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Evidence-Admissibility in Negligence Action of Evidence of Prior Acts of Negligence in Similar Situation [Dallas Ry. & Ter. Co. v. Farnsworth, Tex. 1950]

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CASE COMMENTS

BANKRUPTCY—REVIVAL OF LIEN IMPAIRED BY REMOVAL OF MORTGAGED CHATTEL AS CONSTITUTING PREFERENTIAL TRANSFER. [Federal]

A measure for the protection of creditors who have extended credit or granted loans in reliance on the debtor's possession and apparent unfettered ownership of property is embodied in the Federal Bankruptcy Act provision for the avoidance by the trustee of transfers of such property under circumstances which would constitute a "preference," provided that the transferee knew or had reason to know of the debtor's insolvency at the time of the transfer.[1] The effect of Section 60 is to defeat the rights of secured creditors in favor of the trustee in bankruptcy as representative of all creditors of the bankrupt.[2] Unless these provisions are construed by the courts with great care and applied only after full consideration of the interests of the parties in each suit, they could seriously hamper the utility of ordinary security devices.[3]

A departure from established principles in construing Section 60 is apparent in the case of *England v. Moore Equipment Co.*,[4] involving the avoidance of a transfer of property under a chattel mortgage. The mortgage, valid in its inception and duly recorded in the county of its execution, was obtained by the transferee on certain personal property of the transferor, who subsequently removed the mortgaged property to a different county. A California statute provides that in the event of such removal, the mortgage will not be affected for a period of thirty days, but that after that period the property will be exempt

[1]"A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class." Bankruptcy Act (1950) § 60a(1), 11 U. S. C. A. § 96a(1) (Supp. 1950). "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. . ." Bankruptcy Act (1950) § 60b, 11 U. S. C. A. § 96b (1943).

[2]The assets of a bankrupt comprise a trust which is administered by the trustee for the creditors as beneficiaries therof. 2 Collier, Bankruptcy (14th ed. 1950) 1633.

[3]See Snedeker, Security Devices and Sec. 60A of the Chandler Act (1943) 22 Ore. L. Rev. 307, 329.

[4]94 F. Supp. 532 (N. D. Cal. 1950).

from the operation of the mortgage, except as between the parties thereto, until the mortgagee either has the mortgage recorded in the new county or takes possession of the property as prescribed in subsequent code sections.[5] More than thirty days after the removal, the mortgagee, having reason to know of the mortgagor's then existing insolvency, and having failed to record the mortgage in the new location, seized the property and sold it pursuant to the terms of the mortgage, but not in compliance with the code provisions. Less than four months thereafter the mortgagor filed a petition in bankruptcy and was adjudicated a bankrupt. His trustee instituted suit for recovery of the property and the federal district court granted the plaintiff judgment in the amount of the value of the property, whereupon the defendant moved for a new trial which was denied in the instant decision.

Despite the clear language of the California statute that the property in question was exempt from the operation of the mortgage, "except as between the parties thereto,"[6] the court reasoned that the mortgage was not only void as to creditors at the expiration of thirty days after removal, but was "no longer in existence"[7] after that time, unless it had been revived by the statutory methods provided for. The court took the position that the mortgagee's seizure of the property with intent to dispose of it under the terms of the mortgage was not sufficient to revive the lien; rather the mortgagee must gain possession for the purpose of selling it in the particular manner prescribed in the statute. From this reasoning it was concluded that the seizure and sale of the property was invalid as between the parties, amounted to a conversion of the property, and constituted a preference within the four months period prior to bankruptcy.

It seems hardly disputable that the court simply ignored the statutory phrase "except as between the parties thereto" in determin-

[5]Cal. Stat. Ann. (Deering, 1941) § 2965. Subsequent sections, §§ 2966 and 2967, authorize the seizure by the mortgagee of property removed by the mortgagor from the county of recordation even before the debt has become due, and provide for its sale as a pledge for the payment of the debt under a prescribed procedure.

[6]Cal. Stat. Ann. (Deering, 1941) § 2965; England v. Moore Equipment Co., 94 F. Supp. 532, 534 (N. D. Cal. 1950).

[7]England v. Moore Equipment Co., 94 F. Supp. 532, 535 (N. D. Cal. 1950). After concluding that the mortgage was no longer in existence, the court made the statement that "The mortgagee at the time of sale was in the same position as a mortgagee in possession under an unrecorded chattel mortgage." 94 F. Supp. 532, 535 (N. D. Cal. 1950). This remark is apparently irreconcilable with the court's theory that the mortgage was non-existent, and is inconsistent with the conclusion that, as between parties, the sale under the terms of the mortgage was invalid and amounted to a conversion.

ing that the mortgage was "no longer in existence" and that the property was, unqualifiedly, "exempt from the operation of the mortgage."[8] By the terms of the statute the mortgage was still valid as between the parties thereto, who continued to be bound thereby, regardless of the statutory effect on the rights of third persons in the property. Thus, the seizure and sale, being consistent with the terms of the mortgage, could not have been inconsistent with the property interests of the mortgagor whose rights in the property were governed by the terms of the mortgage, and the court's theory of conversion must be in error.[9]

