. 951, 102 P. (2d) 109 (1940); State v. Biller, 262 Wis. 472, 55 N. W. (2d) 414 (1952); Hill v. State, 17 Wis. 675 (1864) (defendant went out as the jury filed in, returning immediately after verdict was received). The court, after warning the defendant that it would receive a verdict in his absence at night, was justified in finding waiver, since defendant had full knowledge of the facts. Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921). In other cases, when the court remained in session, defendant knew he should be there and his absence showed an intent to waive. State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888); Scott v. State, 113 Neb. 657, 204 N. W. 381 (1925). In State v. Way, 76 Kan. 928, 93 Pac. 159 (1907), the court allowed waiver when defendant was absent without excuse by the court, although at page 163, the court said: "Excusing the defendant temporarily from attendance upon the court ... fairly implies that the trial is not to be proceeded with until his return." The defendant and his counsel, along with all other officers and employees of the court except the bailiff,

absence, though in somewhat serious negligence, which was neither purposeful, deliberate, nor under circumstances from which such an intention could be presumed, would not be voluntary."[26] The view of the dissent that no such affirmative action as would manifest an intent to waive was committed by defendant in the principal case seems sound.

In view of these precedents and the theories upon which they are grounded, it is submitted that the Supreme Court of Pennsylvania erred in affirming the conviction of Diehl. The *Lynch* case,[27] upon which the majority opinion bases its reasoning, is clearly distinguishable in law, and the *Milewski* case,[28] as it is interpreted by the majority to allow the trial to proceed without defendant's presence, does not stand as authority for the view that defendant under these facts has exercised his election to waive his right to be present at this phase of his trial. The absence of Diehl was not "voluntary," because it was not with full knowledge of the material facts. Since he was excused by the court at adjournment, although the jury was still out, there was a fair implication that the trial would not proceed until his return, or at least until he was summoned or given reasonable notice to appear.[29] The decision in the *Diehl* case deprives the accused of a substantial right without justification and without corresponding benefit to the state.

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were excused by the court in the principal case. Likewise, if defendant fails to appear at the appointed time for opening of the court, he is said to be absent without leave of the court and thereby to waive his right. Frey v. Calhoun Circuit Judge, 107 Mich. 130, 64 N. W. 1047 (1895).

However, under facts similar or analogous to those of the principal case, where the time at which the jury returns is unusual, or is not a scheduled time for the transaction of business and no notice is given that the court will conduct proceedings at such a time, there is generally said to be no waiver. Wells v. State, 147 Ala. 140, 41 So. 630 (1906) (verdict returned during recess for lunch); State v. Muir, 32 Kan. 481, 4 Pac. 812 (1884) (Sunday); Strasheim v. State, 138 Neb. 651, 294 N. W. 433 (1940) (additional instructions before court scheduled to open); Derden v. State, 56 Tex. Crim. 396, 130 S. W. 485 (1909) (Sunday); State v. Shutzler, 82 Wash. 365, 144 Pac. 284 (1914) (Sunday). Cf. Barton v. State, 67 Ga. 653 (1881) (11:00 P. M. but defendant had made independent arrangements for notifying him which did not function).

[26]Derden v. State, 56 Tex. Crim. 396, 120 S. W. 485, 488 (1909).

[27]Lynch v. Commonwealth, 88 Pa. St. 189 (1878).

[28]Commonwealth ex rel. Milewski v. Ashe, 363 Pa. 596, 70 A. (2d) 625 (1950). See discussion, note 20, supra.

[29]On all accounts, reasonable exertion should always be made to procure the attendance of the defendant. "Excusing the defendant temporarily from attendance upon the court . . . fairly implies that the trial is not to be proceeded with until his return." State v. Way, 76 Kan. 928, 93 Pac. 159, 163 (1907).

EQUITY—POWER OF COURT TO ORDER OPERATION ON CHILD OVER PARENTAL OBJECTION FOR PURPOSE OF PREVENTING HARMFUL PSYCHOLOGICAL REACTIONS IN CHILD. [New York]

The search through the years by courts and legislative bodies for a satisfactory recourse against a parent's conduct detrimental to an infant child unable to care for himself has assumed special significance in the light of modern medical advances. Parental failure to provide medical treatment for children has been the subject of criminal action against the parent, at common law or pursuant to statute, for non-support or neglect, or, where death results, for manslaughter.[1] Also a parent may be civilly liable for the costs of medical treatment furnished as a "necessary" to his child by a third party.[2]

Preventive measures in the interest of infant welfare have traditionally been attempted through an appeal to the court, in an equity-type proceeding, for the exercise of those powers delegated by the state

[1]People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903) (child died—conviction of father of statutory misdemeanor sustained); Beck v. State, 106 Okla. 138, 233 Pac. 495 (1925) (same); Commonwealth v. Breth, 44 Pa. Co. Ct. 56 (1915) (child died—father convicted of involuntary manslaughter); State v. Barnes, 141 Tenn. 469, 212 S. W. 100 (1919) (child died—case remanded for trail on homicide or manslaughter). Regarding neglect as a common law misdemeanor, a basis which the predominance of various forms of neglect statutes has rendered nearly useless, see Matter of Ryder, 11 Paige 185, 42 Am. Dec. 109 (N. Y. 1844). See, in general: Cawley, Criminal Liability in Faith Healing (1954) 39 Minn. L. Rev. 48.

[2]Lufkin v. Harvey, 131 Minn. 238, 154 N. W. 1097 (1915); Greenspan v. Slate, 12 N. J. 426, 97 A. (2d) 390 (1953) (citing numerous cases); Owen v. Watson, 157 Tenn. 352, 8 S. W. (2d) 484 (1928); Note (1921) 10 A. L. R. 1145. Also, see: Morrison v. State, 252 S. W. (2d) 97, 103 (Mo. App. 1952); Mitchell v. Davis, 205 S. W. (2d) 812, 813 (Tex. Civ. App. 1947).

Some cases have denied that there is a common law duty of a parent to maintain his child, holding that it is at most a "moral" or "natural" duty which will not alone support an action for necessaries. Hunt v. Thompson, 4 Ill 179 (1841); Hollingsworth v. Swedenborg, 49 Ind. 378 (1875); Freeman v. Robinson, 38 N. J. L. 383 (1876). But it is interesting that a failure to perform this moral duty has been found not be be "moral turpitude" in deportation proceedings. N. Y. Times, December 5, 1952, p. 29, col. 5. Holding that a child cannot maintain an action for necessaries against his parent even if the duty of support is legally enforceable, because of a reluctance to interfere directly in the delicate family relationship: Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Buchanan v. Buchanan, 170 Va. 458, 197 S. E. 426 (1938). And see: Yarborough v. Yarborough, 290 U. S. 202, 208, 54 S. Ct. 181, 184, 78 L. ed. 269, 274, 90 A. L. R. 924, 928, (1933); 4 Vernier, American Family Laws (1936) 56. Contra: Simonds v. Simonds, 81 App. D. C. 50, 154 F. (2d) 326, 13 A. L. R. (2d) 1138 (1946); Upchurch v. Upchurch, 196 Ark. 324, 117 S. W. (2d) 339 (1938); Myers v. Anderson, 145 Kan. 775, 67 P. (2d) 542 (1937).

For an exhaustive tabulation by state of statutory civil and criminal liability on the subject of child support, see 4 Vernier, American Family Laws (1936) 66 et seq.

as *parens patriae*.[3] In general, the decree which may result therefrom has taken the form of a change in custody of the child to accomplish the desired purpose.[4] Such attempts as have been successfully maintained to prevent the evils of child neglect from a parent's prospective refusal to provide or permit medical care adhere flexibly to that pattern of employing custodial control, through transferring the child to the care of another order to secure authorization for the necessary treatment.[5]

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[3]Insurance Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580 (1880); Petition of Ferrier, 103 Ill. 367 (1882); McCord v. Ochiltree, 8 Blackford 15 (Ind. 1846); Ex Parte Badger, 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286 (1920); In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933). For numerous other cases see Note (1921) 14 A. L. R. 308.

[4]E.g., Ex Parte Badger, 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286 (1920) (custody of children awarded to mother on bill in equity or maintenance against the father); Ayman v. Roff, 3 John. 49 (N. Y. 1817) (where twelve year old wife was made ward of the court because she was unaware of the obligations of marriage; injunction issued against husband contacting her); Wellesley v. Wellesley, II Bligh N. S. 124, 4 Eng. Rep. 1078 (1828) (early case of custodial control exercised by the court to the exclusion of father because of his unhealthy influence).

In a syllabus the Illinois Supreme Court once said: "In determining the fitness of the person to whom the custody of infants shall be given to act as guardian, the court of chancery is not bound down by any particular form of proceeding.... No certain rule can be laid down for its government, in all cases, except that the best interests of the child must be consulted." Cowles v. Cowles, 8 Ill. (3 Gilman) 435 (1846).

[5]People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952), cert. den. 344 U. S. 824, 73 S. Ct. 24, 97 L. ed. 642 (1952) (guardian appointed by court to have blood transfusion for infant authorized by him); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952) (infant made ward of the court for same purpose); In re Carstairs, 115 N. Y. S. (2d) 314 (1952) (infant remanded to hospital for psychiatric study); In re Rotkowitz, 175 Misc. 948, 25 N. Y. S. (2d) 624 (1941) (direct order to have operation performed over objection of father upon petition of mother charging neglect); In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933) (court undertook to perform parents' duty to have eye operation performed where parents refused to discharge that duty themselves); In re Tuttendario, 21 Pa. Dist. 561 (1911), as cited in Note (1953) 30 A. L. R. (2d) 1138, 1141 (Society for the Prevention of Cruelty to Children would have received custody to have operation performed if facts had justified overriding parents' wishes); Heinemann's Appeal, 96 Pa. 112, 42 Am. Rep. 532 (1880) (guardian appointed to procure medical aid which father would not); Mitchell v. Davis, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947) (custody awarded Juvenile Officer in order that he might authorize medical care). Recognition is some times made, arguendo, of the courts' custodial powers over children in need of medical care which is refused by parents: Snyder v. Mason, 328 Mich. 277, 43 N. W. (2d) 849 (1950); In re DuMond, 196 Misc. 16, 92 N. Y. S. (2d) 805 (1949); Walsh v. Walsh, 146 Misc. 604, 263 N. Y. Supp. 517 (1933).

The importance of this class of litigation should not be gauged by the small number of reported cases because although most cases of child neglect never reach court, the settlement of those are doubtless governed by prevailing case law.

A remarkable variation of that loosely defined practice recently appeared in a New York children's court in *In re Seiferth*.[6] That case was a proceeding for an order to have a twelve-year-old boy's severe harelip and cleft palate surgically corrected over his father's objection raised pursuant to what the court found to be his "personal philosophy."[7] Though the court was positive in its opinion that under normal conditions such an affliction is a proper subject for medical treatment, it declined to make an absolute order because there appeared to be a danger that the child's mind had been soo deeply conditioned by his father's hostility to medical care that forcing him to undergo treatment might cause severe emotional reactions. Therefore, a decree was issued restraining the father from interfering with discussions to be held with the boy by a reasonable number of persons as designated by the court for the purpose of "acquainting the child with the benefits accruing to him from promptly submitting to the recommended operations."[8] The operation was ordered to be performed "as soon as practicable after the child consents,"[9] and at the expense of the father, with financial aid to be provided by the state if necessary.

The *Seiferth* case bears the original and perhaps laudable signigificance of first recognizing the duty of the state as *parens patriae* to prevent the harmful *mental* effects of drastically unsound parental judgment. Historically, parental authority has been accorded frequent judicial lip service concerning its latitude and respected position in the eyes of the law, but these declarations are often made as a preface to holding against the exercise of that natural right.[10] How-

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For example, in one year the New York City Society for Prevention of Cruelty to Children adjusted 2425 of 2783 cases of "abuse and neglect" out of court. N. Y. Times, Feb. 19, 1953, p. 20 col. 1.

The problem of parental refusal to allow medical treatment has twice been found to have the public importance necessary to justify the taking of appellate jurisdiction, notwithstanding that the question became moot pending appeal. People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952).

[6]127 N. Y. S. (2d) 63 (1954).

[7]In re Seiferth, 127 N. Y. S. (2d) 63, 64 (1954).

[8]In re Seiferth, 127 N. Y. S. (2d) 63, 65 (1954).

[9]In re Seiferth, 127 N. Y. S. (2d) 63, 65 (1954). It is remarkable that the court, upon concluding that the child was capable of "making his own decision," nonetheless felt certain of the success of its own "conditioning" process which the decree itself undertook in attempting to offset the father's influence.

[10]Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. ed. 645 (1943); Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. (N. S.) 203 (1905); Denton v. James, 107 Kan. 729, 193 Pac. 307, 12 A. L. R. 1146 (1920); People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903); Mitchell v. Davis, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947). A parent's discretion includes at least two com-

ever, such broad encroachments thereupon as compulsory education, restrictions on child labor, and compulsory vaccination differ from enforced medical treatment. The United States Supreme Court has indicated that the former type of impositions would be enforced over the objections of the very persons on whom they take effect, as well as over parental objection to having them applied to their children.[11] Hence, no problem of invasion of parental discretion in such matters seems to exist separately from a general limitation upon an individual's rights concerning himself. But medical treatment of an ailment not dangerous to others, and not involving a probability of one's becoming a state dependent, cannot be ordered over the competent objection of the would-be recipient, even if his life is at stake.[12] Therefore, the isolated question of curtailment of parental discretion does arise in seeking to enforce the duty of the parent to provide medical treatment for his child.

In determining the nature of the parent's duty to provide medical care, the courts have borrowed from general concepts of tort and criminal law. In an action for personal injury to a child, where the defense was interposed that parental negligence in providing medical care was an aggravating factor increasing the damage, or even an intervening force in the chain of proximate causation, the rule has been adopted that the parent, in promoting his child's recovery, must exercise the reasonable care to be expected of an ordinarily prudent parent under like circumstances.[13] This test has received implied approval from writers for general application to parental conduct, re-

ponents relevant to the Seiferth decision: the right to determine in the first instance what is "necessary" for the child, see 39 Am. Jr., Parent & Child § 113, and the right to determine the child's religious education, see Denton v. James, 107 Kan. 729, 193 Pac. 307, 311, 12 A. L. R. 1146, 1152 (1920); Note (1916) 29 Harv. L. Rev. 485.

[11]Pierce v. Society of Sisters of the Holy Names, etc., 268 U. S. 510, 534, 45 S. Ct. 571, 573, 69 L. ed. 1070, 1077, 39 A. L. R. 468, 476 (1925) (compulsory education); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U. S. 320, 34 S. Ct. 60, 58 L. ed. 245, L. R. A. 1915A. 1196 (1913) (restrictions on child labor); Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. ed. 643, 3 Ann. Cas. 765 (1904) (compulsory vaccination); Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. ed. 645 (1943) (restriction of religious actviity).

[12]See: Prince v. Massachusetts, 321 U. S. 158, 170, 64 S. Ct. 438, 444, 88 L .ed. 645, 654 (1943); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 14, 1 L. R. A. (N. S.) 439, 443 (1905); Morrison v. State, 252 S. W. (2d) 97, 103 (Mo. App. 1902); Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 93, 52 L. R. A. (N. S.) 505, 508 (1914). But see State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 1067 (1905), where it is implied that the state has the power to require a person to procure the services of a physician who has been approved by the state.

[13]Lange v. Hoyt, 114 Conn. 590, 159 Atl. 575 (1932).

gardless of the nature of the litigation.[14] *People v. Pierson*,[15] the leading Amercican case asserting criminal liability for parental denial of medical attendance to a child for religious reasons, held "that a reasonable amount of discretion is vested in parents charged with the duty of maintaining and bringing up infant children; and that the standard is at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician."[16] Substantially the same concept of neglect has been applied in one case as a means by which the jury specially found a violation of a neglected-child statute by a parent, upon which finding the court then based an order for a change in custody of the child to obtain medical treatment for him.[17]

There is considerable interdependency among the tests applied by courts in these several types of actions relating to the medical needs of children. In determining criminal liability, the decisions often discuss what constitutes a "necessary" which a parent is charged with providing for a child; and in actions to recover payment for "necessaries," parental conduct has been tested by whether it amounts to a statutory misdemeanor of neglect or non-support.[18] In preventive proceedings, such as the *Seiferth* case, the courts sometimes rely heavily upon whether the parent's refusal to provide medical attention would, if not overridden by judicial order, be criminally or civilly actionable.[19]

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[14]39 Am. Jur. 673, n. 6. By the introduction of this consistency the child has a theoretically assured recourse either against the parent or the original tortfeasor. To allow a ruler of wider parental discretion in conducting the recovery of the child would likewise be consistent insofar as a single rule would prevail for actions against the parent for neglect and for actions against the original tortfeasor. However, that solution might cause the original tortfeasor to suffer an increase in his liability through what might be called "discretionary" negligence on the part of the injured child's parents, in failing to hasten recovery with adequate medical treatment.

[15]176 N. Y. 201, 68 N. E. 243 (1903).

[16]176 N. Y. 201, 68 N. E. 243, 244 (1903).

[17]Mitchell v. Davis, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ App. 1947).

[18]E.g., Greenspan v. Slate, 12 N. J. 426, 97 A. (2d) 390 at 396 (1953) (action for "necessaries"); People v. Pierson, 176 N. Y. 201, 68 N. E. 243 at 245 (1903) (criminal action); Cowley v. People, 83 N. Y. 464 at 473 (1881) (criminal action); Commonwealth v. Hoffman, 29 Pa. Co. Ct. 65 (1903) (criminal action); Owen v. Watson, 157 Tenn. 352, 8 S. W. (2d) 484 (1928) (action for "necessaries"). It is suggested in Note (1954) 32 Chi-Kent L. Rev. 283 at 285, that an inference is supplied by Regina v. Beer, 32 Can. L. J. 416 (1896), to the effect that penal statutes regarding child neglect do not create a right to recover for "necessaries" furnished a child neglected in violation of that statute.

[19]People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952); In re Carstairs, 115 N. Y. S. (2d) 314 (1952); In re Rotkowitz, 175 Misc. 948, 25 N. Y. S. (2d) 624 (1941); In re

Notably, in this manner, *People v. Labrenz*,[20] in affirming an order for a blood transfusion for a young child which was opposed by his parents, held that the statutory offense of neglect is "the failure to exercise the care that the circumstances justly demand.... It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances changes."[21] This definition is well suited to a justification of the result of the *Seiferth* case in superseding the wishes of the father in order to protect the child's psychological tranquility, because "circumstances" might well include not only advancements in the fields of psychological treatment and cleft palate surgery but also the increased regard for emotional problems amidst the elaborate tensions of modern society.

Thus, the striking innovation of the *Seiferth* case is that the court, though presumably assuming that the harmful effects of a harelip and cleft palate are no more than psychological, found that type of harm to be sufficient reason for setting in motion its determination to have the condition corrected against the father's wishes.[22] Theretofore, direct judicial interference with parental authority on behalf of an infant in the name of *parens patriae* appears to have been factually supported, at least in reported cases, by not less than a substantial threat to the life or health of the child.[23] One court has ordered psychiatric treatment of a minor with apparent disregard for the wishes of his parents, their wishes being unascertainable from the opinion; but that was in a case in which a preponderance of the evidence indicated the likelihood of his suffering from a genuine mental ailment.[24] The controlling principle of *parens patrie* has, however, been

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Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933); Mitchell v. Daivs, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947); In re Hudson, 13 Wash. (2d) 673, 126 P. (2d) 765 at 779 (1942).

