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Procedure-Settlement of Claim Against One Joint Tort-Feasor with Reservation of Rights Against Others [Shortt v. Hudson Supply & Equipment Co., Va. 1950)

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CASE COMMENTS

BILLS AND NOTES—RIGHT OF DRAWER OF CHECK PAID ON PAYEE FORGERY
TO SUE COLLECTING BANK WHEN ACTION AGAINST DRAWEE IS
BARRED BY LIMITATIONS. [California]

When upon examination of his canceled checks returned by a bank, a drawer discovers that the name of the payee on one of his checks has been forged, the generally accepted rules for adjusting the rights of all parties affected are as follows: The drawer of the check is entitled to have his account at his own drawee-bank recredited for the amount paid out on the check.¹ If the forger has cashed the check at a bank other than the drawee-bank, the drawee-bank has a cause of action to recover the money which it paid out to the collecting bank that presented the check for collection.² The collecting bank is left to pursue the forger to recover the money which was paid to him.

However, by the time the forgery is discovered the forger is usually out of reach or insolvent, and consequently, the party who first takes the check from the forger, whether it be the drawee-bank or a collecting bank, bears the loss of the forgery.³ While it may be proper to protect the drawer in most circumstances, the opinion is growing that an unfair financial burden is placed upon the banks when the forger is an employee of the drawer whose job it is to supply the drawer

¹"The general rule must be conceded that the undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order. If it pays out money on a check drawn to order, upon a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and, in the absence of anything further, has no right to charge such payment against the depositor's account." *Los Angeles Inv. Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293, 294, 5 A. L. R. 1193, 1196 (1919). It makes no difference how careful the bank was in making payment or how impossible of detection the forgery was. That is a risk which the bank and not the depositor assumes. *Kessler, Forged Indorsements* (1938) 47 Yale L. J. 863, n. 58.

²*Canal Bank v. Bank of Albany*, 1 Hill 287, 290 (N. Y. 1841): Plaintiffs, the drawees, paid their money under the mistaken belief that the name was genuine. "They [defendants] have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; " For other theories of recovery by the drawee-bank against the collecting bank see *Britton, Bills and Notes* (1943) § 139.

³*Kessler, Forged Indorsements* (1938) 47 Yale L. J. 863, 880: "Thus the protection given to the true owner of an order instrument against the loss of the instrument by reason of a forgery of his signature is complete. It is obvious that the American rule is designed to place the ultimate liability upon the purchaser from the forger."

with the payees' names.⁴ Where this particular employer-employee relationship exists, the forgery might easily have been prevented or detected promptly if the drawer-employer had used proper business and accounting practice. Thus, the financial burden of the forgery should rest on the negligent drawer-employer whose employee perpetrated the forgery, and not upon the bank which took the check from the forger.

In some states the right of the drawer to shift to his own drawee-bank the loss caused by a forgery of his employee has been restricted by special statutes of limitations provisions.⁵ Such statutes limit to one or two years the time in which the drawer can, after return of his canceled checks from his drawee-bank, demand from his drawee-bank a recredit of his account upon discovery of a payee forgery. Thus, unjust results will be avoided where forgeries are reported so long after their occurrence that it is virtually impossible for the drawee-bank which took the forged check ever to recover from the forger. But these special limitations statutes do not extend their protection to a collecting bank,⁶ and in the event that a drawer is barred by limitations from getting a recredit at his own drawee-bank, he may attempt to recover directly from the collecting bank. The decisions on the liability of the collecting bank to the drawer are in conflict, and courts have seldom considered as material the fact that the forger was the drawer's employee who supplied payee names to the drawer.

⁴Wherever an employee of a drawer forges one of the drawer's checks, the forgery is most likely to occur in the indorsement of the payee. If the drawer owes money to the payee, the forgery will soon be detected, for the payee, not receiving his money, will make a demand upon the drawer. But where the drawer actually owes no money to the payee, as where the purchasing agent of a drawer supplies the drawer with false claims by regular customers, there will be no demand to bring the forgery to light. Yet, a proper inventory would quickly reveal it. The ability to perpetrate this latter type of forgery is limited to employees who supply payee names to the drawer and, since proper accounting practice could prevent forgeries by this group, much attention has been recently given to this particular situation, especially by the American Banker's Association. For further discussion of the problem see Britton, *Bills and Notes* (1943) 664, 677.

⁵Wis. Stat. (1947) § 116.285: "No bank shall be liable to a depositor for the payment by it of a check bearing a forged indorsement unless, within 2 years after the return to the depositor of the voucher for such payment, such depositor shall notify the bank that the check so paid bore such forged or unauthorized indorsement." For example of statutes limiting the drawer's recovery to one year see: Cal. Code of Civ. Proc. (1941) § 340(3); Tex. Stat. (Vernon, 1943 Supp.) Art. 342-711.

⁶A collecting bank's liability upon warranty of genuineness of payee's indorsement has not been qualified by a statute providing that no bank should be liable to a depositor for payment of a check bearing a forged indorsement unless within two years after return of vouchers the depositor notifies the bank of such forgery. *National Surety Corp. v. Federal Reserve Bank of New York*, 70 N. Y. S. (2d) 636, aff'd 70 N. Y. S. (2d) 642 (1946).

The recent case of *California Mill Supply Corp. v. Bank of America National Trust & Savings Association*⁷ presented this issue on a typical fact situation. The plaintiff drawer-employer was a corporation which had in its employ a fraudulent purchasing agent, whose duty was to present to the plaintiff's signing officers all of the bills payable from the purchasing department so that checks could be issued in payment. Through the presentation of false documentary evidence to the signing officers, the purchasing agent had checks made out to payees to whom, unknown to the signing officers, the company owed no money. These checks were turned over to the purchasing agent for delivery to the payees, but he forged the indorsements of the payees and negotiated the checks. The checks were paid by the defendant collecting bank, which, in turn, sent them to the drawee-bank. The drawee-bank paid the collecting bank and returned the canceled checks to the plaintiff drawer-employer. After more than a year had elapsed from the time the canceled checks were returned, the drawer-employer, its suit against its own drawee-bank being barred by a statute of limitations,⁸ tried to recover directly from the collecting bank. The trial court refused to allow recovery, deciding, in line with more recent thought, that the drawer-employer should bear the financial burden of the forgery. But the California District Court of Appeals reversed the decision and allowed the drawer-employer to recover from the collecting bank.

In attempting to justify its decision, the appellate court relied upon the reasoning of the older cases and completely ignored the vital point of the particular employer-employee relationship involved. The position was taken "that the drawer has suffered a loss through the act of the collecting bank in accepting, presenting and securing payment of the check on a forged indorsement."⁹ If this means that the drawer's loss has resulted from a breach of a duty owed by the collecting bank to the drawer properly to identify the forger, it has been so held.¹⁰ But this duty has been questioned.¹¹ If, instead, the

⁷216 P (2d) 94 (Cal. App. 1950).

⁸Cal. Code of Civ. Proc. (1941) § 340(3), in which an action on "a check that bears a forged or unauthorized indorsement" is limited to one year. Though it is not specifically stated in this statute, the statutory period has been held to run from the time the canceled checks are returned to the drawer. *Union Tool Co. v. Farmers' & Merchants' Nat. Bank*, 192 Cal. 40 at 52, 218 Pac. 424 at 429, 28 A. L. R. 1417 at 1426 (1923).

⁹*California Mill Supply Corp. v. Bank of America Nat. Trust & Savings Ass'n*, 216 P (2d) 94, 100 (Cal. App. 1950).

¹⁰The bank is "not relieved of its own duty of identification, and acted at its peril in paying the check to any person other than the payee named therein." First

statement means that the drawer has a right to rely on the warranty by the collecting bank to him of the genuineness of prior indorsements and thereby suffered loss,¹² it is contrary to the prevailing view that the warranty runs to subsequent holders in due course and not to a drawer, who is not considered as such.¹³

The California court cited *Home Indemnity Co. of New York v. State Bank of Fort Dodge*¹⁴ for the proposition that the direct action by the drawer-employer against the collecting bank is the most logical type of action to allow if the collecting bank is ultimately to bear the loss. But strictly applied, the *Fort Dodge Bank* case stands for the allowance of a direct action by the drawer against the collecting bank only when the ultimate liability of the collecting bank could be enforced if the normal proceedings in payee forgery cases were followed.¹⁵ In the *Mill Supply* case the first step of such proceedings, the drawer's suit against his own drawee-bank, is barred by a statute of limitations, and thus the drawee-bank would not have occasion to pass the liability on to the collecting bank.

Turning to a different line of reasoning, the California court asserted that, "simple justice requires that the liability of the collecting bank to the drawer be upheld on the theory of money had

Nat. Bank of Waycross v. Guaranty Life Ins. Co., 45 Ga. App. 289, 164 S. E. 212, 213 (1932).

¹²First Nat. Bank of Bloomington v. North Jersey Trust Co., 18 N. J. Misc. 449, 14 A. (2d) 765, 768 (1940), states that "There is no allegation of facts which give rise to a duty owing by the defendant [collecting bank] to this plaintiff [drawer], and there is nothing to indicate that the defendant allowed the forged indorsement to slip by because of its failure to exercise ordinary care."

¹³Farmers' State Bank in Merkel v. United States, 62 F. (2d) 178, 179 (C. C. A. 5th, 1932): "A cause of action against the [collecting] bank in favor of the appellee [drawer] accrued as a result of the [collecting] bank breaching its implied warranty of the genuineness of the indorsements of the name of the payee by bringing about the presentation of the checks and collecting the amounts thereof."

¹⁴Railroad Bldg., Loan & Savings Ass'n v. Bankers Mortgage, 142 Kan. 564, 51 P. (2d) 61, 64, 102 A. L. R. 140, 144 (1935). "While it is difficult in many cases to say who is or is not a holder in due course . . . we are cited to no authority, nor do we find any, holding the drawer of a check to be such . . . In our opinion, the drawer is not a holder in due course, and, not being such holder, the contract of the Ottawa [collecting] Bank, evidenced by its indorsement, was not for his benefit, but solely for the benefit of subsequent holders in due course."

¹⁵233 Iowa 103, 8 N. W. (2d) 757 (1943).

¹⁶Home Indemnity Co. of New York v. State Bank of Fort Dodge, 233 Iowa 103, 8 N. W. (2d) 757, 776 (1943): "And, had the Brady Company [drawer] not provided insurance for itself and the drawee, against the loss so sustained by the forgery, it could and would have required the drawee to withdraw the debits against its account, and the drawee upon doing so, could and would have required the appellee to reimburse it for the money which it wrongfully collected from the drawee."

and received."¹⁶ Though there is an opposing authority on this point,¹⁷ many courts do rule that there is an implied contract, growing out of the circumstances, to pay to the true owner (the drawer-employer) the money received by the collecting bank and paid by it to the wrongdoer on the strength of the forged indorsement.¹⁸

Since the theories advanced by the court have been questioned, consideration should be given to the main argument of the defendant collecting bank backed by the case of *Lavanier v. Cosmopolitan Bank & Trust Company*.¹⁹ There, when the collecting bank paid out money in reliance on a forged indorsement, the court held that it was not the drawer's money that was being paid out, for the drawer's money was still on deposit in the drawee-bank. Under this line of reasoning, "The relation between a bank and its depositor is that of debtor and creditor, not of agent and principal. The money deposited becomes part of the bank's general funds, and it impliedly contracts to pay the depositor's checks, acceptances, notes payable at the bank, and the like, to the amount of his credit; but in discharging its implied obligation, it pays its own money as a debtor, not its depositor's money as an agent."²⁰

As applied to the *Mill Supply* case, the *Lavanier* decision would require the ruling that the collecting bank had not paid out the drawer's money in reliance on a forged indorsement; the drawer's money was still in the general fund of the drawee-bank. Since the drawer's suit against the drawee-bank was barred by the statute of limitations, he could not require that the amount of the check be recredited to his account, and so he would have to bear the loss of the forgery.

But the California court held the *Lavanier* case to be inapplicable on the ground that the debtor-creditor relationship which is the basis

¹⁶*California Mill Supply Corp. v. Bank of America Nat. Trust & Savings Ass'n*, 216 P (2d) 94, 100 (Cal. App. 1950).

¹⁷*First Nat. Bank of Bloomingdale v. North Jersey Trust Co.*, 18 N. J. Misc. 449, 14 A. (2d) 765, 768 (1940), denies recovery on this theory, stating: "The common-law basis for such a cause is the relation of debtor to creditor. The existence of a debt due from the defendant to the plaintiff is essential to the action. Obviously a reading of the complaint demonstrates that the real cause of action is neither for a debt for the value of goods sold and delivered by the plaintiff to the defendant, nor for moneys received by the defendant for the use of the plaintiff; "

¹⁸*Washington Mechanics' Sav. Bank v. District Title Ins. Co.*, 65 F. (2d) 827 (App. D. C. 1933); *United States Fidelity & Guaranty Co. v. First Nat. Bank of El Paso*, 93 S. W (2d) 562 (Tex. Civ. App. 1936); 7 Am. Jur. 431; 9 C. J. S. 738.

¹⁹36 Ohio App. 285, 173 N. E. 216 (1929).

²⁰*General Fire Assur. Co. of Paris, France v. State Bank*, 177 App. Div. 745, 164 N. Y. S. 871, 874 (1917).

of that decision "is true only so long as the depositor retains a right of action against his own bank. When, however, it is impossible for the depositor to recover from his own bank—as where the statute of limitations has run. he has suffered a loss directly traceable to the act of the collecting bank."²¹ The court properly refused to extend the general doctrine of the *Lavanier* case, for the doctrine is so broad that, once extended, it would apply to all payee-forgery cases. Though its application would be desirable in cases similar to the *Mill Supply* case, its extension would likewise require the drawer unjustly to bear the financial burden of the forgery when the forgery grew out of circumstances under which the drawer had no ability to forestall the wrongdoing.

It appears that neither of the contesting parties in the principal case has advanced persuasive arguments to support his contentions. In fact situations like that of the *Mill Supply* case, the drawer-employer should have been able to deter the forgery by proper accounting practices, and there is a growing opinion that the loss should be placed upon him if he fails to do so.²² Thus, the court's decision putting the loss on the collecting bank, though supported by precedent, rests on controverted legal theory and achieves an undesirable result. Yet, the court correctly refused to extend the rule of the *Lavanier* case, which was the basis for the defendant collecting bank's theory of the principal case.

The American Banker's Association has suggested a decisive solution to the problem. An amendment to Section 9(3) of the Negotiable Instruments Law has been proposed which will clearly and definitely place the loss on the drawer-employer in payee forgery cases where the employee-forgery supplies the names of the payees to the drawer-employer. The amended section provides:

"The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing or living person not intended to have any interest in it and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee."²³

Applying this amendment to the facts of the *Mill Supply* case, it is seen that the intent of the purchasing agent that the payees have no interest in the checks is sufficient to make the checks bearer paper.

²¹California *Mill Supply Corp. v. Bank of America Nat. Trust & Savings Ass'n*, 216 P (2d) 94, 100 (Cal. App. 1950).

²²Britton, *Bills and Notes* (1943) 664, 677.

²³Britton, *Bills and Notes* (1943) 677, n. 12.

When the checks become bearer paper, the collecting bank can take from the forger without a break in the chain of title. Thus, the bank gets good title to the checks and the loss due to the forgery falls upon the drawer-employer.²⁴ This revision of the Negotiable Instruments Law has been passed by several states²⁵ and has been incorporated into the 1950 Uniform Commercial Code.²⁶ If the amendment proposed by the American Banker's Association receives widespread adoption among the various states, a long-standing fault in this segment of the commercial law will be corrected.

VIRGIL S. GORE, JR.

CONSTITUTIONAL LAW—APPLICATION OF "SEPARATE BUT EQUAL" FACILITIES STANDARD TO RACIAL SEGREGATION IN EDUCATION. [United States Supreme Court]

In the recent highly publicized and widely discussed case of *Sweatt v. Painter*,¹ the United States Supreme Court handed down a new decision in the segregation in education controversy which could lead to the virtual elimination of racial segregation in state-supported institutions of higher learning in the South. By the same reasoning, the legal barriers which separate the two races in the public secondary schools might eventually crumble as well.

The Supreme Court viewed the case as presenting this question: "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?"² That a state may constitutionally distinguish between persons of different races for certain purposes and within determinable

²⁴The amendment proposed by the American Banker's Association was passed in California in 1945. See Cal. Civ. Code (1947 Supp.) § 3090(3). However, the transactions leading to the *Mill Supply* case occurred prior to the passage of the amendment so that the amendment had no application to the case. The case would not have arisen had the facts which gave rise to it occurred subsequent to the passage of the amendment.

²⁵Ill. Rev. Stat. (1947) c. 98, § 29(3); Idaho Code Ann. (1932) § 26-109(3); Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 8416(3).

²⁶"With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons, or their agents or confederates: . . . an agent or employee of the drawer who has supplied him with the name of the payee intending the latter to have no such interest." Uniform Commercial Code (1950) § 3-405-1(c).

¹70 S. Ct. 848 (1950).

²*Sweatt v. Painter*, 70 S. Ct. 848, 849 (1950).

limits has been accepted since the case of *Plessy v. Ferguson*,³ decided in 1896. In upholding the validity of a state statute requiring railway companies to provide separate accommodations for white and colored passengers, the Court first put its stamp of approval on the doctrine of "separate but equal" facilities for the two races. The gist of this doctrine, which includes a frequently cited dictum upholding segregation in schools, is stated in the opinion in the case:

"Laws permitting and even requiring [the separation of the races], in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."⁴

Two years later in *Cumming v. Richmond County Board of Education*,⁵ this dictum was approved by the Court, which pointed out that "the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."⁶ In 1914, Justice Hughes, speaking for the Court in *McCabe v. A. T. & S. F. R. Co.*,⁷ concluded that the authority of the separate but equal doctrine announced in the *Plessy* case was no longer open to question, and that under it a railroad must, in providing facilities for its passengers, accord substantial equality of treatment to all persons traveling under like conditions. Again in *Gong Lum v. Rice*,⁸ the Court held that a Chinese citizen was not denied equal protection of the law in violation of the Fourteenth Amendment, by reason of being required to attend a colored school furnishing equal educational facilities. Chief Justice Taft declared that "The right and power of

³163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896).

⁴*Plessy v. Ferguson*, 163 U. S. 537, 544, 16 S. Ct. 1138, 1140, 41 L. ed. 256, 258 (1896).

⁵175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 (1899).

⁶*Cumming v. Richmond County Board of Education*, 175 U. S. 528, 545, 20 S. Ct. 197, 201, 44 L. ed. 262, 266 (1899).

⁷235 U. S. 151, 35 S. Ct. 69, 59 L. ed. 169 (1914).

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

the state to regulate the method of providing for the education of its youth at public expense is clear."⁹

Not until 1938, however, was the highest federal tribunal confronted with a question similar to that presented in the *Sweatt* case. In *Missouri ex rel. Gaines v. Canada*,¹⁰ a Negro citizen of Missouri possessing the necessary qualifications had applied for and was refused admission to the state university's law school. Affirming the petitioner's right to enter the latter school, the Supreme Court asserted that the small number of Negroes desiring legal training and the provisions made by the State of Missouri to finance their study elsewhere, did not excuse the state from protecting Gaines' rights guaranteed by the Fourteenth Amendment.

"It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity."¹¹

This view was reaffirmed by the Supreme Court in 1948 in *Sipuel v. Board of Regents of the University of Oklahoma*,¹² holding that not only must the State of Oklahoma provide for the Negro petitioner the legal education afforded white students, but must "provide it as soon as it does for applicants of any other group."¹³ The separate but equal doctrine of the *Plessy* case was thus in no wise disturbed by the decisions in the *Gaines* and *Sipuel* cases, but rather was expressly recognized and followed. It was only because Missouri and Oklahoma maintained no separate law schools for Negroes that Gaines and Sipuel as citizens of their respective states were entitled to avail themselves of the existing facilities for the study of law by white students within the boundaries of those states.

⁹*Gong Lum v. Rice*, 275 U. S. 78, 85, 48 S. Ct. 91, 93, 72 L. ed. 172, 176 (1927). The *Cumming* and *Plessy* cases were cited as authority.

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

¹¹*Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 351, 59 S. Ct. 232, 237, 83 L. ed. 208, 214 (1938). The Court rejected the argument that the petitioner was not discriminated against because the provision for payment of tuition at schools outside the state was only temporary, pending actual establishment of a law school for Negroes within the state. By virtue of the statutory discretion of the curators, discrimination against the petitioner might continue indefinitely and could not, therefore, be excused "by what is called its temporary character."

¹²332 U. S. 631, 68 S. Ct. 299, 92 L. ed. 247 (1948), noted 5 Wash. & Lee L. Rev. 105.

¹³*Sipuel v. Board of Regents of the University of Oklahoma*, 332 U. S. 631, 633, 68 S. Ct. 299, 92 L. ed. 247 (1948).

It was not until the principal case that the Supreme Court was called upon to determine whether the separate educational facilities provided within a state met the test of substantial equality. Although a number of states and lower federal courts have dealt with this problem only as it affected secondary and grade schools, their conclusions would seem equally applicable to state-supported colleges and universities. There has been substantial agreement that a state may not constitutionally differentiate in salaries paid white and colored teachers whose qualifications and services are relatively equal. In addition such factors as the relative competence of teachers and ratios of teachers to pupils, length of school terms and the proportions in which school revenues have been appropriated, have been considered. Sufficient facilities of the same type, although not necessarily identical in size or number, have been deemed adequate to meet the standard of substantial equality.¹⁴ The Supreme Court's interpretation of "substantial equality" in *Sweatt v. Painter*, however, went considerably beyond any of these more conventional applications of the term.

Sweatt, the petitioner in the case, began his efforts to obtain admission to the University of Texas Law School four years before the controversy reached the Supreme Court. When his application for entrance into the school in February, 1946, was denied, Sweatt brought suit for mandamus against the appropriate university officials. In the light of constitutional precedent these officials and others of the State of Texas, upon receiving Sweatt's application for admission to the state university law school, had one of three courses open to them: Admit him in violation of the constitution and statutes of the state;¹⁵ abandon the University of Texas Law School, thereby denying a legal education to all; or establish a separate law school for Negroes as nearly equal to that at the University of Texas as possible. Having chosen this last course, it but remained for the courts to determine whether or not the facilities and opportunities offered the petitioner were substantially equal to those available to white students.

The trial court in Texas continued the case for six months to allow the state to supply substantially equal facilities and, at the expiration of that time, denied the writ in view of plans then underway to open a law school for Negroes the following February. The Texas courts subsequently found that the newly established Negro

¹⁴See Note (1948) 5 Wash. & Lee L. Rev. 105, 110-112 and cases cited.

¹⁵Tex. Const. (1876) Art. VII, § 7, 14; Tex. Stat. (Vernon, 1949 Supp.) § 2643b, 2719, 2900.

law school offered opportunities substantially equivalent to those available to white students at the state university and denied mandamus.¹⁶

The case was brought before the Supreme Court of the United States on a writ of certiorari and the judgment of the state courts was reversed. After examining the facilities and opportunities afforded by the two schools, the Court was unable to find "substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior."¹⁷

The Court did not end the comparison at that point, however. Another, and more important, inequality was found to exist. The University of Texas Law School "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the adminis-

¹⁶Petitioner refused to register in the newly established Negro law school when it opened. The Texas Court of Civil Appeals, meanwhile, set aside the trial court's judgment and ordered the cause remanded to the trial court for further proceedings. On remand, the trial court found that the Negro law school offered opportunities substantially equivalent to those available to white students at the University of Texas Law School, denying mandamus. This finding was affirmed by the Texas Court of Civil Appeals in *Sweatt v. Painter*, 210 S. W. (2d) 442 (1948), and an application for a writ of error was denied by the State's Supreme Court.

¹⁷*Sweatt v. Painter*, 70 S. Ct. 848, 850 (1950). The University of Texas Law School was staffed by a faculty of 16 full-time and three part-time professors. The student body numbered 850. The library contained around 65,000 volumes (30,000 to 35,000 excluding duplicates). Also available to the students were a law review, moot court facilities, scholarship funds and Order of the Coif affiliation. At the time of the decision of the principal case, the law school at the Texas State University for Negroes had a faculty of five full-time professors, a student body of 23, a library of 16,500 books with a full-time library staff, a practice court and a legal aid association. In addition, the students were privileged to use the entire library of the Supreme Court of Texas, numbering approximately 42,000 volumes and located about 300 feet from the law school building. Any other needed texts, legal periodicals or reports were to be made available on a loan basis from the law library of the University of Texas.