It appears that the controlling issue to be determined was not whether the mortgage was "no longer in existence" at the time of the sale,[10] but whether the seizure and sale of the property, though valid as between the parties, constituted a voidable preference within the meaning of Section 60 of the Bankruptcy Act.[11] All other elements of a voidable preference being present, the decision on this question in the *England* case depends upon whether the chattel mortgage would be deemed to have been made within the four months prior to bankruptcy. To determine this issue, a preliminary consideration of the applicability of the doctrine of "relation back" becomes necessary. Under that doctrine, when the mortgaged property is exposed to the hazard of supervening rights of third parties, the mortgagee must reperfect his lien, but such reperfection revives the mortgage and relates its validity to the date of its original execution. Only under this theory is the question as to whether a revival occurred relevant in determining the date a transfer is deemed to have been made. Here if no revival had occurred, the transfer would be deemed to have been made within the four months,[12] whereas if the mortgage was revived, its validity would date from the time of original perfection, which was without

[8] England v. Moore Equipment Co., 94 F. Supp. 532, 535 (N. D. Cal. 1950).

[9] A conversion is a "distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein, or in derogation, exclusion, or defiance of such title or right." 53 Am. Jur. 819.

[10] That the court considered this question as the controlling issue is clear from its statement that "There is presented to the Court the question as to whether or not the mortgage, though valid in its inception, was no longer in existence at the time of the private sale...." England v. Moore Equipment Co., 94 F. Supp. 532, 534 (N. D. Cal. 1950).

[11] The instant case arose prior to the adoption of the 1950 Amendments to the Bankruptcy Act and thus is governed by the Chandler Act, Bankruptcy Act (1938) § 60, 11 U. S. C. A. § 96 (1943).

[12] "If any transfer... is not... perfected... prior to the filing of a petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of the petition." Bankruptcy Act (1950) § 60a(2), 11 U. S. C. A. § 96a(2) (1950).

the four months period. A repudiation of this doctrine means that the original transfer is ineffective until reperfected by recordation or seizure in the new locality, and that the transfer is then judged as of the date of the ultimate perfection. This theory renders the question of the actual occurrence of a revival irrelevant, since the date of ultimate perfection, if it occurred, was within the four months period.

The court's conclusion that no revival had occurred in the principal case because the mortgagee lacked the proper subjective intent in taking possession seems dubious at best. Since the subjective intent of a mortgagee who seizes property under the terms of a chattel mortgage certainly cannot affect the obvious warning to third persons afforded by seizure and subsequent possession, it seems most unlikely that the legislature would have the validity of the mortgage as to third parties controlled by that intent. Clearly a more reasonble interpretation would have been that the mortgage, never having lapsed as between parties, was revived as to general creditors by the mortgagee's gaining possession. Under this interpretation the court would have been faced squarely by the question of whether or not to apply the doctrine of relation back.

Since the *England* case opinion is largely concerned with the question of whether the mortgage had been revived, a reasonable inference can be drawn that if the court had concluded that the mortgage was revived, it would have applied the theory of relation back. Despite the general repudiation of the theory in cases where no completed transaction has occurred,[13] its applicability in the circumstances of the instant case is highly desirable. If the courts refuse to apply it to valid transfers which have once "lapsed," but which have been reperfected within four months of bankruptcy, the security interest of a creditor in property which has been removed to another county for over a statutory period, or which has been removed for even a short time to a state where a lien creditor could have prevailed over the "protected" mortgagee at home,[14] will be defeated. In such cases a mortgagee might be unaware of the removal, might be unable to pre-

[13]Corn Exchange National Bank v. Klauder, 318 U. S. 434, 63 S. Ct. 679, 87 L. ed. 884 (1943); Tyler State Bank and Trust Co. v. Bullington, 179 F. (2d) 755 (C. A. 5th, 1950); Bridgewater v. Shaefer, 164 F. (2d) 447 (C. C. A. 5th, 1947).

[14]A few states continue to deny protection to the valid interests of out of state mortgagees in property which has been imported and subjected to the supervening interests of creditors or purchasers in the jurisdiction of the forum. Castle v. Commercial Invest. Trust Corp., 100 Colo. 191, 66 P. (2d) 804 (1937); Universal Credit Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1933); First Nat. Bank of Jamestown v. Sheldon, 161 Pa. Super. 265, 54 A. (2d) 61 (1947); Note (1950) 7 Wash & Lee L. Rev. 45, 47.

vent the removal of the property to another jurisdiction, or might justifiably require more than the statutory time to locate the property after removal. In any event such a construction would require an unusually close and burdensome supervision by the mortgagee if he is to protect his security interests. These hazards would be imposed on the secured creditor for the benefit of general creditors who had not been sufficiently astute to acquire security, and who might not have relied on the apparent clear title of the mortgagor to the property involved.[15]