[20]411 Ill. 618, 104 N. E. (2d) 769 (1952), cert. denied. 344 U. S. 824, 73 S. Ct. 24, 97 L. ed. 642 (1952).

[21]411 Ill. 618, 104 N. E. (2d) 769, 773 (1952).

[22]Statutory jurisdiction for the Seiferth case is found in the New York Children's Court Act, Laws 1930, c. 393 § 6, which in part provides that the Children's Court shall have jurisdiction over all "cases or proceedings involving... children who are physically handicapped...." Clearly a cleft palate is a "physical handicap" even though its consequences may be purely mental.

[23]People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952); In re Carstairs, 115 N. Y. S. (2d) 314 (1952); In re Rotkowitz, 175 Misc. 948, 25 N. Y. S. (2d) 624 (1941); In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933); Mitchell v. Davis, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947).

[24]In re Carstairs, 115 N. Y. S. (2d) 314 (1952). The commitment of an infant for psychiatric treatment regardless of parental desires may be ordered upon a finding that the child is a delinquent, but this measure is essentially an alternative

once stated so as to include a regard for the child's "intellectual being"[25] although the usual basis for contravention of parental desires is limited to cases of "medical treatment necessary for the protection of [the child's] life or limb."[26]

In re Vasko,[27] cited as authority for the statement in the *Seiferth* case that the "law is... well established that the court has power to interfere not only in matters involving life, health and physical welfare, but also psychological well-being of children,"[28] made no mention whatever of any psychological effect which the child's eye affliction there involved may have had. Although advanced stages of that disease promised a repelling physical appearance, the decisive medical finding was that "there is no doubt the child will die of it"[29] if left to the course of nature. Despite the assertion in the *Vasko* case that the legislature intended through the Children's Court Act "to invest the court with wide powers of discretion... in advancing the well-being of the child,"[30] it has been suggested that the case is poor authority for the *Seiferth* decision.[31]

Beyond the difficulties of extending court protection of infants to their emotional well-being lies a necessity of balancing against the policy of non-interference with parental authority the relative import-

to other restraint upon him as much for the protection of society as for benefit to the child. See, e.g., In re Weintraub, 166 Pa. Super. 342, 71 A. (2d) 823 (1950).

[25]Ex Parte Badger, 286 Mo. 139, 226 S. W. 936, 939, 14 A. L. R. 286, 292 (1920). Where an operation was ordered over parental objection for a child deformed by poliomyelitis, a New York court said: "The physical well-being of children is the basis for the moral care, proper training and guidance. A child who is deprived of the use of its limb which becomes progressively worse cannot have a sense of security. It feels different from others. It suffers from a sense of rejection. It cannot take its proper place in the group in which it lives. To the extent that medical science can correct the deformity... that service should be accorded." In re Rotkowtiz, 175 Misc. 948, 25 N. Y. S. (2d) 624, 626 (1941). Thus the requirement that the child's physical well-being be threatened was treated as a means to a broader end—one that closely resembles the psychological well-being in consideration of which the court in the Seiferth case extended relief.

[26]Note (1953) 30 A. L. R. (2d) 1138. Accord: People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952); In re Carstairs, 115 N. Y. S. (2d) 314 (1952); In re Rotkowitz, 175 Misc. 948, 25 N. Y. S. (2d) 624 (1941); In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933); Mitchell v. Davis, 205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947). "Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act." People v. Sisson, 271 N. Y. 285, 2 N. E. (2d) 660, 661 (1936).

[27]238 App. Div. 128, 263 N. Y. Supp. 552 (1933).

[28]In re Seiferth, 127 N. Y. S. (2d) 63, 64 (1954).

[29]In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552, 555 (1933).

[30]In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552, 555 (1933).

[31]Note (1954) 39 Minn. L. Rev. 118.

ance in the case of such factors as the humanitarian consideration, the possibility of the child's becoming a public dependent, and the interest of state and child in his becoming a normal, useful citizen. A major consideration in cases in which medical care is sought for an infant to protect his life or health over the objection of a parent is the risk of life or health involved in performing the treatment itself.[32] Where that risk is great, courts have refused to interfere with the parents' decision.[33] Logically, where psychological benefit to a child is the object of a proceeding, the risk of adverse psychological effects from ordering treatment deserves equal analysis in seeking the maximum psychological advantage to the child. The solution reached in the principal case, to obtain the consent of the child before the operation, is designed to eliminate at least the psychological dangers inhering in the child's inhibition against surgery, if not the upsetting results of judicially undermining the parent-child relationship.[34]

The *Seiferth* case is somewhat anomolous in its field for absence of the usual question of unconstitutional infringement of religious liberty.[35] The claim of a right to deny a child medical treatment in the free exercise of religious beliefs has consistently failed in suits to prevent, as well as to punish, parental conduct endangering the physical welfare of an infant child.[36] That is, a parent is subject to the

[32]People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769 at 773 (1952); Morrison v. State, 252 S. W. (2d) 97 at 102 (Mo. App. 1952); In re Rotkowitz, 175 Misc. 948, 25 N. Y. S. (2d) 624 at 627 (1941); In re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 at 555 (1933).

[33]In re Truttendario, 21 Pa. Dist. 561 (1911); In re Hudson, 13 Wash. (2d) 673, 126 P. (2d) 765 (1942).

[34]Regard for the delicacy of that family relationship has caused some courts to deny the child a right of action against his parent for maintenance: Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Buchanan v. Buchanan, 170 Va. 458, 197 S. E. 426 (1938).

[35]If the court in the Seiferth case had not found the father's views to be "philosophical" rather than religious, it would have been confronted with the *child's* right of religious liberty since the father had inculcated the child with those views, and the child was not too young to foster religious ideas because, as the court said, he was capable of "making his own decision" about the operation. It might be thought that the particular relief adopted in the principal case should avoid this problem, notwithstanding the finding as to the father's beliefs, since the consent of the boy was expected to be forthcoming. However, that form of relief actually would increase the difficulty because it would mean direct state intermeddling with the religious views of the child for the purpose of changing them to those approved by the judge and medical science. These exact problems did not appear to have arisen in a reported case.

[36]People v. Labrenz, 411 Ill. 618, 104 N. E. (2d) 769, 30 A. L. R. (2d) 1132 (1952); (preventive action); Morrison v. Sstate, 252 S. W. (2d) 97 (Mo. App. 1952) (preventive action); Owens v. State, 6 Okla. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633 (1911) (criminal action for failure to provide medical attention); Mitchell v. Davis,

same limitation as everyone else in the exercise of his religion in that he must not thereby jeopardize the life or health of another.[37] The court in the *Seiferth* case, having found no threat to the child's physical welfare, by designating the father's opposition as "philosophical" rather than religious, avoided the delicate question of whether considerations of mere psychological welfare would support an overruling of religious convictions. Other, perhaps more evasive, examples of this convenient labelling technique have been effectively excerpted and criticized elsewhere.[38] If convinced of the propriety of its result in the *Seiferth* case, the court might, more justifiably than by discounting the father's theories as not being "religious," have found a substantial physical danger in a severe cleft palate. For example, there might be a correlation between that defect and susceptibility to infections or deficiencies of nutrition resulting from the physical limitations on diet. As a matter of precedent, however, the case is probably more valuable as it stands, being a farsighted encouragement toward legal recognition of important psychological factors in this field.

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205 S. W. (2d) 812, 12 A. L. R. (2d) 1042 (Tex. Civ. App. 1947) (preventive action). The leading American, English, and Canadian cases denying the defense of religious convictions in criminal actions resulting from failure to provide necessary medical care, appear to be: People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903); Regina v. Senior, 1 Q. B. D. 283, 19 Cox C. C. 219 (1899); Rex v. Lewis, 6 Ont. L. Rep. 132, 1 B. R. C. 732 (1903).

However, "theories as to proper curative methods held by a large number of reasonable and intelligent people," such as, perhaps, by Christian Scientists, may qualify as one "circumstance" which affects the conduct of an ordinarily prudent man in promoting his recovery from an actionable injury. Lange v. Hoyt, 114 Conn. 590, 159 Atl. 575 (1932); Christiansen v. Hollings, 44 Cal. App. (2d) 332, 112 P. (2d) 723 (1941). Thus, the same religious convictions which may incur criminal liability might leave civil liability unaffected.

[37]Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. ed. 645 (1944); Morrison v. State, 252 S. W. (2d) 97 (Mo. App. 1952).

People v. Pierson tied its denial of the defense of religious liberty to the general rule governing the power of courts to act in behalf of infant welfare, by interpreting a state constitutional provision that religious liberty does not extend to "practices inconsistent with the peace and safety of the state" to include acts inimical to the life and health of the children of the state. 176 N. Y. 201, 68 N. E. 243 at 246 (1903).

[38]Antieau, the Limitations of Religious Liberty (1949), 18 Ford. L. Rev. 221 at 227-9 (1949). Professor Antieau's discussion does not include In re Vasko in which it was decided that a mother's resignation of her child's illness to the will of God was a dereliction in parental duty "through ignorance, fanaticism, or for arbitrary reasons." 238 App. Div. 128, 263 N. Y. Supp. 552, 553 (1933).

JUDGMENTS—RIGHT OF CREDITOR TO SATISFY JUDGMENT BY LEVY AND EXECUTION ON DEBTOR'S EQUITABLE AND AFTER-ACQUIRED INTERSTS IN LAND. [Ohio]

The determination of what property of the judgment debtor may be reached for satisfaction of a judgment lien necessarily depends largely on the statutes of the specific jurisdictions, but while the statutes vary, most of them have a common ancestor in the English Statute of Westminster II, enacted in 1285. Prior to that time a creditor had no remedy against the lands of his debtor, due to the feudal system of land tenure, but that statute enabled the creditor to elect to have a writ of *fieri facias* against one-half of the debtor's land.[1] The modern statutes generally allow a judgment creditor to subject all the debtor's land to the satisfaction of his judgment, but there is still uncertainty as to the scope of his rights under many statutes.

In the recent case of *Bank of Ohio v. Lawrence*,[2] the Supreme Court of Ohio has construed the statutes of that state in such a manner as to align Ohio with the minority view in regard to a creditor's rights against both equitable interests and after-acquired property of his judgment debtor. Plaintiff recovered and duly docketed a judgment against his debtor who was then in possession of the land in controversy pursuant to a land sale contract. Subsequently the judgment debtor acquired the legal title to the property, and then conveyed the property to defendants. Thereafter, plaintiff sought to subject the land to the satisfaction of his judgment, alleging that at the time he docketed his judgment, the debtor had paid enough of the purchase price under the land sale contract to give him an interest in the land sufficient to satisfy the judgment lien, and that defendant had acquired knowledge of both the land sale contract and the debtor's possession. Defendant's demurrer to plaintiff's complaint was sustained in the trial court, and on appeal to the Supreme Court of Ohio the judgment was affirmed, though Section 2329.02 of the Ohio Code states in broad terms that "Any judgment ... shall be a lien upon lands and tenements of each judgment debtor ..." from the time the judgment is filed. The court held that "*equitable interests* in real estate are not subject to levy and sale upon execution"[3] because Section 2329.01

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[1]The writ was called a writ of elegit. 2 Freeman Judgments (5th ed. 1925) § 916; 15 R. C. L., Judgments § 248; and see Jones v. Hall, 177 Va. 658 at 662, 15 S. E. (2d) 108 at 110 (1941).

[2]161 Ohio St. 543, 120 N. E. (2d) 88 (1954), noted in (1954) 23 U. of Cin. L. Rev. 508.

[3]161 Ohio St. 543, 120 N. E. (2d) 88, 90 (1954) [italics supplied], quoting and following Culp v. Jacobs, 123 Ohio St. 109, 174 N. E. 242, 243 (1930), noted in

concerning the property that can be sold on levy and execution had, by a 1925 amendment, been made to cover *"Lands and tenements,* including vested *legal* interests therein, ..."[4] It was further decided that a judgment lien operates in *praesenti* and not in *futuro,* so that a judgment lien does not attach to after-acquired property without a refiling of the judgment after the property is acquired.[5]

A few states expressly provide that equitable interests shall be subject to a judgment lien.[6] In other jurisdictions, courts have interpreted the words "land and tenements" in the statutes providing what interests shall be covered by judgment liens to include both legal and equitable interests;[7] but in still others, the courts have concluded that the judgment lien statutes of their states are not sufficiently broad to include equitable interests.[8] Apparently some courts have been inclined to rule that the judgment lien attaches to the equitable interest of a vendee under a land sale contract if the vendee had paid some or all of the purchase price, but to hold to the contrary if none of the price had been paid.[9] In such jurisdictions as do recognize

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(1931) 6 Notre Dame Law. 384, which held that though defendant was the owner of an equitable interest under a land sale contract when plaintiff obtained a judgment against him, the judgment did not attach to defendant's interest.

[4]Ohio Rev. Code (1954) § 2329.01 [Italics supplied].

[5]Bank of Ohio v. Lawrence, 161 Ohio St. 543, 120 N. E. (2d) 88 at 90, 91 (Ohio 1954).

[6]Tenn. Code Ann. (Williams, 1934) § 8047: "A judgment or decree shall not bind the equitable interest of the debtor in real estate or other property, unless, within sixty days from its rendition, a memorandum. . . ."

[7]Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463 (1904); Eckley v. Bonded Adjustment Co., 30 Wash. (2d) 96, 190 P. (2d) 718, 1 A. L. R. (2d) 717 (1948); Davis v. Vass, 47 W. Va. 811, 35 S. E. 826 (1900); Van Camp v. Peerenboom, 14 Wis. 70 (1861); Notes (1948) 1 A. L. R. (2d) 727; (1933) 85 A. L. R. 927; (1924) 30 A. L. R. 504. In Pennsylvania, due to the lack of an equity court, equitable interests were subject to a judgment lien in the absence of a statute, Auwerter v. Mathiot, 9 S. & R. 397 (Pa. 1823).

[8]". . . a lien upon all the real property of the judgment debtor." Oaks v. Kendall, 23 Cal. App. (2d) 715, 73 P. (2d) 1255, 1257 (1937); Cheves v. First Nat. Bank of Gainesville, 79 Fla. 34, 83 So. 870 (1920).

[9]Lien did not attach where none of the purchase price was paid: Sweeney v. Pratt, 70 Conn. 274, 39 Atl. 182 (1898); Akin v. Freeman, 49 Ga. 52 (1873). Lien attached where part of the purchase price was paid: Joseph v. Donovan, 114 Conn. 79, 157 Atl. 638 (1931); Davis v. Vass, 47 W. Va. 811, 35 S. E. 826 (1900). See Notes (1948) 1 A. L. R. (2d) 727; (1933) 85 A. L. R. 927; (1924) 30 A. L. R. 504. Cf. Rand v. Garner, 75 Iowa 311, 39 N. W. 515 (1888), where under a parol contract for the sale of land the vendee had merely paid the interest, and the court stated: "As stated above, he was in possession under a contract of purchase, but had not received a conveyance. The relation between him and Long [vendor] is that of mortgagor and mortagee of the property." The judgment lien was allowed to attach to the vendee's interest. A contract for the sale of land with installment payments is sometimes used in lieu of other security devices, and is treated as

that judgment liens extend to equitable interests, the tendency, contrary to the ruling of the principal case, is to allow judgment creditors to enforce the liens against the debtor's equitable interests by the cheaper and easier method of levy and execution in the same manner as where legal interests in land are involved,[10] rather than to require the creditor to bring a bill in equity as required under the common law.[11]

Since in the principal case plaintiff alleged that the debtor had paid an amount of the purchase price greater than the judgment, the debtor's equitable interest might well have been regarded as adequate to satisfy the creditor's claim. However, the Ohio court ruled that the legislature, by inserting the word *legal* into the statute concerning what property could be sold by levy and execution, had changed the law as interpreted in a previous Ohio case, which had held that a judgment lien attached to equitable interests and had allowed levy and execution.[12] This conclusion is open to question, because the mere fact that *vested legal interests* are expressly included in the property made subject to levy and execution by Section 2329.01 does not necessarily exclude other interests from the coverage of that statute. But even accepting that unnecessarily restrictive interpretation of Section 2329.01, the Ohio court's assertion that "a judgment lien did not attach to . . . [an equitable interest in land]"[13] is untenable in view of the unqualified language of Section 2329.02, which imposes a judgment lien

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somewhat similar to a mortgage. Therefore, a court could look at the substance of the transaction and consider the vendee as the landowner and mortgagor. 3 Powell, Real Property (1949) § 450.

Under the doctrine of equitable conversion, the vendee becomes the owner when a specifically enforceable contract is executed.Payment of the purchase price is not a condition precedent to receiving the equitable title but rather is a condition precedent to obtaining a conveyance of the legal title. Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430 (1910); Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121 (1905); McClintock, Equity (2nd ed. 1948) § 106; Langdell, Equitable Conversion (1904) 18 Harv. L. Rev. 245. Thus, a judgment lien could attach to the equitable estate before any of the purchase price has been paid, if the judgment lien statute permits, but of course the judgment creditor could levy only on the value of the land over the purchase price owing to the vendor. McClintock, Equity (2nd ed. 1948) § 116.

[10]Eckley v. Bonded Adjustment Co., 30 Wash. (2d) 96, 190 P. (2d) 718, 1 A. L. R. (2d) 717 (1948). "As a result of the growing tendency to enact legislation of this character, judgment creditors of purchasers under land contracts and of other equitable owners of real estate are coming to have the same remedies against their debtors as are available to judgment creditors of owners of legal interests in land or chattels." 3 American Law of Property (1952) 84.

[11]Burks, Pleading and Practice (4th ed. 1952) § 356; McClintock, Equity (2d ed. 1948) § 210.

[12]First Nat. Bank of Cortland v. Logue, 89 Ohio St. 288, 106 N. E. 21, L. R. A. 1915B 340 (1914).

[13]Bank of Ohio v. Lawrence, 161 Ohio St. 543, 120 N. E. (2d) 88, 90 (Ohio 1954).

on "lands and tenements," without the qualifying words *"vested legal interests"* that are used in Section 2329.01. The correct construction of the statutes would seem to be that equitable interests are subject to a judgment lien and that the remedy for the enforcement of the judgment lien is a creditor's bill in equity.[14]

The Ohio court's statement that "It is well established that a judgment is not a lien on after-acquired property..."[15] appears to be applicable to only one other jurisdiction.[16] The overwhelming weight of authority, either by judicial construction or expressly by statute, is that after-acquired property is subject to a judgment lien when the property is still in the debtor's possession.[17] It appears that the basis for the minority view rests on two early Pennsylvania cases, the specific holdings of which were that execution cannot be issued on lands which the debtor received after the docketing of the judgment *and conveyed to a bona fide purchaser without notice before execution.*[18] The principal basis for this ruling was that the custom in Pennsylvania was for purchasers to search land titles only for the period that the seller held the legal title.[19] While the reason advanced in those cases would

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[14]4 Tiffany, Real Property (3rd ed. 1939) §§ 1241, 1242. Cf. 2 Va. Code Ann. (Michie, 1950) §§ 8-386, 8-391. The Ohio court recognized that "Equitable interests may be reached by way of a creditor's bill under this section [2333.01] or by proceedings in aid of execution, and the proceeds of a sale may be applied to the satisfaction of a judgment." Bank of Ohio v. Lawrence, 161 Ohio St. 543, 120 N. E. (2d) 88, 91 (Ohio 1954).