The University of Texas Law School had three classrooms for the instruction of 850 students, whereas there were two classrooms for the student body of 23 at Texas State University for Negroes. The latter institution was apparently soon to be accredited. In respect to entrance requirements, examinations, regulations, fees, degrees awarded, classroom practices and courses offered the first-year class, the two schools were almost identical. The Texas Court of Civil Appeals also emphasized the greater opportunities for individual attention available at the Negro law school due to the small size of the student body. See *Sweatt v. Painter*, 70 S. Ct. 848 (1950) and *Sweatt v. Painter*, 210 S. W. (2d) 442 (Tex. Civ. App. 1948).

tration, position and influence of the alumni, standing in the community, traditions and prestige."¹⁸ To other Southern states which now, or may hereafter, find themselves confronted with a similar problem, this latter pronouncement presents what may well be an insuperable obstacle to the maintenance of a separate but equal educational system. Assuming that the State of Texas had been able to provide Sweatt and others of his race with a law school whose physical plant, library and curriculum were equal to those of the University of Texas and which offered all the other enumerated advantages, there still would seem to be no way to set up a new institution which would immediately be imbued with the intangible factors required.¹⁹

Any remaining possibility of meeting the separate but equal standard appears to have been precluded by yet another part of the opinion in the *Sweatt* case. The law school at Texas State University for Negroes, to which the State was willing to admit Sweatt, excluded 85% of the population of Texas—i. e., the white population. In this group are included most of the lawyers, witnesses, jurors, judges and other officials with whom Sweatt would deal as a member of the Texas bar. Referring to this aspect of the situation, the Court asserted that "With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School."²⁰ The implications of this conclusion are

¹⁸*Sweatt v. Painter*, 70 S. Ct. 848, 850 (1950).

¹⁹Earlier courts recognized that to impose a standard of exact equality for the maintenance of segregated schools would be to require the virtually impossible; hence, the qualifying term "substantial equality." It has been argued that the words "substantial equality" are in themselves incompatible. To this contention the Texas Court of Civil Appeals replied: "'Equality' like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the Fourteenth Amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous." *Sweatt v. Painter*, 210 S. W. (2d) 442, 445 (Tex. Civ. App. 1948).

²⁰*Sweatt v. Painter*, 70 S. Ct. 848, 850 (1950). In *McLaurin v. Oklahoma State Regents*, 70 S. Ct. 851 (1950), decided the same day as the principal case, the Supreme Court held that the University of Oklahoma, after admitting a Negro to its graduate school of education, could not constitutionally attempt to set him

readily discernable: Any Negro institution which excludes white students, irrespective of its size, facilities, reputation or national standing, is inferior per se; or so the Court seems to say. In arriving at its decision, the Court was compelled to announce no new law nor overrule any existing authority. The separate but equal doctrine of the *Plessy* case still remains. It is evident, however, that this new interpretation of "equal" may mean that "separate" is no longer possible.

Inasmuch as the assault upon the barriers of racial segregation appears to be taking on the characteristics of an organized campaign,²¹ it is imperative that the Southern states face the problem squarely and attempt to arrive at a tenable result. The more economical solution would be the abolition of segregated schools, but such a move in the immediate future seems unlikely in the absence of strong pressure. On the other hand, an attempt by each of the states to provide equal educational facilities in as many respects as possible, without regard to relative demand, would probably prove to be financially prohibitive.

WILLIS M. ANDERSON

CONSTITUTIONAL LAW—SCOPE OF POLICE POWER AS BASIS FOR REGULATION OF PRACTICE OF PROFESSIONS. [Washington]

There is no question as to the necessity, existence, or validity of the states' police power to regulate the practice of dentistry, medicine, law, or any other vocation or profession so far as is essential to protect the health, safety, morals, or general welfare of the public.¹ However,

apart from the other students in the school. By compelling him to sit in an assigned seat in the classroom in a row specified for colored students, to use an assigned table in the library and to eat at a special table in the cafeteria, the appellant was "handicapped in his pursuit of effective graduate instruction" and deprived of "his personal and present right to the equal protection of the laws." 70 S. Ct. 851, 853, 854 (1950).

²¹The executive secretary of the Virginia Conference, National Association for the Advancement of the Colored People, stated on December 11, 1950 that the NAACP will "continue to work toward [the] absolute elimination [of racial segregation] from all phases of American life. The economic instability of the South itself, demands that the dual system of education be abolished." *The Roanoke Times*, Dec. 12, 1950, p. 2, col. 1.

¹Speaking of the police power of a state, Justice Strong stated: "It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. 'it extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the State.'" *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 530 (1877). See 16 C. J. S., *Constitutional Law* § 175; 11 Am. Jur., *Constitutional Law* § 245.

the power is not without limitations,² which must be determined and applied by the courts through judicial review. The question faced by the courts is one of degree in that they must decide whether a particular statute or part thereof has unreasonably invaded personal or private rights. Thus, the party attacking the constitutionality of the legislation must convince the court that the law is without rational basis within the knowledge and experience of the legislators.³

In defining those who shall be subject to regulation as members of a profession, many statutes refer only to "one who holds himself out as being able to practice or who shall make an offer or undertake to practice,"⁴ and there appears to be no plausible basis for questioning the legality of such a definition. However, other legislatures have greatly broadened the scope of the statutes by including within their effect anyone who "owns, maintains or operates an office for the practice of the profession."⁵ This extension of the regulation to persons who are not actually engaged in the practice of the profession has given rise to the charge that the legislature has made an arbitrary

²For a good discussion of the police power and its limitations, see *Lawton v. Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 501, 38 L. ed. 385, 388 (1894): "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not duly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

³This "rational basis" test was stated and applied in *West Va. Board of Education v. Barnette*, 319 U. S. 624, 639, 63 S. Ct. 1178, 1186, 87 L. ed. 1628, 1638 (1943): "The right of a state to regulate... may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting."

⁴N. Y. Consol. Laws Ann. (Baldwin, 1938) Art. 49, § 1300: "A person practices dentistry within the meaning of this article, who holds himself out as being able to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums, or jaws, and who shall either offer or undertake by any means or method to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same..." Among the states having similar statutes are Kansas, New Hampshire, Massachusetts, Mississippi, Pennsylvania, South Carolina and Tennessee.

⁵The Washington statute provides: "A person practices dentistry, within the meaning of this act, who owns, maintains or operates an office for the practice of dentistry;..." Rem. Rev. Stat. (1937 Supp.) § 10031-6. See also Dist. of Col. Code (1940) § 2-315; Ill. Stat. Ann. (Smith-Hurd, 1949 Supp.) c. 91, § 60; Ind. Stat. Ann. (Bobbs-Merrill, 1933) § 63-522; N. J. Stat. Ann. (West, 1950 Supp.) § 45: 6-19; N. C. Stat. Ann. (Michie, 1943) § 90-29; Ohio Code Ann. (Banks-Baldwin, 1945 Supp.) § 1329; Va. Code Ann. (Michie, 1950) § 54-146; Wis. Stat. (1947) § 152.02.

exercise of the police power which violates the Equal Protection and Due Process clauses of the Fourteenth Amendment.

In the recent decision of *State v. Boren*⁶ the Supreme Court of Washington was called upon for the second time within a half century to determine the constitutionality of a prohibition against owning, maintaining or operating an office for the practice of dentistry without a state license. The two defendants, Boren and Shepherd, had never been licensed to practice dentistry as required by statute, but had in fact been practicing and were co-partners in the ownership, maintenance, and operation of dental offices. This partnership entered into a conditional sales contract for their practice with a licensed practitioner, Harlow, and as a part of the deal, Boren was employed as manager at a salary of \$500 per month. His duties were to manage the office, buy supplies, watch the charts, make out accounts and payments, and look after the advertising. Under this arrangement, the partnership of the defendants received \$750 per month on the sales contract and Boren, in addition to his regular salary of \$500 per month, received over \$14,000 in a period of eighteen months as "bonus" payments "in appreciation of the increase of the business." The State of Washington, and two interveners, brought these facts before the trial court alleging that the defendants were then illegally practicing dentistry within the meaning of the state dental laws, and prayed that they be enjoined from such illegal practices. The trial court found that Boren and Shepherd did own, maintain, and operate a dental office, and thus, the case rested squarely on the validity of the "owning, maintaining or operating" clause of the statute. Although stating that he was doing so against his own opinion, the trial judge held the statute unconstitutional on the precedent of *State v. Brown*⁷ wherein the Supreme Court of Washington had earlier struck down a previous enactment of substantially the same provision. On appeal, the appellants urged the Supreme Court to overrule the *Brown* case and the court did so, reasoning that:

" the state, in the exercise of its police power, has said that he cannot, without a license, practice dentistry. The state has said, in its wisdom, that a person practices dentistry 'who owns, maintains or operates an office for the practice of dentistry.' There can be no question but that the activities of Boren and Shepherd come within this definition. The state has decided that such a practice does not adequately protect the health of

⁶219 P (2d) 566 (Wash. 1950).

⁷37 Wash. 97, 79 Pac. 635, 68 L. R. A. 889 (1905).

its people. Clearly, such a regulation is a reasonable exercise of its police power."⁸

The *Brown* case, tried before the same Washington court forty-five years ago, was the first case to test the validity of such a clause. It was there declared that: "The police power does not justify the withholding from one individual of a natural privilege or right, in order that a corresponding advantage may be added to the rights or privileges of another. The restriction is permissible only as a preventive of evil results reasonably to be expected without such limitation."⁹ It appears that the court's decision was based upon two illogical conclusions: (1) That the statutes are passed to help the private aims of individuals, and (2) that no evil is likely to result from allowing one not qualified nor licensed to practice dentistry to control such practice. Obviously, the licensing acts are not passed to promote the personal ends of individuals, but are for the safety, health, and welfare of the people. The court also failed to recognize the probability that enterprising business men would attempt to commercialize the practice of dentistry and the other "learned professions"¹⁰ just as they have made the profit motive the dominant factor in business. To permit dentistry to be practiced as a commercial business would inevitably destroy a necessary and valuable personal and private relationship between the dentist and his patient.¹¹

A few courts have attempted to avoid this issue by distinguishing between the regulation of the strictly technical side and the regulation

⁸State v. Boren, 219 P. (2d) 566, 572 (Wash. 1950).

⁹37 Wash. 97, 79 Pac. 635, 637, 68 L. R. A. 889, 891 (1905).

¹⁰In a decision involving police power regulation of dentistry, a Colorado court said: "We are not now concerned with an ordinary trade or calling. Law, medicine, and dentistry are generally considered as learned professions." *People v. Painless Parker Dentist*, 85 Colo. 304, 275 Pac. 928, 930 (1929). It is also significant to note that the courts generally apply the same or similar reasoning to all of these professions in regard to police power regulations. This is clearly stated in *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 881 (1904): "Similar legislation has obtained in a large number of states . . . In some instances the question arose under acts regulating the practice of medicine, and in others, as here, regulating the practice of dentistry; but the same reasoning would apply and the same constitutional provisions govern as to the validity of provisions of a dental as of a medical act. . . and the power of the state to regulate as to both in the interest of the public is equally clear."

¹¹"The purpose of regulation is to protect the public from ignorance, unskillfulness, unscrupulousness, deception, and fraud. To that end the states require that the relation of the dental practitioner to his patients and patrons must be personal." *Winslow v. Kansas State Board of Dental Examiners*, 115 Kan. 450, 223 Pac. 308, 309 (1924).

of the purely business side of the profession.¹² To apply this distinction, however, is to place the dentist in a position of divided allegiance between his employer from whom he receives his pay, and his patient, to whom he owes his professional loyalty. It would place the actual control of the practice in the hands of one who was unlicensed and not qualified. The legislature and the courts are under a duty to prohibit such commercialization of the extremely personal and private professions.¹³

A favorite, but ambiguous, argument employed in support of the *Brown* case viewpoint is found in the statement that "To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist."¹⁴ This appears to say either that there was no necessity for such a statute, or that the framers of the Constitution did not intend that police power statutes should be allowed to prohibit the owning or managing of property. It is possible that the circumstances at the date of the *Brown* decision did not warrant strict and extensive control of the professions. However, the reasoning that the police power could not go so far as to prohibit certain property rights is untenable, for by its very nature the police power involves regulation, and regulation is inseparable from prohibition.¹⁵ If there is a necessity for some control, the limitation on

¹²See *Parker v. Board of Dental Examiners of State of California*, 216 Cal. App. 285, 1 P. (2d) 501 (1931). The District Court of Appeals in this case held that a statute regulating dentistry, if construed as prohibiting unlicensed persons from managing purely business affairs of a dental office, would be unconstitutional. However, on appeal, the Supreme Court of California fully refuted the contention by saying: "The law does not assume to divide the practice of dentistry into that kind of departments. Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is treated as a whole." *Parker v. Board of Dental Examiners of California*, 14 P. (2d) 67, 72 (1932).

¹³A good demonstration of the recognition by the courts and legislatures that the professions must be jealously guarded in the public interest is found in a statement by Justice Holmes: "It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession." *Liggett Co. v. Baldridge*, 278 U. S. 105, 115 (1928). See also 13 Am. Jur., Corporations § 837.

¹⁴37 Wash. 97, 79 Pac. 635, 637, 68 L. R. A. 889, 891 (1905).

¹⁵"Since the very foundation of the police power is the control of private interests for the public welfare, a statute or ordinance is not rendered unconstitutional by the mere fact that private rights of person or property are subjected to restraint or that loss will result to individuals from its enforcement." *Town of Ascarate v.*

the power to regulate is only that its extreme must not be so unreasonable as to violate constitutional rights.

Advocates of the restriction of this phase of the police power almost invariably rely on *Liggett Co. v. Baldridge*,¹⁶ decided by the United States Supreme Court in 1928, holding unconstitutional a statute prohibiting a corporation, association, or co-partnership from owning a pharmacy or drug store unless all members were licensed pharmacists. It is significant that the Court declared that the police power may be exerted even where it infringes upon private property rights if such regulation bears a real and substantial relationship to public health, morals, safety, or general welfare. But the question was regarded as one of degree and the statute was invalidated on the grounds that ownership of a drug store by one not a licensed pharmacist did not substantially affect public health. However, in view of the nature of the modern day drug store and the method in which pharmacy is practiced, this case cannot be taken as a proper authority for the unconstitutionality of the "owning, maintaining, or operating" type clause in regard to the regulation of the practice of the learned professions. Fountain service, magazine stands, patent medicines, cosmetics, and other such items form a major part of the modern pharmacy, and the prescription service consists of merely following the written directions of the licensed physicians. Such service is usually in a separate part of the store, and very often the customer does not even see or talk to the druggist. This is certainly not analogous to the doctor-patient or lawyer-client relationships which involve so much of a personal and private nature.

In overruling the *Brown* case, the Washington court in the principal decision fully refutes its former position:

"We agree with the general statements in *State v. Brown* that to own and manage property is a natural right. But there is a clear distinction between the right of the state to interfere with the owning and managing of property, as such, and its right under its police power, to protect the health of its people."¹⁷

The court then recognized the existence of the personal relationship between the dentist and his patient; that the care and treatment of

Villalobos, 223 S. W. (2d) 945, 950 (Tex. 1949), quoting 12 C. J. 931, 16 C. J. S. 581. It is also a well established principle of law that "Where public safety and welfare, as well as peace and health are involved, the sovereign may abridge, abrogate, impair, or even destroy property." U. S. v. Asher, 90 F. Supp. 257, 259 (W D. Mo. 1950).

¹⁶278 U. S. 105, 49 S. Ct. 57, 73 L. ed. 204 (1928).

¹⁷219 P (2d) 566, 572 (Wash. 1950).

teeth is not a business or a commercial transaction, but is a profession; that to allow one who is not a licensed dentist to own, maintain, or operate an office for the practice of dentistry would not adequately protect the health of its people; and that such a regulation is clearly a reasonable exercise of a state's police power. This reasoning appears to be infallible.

The *Boren* case is supported, both in result and reasoning by the Michigan court in the case of *People v. Carroll*,¹⁸ and two other courts,¹⁹ employing the same reasoning, have gone so far as to suspend the license of a dentist who accepted employment from one who came within the purview of the statute in question. There also seems to be an inclination in the modern courts to bring the field of optometry within the learned profession class.²⁰

It is hoped that the *Boren* case, having eliminated the principal decision upon which the restrictive view has been based, will not only provide support for other courts passing on the constitutionality of similar statutes, but will also impress upon the legislatures which have not yet enacted the "owning, managing, or operating" type clause into their state laws the importance of doing so. The failure to pass and enforce strict regulations of the learned professions will result in allowing those not qualified to do indirectly that which they cannot do directly, and thus evade the purpose of the law to protect the health and welfare of the public.

HARRY G. CAMPER, JR.

CRIMINAL LAW—APPLICATION OF DOUBLE JEOPARDY PROHIBITION IN
CASE OF TWO DEATHS RESULTING FROM SINGLE ACT OF WRONG-
DOING. [Ohio]

The common law, the United States Constitution and virtually all of the state constitutions guarantee that no person shall be twice

¹⁸274 Mich. 451, 264 N. W. 861 (1936).

¹⁹*People v. Painless Parker Dentist*, 85 Colo. 304, 275 Pac. 928 (1929) and *Taber v. State Board of Registration*, 137 N. J. L. 161, 59 A. (2d) 231 (1948). The court in the *Taber* case in referring to the "owning, managing or operating" type clause states: "The constitutionality of the latter statutory provisions is not disputed. It could not well be, for the restrictions so imposed upon personal liberty of actions are within the police power of the state to provide for the general welfare of its people and to that end to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." 137 N. J. L. 161, 59 A. (2d) 231, 232 (1948).

²⁰*McMurdo v. Getter*, 298 Mass. 363, 10 N. E. (2d) 139 (1937); *State v. Superior Court for Chelan County*, 17 Wash. (2d) 323, 135 P. (2d) 839 (1943).

put in jeopardy for the same offense.¹ The purpose of the guaranty is to protect the citizen against vexatious criminal prosecutions, but in applying this safeguard to individual rights the courts must give consideration to the chief design of penal laws which, apart from their reformatory aspects, have in view the double aim of protecting society and preventing crime.²

This inevitable conflict in interest between the accused and the State gives rise to such difficult problems of interpretation of the double jeopardy prohibition³ as was involved in the recent case of *State v. Martin*,⁴ which resulted from a highway collision causing the death of two men who were riding on a motorcycle. Defendant, the driver of the truck which struck the motorcycle, was charged with unlawfully killing one John Batori as a result of operating his vehicle in a manner prohibited by law. At the trial, the defendant entered the plea of former jeopardy based on the fact that he had been previously tried and acquitted for the very crime specified in the indictment. The only variance between the present and prior indictments lay in the identity of the person killed, the first indictment having charged the death of John Police, who had been Batori's companion on the motorcycle. In support of his contention, the defendant showed that both parties were killed at or about the same time and as a result of the same accident. The Ohio Court of Appeals overruled the State's demurrer to defendant's plea on the theory that his acts constituted only one offense, if any, and for this he had previously been placed in jeopardy.⁵

¹U. S. Const. Amend. V; Ohio Const. (1851) Art. 1, § 10; *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934).

²22 C. J. S., Criminal Law § 238.

³In *People v. Allen*, 368 Ill. 368, 14 N. E. (2d) 397, 402 (1938), a case growing out of facts similar to those of the principal case, the court observed: "Decided cases in which pleas of former jeopardy have been considered fall into three principal classes: (1) Where there are different degrees of the same offense and the defendant has been acquitted or convicted of a charge involving one of those degrees. In such case the plea will be sustained . . . (2) Where the commission of larceny consists of the felonious act and different kinds of articles of property or articles of different owners are stolen there is but a single larceny . . . , and (3) where a single felonious act results in the commission of two or more crimes not embraced in different degrees of the same offense. This case falls within the third class. There was but a single physical act—the collision—from which two persons met their deaths."

⁴90 N. E. (2d) 706 (Ohio 1950).

⁵The majority of courts consider it inconsequential whether the first trial resulted in a conviction or an acquittal. *People v. Brannan*, 70 Cal. App. 225, 233 Pac. 88 (1924); *State v. Roberts*, 170 La. 727, 129 So. 144 (1930); *Fay v. State*, 62 Okla. Cr. 350, 71 P. (2d) 768 (1937). *Contra: Simco v. State*, 9 Tex. App. 338 (1880).

The court based its decision upon the premise that a single act of unlawfully operating a vehicle could be only one violation of the manslaughter statute, irrespective of the number of deaths which this single act might produce. From this view, it would seem that the *act* and not the *result* is the thing prohibited, or perhaps that the act and the results are identical. This line of reasoning, which has been adopted by a number of courts,⁶ is contrary to the rule followed in a majority of American jurisdictions, which holds there are as many offenses as there are deaths, though there may have been but a single wrongful act.⁷

The majority view is predicated upon the idea that the act and the offense are two different elements. Thus it is said that "Two things, not one, are necessary to constitute the offense in this case [manslaughter]. The first is the act of culpable negligence. The second is the killing of a person. Until the second thing occurs, no offense has been committed."⁸ The constitutional prohibition deals with duplication in relation to the criminal offense, without regard to the quantity of acts. "In order for one prosecution to be a bar to another, it is not sufficient to show that the act is the same, but it must be shown that the offense, also, is the same in law and in fact."⁹

In determining whether there is an identity of offenses, the courts generally look to see whether the facts alleged in the later indictment would, if found to be true, have justified a conviction under the former. If the proof necessary to sustain a conviction under the later indictment is the same in every particular as that required in the former, then the offenses charged are identical and a plea of former jeopardy will be sustained.¹⁰

In following this identity of offense rule, the courts which subscribe to the majority view hold that an indictment for the death of A does not charge the same offense as an indictment for the death of B, although both deaths are caused by the same act. The singular proof of the death of B in the trial under the first indictment could

⁶State v. Wheelock, 216 Iowa 1428, 250 N. W. 617 (1933); State v. Cosgrove, 103 N. J. L. 412, 135 Atl. 871 (1927); People v. Barr, 259 N. Y. 104, 181 N. E. 64 (1932); State v. Damon, 2 Tyler 387 (Vt. 1803).

⁷People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938); State v. Fredlund, 200 Minn. 44, 273 N. W. 353, 113 A. L. R. 215 (1937); Lawrence v. Commonwealth, 181 Va. 582, 26 S. E. (2d) 54 (1943); 1 Wharton, Criminal Law (12th ed. 1932) 537.

⁸State v. Carte, 157 Kan. 673, 143 P. (2d) 774, 777 (1943).

⁹People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397, 403 (1938).

¹⁰"The words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." State v. Rose, 89 Ohio St. 383, 106 N. E. 50, 51 (1914). Also Garner v. State, 31 Ala. App. 52, 11 S. (2d) 872 (1943); State v. Midgett, 214 N. C. 107, 198 S. E. 613 (1938).

not sustain a conviction for the death of A. Consequently, a subsequent trial for the death of B does not place the defendant in double jeopardy.¹¹

The argument as to whether a single act may be more than one offense has arisen repeatedly in other branches of the criminal law.¹² It has been decided both in a murder case¹³ and in a malicious shooting case¹⁴ that a violent act injuring two people is two separate offenses; but it has also been held that it is two offenses *only* when the act was not part of a general design to effect a multiple injury.¹⁵ An acquittal for arson in burning a building was held not to bar a subsequent indictment for burning the contents thereof with intent to defraud an insurance company;¹⁶ and an embezzlement from two individuals is two offenses even though committed by the same act.¹⁷ Likewise an acquittal for forging the election returns of one town is not a bar to an indictment for forging the election returns of another town, although the forgery was all part of one act.¹⁸ An armed robbery from two people at the same time is two offenses.¹⁹ And a like result was reached in a case where defendant sold liquor in violation of law to two different individuals.²⁰

The court in the instant case relied on the case of *State v. Hennessey*²¹ in which it was held that a person who, in a single act of stealing, appropriated the property of two individuals committed only one offense of larceny. In answer to the state's contention that there were as many acts of larceny as there were owners, the court explained that "The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense."²² Virtually all courts agree that this is correct law as regards the crime of larceny, because

¹¹See *State v. Carte*, 157 Kan. 673, 143 P. (2d) 774, 777 (1943); *State v. Billott*, 104 Ohio St. 13, 135 N. E. 285, 287 (1922).

¹²22 C. J. S., Criminal Law § 298.

¹³*People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884).

¹⁴*Vaughan v. Commonwealth*, 2 Va. Cas. 273 (1821).

¹⁵*Hurst v. State*, 24 Ala. App. 47, 129 So. 714 (1930).

¹⁶*People v. Fox*, 269 Ill. 300, 110 N. E. 26 (1915). Such a case may be regarded as falling within the Illinois court's first category as involving different degrees of the same offense. See note 3, *supra*.

¹⁷*State v. Laughlin*, 180 Mo. 342, 79 S. W. 401 (1904).

¹⁸*Commonwealth v. Trimmer*, 84 Pa. 65 (1877).

¹⁹*Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. 359 (1892); *Orcutt v. State*, 52 Okla. Cr. 217, 3 P. (2d) 912 (1931).

²⁰*Harris v. State*, 50 Tex. Cr. 411, 97 S. W. 704 (1906).

²¹23 Ohio St. 339, 13 Am. Rep. 253 (1872).

²²*State v. Hennessey*, 23 Ohio St. 339, 347, 13 Am. Rep. 253, 254 (1872).

here the crime is the taking itself, and the individual owner's loss is merely an incident thereto.²³ But a majority of courts refuse to draw an analogy between larceny and crimes such as manslaughter,²⁴ as did the court in the instant case. The death of the person in a manslaughter case finds its equivalent in a larceny case in the taking of the property, not in the loss of the property by the owner.