On the other hand, it is apparent that a literal reading of the Act[16] does not support the application of the doctrine of relation back in such cases. Also, it must be realized that the intent of Congress in adopting Section 60 in its present form into the Bankruptcy Act has been to guard against secret liens and to arm innocent creditors with a process for avoiding them.[17] Once mortgaged property is brought into a jurisdiction in which there is no record of a charge upon it, a secret lien exists so far as the creditors and purchasers in the new location are concerned. That a measure of protection should be afforded even general creditors in that location in their reliance on the apparent unencumbered ownership of the mortgagor does not seem unreasonable. Nor does the fact that the mortgagee might be less culpable where he has once made a completed transaction in the original locality, than where he never made such a perfected transfer, detract from the position of subsequent good faith creditors whom the Act seeks to protect against secret liens.

It would afford a solution to the problem at hand for all jurisdictions to provide protection to security interests in property which has

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[15]Also, the secured creditor who had not been able, as a practical matter, to locate the property for the purpose of recording his lien in the new location, might be worthy of favorable consideration even though bankruptcy ensued while his lien had never been reperfected. He would inevitably lose his security interest in the event of the debtor's bankruptcy after removal unless his transfer could be judged as of the date of its original perfection. That circumstances might exist which would justify such a ruling is readily understandable.

[16]"For the purposes of subdivisions (a) and (b) of this section, a transfer of property...shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." Bankruptcy Act (1950) § 60a(2), 11 U. S. C. A. § 96a(2) (1950).

[17]Justice Jackson for the majority of the United States Supreme Court has stated that "for thirty-five years Congress has consistently reached out to strike down secret transfers, and the courts have with equal consistency found its efforts faulty or insufficient to that end." Corn Exchange National Bank v. Klauder, 318 U. S. 434, 438, 63 S. Ct. 679, 682, 87 L. ed. 884, 887 (1943).

been imported without knowledge or consent of the mortgagee from the jurisdiction or recordation, and to allow a reasonable time after such notice or consent for perfection in the new locality. What constitutes a reasonable time should depend on the circumstances of each case.[18] If this reform could be accomplished, there would be no need for the fiction of relation back. Since no supervening rights could defeat the mortgage until a reasonable time had lapsed after notice or consent, a mortgagee would be protected against the trustee in bankruptcy where he either had never rerecorded and bankruptcy had ensued before the lapse of a reasonable time, or had rerecorded within a reasonable time followed by bankruptcy within four months. The situations of all the parties would be considered in determining the time element, thus allowing thorough balancing of the equities of all concerned.

The closest approach to this ideal situation immediately available is the application of the doctrine of relation back in cases where a completed transaction has once been perfected, and where the equities of the parties would best be protected thereby. Although it has been said that "the doctrine of relation back with respect to chattel mortgages ... has received its death blow,"[19] as a result of the notable case of *Corn Exchange National Bank v. Klauder*,[20] it seems to be an unnecessarily broad extension of that decision to say it governed situations such as that included in the *England* case. In the *Klauder* case the trustee in bankruptcy was allowed to avoid the assignment of certain claims where no notice of the assignments had been given to the obligor by the assignees. There had never been a complete transaction.[21] Consequently from the time of the original transfer to the filing of the petition in bankruptcy there was a possibility of intervening rights prevailing over the interests of the assignees.

The significance of the question involved in the *England* case is

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[18]Under the Uniform Conditional Sales Act, 2 U. L. A. § 14 (1922) a vendor-mortgagee is required to refile his lien in the new location within ten days after notice of the filing district to which the property has been renewed. The greater equity in starting the time running from the date of notice rather than from the date of removal is apparent, but the arbitrary stipulation of ten days could no doubt result in inequitable results in some cases.

[19]Snedeker, Security Devices and Sec. 60A of the Chandler Act (1943) 22 Ore. L. Rev. 307, 317.

[20]318 U. S. 434, 63 S. Ct. 679, 87 L. ed. 884 (1943).

[21]The requisite notice to preclude possible superior rights in subsequent bona fide purchasers of the accounts had not been given. Thus, the court found that the transfer had not been perfected within § 60a of the Bankruptcy Act. Corn Exchange National Bank v. Klauder, 318 U. S. 434, 63 S. Ct. 679, 87 L. ed. 884 (1943).

not to be minimized. So long as there are state laws which deny protection to valid security interests of mortgagees in property imported from the state of recordation, and which invalidate liens on property removed from one county to another for an arbitrarily appointed period of time, and without inquiry as to the knowledge or consent of the lienor, there is need for the doctrine of relation back. A consideration of Section 60a of the Bankruptcy Act which will allow investigation and protection of the equities of the parties is essential to the continued usefulness of a chattel mortgage as a practical security device.