[15]Bank of Ohio v. Lawrence, 161 Ohio St. 543, 120 N. E. (2d) 88, 90 (1954).

[16]General Casmir Pulaski B. & L. Ass'n v. Provident Trust Co. of Philadelphia, 338 Pa., 198, 12 A. (2d) 336 (1940). Arizona is sometimes cited for this minority view [49 C. J. S., Judgments § 477, n. 48; Note (1954) 23 U. of Cin. L. Rev. 508, 510] due to dictum in Steinfeld v. Copper State Mining Co., 37 Ariz. 151, 290 Pac. 155, 160 (1930). But see 4 Ariz. Code Ann. (Bobbs-Merrill, 1939) § 62-104, and discussion in Tway v. Payne, 55 Ariz. 343, 101 P. (2d) 455 (1940):

[17]Atlas Portland Cement Co. v. Fox, 265 Fed. 444 (C. A. D. C., 1920); Hertwick v. Feason, 180 Cal. 71, 179 Pac. 190 (1919); 1 Black, Judgments (1891) § 432; 2 Freeman, Judgments (5th ed. 1925) § 955; 49 C. J. S., Judgments § 477. Compare, regarding tax liens, United States v. Taft, 44 F. Supp. 564 (S. D. Cal. 1942); Note (1942) 56 Harv. L. Rev. 143.

[18]Colhoun v. Snider, 6 Binn. 135 (Pa. 1813); Rundle v. Ettwein, 2 Yeats 23 (Pa. 1795). The Ohio court cited and followed the later Pennsylvania case in Roads v. Symmes, 1 Ohio 281, 13 Am. Dec. 621 (1824). But cf. Stiles v. Murphy, 4 Ohio 92 at 98 (1829): "For the satisfaction of the execution, those are the lands of the debtor which are bound by the judgment, as well as those afterward acquired, *but not conveyed.*" [italics supplied]

[19]Colhoun v. Snider, 6 Binn. 135, 146 (Pa. 1813): "The strong ground, however, upon which I rely as to this branch of the case is, the practical construction of our acts of assembly, since they were passed, by the common usage of the country. I have never known or heard it suggested, that upon sales of lands the public offices have been searched for judgments against the purchasers prior to the sale, or against the sellers, except for the time that their title commenced." A more gen-

be valid where the judgment debtor had transferred the after-acquired property to a bona fide purchaser without notice, it certainly is not persuasive when the judgment debtor is still in possession of the land. In such case no reason appears why a judgment creditor should not be allowed to reach the land. The Ohio court, in accepting the minority view, has failed to distinguish between the matter of whether a judgment lien attaches to after-acquired property and of whether a judgment debtor is able to convey to a bona fide purchaser before execution a title free of claims of the judgment creditor. If this fundamental distinction had been made, the result of the principal case should have been different, unless the defendant was a bona fide purchaser without notice[20]—a factor the court did not even see fit to mention in its opinion.

In most jurisdictions, one purchasing land with actual notice of a judgment lien on the land cannot claim as a bona fide purchaser, even though the lien was not recorded.[21]The Ohio court did not discuss the effect of the recording statutes, except to state that the certificate of the judgment must be refiled after the property is acquired by the judgment debtor in order to make the lien effective even against the debtor.[22] However, the only practical reason to require the refiling of a judgment is to place the judgment lien in the debtor's chain of title so as to give constructive notice to a purchaser, inasmuch as an encumbrance recorded out of the owner's chain of title is not constructive notice.[23] Although in Ohio land sale contracts are

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eral basis for the holding is suggested at 6 Binn. 135 at 148. "This judgment by the force of statute Westminister 2., 13 ed. 1. c. 18., charges the land of the debtor, and is in the nature of a general security. The lands are but in the nature of a *pawn* or *pledge* to secure the payments of the debt.... Can one be supposed to pledge a thing *of which he has not the property?*"

It is to be noted that the Pennsylvania court later restricted its holding to land in which the judgment debtor had *no interest* at the time of the judgment, because in Pennsylvania equitable interests are subject to a judgment lien. Waters' Appeal, 35 Pa. St. Rep. 523 (1860); Stephens' Appeal, 8 W. & S. 186 (Pa. 1844); 2 Freeman, Judgments (5th ed. 1925) § 955.

[20]Hultz v. Zollers, 39 Iowa 589 (1874); Harper v. Bibb, 34 Miss. 472 (1857); Vicars v. Weisiger Clothing Co., 121 Va. 679, 93 S. E. 580 (1917); Moore v. Sexton, 30 Gratt. (71 Va.) 505 (1878); Bartz v. Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848 (1896). Cf. Van Hoose v. French, 75 Ohio App. 342, 62 N. E. (2d) 259 (1944).

[21]Coral Gables v. Kerl, 334 Pa. 441, 6 A. (2d) 275 (1939); Lambert v. K-Y Transp. Co., 182 Pa. Super. 82, 172 Atl. 180 (1934); Craig v. Sebrell, 9 Gratt. (50 Va.) 131 (1852). Contra: Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901 (1897).

[22]Bank of Ohio v. Lawrence, 161 Ohio St. 543, 120 N. E. (2d) 88 at 90 (1954).

[23]Lacey v. Humphres, 196 Ark. 72, 116 S. W. (2d) 345 (1938); Greer v. Carter Oil Co., 373 Ill. 168, 25 N. E. (2d) 805 (1940); Van Hoose v. French, 75 Ohio App. 342, 62 N. E. (2d) 259 (1944); Davis v. Morley, 169 S. W. (2d) 561 (Tex. Civ. App. 1943).

not entitled to be recorded,[24] in many states they are,[25] in which situation the docketing of a judgment lien against the vendee of a recorded land sale contract could provide constructive notice of the lien to a subsequent purchaser of the land. In the principal case the defendant-vendee might have been prevented from being a bona fide purchaser by the fact that the judgment debtor was in possession of the land when the judgment was recorded. Several states regard possession of land by someone other than the record title owner as sufficient to put a purchaser of the land on notice to examine the title for the period when the possession was held by one other than the record owner.[26]

The Ohio court would have been on much sounder ground if it had restricted its holdings to the rule that the judgment debtor can pass good title to a bona fide purchaser without notice when the judgment lien is not in his record chain of title.[27] That rule would further the basic objective of recording statutes to provide a public record whereby a purchaser of property may protect himself by examining a seller's title for any defects or encumbrances,[28] and would still preserve the relative priorities among competing judgment creditors when the debtor still holds the property. The basic problem in the principal case is one of title recording, and if the purchaser had an opportunity to discover the judgment lien by the exercise of due care, his ownership of the land should be subject to the rights of the judgment creditor.

RICHARD E. HILL

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[24]Grant v. Hickok Oil Co., 84 Ohio App. 590, 87 N. E. (2d) 708 (1948).

[25]4 American Law of Property (1952) § 17.8.

[26]In Re Buchner, 205 Fed. 454 (C. C. A. 7th, 1913); Doll v. Walter, 305 Ill. App. 188, 27 N. E. (2d) 231 (1940); Johnston v. Terry, 128 W. Va. 94, 36 S. E. (2d) 489 (1945).

[27]See cases cited, note 20, supra.

[28]4 American Law of Property (1952) § 17.5. The problem in the principal case can be compared with an estoppel by deed situation. The grantor deeds property to a purchaser before he acquires title to the property, and after he acquires the property he conveys it to the second grantee. It is generally held that the second purchaser without notice is not estopped to assert the title subsequently acquired by his grantor. The basis seems to be that a contrary view would defeat the purpose and spirit of the recording laws. Rozell v. Chicago Mill & Lumber Co., 76 Ark. 525, 89 S. W. 469 (1905); Richardson v. Atlantic Coast Lumber Co., 93 S. C. 254, 75 S. E. 371 (1912). Contra: Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N. E. 177 (1893). There is also the comparable situation of a mortgage of property to be subsequently acquired, which is generally held to be valid except as to subsequent purchasers without notice. Walsh, Mortgages (1934) § 10.

LABOR LAW—DENIAL OF RANK-AND-FILE EMPLOYMENT TO FOREMAN DISCHARGED FOR ECONOMIC REASONS AFTER ENGAGING IN UNION ACTIVITY. [Federal]

Among the important advantages secured to employees under the National Labor Relations Act[1] is the prohibition against discrimination in the employment of workers because of their membership in labor unions.[2] However, the Supreme Court has declared that the statute does not interfere with the employer's right to exercise his managerial prerogative in deciding whom he will employ,[3] but merely forbids the employer under the cover of that right from intimidating or coercing his employees with respect to labor organizations.[4]

Following the enactment of the original National Labor Relations Act, there was disagreement on whether the coverage of the statute was broad enough to include supervisory employees.[5] Under the 1947

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[1]49 Stat. 449 (1935), 29 U. S. C. A. § 151 (1947).

[2]49 Stat. 449, 452 (1935), 29 U. S. C. A. § 158 (1947), where in Section 8(3) of the Act it is stated: "It shall be an unfair labor practice for an employer... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership on any labor organization...." Prior to the enactment of the Wagner Act in 1935, the denial of jobs to men because of union affiliation had been a familiar aspect of American industrial relations. See Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177 at 182, 61 S. Ct. 845 at 847, 85 L. ed. 1271 at 1276, 133 A. L. R. 1217 at 1219 (1941).

[3]Phelps Dodge Corp v. N. L. R. B., 313 U. S. 177, 182, 61 S. Ct. 845, 847, 85 L. ed. 1271, 1277, 133 A. L. R. 1217, 1220 (1941): "Protection of the workers' right of self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise."

[4]N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 628, 81 L. ed. 893, 916, 108 A. L. R. 1352, 1370 (1936): "The employer may not, under cover of that right [to select or to discharge employees], intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for the interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

[5]In support of the view that the statute did cover supervisory employees are: Packard Motor Car Co. v. N. L. R. B., 330 U. S. 485, 67 S. Ct. 789, 91 L. ed. 1040 (1947); N. L. R. B. v. Skinner & Kennedy Stationery Co., 113 F. (2d) 667 (C. C. A. 8th, 1940). In Packard Motor Car Co. v. N. L. R. B., supra, it was said: "The point that these foremen are employees [within the meaning of the Act] both in the most technical sense at common law as well as in common acceptance of the term, is too obvious to be labored." 330 U. S. 485, 488, 67 S. Ct. 789, 791, 91 L. ed. 1040, 1049 (1947). Contra: See dissent in Packard Motor Car Co. v. N. L. R. B., where four of the Justices dissented, saying: "The complications of dealing with the problems of supervisory employees strongly suggest that if Congress had planned to include them in its project, it would have made some special provision for them. But we find no trace of a suggestion that where Congress came to consider the units appropriate for collective bargaining, it was aware that groups of employees might have conflicting loyalties. Yet that would have been one of the most important and conspicious problems if foremen were to be included." 330 U. S. 485,

amendments,[6] the position of Congress with respect to supervisory employees was clarified, in that it was said that the employer has the right to expect the undivided loyalty of his supervisory personnel.[7]

Two rather strict rules have thus developed: first, employees cannot be discriminated against in hiring because of their union membership; and secondly, supervisory employees are not protected by the statute. As a result, the question arises as to which of these rules will prevail if they come into conflict. When, as in the recent case of *National Labor Relations Board v. Columbus Iron Works Co.*,[8] a supervisory employee has for some reason been discharged and later seeks employment as a rank-and-file employee, the resolution of the two conflicting principles is essential. In the proceeding on a petition filed by the National Labor Relations Board to enforce its order finding an employer guilty of an unfair labor practice in refusing employment to a former supervisor as a production worker, the Court of Appeals for

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497, 67 S. Ct. 789, 796, 91 L. ed. 1040, 1053 (1947). See also dissent in N. L. R. B. v. Packard Motor Car Co., 157 F.(2d) 80 at 87 (C. C. A. 6th, 1946); Daykin, The Status of Supervisory Employees Under the National Labor Relations Act (1944) 29 Iowa L. Rev. 297.

[6]61 Stat. 136, 138 (1947), 29 U. S. C. A. § 152 (11) (1954 Supp.): "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[7]Senator Smith, a member of the committee which considered this legislation, remarked during the debates thereon: "It [the definition of supervisor as contained in § 2 (11) of the Act] recognizes a supervisor as representing management, and not representing labor, and where the supervisor has to represent management, it seems only proper that he should not be in the category of being union-minded because unfortunately controversies between management and unions do occur." 93 Cong. Rec. 4283, Apr. 30, 1947.

Senator Flanders, author of part of Section 2 (11), remarked: "The reasons [for removing the supervisory force from the area of collective bargaining] are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost control of his business. He cannot run it effectively." 93 Cong. Rec. 4678, May 7, 1947. See House of Representatives Report No. 245, on H. R. 3020, 80th Congress, 1st Session, pp. 13-14; also Senate Report No. 105, on S. 1126, 80th Congress, 1st Session, pp. 3-4 [as cited in Texas Company v. N. L. R. B., 198 F. (2d) 540 at 542, n. 4 (C. A. 9th, 1952)].

As the late Senator Robert A. Taft, co-author of the 1947 amendments, has brought out: "They [the supervisory employees] may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act.... They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act." 93 Cong. Rec. 3952, Apr. 23, 1947 [as cited in Texas Company v. N. L. R. B., 198 F. (2d) 540 at 542-543, n. 5 (C. A. 9th, 1952)].

[8]217 F. (2d) 208 (C. A. 5th, 1954).

the Fifth Circuit denied enforcement of the order. The Board had found that, although the foreman's job had been abolished for economic reasons while he was laid off because of lack of work, the foreman had engaged in union activity while employed in the supervisory capacity, a fact which the employer knew.[9] The court, in upholding the right of the employer to refuse reemployment under those conditions, justified its decision upon the theory that even though the employer had not actually discharged the foreman for his union activity, *it could have done so* without committing an unfair labor practice. As a result, the employer could deny employment to him later as a rank-and-file employee because of his prior act of disloyalty to the employer.[10] The court based its decision primarily upon the reasoning that an employee "who has been disloyal in one capacity may be disloyal in another."[11]

Under the ruling of *Texas Company v. N. L. R. B.*,[12] decided in the Ninth Circuit in 1952 and relied on heavily in the principal case, a supervisory employee who has actually been discharged for engaging in union activities may later be denied rank-and-file employment because of his prior act of disloyalty. The policy consideration behind that holding is that disloyalty to the employer by an employee in a supervisory capacity justifies the employer's refusal to hire the employee in a rank-and-file capacity. Since the employer has reason to fear disloyalty by the employee in the capacity of production work, the refusal to hire is within the discretion allowed the employer under the Act.[13] So strong is this policy that it has been held that even if

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[9]217 F. (2d) 208 at 209 (C. A. 5th, 1954). The foreman had been laid off during a slack work period and later discharged because his position was abolished due to technological changes. Although he did not actually apply for work as a rank-and-file employee, a union representative told the employer's agent that the former foreman was interested in rank-and-file employment. The employer's agent was alleged to have made a statement that if the foreman returned to work he would be elected to a union committee, which would "make for bad labor relationship in the plant."

[10]217 F. (2d) 208 at 209-210 (C. A. 5th, 1954.) On the authority of Texas Company v. N. L. R. B., 198 F. (2d) 540 (C. A. 9th, 1952), the court in the principal case held that engaging in union activity while a supervisory employee constitutes a prior act of disloyalty which justifies a failure to hire.

[11]217 F. (2d) 208, 210 (C. A. 5th, 1954): "It is the inherent prerogative of management to operate its business efficiently, and one means of doing this is to decide whom it shall hire. A person who has been disloyal in one capacity may be disloyal in another."

[12]198 F. (2d) 540, 544 (C. A. 9th, 1952): "... Sec. 2 (3) of the Act privileged Cody's [the foreman] discharge, and ... the petitioner refused to employ him for the conduct which occasioned his discharge."

[13]217 F. (2d) 208 at 210 (C. A. 5th, 1954). In Gillcraft Furniture Co., 103 N. L. R. B. 81 at 100 (1953), in which the employer had stated that he had "lost con-

membership in unions is discouraged because employers refuse to hire as rank-and file workers those supervisory employees whom they have fired, such discouragement is privileged under the statute.[14]

Perhaps the doctrine of the *Texas Company* case is well founded because there is only a small likelihood that the refusal of employment to supervisors *discharged for union activities* would discourage union activities among rank-and-file employees. However, always lurking in this view is the danger that employers will promote union leaders to foreman, discharge them for union activity, and then refuse to hire them in the rank-and-file for their prior acts of disloyalty as supervisors. And even if the *Texas Company* decision is approved on its facts, the mere fact that a foreman *engaged in union activities* while in a supervisory capacity should not, if the discharge was not for that cause, be sufficient to justify a later refusal to hire the supervisor as a rank-and-file employee. Otherwise, supervisors who had been discharged for other reasons after committing only slight infractions of the rule prohibiting union activity could be refused employment in the rank-and-file ostensibly because of their past acts of disloyalty, when the real motivation might be to refuse employment because of *present* union affiliations. In any event, the refusal to hire in the *Texas Company* case was actually achieved under color of right, since it appeared that the reason for the discharge was wrongful union activity as a foreman. However, in the principal case doubt exists as to whether the refusal was effected under color of right, since the supervisory employee had not been actually discharged for union activity.

Relying on the *Texas Company* case, the Court of Appeals in the principal case confuses *actual discharge* for union activity—which justified the refusal to hire for an act of prior disloyalty in the *Texas Company* case—with *the ability* of the employer to have discharged the supervisory employee for union activity, in order to validate the refusal to hire for the same reason. The rationale of the *Texas Company* case is that "the conduct which would rationally be discouraged by the

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fidence" in the discharged supervisor and would rather dispense with his services than restore him to his previous position as repairman, the Board said: "While this assertion, considered in isolation might, in some circumstances, warrant an inference that Respondent had acted arbitrarily, and cast doubt upon its motivation, Mason's [plant executive] attitude cannot be described as inherently unreasonable."