As already pointed out, the ownership of stolen property is alleged merely for purposes of describing the offenses; it is not an essential part of the indictment.²⁵ But in cases of homicide, it is incumbent upon the state to prove the *corpus delicti*.²⁶ The death is a necessary ingredient of the crime, and in some states the identity of the specific person alleged in the indictment must be proven.²⁷ The name specified in a manslaughter indictment is not merely a descriptive word, but is necessary to prove the crime; and merely to allege that death resulted, without proof of the death of the person named in the indictment, could never sustain a conviction.²⁸

In order that the courts may properly protect the public against the multiple consequences of a single act, it is contended that the perpetrator must be compelled to answer for each result of his wrongful doing. The courts which follow the majority view believe that multiple penalties are proper for the person whose act resulted in multiple wrongs,²⁹ and that such a wrongdoer is not protected by the double jeopardy provision of a constitution because this provision specifies *offense* and not *act*, and hence should be construed in that light.³⁰

²³People v. Israel, 269 Ill. 284, 109 N. E. 969 (1915); State v. Douglas, 26 Nev. 196, 65 Pac. 802 (1901); State v. Emery, 68 Vt. 109, 34 Atl. 432 (1896); 1 Bishop, Criminal Law (9th ed. 1923) 778.

²⁴"Of course it must be conceded that 'when the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, a prosecution to final judgment for stealing some of the articles will bar a subsequent prosecution for stealing any of the other articles taken at the same time.'" State v. Fredlund, 200 Minn. 44, 273 N. W. 353, 355, 113 A. L. R. 215, 218 (1937). Also People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938).

²⁵State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253 (1872).

²⁶Ausmus v. People, 47 Colo. 167, 107 Pac. 204 (1910); State v. Weston, 102 Ore. 102, 201 Pac. 1083 (1921); 3 Warren, Homicide (1938) 108.

²⁷Ausmus v. People, 47 Colo. 167, 107 Pac. 204 (1910); Wall v. State, 5 Ga. App. 305, 63 S. E. 27 (1908); 3 Warren, Homicide (1938) 111.

²⁸Bolden v. State, 140 Tenn. 118, 203 S. W. 755 (1918). See 3 Warren, Homicide (1938) 132, for general requirements of identification.

²⁹But the courts fail to explain why a person who steals from two people should not be punished for hurting both owners, as is his counterpart in the manslaughter case. Perhaps the difference in the magnitude of the crimes is the deciding factor.

³⁰People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938). See State v. Carte, 157 Kan. 673, 143 P. (2d) 774, 777 (1943).

On the other hand, the jurisdictions which follow the view adopted by the court in the instant case take the position that there has been only one act against the peace and dignity of the sovereign, and consequently only one injury for which punishment should be given.³¹ Making a single offense the basis of numerous criminal actions is known as "carving," and all authorities concede that it is illegal.³² The minority contend that to allow the state to prosecute the defendant for each person who was injured by his single act is to permit carving. The divergence between the two views thus turns on the issue of whether or not such a practice is in fact dividing a single offense or merely handling a multiplicity of offenses.

The cases are in sharp conflict on the subject and there is little hope of the views becoming reconciled in the foreseeable future by judicial action. Inasmuch as the choice between the two views lies more directly in theories of penology than in principles of law, a legislative solution may be more desirable as well as more possible of attainment.

F. BERT PULLEY

DAMAGES—APPLICATION OF AMERICAN AND ENGLISH RULES FOR MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO SELL LAND. [Kentucky]

The fundamental principle of assessing damages for the breach of a contract is to give the innocent party the value of the performance as nearly as possible by awarding damages for loss of the bargain.¹ However, for breach of contract for sale of land, the English courts nearly two centuries ago adopted an exception to the usual measure of damages by refusing to award the plaintiff lost profits but allowing recovery of any purchase money paid, with interest, plus incidental expenses incurred while investigating the vendor's title.² Numerous American courts adopted this English rule, but the United States Supreme Court in 1821³ established the "American," or loss of bargain, rule which applies the normal theory of contract damages by awarding

³¹See cases cited, note 6, *supra*.

³²*State v. Martin*, 90 N. E. (2d) 706 (Ohio 1950); *Dowdy v. State*, 158 Tenn. 364, 13 S. W. (2d) 794 (1929). See *People v. Thomas*, 59 Cal. App. (2d) 585, 139 P. (2d) 359, 361 (1943); *People v. Allen*, 368 Ill. 368, 14 N. E. (2d) 397, 407 (1938).

¹5 Williston, *Contracts* (Rev. ed. 1937) § 1338; McCormick, *Damages* (1935) § 137; 1 Sedgwick, *Measure of Damages* (9th ed. 1920) § 30; 1 Sutherland, *Damages* (4th ed. 1916) § 12; Restatement, *Contracts* (1932) § 329.

²*Flureau v. Thornhill*, 2 W. Bl. 1078, 96 Eng. Rep. 635 (1776).

³*Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218 (U. S. 1821).

the difference between the contract price and the reasonable market value of the land at the time for conveyance under the contract.⁴

The action of the Court of Appeals of Kentucky in the recent case of *Raisor v. Jackson*⁵ clearly demonstrates the uncertainty which has developed in the application of these divergent views and reveals the most important factors upon which qualifications of the general rules have been based. The defendant, knowing his ownership of a tract of land to be only an undivided one-half interest, but honestly believing that his wife who owned the other one-half interest would join in conveying, sold to plaintiff as the unconditional owner. Upon the refusal by the wife to join, the plaintiff sued for breach of contract, asking damages for loss of the bargain. Relying on previous Kentucky decisions,⁶ the trial court held that where the vendor acts in good faith without positive fraud, the measure of damages extends only to refund of the purchase money with interest plus costs of investigating the title. In reversing this judgment the Court of Appeals re-examined the "good faith doctrine", distinguishing *Crenshaw v. Williams*⁷ from *Potts v. Moran's Executors*,⁸ reaffirming the former case and overruling the latter. In the *Crenshaw* case the vendor's wife had a life estate with remainder to her children, and though she and her child joined in the conveyance and she was past the normal childbearing age, the possibility of more children made the title defective in point of law. This was considered to be a latent or unknown defect for which "reimbursement damages" of the English rule were properly awarded, since the court felt that the vendor layman could not be required to know that the circumstances gave rise to a legal encumbrance, and therefore he had acted in good faith. The defect of title in the *Potts* case was caused by the seller's inability to convey because his wife would not release her dower right. Under those circumstances the court in the present case felt that a patent or known defect was involved for which reimbursement damages were inadequate, since the seller could have made no mistake as to the present extent of his own title. The court

⁴Any amount paid on the purchase price is added to the award.

⁵311 Ky. 803, 225 S. W (2d) 657 (1950).

⁶*Gober v. Leslie*, 307 Ky. 477, 211 S. W (2d) 658 (1948) (wife's refusal to join); *Potts v. Moran's Executors*, 236 Ky. 28, 32 S. W (2d) 534 (1930) (same); *Crenshaw v. Williams*, 191 Ky. 559, 231 S. W 45, 48 A. L. R. 5 (1921). The Court of Appeals in the principal case admitted that the *Gober* case and the *Potts* case were squarely in point and conflicting, since loss of bargain damages were imposed in the *Gober* case but only reimbursement damages were imposed in the *Potts* case. The *Gober* case was held to state the law correctly.

⁷191 Ky. 559, 231 S. W 45, 48 A. L. R. 5 (1921).

⁸236 Ky. 28, 32 S. W (2d) 534 (1930).

concluded that the good faith doctrine of the *Crenshaw* case was still sound doctrine in Kentucky but that it had been unjustifiably extended in the *Potts* case. The correct rule was then stated to be that:

“where a seller unconditionally agrees to convey real property, knowing he has no title or with knowledge of an outstanding interest therein owned by a third party, he is bound by his undertaking to deliver a good deed to the purchaser; the question of good faith is immaterial if he breaches his agreement; and if the buyer is so damaged, he may recover the difference between the contract price and the reasonable market value of the property at the time the contract was executed.”⁹

Although the court obviously intended to impose damages for loss of the bargain in this case, it did not adopt the usual measure of damages for such purpose. The American rule is the difference between the contract price and the reasonable market price at the time for conveyance, not at the time of execution of the contract. This inadvertence was probably of no consequence in the *Raisor* case because there was no indication of any change in value between the time the contract was executed and the time for conveyance; but it may cause uncertainty when future litigants attempt to benefit by the peculiar form of the measure of damages here stated.

In order properly to classify states or even single decisions as following one rule or the other, the development of the English and American rules must be noted.

The decision of *Flureau v. Thornhill*¹⁰ in 1776 marks the origin of the English, or Flureau, rule that only reimbursement damages should be awarded except where the vendor's conduct amounts to legal fraud, intentionally misleading the innocent vendee. The theory was that both the vendor and vendee contracted upon the implied condition that the vendor had a good title; and if he did not have it, restoration to status quo was all either was entitled to expect.¹¹ A decision of 1826¹² limited the doctrine by holding that a person who sold land knowing his title to be incomplete must respond in damages for loss of the bargain. This qualification of the *Flureau*

⁹*Raisor v. Jackson*, 311 Ky. 803, 225 S. W. (2d) 657, 660 (1950).

¹⁰2 W Bl. 1078, 96 Eng. Rep. 635 (1776).

¹¹2 W Bl. 1078, 96 Eng. Rep. 635, 635 (1776) (Blackstone pointed out: “These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected.”).

¹²*Hopkins v. Grazebrook*, 6 B. & C. 31, 108 Eng. Rep. 364 (1826).

rule was alternately accepted¹³ and rejected¹⁴ by the English courts until the 1826 case was overruled by the House of Lords in *Bain v. Fothergill*¹⁵ in 1874. That decision held that the *Flureau* rule was to be followed "without exception" and that the vendee could not recover damages beyond the expenses he had incurred even though the vendor knew he had no title and no means of acquiring it.¹⁶ However, subsequent English cases have implemented a new means to escape the force of the *Bain* rule by imposing the more extensive damages for bad faith where the vendor fails to make every reasonable effort to remove defects of title, even though he contracted in ignorance of any defect.¹⁷ Obviously, the recent trend of the English decisions represents a radical change from the original *Flureau* rule that a vendor, without fraud, may not be held for loss of the bargain. It appears that the present English rule may be stated as follows: Where the vendor acts either with knowledge or in ignorance of a defect of title and afterwards does all he reasonably can do to remove the defect, the vendee will be reimbursed only for what he has paid, with interest, plus investigative costs. Otherwise, damages for loss of the bargain shall be imposed. Approximately one-half of the American jurisdictions follow a rule in some degree analogous to this "English rule."¹⁸

The leading case which established the American rule¹⁹ imposing

¹³*Robinson v. Harman*, 1 Ex. 850, 154 Eng. Rep. 363 (1848); *Engel v. Fitch*, L. R. 3 Q. B. D. 314 (1868). Also see Cockburn's dissent in *Sikes v. Wild*, 1 B. & S. 587, 121 Eng. Rep. 832 (1861).

¹⁴*Walker v. Moore*, 10 B. & C. 416, 109 Eng. Rep. 504 (1829); *Worthington v. Warrington*, 8 C. B. 134, 137 Eng. Rep. 459 (1849).

¹⁵L. R. 7 H. L. 158 (1874).

¹⁶This was a considerable extension since the *Flureau* case made an exception where the vendor acts fraudulently. 2 W Bl. 1078, 96 Eng. Rep. 635 (1776).

¹⁷A line of cases has established the present rule in England that the vendor must "do his best" or make every "reasonable effort" to remove the defect. The vendor was held to have acted in bad faith in: *Thomas v. Kensington*, [1942] 2 K. B. 181 (vendor was unable or unwilling to redeem a mortgage in order to pass good title); *Braybrooks v. Whaley*, [1919] 1 K. B. 435 (vendor-mortgagee failed to obtain leave of court to sell where statute required such leave); *Daniel v. Vassall*, [1917] 2 Ch. 405 (vendor failed to secure the release of property from a mortgage because he was financially unable to do so); *Day v. Singleton*, [1899] 2 Ch. 320 (vendor of leaseholds assignable only with consent of lessor failed to obtain that consent). See 29 *Halsbury's Laws of England* (2d ed., Hailsham, 1938) § 537.

¹⁸*Markoff v. Kreiner*, 180 Md. 150, 23 A. (2d) 19 (1941); *Kargiatly v. Provident Trust Co.*, 338 Pa. 358, 12 A. (2d) 11 (1940); *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120 (1909); *Boston v. De Jarnette*, 153 Va. 591, 151 S. E. 146 (1930). See 55 *Am. Jur.*, *Vendor & Purchaser* § § 557, 558 (1946). Several states have adopted the rule by statute. *McCormick, Damages* (1935) § 179.

¹⁹*Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218 (U. S. 1821). In *Doherty v. Dolan*,

loss of bargain damages determined that the motives of the vendor were immaterial, since in every case the vendee's damage is the same. This view has prevailed without material qualification in approximately one-half of the jurisdictions of the states²⁰ and is consistently employed as the federal rule²¹ except where, in deference to local land law,²² state law is held to be binding.

American jurisdictions which follow the "English rule," while asserting that in general only reimbursement damages are recoverable, have imposed full damages for loss of the bargain wherever "bad faith" is found. As in England, "bad faith" is an extremely broad term. It refers not only to any case where there is actual fraud, but also to cases in which the vendor, though not a wilful wrongdoer, knew or should have known at the time of contracting that he could not then pass title. Loss of bargain damages are almost uniformly imposed for bad faith where: the vendor had title but either arbitrarily refuses to perform or by his own act incapacitates himself from performance;²³ the vendor with a partial interest contracts to sell knowing that a spouse or other third party must join and the latter refuses to do so;²⁴ the vendor is without title but honestly believes that he can secure title in time to perform, and later fails to secure the title.²⁵ The same result, of course, is reached in American rule jurisdictions, since the

65 Me. 87, 20 Am. Rep. 677 (1876) the court stated some eight reasons, including an analogy to breach of contract for sale of personal property, for its preference of this measure of damages. However, plaintiff has an election either to sue for rescission and recover the amount paid or affirm and sue for breach of the contract to recover his loss of bargain.

²⁰*Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413 (1908); *Fleckton v. Spicer*, 63 Minn. 454, 65 N. W. 926 (1896); *McCarty v. Lingham*, 111 Ohio 551, 146 N. E. 64 (1924). See Note (1927) 48 A. L. R. 12, 22-24.

²¹*Harten v. Loffler*, 212 U. S. 397, 29 S. Ct. 351, 53 L. ed. 568 (1909).

²²*Freeman v. Falconer*, 201 Fed. 785 (C. C. A. 6th, 1913).

²³*Toley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107 (1856); *McAdam v. Leak*, 111 Kan. 704, 208 Pac. 569 (1922) (refusal by vendor on ground that price was too low); *Horner v. Holt*, 187 Va. 715, 47 S. E. (2d) 365 (1948) (refusal on ground that price of building materials had increased); *Arentsen v. Moreland*, 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973 (1904) (failure of vendor to reacquire title to timber upon land).

²⁴*Key v. Alexander*, 91 Fla. 975, 108 So. 883 (1926); *Gober v. Leslie*, 307 Ky. 477, 211 S. W. (2d) 658 (1948); *Matthews v. La Prade*, 144 Va. 795, 130 S. E. 788 (1925). Contra: *Gerbert v. Sons of Abraham*, 59 N. J. L. 160, 35 Atl. 1121, 69 L. R. A. 764 (1896) (holding plaintiff must resort to an action for deceit, and resting the decision squarely on *Bain v. Fothergill*).

²⁵*Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463 (1869); *Seidlek v. Bradley*, 293 Pa. 379, 142 Atl. 914, 68 A. L. R. 134 (1928) (where vendor contemplated making purchase for resale to vendee). But see *Hamaker v. Bryan*, 178 Cal. 128, 172 Pac. 391 (1918) (fact that vendee knows of his inability at time does not, per se, show bad faith where he had made arrangements to secure title).

heavier measure of damages is applied in all cases.²⁶ Thus, all of these so-called "English rule" jurisdictions follow the American rule in so far as they impose damages for loss of bargain, while they follow the early English rule in so far as they deny damages for loss of the bargain.

The difficulty in terminology is illustrated by considering a line of New York decisions, a state which is generally considered to have adopted the English rule.²⁷ In *Pumpelly v. Phelps*,²⁸ decided in 1869, the trustee-vendor refused to convey because the cestui qui vie would not give her consent due to personal reasons. The court imposed damages for loss of the bargain, stating that the general rule of damages would compensate plaintiff for the loss of bargain, but that an exception to the rule would apply where a vendor acts without knowledge. Subsequent New York decisions of 1908²⁹ and 1924³⁰ used the same terminology, citing the *Pumpelly* case with approval. In a recent case, *Holdridge v. Roberts*,³¹ wherein the vendor was unable to convey marketable title because a garage encroached upon adjoining land, the court decided that the purchase of that land was a "reasonable expense"³² the vendor should have incurred, and imposed loss of bargain damages for his failure to do so. The rule of New York is stated by the court in such an ambiguous fashion that one cannot with finality declare which view, American or English, is generally followed there.³³

As a result of the principal decision it cannot be said with any degree of accuracy that Kentucky courts follow either rule to the exclusion of the other. Kentucky's view is like the American rule in

²⁶*Greenberg v. Ray*, 214 Ala. 481, 108 So. 385 (1926) (wife's refusal to join); *Makusevich v. Gotta*, 107 Conn. 207, 139 Atl. 780 (1928) (arbitrary refusal); *Dunshee v. Geoghegan*, 7 Utah 113, 25 Pac. 731 (1891).

²⁷*McCormick*, *Damages* (1935) § 179.

²⁸40 N. Y. 59, 100 Am. Dec. 463 (1869).

²⁹*Marsh v. Johnston*, 125 App. Div. 597, 109 N. Y. Supp. 1106 (1908), aff'd without opinion 196 N. Y. 511, 89 N. E. 1104 (1909).

³⁰*Grosso v. Sporer*, 123 Misc. 796, 206 N. Y. Supp. 227 (1924), aff'd 220 App. Div. 807, 222 N. Y. Supp. 813 (1927).

³¹195 Misc. 646, 89 N. Y. S. (2d) 619 (1949).

³²Compare the requirement of "reasonable expense" in the *Holdridge* case with the "reasonable effort" or "do his best" requirement of the present English rule, note 17, *supra*.

³³In speaking of when a vendee may recover for loss of the bargain, the court said: "the rule in New York is that he cannot recover where the vendor has acted in good faith, and is unable to give a good title; but can recover where the vendor has not acted in good faith, or has knowingly contracted beyond his powers, or is able to give a good title and refuses, or is able at reasonable expense to remedy defects in his title and arbitrarily refuses to do so." 195 Misc. 646, 89 N. Y. S. (2d) 619, 622 (1949).

that loss of bargain damages will be given regardless of the vendor's motive where he knew or should have known he could not convey title, as was true in the principal case. Kentucky's view is like the early English rule in that only reimbursement damages will be given where the vendor neither knew nor should have known of his inability to convey. Kentucky's view is unlike the present English rule in that if the vendor knew or should have known he could not pass title, the fact that he subsequently "does his best" to cure the defect is apparently immaterial and he will be charged with loss of bargain damages.

Without question, the labels "English Rule" and "American Rule" have become misleading, and many jurisdictions defy classification unless arbitrary definitions of the two rules are adopted for the sake of making classification possible. Better understanding of this segment of the law might be achieved if these treacherous labels were abandoned and the decisions explained in more general terms. In this regard the following conclusions may be ventured: (1) The present rule in England bears little resemblance to the rule of the *Flureau* case as reaffirmed by *Bain v. Fothergill*, having been radically changed by the "reasonable effort" or "do his best" requirement of recent decisions in England. (2) Present "English rule" jurisdictions in the United States differ from the present rule in England in that once the concept of bad faith is found, the fact that a vendor does his best will not excuse him from damages for loss of the bargain. (3) Since loss of bargain damages are always imposed in American rule jurisdictions, all American states impose the loss of bargain damages where the mentioned concept of bad faith is found to exist. (4) The only fact situation where different results are certain to follow is that in which a vendor is held for loss of the bargain in an American rule jurisdiction even though he acted with purest motives. (5) A questionable area exists in situations in which the court may decide that a vendor who actually did not know of a defect, nevertheless should have known, and therefore may hold such vendor for loss of the bargain.

EMMETT E. TUCKER, JR.

DOMESTIC RELATIONS—AUTHORITY OF GUARDIAN TO BRING ACTION FOR
DIVORCE IN BEHALF OF INSANE WARD. [Florida]

Statutes providing for the appointment of guardians of mental incompetents invest the guardian with general power to sue and be

sued on behalf of the ward.¹ Under this broad authority the representative may prosecute such actions for the ward as for annulment of his marriage, for torts against the ward's person, and for damages inflicted on his property.² However, the courts, while giving the statutory authority broad application in most respects, have been reluctant to recognize its application to suits for divorce brought by the guardian for an incompetent spouse.

In *Scott v. Scott*³ the question was recently certified to the Supreme Court of Florida in a case of first impression, and the resulting decision denying the guardian's power to seek the divorce aligned that state with the large majority of jurisdictions which have passed on the controversy.⁴ Though a valid ground for divorce apparently existed, the court reasoned that the guardian's power to maintain actions in behalf of his ward⁵ does not include the authority to sue for a divorce, because "the right to maintain the suit is of such a strictly personal and volitional nature that it must of necessity, remain personal to the spouse aggrieved by the acts and conduct of the other."⁶ This reasoning employs the theory that no marital wrongs are of themselves sufficient to dissolve the bonds of matrimony nor unsusceptible of being condoned, and, therefore, the marriage can be set aside only with the consent of the aggrieved spouse, which consent cannot be given if he or she is mentally incompetent.⁷

Other courts adopting this position have stressed the point that

¹A typical example of such a statute is the New York Civil Practice Act § 1377, Clevenger's Practice Manual (1950), which provides in part as follows: "A committee of the property may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made."

²25 Am. Jur., Guardian and Ward § 147.

³*Scott v. Scott*, 45 S. (2d) 878 (Fla. 1950).

⁴*Worthy v. Worthy*, 36 Ga. 45 (1867); *Mohler v. Shank's Estate*, 93 Iowa 273, 61 N. W. 981 (1895); *Birdzell v. Birdzell*, 33 Kan. 433, 6 Pac. 561 (1885); *Johnson v. Johnson*, 294 Ky. 77, 170 S. W. (2d) 889 (1943); *Higginbotham v. Higginbotham*, 146 S. W. (2d) 856 (Mo. App. 1940); *Mohrmann v. Kob*, 291 N. Y. 181, 51 N. E. (2d) 921 (1943); *Jack v. Jack*, 75 N. E. (2d) 484 (Ohio App. 1947); *Dillon v. Dillon*, 274 S. W. 217 (Tex. Civ. App. 1925). Also see *Stevens v. Stevens*, 266 Mich. 446, 254 N. W. 162 (1934).

⁵Fla. Stat. (1945 Supp.) § 744.61 reads in part: "Suits to enforce or to declare rights of the ward shall be brought jointly in the name of the guardian and the ward." § 744.04 provides: "This law [Guardianship Law] shall be liberally construed to the end that controversies and the rights of the parties may be speedily and finally determined; and the rule that statutes in derogation of the common law shall be strictly construed does not apply."

⁶*Scott v. Scott*, 45 S. (2d) 878, 879 (Fla. 1950).

⁷*Birdzell v. Birdzell*, 33 Kan. 433, 6 Pac. 561 (1885).

to allow the guardian to obtain a divorce for the incompetent would deprive the incompetent of the right to forgive and excuse the guilty party if he or she so desired.⁸ Regardless of the nature of the offense, it is reasonable to suppose that the incompetent might want to exercise his right of condonation. Because of religious beliefs or for other reasons the insane party may consider marriage a sacrament which can be broken only by death.⁹ Moreover, in some instances insanity may prove to be only temporary; the insane spouse might regain sanity and to his dismay and sorrow find that he has secured a divorce.¹⁰ Further, the right of securing a divorce is not an inherent or vested right,¹¹ and since the stability of the marriage relationship is a matter of public concern, courts have felt that its continuance or dissolution should never be trusted to the discretion of a legal representative, absent express statutory authority.¹²

A rather questionable process of statutory interpretation is indulged in to support the refusal to permit the guardian to maintain divorce actions. The typical guardianship statute is a general grant of authority, neither expressly enumerating the actions that can be brought nor excluding any specific actions from the authorization.¹³ Thus, the grant of power would seem to include all types of action. But instead of so holding, the courts rule that divorce actions are not included because the legislature did not expressly specify that divorce actions could be brought by the guardian.¹⁴ The view seems to be taken that the guardian statute should not apply since it was the intent of the legislature to deal with divorce actions separately and completely in other statutes.¹⁵ Having thus construed an unexpressed exception into the statutes already passed by the legislatures, the courts declare that any authority of the guardians to bring divorce actions must be granted by the legislatures. In the words of a New York court:

“ . the fact is pressed upon us that unless a cause of action for divorce may be pleaded in his behalf by his committee, the

⁸Mohler v. Shank's Estate, 93 Iowa 273, 61 N. W. 981 (1895).

⁹Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885); Mohrmann v. Kob, 291 N. Y. 181, 51 N. E. (2d) 921 (1943).

¹⁰Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885).