THOMAS R. McNAMARA

CONFLICT OF LAWS—BASIS FOR DETERMINING VALIDITY OF REMARRIAGE IN VIOLATION OF DIVORCE DECREE OF ANOTHER JURISDICTION. [New York]

When a party who has been granted a divorce to which a statutory prohibition attaches against remarriage within a specified time goes to another state and remarries in violation of that prohibition, the courts are in disagreement not only as to the validity of the marriage but also as to what is the proper basis for determining its validity.[1] If the decree is a clearly designated interlocutory decree of divorce, the remarriage is unanimously conceded to be invalid, for the parties to the divorce have not yet had the bonds of matrimony completely severed.[2] But when the decree is absolute in form and the disability to remarry immediately is imposed by local statute, a perplexing problem in conflict of laws is presented.

The recent New York decision of *In re Peart's Estate*[3] illustrates the difficulty in acute form, for consideration had to be given to the varying rules of law in the states of the divorce, of the remarriage and of the marital domicile. The case arose from a contest between the petitioner-husband and the objectant over the administration of the estate of the deceased wife. Petitionêr had been married previously in New York but had separated from his wife and had gone to Virginia and had there established a bona fide residence. A few years later petitioner obtained a divorce *a vinculo* in Virginia and the decree, con-

[1]If the remarriage occurs within the prohibiting state there is no question about the marriage being treated as invalid. 27 C. J. S., Divorce § 182 and cases cited therein.

[2]Stumberg, Conflict of Laws (2d ed. 1951) 287; Goodrich, Conflict of Laws (3d ed. 1949) 359.

[3]277 App. Div. 61, 97 N. Y. S. (2d) 879 (1950).

forming to a statute,[4] provided that neither party should marry another within four months of the decree. However, within four months petitioner married decedent, a New York resident, in Maryland, and they moved to and lived in New York until the latter's death. On an appeal from a holding in favor of petitioner[5] the argument was raised that the Virginia divorce was, in effect, a decree nisi for a period of four months, that the Maryland marriage was void and should be treated so in every state and, therefore, that the petitioner was not the husband of the decedent.

In a three-to-two decision the New York Supreme Court Appellate Division held that the Virginia decree of divorce was absolute and that the second marriage in Maryland was valid. The majority opinion pointed out that there was no provision in Virginia for an interlocutory decree, that the absolute decree merely contained a prohibition against remarriage and that such a prohibition "by the weight of authority in this country would have no extra-territorial effect."[6] The opinion stressed the public policy of New York to protect the marital status of its residents and to recognize that a marriage contracted in a state other than the state of prohibition is valid in New York if valid in the state where contracted.

The dissent was based on the theory that petitioner did not have capacity to marry in Maryland because the Virginia decree was the equivalent of an interlocutory decree and the statute does not merely prohibit remarriage but actually suspends the finality of the decree in regard to remarrying. It was argued that the rule that a prohibition has no extraterritorial effect was of no consequence here since the rule only applied where there has been a final decree.

The majority of the court acknowledged the significance of the law of the state of remarriage by purporting to be willing to be controlled by any rule of the Maryland court as to the validity of a marriage in Maryland in defiance of the Virginia statute. A considerable number of jurisdictions have recognized the law of the state of re-

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[4]Va. Code Ann. (Michie, 1950) § 20-118. At the time of divorce it was Va. Code (1919) § 5113.

[5]James Peart was petitioning for letters of administration of the decedent's estate. In the Surrogate court the issue raised was that the petitioner's divorce from his first wife was invalid for lack of jurisdiction, but that objection was resolved in favor of petitioner. The issue of the statutory prohibition was first raised on this appeal.

[6]In re Peart's Estate, 277 App. Div. 61, 97 N. Y. S. (2d) 879, 882 (1950).

marriage as the basis of determining the validity of such marriages,[7] thereby adhering to the general rule that a marriage valid where contracted is valid everywhere.[8] New York is probably the leading proponent of this doctrine, having initiated the policy in the case of *Van Voorhis v. Brintnall*[9] where it appeared that, though the New York statute prohibited the guilty party in an action for divorce for adultry from remarrying during the life of the innocent party, the guilty party had gone to Connecticut and had married and returned the same day to live in New York. The court held that the validity of the marriage was determined by the place where contracted and that the action of the New York statute did not extend beyond territorial authority. Other states have similarly ruled that the policy of recognizing such a marriage because valid where contracted is so strong as to override their own prohibition statutes. These states in effect declare that their statutes are to have no extraterritorial effect.[10]

However, in the *Peart* case the court, after stating its readiness to follow Maryland law, decided that there were no cases directly in point and that in such absence of a Maryland decision the case would be treated as if the marriage had occurred in New York. It then mentioned the Maryland case of *Dimpfel v. Wilson*[11] evidently as indicating that if such a marriage were ruled on in Maryland it would be held valid; and it is true that the Maryland court there held that a marriage was valid when a party suffering under the prohibition in New York remarried in the District of Columbia. What the New York court seemed to overlook was that the Maryland court stressed the fact that "what should properly govern us in this case is the law of the District, when the marriage took place, and the construction placed upon the statute of New

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[7]Loughran v. Loughran, 292 U. S. 216, 54 S. Ct. 684, 78 L. ed. 1219 (1934); Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560 (1913); In re Ommang's Estate, 183 Minn. 92, 235 N. W. 529 (1931); Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505 (1881); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897); Hoagland v. Hoagland, 27 Wyo. 178, 193 Pac. 843 (1920).