[14]Texas Company v. N. L. R. B., 198 F. (2d) 540, 544 (C. A. 9th, 1952): "... that if any discouragement of union membership were occasioned, it would be incidental and permissible under the Act." Accord: N. L. R. B. v. Potlatch Forests, 189 F. (2d) 82 at 85-86 (C. A. 9th, 1951), noted in (1952) 9 Wash. & Lee L. Rev. 115; Panaderia Sucesion Alonso, 87 N. L. R. B. 877 at 880 (1949).

refusal to rehire him would be union activity by a foreman. Discouraging such activity is certainly permissible and not violative of the Act."[15] Thus, the refusal in the *Texas Company* case to hire the discharged supervisor because of a prior act of disloyalty for which he had *actually* been discharged gave notice to all employees that union activity in management was undesirable. There was nothing amounting to discrimination against applicants because of *present* union affiliations within the meaning of the statute.[16]

However, in the principal case, the supervisory employee was not actually discharged for his conduct, although he could have been, but was laid off for economic reasons. When he applied for a job as a rank-and-file employee and was refused because of a prior act of disloyalty for which he had not actually been discharged, the average employee would fail to grasp the hidden subjective intent of the employer in refusing him employment because of his *past act of disloyalty* and would conclude that the applicant's *present union affiliations* formed the basis for the rejection. Since the employer made no overt act to indicate objectively that his reason for denying employment was the *prior* union activity, and since he actually stated that the return of the employee would "make for bad labor relationship in the plant,"[17] employees will naturally suspect that the former foreman's union affiliations at the present time played the primary role in his rejection. Speculation as to the employer's subjective intention, in the face of stronger objective evidence to the contrary, does not prevent this conclusion.

Therefore, under the facts in the principal case, it is concluded that the refusal to hire the supervisor as a rank-and-file employee because of an act of prior disloyalty for which he had not been discharged will necessarily discourage union membership within the meaning of the statute, since the employer has, by all objective standards, discriminated against the former supervisor because he now belongs to a labor organization.[18] Once it has been determined that a refusal to

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[15]198 F. (2d) 540, 544 (C. A. 9th, 1952). The court relied on Tri-Pack Machinery Service, Inc., 94 N. L. R. B. 1715 (1951).

[16]See notes 6 and 7, supra.

[17]See note 9, supra.

[18]Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271, 133 A. L. R. 1217 (1941) stands for the proposition that refusal to hire based solely on the reason of union affiliation will necessarily discourage employees from joining labor organizations and constitutes discrimination which is an unfair labor practice forbidden by the statute. Therefore, the principal case should turn on whether or not the act of the employer discriminates against the employee within the prohibition of the statute.

rehire does in fact discourage membership in labor organizations, then it becomes necessary to determine whether the applicant is an "employee" within the protection of the statute with regard to discriminatory hiring as interpreted by the Supreme Court.[19] In the cases which have gone far enough to consider this problem, it has been generally held that discharged supervisory employees are employees within the meaning of the statute.[20] The inevitable conclusion, then, is that when a supervisory employee has been discharged for other reasons than union activity and is then denied employment as a rank-and-file employee because his union affiliations make him undesirable, such an employee falls within the protection of the statute, and the refusal to hire him amounts to an unfair labor practice under the statute.[21]

MILTON T. HERNDON

PROCEDURE—JURISDICTION OF STATE COURT OVER FOREIGN CORPORATION NOT "DOING BUSINESS" WITHIN STATE. [Maryland]

In the recent case of *Compania de Astral, S. A. v. Boston Metals Co.*,[1] the Court of Appeals of Maryland has sustained a statute which may represent the ultimate step in the development by a state of its

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[19]See 49 Stat. 449 at 452 (1935), 29 U. S. C. A. § 158 (3) (1947). In Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271, 133 A. L. R. 1217 (1941), the Supreme Court held that the word "employee" includes any employee, and is not limited to the employees of a particular employer.

[20]In John Hancock Mutual Life Insurance Co., 92 N. L. R. B., 122 at 133 (1950), when a discharged foreman applied for employment as a rank-and-file employee, the Board found that he was an employee within the meaning of the statute, and the employer was found guilty of an unfair labor practice in refusing to hire the employee under Section 8 (a) (4) of the Act. In Pacific American Shipowners Ass'n, 98 N. L. R. B. 582 at 657 (1952), it was held that when an employee applies for a supervisory position, he is protected under the statute until he ceases to be an applicant and becomes a supervisory employee. See Briggs Mfg. Co., 75 N. L. R. B. 569 at 572 (1947) and dissent in F. H. McGraw & Co., 99 N. L. R. B. 695 at 700 (1952).

[21]Another consideration which should be taken into account when comparing the Texas Company case with the principal case is that under the 1947 amendments to the Act, the power of the Board was restricted in Section 10 (c) in that: "No order of the Board shall require the reinstatement of any *individual* as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 61 Stat. 136, 147 (1947), 29 U. S. C. A. § 160 (c) (1954 supp.) Section 10 (c) would seem to apply to the Texas Company case because in that case the supervisory employee was discharged for cause, and it would appear that the Board could not require the employer to reinstate the discharged supervisor. However, in the principal case, the employee was not discharged for union activity and a proper construction of the section would seem to imply that the employer could be ordered to rehire the employee.

[1]107 A. (2d) 357 (Md. 1954).

ability to subject a foreign corporation to its jurisdiction. Against the constitutional objection that it violated the Due Process Clause of the Fourteenth Amendment, the court upheld the validity of a Maryland statute, as applied to the facts of the principal case, which provides: "Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in this State on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State."[2]

The defendant, a Panamanian corporation, had entered into a contract with the plaintiff, a Maryland corporation, to purchase three ships from the plaintiff. The final contract was signed by defendant in Panama, but did not become effective until the plaintiff had executed it in Maryland.[3] It provided that the delivery of the vessels and the payment therefore should be made in Maryland. However, aside from the matters incident to this transaction, the defendant was not doing business in Maryland and maintained no office therein.

The contract provided that it should become void if the approval of the Maritime Administration to the transfer should not be obtained within thirty days from the signing of the contract. The Maritime Administration approved the sale, but imposed such conditions that defendant claimed that it was discharged from any obligation thereunder. The plaintiff contested that view, and filed suit in Maryland against defendant, which appeared specially and moved to quash the summons and dismiss the suit. The trial court denied the motion, applying the Maryland statute. An adjudication on the merits resulted in a

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[2]Md. Code Ann. (Flack, 1951) Art. 23, § 88 (d).

[3]By its provisions, the substantive law of Maryland was to control the construction or interpretation of the contract, and an escrow fund was to be established in Maryland which was to be paid to plaintiff as liquidated damages in the event of default by defendant. Prior to the formation of this contract, the three ships which were the principal subject matter of the contact had been in Maryland for several years. One of defendant's representatives had come to Maryland to inspect the vessels, and this inspection had been followed by a visit to Maryland by two representatives of defendant. Negotiations between them and plaintiff's representatives resulted in a general agreement embodying many of the terms of the final contract. The documents embodying the contract were brought to Maryland by defendant's representatives for the purpose of execution by plaintiff, and at the same time the representatives delivered the escrow fund to the escrow agent in Maryland. In further compliance with the terms of the final contract, the dedendant's agent inspected the vessels in Maryland a second time, and the defendant sent to plaintiff at its office in Maryland notice of acceptance of all three vessels. The defendant also signed in Maryland, as purchaser, the application made by the plaintiff, as seller, to the Maritime Administration for transfer of the vessels.

judgment for plaintiff, from which defendant appealed, alleging as one of his grounds of error that the statute is unconstitutional as applied to defendant under the facts in the case because it denied defendant due process of law under the Maryland and United States Constitutions. The Court of Appeals first ruled that since the final act which made the agreement a binding contract—that is, the signing by plaintiff—took place in Maryland, the contract was made in Maryland, so that defendant was answerable to suit thereon in Maryland under the statute. The court reversed the judgment of the trial court on the merits, but affirmed the denial of the motion to quash the summons and dismiss the suit, thereby sustaining the constitutionality of the Maryland statute as applied to the facts of the case.

The ability of a state to subject a foreign corporation to the jurisdiction of its courts in order to render against it an *in personam* judgment or decree has progressed through three evolutionary stages. It was early held that, inasmuch as a corporation had no legal existence outside of the state of incorporation,[4] it could not be sued anywhere but in the state of incorporation.[5] This unrealistic approach in time gave way to statutes in many states which asserted and limited the jurisdiction of their courts over foreign corporations in respect to causes of action arising out of activity carried on within the state.[6] The underlying philosophy behind these statutes was that "doing business" within the state constituted sufficient *presence* by the corporation within the state to afford a constitutional basis for jurisdiction.[7]

In upholding such statutes, the courts resorted to several theories. When an actual consent to be sued within the state could be found, the courts had little trouble in upholding the asserted jurisdiction,[8] even as to causes of action arising outside of the state.[9] In order to take advantage of this approach to the jurisdiction problem, state

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[4]Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274 (1839).

[5]St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222 (1882).

[6]Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (1856); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222 (1882).

[7]James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 47 S. Ct. 308, 71 L. ed. 569 (1927); Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 S. Ct. 579, 59 L. ed. 910 (1915); Goldey v. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517 (1895); New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292 (1893).

[8]State ex rel. Watkins v. North American Land & Timber Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309 (1902).

[9]Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917); Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 49 S. Ct. 329, 73 L. ed. 711 (1929); State ex rel. Aetna Ins. Co. v. Fowler, 196 Wis. 451, 220 N. W. 534 (1928).

statutes often provide that as a condition precedent to doing business in the state the foreign corporation must designate an agent upon whom process may be served.[10] Where the foreign corporation has failed to comply with the requirement that it appoint an agent for service of process before it engaged in business, the courts, apparently relying on provisions in the statutes that in such event the service of process may be made upon a designated public official,[11] have invoked an implied consent doctrine to justify taking jurisdiction.[12] In at least one decision, jurisdiction based on service upon a public official in compliance with a statutory provision has been sustained on the more realistic reasoning that the jurisdiction "flows from the fact the corporation itself does business in the State . . . in such a manner and to such an extent that its actual presence there is established,"[13] rather than on the doctrine of fictional consent to be sued.

Under any of these theories, the crucial question is always what activities by the foreign corporation or its agents are sufficient, in composite, to constitute "doing business" in the state within the meaning of the statute. Aside from the generalization that the courts scrutinize the facts in each case to determine whether the corporation is "doing business" within the meaning of the statute, none of the decisions reveal the emergence of any definitive rule.[14] The process by which the courts have sought to determine whether foreign corporations are "doing business" within the state might be described as a "judicial treasure hunt." However, an isolated or occasional act by a corporate agent had been thought insufficient to confer on the courts authority to enforce an obligation arising from such an act,[15] while it has never been doubted that if the activities have been continuous and systematic, the courts do have authority to enforce obligations arising out of such activity.[16]

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[10]LaFayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (1856); St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222 (1882).

[11]Washington ex rel. Bond, etc. v. Superior Court, 289 U. S. 361, 53 S. Ct. 624, 77 L. ed. 1256 (1933); American Ry. Express Co. v. Royster Guano Co., 273 U. S. 274, 47 S. Ct. 355, 71 L. ed. 642 (1927).

[12]St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 57 L. ed. 486 (1913).

[13]Bank of America v. Whitney Central Nat. Bank, 261 U. S. 171, 173, 43 S. Ct. 311, 312, 67 L. ed. 594, 596 (1923).

[14]See Note (1952) 37 Corn. L. Q. 458 at 460.

[15]Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. ed. 372 (1923).

[16]St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222 (1882); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569 (1899); Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 S. Ct. 483, 49 L. ed. 810 (1905); Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 29 S.

In the pivotal case of *International Shoe Co. v. Washington*[17] the United States Supreme Court laid down a much broader test. Writing for the Court with one Justice disagreeing,[18] Chief Justice Stone stated: "... due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[19] The Court specifically rejected the previous notion that the commission of a single or occasional act sufficient to impose on the corporation an obligation or liability does not confer on the state authority to enforce it, and held that certain acts by the corporation or its agents "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."[20] Chief Justice Stone wrote that the test is not one of quantity of activity, as some courts had believed, but is a matter of quality, the answer depending upon the "nature of the activity in relation to the fair and orderly administration of the laws...."[21] When the state has had no contacts, ties, or relations with the foreign corporation, its courts may not, consistent with the Due Process Clause, render against the corporation a judgment *in personam.* However, when a corporation conducts activities within a state, it receives from the state certain benefits and the protection of the laws of the state. In the exercise of such privileges, according to the Supreme Court, the corporation may incur a corresponding obligation to answer therefor in the courts of the state in which the obligation arises. The Court of Appeals of Maryland relied heavily on the *International Shoe Co.* case in upholding the Maryland statute as applied to the principal case.[22]

Ct. 445, 53 L. ed. 782 (1909); International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479 (1914).

[17]326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95, 161 A. L. R. 1057 (1945).

[18]Justice Black dissented on the ground that it was " a judicial deprivation" to condition a state's right to tax and to open the door of its courts to a suit against a foreign corporation on the Supreme Court's notion of "fair-play." 326 U. S. 310 at 324, 66 S. Ct. 154 at 162, 90 L. ed. 95 at 107, 161 A. L. R. 1057 at 1066 (1945).

[19]326 U. S. 310, 316, 66 S. Ct. 154, 158, 90 L. ed. 95, 102, 161 A. L. R. 1057, 1061 (1945).

[20]326 U. S. 310, 318, 66 S. Ct. 154, 159, 90 L. ed. 95, 103, 161 A. L. R. 1057, 1063 (1945).

[21]326 U. S. 310, 319, 66 S. Ct. 154, 160, 90 L. ed. 95, 104, 161 A. L. R. 1057, 1063 (1945).

[22]"The rule announced by the Supreme Court in [the International Shoe Co. Case] is that by which we believe the jurisdiction of Maryland is to be tested in this case." 107 A. (2d) 357, 366 (Md. 1954).

At least three recent cases illustrate the operation of the doctrine of the *International Shoe Co.* case. In *Travelers Health Association v. Virginia*,[23] the Supreme Court held that "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."[24] In 1950, the Federal District Court in Maryland, in *Johns v. Bay State Abrasive Products Co.*,[25] upheld the section of the Maryland statute presently under question as applied to a tort claim based upon a liability incurred in Maryland, that court finding that one of the defendant non-resident corporations was doing more in Maryland than simply engaging in one isolated transaction, though it was not "doing business" in Maryland. The next year the Supreme Court of Vermont upheld a statute in *Smyth v. Twin State Improvement Co.*,[26] which gave jurisdiction over foreign corporations committing a tort in whole or in part in Vermont against a resident.[27] If the commission of a single tort by a foreign corporation supplies the "minimum contact" required by the Supreme Court, the Court of Appeals of Maryland has at least proceeded no further. In the principal case, other "minimum contacts" were presented beyond the mere fact that the contract creating the obligation was made in Maryland, although all such contacts were incident to the one transaction.[28]

Both the *Smyth* case and the principal case rely heavily for support on the fact that it has long been established that a single transaction may serve as a basis of jurisdiction over a non-resident *individual*.[29] It is argued that the same reasoning which makes such statutes valid as applied to non-resident individuals should also make them valid

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[23]339 U. S. 643, 70 S. Ct. 927, 94 L. ed. 1154 (1950).

[24]339 U. S. 643, 647, 70 S. Ct. 927, 929, 44 L. ed. 1154, 1161 (1950). This does not represent as great an extension of the International Shoe Co. case doctrine as this language would indicate, since the Court rested its decision to some degree on the police power of Virginia. In his concurring opinion, Justice Douglas stated: "I put to one side the case where a policyholder seeks to sue an out-of-state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate. . . ." 339 U. S. 643, 652, 70 S. Ct. 927, 932, 94 L. ed. 1154, 1163 (1950).

[25]89 F. Supp. 655 (D. C. Md. 1950).

[26]116 Vt. 569, 80 A. (2d) 664, 25 A. L. R. (2d) 1193 (1951), noted in (1952) 9 Wash. & Lee L. Rev. 284.

[27]Vt. Stat. (1950) § 1562.

[28]See note 3, supra.

[29]Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 109 (1927).

when applied to non-resident corporations.[30] This extension is more readily acceptable when it is considered that the cases which denied jurisdiction over a corporation on the basis of a single act were decided under statutes which attempted to assert a general jurisdiction based on "doing business" within that state. Statutes such as those involved in the *Smyth* case and the principal case seek to impose a *specific* jurisdiction based on the commission of an act, with jurisdiction limited to causes of actions arising out of that single act or transaction. It is interesting to note in this connection that even during the early formative period there was a minority view which held that where a cause of action against the foreign corporation arose from a specific act of its agent within the jurisdiction, the corporation was subject to that state's jurisdiction over that cause of action. In these states this view prevailed even though the business was limited to the particular act of creating the cause of action and even though the corporation was not engaged in business generally within the state.[31] In South Carolina, apparently in disregard of later holdings by the Supreme Court,[32] the minority view persisted, and, in fact, it probably is the only jurisdiction where the view taken by the principal case has always obtained.[33] Since the statute brought into question in the principal case does not extend the jurisdiction over the corporation beyond a cause of action arising out of a particular transaction, it would appear that the corporation would have such "minimum contacts" with the state that the maintenance of the suit would not offend "traditional notions of fair play and substantial justice," or, to put it another way, this situation would fall within the area of jurisdiction contemplated by the *International Shoe Co.* decision.[34]

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[30]See Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. (2d) 664 at 688 (1951); Compania de Astral v. Boston Metals Co., 107 A. (2d) 357 at 365 (Md. 1954); Rieblich, Jurisdiction of Maryland Courts over Foreign Corporations under the Act of 1937 (1938) 3 Md. L. Rev. 35 at 68.

[31]Houston v. Filer & Stowell Co., 85 Fed. 757 (C. C. N. D. Ill. 1898); Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co., 136 Fed. 505 (C. C. W. D. Mo. 1905). See Macario v. Alaska Gastineau Mining Co., 96 Wash. 458, 165 Pac. 73, 75 (1917).

[32]The above-mentioned cases were overruled by Consolidated Textile Corp. v. Gregory, 289 U. S. 85, 53 S. Ct. 529, 77 L. ed. 1047 (1933); James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 47 S. Ct. 308, 71 L. ed. 569 (1927); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. ed. 372 (1923).

[33]Jones v. General Motors Corp., 197 S. C. 129, 14 S. E. (2d) 628 (1941).

[34]A further basis of support for the holdings in the Smyth and Compania decisions may be found in the fact that the jurisdiction exercised in those cases "closely resembles well established bases of jurisdiction over non-residents in England and Continental countries." Note (1952) 37 Corn. L. Q. 458, 471. Order XI, Rule 1 of the Rules of the Supreme Court provides that English courts may adjudicate controversies arising out of: (1) a contract made within the jurisdiction;

There are other good reasons for sustaining this exercise of jurisdiction. It could hardly be contended that a state does not have sufficient interest in contracts made within the state to allow its residents the convenience of litigating in their state a dispute arising out of such a contract. Although this convenience to the plaintiff must be balanced against the hardship to the defendant necessitated by answering an action in a foreign court, in the principal case all of the factors seem to point to the reasonableness of sustaining the action brought in Maryland. Of primary importance is the fact that the defendant chose to contract with the plaintiff in Maryland. Since all of the negotiations centered in that state, most of the witnesses will be found in that jurisdiction. From a conflict of laws standpoint, too, it would seem desirable to sustain the jurisdiction of the Maryland court, since in this instance that state is both the place of execution and of performance of the contract, and Maryland law will be applicable.[35]

Not all of the comment on this type of statute has been favorable. Perhaps the most common criticism is that if such jurisdiction is sustained, a corporation will be compelled to defend *any action* brought against it in a foreign state where it has made a single contract, and that, therefore, it will be subject to an undue burden.[36] The invalidity of such an argument lies in the fact that the statute gives the state jurisdiction *only* as to those causes of action arising out of a single act, or occurrence, and not as to any cause of action against the corporation. No court has construed such a statute to confer a general jurisdiction.[37] Closely related to this point is the argument that such a statute places the non-resident corporation at the mercy of unscrupulous residents who may file unfounded claims for amounts so small that it will be necessary for non-resident corporations to pay them

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(2) a contract by its terms or by implication governed by English law; (3) a contract made by or through an agent travelling or residing in England on behalf of a principal trading or residing outside the jurisdiction; (4) a contract breached within the jurisdiction regardless of where made; and (5) causes of action arising from a tort committed within the jurisdiction. It is interesting to note that the fourth basis for jurisdiction requires much less contact with that jurisdiction than the statute in the principal case.