¹¹Pappas v. Pappas, 146 S. W. (2d) 1115 (Tex. Civ. App. 1941).

¹²Johnson v. Johnson, 294 Ky. 77, 170 S. W. (2d) 889 (1943).

¹³See note 1, *supra*.

¹⁴Mohrmann v. Kob, 291 N. Y. 181, 51 N. E. (2d) 921 (1943); Dillon v. Dillon, 274 S. W. 217 (Tex. Civ. App. 1925).

¹⁵For a criticism of this argument see the dissenting opinion in Mohrmann v. Kob, 291 N. Y. 181, 51 N. E. (2d) 921, 925 (1943).

plaintiff wife may subject him to grave injustice. The argument carries strong appeal but is more properly to be addressed to the Legislature. Until that body has enacted a statute which expressly or by clear implication authorizes a committee of an insane person to make that choice, the courts may not assume to grant that power."¹⁶

Apparently taking note of this trend of judicial decisions, the Massachusetts legislature has forestalled a restrictive interpretation of its statute by providing expressly that "the libel [for divorce] shall be signed by the libellant, if of sound mind and of legal age to consent to marriage; otherwise it may be signed by the guardian of the libellant or by a person admitted by the court to prosecute the libel as his next friend."¹⁷ Under this mandate the Massachusetts courts have granted divorces to insane spouses where the facts clearly indicated that the interests of the parties required abrogation of the marriage.¹⁸

Only in England and Alabama do the courts seem to have included divorce actions within the guardian's authority without an express statutory provision. The Matrimonial Causes Act of 1857 provided for absolute divorce to be granted by the Court for Divorce and Matrimonial Causes and took away from the ecclesiastical courts their jurisdiction over that type of cases.¹⁹ Shortly after the passage of this Act, it was held that since the statute did not expressly say the action for divorce might not be maintained against an incompetent, the court could not impose such a limitation by implication.²⁰ It was later decided in *Baker v. Baker*²¹ that the same rule must apply when the action is brought in behalf of an insane spouse. The court ruled that "as proceedings for divorce are civil, though no provision for the case of lunatics is contained in the Act, recourse must be had in such a case to the ordinary forms of civil courts where lunatics are litigants."²² The Alabama Supreme Court in the case of *Campbell*

¹⁶*Mohrman v. Kob*, 291 N. Y. 181, 51 N. E. (2d) 921, 925 (1943).

¹⁷Mass. Ann. Laws (Michie, 1933) c. 208, § 7.

¹⁸*Cowan v. Cowan*, 139 Mass. 377, 1 N. E. 152 (1885); *Garnett v. Garnett*, 114 Mass. 379 (1874). See *Cohn v. Carlisle*, 310 Mass. 126, 37 N. E. (2d) 260, 262 (1941).

¹⁹20 & 21 Vict., c. 85 (1857). Prior to the enactment of this statute an absolute divorce could be granted only by Parliament, though the ecclesiastical courts granted legal separations and in some instances adjudged marriages void where there was a lack of capacity on the part of the parties to consent to marriage, or where the ceremony was entered into under duress, fraud, and the like. See 1 Nelson, *Divorce and Annulment* (2d ed. 1945) § 1.01; Keezer, *The Law of Marriage and Divorce* (Moreland, 3d ed. 1946) § 240.

²⁰*Mordaunt v. Moncrieffe*, 2 L. R. (Scotch & Divorce Appeal Cases) H. L. 374 (1874).

²¹5 P. D. 142 (1880).

²²*Baker v. Baker*, 5 P. D. 142, 151 (1880).

*v. Campbell*²³ took notice of the rule of the majority of jurisdictions that absent statute an action for divorce cannot be maintained on behalf of the incompetent, but decided that the Alabama statute enabling persons of unsound mind to sue by next friend entitled the next friend to bring divorce actions.²⁴ Inasmuch as the provisions of this enactment concerning the powers of the guardian²⁵ are similar to those in Florida and other states, the *Campbell* decision is squarely in conflict with the instant case.²⁶ Under this broad interpretation of the statute, the Alabama court declared that "The court has ample power to protect the interest of the incompetent complainant, and the equity of the bill must be determined on its averments, independent of the state of the complainant's mind as if he were suing of his own volition."²⁷

Despite the persuasive practical arguments advanced to support the prevailing doctrine, it has the unfortunate effect of rendering the marriage indissoluble on behalf of the incompetent spouse. It is questionable whether such a rigid prohibition is consistent with sound social policy. It is true that the stability of the marriage relationship is the very essence and foundation of modern society, and it is a function of law to encourage the parties to live amicably together and to prevent separation. But some marriages, consistent with the public welfare at the time of the ceremony, cease to be beneficial at some subsequent date, and are in fact detrimental. In such a situation divorce is not prejudicial but desirable. The English court in *Baker v. Baker*, realizing this fact, observed:

" if reasons of expediency are to be regarded, great wrong might arise from holding that no proceedings for divorce can be maintained against the adulterous wife of a lunatic. She might

²³242 Ala. 141, 5 S. (2d) 401 (1941).

²⁴The Florida court in the instant case noted *Campbell v. Campbell*, but declined to accept the logic by which the Alabama court had reached its decision.

²⁵"Whenever a person of unsound mind has a guardian appointed under the laws of this state the guardian must sue or defend for and in the name of such person of unsound mind. If he has no duly appointed guardian, or if he have such a guardian who fails or refused to sue or defend for him, or if the interest of the guardian is adverse to that of the person of unsound mind, he may sue by a next friend and must defend by a guardian ad litem, and the person of unsound mind may prosecute a cross-claim by his guardian or guardian ad litem." Ala. Code (1940) Equity Rule 8, Tit. 7, p. 1047. Compare the Florida statute, note 5, supra.

²⁶There was a dissent filed in the *Campbell* case on the grounds that no statutory authority existed for such an action, and that in the absence of such authority such suits should not be allowed because of the social implications. *Campbell v. Campbell*, 242 Ala. 141, 5 S. (2d) 401, 402 (1941).

²⁷*Campbell v. Campbell*, 242 Ala. 141, 5 S. (2d) 401, 402 (1941).

be left in possession of property settled on her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic. She might exercise powers of appointment in favor of the paramour or the children of her and his adultery, a spurious offspring might be foisted upon her husband and his family, by which the devolution of estates or titles might be diverted in favor of the illegitimate objects. These evils would only be avoided by a dissolution of the marriage."²⁸

If divorces are granted neither as a punishment of the offending spouse nor as a favor to the innocent one, but for the benefit and well-being of society as a whole,²⁹ the application of the minority rule will be more practical and more in line with obvious justice in situations similar to the one illustrated in the *Baker* case. However, the courts generally find it necessary to reason that since marriage is an institution in which the public is deeply interested, changes in the mode of dissolving marriages should come from the legislature and not by judicial decisions.³⁰

The fact that a divorce is denied does not necessarily mean that the insane spouse has no remedy in the courts. Where the aggrieved spouse was insane at the time of the marriage, a guardian may bring an action to annul the marriage even though divorce proceedings could not be maintained.³¹ The two rules are reconcilable. Divorce and annulment are closely related, yet the two proceedings differ in nature. The theory of an annulment action is that a valid marriage never came into existence, whereas a divorce action is to dissolve a marriage legally consummated.³² Where a person lacks sufficient mental capacity to give an intelligent assent, there can be no valid marriage. In some jurisdictions the marriage of an insane person is void, but in other jurisdictions the marriage is not void but is voidable only.³³ Where the suit is to obtain a judicial decree of the invalidity of a void marriage there is no reason for denying the guardian's power to

²⁸5 P. D. 142, 151 (1880).

²⁹"As the state favors marriages for the reasons stated, so the state does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interest of society will be better served, and that parties will be happier, and so the better citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted." *Dennis v. Dennis*, 68 Conn. 186, 36 Atl. 34, 37 (1896).

³⁰*Mohrman v. Kob*, 291 N. Y. 181, 51 N. E. (2d) 921 (1943).

³¹3 Nelson, *Divorce and Annulment* (2d ed. 1945) § 31.10.

³²*McDonald v. McDonald*, 6 Cal. (2d) 457, 58 P. (2d) 163 (1936).

³³3 Nelson, *Divorce and Annulment* (2d ed. 1945) § 31.21.

bring such an action. Clearly there is no marriage to be dissolved. In jurisdictions where the marriage of an insane person is voidable only, the sane spouse not having knowledge of the insanity at the time of the ceremony can secure an annulment, but one who knowingly marries an insane person would seem to be bound as if he or she were legally married until such time as the incompetent party might obtain an annulment decree.³⁴ However, there is no valid marriage until it is ratified by the insane spouse, something that cannot be done as long as the insanity exists. If the guardian secures an annulment while the ward is insane, no valid marriage has been dissolved because the marriage was voidable by the incompetent from the very beginning. If sanity is regained and the marriage is ratified, no annulment can be obtained thereafter.³⁵

In New York, an action by an incompetent spouse for separate maintenance has been allowed³⁶ though under a later decision it appears that a suit for divorce could not have been brought.³⁷ The court was of the opinion that the action must be permitted because no legislative intent could be found to the contrary, and also because factors which require refusal of a divorce were not present.

However, annulment and separate maintenance remedies are not adequate to relieve the incompetent spouse of the burden of an unfortunate marriage, and divorce should be made available in appropriate cases. Though the rule of the principal case works hardships in many instances, American courts have shown no inclination to take a more liberal position in the face of this sociological-legal issue. It seems that a legislative solution must be provided, and it is to be hoped that the demonstration of the unrelenting attitude of the courts as found in the principal case may help to stir state legislatures to action.

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³⁴N. Y. Civil Practice Act § 1137, Clevenger's Practice Manual (1950). See also, *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323 (1890).

³⁵*Waughop v. Waughop*, 82 Wash. 69, 143 Pac. 444 (1914).

³⁶*Kaplan v. Kaplan*, 256 N. Y. 366, 176 N. E. 426 (1931).

³⁷*Mohrmann v. Kob*, 291 N. Y. 181, 51 N. E. (2d) 921 (1943).

DOMESTIC RELATIONS—LIMITATIONS ON APPLICATION OF HEART BALM STATUTES. [New Jersey]

Since 1935, the legislatures of fifteen states have enacted so-called "Heart Balm Acts,"¹ abolishing civil actions for alienation of affections, criminal conversation and breach of promise to marry. The primary purpose was to destroy forms of action that had become weapons of blackmail and extortion.² The statutes were sweeping in their nature, in that they abolished the remedy not only to the fraudulent blackmailer, but also to the truly injured party.³

The alacrity with which the judiciary approved this type legislation is manifested in the New Jersey court's opinion in *Bunten v. Bunten*. "Never were the words, 'this is a good bill and ought to pass' more properly spoken by a member of the Legislature than in the case of this measure. It was a good bill, is a splendid law, and I hold it to be constitutional."⁴ The right of the states to abolish these actions has been founded on the plenary power⁵ which the law making bodies have over the subject of marriage, and on the authority to legislate for the benefit of the general welfare.⁶ Admittedly, the legislatures took away no property right in abolishing these actions

¹Ala. Code (1940) Tit. 7, § 114-115; Cal. Civ. Code (Deering, 1941) § 43-5; Colo. Laws (1937) c. 111, p. 403-409; Fla. Stat. (1945 Supp.) § 771.01-08; Ill. Rev. Stat. (1945) c. 38, § 246.1-5; Ind. Stat. Ann. (Burns, 1946 Supp.) § 2-508; Mass. Laws Ann. (Michie, 1949 Supp.) c. 207, § 47A; Me. Rev. Stat. (1944) c. 99, § 91; Mich. Sess. Laws (1935) No. 127, p. 201; Nev. Laws (1943) c. 53, p. 75-76; N. H. Laws (1941) c. 150, p. 223-224; N. J. Stat. Ann. (West, 1939) § 2:39-A-1; N. Y. Laws (1935) c. 263, § 2A Civil Practice Act; Pa. Stat. Ann. (Purdon, 1949 Supp.) 48, § 170-171; Wyo. (1941) c. 36, p. 32-33.

²*Young v. Young*, 236 Ala. 627, 184 So. 187, 190 (1938): "The well known reason for striking down the causes of action named in the act, was in response to a public sentiment, after wide discussion, to the effect that such actions had been so abused, made the means of exploitation and blackmail, that the existence of such causes of action had become of greater injury than of benefit to society." Grave abuses also existed in awarding damages. See Note (1936) 30 Ill. L. Rev. 764, 772: "In regard to seduction the average jury recognizes only two bases for damages—the plaintiff's beauty and the defendant's ability to pay."

³*Bunten v. Bunten*, 15 N. J. Misc. 532, 192 Atl. 727, 729 (1937): "It is impossible to save the remedy for the honest, well-meaning, truly injured spouse without leaving the door wide open for the 'racketeer.' Therefore, the spouse having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society."

⁴15 N. J. Misc. 532, 192 Atl. 727, 730 (1937).

⁵*Bunten v. Bunten*, 15 N. J. Misc. 532, 192 Atl. 727 (1937); *Hanfgarn v. Mark*, 274 N. Y. 22, 8 N. E. (2d) 47 (1937).

⁶*Young v. Young*, 236 Ala. 627, 184 So. 187 (1938). The Indiana Heart Balm statute was designated as one to promote public morals. See Note (1936) 30 Ill. L. Rev. 764 at 773.

because it has long been recognized that an individual has no property right or vested interest in common law rules,⁷ and courts have repeatedly upheld other legislation which does away with common law forms of action.⁸ Heart Balm statutes have been struck down in only two states.⁹ The Illinois statute was held unconstitutional in *Heck v. Schupp*¹⁰ as being in violation of the bill of rights provision that every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive to his person, property or reputation. In Indiana¹¹ that part of the statute which made it an offense to bring the action was declared contrary to the constitution, because the practical effect would be to prohibit one from contesting the constitutionality of the Act. The remaining part of the Act was sustained.

With the validity of Heart Balm legislation now commonly accepted, questions as to the scope of the statutes are frequently arising. Such a problem was recently before the New Jersey court in the case of *Grobart v. Grobart*.¹² Plaintiff brought an action alleging that defendants maliciously conspired to injure her in her marital relations with her husband, with the result that she was deprived of certain rights in her husband's property, was prevented from obtaining separate maintenance, and was forced to compromise certain claims at less than their true value. The complaint also charged that plaintiff's husband was maliciously induced to bring suit for divorce on the ground of adultery, and that the suit was successfully defended at great expense to plaintiff. It was further alleged that because of these and other acts, plaintiff's health, good name and reputation were impaired. The trial court dismissed the complaint on the ground that it attempted to set forth a cause of action for alienation of affections and was therefore barred by the Heart Balm Act. On appeal to the Supreme Court of New Jersey, plaintiff contended that her complaint was not grounded in alienation of affections, but rested upon the theory of conspiracy, formed to deprive her of and injure her in property interests, and that if the statute were to be construed to

⁷*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1876).

⁸In *Silver v. Silver*, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929), aff'g 108 Conn. 371, 143 Atl. 240 (1928), a Connecticut statute which abolished a guest rider's right to recover because of negligent operation of car was held valid. Accord: *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794 (1935); *Shea v. Olson*, 185 Wash. 143, 53 P (2d) 615 (1936).

⁹See Note (1947) 4 Wash. & Lee L. Rev. 185.

¹⁰394 Ill. 296, 68 N. E. (2d) 464 (1946), noted (1947) 4 Wash. & Lee L. Rev. 185.

¹¹*Pennington v. Stewart*, 212 Ind. 553, 10 N. E. (2d) 619 (1937).

¹²5 N. J. 161, 74 A. (2d) 294 (1950).

bar her action, then it was unconstitutional in that it deprived her of property without due process of law. The court reversed the judgment of dismissal on the ground that the complaint asserted causes of action outside the purview of the Heart Balm Act.

That the New Jersey statute abolished the cause of action for alienation of affections was not questioned, but the court reasoned that the plaintiff was not asserting that cause of action. The gist of such an action, it was pointed out, is the loss of consortium, "by which term is meant loss of the marital affections, comfort, society, assistance and services of a spouse who has been wrongfully enticed away."¹³ By contrast, the action here was regarded as being for injury to property interests, and as such, beyond the scope of the statute. The court declared: "We cannot conceive that the statute was designed to deprive plaintiff of redress for such wrongs merely because they are related or incidental to the marital relation."¹⁴

In general, Heart Balm statutes have been strictly construed, so as to limit the causes of action abolished to these that are within the defined intent of the legislatures. The New Jersey court had already had occasion to pass on the scope of its statute in the case of *Glazer v. Klughaupt*.¹⁵ Defendant had promised to marry plaintiff, who then started working for the defendant as a stenographer. Defendant withheld part of plaintiff's wages, such wages to be given to plaintiff when the marriage was consummated. Defendant later refused to marry the plaintiff, who brought action to recover the wages withheld. The defense was that the action was barred by that part of the Heart Balm Act which abolished the right to recover damages for breach of promise to marry, but the court rejected this contention, saying: "The pleaded cause of action rests upon the contract of hire, and not the asserted contract to marry."¹⁶

A California District Court of Appeals also refused to bar a complaint merely because it was related to breach of promise to marry.¹⁷ The complaint stated that defendant fraudulently represented to plaintiff that he intended to enter into a valid marriage with her and because of such representation plaintiff gave to defendant half the proceeds from the sale of a certain piece of property. In a suit to recover the money given to defendant, the court ruled that plaintiff's

¹³Grobart v. Grobart, 5 N. J. 161, 74 A. (2d) 294, 296 (1950).

¹⁴Grobart v. Grobart, 5 N. J. 161, 74 A. (2d) 294, 297 (1950).

¹⁵116 N. J. L. 507, 185 Atl. 8 (1936).

¹⁶Glazer v. Klughaupt, 116 N. J. L. 507, 185 Atl. 8, 9 (1936).

¹⁷Mack v. White, 218 P. (2d) 76 (Cal. App. 1950).

cause of action was not for breach of promise to marry but rather was for obtaining money upon fraudulent representation.

In *Burger v. Nueman*,¹⁸ plaintiff alleged that defendant had forced her to have sexual relations with him, had professed his love for her and had promised to marry her. It was further alleged that defendant had acknowledged paternity of plaintiff's child and in consideration of certain promises made by the plaintiff, defendant had agreed to make financial provisions for her and to support the child until he reached the age of twenty-one. When defendant failed to support the child, plaintiff brought suit and was met with the argument that the action was against public policy and was barred by the Heart Balm Act of New York. However, it was held that the complaint stated a good cause of action because the gist of the action was not seduction or breach of promise to marry, but was the breach by defendant of his promise to support plaintiff and her child.

In spite of this consideration for property rights, the New York courts have refused to allow the injured party recovery for gifts, typically rings, given in contemplation of marriage.¹⁹ Such a result has been put on the ground that recovery of gifts made in contemplation of marriage is based on breach of contract to marry and is thus barred by Heart Balm Acts. However, where a subsequent agreement has been made to return such gifts, the courts have found no trouble in enforcing the agreements. In *Spitz v. Maxwell*,²⁰ plaintiff had given defendant several articles of jewelry in contemplation of marriage. The parties mutually agreed to cancel their contract to marry and a new agreement was entered into, whereby each party was to return the gifts received. Plaintiff sued to recover damages for breach of the agreement, and the judgment was for plaintiff, the court observing that "the breach of the agreement made after the contract was mutually cancelled and rescinded gives rise to a valid cause of action, for the new contract has no relation whatever to the contract to marry."²¹ Another New York court reached the same result in a similar case, reasoning that "The mere fact that a contract to marry,

¹⁸69 N. Y. S. (2d) 661 (1947).

¹⁹*Josephson v. Dry Dock Savings Institution*, 292 N. Y. 666, 56 N. E. (2d) 96 (1944). In *Morris v. Baird*, 269 App. 948, 57 N. Y. S. (2d) 890 (1945), where the gift was land, the court refused to uphold the plaintiff's action, when plaintiff had brought suit to have title reconveyed. Contra: Heart Balm statute did not bar recovery of ring or its value if engagement was not unjustifiably broken by plaintiff. *Beherman v. Segal*, 6 N. J. Super. 472, 69 A. (2d) 587 (1949).

²⁰59 N. Y. S. (2d) 593 (1945).

²¹*Spitz v. Maxwell*, 59 N. Y. S. (2d) 593, 595 (1945).

and its breach, are alleged in a complaint, is not in and of itself, sufficient to bring the action within the ban, if the cause of action is not based thereon."²² The opinion pointed out that the contract to marry was alleged merely by way of fixing the time and the occasion for the making of the gifts.

Still another case indicating that a cause of action only incidental to a breach of contract to marry is not barred by Heart Balm legislation is *Warneck v. Kielly*.²³ Plaintiff, having himself breached the contract to marry, brought an action to recover funds held in trust for him by defendant. Plaintiff was allowed to maintain a suit for the money so held on the ground that his cause of action was not based upon the breach of contract to marry.

The foregoing review of cases clearly demonstrates the unwillingness of the courts to bar actions merely because they might be incidental or closely related to actions for breach of promise to marry. In each case the contract to marry had been breached, yet the court felt that the action was not based upon breach of marriage contract, but upon deprivation of property rights.

In determining what actions legislatures intended to place within the interdiction of Heart Balm statutes, it must be remembered that the primary purpose behind the enactment of the legislation was the prevention of such evils as blackmail and extortion.²⁴ But since there is no similar evil to be corrected in cases involving injury to property rights, it seems illogical to assume that the legislatures intended to abolish such causes of action as were asserted in the cases here considered merely because they are incidental to the marital relation.²⁵ A consideration of the purposes behind the enactment of Heart Balm Acts, and the holding of various courts defining the scope of these statutes leads to the conclusion that the decision in the *Grobart* case is justifiable from a legal standpoint and is not objectionable on policy grounds.

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²²*Levy v. Gersten*, 196 Misc. 255, 94 N. Y. S. (2d) 484, 487 (1949).

²³68 N. Y. S. (2d) 157, 158 (1946): "It does not appear that this cause of action is based upon the breach of a contract to marry or seeks damages for the breach of such a contract. The fact is that the contract was breached by the plaintiff."

²⁴Note (1936) 30 Ill. L. Rev. 764, 771: "In general, the objections to the retention of the actions were that they had become encumbered with an incoherent mass of theories and rules of procedure, evidence, and damages, and secondly, that they were rapidly becoming nothing more than vehicles for blackmail, extortion and 'fake' cases."

²⁵*Antonelli v. Xenakis*, 363 Pa. 375, 69 A. (2d) 102, 104 (1949): "The Act being in diminution of the jurisdiction of the court of Common Pleas of the Commonwealth, it is not to be presumed that the legislature intended thereby to abolish a right of action not expressly brought within the statute's purview."

FEDERAL PROCEDURE—APPEARANCE OF FEDERAL QUESTION ON FACE OF COMPLAINT AS NECESSARY TO FEDERAL COURT JURISDICTION. [United States Supreme Court]

More than half a century ago the Supreme Court, in *Tennessee v. Union & Planters' Bank*,¹ established the rule that a case arises under the Constitution or laws of the United States, so as to confer jurisdiction on the federal courts, when the plaintiff's cause of action shows on its face that some right, title or interest may be defeated by one construction of the law or Constitution and upheld by another construction.² It is not enough that the federal question is presented by the defendant's answer or by the plaintiff anticipating a defense based on a federal question.³ The federal jurisdiction is taken wholly from the face of the plaintiff's cause of action.⁴

Because of this rule, it was not until after the Federal Declaratory Judgments Act⁵ was passed in 1934 that an alleged infringer of a patent was allowed to sue the patentee to determine the validity of the patentee's right or to disprove the alleged infringement. Instead, he was forced to wait to establish his rights until he was sued by the patentee, even though he had a good defense.⁶

Some courts have argued that the Declaratory Judgments Act, in allowing the alleged infringer to bring the suit for a declaration that the patent held by the patentee is or is not valid, does not expand federal jurisdiction but simply creates a new procedural device.⁷ Yet later federal cases have allowed suits to be brought by the alleged infringer which before the Act would have been dismissed because a federal question was not presented on the face of the plaintiff's

¹152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511 (1894). It is interesting to note that this case, which is credited with establishing the rule that the federal question must appear on the face of the plaintiff's complaint, was brought into the federal court upon the petition of the defendant that this case be removed from the state court where it was originally instituted.

²*Hopkins v. Walker*, 244 U. S. 486, 37 S. Ct. 711, 61 L. ed. 1270 (1917); *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511 (1894); *International Harvest Hat Co. v. Caradine Hat Co.*, 17 F. Supp. 79 (E. D. Mo. 1935).

³*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511 (1894).

⁴*Taylor v. Anderson*, 234 U. S. 74, 34 S. Ct. 724, 58 L. ed. 1218 (1914); *Joy v. St. Louis*, 201 U. S. 332, 26 S. Ct. 478, 50 L. ed. 776 (1906).

⁵48 Stat. 955 (1934), reenacted 62 Stat. 964 (1948), 28 U. S. C. A. § 2201 (1950).

⁶*Zenit Bros. v. Miskend*, 10 F. Supp. 779 (S. D. N. Y. 1935); *Notes* (1935) 45 *Yale L. J.* 160, (1936) 45 *Yale L. J.* 1287.