[8]Loughran v. Loughran, 292 U. S. 216, 54 S. Ct. 684, 78 L. ed. 1219 (1934); 2 Beale, The Conflict of Laws (1st ed. 1935) 669; Goodrich, Conflict of Law (3d ed. 1949) 360.

[9]86 N. Y. 18, 40 Am. Rep. 505 (1881). It should be noted that New York's statute prohibits only the guilty party from remarrying and is considered penal in nature, but the Peart case and the cases cited in note 7, supra, show that this doctrine of looking to the law of the state of remarriage is used as well when both parties are prohibited.

[10]Crouse v. Wheeler, 62 Colo. 51, 158 Pac. 1100 (1916); Farrell v. Farrell, 190 Iowa 919, 181 N. W. 12 (1921); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897).

[11]107 Md. 329, 68 Atl. 561 (1908).

York, where the decree was passed."[12] This language would seem to imply that in such a situation as the principal case, Maryland would be inclined to follow the construction of the Virginia statute and declare the marriage invalid.[13]

Thus, it would seem that Maryland actually may be aligned with the decisions that recognize the law of the state where the prohibition decree is issued as the basis for determining the validity of the remarriage in another state.[14] The states using this theory contravene what appears still to be the general rule that prohibition statutes have no extraterritorial effect.[15] They consider that the best policy is to let the state of divorce determine the status of the parties for all marital purposes. In such cases the court of the forum will accede to either an express legislative provision or a judicial construction by the prohibiting state giving extraterritorial effect. This view would seem to be based on the vested rights theory,[16] since these courts look to the rights of the parties acquired under the law of the state granting the divorce.

The court in the *Peart* case recognized the validity of the holding in the leading Virginia case of *Heflinger v. Heflinger*[17] as to the effect to be given to such a remarriage when a subsequent suit is brought in Virginia by Virginia residents, but it refused to be bound by what it considered dictum as to the extraterritorial effect that the Virginia

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[12]Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561, 563 (1908). Though using the double basis of the law of the state of remarriage and the law of the prohibiting state worked out well in this case, the Maryland court is likely to encounter trouble if a case arises in which there is a conflict between the two state's rules of law.

[13]The court also referred to Bannister v. Bannister, 181 Md. 177, 29 A. (2d) 287 (1942) which was a case involving the validity of a marriage entered into in California by a person who had not had an interlocutory decree declared final, although entitled to do so. At a later date the California court, by statutory authority, entered a nunc pro tunc order making the decree final at a date previous to the marriage. The Maryland court held this marriage valid and said: "It is now the settled law that marriages are valid everywhere if the requirements of the marriage laws of the state where the contract [of marriage] takes place are compiled with; and one of the elements of a marriage relation is the capacity of the parties to enter into the marriage contract." 29 A. (2d) 287, 288.

[14]Means v. Means, 40 Cal. App. 469, 104 P. (2d) 1066 (1940); Johnson v. State Compensation Com'r, 116 W. Va. 232, 179 S. E. 814 (1935).

[15]27 C. J. S. 842.

[16]The vested rights theory is one of the three principal theoretical bases of the the Conflict of Laws in this country. Under this theory the rights or obligations arising in the foreign state are said to be enforced by the forum. This is deemed to be different from the foreign law operating in the forum at the will of the forum as it does under the comity theory. Under the third, or local law, theory the forum is said to create rights and obligations by its own law, but fashioning them by the law of the foreign state. See Goodrich, Conflict of Laws (3d ed. 1949)9.

[17]136 Va. 289, 118 S. E. 316 (1923).

court had declared should be given by the courts of any other state. In the *Heflinger* case the prohibited party had married another Virginia resident in Maryland and they had returned to Virginia to live. The court held that the second marriage was void, under an exception to the general rule that a marriage valid where contracted is valid everywhere;[18] the controlling factor here was that the statute went further than a mere prohibition, instead declaring that the bond of matrimony is not deemed to be dissolved as to any marriage within a six month period (now four) subsequent to the decree. The New York court argued that the Virginia court went to unnecessary length in pronouncing that the marriage was invalid even in Maryland and declaring that the Maryland court would be under a duty to so hold if the question should come before it.[19]

The different results that can be reached from similar facts when one court uses the state of remarriage basis of validity and the other uses the state of prohibition is graphically illustrated by comparing the West Virginia case of *Johnson v. State Compensation Com'r*[20] and the principal New York case. Both cases involved the Virginia statute of prohibition and its interpretation in the *Heflinger* case. The West Virginia court held that a marriage entered into in West Virginia by a

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[18]The court said, "Undoubtedly, the general rule is that a marriage valid where performed is valid everywhere, but there are exceptions to the rule as well established as the rule itself. These exceptions are generally embraced in two classes: 1st, Marriages deemed contrary to the laws of nature as generally recognized in Christian countries, and include only those which are void for polygamy or incest; 2nd, Marriages forbidden by statute because contrary to the public policy of the state.... The marriage in the case in judgment was declared void by the trial court under the second class above, as contrary to the public policy of the state." Heflinger v. Heflinger, 136 Va. 289, 303, 118 S. E. 316, 320 (1923).