[35]Liability can best be determined by a court familiar with the law applicable rather than a court which, in some instances, may find itself unversed in the application of such laws. See Reiblich, Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937 (1938) 3 Md. L. Rev. 35 at 70.

[36]Notes (1954) 40 Va. L. Rev. 1083 at 1085; (1952) 9 Wash. & Lee L. Rev. 284 at 291.

[37]See Reiblich, Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937 (1938) 3 Md. L. Rev. 35 at 68 for a further development of this point.

or suffer default judgments.[38] While there is this possibility of "shakedowns," it is not apparent why the law should sacrifice the welfare of the majority to avoid a possible detriment to a few. And the statutes may be so worded as to make it possible for a court to decline jurisdiction in those cases in which the motive for the suit is questionable.[39]

It will be admitted that without the *International Shoe Co.* case as a foundation, the Maryland court's decision would represent a great extension of the law in this field, but with that landmark case as its basis, the principal case is no more than the natural and desirable culmination of principles already formulated by the Supreme Court.

GRAY C. CASTLE

PROCEDURE—VALIDITY OF NON-RESIDENT MOTORIST STATUTE PROVIDING FOR SENDING OF NOTICE OF SUIT TO DEFENDANT PRIOR TO SERVICE ON LOCAL AGENT. [Delaware]

Although the traditional method by which a court acquires jurisdiction over a defendant is personal service of process on him within the state by whose authority the process is issued,[1] the Supreme Court of the United States in 1878 recognized that in some circumstances a state could validly provide for substituted or constructive service on non-resident defendants. Thus, in *Pennoyer v. Neff* it was stated: "Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way,

[38]Note (1954) 40 Va. L. Rev. 1083 at 1085.

[39]Such a procedure is provided for by the English statutes under which jurisdiction does not exist until the plaintiff has secured the court's permission to use Rule 1 (the terms of which are set forth in note 34, supra.) See Note (1952) 37 Corn. L. Q. 458 at 474.

[1]Michigan Trust Co. v. Ferry, 228 U. S. 346 at 353, 33 S. Ct. 550 at 552, 57 L. ed. 867 at 874 (1913); D'Arcy v. Ketchum, 11 How. 165 at 174, 13 L .ed. 648 at 652 (1850); Culp, Process in Actions Against Non-resident Motorists (1934) 32 Mich. L. Rev. 325; Ross, The Shifting Basis of Jurisdiction (1933) 17 Minn. L. Rev. 146.

and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State."[2]

After the advent of the automobile, the increasing volume of interstate motor vehicle traffic resulted in an inevitable increase in the number of accidents involving residents of different states and gave rise to a new jurdisdictional problem. In the early days of the automobile, the resident motorist who had been involved in an accident with a non-resident, and who wished to sue for his damages, found it necessary to bear the burden of leaving his state and the scene of the accident and going to the state of the non-resident's domicile in order to prosecute the case. It soon became apparent that some method was needed whereby the courts of the state where the accident occurred might secure jurisdiction over the non-resident.

Three cases generally have been cited as laying the constitutional foundation for this jurisdiction and perfecting the procedure for invoking it.[3] The first of these was *Hendrick v. Maryland*,[4] dealing with a Maryland statute requiring non-resident motorists entering the state to secure Maryland operator's licenses. The Supreme Court of the United States upheld the constitutionality of the statute on the ground that it was a reasonable use of the police power of the state to regulate the traffic on its highways, even though the highways were used by those engaged in interstate commerce as well as by those engaged in intrastate commerce. While this case did not deal with the civil liabilities of non-resident motorists, it did indicate that a state might, through the reasonable exercise of its police power in regulating the use of its roads, place conditions on the privilege of non-resident motorists to travel over those roads.

The second phase of development arose from consideration of a New Jersey statute which required a non-resident motorist actually to appoint a state official as agent to receive service of process in case an accident should occur in connection with his use of the highways of the state.[5] Although the case involved criminal punishment for failure to appoint such an agent, the decision, sustaining the statute as a reasonable exercise of the police power of the state, helped to lay

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[2]95 U. S. 714, 735, 24 L. ed. 565, 573 (1878).

[3]Culp, Process in Actions Against Non-resident Motorists (1934) 32 Mich L. Rev. 325, 326; Note (1927) 4 Wis. L. Rev. 189.

[4]235 U. S. 610, 35 S. Ct. 140, 59 L. ed. 385 (1915). The Maryland statute under question is to be found in Md. Laws (1910) c. 207, p. 177.

[5]Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. ed. 222 (1916). The New Jersey statute under question is to be found at N. J. Laws (1908) 613.

the foundation for today's more comprehensive non-resident motorist statutes.

The third case[6] in the pattern of development interpreted a Massachusetts statute which provided that by the use of the state highways a non-resident was deemed to have appointed the Registrar of Motor Vehicles as his agent to receive service of process in accidents resulting from such use of the highways. As a means of providing the non-resident with actual notice of the Massachusetts proceeding against him, this statute further required that notice of service of process on the Registrar be sent to the defendant by registered mail. The Supreme Court, in upholding the validity of this system of obtaining jurisdiction over a non-resident in a civil action, stated that "the difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the 14th Amendment."[7] Thus it was determined that jurisdiction can be secured by the implied consent of the non-resident motorist, as evidenced by his voluntary use of the highways, that a designated state official shall be his agent for the receipt of process. And it further appears that this jurisdiction is based on the exercise of the state's police power to make reasonable regulations for the use of its highways.[8]

Although it is conceded that a state may acquire jurisdiction over a non-resident motorist using the state highways, procedure for doing so must conform to the Due Process Clause of the Fourteenth Amendment, which requires that every defendant shall have an opportunity to defend his property and himself in all legal proceedings instituted with respect thereto. The relation between due process and notice to the defendant was in issue in the case of *Wuchter v. Pizzutti*,[9] involving a New Jersey statute which provided for service on the Secretary of State but which did not provide for notice to the non-resident defendant of such service. The statute had been sustained by the New Jersey courts[10] on the basis of *Hess v. Pawloski*,[11] but

[6]Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927). The Massachusetts statute involved is to be found in 90 Mass. Gen. Laws (1923) c. 431 § 2.

[7]Hess v. Pawloski, 274 U. S. 352, 357, 47 S. Ct. 632, 633, 634, 71 L. ed. 1091, 1095 (1927).

[8]Culp, Process in Actions Against Non-resident Motorists (1934) 32 Mich. L. Rev. 325, 330; see also Scott, Jurisdiction Over Non-resident Motorists (1926) 39 Harv. L. Rev. 563 at 585.

[9]276 U. S. 13, 48 S. Ct. 259, 72 L. ed. 446 (1928). The New Jersey statute under question is to be found in N. J. Laws (1924) c. 232, p. 517.

[10]Martin v. Condon, 3 N. J. Misc. 726, 129 Atl. 738 (1925).

[11]247 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927). This decision had held that substituted service on a non-resident motorist was sufficient when notice and copy of the process was sent by registered mail to the non-resident. The New Jer-

the United States Supreme Court held it unconstitutional as denying due process because of the absence of reasonable provisions for notifying the defendant of the action pending against him. Chief Justice Taft expressed the opinion of the Court that "the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice."[12] After this decision the New Jersey law was amended so as to provide that notice of service on the Secretary of State be sent by registered mail to the non-resident defendant, and in this form the validity of the statute was thereafter upheld.[13]

Though the states generally now have non-resident motorist statutes which expand the concept of "in personam" jurisdiction in this matter, [14] litigation concerning their validity is not yet at an end. The recent Delaware case of *Castelline v. Goldfine Truck Rental*

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sey statute provided for no notice to the defendant, but the New Jersey court failed to observe the distinction laid out in the Hess case.

[12]Wuchter v. Pizzutti, 276 U. S. 13, 19, 48 S. Ct. 259, 260, 72 L. ed. 446, 449 (1928).

[13]Cohen v. Plutschak, 40 F. (2d) 727 (D. C. N. J. 1930). N. J. Laws (1927) c. 232, amending N. J. Laws (1924) c. 232 added the notice provision that service on the Secretary of State or someone designated by him was sufficient "provided that notice of such service and the copy of the summons and complaint are forthwith sent by registered mail to the defendant by the Secretary of State... and the defendant's return receipt and the affidavit of the Secretary of State... of the compliance herewith are appended to the said summons and complaint and filed in the office of the clerk of court wherein the said action may be pending...." The court said this statute gave to non-resident defendants every opportunity to defend that resident defendants had.

[14]For example: 3 Mass. Laws Ann. (Michie, 1954) c. 90, § 3A: "The acceptance by a person who is a resident of any other state or country of the rights and privileges conferred by section three, as evidenced by the operation, by himself or agent, of a motor vehicle thereunder,... shall be deemed equivalent to an appointment by him of the registrar, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him or his executor or administrator growing out of any accident or collision in which such person or his agent may be involved while operating a motor vehicle on such way or in such place, and said acceptance or operation shall be a signification of his agreement that any such process against him, or his executor or administrator, which is so served shall be of the same legal force and validity as if served on him personally." 3 Mass. Laws Ann. (Michie, 1954) c. 90, § 3C (2): "Notice of such service upon the registrar and a copy of the process shall be served upon the defendant, if found within the commonwealth, by a sheriff or deputy sheriff of any county of this commonwealth, or, if found without the commonwealth, by any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found...." See also, N. Y. Consol. Laws Serv. (1952) Vehicle and Traffic Laws § 52; Mich. Comp. Laws (1948) § 256.521; 39 N. J. Stat. Ann. (1955) § 39:7-3.

Service[15] raised the question of the constitutionality of the Delaware non-resident motorist act in regard to the type of notice given to the non-resident defendant. More specifically, the issue presented was "whether the requirements of due process are satisfied by a provision that the notice to the non-resident be sent prior to actual service upon the pretended agent."[16] The statute provides that "not later than the day following the commencement of the action a copy of the process and notice that service of the original of such process has or will soon be made upon the Secretary of State of this State . . . [shall be] sent by registered mail by the plaintiff in the civil action to the non-resident defendant therein. . . ."[17]

The trial court had reasoned that due process of law demands that a non-resident defendant be given notice that will indicate "that action has been commenced against him, and that legal process has been served upon his agent, the Secretary of State,"[18] because without such notice he is not informed that the court has acquired jurisdiction over him. It was held that the Delaware Act does not meet these constitutional requirements because "It is but an idle gesture to pretend that the notice provision of our statute as prescribed therein, that service of the original of such process has *or soon will be made* upon the Secretary of State, is a reliable means of acquainting the non-resident defendants of the fact that their rights are before this Court for adjudication."[19]

On appeal, the Supreme Court of Delaware in reversing the trial court decision concluded "that the fundamental requirement of due process of law is that the non-resident motorist be assured by the statute that he will in reasonable probability receive notice of the

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[15]112 A. (2d) 840 (Del. 1955).

[16]112 A. (2d) 840, 843 (Del. 1955).

[17]2 Del. Code (1953) tit. 10, § 3112(b).

[18]Castelline v. Goldfine Truck Rental Service, 107 A. (2d) 915, 919 (Del. Super. 1954). The Superior Court also held that the provision of the statute in question violated the equal protection clause of the 14th Amendment in showing a discrimination harmful to non-resident defendants. The ground for this holding appears to be that suit against non-residents may be started by giving notice, while suit against residents is started by the service of summons. This point is discussed by the Delaware Supreme Court decision at 112 A. (2d) 840, 844 where it is pointed out that actual service on the statutory agent must be made before a valid judgment can be pronounced. It thus appears that the result between residents and non-residents is the same. Literal and precise equality in the matter of notice is not required. Hess v. Pawloski, 274 U. S. 352 at 356, 47 S. Ct. 632 at 633, 71 L. ed. 1091 at 1095 (1927); Schilling v. Odlebak, 177 Minn. 90, 224 N. W. 694 at 696 (1929).

[19]Castelline v. Goldfine Truck Rental Service, 107 A. (2d) 915, 920 (Del. Super. 1954).

pendency of the action against him and that he be given an opportunity to defend the action. To comply with this requirement, it is not necessary . . . that he be notified that in fact formalistic gestures have been completed. It is sufficient if he is given notice that an action has been instituted against him."[20] So reasoning, the Delaware Supreme Court held that sufficient notice was afforded the non-resident defendant and that the statute meets due process requirements.

A search among the cases and statutes of the various states has failed to bring to light any non-resident motorist legislation which includes any phrase similar to that of the Delaware statute stating that service of process *has or will soon be made* on the designated state official. Other courts, in construing the conventionally-worded statutes, have employed strikingly similar phraseology in explaining the nature and scope of the notice requirement as applied to the Acts. Similar to the course followed by the principal decision, they have uniformly ruled that adequacy of notice, so far as due process is concerned, depends on whether the form of the substituted service is reasonably calculated to give the non-resident defendant *actual* notice of the pendency of the action and an opportunity to be heard.[21]

On this basis, a New York court, in refusing to enforce a judgment secured in Connecticut, held that the Connecticut statute, which required that notice of service of process on the Commissioner of Motor Vehicles be sent by registered mail to the last-known address of the non-resident operator, denied due process.[22] It was decided that the sending of notice to the last-known address did not make it reasonably certain that the non-resident defendant would be informed of the action started against him. In affirming this decision, the Appellate Division court stated that the Connecticut statute did not make it reasonably certain that notice of service on the Commissioner would be communicated to the defendant within time for him to defend the action, for the statute did not require notice to be sent *forthwith* to the defendant.[23] Similarly, a Maryland statute which required that notice be sent to the defendant at his address as specified in the process has been held unconstitutional.[24] It was concluded that sending notice to such address would not give a reasonable certainty of actual notice

[20]Castelline v. Goldfine Truck Rental Service, 112 A. (2d) 840, 843 (Del. 1955).

[21]Olberding v. Illinois Central Railroad Co., Inc., 346 U. S. 338, 74 S. Ct. 83, 98 L. ed. 39 (1953); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927); Ray v. Richardson, 250 Ala. 705, 36 S. (2d) 89 (1948).

[22]Freedman v. Poirier, 134 Misc. 253, 236 U. Y. Supp. 96 (1929).

[23]Freedman v. Poirier, 227 App. Div. 320, 237 N. Y. Supp. 618 (1929).

[24]Grote v. Rogers, 158 Md. 685, 149 Atl. 547 (1930).

to the defendant, as the defendant might change his domicile between the giving of his address at the time of the accident and the institution of the suit. But it has been stated broadly that no specific language is required in the notice to the non-resident. Any language plainly informing him that the service has been made on his agent is considered sufficient.[25]

A distinction has been observed in the notice requirement between substantive and procedural due process. A federal court, in construing a conventionally-worded Missouri statute, observed: "Service is not completed by receipt of same by the Secretary of State since that merely establishes the jurisdictional base and gives a defendant substantive due process. Such a statute must also provide for notice reasonably calculated to reach the defendant before procedural due process has been complied with."[26]

If any special significance is to be attributed to the principal decision, it is that it recognizes the fictional quality of the requirement that both procedural and substantive due process be satisfied in order to obtain jurisdiction over non-resident motorists.[27] As the formalistic gesture of serving the Secretary of State does not aid in the accomplishment of the actual notice required to be given the non-resident, it is conceivable that a trend will develop whereby procedural due process alone will satisfy the constitutional requirements for the obtaining of jurisdiction in the instant situation.[28]

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[25]Webb Packing Co. v. Harmon, 8 Harr. 476, 193 Atl. 596 at 597 (Del. 1937); Biddle v. Boyd, 8 Harr. 469, 193 Atl. 593 at 595 (Del. 1937).

[26]Welker v. Hefner, 97 F. Supp. 630, 632 (E. D. Mo. 1951). This case holds that removal time starts running from receipt of service by the defendant and not from service on the Secretary of State.

[27]"We recognize that we approach the realm of fiction in requiring formal service upon a statutorily appointed agent, but since our courts may proceed *in personam* only after service of process, and since the state's process cannot run beyond its boundaries, the fiction may be utilized to permit the state to exercise its admitted police power over its highways.... The real question presented in this appeal is whether or not the requirements of Federal due process are satisfied by the notice provisions of 10 Del. C. § 3112." Castelline v. Goldfine Truck Rental Service, 112 A. (2d) 840, 842 (Del. 1955).

[28]In Olberding v. Illinois Central Railroad Co., Inc., 346 U. S. 338, 341, 74 S. Ct. 83, 85, 98 L. ed. 39, 43 (1953), Justice Frankfurter, in speaking of jurisdiction over non-resident motorists (in a venue case) said: "The liability rests on the inroad which the automobile has made on the decision of Pennoyer v. Neff, 95 U. S. 714, as it has on so many aspects of our social scene. The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him provided only that he is afforded an opportunity to defend himself." This case was considered by the Supreme Court of Delaware and at least seems to indicate a possibility of doing away with service on a fictional agent in favor of actual service on the defendant.

PROPERTY—DOWER AS INTEREST IN LAND ENTITLING WIFE TO OBTAIN SHARE OF PROCEEDS FROM CONDEMNATION OF HUSBAND'S LAND. [South Carolina]

Dower, being that portion of lands or tenements of the husband which the wife has for the term of her life after his decease for the sustenance of herself and the nurture and education of her children,[1] has always been highly regarded and diligently protected by the law.[2] Inchoate dower is a valuable property right in the sense that the husband may not defeat dower by a voluntary conveyance in which the wife does not join, and that it is not subject to the claims of the husband's creditors and will not be defeated by a sale of the husband's property by his trustee in bankruptcy.[3] Thus, the law has zealously guarded inchoate dower against any individual who would divest the wife of her rights without her consent.[4] However, the courts have not been so uniformly alert to protect dower interests when called upon to adjudicate the rights of the husband, the wife, and the state in eminent domain proceedings.[5]

The courts appear to be agreed that the wife's inchoate dower rights are extinguished as against the *land* itself when the state con-

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[1]Beals v. Ares, 25 N. M. 459, 185 Pac. 780 (1919). As in Knapp v. Knapp, 303 Ill. 535, 135 N. E. 732 (1922) where it was said that dower is the right which the law gives to the widow in the lands of which her husband was seized during marriage, and is inchoate during the husband's lifetime.

[2]United States v. Certain Parcels of Land, 46 F. Supp. 441 at 446 (D. C. Md. 1942). "When the wife's inchoate dower right has once attached it cannot be divested except as provided by law, generally by some act of her own done in accordance with statutory requirements. While the wife's inchoate right will be lost if the husband should be divested of seisin,... her right cannot ordinarily be affected by any act of the husband without her assent, particularly where his acts constitute fraud as against the wife. Thus he cannot by will defeat her dower, or statutory substitute for dower." 28 C. J. S. 115.