⁷*E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. (2d) 852 (C. C. A. 7th, 1937); *Mitchell & Weber v. Williamsbridge Mills*, 14 F. Supp. 954 (S. D. N. Y. 1936). Also see *Borchard, Declaratory Judgments* (2d ed. 1941) 231.

complaint. In rebutting the argument that these actions brought by the alleged infringer were without precedent, the courts argued that the Act was a remedial statute and was passed for the purpose of allowing relief in cases that could not be tried under existing forms of procedure. Therefore, it should be applied liberally to allow certain suits to be brought in the federal courts which would not otherwise come within the federal jurisdiction.⁸

In spite of this demonstrated tendency to relax the general rule in cases arising under the Declaratory Judgments Act, the Supreme Court in the recent case of *Skelly Oil Co. v. Phillips Petroleum Co.*⁹ has held that even though the action is for a declaratory judgment, in order to invoke federal jurisdiction the federal question must be presented on the face of the plaintiff's complaint, and not by the plaintiff anticipating a federal defense or by the defendant's answer. The Phillips Co. entered into contracts with petitioners, three oil companies, to purchase gas produced by them for resale to the Michigan-Wisconsin Pipe Line Company. The latter company was seeking a certificate of public convenience and necessity from the Federal Power Commission for the construction and operation of a pipe line to carry natural gas. Each of the contracts provided that in the event the Federal Power Commission had not granted the certificate to the Michigan-Wisconsin Pipe Line Company by October 1, 1946, the seller would have the right to terminate the contract by written notice to the buyer, Phillips, at any time after December 1, 1946, but before the certificate was issued.

The Federal Power Commission issued an order dated November 30, 1946, granting the certificate of public convenience and necessity,¹⁰ but the content of the order was not made public until December 2. Also on December 2, the petitioners severally notified Phillips Co. of termination of the contracts on the ground that a certificate of public convenience and necessity had not been granted. Phillips Co. sought a declaratory judgment stating that these contracts were still in effect,

⁸*Dewey & Almy Chemical Co. v. American Anode, Inc.*, 137 F. (2d) 68 (C. C. A. 3d, 1943); *Alfred Hofmann, Inc. v. Knitting Machines Corp.*, 123 F. (2d) 458 (C. C. A. 3d, 1941). In *Borchard, Declaratory Judgments* (2d ed. 1941) 809, after arguments have been put forth stating that the Act does not expand federal jurisdiction, it is said: ". . . it might be argued that the action for a declaration that the plaintiff is not infringing as charged or that the patent on which the defendant relies is invalid, is an expansion of federal jurisdiction. If so it is a proper one."

⁹339 U. S. 667, 70 S. Ct. 876 (1950).

¹⁰*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 669, 70 S. Ct. 876, 878 (1950).

evidently basing federal jurisdiction on the necessity of a construction of the Natural Gas Act to show that the certificate of necessity and convenience had actually been issued by the Commission within the required time.

The District Court held that it had jurisdiction and decided the case on its merits.¹¹ The Court of Appeals affirmed the decision, but the Supreme Court then reversed the lower courts and ruled that the plaintiff did not state a case arising under the Constitution or laws of the United States on the face of its complaint. It was held to be a suit on a contract, a state created right, and the plaintiff's artful pleading which attempted to raise a federal question was merely anticipating a defense. Therefore, the suit could not be brought in a federal court, there being no diversity of citizenship.¹²

Counsel for the plaintiff cited the patent cases as indicating that the federal question does not have to appear strictly on the face of the plaintiff's cause of action in a suit for a declaratory judgment. It was argued that the "federal courts often have jurisdiction over claims for declaratory relief even though no other type of action based upon the same facts would meet the requirements for establishing federal jurisdiction."¹³ Inasmuch as this contention was squarely before the Supreme Court, it is significant that these patent cases were not mentioned in its opinion.

There are two possible explanations for this omission. The Court may have intended this decision to cover all cases concerning declaratory judgments, including the patent cases, and thereby rule that the Declaratory Judgments Act would not be given a liberal interpreta-

¹¹The court, in finding that it had jurisdiction, stated that the primary question presented was whether the order of the Commission of November 30, 1946, constituted a certificate of public convenience and necessity, within the requirements of the Natural Gas Act. The court held that plaintiffs' claim arose out of, and was dependent upon, the construction and application of federal law. The reasoning was that it was necessary that plaintiffs state as a part of their affirmative cause of action the grounds upon which they challenged the claims asserted by the defendants, and this was not an anticipated defense. *Skelly Oil Co. v. Phillips Petroleum Co.*, 174 F. (2d) 89 (C. A. 10th, 1949).

¹²The Court held that there was no federal jurisdiction as to two of the petitioners, *Skelly Oil Co.*, and *Stanolind Oil and Gas Company*. However, there was federal jurisdiction as to *Magnolia Petroleum Co.* based on diversity of citizenship. Therefore as to *Magnolia*, the judgment of the Court of Appeals was vacated and the cause was remanded for further proceedings. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 70 S. Ct. 876 (1950).

¹³Counsel, in their brief, cited *Arlac, Inc. v. Hat Corp. of America*, 166 F. (2d) 286 (C. C. A. 3d, 1948), and cases cited at 166 F. (2d) 286, 292, n. 9. *Skelly Oil Co. v. Phillips Petroleum Co.*, brief of respondent, 52.

tion in this respect. If this is true, the Court has "silently" overruled the patent cases. The other possibility is that the Court intends to rule on these cases separately at some later time, perhaps to make an exception of them as to the requirements of federal question jurisdiction.

If the first approach proves to be the correct one, it is probable that this decision will necessitate a more narrow application of the requirements of federal jurisdiction in subsequent patent cases. The Court of Appeals for the Seventh Circuit in the leading patent case of *E. Edelmann & Co. v. Triple-A Specialty Co.*¹⁴ reasoned that since, before the Declaratory Judgments Act was passed the owner of the patent might sue to enjoin the infringement of his patent, now under the new procedural devices of the Act, the alleged infringer could sue to determine whether or not he was infringing the patent of the patentee. It was observed that the suit is the same regardless of who brings the action and that in either instance the controversy is essentially one arising under the patent laws.¹⁵ However, the Supreme Court in the *Skelly* case stated:

"The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress has authorized the District Courts to adjudicate—were not impliedly repealed or modified."¹⁶

Therefore, since the requirements of jurisdiction have not been repealed or modified it would seem to make a great deal of difference which of the parties brings the action in the patent cases. If the alleged infringer institutes the action there will not be federal jurisdiction, since the federal question will not appear on the face of his complaint.¹⁷ This argument was recognized but disposed of in the *Edelmann* case:

"Appellant urges, however, that the prayer for damages because of circulation of charges of infringement among dealers and potential customers, stamps appellee's suit as one to enforce a common-law remedy, namely, recovery of damages for unfair competition. If this were the only end sought and the jurisdic-

¹⁴88 F. (2d) 852 (C. C. A. 7th, 1937).

¹⁵*E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. (2d) 852 (C. C. A. 7th, 1937).

¹⁶*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 671, 70 S. Ct. 876, 879 (1950).

¹⁷*International Harvest Hat Co. v. Caradine Hat Co.*, 17 F. Supp. 79 (E. D. Mo. 1935).

tion of the court invoked to secure only that relief, the contention would necessarily prevail. But appellee relies upon two remedies: First, the determination of whether the patent is valid and infringed; and, second, if either of these questions is answered in the negative, whether it is also entitled to damages for violation of its common-law rights¹⁸

However, it seems that the first remedy relied upon by the infringer was not a right or immunity of his own, but rather the absence of this right or immunity in the patentee. Therefore, it would seem that this is an anticipated defense, which it has been repeatedly held will not confer federal jurisdiction,¹⁹ even though the action is for a declaratory judgment as in the principal case.²⁰

If the Court intends to make an exception of the patent cases, and allow them to stand even though they do not fulfill the requirements of federal jurisdiction, it could well be argued that this deviation serves a justifiable purpose.

It has been pointed out that it is good policy to allow the alleged infringer to bring the suit rather than force him to wait until the patentee has sued him to determine the validity of his defense. For, by simply refusing to bring the suit and by continuing to make public threats against the alleged infringer and to warn merchants not to buy these goods from him, the patentee could force a settlement without risking a judicial determination of his claims. Thereby the business of the one charged with infringement would be injured and he would have no remedy in a federal court.²¹ If the earlier interpretation of the Declaratory Judgments Act is sustained, the alleged infringer is allowed to bring the suit and thus to determine the validity of the patentee's claim before he has suffered great damage.²² This exception could be based on the theory that in the patent cases the suit by the alleged infringer is similar to a bill *quia timet*.²³ The parties are thus reversed in the position they would hold in a traditional suit, in the sense that the plaintiff or infringer would be asserting what normally would be the defense, and the defendant or patentee

¹⁸88 F. (2d) 852, 854 (C. C. A. 7th, 1937).

¹⁹Taylor v. Anderson, 234 U. S. 74, 34 S. Ct. 724, 58 L. ed. 1218 (1914); The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 S. Ct. 410, 57 L. ed. 716 (1913); Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 53 L. ed. 126 (1908).

²⁰Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667, 70 S. Ct. 876 (1950).

²¹Note (1935) 45 Yale L. J. 160.

²²E. Edelmann & Co. v. Triple-A Specialty Co., 88 F. (2d) 852 (C. C. A. 7th, 1937); Note (1935) 45 Yale L. J. 160.

²³Borchard, Declaratory Judgments (2d ed. 1941) 232.

would be asserting what in a regular coercive action would be the complaint.²⁴ On this basis, it could be argued that the defendant or patentee was not asserting a defense but was simply being forced to state his cause of action—*i. e.*, the cause of action he would assert in a coercive suit between himself and the infringer when and if he brought the suit he has been threatening to bring and which he is entitled to bring by his own allegations.²⁵

That this exception would not open the door wide for many other types of cases to be brought in the federal courts which normally would not fill the requirements of federal jurisdiction can be shown by applying this theory to the *Skelly* case. Thus tested, defendant would not be in the position of stating a cause of action "arising under" federal law, as would a defendant-patentee in a declaratory judgment action. Rather, defendant's position would be one of asserting a state-created right based on contract.

THOMAS G. MCCLELLAN, JR.

INSURANCE—CONSTRUCTION OF DELIVERY-IN-GOOD-HEALTH CLAUSES IN LIFE INSURANCE POLICIES. [Oklahoma]

With the widespread incorporation of delivery-in-good-health clauses¹ in life insurance policies,² the courts have had to determine

²⁴Borchard, *Declaratory Judgments* (2d ed. 1941) 232; *Developments In the Law, Declaratory Judgments—1941-1949* (1949) 62 *Harv. L. Rev.* 787.

²⁵*Developments In the Law, Declaratory Judgments—1941-1949* (1949) 62 *Harv. L. Rev.* 787. At page 803, this theory of reversal of parties has been referred to as the preferable rule: "In the absence of Congressional clarification, certainly necessary here, the preferable rule would seem to be that the declaratory action seeking to test a defense is triable in the federal courts provided this defense would normally arise in answer to a complaint which itself would properly raise a federal question. Jurisdiction would depend on the nature of the coercive action which the declaratory action has anticipated, and substantial conformity with the principles applicable to conventional actions would thus be achieved. In addition the rule would remove any doubt as to the propriety of suit for a declaration of noninfringement and invalidity of a patent brought against a patentee threatening suit for infringement."

¹Valid delivery requires: (1) The intention of the party executing the policy to give it legal effect as a complete instrument. (2) Evidencing of this intention by some word or act indicating that the insured has put the instrument beyond his legal control though not necessarily beyond his physical control. (3) The insured's acquiescence in this intention. *Franklin Fire Ins. Co. v. Colt*, 20 *Wall.* 560, 22 *L. ed.* 423 (*U. S.* 1874); *Home Life & Accident Co. v. Compton*, 144 *Ark.* 561, 222 *S. W.* 1063 (1920); *New York Life Ins. Co. v. Babcock*, 104 *Ga.* 67, 30 *S. E.* 273 (1898); *Newark Machinery Co. v. Kenton Ins. Co.*, 50 *Ohio St.* 549, 35 *N. E.* 1060 (1893).

²In a 1921 survey it was found that 112 out of 125 companies issued policies containing the delivery-in-good-health clause. Note (1934) 34 *Col. L. Rev.* 1508, n. 2.

what standards should be applied in deciding whether the insured³ has fulfilled the good health condition. Aside from the pure questions of fact as to what the insured's particular state of health actually was, a difficult question of law presents itself: whether apparent good health will satisfy the clause or whether actual good health is the requisite.

Demonstrating the troublesome nature of the problem is the recent case of *Farmers & Bankers Life Ins. Co. v. Baxley*,⁴ which resulted in a six to three division among the Justices of the Oklahoma Supreme Court. The insured made a non-medical application for life insurance, both the application and the policy containing the clause that no liability attached unless the insured was in good health upon delivery and receipt of the policy. About five months before the application was made, the insured had had an ovarian cyst removed and on June 11, 1946, six days after application for the policy, the insured, having consulted a physician because she was "not feeling well," was informed that a further operation was necessary to remedy a condition known as stenosis of the cervix. On June 17 the policy was delivered. The operation took place on June 20, and on August 27 the insured died of peritonitis fever, something latent in her system having caused the peritonitis to develop. Although the physician who recommended the operation testified that he would not have passed the insured for an insurance policy had such an examination been held on June 11, the court ruled that there was sufficient evidence to support the jury's finding that the insured was in good health within the meaning of the clause. In interpreting the policy, the majority of the court declared: "In the absence of fraud or bad faith, we are of the opinion that the policy requirement of sound health does not extend to slight or periodic ailments or disorders."⁵ The dissenting justices argued that the evidence to prove good health was insufficient to be presented to the jury, and that on the basis of the undisputed testimony of the doctor that insured was not in good health there should have been a directed verdict for the defendant insurance company.

The courts are in general agreement that "good health" is a comparative term which does not require freedom from slight ailments, but rather from grave or serious diseases or defects which have a

³"Insured" is used to indicate the person by whose life the duration of the insurance contract is measured, as distinguished from the beneficiary.

⁴215 P (2d) 941 (Okla. 1950).

⁵*Farmers & Bankers Life Ins. Co. v. Baxley*, 215 P. (2d) 941, 945 (Okla. 1950).

definite tendency to impair the system or shorten life.⁶ However, in applying this principle, some courts hold that apparent or ostensible good health is sufficient, while others rule that actual, existing good health is the standard to be met. One of the leading cases supporting the latter view is *Packard v. Metropolitan Ins. Co.*⁷ The insured, a boy of ten, had contracted a heart disease before delivery of the policy and was taken to the doctor by his mother, but the mother was not informed that the condition existed. The disease was of such a nature that only a physician could have detected it, the outward appearance of the boy being indicative of good health. In holding the insured's health to be unsound, the court gave the term "good health" a literal meaning and declared that lack of knowledge of the existence of the disease did not alter the fact that the boy's health was unsound. This point is further amplified in *Murphy v. Metropolitan Ins. Co.*⁸ where upon medical examination by the insurance company's physician, the insured was passed and said to be in good health. About fifteen days before receipt of the policy the insured had a little trouble with his knee, which did not appear to be serious when he had it treated by a doctor, but which some months later was found to be a cancerous condition. The insured was held to be in unsound health because he did in fact have the cancerous condition at the time of receipt of the policy, absence of knowledge being held to be immaterial. However, in *Greenwood v. Royal Neighbors of America*,⁹ where the insured had a fatal heart disease which was not known or apparent and did not become so even to physicians until after death, the court held that the term good health was no more than a non-expert opinion as to an honest belief of good health in the sense known to the man in the street. The United States Supreme Court has declared that the representation of good health need be only "honest, sincere, not fraudulent."¹⁰

Upon this comparison it is seen that lack of knowledge of the defect has no effect under the actual good health theory, but in the

⁶*Manhattan Life Ins. Co. v. Carder*, 82 Fed. 986 (C. C. A. 4th, 1897); *Burr v. Policy Holder's Life Ins. Ass'n*, 128 Cal. App. 563, 17 P (2d) 1014 (1933); *Maine Benefit Ass'n v. Parks*, 81 Me. 79, 16 Atl. 339 (1888); *Woodland v. Liberty Life Ins. Co.*, 241 Mich. 600, 217 N. W 796 (1928); *Bradich v. Metropolitan Life Ins.*, 128 Pa. Super. 513, 194 Atl. 522 (1937); *White v. Sovereign Camp, W. O. W.*, 184 S. C. 215, 192 S. E. 161 (1937).

⁷72 N. H. 1, 54 Atl. 287 (1903).

⁸106 Minn. 112, 118 N. W 355 (1908).

⁹118 Va. 329, 87 S. E. 581 (1916).

¹⁰*Moulou v. American Life Ins. Co.*, 111 U. S. 335, 345, 4 S. Ct. 466, 471, 28 L. ed. 447, 451 (1884).

apparent good health theory, lack of knowledge is a material and decisive factor. In the jurisdictions that follow the latter theory, where there is a conflict of evidence the questions of knowledge and good faith ordinarily are jury questions,¹¹ and the defense of fraud must be established by affirmative proof. The fact that the statements made by the insured were false in fact does not raise a presumption of fraud.¹²

While the majority of the Oklahoma court in the principal case appears to have decided that the insured could be said to have been in actual good health when the policy was issued, this conclusion is questionable when viewed against the evidence of her previous and prospective operation, her own admission of not feeling well, and her death within six weeks thereafter, caused by a condition which had apparently existed for some time previously. Several of the statements in the opinion suggest that the court might have been thinking of apparent good health, and the decision might have been more logically placed on that ground.

An analysis of the facts tending to support an apparent good health view shows: First, the application was non-medical,¹³ which would seem to preclude any intention that the insured be required to make representations with the authoritativeness of a physician. Second, the

¹¹*Blades v. Farmers & Bankers' Life Ins. Co.*, 116 Kan. 120, 225 Pac. 1082 (1924).

¹²*Supreme Tribe of Ben Hur v. York*, 70 Colo. 175, 197 Pac. 1012 (1921). However, in *Supreme Lodge K. P. v. Bradley*, 141 Ky. 334, 132 S. W. 547 (1910), where the insured had been treated by several physicians for tubercular bronchitis and cystitis yet was reported by the insurance company's medical examiner to be a good risk, the court found a strong case of misrepresentation as to the question of good health and other related questions, and therefore, ordered that peremptory instructions be given to the jury in favor of the defendant.

¹³Statements in a non-medical application are held to be valid if false unless they were intentionally and wilfully false. Nor can the insurance company be heard to call sound health a condition precedent, as the company had full opportunity for a medical examination. *Schmidt v. Prudential Ins. Co. of America*, 190 Minn. 239, 251 N. W. 683 (1933); *Elness v. Prudential Ins. Co. of America*, 190 Minn. 169, 251 N. W. 183 (1933); *Hafner v. Prudential Ins. Co. of America*, 188 Minn. 481, 247 N. W. 576 (1933); *Eckard v. Metropolitan Life Ins. Co.*, 210 N. C. 130, 185 S. E. 671 (1936). "Sound health" in a policy issued without medical examination are equivalent to words "good health" in the application. *Tool v. National Life & Accident Ins. Co.*, 130 Kan. 117, 285 Pac. 580 (1930).

Where a policy is issued upon a medical examination, the sound health clause applies to any interim change between the examination and the delivery of the policy, but where there is no medical examination the sound health clause must be fulfilled irrespective of the time of origin before delivery. *Western & Southern Life Ins. Co. v. Downs*, 301 Ky. 322, 191 S. W. (2d) 576 (1945); *Minzenberg v. Metropolitan Life Ins. Co.*, 157 Pa. Super. 557, 43 A. (2d) 377 (1945); *Hatfield v. Sovereign Camp, W. O. W.*, 129 Pa. Super. 570, 196 Atl. 904 (1938).

insured was told that she was recovering satisfactorily from the first operation. This would indicate absence of wilful misrepresentation as far as that operation is concerned, inasmuch as fraud is an affirmative defense and "facts to prove fraud 'must be inconsistent with any other reasonable or probable theory.'"¹⁴ Third, knowledge of the pending operation did not imply a condition of bad health, for that operation was required by a minor ailment which does not preclude good health.¹⁵ Finally, evidence tended to show that the insured looked healthy and had conducted herself as a normal, active person, which would be strong evidence in her favor before a court that follows the apparent good health doctrine.

On the other hand, it may well be argued that allowing recovery on the policy under either interpretation of the decision constitutes a case of "sticking the insurance company." The dissent found reasonable grounds for declaring that the insured both was in bad health and was or should have been aware of that fact. Nevertheless, the decision in the instant case is in accord with the trend toward a general liberalization of interpretation of insurance policies, best demonstrated by the long process of reducing the strict common law warranty to the status of a representation. In 1786, Lord Mansfield evidenced the prevailing view in declaring:

"There is a material distinction between a warranty and representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with."¹⁶

Over the years, however, the courts recognized that such a rule extended undeserved protection to the insurance company and imposed severe hardships on the insured. Late in the nineteenth century, legislation began to appear providing that misrepresentations made in the negotiation of a policy of insurance should not avoid the policy unless the misrepresentations were fraudulently made or increased the risk.¹⁷ This principle has become the accepted rule, even though the

¹⁴Ley v. Metropolitan Life Ins. Co. of New York, 128 Iowa 203, 94 N. W. 568, 569 (1903).

¹⁵Galloway v. Prudential Ins. Co., 112 Kan. 720, 212 Pac. 887 (1923) held that an operation to correct a retrofused uterus does not take the insured out of the meaning of "good health."

¹⁶De Hahn v. Hartley, 1 T. R. 343, 99 Eng. Rep. 1130, 1131 (1786).

¹⁷Mass. Stat. (1887) c. 214, § 21, as construed in White v. Provident Saving Life Assur. Soc. of New York, 163 Mass. 108, 39 N. E. 771 (1895).

representations in question may have been branded as "warranties" by the insurer.¹⁸ The adoption of the "apparent good health" standard can be regarded as merely an extension of this interpretive process. The very essence of a representation is that the insured is purporting only to make statements to the best of his ability; he is not making the statement from the standpoint of an authority or expert. Nor does it seem feasible to require a layman, who merely wishes to protect himself with insurance, to make any statement with the same authority as would be required of a physician. Similarly, the main feature of a non-medical application is that it requests an insurance contract on the basis of information divulged by the applicant without any recommendation by a physician. It would seem, then, to be a complete divergence from the purpose of the application to require statements made by the applicant to be measured by the same standards of knowledge used in measuring statements made by a physician.

Conversely, it would seem that the "actual good health" doctrine, and the technical standards by which it is viewed, could be compared to the rigid enforcement of the warranty, not in that minor ailments will permit the insurance company to avoid the policy but in that a statement of good health is held to be one of absolute fact as to serious diseases. And in some cases this standard was higher than that of a physician who on a previous examination passed the applicant for insurance when the applicant was actually in bad health.¹⁹ It seems incongruous to hold a layman to such standards of good health in view of the present policy of treating the warranty as a representation, especially in the case of a non-medical application.

JACKSON L. KISER

PROCEDURE—DISQUALIFICATION OF GOVERNMENT EMPLOYEES AS JURORS IN CRIMINAL CASES. [United States Supreme Court]

In 1909, the United States Supreme Court decided in *Crawford v. United States*¹ that the common law rule that a servant of the Crown was not a qualified juror in cases in which the Crown was a party was in force in the District of Columbia. Hence, a clerk of the post office was not a qualified juror in a case in which the defendants were accused of defrauding the United States. Because of the large

¹⁸Those states not having such statutes are Colorado, Florida, Iowa and Maine. The Virginia law may be found in Va. Code Ann. (Michie, 1950) § 38-371, pgf. 3.

¹⁹*Murphy v. Metropolitan Life Ins. Co.*, 106 Minn. 112, 118 N. W. 355 (1908).

²¹²U. S. 183, 29 S. Ct. 260, 53 L. ed. 465 (1909).

number of government employees in the area, this decision made it very difficult to secure juries for criminal cases in the District. To remedy this situation Congress in 1935 amended the District of Columbia code so as to make those employed by the government qualified for jury duty.²

In *Wood v. United States*,³ decided in 1936, it was argued by a defendant convicted of larceny from a private corporation that this Act was unconstitutional because it deprived accused parties of an impartial jury as guaranteed by the Sixth Amendment.⁴ The Supreme Court held that a more careful research than had been employed in the *Crawford* decision showed that it was not a "settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, unrelated to the particular issues or circumstances of a criminal prosecution, created an absolute disqualification to serve as a juror in a criminal case,"⁵ and in the alternative that even if such a disqualification did exist at common law it was not substantive and therefore could be removed by Congress.

The issue again came before the Court in *Frazier v. United States*⁶ in which the defendant was tried for violation of the Narcotics Act before a jury composed entirely of government employees, one juror and the wife of another being employed by the Treasury Department, the agency responsible for enforcement of the Narcotics Act. It was held that government employees were qualified jurors and that the challenge to the two jurors connected with the Treasury Department should have been made for actual bias while the jury was being impanelled and could not be raised on a motion for a new trial. Justice Jackson wrote a dissenting opinion⁷ urging that a distinction be made between the *Wood* and the *Frazier* cases on the grounds that in the *Wood* case the government was only a nominal plaintiff while in the *Frazier* case it was a real litigant. On this basis he argued that all government employees should have been disqualified as partial in the latter case.