[19]Here the Virginia court said: "If this question had been raised in Maryland, instead of Virginia... it would have been the duty of the Maryland court to have given effect to the [Virginia] statute.... Such would seem to be proper application of the full faith and credit clause of the federal Constitution." Heflinger v. Heflinger, 136 Va. 289, 309, 118 S. E. 316, 322 (1923). Perhaps the New York court could have emphasized its point by indicating that the Virginia court in the Heflinger case relied upon Kinney v. Commonwealth, 30 Gratt. (71 Va.) 858, 32 Am. Rep. 690 (1878) and quoted the rule there laid down that "the essentials of the marriage contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated." Heflinger v. Heflinger, 136 Va. 289, 306, 118 S. E. 316, 320 (1923). Under the facts of the principal case, although James Peart might have still been a domiciliary of Virginia at the time of the marriage in Maryland, it is clearly shown that there was no intention to make Virginia the matrimonial residence and thus there would seem to be less reason for the Virginia law to have the extraterritorial effect that the Virginia court proclaimed.

[20]116 W. Va. 232, 179 S. E. 814 (1935).

party prohibited by a Virginia divorce decree was void because that court would give full effect to the Virginia statute. It was stated that "Such is the Virginia law, and William's [the prohibited party] status must be measured thereby."[21] But the *Peart* case reached exactly the opposite result and declared a similar marriage valid in spite of the fact that the Virginia court had said that there was in effect only an interlocutory decree for four months in regard to a subsequent marriage.

A third basis used in determining the validity of such marriages is the law of the domicile of the prohibited party at the time of the marriage.[22] The states using this approach evidently feel that the state of the party's domicile has such an interest in its citizen that it should determine his status. Thus, it has been held in Oregon that a party domiciled in Washington and prohibited by its statute could not contract a valid marriage in British Columbia, because the law of his domicile followed him there.[23] The Washington court upheld the validity of a marriage where the evidence showed that the prohibited party married another Washington resident in Vancouver where both had gone with the intention of establishing a new domicile, even though shortly afterwards they returned and lived in Washington.[24] At least one state even has a specific statute invalidating a marriage in that jurisdiction of a non-resident suffering under a prohibition in his resident state.[25]

It might seem reasonable to assume that the interpretation as to extraterritorial effect with a state gives its own prohibition statute would be an indication of the effect it will give another state's statute. For example, New York does not give its own statute extraterritorial effect, and in the principal case it refused to recognize the extraterritorial effect of the Virginia statute. On the other hand, the West Virginia court gave its statute extraterritorial effect by declaring that a marriage contracted in Ohio by a West Virginia resident suffering under its prohibition was void.[26] Subsequently the West Virginia court gave the Virginia statute extraterritorial effect by declaring that a marriage contracted in West Virginia by a party prohibited by a

[21]Johnson v. State Compensation Com'r, 116 W. Va. 232, 179 S. E. 814, 815 (1935).

[22]Goodrich, Conflict of Laws (3d ed. 1949) 358.

[23]Huard v. McTeigh, 113 Ore. 279, 232 Pac. 658 (1925).

[24]Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45 (1910).

[25]Wis. Stat. (1947) § 245.04. See Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, 313 (1917).

[26]McManus v. State Compensation Com'r, 113 W. Va. 566, 169 S. E. 172 (1933).

Virginia divorce decree was void.[27] Thus, though opposite results were reached, the two courts were consistent in treating their own prohibition statutes and those of another state alike. However, further examination shows that such a consistent treatment is not always used, for the California court sustained the validity of a marriage contracted in Nevada by a party suffering under a California prohibition,[28] thereby giving no extraterritorial effect to its own statute, but subsequently allowed the Wisconsin statute to govern by declaring void a marriage entered into in Arizona by a party prohibited by a Wisconsin decree who thereafter resided in California.[29]