[3]United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. C. Md. 1942); 2 Tiffany, Real Property (3rd ed. 1939) § 533. A wife's inchoate right of dower cannot be reached by a creditor's bill, Sherman v. Hayward, 98 App. Div. 254, 90 N. Y. Supp. 481 (1904), and is not liable to levy and execution, Hopkins v. Magruder, 34 F. Supp. 381 (D. C. Md. 1940).

[4]Note (1935) 4 Ford. L. Rev. 504.

[5]Dower was not recognized in eminent domain proceedings in Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98 (1898); Long v. Long, 99 Ohio St. 330, 124 N. E. 161, 5 A. L. R. 1347 (1919). Cf. Venable v. Wabash Ry. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68 (1892) (voluntary conveyance by husband alone in lieu of eminent domain taking); Chouteau v. Missouri Pacific Ry. Co., 122 Mo. 375, 22 S. W. 458 (1893), aff'd 30 S. W. 299 (1894) (condemnation for an easement); Duncan v. Terre Haute, 85 Ind. 104 (1882) and Gwynne v. Cincinnati, 3 Ohio 24 (1827) (dedication to public use).

demns the property in eminent domain proceedings.[6] This conclusion is based on the rule that when the husband acquires property, the wife's dower attaches subject to any encumbrance on, or infirmity in, his title.[7] Though the rule is generally applied to protect the holders of liens or other specific interests existing when the husband became owner of the land,[8] it is extended to embrace also the general right of the state to take property for public uses.[9]

While the courts are thus generally agreed that the wife has no legal status which enables her to claim compensation as against the condemnor, a substantial conflict of opinion exists as to whether, after the award has been paid into court, the wife can, as against her husband, secure a share of the compensation which represents her dower interest. In the recent case of *Shelton v. Shelton*,[10] this issue was litigated for the first time in South Carolina. The state Supreme Court, noting that the decisions in other jurisdictions are not completely in accord, adopted the view of what was termed the "overwhelming weight of authority" that "the inchoate right of dower is not such an interest in land as to entitle the wife, when such land is taken by the right of eminent domain, to have any portion of the compensation paid turned over to her directly, or set aside for her benefit upon the contingency of her surviving her husband."[11]

Lacking direct precedent in the state for denying the wife's claim, and faced with the incontrovertible fact that inchoate dower had repeatedly been held to be "a substantial right of property,"[12] the court found some difficulty in supporting its conclusion with persuasive reasoning. General reference was made to the recognized rules that the wife's dower right is subject to any infirmity in the husband's

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[6]Wheeler v. Kirtland, 27 N. J. Eq. 534 (1875); Long v. Long, 99 Ohio St. 330, 124 N. E. 161, 5 A. L. R. 1343 (1919); Shelton v. Shelton, 83 S. E. (2d) 176 (S. C. 1954); 2 Tiffany, Real Property (3rd ed. 1939) § 533. In Justice v. Georgia Industrial Realty Co., 109 Va. 366, 368, 63 S. E. 1084, 1085 (1909) where a wife was allowed to upset a fraudulent condemnation proceeding by virtue of her dower interest, however, it was said that the principle that a wife is not a necessary party to condemnation proceedings "would be unquestionably sound in a lawful proceedings against the husband to condemn land in which the wife had an inchoate right of dower."

[7]Shelton v. Shelton, 83 S. E. (2d) 176 at 177 (S. C. 1954); Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776 (1892); 28 C. J. S. 96.

[8]Shelton v. Shelton, 83 S. E. (2d) 176 (S. C. 1954); Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776 (1892).

[9]In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935); Shelton v. Shelton, 83 S. E. (2d) 176 (S. C. 1954).

[10]83 S. E. (2d) 176 (S. C. 1954).

[11]83 S. E. (2d) 176, 177 (S. C. 1954).

[12]Shelton v. Shelton, 83 S. E. (2d) 176, 177 (S. C. 1954).

title, including the liability to be taken for public use, and that land is sold in a partition proceeding free of the dower rights of the wife of the co-tenant. The court then advanced two specific arguments against recognizing any right in the wife to a share of the condemnation award: First, an analogy was drawn to the cases which hold that when the wife releases her dower rights by joining her husband in executing a mortgage on the property, she has no rights in the surplus proceeds of a foreclosure sale. Second, it was reasoned that since the wife does not have sufficient interest in the land to make her a necessary party in the condemnation proceedings,[13] she has no interest in the compensation award worthy of judicial protection.[14]

The fact that inchoate dower rights are subject to the infirmities of the husband's title fails to bear directly on the real issue of the principal case, because that rule is pertinent where the question is whether the wife has rights in the land itself, whereas the claim in the principal case is made against the award to the husband as owner of the land. Similarly, the partition cases have commonly involved the wife's claim against the land in the hands of the purchaser in the partition proceedings. In that connection her right is said to have been extinguished because her dower interest attached subject to the paramount right of tenants-in-common to have partition of common property.[15] In order that the co-tenants may gain their due benefit from partition, the land must be sold free from dower claims so that the purchasers will be willing to pay full value for the property. The few

[13]Generally, it is held that the wife is not a necessary party to the condemnation proceedings, meaning that since her dower interest attaches subject to the infirmity that all land is liable to be taken for public uses, her rights are not recognized as against the state in eminent domain proceedings. In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935). In United States v. Certain Parcels of Land, 46 F. Supp. 441 (D. C. Md. 1942), although a statute required that the wife be a party to the proceedings, it was held that this was merely a procedural requirement and did not indicate that the wife had a substantial property right, However, whether or not the wife is joined in the condemnation proceedings appears to have no effect on the wife's ultimate right in the award since in any event her dower claims are extinguished as to the state, and her rights, if any, are against her husband for a share of the award.

[14]Finally, the court drew the rather dubious conclusion that the fact that no such claim had ever been asserted in South Carolina courts before "indicates the common consent and opinion of the legal profession in this state that the wife... has no interest [in condemnation proceedings]." Shelton v. Shelton, 83 S. E. (2d) 176, 177 (S. C. 1954). Obviously, there must be a first time for every controversy to be brought before the courts; this reasoning, therefore, could be advanced to refute any new claim.

[15]Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262 (1855); Weaver v. Gregg, 6 Ohio St. 547 (1856); Shelton v. Shelton, 83 S. E. (2d) 176 (S. C. 1954); Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776 (1892).

partition cases which have been concerned with the wife's right as against her husband have held either: (1) that since it is not possible to ascertain judicially the value of inchoate dower, it can not be awarded to her;[16] or, (2) in jurisdictions where dower has been extended by statute to include personalty, that while her inchoate right attaches to the award as personalty of her husband, she has no present right to the award, but only the right to receive her share of the proceeds at his death if they are still in his estate.[17] The former reason impliedly concedes that the wife is being wrongfully deprived of her dower rights, and under the latter the husband can divest her of her inchoate interest without her consent by merely spending the money before his death.

The analogy between the wife's contention in the *Shelton* case and the wife's claim against the surplus proceeds from a mortgage foreclosure[18] also seems irrelevant to the issue of the principal case. By joining in the execution of the mortgage, the wife has voluntarily waived her dower interest in the land, and the surplus proceeds of the foreclosure sale merely represent the part of the land termed the mortgagor's equity of redemption.[19] By contrast, in condemnation cases, the sovereign has divested the wife of her interest in the land without her consent, and she should have her rights in the land transferred to the compensation award which the husband receives in place of the land.[20]

In concluding that since the wife has no such interest in the lands as to require making her a party to this proceeding, then she has no interest in the proceeds which the court should protect,[21] the

[16]Salvator v. Fuscellaro, 53 R. I. 271, 166 Atl. 26 (1933).

[17]Long v. Long, 99 Ohio St. 330, 124 N. E. 161, 5 A. L. R. 1343 (1919).

[18]Grube v. Lilienthal, 51 S. C. 442, 29 S. E. 230 (1898).

[19]In the principal case, the wife has in no way affected her rights by her own actions, whereas in the case of a mortgage, she has at least signed the mortgage, purporting to waive her dower rights. The argument in favor of allowing dower to attach to the surplus proceeds may be based on the idea that the wife's release of her dower in the land is given only to the extent the land is needed to secure the mortgage debt. When foreclosure sale is held, enough of the purchase price to pay off the debt is paid to the creditor-mortgagee, and the surplus is returned to the husband. The argument is that the wife's dower release was never extended to this surplus value of the land, and that she therefore should have part of the surplus which represents the remainder of the husband's ownership in the land. For an extensive discussion of the problems arising in different jurisdictions, see Note (1921) 12 A. L. R. 1347. Virginia cases on this problem are Hoy v. Varner, 100 Va. 60, 42 S. E. 690 (1902); Land v. Shipp, 100 Va. 337, 41 S. E. 742 (1902); Wilson v. Branch, 77 Va. 65, 46 Am. St. Rep. 709 (1883); Wilson v. Davisson, 2 Rob. 384 (Va. 1843); Heth v. Cocke, 1 Rand. 349 (Va. 1823).

[20]In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935).

[21]Shelton v. Shelton, 83 S. E. (2d) 176 at 178 (S. C. 1954).

South Carolina court was once again diverted from the essential distinction between the rights of the wife in the land itself as against the condemnor and the rights in the compensation award as against the husband. As a means of facilitating the condemnation proceedings, it may be a good policy to simplify procedure by having the sovereign pay the full value of the property directly to the husband, without being put to the delay and expense of bringing the wife into the case and determining the amount of the total value that represents her dower claims. Once the sovereign has achieved its purpose of obtaining the land, however, the pertinent public policy is served, and the individual rights of the husband and the wife can then be brought into issue. To say that the wife need not be joined in the condemnation is not to say that she has no interest in the property or the award, but is merely to say that compensation for her interest is, for the convenience of the sovereign, made in the single award to the husband instead of in separate awards to each.[22] Other courts, in jurisdictions where the wife has dower rights in personalty, have followed the majority view even while conceding that when a condemnation award is made, the wife's interest in the land is covered by the award and her inchoate dower attaches thereto.[23] As in the partition cases,[24] it is reasoned that the money being personalty, the wife has no present right to have any part of the award secured to her or protected for her later use, because when her husband dies, she will be entitled to a share of his personalty and will thereby realize her share of the award.[25] The further argument is advanced that if the wife is allowed to take a share of the condemnation money immediately and again at the death of her husband, she would be receiving double payment of dower claims from the award money.[26] The fallacy in the double-compensation contention lies in the fact that in the jurisdictions in question a wife has dower rights in both realty and personalty. At the time of the condemnation, she is claiming her inchoate dower interest in the husband's realty, whereas at his death she would receive her dower rights in the husband's personalty. The fact that some of the

[22]See Long v. Long, 99 Ohio St. 330, 124 N. E. 161, 162, 5 A. L. R. 1343, 1346 (1919).

[23]Moore v. City of New York, 8 N. Y. (4 Selden) 110, 59 Am. Dec. 473 (1853); Long v. Long, 99 Ohio St. 330, 124 N. E. 161, 5 A. L. R. 1343 (1919). The New York court In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935) reinterpreted the Moore decision.

[24]Weaver v. Gregg, 6 Ohio St. 547 (1856); Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776 (1892); Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262 (1855).

[25]See Long v. Long, 99 Ohio St. 330, 124 N. E. 161 at 163, 5 A. L. R. 1343 at 1346 (1919).

[26]Salvatore v. Fuscellaro, 53 R. I. 271, 166 Atl. 26 (1933).

husband's personalty may represent the money he received in the condemnation proceedings is purely coincidental. An analogous situation arises when the husband sells land without release of dower, and the wife sues after the husband's death for her interest. There the courts allow her to recover, even though she also receives her share of her husband's personalty.[27]

Perhaps the basic factor which has made the courts reluctant to recognize a wife's claim to part of the condemnation award rests not on legal theory but on the practical objection that it is not possible to determine the present value of inchoate dower, there being no way to foretell accurately whether and for how long the wife will survive her husband, or what the value of the use of the land would be during the period of her survival.[28] Because of the uncertainty of how much the wife should have, she is denied any recovery, a result which is neither legally sound nor socially desirable.[29]

The few courts which have accorded protection to the wife's dower rights in condemnation proceedings against the husband's land[30] reason that: "The value of her interest, therefore, passes into the award. In this view, the condemnation of the land, by notice to the husband, condemns and extinguishes the inchoate interest of the wife. The land is transmuted into money. It assumes a shape where she can claim her right without interfering with the public. Equity will secure to her that portion of the award which represents her inchoate dower."[31] This position is confirmed, in the opinion of the minority courts, by the strong policy of the law to secure dower rights against destruction by any possible act of the husband.[32] Since it is not possible for the husband to defeat his wife's dower in the land, he should not be able to deny that her interest attaches to the condemnation award, which stands as a substitute for the land taken under eminent domain power.

The validity of the minority position can be sustained by drawing

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[27]O'Steen v. O'Steen, 204 Ala. 397, 85 So. 547 (1920); Rowe v. Ratliff, 268 Ky. 217, 104 S. W. (2d) 437 (1937).

[28]See Long v. Long, 99 Ohio St. 330, 124 N. E. 161 at 162, 5 A. L. R. 1343 at 1346 (1919), quoting from Moore v. City of New York, 8 N. Y. (4 Selden) 110, 59 Am. Dec. 473 (1853).

[29]Note (1943) 7 Md. L. Rev. 263 at 268.

[30]In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935); In re New York and Brooklyn Bridge, 75 Hun. 558, 27 N. Y. Supp. 597 (1894), aff'd 143 N. Y. 640, 37 N. E. 823 (1894). See Simar v. Canaday, 53 N. Y. 298, 304 (1873); Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721, 722 (1906).

[31]Wheeler v. Kirtland, 27 N. J. Eq. 534, 537 (1875).

[32]In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935).

an analogy between the nature of inchoate dower and an executory interest in realty, conditioned to take effect if the grantee survives another.[33] Although technically, inchoate dower does not rise to the dignity of a vested property interest, and lacks some of the attributes of an executory limitation, yet the interest is the same for purposes of the problem under discussion. Since the courts will allow the holder of an executory limitation to recover a portion of the condemnation award in eminent domain proceedings,[34] the wife's right to part of the award as compensation for her inchoate dower should also be recognized.

The minority courts refuse to be diverted by the difficulty of evaluating the dower claim. In New York and New Jersey no present lump sum award is given, but provision is made for future payments.[35] One-third of the total award is withheld from the husband and invested. During the husband's lifetime, the interest on the investment is paid to the husband, and if he survives his wife, then the invested principal is paid over to him. In the event the wife survives the husband, she receives the interest from the investment for the rest of her life.[36] It would seem that this method provides the more accurate means of assuring due compensation to the wife, but it has been suggested also that the value of inchoate dower may be computed in such a way as to enable the court to make a present award to the wife.[37] This process is to ascertain the present cost of an annuity for her

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[33]"Until his death, she has a possibility of an estate, conditioned, in the first place, upon her survival of him, and in the second, upon the assignment of dower. Since, however, she can insist on the assignment of dower after his death, the only contingency of a substantial character is that of her survival. Consequently, is seems, the possibility of an estate represented by the expression 'dower inchoate' might be regarded as analogous to the possibility created by an executory limitation on one's favor conditioned to take effect in case she survives another." 2 Tiffany, Real Property (3rd ed. 1939) § 533.

[34]1 Orgel, Valuation Under Eminent Domain (1953) § 119: "Where the outstanding interest is a life estate, the duration of the present estate may be estimated on the basis of the mortality and life expectancy tables." Where the termination of the present estate is likely, it is said: "... the award is to be divided 'in such shares as fairly represented the proportionate value of the present defeasible possessory estate and the future expectancy'."

[35]Wheeler v. Kirtland, 27 N. J. Eq. 534 (1875); In re Cropsey Ave., 268 N. Y. 183, 197 N. E. 189, 101 A. L. R. 694 (1935). The chance of the question under discussion arising in New York is decreasing continually because inchoate dower was abolished by the New York Real Property Law § 90, providing that the wife shall have no inchoate dower in property acquired by her husband after 1930.

[36]For a discussion of the evaluation of inchoate dower for a different purpose, see Note (1945) 29 Minn. L. Rev. 280.

[37]United States ex rel. and for the use of Tennessee Valley Authority v. Spiceland, 52 F. Supp. 40 (1943); Lancaster v. Lancaster's Trustee, 78 Ky. 198 (1879).

life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then deduct from that cost the cost of a similar annuity dependent upon the joint lives of herself and her husband; the difference between those two sums will be the present value of her contingent right of dower.[38]

Though the decision in the principal case reflects the view of most of the courts, it rests largely upon inappropriate analogies, superficial reasoning, and surrender to practical difficulties. The New York view affords a more realistic and accurate means of protecting the interests of both the husband and wife in the condemnation award.

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PROPERTY—EXISTENCE OF HOSTILE INTENT NECESSARY FOR ADVERSE POSSESSION WHEN POSSESSOR OCCUPIES UNDER MISTAKEN ASSUMPTION OF OWNERSHIP. [Maryland and New Jersey]

Controversies regarding the proper location of boundaries between adjoining land owners have long been a prolific source of litigation, particularly when the question of adverse possession arises. In the latter situation, the ascertainment of the rights of the disputants is often made difficult by the conflicting judicial pronouncements as to what constitutes the "hostile intent" which is an essential element of adverse possession.[1] Some confusion arises from the use by the courts of two approaches to the problem and of differing interpretations as to each approach.

One approach to the meaning of "hostile intent" emphasizes the possessor's *intention* relative to visible or ascertainable boundaries, as in the typical situation in which A occupies a strip of land up to a fence which both parties suppose to mark the boundary line between A and B, but which actually encroaches materially upon B's land. If the adverse possessor intended to claim the land to the visible boundary as his own, and possessed and used such land, then the great majority of jurisdictions consider the mistake as immaterial and the possession as adverse.[2] This result is demonstrated in the recent case of *Ridgely*

[38]Jackson v. Edwards, 7 Paige 386 (N. Y. 1839); Strayer v. Long, 86 Va. 557, 10 S. E. 574 (1890).

[1]To have been "adverse," the possession must have been hostile, exclusive, continuous, uninterrupted, visible, and notorious. 4 Tiffany, Real Property (3rd ed. 1939) §§ 1137-1145.

[2]Guy v. Lancaster, 250 Ala. 287, 34 S. (2d) 499 (1948), noted in (1948) 1 Ala. L. Rev. 80; Vade v. Sickler, 118 Colo. 236, 195 P. (2d) 390 (1948); Landers v.

v. Lewis[3] where the disputed land was included in a larger tract that was enclosed by a plainly visible fence. Stressing the fact that the adverse possessor had cultivated the entire enclosed area under the mistaken belief of both parties that he owned it all, the Maryland court concluded that an intention to occupy to fixed limits and claim them as *the* boundary line was not a provisional occupancy and therefore was sufficient to fulfill the requirements of hostility.[4]

Incorporated within the opinion of the *Ridgely* case, however, is an excerpt from an earlier Maryland decision pointing out that there is no adverse possession where the intent is to claim up to the boundaries only if they are found to be proper boundaries.[5] In other words, there is not sufficient "hostility" present in the mere intention of the adverse possessor to claim to the true line only, even though he has actually occupied the land up to the visible boundaries. The issue under this interpretation of the first approach is therefore complicated by the necessity of delving into the subjective intention of the adverse possessor. The question now is whether it is the *intention* or the *action* of the adverse possessor which is to be regarded as the determining factor, since one will necessarily be in conflict with the other.[6] Although there is much disagreement, the better view seems to consider that the mistaken belief or subjective intention of the disseisor is not a controlling factor.[7] Under this view,

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Thompson, 356 Mo. 1169, 205 S. W. (2d) 544 (1947); Morse v. Cochran, 131 Neb. 424, 268 N. W. 307 (1936); Menzner v. Tracy, 247 Wis. 245, 19 N. W. (2d) 257 (1945). For an exhaustive list of earlier cases so holding, see Note (1935) 97 A. L. R. 14 at 86.