The same problem in perhaps its most serious form has recently

²49 Stat. 682 (1935), D. C. Code (1940) § 11-1420.

³299 U. S. 123, 57 S. Ct. 177, 81 L. ed. 78 (1936).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U. S. Const. Amend. VI.

⁵299 U. S. 123, 141, 57 S. Ct. 177, 183, 81 L. ed. 78, 86 (1936).

⁶335 U. S. 497, 69 S. Ct. 201, 93 L. ed. 187 (1948), rehearing denied, 336 U. S. 907, 69 S. Ct. 488, 93 L. ed. 1072 (1949).

⁷335 U. S. 497, 514, 69 S. Ct. 201, 210, 93 L. ed. 187, 200 (1948).

been raised in *Dennis v. United States*.⁸ Dennis, Secretary of the Communist Party, was indicted for contempt of Congress for refusing to appear before the Un-American Activities Committee. Government employees were listed on the jury panel and defendant challenged them for cause on the ground that government employees were subject to Executive Order 9835,⁹ popularly known as the "Loyalty Order," requiring the investigation of all government employees and discharge of all those disloyal to the United States, and that, therefore, government employees would be reluctant to vote for acquittal because of fear of losing their jobs. The trial court denied the challenge and the defendant appealed. The Supreme Court, with Justice Minton writing for the majority, held that the case was controlled by the *Wood* and *Frazier* decisions, and that a "holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible."¹⁰

Although adhering to his position taken in the *Frazier* case, Justice Jackson in a concurring opinion¹¹ expressed the view that to make an exception in this case would afford Communists a protection not afforded persons of other political beliefs, thereby destroying equal protection under law.

Justice Frankfurter, who also had dissented in the *Frazier* case, wrote a dissenting opinion¹² acquiescing in the precedent of the *Wood* and *Frazier* cases, but objecting to any extension of the doctrine promulgated by those two decisions. In a separate dissenting opinion,¹³ Justice Black took the position that the *Wood* and *Frazier* cases permitted disqualification of government employees without prejudice in the subjective sense when the circumstances would make government employees unsuitable as jurors, and that under the circumstances of the instant case employees of the government were not qualified jurors.¹⁴

⁸339 U. S. 162, 70 S. Ct. 519, 94 L. ed. 461 (1950).

⁹3 C. F. R. 129 (1947 Supp.), 5 C. F. R. § § 200-230.6 (1949).

¹⁰339 U. S. 162, 171, 70 S. Ct. 519, 523, 94 L. ed. 461, 467 (1950).

¹¹339 U. S. 162, 173, 70 S. Ct. 519, 524, 94 L. ed. 461, 467 (1950).

¹²339 U. S. 162, 181, 70 S. Ct. 519, 525, 94 L. ed. 461, 471 (1950).

¹³339 U. S. 162, 175, 70 S. Ct. 519, 527, 94 L. ed. 461, 469 (1950).

¹⁴Neither Justice Clark nor Justice Douglas took part in the consideration of this case. However, in *Morford v. United States* Justice Douglas expressed the view, in a concurring opinion, that the case should have been reversed "for the reasons stated by the dissenting Justices in *Frazier v. United States* . . . and in *Dennis v. United States* . . ." 339 U. S. 258, 260, 70 S. Ct. 586, 587, 94 L. ed. 544, 545 (1950). Justice Clark's views on the subject are still not known, for he did not take part in the decision of the *Morford* case.

In the light of the *Dennis* case, the problem in these decisions appears to be the determination of what constitutes implied bias. The Court in the *Wood* case declared that bias "may be actual or implied—that is, it may be bias in fact or bias conclusively presumed as matter of law."¹⁵ But it was also said that "In dealing with an employee of the government, the court would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular government activity to the matters involved in the prosecution, or otherwise, he had *actual bias*, and, if he had, to disqualify him."¹⁶ And at another place in the opinion the observation was made "that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting, to employees of the treasury it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances."¹⁷

The *Frazier* decision said of the *Wood* case that "the Court regarded 'actual bias' or challenge 'to the favor' as including not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise.'"¹⁸ In spite of the unfortunate use of the word "implicitly" in reference to actual bias, it appears that the *Frazier* case made a proper evaluation of the *Wood* decision. However, if actual bias is bias in fact, it is difficult to understand how actual bias can include any prejudice other than prejudice that exists in a subjective sense. This rather loose use of the terms actual and implied may account for some of the difficulty the Court had in deciding the *Dennis* case, and unfortunately the decision in that case does not clarify the scope of these terms.

The confusion caused by the terminology is clearly evidenced by the concurring opinion of Justice Reed.¹⁹ He read the Court's decision "to mean that Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case."²⁰ Apparently Justice Reed is

¹⁵299 U. S. 123, 133, 57 S. Ct. 177, 179, 81 L. ed. 78, 82 (1936).

¹⁶299 U. S. 123, 134, 57 S. Ct. 177, 179, 81 L. ed. 78, 82 (1936) [italics supplied].

¹⁷299 U. S. 123, 149, 57 S. Ct. 177, 187, 81 L. ed. 90 (1936).

¹⁸335 U. S. 497, 510, n. 19, 69 S. Ct. 201, 208, n. 19, 93 L. ed. 187, 198, n. 19 (1948).

¹⁹*Dennis v. United States*, 339 U. S. 162, 172, 70 S. Ct. 519, 523, 94 L. ed. 461, 467 (1950).

²⁰339 U. S. 162, 172, 70 S. Ct. 519, 523, 94 L. ed. 461, 467 (1950).

not using the term implied bias in the same sense that it was employed in the opinion of the Court, for there it was said unequivocally that a "holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible."²¹ Probably Justice Reed intended to limit the term actual bias to bias in the subjective sense and used the term implied bias to include all bias not shown in the subjective sense, which is a more logical use of the term than was applied in the *Wood* and *Frazier* cases. If this was the manner in which Justice Reed employed the terms, then implied bias as used in his opinion and actual bias as used in the opinion of the Court, assuming the Court used the terminology adopted in previous decisions, are not mutually exclusive.

The law as announced by the Supreme Court seems to harmonize with the decisions of the state courts. No state has by judicial decision disqualified all government employees.²² However, government employees have been declared incompetent to act as jurors in cases where the circumstances of their employment have made them unsuitable as jurors. Special circumstances sufficient to disqualify have been: employment as deputy prosecuting attorney;²³ employment as deputy sheriff where the sheriff was paid from convictions;²⁴ employment as justice of the peace where the juror issued the warrant in the case and was paid for that service only if there was a conviction;²⁵ employ-

²¹339 U. S. 162, 171, 70 S. Ct. 519, 523, 94 L. ed. 461, 467 (1950).

²²For the rule that employees of the government may be competent jurors in criminal prosecutions: *Brackin v. State*, 31 Ala. App. 228, 14 S. (2d) 383 (1943) (police officer); *Buchanan v. State*, 214 Ark. 835, 218 S. W (2d) 700 (1949) (inspector in revenue department); *Smith v. State*, 115 Ark. 238, 170 S. W (2d) 1001 (1943) (referee of Workmen's Compensation Commission); *People v. Yuen*, 32 Cal. App. (2d) 151, 89 P. (2d) 438 (1939) (employee of city department of streets); *O'Connor v. State*, 9 Fla. 215 (1860) (coroner); *Spittorff v. State*, 108 Ind. 171, 8 N. E. 911 (1886) (bailiff); *State v. McDonald*, 59 Kan. 241, 52 Pac. 453 (1898) (school district officer); *State v. Lewis*, 50 Nev. 212, 255 Pac. 1002 (1927) (special police officer paid by a private party); *State v. Cosgrove*, 16 R. I. 441, 16 Atl. 900 (1889) (constable); *City Council of Anderson v. Fowler*, 48 S. C. 8, 25 S. E. 900 (1896) (members of city council); *Lugo v. State*, 136 Tex. Cr. App. 240, 124 S. W. (2d) 344 (1939) (peace officer); *Thompson v. Commonwealth*, 88 Va. 45, 13 S. E. 304 (1891) (treasurer and member of town council); *State v. Galbraith*, 150 Wash. 664, 274 Pac. 797 (1929) (member of state legislature).

²³*Block v. State*, 100 Ind. 357 (1884).

²⁴*Gaff v. State*, 155 Ind. 277, 58 N. E. 74 (1900); *Zimmerman v. State*, 115 Ind. 129, 17 N. E. 258 (1888); *State v. Langley*, 342 Mo. 447, 116 S. W (2d) 38 (1938) (deputy inactive but subject to call of sheriff at any time); *State v. Golubski*, 45 S. W. (2d) 873 (Mo. App. 1932).

²⁵*Evans v. State*, 13 Ga. App. 700, 79 S. E. 916 (1913).

ment as a police officer in a prosecution for violation of a municipal ordinance;²⁶ and employment as a police officer.²⁷

Decisions of the Missouri and Indiana courts go furthest among the state courts in establishing governmental employment as a basis for disqualification. A deputy sheriff has been disqualified as a juror in Missouri as being partial because he or his superior officer might be in position to derive additional compensation if a conviction was secured, and because as a member of the police force he probably would have received information about the case which would lead him to pre-determine the guilt of the accused.²⁸ In the same state a police officer has also been excluded from a jury because "It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom police officers are going to testify, should be tried by a jury made up of police officers."²⁹ In an Indiana decision³⁰ a deputy prosecuting attorney was disqualified as a juror on the reasoning that the prosecuting attorney was for practical purposes the plaintiff in the case, and since the deputy prosecuting attorney is his employee, the latter was not qualified to serve on a jury because an employee of one of the parties to a suit is not competent to act as a juror.³¹ This reasoning goes far to eliminate all governmental employees as jurors, but in later cases decided by the Indiana court where the employee of the state has been disqualified, there has been some special interest.³²

²⁶*Shapiro v. City of Birmingham*, 30 Ala. App. 563, 10 S. (2d) 38 (1942). An interesting distinction has been made by the Alabama courts. In *Shapiro v. City of Birmingham* a police officer was disqualified in a prosecution for violation of a municipal ordinance because the officer was an employee of the prosecuting city. But a municipal police officer is a qualified juror in a prosecution by the state. *Brackin v. State*, 31 Ala. App. 228, 14 S. (2d) 383 (1943).

²⁷*State v. Butts*, 349 Mo. 213, 159 S. W (2d) 790 (1942).

²⁸"It is obvious that he might be interested in a conviction because of the additional fees and prison board the sheriff might thereby collect. He might be interested because his own salary might, if so agreed, depend upon the number of convictions, as is often the case, in certain counties. His loyalty to his chief and fellow deputies would certainly have its weight. The likelihood exists that he had become conversant with the facts in the case, and was more or less convinced as to the guilt of defendant. Moreover, our statute exempts a deputy sheriff from jury service. Obviously such exemption exists because of the impropriety of officers acting as jurors in cases wherein they may be called upon to perform other and inconsistent duties." *State v. Golubski*, 45 S. W (2d) 873, 873 (Mo. App. 1932).

²⁹*State v. Butts*, 349 Mo. 213, 159 S. W (2d) 790, 794 (1942).

³⁰*Block v. State*, 100 Ind. 357 (1884).

³¹*Lockhart v. State*, 145 Md. 602, 125 Atl. 829 (1924); *Berbette v. State*, 109 Miss. 94, 67 So. 853 (1915); *State v. Dushman*, 79 W Va. 747, 91 S. E. 809 (1917); 50 C. J. S., *Juries* § 221.

³²*Gaff v. State*, 155 Ind. 227, 58 N. E. 74 (1900) (sheriff's salary paid by county,

If there can be instances where government employment can be grounds for disqualification, as the *Wood* and *Frazier* cases and the state courts have determined there can be, the problem presented the Court in the instant case was whether special conditions existed to make the general rule that government employees are qualified jurors inapplicable. Statutes such as the Act of 1935 represent a policy of facilitating the administration of justice by making it reasonably easy to secure juries. Cases like the *Dennis* case bring this policy into conflict with another policy of the law that an accused be tried by a completely impartial jury. Excluding government employees from juries in the few criminal cases involving persons whose affiliations are such that their loyalty might be doubted would produce a small burden on the administration of justice. It is therefore submitted that the solicitude afforded every accused criminal should require the exclusion of government employees in such cases because as average men the "Loyalty Order" might influence their decision in the case.

ALBERT F. KNIGHT

PROCEDURE—SETTLEMENT OF CLAIM AGAINST ONE JOINT TORT-FEASOR WITH RESERVATION OF RIGHTS AGAINST OTHERS. [Virginia]

When a party plaintiff has a single cause of action against several tort-feasors, he may wish to settle with, or forbear to exercise his right against, one of them, either gratuitously or on receipt of compensation. Of the several legal devices which have been employed by plaintiffs attempting to preserve rights against one or more of the wrongdoers while surrendering the rights against the others, the most common are the accord and satisfaction, the release, and the covenant not to sue.

In an accord and satisfaction the parties agree to give and accept something in full settlement of a claim which one has against the other, and then execute their agreement.¹ The "accord" is the agreement and the "satisfaction" is the execution of the agreement.² A

but only from fees, and so deputy was incompetent as in the employ of one peculiarly interested in the prosecution); *Zimmerman v. State*, 115 Ind. 129, 17 N. E. 258 (1888) (juror served subpoenas for sheriff but sheriff was only paid for such duties if there was a conviction.

¹*Nelson v. Chicago Mill & Lumber Corp.*, 76 F. (2d) 17 (C. C. A. 8th, 1935); *Frazier v. Ray*, 29 N. M. 121, 219 Pac. (1923); *Walker v. Burt*, 128 N. C. 325, 109 S. E. 43 (1921); *Gentry v. Fife*, 56 Okla. 1, 155 Pac. 246 (1916).

²*Cano v. Arizona Frozen Products Co.*, 38 Ariz. 404, 300 Pac. 953 (1931); *In re Trexler Co. of America*, 15 Del. Ch. 76, 132 Atl. 144 (1926); *Davis v. Davis*, 103 Okla. 83, 229 Pac. 479 (1924).

release is similar in that it is also a device for settling a claim,³ but a release is a relinquishment or giving up of a claim, while an accord and satisfaction is the discharge of a claim by a performance which is accepted as full compensation, although it may actually be less than the party receiving it considers himself entitled to.⁴ A covenant not to sue is a covenant made by one who has a right of action against another, whereby he agrees not to enforce his right.⁵

It has been rather generally held that an accord and satisfaction with one of several joint tort-feasors operates to discharge the others,⁶ the theory being that where a plaintiff has a single cause of action, he may have but one satisfaction of his claim.⁷

Similarly, at common law it seems to be accepted that an absolute, unqualified release of one joint tort-feasor releases all.⁸ But upon the question of whether a release of one joint tort-feasor, coupled with a reservation of rights against the others, releases all, there is much conflict.⁹ Some authorities reason that since a release is a relinquishment of the releasor's right, that right cannot be alive as to one wrongdoer and extinct as to another, and hence a release of one, even with a reservation of rights against the others, discharges all from liability.¹⁰ Other authorities maintain that the intention of the parties is

³Coopey v. Keady, 73 Ore. 66, 144 Pac. 99 (1914).

⁴Frazier v. Ray, 29 N. M. 121, 219 Pac. 492 (1923).

⁵"The release of the right to make future claim for injury [is] a covenant to forbear to sue " Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 Atl. 860, 862, (1927).

⁶Steenhuis v. Holland, 217 Ala. 105, 115 So. (2d) (1927); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 638 (1912); Brewer v. Casey, 196 Mass. 384, 82 N. E. 45 (1907); Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125 (1903); Cooley, Torts (Throckmorton, 1930) 182. It seems that where the payment is intended and accepted as *partial*, rather than *full*, compensation, no accord and satisfaction has been effected. See note 19, *infra*.

⁷"The reason most commonly assigned, especially in modern cases, and that which is most satisfactory in that it does not rest upon pure techniques, but upon broad principles of justice and equity, is that the releasor is entitled to one satisfaction, and one only, and that an unqualified release or discharge implies the receipt of such satisfaction." Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, 884 (1915). Also Tanana Trading Co. v. North American Trading & Transportation Co., 220 Fed. 783 (C. C. A. 9th, 1915); Washington B. & A. Electric R. Co. v. Cross, 142 Md. 500, 121 Atl. 374 (1923).

⁸American Ry. Express Co. v. Stone, 27 F. (2d) 8, 66 A. L. R. 202 (C. C. A. 1st, 1928); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Muse v. DeVito, 243 Mass. 384, 137 N. E. 730 (1923); Cooley, Torts (Throckmorton, 1930) 182.

⁹"Upon this point the courts are hopelessly divided and in irreconcilable conflict." Louisville & N. R. Co. v. Allen, 67 Fla. 257, 65 So. 8, 12 (1914).

¹⁰The Adour, 21 F. (2d) 858 (D. C. Md. 1927); Louisville & N. R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914); Ruble v. Turner, 2 Hen. & M. (12 Va.) 38 (1808).

the controlling factor, and hence a release with a reservation of rights against others operates as a covenant not to sue.¹¹ A covenant not to sue one of several joint tort-feasors is regarded as personal to the covenantee and does not discharge other wrongdoers.¹²

In Virginia, the strict view that a release of one joint tort-feasor, even with a reservation of rights against others, operates to discharge all, has long been adhered to.¹³ In the recent case of *Shortt v. Hudson Supply & Equipment Co.*,¹⁴ the Supreme Court of Appeals of Virginia had occasion to determine whether an instrument in form a covenant not to sue one of several joint wrongdoers, with a reservation of rights against the others, might operate to discharge the others. Plaintiff sustained personal injuries in a grade crossing collision between a tractor and trailer and a train on which he was employed as a fireman. Prior to bringing suit against the owner and the operator of the tractor and trailer, plaintiff, in consideration of \$3,500 paid by the railroad company, covenanted not to sue that company for any damages resulting from the collision.

The language of the instrument indicated clearly that it was not intended to operate as a release,¹⁵ but the court nonetheless held that plaintiff's right of action against the owner and the operator of the tractor and trailer was barred, since by accepting the \$3,500 from the railroad company plaintiff had effected an accord and satisfaction.¹⁶

Citing its own holding in an earlier case in which a plaintiff had settled a claim with one of two joint wrongdoers, the court declared that "where two are jointly and severally liable in tort for an injury caused by their negligence or misconduct, the satisfaction of the injured party's single cause of action by one discharges the other, since

¹¹*Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883 (1915); *Feighley v. C. Hoffman & Son Milling Co.*, 100 Kan. 430, 165 Pac. 276 (1917); *Adams Express Co. v. Beckwith*, 100 Ohio St. 348, 126 N. E. 300 (1919).

¹²*Pacific States Lumber Co. v. Bargar*, 10 F. (2d) 335 (C. C. A. 9th, 1926); *Texas-arkana Telephone Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257 (1908); *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883 (1915); *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271 (1892); *Cooley*, *Torts* (Throckmorton, 1930) 183.

¹³The doctrine was laid down in the early case of *Ruble v. Turner*, 2 Hen. & M. (12 Va.) 38 (1808), and has been followed by later Virginia cases. *McLaughlin v. Siegel*, 166 Va. 374, 185 S. E. 873 (1936); *Bland v. Warwickshire Corp.*, 160 Va. 131, 168 S. E. 443 (1933).

¹⁴191 Va. 306, 60 S. E. (2d) 900 (1950).

¹⁵The instrument stated: "It is expressly understood that this instrument is merely a covenant not to sue and not a release." *Shortt v. Hudson Supply & Equipment Co.*, 191 Va. 306, 309, 60 S. E. (2d) 900, 902 (1950).

¹⁶*Shortt v. Hudson Supply & Equipment Co.*, 191 Va. 306 at 313, 60 S. E. (2d) 900 at 904 (1950).

the transaction 'is similar in its operation to an accord and satisfaction. This is true, even though the parties did not intend to discharge the other joint wrongdoer.'¹⁷

Although an accord and satisfaction with one of several joint tortfeasors operates to discharge all,¹⁸ it has often been held that in order for an agreement to operate as an accord and satisfaction, the consideration must have been intended by the party giving it and accepted by the party receiving it, as full satisfaction of the claim.¹⁹ There remains the problem of how to determine whether the payment was so intended and accepted. Where the instrument specifically recites that the payment is in full satisfaction, there is no difficulty in holding that an accord and satisfaction has been effected.²⁰ If there is no such specific provision, a number of courts apparently decide entirely from the form of the instrument whether plaintiff has received full satisfaction for his injury. Such courts have ruled that if the instrument takes the form of a covenant not to sue, plaintiff has received partial satisfaction only,²¹ or if the instrument expressly reserves rights against others responsible for the same wrong, the amount paid was not intended to be full compensation.²² Other courts have taken the position that whether an accord and satisfaction has been made is a question of fact to be determined from all relevant circumstances.²³

That the holding in the principal case defeats the intention of the parties, as expressed in the instrument, seems to be beyond question. The unequivocal language used and the express reservation of rights against the other wrongdoers would indicate to the satisfaction of a number of courts that the sum received by plaintiff was not intended to be full compensation for the injury suffered.²⁴

The Virginia court conceded that the instrument did not "state

¹⁷Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 312, 60 S. E. (2d) 900, 904 (1950), referring to First and Merchants Nat. Bank v. Bank of Waverly, 170 Va. 496 at 503, 197 S. E. 462 at 465 (1938).

¹⁸Bedwell v. DeBolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943). Also cases cited in note 5, *supra*.

¹⁹City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Schmidt v. Austin, 159 N. E. 850 (Ohio App. 1927); Blackmer v. McCabe, 86 Vt. 303, 85 Atl. 113 (1912); 1 Thompson, Trials (2d ed. 1918) 1018.

²⁰Peteri v. Pennsylvania R. Co., 41 Ohio App. 105, 179 N. E. 817 (1931).

²¹Smith v. Dixie Park & Amusement Co., 128 Tenn. 112, 157 S. W. 900 (1913).

²²McKenna v. Austin, 134 F. (2d) 659 (App. D. C. 1943); Black v. Martin, 88 Mont. 256, 292 Pac. 577 (1930).

²³City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271, (1892); Bedwell v. DeBolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943); Haney v. Cheatham, 8 Wash. (2d) 310, 111 P (2d) 1103 (1941).

²⁴See cases cited in notes 21, 22 and 23, *supra*.

in terms" that the money was paid in full satisfaction of plaintiff's claim;²⁵ but apparently the court sought to align itself with those jurisdictions holding that the question of whether full satisfaction has been received is one to be determined from all relevant circumstances.²⁶ It declared that "to interpret the circumstances as showing that this substantial sum was paid and accepted for anything less than a full satisfaction of the plaintiff's claim against the Railway Company would compel us to shut our eyes to the plain purpose of the settlement and the other actualities of the situation."²⁷

Yet it seems doubtful that the fact of settlement alone, although for a substantial, as distinguished from a nominal, sum, is enough to warrant a holding that the circumstances show an intention that the payment be accepted as full compensation. At that stage of the proceedings, there is no evidence upon which the court can determine the extent of plaintiff's injury, and if the amount of damage is unknown, it hardly seems tenable to say that a settlement for a specified amount was intended to be in full satisfaction of the claim.

It thus appears that the Virginia court's holding is not in accord with those cases which determine the parties' intentions purely from the instrument itself, nor is it completely in harmony with those cases which state that the question is to be decided on the basis of all the relevant circumstances. Rather, the court seems to be simply laying down a rule that if the payment is substantial, plaintiff has, as a matter of law, effected an accord and satisfaction, discharging the others responsible for the same tort, regardless of the form of the instrument.²⁸

²⁵Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 312, 60 S. E. (2d) 900, 904 (1950).

²⁶See cases cited in note 23, *supra*.

²⁷Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 313, 60 S. E. (2d) 900, 904 (1950).

²⁸Even had the instrument expressly recited that the sum received was not intended as full satisfaction or was intended as partial compensation only, it is doubtful that the Virginia court would have reached a different result, so long as the payment was substantial. ". . . the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent." Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 313, 60 S. E. (2d) 900, 904 (1950), quoting from 1 Cooley, Torts (4th ed.) 263. "The rule is that even if the writing be appropriately drawn to make it a covenant not to sue, the court, nevertheless, must construe it in the light of the facts and circumstances surrounding its execution to ascertain whether it was in substance and effect given for a consideration which is reasonably compensatory." Short v. Hudson Supply & Equipment Co., 191 Va. 306, 313, 314, 60 S. E. (2d) 900, 904 (1950), quoting from Haney v. Cheatham, 8 Wash. (2d) 310,

From a practical standpoint, however, there is much to be said for the result of the case. The rule has been generally stated that where a payment made to a plaintiff is given and received as partial satisfaction only, and hence other tort-feasors are not discharged, the payment should work a pro tanto reduction of the liability of the unreleased tort-feasors in a later suit by the plaintiff against them for the full amount of the damages.²⁹ Although the soundness of the rule may be conceded, its application may impose problems of a practical nature. The cases stating the rule have been very vague as to just how the courts are to effect a reduction of the liability of the unreleased defendants. The reduction of liability could be achieved in one of a number of ways. The trial court could instruct the jury to take into account the fact of partial satisfaction when considering the question of damages, and the verdict rendered would presumably be for an amount equal to the difference between plaintiff's total damages and the partial payment already received.³⁰ Or the court could allow the jury to return a verdict for the whole amount of plaintiff's damages, and then enter judgment for the amount of the verdict reduced by the amount already paid. Another alternative might be for the court to enter judgment for the full sum, and then to credit the defendants with the amount already paid by way of partial satisfaction.