That there is confusion in this field of law in determining if and in what manner a remarriage will be considered valid or invalid is quite evident. There seems to be conflict as to which policy should prevail: that of resolving all doubts in favor of a valid marriage so as to avoid the many unfair results (such as bastardizing issue or making the parties adulterers) which may ensue from adjudging a marriage to be void, or that of preventing parties from intentionally evading prohibition statutes that are supposedly passed for the worthy purposes of preventing hasty divorces and of aiding reconciliations. Perhaps one solution would be for the legislatures to provide for an interlocutory decree—not merely a statute to be construed as the equivalent of one merely prohibiting a remarriage, as in the principal case—and not give a final decree until the state intends the parties really to be free agents. One objection to this move might be that the marital rights or obligations of the respective parties would continue during this period against the wishes of either party. However, many modern statutes granting divorces *a mensa* make provisions for the fair adjustment of such obligations,[30] and it would seem that this could be done with this type of statute also. If this were done then it would seem that all other states would have to give the desired effect to the decree by complying with the universal rule that a valid interlocutory decree does have an extraterritorial effect; thus, a second marriage would have to be considered invalid. In this way much of the present confusion could be eliminated.

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[27]Johnson v. State Compensation Com'r, 116 W. Va. 232, 179 S. E. 814 (1935).
[28]In re Wood's Estate, 137 Cal. 129, 69 Pac. 900 (1902).
[29]Means v. Means, 40 Cal. App. (2d) 469, 104 P. (2d) 1066 (1940).
[30]Note (1924) 33 Yale L. J. 426, 427.

CONSTITUTIONAL LAW—APPLICATION OF POLITICAL QUESTION DOCTRINE IN SUIT TO ENJOIN DISCRIMINATORY STATE ELECTION PROCEDURE. [United States Supreme Court]

The highly publicized controversy over the validity of the County Unit System of voting in Georgia, culminating with the recent refusal of the Supreme Court to interfere with the practice,[1] gives new emphasis to the doctrine that the judiciary will not interfere with the legislative or executive branch in the determination of questions political in their nature. Though this is a familiar principle of constitutional law, much dispute still centers around the question of what basis or test is to be applied by the courts to determine whether a given question is a political one.[2] One view has been expressed that the basis is simply the Court's policy to avoid deciding certain questions at a given time, because it is deemed impolitic or inexpedient due to the vastness of the consequences of a decision upon the merits, to a feeling of incompetency due to lack of power, or to a conviction that the matter involved is too delicate for a court to decide.[3] Others contend that the basis is of a more judicial nature, involving primarily an interpretation of the separation of powers doctrine.[4] Neither argument appears to explain all cases; but whatever the criteria, certain important questions are consistently classed as political and therefore non-justiciable.[5]

The political question doctrine has not deterred the Supreme Court from protecting the exercise of the voting privilege in numerous instances. Through a strong line of cases dating from *Nixon v. Herndon*[6] in 1927 there has been no hesitancy in striking down discrimination against the Negro in primary elections where the discrimination was found to result from an act of a state or its instrumentality. Each de-

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[1]South v. Peters, 339 U. S. 276, 70 S. Ct. 641, 94 L. ed. 834 (1950).

[2]Dodd, Judicially Non-Enforceable Provisions of Constitutions (1931) 80 U. of Pa. L. Rev. 54; Field, The Doctrine of Political Questions in the Federal Courts (1924) 8 Minn. L. Rev. 485.

[3]Finklestein, Judicial Self-Limitation (1924) 37 Harv. L. Rev. 338.

[4]Weston, Political Questions (1925) 38 Harv. L. Rev. 296.

[5]Coleman v. Miller, 307 U. S. 433, 59 S. Ct. 972, 83 L. ed. 1385 (1939) (amending process); Massachusetts v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. ed. 1078 (1923) (whether mere passage into law of a federal statute invades reserved powers of a state); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 S. Ct. 224, 56 L. ed. 377 (1912) (guarantee of a Republican form of government); Chae Chan Ping v. United States, 130 U. S. 581, 9 S. Ct. 623, 32 L. ed. 1068 (1889) (power to admit or exclude aliens); Luther v. Borden, 7 How. 1, 12 L. ed. 581 (U. S. 1849) (which of two governments is legal). Also see New York Life Ins. Co. v. Durham, 166 F. (2d) 874 (C. C. A. 10th, 1948) (initiation and termination of a state of war).

[6]273 U. S. 536, 47 S. Ct. 446, 71 L. ed. 759 (1927).

cision has been met with attempts to evade its force by inventing new devices for the purpose of securing a "white primary" election. In the *Herndon* case it was held that a Texas statute, expressly denying Negroes eligibility to vote in a primary election, was obviously violative of the Equal Protection Clause of the Fourteenth Amendment. This approach rendered a consideration of the Fifteenth Amendment unnecessary.[7] The Texas legislature then granted power to the State Executive Committee of the Democratic Party to prescribe the voting qualifications of its members, and the committee adopted a resolution that white persons only might participate in the party primary. The same plaintiff again sued for damages, and the Supreme Court held that the committee action constituted state action invalid under the Fourteenth Amendment.[8] Proponents of the white primary, however, were persistent, and they temporarily achieved the desired goal when the Court refused, in *Grovey v. Townsend*,[9] to label discrimination by a private political party an act of the state, deeming such a group to be a "voluntary association" with power to determine its membership as it chose. *United States v. Classic*,[10] decided six years later, concerned a criminal indictment, under a federal statute, of state election officials for altering and manipulating ballots in a primary election. The question as to whether Congress' power over "elections"[11] extended to primary as well as general elections was resolved in the affirmative. By deciding that the plaintiff had the right to vote and have the vote counted without interference where the primary is by law an integral part of the election process, the *Classic* case set the