[3]105 A. (2d) 212 (Md. 1954).

[4]Ridgely v. Lewis follows Tamburo v. Miller, 203 Md. 329, 100 A. (2d) 818 (1953), which seems to have overruled an earlier Maryland decision which followed the rule that a mistaken belief would not support an adverse claim. Davis v. Furlow's Lessee, 27 Md. 536 (1867). This overruling is significant since it points out a modern trend which is also on the verge of being recognized in New Jersey. See note 30, infra.

[5]Tamburo v. Miller, 203 Md. 329, 100 A. (2d) 818 at 821 (1953).

[6]In mistake-of-boundary cases, the adverse possessor did not know he was encroaching upon and possessing another's land. Therefore his intention could never be hostile unless he considered the fact he might be in possession of another's land and yet ignored such consideration. However, practically speaking, the adverse possessor seldom ever considers such a possibility, and therefore it is to be regretted that courts relying on intention rather than action have failed to realize that a person cannot show what he intended as to a matter which he never considered at all.

[7]In accord that subjective intention is immaterial: Daily v. Boudreau, 321 Ill. 228, 83 N. E. 218 (1907) (title acquired, although possessor never intended to hold more than his deed called for); Van Allen v. Sweet, 239 Mass. 571, 132 N. E. 348 (1921) (statement by defendant that "I do not want anything not belonging to me" did not affect adverse character of holding); Mittet v. Hansen, 178 Wash. 700, 35 P.

it is not deemed proper to place more emphasis on what the mistaken possessor would have intended had the facts been known to him than on his actual use of the land up to the visible boundary under a mistaken claim of right.[8] Furthermore, to place more weight on the adverse claimant's mental attitude than on his actions is not conducive to achieving the purpose of the statute of limitations—to give protection to the long-time apparent owner of the land—because turning the cases on the former factor will more often lead to results opposed to the policy of promoting the security of titles.[9]

The second possible approach to mistake-of-boundary cases is interrelated with the first, but is distinguished by its reduced emphasis on the possessor's intention in regard to visible boundaries and by its greater stress on the question of whether the disseisor's occupation had met the "hostility" requisite of adverse possession irrespective of his lack of intent to claim wrongfully. That is, the possession alone and the qualities immediately attached to it are taken into consideration, and if the adverse possessor occupies what he believes to be his own under a claim of ownership, then such possession is adverse. In respect to adverse possession, "hostile intent" was at one time interpreted literally to the point of virtually requiring an intentional tortious acquisition of land known to belong to another.[10] Through the

(2d) 93 (1934) (title by adverse possession in spite of statements that possessor claimed only to the true line). For a general discussion, see Walsh, Title by Adverse Possession (1939) 17 N. Y. U. L. Q. Rev. 44. For cases citing the opposite and majority view, see Note (1935) 97 A. L. R. 14 at 21.

[8]There is a problem of testimony here, since the adverse possessor will not usually commit himself as to whether he would have remained a wrongdoer had he known that he was one. As a witness, he would not generally admit that he intended to claim more than was lawfully his. See Hallowell v. Borchers, 150 Neb. 322, 34 N. W. (2d) 404 at 410 (1948).

In Milligan v. Fritts, 226 Mo. 189, 125 S. W. 1101 (1910), the court pointed out that the evident aim of cross-examination of the adverse possessor was to force him to admit that he never intended to claim ownership further than to the true line or else confess that he intended to claim what did not belong to him.

[9]"The desirability of fixing, by law, a definite period within which claims to land must be asserted has been generally recognized, among the practical considerations in favor of such a policy being the prevention of the making of illegal claims after the evidence necessary to defeat them has been lost, and the interest which the community as a whole has in the security of title." 4 Tiffany, Real Property (3rd ed. 1939) § 1134.

[10]An example of making the old intention to disseise a prerequisite to adverse possession under the statute is afforded by the statement in Ouzts v. McKnight, 114 S. C. 303, 103 S. E. 561 (1920), that "adverse possession is hostile possession, and hostile possession is possession with intention to dispossess the owner." See 3 Washburn, Real property (4th ed. 1876) 129. A similar view is expressed in Grube v. Wells, 34 Iowa 148 (1871).

years, however, its meaning has been altered[11] to include any intent which would help create such circumstances of notoriety as would alert the owner and give him a chance to resist the wrongful possession.[12] Even under the modified definition, there is some division of opinion as to the intention necessary to create hostility. One possible explanation for this conflict is that the courts have made either a negative or positive interpretation of the essential elements required to establish hostility. Under the negative interpretation, a possession is adverse when it is unaccompanied by any express or inferable recognition of the right of the real owner. In such a situation, "hostility" exists whether or not such claim to ownership is made under a mistaken belief. Such reasoning is set down in the leading case of *French v. Pearce*[13] where the controversy was over a border of unfenced woodland between two adjoining proprietors. The court on appeal ruled that the trial court had committed error in charging that the defendant's possession of the strip in dispute was not adverse if held with intent merely to claim to the true line. In its opinion, the court states: "... the intention of the possessor to claim adversely, is an essential ingredient. But the person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land."[14] Thus it appears that the actual exclusive possession and use of the land by the adverse possessor is regarded as sufficient to imply a hostile intention which serves the purpose of alerting the true owner to the existence of the adverse holding.[15] Such a result has merit, since the

[11]"It would seem that according to this rule, the intention necessary to make possession adverse is akin to felonious intent. Of course such a position is untenable and as soon as this view is brought to the attention of the courts, they repudiate all intention to hold it." Sternberg, The Element of Hostility in Adverse Possession (1932) 6 Temp. L. Q. 207, 214, as quoted in Darling, Adverse Possession in Boundary Cases (1939) 19 Ore. L. Rev. 117, 136.

[12]Under this view it would appear that "hostility" is not an essential element of adverse possession to the extent that the adverse possessor must be an intentional wrongdoer, but rather, it is becoming interrelated with the element of notoriety. In Ortiz v. Pacific States Properties, 96 Cal. App. (2d) 34, 215 P. (2d) 514, 516 (1950). the court stated: "To constitute a hostile claim there need not be open aggression or combat, neither need a notice to the owner be given other than the claimant's occupancy."

[13]8 Conn. 439 (1831).

[14]8 Conn. 439, 445 (1831).

[15]Under the doctrine of French v. Pearce, the occupation of a neighbor's land as if it were one's own creates an implication of the requisite claim to acquire

courts need not fetter themselves with testimony relative to "subjective hostile intention," and the mistaken claim is still considered wrongful so as to give rise to a cause of action in ejectment in favor of the original owner—the very cause of action against which the statute of limitations was intended to run.[16]

The rule of *French v. Pearce,* however, is contradicted by an earlier line of cases which derive their results from the common law doctrine of disseisin.[17] Disseisin, as properly recognized at common law, occurs when a man enters without permission into the lands or tenements of another and dispossesses the one who has a freehold estate in the land. Although most of the American courts in adverse possession cases interpreted "hostility" as meaning possession under conflicting claims,[18] a few courts flirted with the true doctrine of disseisin, and consequently required an expressed intention to oust the legal owner.[19] It was soon realized, however, that this latter view was placing a "premium on dishonesty," and in an attempt to depart from the harsh doctrine of old disseisin, many courts adopted the view that it was the withholding of the possession that constituted the cause of action in ejectment and not the manner in which that possession was gained, and consequently ouster no longer remained a principal factor.[20] Thus, the positive interpretation of this approach requires possession accompanied by a claim of right even if the boundary should eventually be found to be incorrect. The leading case following this interpretation is *Preble v. Maine Central Ry.*,[21] where, in an action brought to determine the dividing line between adjoining owners, the plaintiff claimed title to the disputed land by adverse pos-

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ownership under the statute of limitations. The question arises, then, what circumstances will overcome such implication. It appears that under this doctrine a mistaken belief will have no such effect.

[16]Cases in accord with the doctrine as laid down in French v. Pearce: Branyon v. Kirk, 238 Ala. 321, 191 So. 345 (1939); Miller v. Fitzgerald, 169 Ark. 376, 275 S. W. 698 (1925); Skala v. Lindbeck, 171 Minn. 410, 214 N. W. 271 (1927); and the cases cited in 2 C. J. S. 635, n. 70.

[17]Riley v. Griffin, 16 Ga. 141 (1854); Brown v. Gay, 3 Greenl. 126 (Me. 1824); Knowlton v. Smith, 36 Mo. 507 (1865).

[18]Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904 (1895); Crooker v. Jewell, 31 Me. 306 (1850).

[19]Zeller's Lessee v. Eckert, 45 U. S. 289, 11 L. ed. 979 (1846); Bannon v. Brandon, 34 Pa. St. 263, 75 Am. Dec. 655 (1859); Stonestreet v. Doyle, 75 Va. 356 (1881). See also Bordwell, Disseisin and Adverse Possession (1923) 33 Yale L. J. 141 at 151.

[20]"It was the logical outcome of the change in the action of ejectment from an action based on an ouster to an action based on detention of possession." Bordwell, Disseisin and Adverse Possession (1923) 33 Yale L. J. 141, 144.

[21]85 Me. 260, 27 Atl. 149, 21 L. R. A. 829 (1893).

session. The defendant railroad, after acquiring the land from the the plaintiff, replaced an existing fence to establish the seemingly proper boundary line. Although the plaintiff had possessed the land up to the fence for the statutory period, the court held there was no adverse possession since the testimony clearly showed that the plaintiff would have had no intention to eject the true owner if the true facts had been known. Under this theory, it would seem that the adverse possessor's mistaken belief in his own ownership negatives the existence of the necessary hostile intent. If this be so, the rule tends to benefit the intentional wrongdoer and to deny the acquired rights of the honest possessor. Nor does such a rule promote the security of titles or protect the long-time apparent owner.[22]

For these reasons, the doctrine of the *Preble* case, though it at one time had considerable support,[23] has been rejected both by text writers[24] and by courts,[25] which have become reluctant to inquire into the subjective intention of the adverse possessor. Though the rule is becoming obsolete even in the states where it once flourished,[26] its continued existence is demonstrated in the recent New Jersey case of *Predham v. Holfester*.[27] There, a small portion of the defendant's concrete driveway had been constructed on the land of the plaintiff and remained so for the statutory period.[28] Although this court re-

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[22]See note 9, supra.

[23]Smith v. Cook, 220 Ala. 338, 124 So. 898 (1929); Grube v. Wells, 34 Iowa 148 (1871); Vanderbilt v. Chapman, 175 N. C. 11, 94 S. E. 703 (1917); Davis v. Owen, 107 Va. 283, 58 S. E. 581, 13 L. R. A. (N. S.) 728 (1907).

[24]4 Tiffany, Real Property (3rd ed. 1939) § 1159; 1 Walsh, Law of Real Property (1947) 155.

[25]Guy v. Lancaster, 250 Ala. 287, 34 S. (2d) 499 (1948); Landers v. Thompson, 356 Mo. 1169, 205 S. W. (2d) 544 (1947); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929).

[26]See Sternberg, The Element of Hostility in Adverse Possession (1932) 6 Temp. L. Q. 207 at 214. As pointed out in note 4, supra, it appears that Maryland has already made such a change. With the decision in Brown v. Cockerell, 33 Ala. 38 at 45 (1858), Alabama adopted the rule necessitating the consideration of subjective intent in mistake cases. However, this rule was finally repudiated in Guy v. Lancaster, 250 Ala. 287, 34 S. (2d) 499, 501 (1948), where the new Alabama rule was stated as follows: "... if the possessor considers and claims land as his own his possession is hostile though he does not suppose he is claiming more than he owns and claims by mistake of fact. It is not necessary for one to know that he is claiming the property of another when he is in actual possession of it to make such possession adverse to the true owner. If he is in the actual possession with the intention of holding it and claiming it as his own, such possession is adverse."

[27]32 N. J. Super. 419, 108 A. (2d) 458 (1954).

[28]A strict application of the intent rule to cases where buildings or other improvements have been erected over the line by mistake would often result in hardship. Because of strong equitable considerations, therefore, the tendency of the courts has been to hold that where there is continuous, open and exclusive

pudiated the old doctrine of disseisin,[29] it nevertheless demanded quo animo—i.e., the hostile intent to claim the land as against the true owner. Conceiving it impossible to create the necessary quo animo in an adverse possessor who had no knowledge of his encroachment, the court concluded that such "pure mistake" situations could not fulfill the requirements of adverse possession.[30]

It would appear, then, that the *Preble-Predham* line of cases is in reality applying either one of two alternative lines of reasoning—that is, it is argued either that the adverse possessor's mistaken belief in his own ownership negatives the existence of the necessary hostile intent toward the true owner *or* that it will be presumed that there is no claim of ownership where there is a mistake in occupation.[31]

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possession of the encroachment, there are sufficient grounds to give title by adverse possession. See the cases cited in Note (1935) 97 A. L. R. 14 at 81. Missouri, which still requires a hostile intent, has circumvented its rule by finding such intent by virtue of the improvements made. McDaniels v. Cutburth, 270 S. W. 353 (Mo. 1925).

Where a building was constructed partially on the land of another by mistake, an equity court decreed a release of the land in dispute to the innocent occupant upon payment of its market value. Magnolia Construction Co. v. McQuillan, 94 N. J. Eq. 739, 121 Atl. 734 (1923). However, many courts feel that the owner should have an election either to pay for the improvements or to sell the land to the occupier. See Woodward, The Law of Quasi Contracts (1913) §§ 187-188.

[29]See note 19, supra.

[30]The court in the Predham case discusses at length the favorable results derived from the doctrine of French v. Pearce, and then goes on to admit candidly that the rule it is about to follow is not only the minority rule, but that it has been severely criticized. It appears that the court is bound by stare decisis to the decision in Myers v. Folkman, 89 N. J. L. 390, 99 Atl. 97 (1916). However, the court's reluctance to adhere to stare decisis is pointed out when it cited Greenspan v. Slate, 22 N. J. Super. 344, 92 A. (2d) 47 (1952), existing principle overthrown, 12 N. J. 426, 97 A. (2d) 390 (1953) where an old rule of law relative to creditors' rights was overruled by the Supreme Court of New Jersey after the lower court had reluctantly followed the doctrine of stare decisis. Thus, if the Predham case were to be appealed to the Supreme Court of New Jersey, there is a strong possibility that it would be reversed.

[31]In a leading case on mistake, the Supreme Court of Appeals of Virginia held that where the proof is that the possession originated in mistake as to the true boundary, a presumption arose that the possessor had no intention to claim as his own the disputed land. Christian v. Bulbeck, 120 Va. 74, 90 S. E. 661 (1916). The facts necessary to rebut this presumption can be adduced only from the acts indicative of ownership occurring on the disputed tract. Clatterbuck v. Clore, 130 Va. 113, 107 S. E. 669 (1921). Although such reasoning is not in conformity with the better rule of French v. Pearce, it was a departure from the decisions of an earlier line of Virginia cases which conclusively presumed that the possession was not adverse where the intent was to claim only to the true line wherever it might be. It was pointed out in Christian v. Bulbeck that mistake was an evidential and not an operative fact. Thus, it appears that Virginia requires not only an intent to hold as owner, which was sufficient in French v. Pearce, but also an intent to hold personally hostile to the true owner, which actually approaches the old doctrine of

As has already been noted, the former reasoning represents an erroneous application to adverse possession of the rules of common law disseisin; and the latter reasoning has no factual basis for support, especially since the courts which indulge in it are thereby drawn into the embarrassment of dealing with conflicting and inconclusive testimony relative to subjective intention. A possible explanation of these decisions is that they are an expression of public policy against the establishment of adverse possession in boundary cases. This policy may be sustained by the fact that the parties to the controversy are often long-existing neighbors, and therefore the possibility of the owner recognizing the threat of a hostile claim is more remote than if the adverse claimant were a stranger. However, in legal contemplation, a neighbor can occupy as wrongfully and notoriously as can a stranger, and a policy against ownership by adverse possession is counterbalanced by a broader policy favoring security of titles.

The only element of comparison between these different approaches and interpretations is that the courts are, in all cases, perplexed with the significance of the element of mistake as to the boundary.[32] Generally the courts have been reluctant to ignore the materiality of mistake, since logically there can be no "hostility" in the nonlegal sense of the word where the adverse claimant does not realize that he is occupying the land of another. It should be remembered, however, that the policy behind adverse possession is one of repose, and the furtherance of this policy should not depend on the significance which individual courts choose to place on mistaken belief. If, therefore, the courts ignored the relevancy of mistake and regarded every case as one in which the possessor knew the other party was the true owner and yet intended to claim adversely, they would be able to rule more consistently with the principles of adverse possession.

NICHOLAS G. MANDAK

TORTS—LIABILITY OF TESTATOR'S ESTATE FOR LIBEL INCORPORATED IN WILL AND PUBLISHED IN PROBATE PROCEEDINGS. [Oregon]

Though the problem of testamentary libel is one which has arisen infrequently in the United States, with only six states considering the

disseisin. The Virginia law is summarized in Radford Veneer Corp. v. Jones, 143 Va. 124, 129 S. E. 260 (1925). For a complete analysis of the Virginia law on this subject see Notes (1926) 12 Va. L. Rev. 675; (1929) 15 Va. L. Rev. 498.

[32]See 4 Tiffany, Real Property (3rd ed. 1939) § 1159.

numerous issues posed,[1] there is a very clear division of opinion among the courts passing on the question, both as to ultimate conclusions and supporting reasoning. The cases present a policy problem of whether the estate of a decedent should bear the legal responsibility for libelous statements in a will posthumously published. If liability is not imposed, a damaging defamation may be maliciously published and made a matter of public record with assured impunity for the tortfeasor and his estate. On the other hand, if the estate is to be held liable, a time-honored common law rule must be overthrown in order to open the way for such litigation.