However, under the Virginia rule, as announced by the *Shortt* case, the mechanical problem of applying a pro tanto reduction of liability will not arise whenever the original payment is substantial, since the plaintiff may not then proceed against the other tort-feasors at all.

The rule of the principal case may have varying effects upon the adjustment of controversies by the parties involved. Clearly a plaintiff is taking an unnecessary chance if he attempts to make piecemeal

111 P (2d) 1003, 1008 (1941). It is perhaps likely that had the sum received by plaintiff in the principal case been nominal, the court would have given effect to the expressed intention of the parties as evidenced by the writing. The court recognized the difference between a covenant not to sue and a release as affecting the liability of joint tort-feasors. *Shortt v. Hudson Supply & Equipment Co.*, 191 Va. 306 at 310, 60 S. E. (2d) 900 at 903 (1950).

²⁹*Husky Refining Co. v. Barnes*, 119 F. (2d) 715 (C. C. A. 9th, 1941); *McWhurter v. Otis Elevator Co.*, 40 F. Supp. 11 (W D. S. C. 1941); *Black v. Martin*, 88 Mont. 256, 22 Pac. 577 (1930); *Brandstein v. Ironbound Transportation Co.*, 12 N. J. L. 585, 172 Atl. 580, 104 A. L. R. 926 (1934).

³⁰One practical difficulty which almost certainly would be encountered if such a solution were adopted is that instructions of the type in question would almost inevitably have varying effects upon different juries, with consequent variations in verdicts rendered.

compromises with each of several wrongdoers. A single settlement for a fully compensatory sum offers the one practical solution for the person who wishes to settle his case out of court. Parties to a controversy are often prone to reach a compromise, and if they know that one substantial payment is all that the law will allow, they will doubtless tend to adjust their claims for sums which bear a close relationship to the actual damage sustained.

On the other hand, one wrongdoer may be willing to pay for a proportionate part of the damages, but unwilling to pay a sum which would be fully compensatory. If, in such a case, the other tort-feasors are unwilling to pay for part of the damage, it seems likely that no compromise can be attained because the plaintiff would not be safe in accepting from the party willing to settle any payment which might be considered "substantial."

At all events, the distinction between a release and a covenant not to sue as affecting the liability of joint tort-feasors is at best technical and artificial. A decision which goes far toward wiping out such a distinction is indicative of a healthy trend in procedural law.

J. FORESTER TAYLOR

PUBLIC UTILITIES—POWER OF PUBLIC SERVICE COMMISSIONS OVER CONTRACTS BETWEEN PARENT AND SUBSIDIARY UTILITY CORPORATIONS.
[California]

Many of the problems growing out of the relationship between public utility holding companies and their subsidiaries have been resolved by state¹ and federal statutes,² but the notorious service contract³ still provides much difficulty for regulatory commissions and courts.⁴ Recently the California Supreme Court in *Pacific Telephone and Telegraph Company v. Public Utilities Commission*,⁵ was

¹Note (1936) 49 Harv. L. Rev. 957, 982-89.

²Public Utilities Holding Company Act. 49 Stat. 803 (1935), 15 U. S. C. A. § 79 (1941).

³"These contracts may be for the supply of services, such as expert engineering, accounting or legal advice, or for the sale or rental to the operating company of necessary materials either manufactured or bought wholesale by the affiliate." Note (1932) 18 St. Louis L. Rev. 62. The Public Utilities Holding Company Act forbids such contracts when made directly with the holding company, but allows service companies which are subsidiary to the holding company to make service agreements under control of the Securities and Exchange Commission. 49 Stat. 825 (1935), 15 U. S. C. A. § 79 (m) (1941). The Act, of course, applies only to holding groups engaged in interstate commerce and regulates only those companies which control gas and electric utilities.

⁴See Note (1949) 97 U. of Pa. L. Rev. 568.

⁵215 P. (2d) 441 (Cal. 1950).

again faced with one of the long-standing problems created by these service arrangements: whether a state public service commission may determine the terms on which a subsidiary utility may contract with its parent company. The Pacific Telephone and Telegraph Company had attacked the orders of the state Public Utilities Commission prescribing the terms on which Pacific could contract with the American Telephone and Telegraph Company for certain services. American owned approximately 88 per cent of the capital stock of Pacific, and as a result of this domination the commission found that the contract between the two, whereby Pacific paid one per cent of its gross receipts for American services, was in reality an arbitrary exaction from Pacific by the parent company. A majority of the court found that the commission had exceeded its authority, but two dissenting justices⁶ took the position that the broadly phrased statute, which gave the commission general regulation over public utilities, authorized the control action.

Part of the uncertainty in regard to the scope of governmental regulation of the holding company lies in the fact that while such organizations have often served as instruments for illegal financial manipulations, they also have numerous beneficial and completely legitimate functions. During the early stage of the development of the public utility industry, the device of the holding company lent itself readily to the solution of the financial and managerial problems facing small local utility organizations. When a small operating company found it difficult to sell stock without giving it a preferred status, a holding group would step in and purchase a large part of this common stock with funds received in the sale of its own securities. This transaction was continued until in many instances the holding company became the central control authority for a vast empire of related utilities. Then, because of its central position and large financial resources, the company was able to supply highly skilled technicians to the subsidiary at a comparatively low cost. Since the limited scale of operation of the subsidiary did not warrant the establishment of a separate technical staff, the subsidiary readily entered into agreements with the holding company whereby it would be extended the use of the services of the parent organization. Thus the service contract evolved.⁷

⁶Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State, 215 P (2d) 441, 447, 448 (Cal. 1950). There were two separate dissenting opinions, one by Justice Shenk, the other by Justice Carter. The latter provides an excellent short discussion on the evils of the service contract.

⁷See Note (1936) 49 Harv. L. Rev. 957 for a discussion on the servicing function of the public utility holding company.

On its surface, the service contract appears to be an innocuous contrivance, but when it is remembered that the holding concern has managerial control over the operating utility it becomes quite apparent that such an agreement is laden with dangerous possibilities. Within this control mechanism is the ability to force unreasonable demands on the affiliate, and since, as often occurs, the holding company has relatively little capital investment in the operating institution there is likely to be no deterrent force to constrain exploitation.⁸ Consequently, many holding companies have found the service relation a ready means for obtaining increased income; and inasmuch as these excessive exactions necessarily reflect as operating expenses—an important item in calculating consumer rate schedules—the nature of the service contract becomes a proper item for consideration by the rate-making body.⁹

As early as 1892 it was recognized that the rate-making power includes the power to disallow improper expenditures,¹⁰ and yet before 1930 public service commissions were not disposed to reject payments made under contracts as improper items in calculating a fair rate base.¹¹ In fact, the commissions were inclined to give complete approval of and occasionally even throw in a commendation for the holding company.¹² On the other hand in a few situations, especially those where the famous "license contract"¹³ of the American

⁸Buchanan, *The Public Utility Holding Company Problem* (1937) 25 *Calif. L. Rev.* 517.

⁹See Note (1929) 14 *St. Louis L. Rev.* 299.

¹⁰See dictum in *Chicago and Grand Trunk Railway v. Wellman*, 143 U. S. 339, 345, 12 S. Ct. 400, 402, 36 L. ed. 176, 179 (1892). Also see Note (1936) 49 *Harv. L. Rev.* 957, 982.

¹¹This process of rejecting payments is called disallowance. In disallowance the regulatory body does not prevent the subsidiary company from making payments under the service contract, but it does refuse to recognize such payments as operating expenses. This is done because operating expenses are a legitimate item in calculating the rates which the utility may charge its customers, and thus any increase in expense must necessarily reflect itself in increased rates. Therefore, if the regulating commission were to allow the arbitrary exactions often made through the service contract medium, the rate-payer would bear the ultimate financial burden. As it is, under disallowance, the burden falls on the subsidiary. Note (1936) 49 *Harv. L. Rev.* 957, 985-986.

¹²*State v. Southwestern Bell Telephone Co.*, 115 Kan. 236, 223 Pac. 771 (1924).

¹³The license contract of the American Telephone and Telegraph Company is a form of service contract granting the use of certain patent rights and other services to a subsidiary telephone company in return for payments based on a fixed percentage of the subsidiary's gross receipts. It can readily be seen that these payments bear no relation to the actual cost of production of the services rendered by the parent, and if the subsidiary should secure a rate increase by showing the cost of the contract as an operating expense, the parent company would receive a windfall. For an example of a license contract, see *State v. Southwestern Bell Telephone Co.*, 115 Kan. 236, 223 Pac. 771 (1924).

Telephone and Telegraph Company was involved, commissions often questioned the fees paid to the parent group. Some commissions went so far as to reduce and in a few instances even disallow expenses incurred under service agreements as improper items in so far as rate calculations were concerned.¹⁴ However, in the cases of *City of Houston v. Southwestern Bell Telephone Company*¹⁵ and *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Company*,¹⁶ the Supreme Court of the United States severely limited state interference with service contracts. In the *Houston* case the Court declared that service contracts were not to be disallowed so long as reasonable and less in cost than could be secured elsewhere in the competitive market. The *Missouri* case placed even more drastic restrictions on the states by directing that bad faith would have to be shown before the contract expenses could be disallowed. As a direct consequence of these decisions the disallowing actions of rate-making bodies were often overruled as being confiscatory.¹⁷ However, in 1930 in *Smith v. Illinois Bell Telephone Company*¹⁸ these two decisions were disregarded as the Court indicated that rate-making bodies might now refuse to accept as operating expense any payment made to the parent company in excess of the actual cost of producing the service plus a reasonable profit to the parent group.

While the *Smith* case went a long way toward allowing commission control over service contracts, it did not solve the problem entirely. Control by disallowance was at best indirect, and it did not prohibit the payment of the agreed service fee to the holding company. Thus, when a commission refused to recognize the service expenditure in rate calculations, the utility would have to meet the contract costs from its own profits or be negligent in plant replacement and service to the consumers. To prevent these undesirable effects the commissions turned to the legislatures, and by 1936 at least eighteen states¹⁹ had

¹⁴For a comprehensive list of commission reports on this point see Note (1936) 49 *Harv. L. Rev.* 957, 983 n. 112.

¹⁵259 U. S. 318, 42 S. Ct. 486, 66 L. ed. 961 (1922).

¹⁶262 U. S. 276, 43 S. Ct. 544, 67 L. ed. 98 (1923).

¹⁷The following cases are typical: *Chesapeake and Potomac Telephone Co. of Baltimore City v. Whitman*, 3 F. (2d) 938 (D. C. Md. 1925); *Northwestern Bell Telephone Co. v. Spillman*, 6 F. (2d) 663 (D. C. Neb. 1925); *Indiana Bell Telephone Co. v. Public Service Commission of Indiana*, 300 Fed. 190 (D. C. Ind. 1924).

¹⁸U. S. 133, 51 S. Ct. 65, 75 L. ed. 255 (1930), noted (1931) 44 *Harv. L. Rev.* 833.

¹⁹Alabama, Connecticut, Illinois, Indiana, Kansas, Maine, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See Note (1936) 49 *Harv. L. Rev.* 957, 987, n. 128 and 130.

enacted statutes giving commissions direct control over utility-affiliate contracts.²⁰ Nine²¹ of the states merely authorized disapproval of service contracts if not in the public interest,²² but the others²³ acted more positively and required that the contracts be affirmed by commissions as a condition precedent to their validity.²⁴

²⁰The New York parent statute was upheld by the New York Supreme Court in *International Railway Company v. Public Service Commission*, 36 N. Y. S. (2d) 125 (1942), aff'd 289 N. Y. 830, 47 N. E. (2d) 435 (1943). The validity of the Kansas statute was recognized by implication in *State ex rel. Steiger v. Capital Gas and Electric Co.*, 139 Kan. 870, 33 P. (2d) 731, 734 (1934). *Lockard v. City of Salem*, 127 W. Va. 237, 32 S. E. (2d) 568 (1944) applied the West Virginia statute granting commission control over utility contracts without question as to its constitutionality. It has been stated that these statutes can be supported by analogy to commission powers to supervise the issuance of securities and grant or refuse certificates of convenience and necessity. "These involve interference in questions of management which are no more drastic than the exercise of power to forbid the making of such contracts." *Simpkins, State Regulation of Contracts with Public Utility Affiliates* (1934) 20 St. Louis L. Rev. 1, 57.

²¹Alabama, Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, New York, Pennsylvania, and Vermont.

²²The parent statute of this type provides "No management, construction, engineering or similar contract, hereafter made, with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with the commission, and no charge for any such management, construction, engineering or similar service, whether made pursuant to contract or otherwise, shall exceed the reasonable cost of performing such service. In any proceeding to determine the reasonable cost of such charge or service the burden of proof shall be on the company. If it be found that any such contract is not in the public interest, the commission, after investigation and a hearing, is hereby authorized to disapprove such contract." *New York Public Service Law* (1934) § 110 (3).

²³These states were Illinois, Maine, New Jersey, North Carolina, Oregon, Virginia, Washington, West Virginia, and Wisconsin.

²⁴The Wisconsin statute provides: "Whenever the commission shall find upon investigation that any public utility is giving effect to any such contract . . . without such contract . . . having received the commission's approval as required by this section, the commission shall issue a summary order directing the public utility to cease and desist from making any payments or otherwise giving any effect to the terms of such contract . . . , until such contract . . . shall have received the approval of the commission. The circuit court of Dane county is authorized to enforce such order to cease and desist by appropriate process, including the issuance of a preliminary injunction, upon the suit of commission." *Wis. Stat.* (1947) c. 196, § 6. The West Virginia statute while not being as specific as the Wisconsin act states: "The commission shall prescribe such rules and regulations as, in its opinion, are necessary for the reasonable enforcement and administration of this section, including the procedure to be followed, the notice to be given of any hearing hereunder, if it deems a hearing necessary, and after such hearing or in case no hearing is required, the commission shall, if the public will be inconvenienced thereby, enter such order as it may deem proper . . ." *W. Va. Code Ann.* (Michie, 1949) § 2562 (2). If an order made in pursuance of the West Virginia statute is violated by any person or public utility that person or public utility "shall be guilty of contempt, and the commission shall have the same power to punish therefor as is now conferred on the circuit court, with the right of appeal in all cases to the supreme court of appeals." *W. Va. Code Ann.* (Michie, 1949) § 2573.

In jurisdictions in which surveillance over contracts has not been specifically granted by legislative enactment there has been some doubt²⁵ as to whether commissions should be allowed to dictate terms of utility-affiliate contracts. The *Pacific Telephone* case takes the view that without specific legislative authority a commission should only have the power to disallow, for rate-making purposes, payments that it finds excessive.²⁶ The court reasons that the broadly phrased California statute²⁷ dealing with commission control of public utility activities extends authority only to those transactions that "directly affect the service the rate-payer will receive at a particular rate,"²⁸ and since the service contract involves a supplier-utility relationship rather than a utility-consumer relationship, the commission is powerless. Although the California court conceded that the service contract under question was not arrived at through arms-length bargaining, it insisted that there was no legislative policy against utility-affiliate agreements. To allow the commission to prescribe contract terms under these conditions would be tantamount to allowing it to manage the affairs of all utilities subject to its jurisdiction. This majority interpretation is supported by the only two cases²⁹ which have considered a statute similar to that of California in regard to the service contract.

However, in view of the paucity of decisions on the subject, the dissent of Justice Carter is significant.³⁰ Justice Carter, who thought

²⁵Writers on service contracts were uncertain as to how the courts would react to commission attempts to determine the terms of utility-affiliate agreements. See Buchanan, *The Public Utility Holding Company Problem* (1937) 25 *Calif. L. Rev.* 517, 532; Note (1932) 45 *Harv. L. Rev.* 729, 736.

²⁶*Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*, 215 P (2d) 441, 447 (Cal. 1950).

²⁷"Section 32 of the Act provides that 'Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates charged or collected by any public utility or that the rules, regulations, practices or contracts, of any of them, affecting such rates are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law the commission shall determine the just, reasonable or sufficient rates practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided' " *Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*, 215 P (2d) 441, 444 (Cal. 1950).

²⁸*Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*, 215 P (2d) 441, 445 (Cal. 1950).

²⁹The courts of Illinois and Pennsylvania have interpreted statutes similar to that of California in the same manner as did the majority in the *Pacific Telephone* case. *Illinois Commerce Commission ex rel. East St. Louis, C. and W. Ry. v. East St. Louis and C. Ry. Co.*, 361 Ill. 606, 198 N. E. 716 (1935); *Philadelphia City Passenger Ry. Co. v. Public Service Commission of Pennsylvania*, 271 Pa. 39, 114 Atl. 642 (1921).

³⁰*Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*,

that the general grant of authority in the Act covered the service arrangement, recognized a vital fact that the majority overlooked when he explained that the net effect of a harsh service contract might be to hamper seriously the ability of the utility to serve its consumers.³¹ In this respect the dissenting opinion was far closer to reality than the majority which concluded that only a buyer-supplier relationship was involved. By adopting this point of view and insisting that the legislature had expressed no policy on the subject, the majority displayed superficiality in not realizing that the commission was actually doing what the legislature had expressly gone on record as favoring—insuring the public adequate service at a reasonable rate without discrimination.³² It is suggested that there is no valid reason why a commission operating under a general statute, such as California has, should not dictate the terms of affiliate service contracts. As Justice Carter maintained,

“It may be that some measure of protection is afforded by the power to refuse to recognize the license fee contract when fixing rates, but having that power, it of necessity follows that they may lock the door before the horse is stolen. If they may affect the utility management indirectly by subsequent action, surely they may take precautionary measures in advance.”³³

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215 P. (2d) 448 (Cal. 1950). Although no cases have been found supporting the dissent, the argument used therein was developed by the Alabama public service commission in *Re Southern Bell Tel. & Tel. Co.*, P U. R. 1932E 207.

³¹“It may be asked why should the commission, as representative of the consumers be concerned over a ‘raid on the treasury of the operating utility.’ Directly the consumers will not be affected whether the utility is solvent or insolvent. Their rates are based upon a fair return on a fair value and it should not matter to them who gets it. Unfortunately, this argument overlooks the simple facts that an insolvent utility has no credit with which to obtain the capital necessary for the continuous expansion of service demanded from a utility under modern conditions and that operation of a utility by receivers seems usually to be thought to result in higher operating expenses than would ordinarily be incurred.” *Simpkins, State Regulation of Contracts with Public Utility Affiliates* (1934) 20 St. Louis L. Rev. 1, 58 as quoted by Justice Carter in the *Pacific Telephone Case*, 215 P. (2d) 441, 449 (Cal. 1950).

³²The majority itself admitted that “the primary purpose of the Public Utilities Act, Gen. Laws, Act 6386, is to insure the public adequate service at reasonable rates without discrimination.” *Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*, 215 P. (2d) 441, 444 (Cal. 1950). This admission lends support to Justice Carter’s contention that in reality the commission was endeavoring to safeguard the ability of the utility to serve the rate-payers.

³³*Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State*, 215 P (2d) 441, 449 (Cal. 1950).

TORTS—LIABILITY IN CONVERSION OF THIRD PARTY WHO KNOWINGLY
RECEIVED PROCEEDS OF CONVERSION FROM PRIMARY WRONGDOER.
[Maine]

The victim of a conversion often finds his rights against the converter useless because of the inability of the wrongdoer to satisfy a judgment for damages. If a third party has contributed to a sequence of events, the total effect of which gave rise to the conversion, the property owner's only hope for reimbursement may lie in extending the liability for the wrong to the third party.

Such an effort was made in the recent case of *Lewiston Trust Company v. Deveno*¹ in which the defendant, Deveno, had executed a chattel mortgage on his truck to the plaintiff trust company. Deveno was the debtor of the other defendant, Perlstein, who, knowing the truck was mortgaged, had advised Deveno to sell it and had implied that if what was due him was paid he would make Deveno a new loan. Deveno sold the truck, thereby converting the plaintiff's interest, and turned all of the proceeds over to Perlstein. In the action for trover for damages, the trial court directed a verdict for the defendant, Perlstein, and the Supreme Court of Maine affirmed, ruling that the action taken by Perlstein, though it did "not commend itself to a desirable standard of honesty,"² still did not sufficiently implicate him in the wrong to make him liable as a converter.

The courts have given approval to the imposition of liability on third parties for conversion it being generally asserted that "Every person is liable in trover who personally or by his agent commits an act of conversion, or who participates in the conversion by instigating, aiding or assisting another or who knowingly benefits by its proceeds in whole or in part."³ However, the actual holdings of the cases seldom support such a broad proposition, and the statement that one may be held liable because he has knowingly benefitted from the proceeds of the conversion is either dicta,⁴ or an alternative basis for liability where the other grounds might exist.⁵

¹74 A. (2d) 457 (Me. 1950).

²*Lewiston Trust Co. v. Deveno*, 74 A. (2d) 457, 459 (Me. 1950).

³*First Nat. Bank of Strasburg v. American State Bank of Brighton*, 73 Colo. 254, 215 Pac. 473, 475 (1923); *Hardie v. Peterson*, 86 Mont. 150, 282 Pac. 494, 498 (1929); *Bruton v. Sakariason*, 21 N. M. 438, 155 Pac. 725, 726 (1916); 65 C. J., *Trover and Conversion* § 103; 38 Cyc. 2054, pgf. 4.

⁴Facts do not bring the case within this part of the rule: *The Quantico Cotton*, 24 Fed. 325, 332 (C. C. E. D. La. 1885); *Bruton v. Sakariason*, 21 N. M. 438, 155 Pac. 725, 726 (1916). Received benefits by having possession of the chattel: *Hardie v. Peterson*, 86 Mont. 150, 282 Pac. 494, 498 (1929).

⁵*Dow v. Brookline Trust Co.*, 308 Mass. 90, 31 N. E. (2d) 13 (1941); *Talich v. Marvel*, 115 Neb. 255, 212 N. W. 540 (1927).

Cases clearly come within the general rule where the third party wrongdoer, though he had no actual possession of the converted property has nevertheless had constructive possession of it, as where he stands in the relationship of principal with the primary wrongdoer agent who acted within the scope of his authority.⁶ If the agent acted outside the scope of his authority, however, liability is not extended to the principal⁷ unless he received the proceeds under such circumstances as to amount to a ratification of the act.⁸

Liability is also extended to a third party who, although he acted as an agent for the principal, aided the primary wrongdoer in a conversion.⁹ The prevailing view is that if the agent negotiated the transaction for his principal in which the agent had actual possession of the goods, he thereby asserts such an adverse claim that he is liable to the owner for the conversion,¹⁰ and his lack of knowledge of the true ownership is immaterial. On this reasoning, an auctioneer is held liable for an unauthorized sale and delivery of the chattel to a buyer.¹¹ But liability is not extended to the agent if he merely innocently receives and transports the converted goods and has no part in the transaction which constituted the conversion, because by his act he merely purports to change the position of the goods and not the property interest.¹² If, however, the agent has reason to know of the owner's rights he may be liable on the theory of aiding by

⁶Kean v. Nat. City Bank, 294 Fed. 214 (C. C. A. 6th, 1923); Hardie v. Peterson, 86 Mont. 150, 282 Pac. 494 (1929); Hooser v. Carlton Bros. & Co., 288 S. W. 1095 (Tex. Civ. App. 1926). The acts of the agent in this connection must be considered the acts of the principal.

⁷The Quantico Cotton, 24 Fed. 325 (C. C. E. D. La. 1885); Bruton v. Sakamason, 21 N. M. 438, 155 Pac. 725 (1916).

⁸Dow v. Brookline Trust Co., 308 Mass. 90, 31 N. E. (2d) 13 (1941); Parker v. Cone, 105 Vt. 426, 168 Atl. 715 (1933).

⁹Aided in conversion: Edwards v. Max Thieme Chevrolet Co., 191 So. 569 (La. App. 1939); Skunner v. First Nat. Bank & Trust Co., 61 S. D. 481, 249 N. W. 821 (1933); Parker v. Cone, 105 Vt. 426, 168 Atl. 715 (1933); Contractors' Machine & Storage Co. v. Stewart, 177 Wash. 263, 31 P. (2d) 546 (1934); Davin v. Dowling, 146 Wash. 137, 262 Pac. 123 (1927). Committed conversion as agent: Starr v. Banker's Union of the World, 81 Neb. 377, 116 N. W. 61 (1908); Singer Manuf. Co. v. Patrick King, 14 R. I. 511 (1884). The principal is the primary wrongdoer where he committed the initial act of conversion and the agent is the third party wrongdoer if he aided by subsequently acting for his principal.

¹⁰Lee v. Mathews, 10 Ala. 682, 44 Am. Dec. 498 (1846); Miller v. Wilson, 98 Ga. 578, 25 S. E. 578, 58 Am. St. Rep. 319 (1896).

¹¹Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394 (1894); Hoffman v. Carow, 22 Wend. 285 (N. Y. 1839) (innocence immaterial).

¹²Shellnut v. Central of Ga. R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A. (N. S.) 494 (1908) (carrier transporting goods).

giving faith and credit to the instruction of the principal.¹³

Where a bailee has property delivered to him by a bailor who is the primary wrongdoer and re-delivers to the bailor, no liability will attach to him¹⁴ unless before the re-delivery was made he had received notice of the owner's claim, in which case he is then required, at his peril, to see that he delivers to the proper person.¹⁵ If the bailee, under the orders of the bailor, delivers to a third party the better view is to protect him from liability, provided he does not himself negotiate the transaction to deliver to another.¹⁶ But the weight of authority is that the bailee is liable, unless the delivery was part of the original agreement of bailment.¹⁷

It is not essential that the third party wrongdoer ever have had either actual or constructive possession of the converted chattel in order to extend liability to him for having aided in its conversion.¹⁸ Where the aid was given to bring about the taking of the property of another the third party wrongdoer may be held liable if he participated in a deception which made it possible for the primary wrongdoer to convert,¹⁹ or if he knowingly aided by cooperating in the arrangements necessary for the act which constituted the conversion,²⁰ or if he "instigated" the conversion.²¹ It is immaterial whether or not

¹³Edwards v. Max Thieme Chevrolet Co., 191 So. 569 (La. App. 1939); *Warder-Bushnell & Glessner Co. v. Harris*, 81 Iowa 153, 46 N. W. 859 (1890).

¹⁴Coleman v. Francis, 102 Conn. 612, 129 Atl. 718 (1925); Restatement, Torts (1934) § 235.

¹⁵Ga. R. R. & Banking Co. v. Hass, 127 Ga. 187, 56 S. E. 313, 119 Am. St. Rep. 327 (1906); *Atchison T. & S. F. R. Co. v. Jordon Stock-Food Co.*, 67 Kan. 86, 72 Pac. 533 (1903). In *Hudmon v. DuBose*, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475 (1888), it was held that a recorded mortgage was constructive notice of the owner's rights.

¹⁶Ashcraft v. Tucker, 73 Colo. 363, 215 Pac. 877, 28 A. L. R. 692 (1923); *First Nat. Bank of Pipestone v. Siman*, 65 S. D. 514, 275 N. W. 347 (1937); Prosser, Torts (1941) 105; Restatement, Torts (1934) § 233(3).

¹⁷Varney v. Curtis, 213 Mass. 309, 100 N. E. 650, L. R. A. 1916A, 629 (1913); Restatement, Agency (1933) § 349, Comment d. (delivery to another, not part of original agreement). *Parker v. Lombard*, 100 Mass. 405 (1868) (delivery to another, part of the agreement of bailment).

¹⁸Hooser v. Carlton Bros. & Co., 288 S. W. 1095 (Tex. Civ. App. 1926).

¹⁹Scott v. Perkins, 28 Me. 22, 48 Am. Dec. 470 (1848) (collusion); *Nolan v. Mathis*, 134 Okla. 79, 272 Pac. 868 (conspiracy); *Contractors' Machinery & Storage Co. v. Stewart*, 177 Wash. 263, 31 P. (2d) 546 (1934) (knowingly affirming false utterances).

²⁰Davin v. Dowling, 146 Wash. 137, 262 Pac. 123 (1927). In this case, although the defendant was not held liable for the portion of the crop which was converted without the defendant's aid even though the defendant had knowingly received the proceeds from its sale, the defendant was held liable for the portion of the crop which was converted with the defendant's aid.

²¹The word "instigate" is rarely used as the basis of imposing civil liability on the defendant. Even when used, its meaning is seldom defined. E. g., *Bowen v.*

he stood to gain from the wrongdoing.²² However, liability is not extended to the third party where his only act was to advise the conversion.²³

Where the third party has done no act affecting the disposition of the property itself, but has only dealt with the proceeds of the sale thereof, liability will not extend to him if there was no knowledge that they were the fruits of a conversion,²⁴ except as he might incur liability as the principal of a converting agent.²⁵ Where there was knowledge that the funds were the fruits of a conversion, one line of authority holds that sufficient participation in the conversion exists to impose liability on the third party receiving the proceeds.²⁶ This view is in conflict with the position taken by the court in the principal case in refusing to extend liability to the defendant Perlstern.

The latter position is well supported by the reasoning of the Washington Supreme Court in *Davin v. Dowling*.²⁷ The plaintiff had a statutory lien on the crops of his tenant, of which the defendant bank was charged with notice. The bank loaned the tenant money on the crop, part of which the tenant sold to a third party, and the bank, knowing the tenant sold the crop without the landlord's permission (which action amounted to a conversion), received the proceeds of the sale and applied them to the indebtedness of the tenant. The court, holding the bank not liable in trover as to this portion of the crop, reasoned that the statutory lien was upon the crop and

Yellow Cab Co., 13 S. W. (2d) 708 (Tex. Civ. App. 1929). In *Cone v. Iverson*, 4 Wyo. 203, 35 Pac. 933, 938 (1894), it was pointed out: "To say that one 'requested' another to do an act does not imply that there was anything wrong in the act, but to say that one 'instigated' another to do any act does imply that the act itself was wrongful. The word is never used properly with reference to a good, virtuous, lawful act." In regard to whether such "instigation" would extend civil liability to the instigator the court said: "If, under the law, one who instigates another to the commission of a crime is guilty as principal, how can it be doubted that one who instigates another to the commission of a civil wrong is as completely a principal as he would have been had he actually performed the wrongful act himself?" *Cone v. Iverson*, 4 Wyo. 203, 35 Pac. 933, 938 (1894).

²²*Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116 (1896); *Contractors' Machinery & Storage Co. v. Stewart*, 177 Wash. 263, 31 P. (2d) 546 (1934).

²³*Johnson v. Tuttle*, 108 Vt. 291, 187 Atl. 515, 106 A. L. R. 1291 (1936).

²⁴*Kelly v. Oliver Farm Equipment Sales Co.*, 169 Okla. 269, 36 P. (2d) 888 (1934). Ignorance is material where one received the benefits of a conversion unless defendant actually or constructively received the possession of the converted property.

²⁵*Dow v. Brookline Trust Co.*, 308 Mass. 90, 31 N. E. (2d) 13 (1941); *Parker v. Cone*, 105 Vt. 426, 168 Atl. 715 (1933).

²⁶*Penalosa State Bank v. Calista Gram & Mercantile Co.*, 128 Kan. 132, 276 Pac. 70 (1929); *Hooser v. Carlton Bros. & Co.*, 288 S. W. 1095 (Tex. Civ. App. 1926).

²⁷146 Wash. 137, 262 Pac. 123 (1927).

not upon the money received for it,²⁸ and that although money under certain circumstances may become the subject of conversion,²⁹ yet there can be no conversion of money unless it was wrongfully received by the party charged with the conversion or unless such party was under an obligation to return the specific money to the party claiming it.³⁰ The court observed:

"It cannot be said that the bank when it received the money, knowing that it was the proceeds of the crop, and applied it to the indebtedness of Dowling's did so wrongfully or was under any obligation to deliver the specific money. It could have done nothing more than refuse to receive the money on a legitimate indebtedness of Dowling, and then Dowling would have been free, so far as the bank was concerned, to have disposed of it as he saw fit. He could have paid it to Davin or any other of his creditors."³¹

However, in a Kansas case³² in which the operative facts were quite similar³³ and in which the defendant advanced arguments con-

²⁸The lien on the thing does not attach to the money received for it. *Riddle v. Etling*, 84 Cal. App. 460, 258 Pac. 162 (1927); *Scurry v. Quaker Oats Co.*, 201 Iowa 1171, 208 N. W. 860 (1926). In general when converted property is turned into money it loses its identity. *Walker v. First National Bank of Athena*, 43 Ore. 102, 72 Pac. 635 (1903). But where the proceeds are received with knowledge of their source the plaintiff has available other actions besides trover. *U. S. v. Fleming*, 69 F. Supp. 252 (D. C. Iowa 1946); *Smith v. Shellbarger*, 291 Fed. 144 (D. C. Colo. 1923); *State v. Brown County Bank of Long Pine*, 112 Neb. 642, 200 N. W. 866 (1924) (equity will trace proceeds and impose a constructive trust); *State Bank v. Kelly*, 78 Ind. App. 418, 136 N. E. 30 (1922); *Gorin Saving Bank v. Early*, 260 S. W. 480 (Mo. App. 1924) (action at law for money had and received). But an election must be made: *Minneapolis National Bank v. Liberty Nat. Bank of Kansas City*, 72 F. (2d) 434 (C. C. A. 10th, 1934).

²⁹In *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661, 662, 20 L. R. A. (N. S.) 35 (1908), it was said: "Legal currency may be the subject of an action of trover. There is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained."

³⁰In *Larson v. Dawson*, 24 R. I. 317, 53 Atl. 93 (1902), it was said: "The question whether money can be the subject matter of an action of trover generally depends upon whether there is any obligation on the part of the defendant to deliver specific money to the plaintiff."

³¹*Davin v. Dowling*, 146 Wash. 137, 262 Pac. 123, 125 (1927).

³²*Penalosa State Bank v. Calista Grain & Mercantile Co.*, 128 Kan. 132, 276 Pac. 70 (1929).

³³Although the defendant demanded the proceeds from the grain company, it was said in *Webach Corp. v. Emigrant Ind. Sav. Bank*, 264 App. Div. 161, 34 N. Y. S. (2d) 688 (1942), that mere verbal assertion of the right of possession will not be deemed an unlawful exercise of dominion, unless the words are uttered under such

sistent with the reasoning of the *Davin* case, the opposite result was reached. The court pointed out that when the defendant took the money he knew he had no right to it, and although mere receipt of proceeds would not render the defendant liable for conversion if the sale had been lawful, yet when the sale is illegal, this rule has no application. The defendant's liability does not rest on the conversion of the money; rather, a finding that the defendant knowingly received the proceeds of a conversion will justify the implication that the defendant was sufficiently connected with the conversion of the chattel to be held liable in trover.³⁴

The principal case is not merely an application of the more restrictive of these two points of view as to liability, because on the facts of the case, the defendant had a part in the conversion transaction beyond the mere receipt of the proceeds of the sale. Taking the testimony in the light most favorable to the plaintiff, as the court indicated it was bound to do in testing the validity of a directed verdict, it appears that the defendant Perlstein induced Deveno to sell the truck by inferring that he could thereby obtain another loan from Perlstein, and then accepted the full amount of the sale price, not only knowing of its source but also impliedly in furtherance of the negotiation of a new loan. Such conduct might be regarded as "instigation" of a conversion, but at least could clearly come within the general term "participation" by a combination of advising the wrongdoer prior to the conversion and subsequently knowingly receiving the proceeds thereof.³⁵

Under this construction of the situation, the third party defendant fairly comes within the principle that "where several parties unite in an act which constitutes a wrong to another under circumstances which fairly charge them with intending the consequences which follow, it is a very just and reasonable rule of the law which compels each to assume and bear the responsibility of misconduct of all."³⁶

circumstances as to indicate an intention to control possession, and are coupled with an apparent ability to do so. Therefore, since the grain company knew the facts, the demand was as an operative fact no more than a request.

³⁴*Hooser v. Carlton Bros. & Co.*, 288 S. W. 1095 (Tex. Civ. App. 1926).

³⁵It is suggested, however, that the part of the opinion of the Maine court which pertains to this point was dictum as the same results would have been reached even though the truck on which there was an unrecorded mortgage had been transferred to Perlstein who had knowledge of the mortgage because of the construction the Maine court has put on its chattel mortgage recording act—that any mortgage which is unrecorded is invalid as to all except the parties to it, even though others have actual knowledge of it, unless there was actual intent to defraud.

³⁶*Starr v. Bankers' Union of the World*, 81 Neb. 377, 116 N. W. 61 (1908).

By extending liability to persons who contrive to benefit directly from acts infringing on the property rights of others, without themselves actively committing the wrongful acts, the law might serve the salutary purpose of raising standards of business ethics in some quarters, as well as adding stability to the types of security interests readily subject to conversion.

JAMES W. H. STEWART

WORKMEN'S COMPENSATION—REMEDIES OF EMPLOYER OR INSURER AGAINST THIRD PARTY CAUSING INJURY TO EMPLOYEE. [New Jersey]

When an employer, or his insurer, has been compelled to make payment of compensation to an injured employee under workmen's compensation legislation, the need for providing a means of obtaining recovery from an ultimately responsible third party has led to the adoption by almost all states of statutory provisions prescribing the rights of the various parties. Within the scope of such statutory formulae falls the burden of assuring full compensation to the employee, full reimbursement to the employer, and protection from any possibility of injustice to the third party.¹

A recent case which illustrates one manner of coping with the problem of reimbursement from third parties is *United States Casualty Company v. Hercules Powder Company*.² The insurer of an employer, after paying compensation to several employees who had been injured through the handling of defective fuses in the course of their employment, sought reimbursement from the manufacturer of the fuse. On the theory that it was subrogated to the rights of the employer by its policy, which included such a provision, the insurance company based its action on the manufacturer's breach of implied warranty of fitness, and prayed for relief in the amount of loss which had been sustained as a result of that breach—*i. e.*, the compensation paid to the injured employee. The trial court dismissed the complaint of the United States Casualty Company as failing to

¹An excellent expression of the general purpose and method of all workmen's compensation legislation is found in *United States Casualty Co. v. Hercules Powder Co.*, 4 N. J. 157, 72 A. (2d) 190, 193 (1950): "The act was intended to accomplish an economic reform in the legal rights and responsibilities between employer and employee, and to accomplish its purpose it made the employer responsible to his employee for injuries sustained in an accident arising out of and in the course of his employment even though no negligent act of the employer caused the accident and even though the accident was the result of the negligent act of a third party."

²4 N. J. 157, 72 A. (2d) 190 (1950).

state a cause of action.³ The basis for the dismissal was that the insurer was subrogated by the terms of the New Jersey Workmen's Compensation Act⁴ only to the rights of the employee, and that he must therefore bring his action in tort, as this would have been the employee's only remedy. In reversing this decision the Appellate Division held that, aside from the Workmen's Compensation Act, a cause of action in contract for breach of warranty arose in favor of the employer from the circumstances of the case, and that the insurer should therefore be allowed to seek recovery through this remedy to which it was subrogated by the terms of its policy.⁵ On review of the decision of the appellate court, the Supreme Court of New Jersey denied that reimbursement for the compensation could be recovered in an action *ex contractu*, and insisted that for this purpose the plaintiff must bring its case in tort, since under the Workmen's Compensation Act of that state the employer, or his insurer, is subrogated to the right of action of the injured employee only.⁶

The Act preserves for the employee his right of action in tort against the third party, but in the event of recovery in such an action the employee holds for the benefit of the employer or insurer the amount recovered up to the amount of compensation received.⁷ If the employee does not bring such an action within a prescribed period, the employer or insurer may do so, and in the event of recovery, he holds for the benefit of the employee any amount in excess of the compensation paid.⁸ That this assignment of the employee's right of action under the Act affords the insurer his exclusive remedy to

³See *United States Casualty Co. v. Hercules Powder Co.*, 4 N. J. 157, 72 A. (2d) 190, 193 (1950).

⁴N. J. Stat. Ann. (West, 1940) 34:15.

⁵*United States Casualty Co. v. Hercules Powder Co.*, 4 N. J. Super. 444, 67 A. (2) 880 (1949).

⁶The statute provides that the suit of an employer against the third party "shall be only for such right of action that the injured employee or his dependents would have had against the third person or corporation. . ." N. J. Stat. Ann. (West, 1940) 34:15-40 (f).

⁷The statute provides that if the sum recovered by the employee from the third party is in excess of the expenses of the suit and the attorney's fees, the employer, or his insurer, shall be entitled to be reimbursed for the compensation paid. N. J. Stat. Ann. (West, 1940) 34:15-40 (b). This provision merely gives the employer a right of action in rem against the money received by the employee. See *Feinsod v. L. & F. Const. Co.*, 16 N. J. Misc. 514, 2 A. (2d) 357, 360 (1938), *aff'd* 17 N. J. Misc. 65, 4 A. (2d) 692 (1939). Other jurisdictions go so far as to grant the employer a lien on the award, judgment or fund out of which the employee is paid by the third party. The Illinois statute illustrates this type of provision. Ill. Rev. Stat. (1947) c. 48, § 166.

⁸N. J. Stat. Ann. (West, 1940) 34:15-40 (f).

recover the amount of compensation paid was the opinion of the majority of the court. It was not denied that the employer's common law right of action in contract still existed, but it was declared that in an action thereon the measurement of damages could not include the amount of compensation paid under the Act.⁹

Perhaps the fundamental reason for this restriction of the employer-insurer rights lies in the fact that the New Jersey Workmen's Compensation Act, along with the statutes of several other states, leaves to the employee his common law right of action against the negligent third party even after recovery of compensation from the insurer of the employer.¹⁰ In fact, while the New Jersey court was considering the principal case an action in tort had been brought against the Powder Company by the injured employees,¹¹ and was still undetermined. Thus being the situation, if the insurer were allowed to recover the payment of compensation from the third party on the grounds of any action other than that of the employee to whose rights he is subrogated under the Act, the result would be to subject the third party to double liability for the injury caused to the employee.

Though this decision affords protection to the negligent third party, it seems equally clear that it works a hardship on the employer. At common law, if an employee recovered a judgment against his employer for injuries and loss sustained by reason of defective equipment, the employer could include the amount of such a recovery in the measurement of damages in a suit against the manufacturer of the faulty equipment on the basis of implied warranty.¹² To declare that for the purpose of an employer's recovering a loss sustained by reason of payment of compensation to an employee similarly injured the remedy under the Act is exclusive is in effect to deprive the employer of his common law right of action to the extent of loss sustained by reason of the payment of compensation. Certainly such a ruling operates to deprive an employer of the full amount of

⁹United States Casualty Co. v. Hercules Powder Co., 4 N. J. 157, 72 A. (2d) 190 (1950).

¹⁰N. J. Stat. Ann. (West, 1940) 34:15-40.

¹¹See United States Casualty Co. v. Hercules Powder Co., 4 N. J. 157, 72 A. (2d) 190, 193 (1950).

¹²Dushane v. Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810 (1886); Manning Mfg. Co. v. Hartol Products Corp., 99 F. (2d) 813 (C. C. A. 2d, 1938); Standard Oil Co. of Indiana v. Daniel Burkhardtmeier Co-op. Co., 333 Ill. App. 338, 77 N. E. (2d) 526 (1948); Boston Woven-Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781 (1901); London Guarantee & Accident Co. v. Strait Scale Co., 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 986 (1929).

recovery he formerly could have received under his common law right of action in contract, and forces him to carry the burden in a tort action of proving negligence on the part of the third party, while subjecting him to the defense of the employee's contributory negligence.

In jurisdictions whose statutes are similar to the New Jersey Act with respect to recovery from third parties,¹³ it seems clear that the result reached in the *Hercules Powder Company* case¹⁴ is inevitable under the circumstances involved. Wherever the statute expressly preserves the employee's common law cause of action, the courts find it more just to impose this hardship on the employer or insurer than to require the third party to bear double liability for his wrong.

Such a result must also be reached in jurisdictions embracing the federal type of statute,¹⁵ as is illustrated in cases involving the United States Employees' Compensation Act. It is held that unless a specific assignment of the employee's cause of action has been made to the employer, the United States, that right of action still exists in the employee.¹⁶ Thus, under the Federal Act the right of action of the injured employee against the third person continues to exist in the employee by necessary implication from the terms of the Act.¹⁷ States whose statutes are similar to the Federal Act in this respect do not expressly give the employee the right to recover compensation and also to sue the third party, but by implication they arrive at that result. Typical among these states is Texas.¹⁸

¹³Among the states whose statutes provide that an injured employee has a right to recover compensation and also sue the third party for negligence are the following: Ga. Code (Harrison, 1933) § 114-403; *Sheffield Co. v. Phillips*, 69 Ga. App. 41, 24 S. E. (2d) 834 (1943). Ill. Rev. Stat. (1947) c. 48, § 166; *Walsh v. Central Cold Storage Co.*, 324 Ill. 402, 58 N. E. (2d) 325 (1945). New York State Workmen's Compensation Law, Consol. Laws (1945) c. 67, § 29; *Taylor v. New York Central R. Co.*, 294 N. Y. 397, 62 N. E. (2d) 777 (1945).

¹⁴*United States Casualty Co. v. Hercules Powder Co.*, 4 N. J. 157, 72 A. (2d) 190 (1950).

¹⁵United States Employees' Compensation Act, 39 Stat. 742 (1916), 5 U. S. C. A. § 751 et seq. (1949).

¹⁶*Lassell v. City of Gloversville*, 217 App. Div. 323, 217 N. Y. Supp. 128 (1926).

¹⁷The pertinent term of the United States Employees' Compensation Act, 39 Stat. 742 (1916), 5 U. S. C. A. § 776 (1949) provides that the United States may require the injured employee to assign his claim to the government or to prosecute his claim against the third party. This section is interpreted as implying that the employee's common law cause of action must remain in him until a specific assignment is made. *Lassell v. City of Gloversville*, 217 App. Div. 323, 217 N. Y. Supp. 128 (1926). *Accord*, *Cary v. Burriss*, 169 Ore. 24, 127 P. (2d) 126 (1942).

¹⁸Tex. Rev. Stat. (Vernon, 1936) Art. 8307, § 6A; *Galveston, H. & S. A. Ry. Co. v. Wells*, 15 S. W. (2d) 46 (Tex. Civ. App. 1929); *Hoffman v. Houston Clinic*, 41 S. W. (2d) 134 (Tex. Civ. App. 1931).

Other jurisdictions have met the problem of avoiding the subjection of third parties to the possibility of double liability by provisions embodying rules for an election of remedies by the injured employee.¹⁹ Thus, in Alabama it has been held that the right granted to the employee under the Alabama statute²⁰ was merely the right to elect to proceed against the employer or the third party causing the injury, and that the acceptance of benefits from the employer constitutes an election binding on the employee so that he cannot thereafter proceed against the third party.²¹ It is clear that in a jurisdiction requiring such an election of remedies, the argument against allowing the employer to recover his compensation payment in an action *ex contractu* for fear of rendering the third party subject to double liability must fail. The action of the employee in his own right against the third party is barred by his election.

A statutory provision similar to the New Jersey Workmen's Compensation Act, but with an additional limitation which might afford a solution to the problem at hand is found in Indiana.²² It is pointed out in *Weis v. Wakefield*²³ that under the Indiana Workmen's Compensation Act²⁴ an injured workman may proceed against both his employer for compensation and a negligent third party for damages, and may obtain an award against the employer and also a judgment against the third party; but at that point he must elect to recover from one or the other of the defendants, and recovery from one bars recovery from the other.²⁵ The provision establishing the right of

¹⁹Among these states are: Colo. Stat. Ann. (1935) c. 97, § 366; Riss & Co. v. Anderson, 108 Colo. 78, 114 P. (2d) 278 (1941). Minn. Stat. (Mason, 1940 Supp.) § 4272-5 (1); Wagner v. City of Duluth, 211 Minn. 252, 300 N. W. 820 (1941). 2 Mich. Comp. Laws (1929) § 8454; Quick v. Western Michigan Transportation Co., 294 Mich. 402, 293 N. W. 696 (1940).

²⁰Ala. Code Ann. (West, 1940) Tit. 26, § 311.

²¹See Employers Ins. Co. v. Harrison, 33 S. (2d) 264, 267 (Ala., 1947).

²²Ind. Stat. Ann. (Burns, 1949 Supp.) § 40-1213.

²³111 Ind. App. 106, 38 N. E. (2d) 303 (1941).

²⁴Ind. Stat. Ann. (Burns, 1949 Supp.) § 40-1201 et seq.

²⁵Ind. Stat. Ann. (Burns, 1949 Supp.) § 40-1213. The provision that the employer may collect from the third party in the name of the employee indicates that he may take advantage of a judgment which was obtained by the employee against a third party prior to the employee's election to receive compensation. It appears from the statute that an assignment of such a judgment takes place by operation of law upon receipt of compensation by the employee. The term "may" in the subsequent provision that in order to collect the employer "may commence an action at law" against the third party would seem to be directory rather than mandatory, since the commencement of an action at law in the employee's name would be barred by the previous judgment on the merits. Ind. Stat. Ann. (Burns, 1949 Supp.) § 40-1213.

the employee to proceed both under the Act against the employer and on his common law right against the tortfeasor precludes the possibility of the injured employee's being unduly restricted or suffering by reason of a compulsory election of remedies before he can ascertain which will be the more beneficial to him. The further provision that recoveries from the employer and from the third party are mutually exclusive successfully insulates the third party from the threat of double liability. In the absence of this threat to the third party the basis for the New Jersey court's argument, that the employer's remedy under the Act must be exclusive, disappears, and there remains no valid grounds on which the employer should be deprived of his common law right to recover in contract for any loss he has sustained by reason of a breach of warranty.²⁶

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²⁶Virginia has adopted a similar provision: Va. Code Ann. (Michie, 1950) § 65-108; *Stone v. George W Helme Co.*, 184 Va. 1051, 37 S. E. (2d) 70 (1946).

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