The most formidable of the obstacles to recovery is the common law maxim, *actio personalis moritur cum persona,* which dictates that, in the absence of a statute to the contrary, an ordinary libel occurring before the death of the tortfeasor, like any other personal action, will abate at his death.[2] Denial of recovery against the decedent's estate is based on the theory that since the common law conceives of death as extinguishing pre-existing tort liability, the impossibility of imposing a subsequently arising liability must necessarily follow.[3] In any event, if no tort were committed until after the death of the tortfeasor, there is no one to punish.[4] The position of the injured party, in the view of these courts, seems to be the same whether the defamation occurs before or after the death of the defamer.[5]

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[1]Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933), noted in (1934) 10 N. C. L. Rev. 88; Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945) noted in (1945) 32 Va. L. Rev. 189; Klienschmidt v. Matthieu, 266 P. (2d) 686 (Ore. 1954), noted in (1954) 33 N. C. L. Rev. 146; (1954) 16 U. of Pitt. L. Rev. 74; Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934), noted in (1935) 48 Harv. L. Rev. 1027; Gallagher's Estate, 10 Pa. Dist. 733 (1901), as cited in Note (1933) 87 A. L. R. 234; Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948), noted in (1949) 62 Harv. L. Rev. 318; (1949) 33 Minn. L. Rev. 171; (1949) 28 Neb. L. Rev. 128; (1949) 97 U. of Pa. L. Rev. 289; (1949) 10 U. of Pitt. L. Rev. 248; (1949) 6 Wash & Lee L. Rev. 247; Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914), noted in (1914) 27 Harv. L. Rev. 666; (1914) 12 Mich. L. Rev. 489; (1914) 62 U. of Pa. L. Rev. 643; (1914) 23 Yale L. J. 534.

[2]Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F. (2d) 645 (C. C. A. 4th. 1942); Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933); Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948). See for discussion of this common law rule: Prosser, Torts (1941) 949; Oppenheim, The Survival of Tort Actions and the Action for Wrongful Death—A Survey and A Proposal (1941) 16 Tulane L. Rev. 386; Notes (1913) 27 Harv. L. Rev. 666; (1946) 30 Minn. L. Rev. 127.

[3]Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933); Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948).

[4]"Since the defendant could not be punished when he was dead, it was natural to regard his demise as terminating the criminal action, and tort liability with it." Prosser, Torts (1941) 951. See: Pollock, Torts (12th ed. 1923) 61; Note (1931) 80 U. of Pa. L. Rev. 1018.

[5]"... even if one in his lifetime does make and publish a libel in the most offensive manner which may be imagined, the cause of action will not survive his

Though the legislatures have, by creating the action for wrongful death, repudiated one phase of the common law rule that personal actions do not survive the death of the victim of the tort, courts refuse to accept such legislation as a basis for the abolition of the other phase of the common law rule that personal actions do not survive the death of the tortfeasor, whether he dies before or after the death of the victim.[6] And in one instance, even though the legislature had repudiated both phases of the common law rule, a court refused to allow a cause of action in favor of the victim which could have arisen only after the death of the tortfeasor.[7] The statute was interpreted as being applicable only to causes of action which arose before the death of the tortfeasor, and, therefore, "it creates no new cause of action."[8] It seems clear that any jurisdiction which refuses to impose liability for wrongful death in such circumstances, even under the apparent legislative sanction of making the action survive the deaths of both the victim and the tortfeasor, would certainly dismiss a personal action for testamentary libel, not aided by any analogous statute.[9] The hesitancy of the courts to grant recovery in the absence of an authorizing statute is explained by the fact that such result would import into the law the principle that the estate of the decedent is liable for tort causes of action having no existence in his lifetime.[10] It is certainly arguable that when the decedent perpetrates a malicious tort to take effect after his death, the injured party should be compensated out of the estate; but on the other hand the courts should be vigilant to promote the public policy that owner-

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death, in which case there will be no remedy for such wrong. A person who may be defamed in a will is in no worse position." Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814, 817 (1948). The objection to this reasoning is that the tortfeasor was never subject to any liability during his lifetime, as he would have been had the cause of action arisen and then abated at his death, since the libelous matter was not published during his lifetime to give rise to a cause of action against him. No cause of action arises until publication. Pentz v. Downey, 110 F. Supp. 642 (E. D. Pa. 1953): Yousling v. Dare, 122 Iowa 539, 98 N. W. 371 (1904); Taylor v. Jones Bros. Bakery, 234 N. C. 660, 68 S. E. (2d) 313 (1951).

[6]Henshaw v. Miller, 58 U. S. 212, 15 L. ed. 222 (1854); In re Statler, 31 F. (2d) 767 (S. D. N. Y. 1929); Clark v. Goodwin, 170 Cal. 527, 150 Pac. 357 (1915); Willard v. Mohn, 24 N. D. 390, 139 N. W. 979 (1913); Beaver's Adm'r v. Putman's Curator, 110 Va. 713, 67 S. E. 353 (1910); Bryd, Sheriff v. Byrd, 122 W. Va. 115, 7 S. E. (2d) 507 (1940).

[7]Hegel v. George, 218 Wis. 327, 259 N. W. 862 (1935) (statute involved stated: "Actions for wrongful death shall survive the death of the wrongdoer.")

[8]Hegel v. George, 218 Wis. 327, 269 N. W. 862, 863 (1935).

[9]For discussion of the effect of these statutes see Evans, Survival of the Action for Death by Wrongful Act (1933) 1 U. of Chi. L. Rev. 102.

[10]For example of such torts, see Carver v. Morrow, 213 S. E. 199, 48 S. E. (2d) 814, 817 (1948).

ship of property shall vest as quickly as possible, thus insuring the speedy settlement of estates by not hampering them with vexatious litigation arising from slight injuries to the pride of a party mentioned in a will.[11]

Another basis for denying liability is established by finding that the executor is the agent of the court for the probating of the will.[12] Since it is held that "a will is the foundation of a judicial proceeding . . . ,"[13] the rule which makes pleadings and judicial acts privileged is applied to protect the executor as agent of the court.[14] This application of the privilege is appropriate, because it was originated to promote a more efficient administration of justice by enabling the parties to a legal controversy to disclose all existing facts without fear of liability for their statements.[15]

Though due recognition was given to these considerations in the recent case of *Klienschmidt v. Matthieu*,[16] the Oregon Supreme Court, nevertheless, placed that state among the jurisdictions imposing liability on the estate of the testator. The trial court had sustained a general demurrer to a complaint by the grandson of the testator that alleged the following remarks contained in the probated will constituted libel per se: " 'To my grandson . . . , I give and bequeath the sum of ten

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[11]A conflict arises as between the injured party and the beneficiaries of the testator, since the will disposed of his property completely and the will takes effect as of the time of the death of the testator. McGee v. Marbury, 83 A. (2d) 157 (Mun. Ct. App. D. C. 1951); In re White's Estate, 190 P. (2d) 968 (Cal. App. 1948); In re Chertow's Estate, 109 N. Y. S. (2d) 567 (1951); Braun v. Central Trust Co., 92 Ohio App. 110, 109 N. E. (2d) 476 (1952). Thus, the legacies upon probate will vest in the legatees as of the date of the death of the testator, and they are deemed to have been the owners from the time of the testator's death. The argument, therefore, is that the liability is not imposed upon the testator but upon those whom he has seen fit to favor in his will.

[12]Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933); Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934); Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814, (1948).

[13]Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487, 488 (1934).

[14]Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933); Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934); Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948). For examples of the application of the judicial privilege in Virginia see: Peoples Life Ins. Co v. Talley, 166 Va. 464, 186 S. E. 42 (1936); Rosenberg v. Mason, 157 Va. 215, 160 S. E. 190 (1931); James v. Powell, 154 Va. 96, 152 S. E. 539 (1930); Penick v. Ratcliffe, 149 Va. 618, 140 S. E. 664 (1927).

[15]McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317 (1897) (suing out warrant from magistrate); Reycraft v. McDonald, 194 Mich. 500, 160 N. W. 836 (1916) (probate in a judicial proceeding); Shummway v. Warrick, 108 Neb. 652, 189 N. W. 301 (1922) (hearing of state banking board); Rogers v. Thompson, 89 N. J. L. 639, 99 Atl. 389 (1916) (meeting of creditors before banking referee); Prosser, Torts (1941) 823; Veeder, Absolute Immunity in Defamation: Judicial Proceedings (1909) 9 Col. L. Rev. 463.

[16]266 P. (2d) 686 (Ore. 1954).

Dollars ($10.00). I have already given my said grandson the sum of One Thousand Dollars ($1,000.00) which he squandered.... [This] expresses the regard in which I hold my said grandson, who deserted his mother and myself by taking sides against me in a lawsuit, and because he is a slacker, having shirked his duty in World War II'."[17] In reversing the sustention of the demurrer to the complaint the Oregon court declared: "A testator may properly give the reasons for disinheriting the natural objects of his bounty. Though such provisions are neither necessary not dispositive, they are frequently important in a probate proceeding. However, justice and public policy suggest that the testator should not have a shield of privilege. If the libelous criticism of his distributees is true, his estate has the defense of justification. He composed the alleged libel and in justice his estate should bear the burden of defending it."[18]

Conceding that its decision introduced such an innovation into the common law as to be subject to the charge of being judicial legislation, the court defended its view as being " 'Consonant with the trend of present day judicial thinking and ... concepts of justice'."[19] Further, the recognition of the cause of action was deemed justified in view of a provision in the Oregon Constitution guaranteeing every man a remedy for injury done to his reputation, for no recourse whatever would be available to plaintiff unless the present action is to be allowed. The court rejected the opposite line of cases as misapplying the old and discredited principle of law, *actio personalis moritur cum persona,* and repudiated the reasons for this rule as being " 'unsatisfactory, if not absurd'."[20] This is the first case relating to the problem of testamentary libel which attacks the common law rule in such a forthright manner.

In the few decisions in which such a cause of action has previously been sustained, the most frequent approach of the courts is to distinguish the maxim and hold it inapplicable since the cause of action did not accrue during the life of the testator and therefore could not abate at his death.[21] It is often observed that the common law principle is not presently in favor with the legislatures or some courts,

[17]Klienschmidt v. Matthieu, 266 P. (2d) 686, 687 (Ore. 1954).

[18]Klienschmidt v. Matthieu, 266 P. (2d) 686, 689 (Ore. 1954).

[19]Klienschmidt v. Matthieu, 266 P. (2d) 686, 690 (Ore. 1954), quoting Bedell v. Goulter, 199 Ore. 344, 261 P. (2d) 842, 851 (1953).

[20]Klienschmidt v. Matthieu, 266 P. (2d) 686, 688 (Ore. 1954), quoting 1 Jaggard, Torts 328.

[21]Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945); Gallagher's Estate, 10 Pa. Dist. 733 (1901) as cited in Note (1933) 87 A. L. R. 234; Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914).

inasmuch as legislatures have abolished the rule in regard to many types of personal actions,[22] and progressive courts have shown a tendency to limit its application generally.[23]

It is noteworthy that the Oregon court in the principal case did not impose liability by reliance on the superficial agency argument employed by the Tennessee court, which, when unable to find other more justifiable grounds, based its decision upon the reasoning that the executor was the agent of the testator.[24] This view has been criticized as overlooking the fact that unless the agency is coupled with an interest, it ceases to exist with the death of the principal.[25] It would be stretching the imagination to conceive of such an agency arising after death, since there would be no principal. This view is so competely discredited that it can only serve to demonstrate the extent to which the courts will go at times to evade the weight of common law authority and achieve their concept of a just result.

The Oregon and New York courts,[26] applying a rule of the Restatement, [27] have circumvented the agency argument by placing responsibility for the publication directly on the decedent. Their view is derived from the proposition that "responsibility for publication in libel actions, it is well established, may be inferred from the setting in motion of the procedure designed to achieve such result, if the result actually follows."[28]

The privilege argument is refuted in the principal case by the reasoning that the executor did not become an agent of the court until he had received his letters of appointment, which event could

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[22]For a discussion of statutory revision see: Pollock, Torts (14th ed. 1939) 53; Note (1950) Wash. U. L. Q. 122.

[23]Davis v. Nichols, 54 Ark. 358, 15 S. W. 880 (1891); Devine v. Healy, 241 Ill. 34, 89 N. E. 251 (1909); Hackensack Trust Co. v. Vanden Berg, 88 N. J. L. 518, 97 Atl. 148 (1916).

[24]Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1914).

[25]Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948). See Notes (1914) 12 Mich L. Rev. 489; (1913) 62 U. of Pa. L. Rev. 643; (1914) 23 Yale L. J. 534. The agency rule of the South Carolina court is well supported by authority. Warner v. Maddox, 68 F. Supp. 27 (W. D. Va. 1946); Trenouth v. Mulroney, 124 Mont. 499, 227 P. (2d) 590 (1951); In re Hayward's Estate, 115 N. Y. S. (2d) 136 (1952); Julian v. Lawton, 240 N. C. 436, 82 S. E. (2d) 210 (1954); Parker v. First Citizens Bank and Trust Co., 229 N. C. 527, 50 S. E. (2d) 304 (1948); In re Daniels' Estate, 185 Ore. 642, 205 P. (2d) 167 (1949); Triplett v. Woodwards Adm'r, 98 Va. 187, 35 S. E. 455 (1900); Restatement, Agency (1933) § 120.

[26]Klienschmidt v. Matthieu, 266 P. (2d) 686 (Ore. 1954); Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945).

[27]Restatement, Torts (1938) § 577, comment f: "One is liable for the publication of defamation by a third person whom as his servant, agent or otherwise, he directs or procures to publish defamatory matter."

[28]Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910, 915 (1945).

not occur until after the will had been presented to the court for the purpose of qualifying the executor.[29] This presentation, prior to his appointment as executor, was deemed a sufficient publication on which to base liability. The problem of judicial privilege previously has been differently answered by a New York court,[30] which looked not to the position of the executor but to that of the testator; thus, it was pointed out that the will was not made in a judicial proceeding, and that, therefore, the testator was not a party to the proceeding when he drew the will, nor was he a party to the probate proceedings which followed his death. This view appears justified, since it is the actions of the testator which are in question, not those of the executor.[31]

Application of the rule of judicial privilege in the testamentary libel situation can be criticized also on the reasoning that the defamed party has no chance to answer the statements of the deceased defamer or in some manner to disprove them. Where the libelous statements occur in the pleadings or in the course of normal litigation before the courts, the allegedly defamed party can answer the complete allegation in which the statements are contained and have a decision upon the merits of these allegations. Thus, if the disproving of assertions of the tortfeasor constitute at least a part of the basis for defeating his action, the defamed party can in some measure refute the libelous statements, thus reducing his need for an action for libel, which would be precluded by the privileged nature of these allegations.[32]

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[29]Holladay v. Holladay, 16 Ore. 147, 19 Pac. 81 (1888), approved by Klienschmidt v. Matthieu, 266 P. (2d) 686 (Ore. 1954).

[30]Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945).

[31]If a party writes a defamatory statement in a news article and has it published in a newspaper, the injured party is entitled to recover damages from both the original writer of the libel and the newspaper as the publication instrumentality. Peterson v. Cleaner, 105 Neb. 438, 181 N. W. 187 (1920) (individual author of libel and newspaper carrying the libel both held liable for the defamatory statement published therein). Therefore, if the writer of the defamation dies after the process of publication has been instituted, the victim still has recourse against the newspaper. However, in a case of testamentary libel, the injured party would not have this additional source of compensation, since the executor as the instrumentality of publication, is immune from individual liability. Citizens & So. Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933); Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 (1945); Klienschmidt v. Matthieu, 266 P. (2d) 686 (Ore. 1954); Carver v. Morrow, 213 S. C. 199, 48 S. E. (2d) 814 (1948).

[32]This consideration is especially relevant in view of holdings that the judicial privilege ceases to apply when the statements are shown by plaintiff's evidence to have been activated by malice or to have been made in bad faith. Mellen v. Athens Hotel Co., 153 App. Div. 891, 138 N. Y. Supp. 451 (1912); Tuohy v. Halsell, 35 Okla. 61, 128 Pac. 126 (1912). The plaintiff in the present event, if denied recovery, would have no other chance to disprove the statements and receive compensation for his injury.

Limitations which have already been placed upon the rule of judicial privilege are sufficient to render the privilege inapplicable in most testamentary libel situations. In England this privilege is extended to all statements heard in connection with a judicial proceeding,[33] but American courts, in order to prevent the privilege from being a cloak for private malice, have modified the rule so as to include within the privilege only those statements which are relevant to the matter litigated.[34] Thus, in testamentary libel cases, the alleged libel must serve some dispository function to fall under this privilege. It would appear that the statements involved in the principal case, and in most such cases, do not come within this category, and thus are not privileged.[35]

An attempt to avoid the entire problem of liability has been made in England[36] and New York[37] simply by allowing the exclusion of the libelous matter from probate. This procedure has not found much favor and has been criticized on various grounds. One objection is that the libel may be dispositive in character or, if deleted, may detract from the meaning of the will. Another criticism is that the probated will professes to be a true copy, which would not be the case if parts have been deleted. Futhermore, this attempt to dispose of the libel would only lessen the *scope* of the publication, since it would still be necessary for someone to read the will in order to censor it, and the defamation would thereby receive some actual publication.[38]

In the final analysis, courts faced with testamentary libel cases are presented a choice between two courses: "on the one hand, the

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[33]Munster v. Lamb, 11 Q. B. D. 588, 52 L. J. Q. B. 726 (1883); Prosser, Torts (1941) 825; Note (1928) 14 Va. L. Rev. 587.

[34]For a discussion of the limitation on judicial privilege in the United States, Brown v. Mack, 56 N. Y. S. (2d) 910, 917 (1945). Also, see Ginsburg v. Black, 192 F. (2d) 823, 825 (C. A. 7th, 1951); Robinson v. Home Fire and Marine Ins. Co., 242 Iowa 1120, 49 N. W. (2d) 521, 525 (1951); Waldo v. Morrison, 220 La. 1006, 58 S. (2d) 210, 211 (1952) (qualified privilege); Ellish v. Goldman, 117 N. Y. S. (2d) 867, 868 (1952); Penick v. Ratcliffe, 149 Va. 618, 140 S. E. 664, 668 (1927).

[35]A Pennsylvania court may have had this modification of the judicial privilege in mind when it said: "We believe that the rule which makes the pleading in a judicial proceeding absolutely privileged may properly be applied to a will in which there is no apparent purpose to injure the reputation of anyone. . . ." Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487, 488 (1934). This view would have the effect of qualifying the privilege to non-malicious material.

[36]Estate of White, (1914) P. D. 153; Goods of Wartnaby, 1 Rob. Ecc. 423, 163 Eng. Rep. 1088 (1846).

[37]In re Draske's Will, 160 Misc. 587, 290 N. Y. Supp. 581 (1936): In re Payne's Estate, 160 Misc. 224, 290 N. Y. Supp. 407 (1936); In re Meyer, 72 Misc. 566, 131 N. Y. Supp. 27 (1911).

[38]For discussions of the practice of deleting libelous material, see Brown v. Mack, 185 Misc. 368, 56 N. Y. S. (2d) 910 at 920 (1945); Freifield, Libel by Will, (1933) 19 A. B. A. J. 301 at 302.

orthodox course of adhering strictly to the rigid rule of the common law, which in any case of the character of that before us would do violence to our innate sense of what is fair and right; or, on the other hand, of falling in line with the constantly changing concepts of the law and its administration, by conforming with what appears to be a modern doctrine, 'pure drawn from the fountains of justice'."[39] It is to be hoped that the resolute position of the Oregon court in the principal decision will add weight to the view in favor of imposing liability.

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[39]Hendricks v. Citizens & So. Nat. Bk., 43 Ga. App. 404, 158 S. E. 915, 916 (1931), reversed on other grounds, Citizens & So. Nat. Bk. v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933).