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[7]Had the Fifteenth Amendment been considered, the Court would have had to pass upon the question whether a primary election was an "election" within the meaning of the word as used in the Constitution, thus determining whether Congress had power to punish frauds or discrimination in primary elections. The question was finally passed upon fourteen years later in United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. ed. 1368 (1941) (within the power of Congress).

[8]Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. ed. 984 (1932). "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black." 286 U. S. 73, 89, 52 S. Ct. 484, 487, 76 L. ed. 984, 990 (1932).

[9]295 U. S. 45, 55 S. Ct. 622, 79 L. ed. 1292 (1935). In the Condon case, the question whether a political party unaided by statute could determine its membership was expressly reserved. In the Grovey case such power was upheld. Action in state convention by a political party was said to be a private act upon which no constitutional ban exists.

[10]313 U. S. 299, 61 S. Ct. 1031, 85 L. ed. 1368 (1941).

[11]Article 1, § 4 of the Federal Constitution provides that Congress may make or alter regulations by states as to time, places and manner of holding elections, except as to places of choosing senators.

stage for *Smith v Allwright*,[12] which overruled the voluntary association principle of the *Grovey* case. It was decided in the *Allwright* case that if the state prescribes a ballot and general procedure of election which, in fact, limits the choice to persons elected in the primary, it adopts and endorses the discriminatory action of the political party which held the primary. A resolution by the party excluding Negroes, then, came within the ban of the Fifteenth Amendment, which prohibits a state from denying a citizen the right to vote. The ingenious South Carolina plan to avoid the language[13] and decision of the *Allwright* case by excising all mention of primary elections from the state constitution and statutes was summarily struck down by the Court of Appeals for the Fourth Circuit as constituting state action.[14] The injunctive relief prayed for in the plaintiff's class suit was granted upon the theory that the State's pointed action constituted an implied authority to political parties to carry out a state policy of excluding the Negro from the primary election. From the decisions it would seem clear that the right to vote in a primary election and to have that vote counted for full value is a justiciable issue in the strictest sense of the term.

However, the political question doctrine in conjunction with a refusal to exercise the discretionary injunctive power of equity operated as a conclusive barrier to the giving of relief from a discriminatory voting restriction in the recent decision of *South v. Peters*.[15] Plaintiff and another, qualified resident voters of Fulton County, Georgia, sued in a federal court to enjoin the chairman of the Georgia State Democratic Executive Committee and others from adhering to a Georgia statute[16] providing that a county unit vote shall determine the out-

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[12]321 U. S. 649, 64 S. Ct. 757, 88 L. ed. 987 (1944). The Court changed its mind about the Grovey case because, "When Grovey v. Townsend was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership." 321 U. S. 649, 660, 64 S. Ct. 757, 763, 88 L. ed. 987, 995 (1944). The Classic case, by holding that a primary was such an "election," drew the Grovey decision into question, and its ruling was re-examined in the Allwright case. The right to vote in a primary was thereafter a constitutional right of franchise under a possible double restriction of the Fourteenth and Fifteenth Amendments.

[13]The Allwright case involved general statutory regulation, and the language of that opinion suggested that in the absense of such regulation by a state, the voluntary association principal of the overruled Grovey case might apply and an immunity from the prohibitions of the Fourteenth and Fifteenth Amendments would ensue.

[14]Rice v. Elmore, 165 F. (2d) 387 (C. C. A. 4th, 1947), cert. denied 333 U. S. 875, 68 S. Ct. 905, 92 L. ed. 1151 (1948).

[15]339 U. S. 276, 70 S. Ct. 641, 94 L. ed. 834 (1950).

[16]Ga. Code (1933) § 34-3212. The system in original form appeared in the first constitution of Georgia in 1777.

come of primary elections.[17] Plaintiff contended that the statute was violative of the Fourteenth and Seventeenth Amendments in that unit votes were allocated without due regard to relative population with the result that a vote in any other county was worth, on an average, eleven times the value of a vote in Fulton County, the most populous in Georgia.[18] The Supreme Court, in a Per Curiam opinion, affirmed dismissal of the action, declaring that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[19]

The discrimination in the *South* case may be distinguished on the facts from that present in the primary cases discussed earlier,[20] but there seems to be no distinction in principle. In the primary cases the discrimination involved a denial of the right to vote on the basis of race. In the *South* case the discrimination does not concern race, but designedly strikes at the accident of residence; the quantitative value of a vote depends on where it is cast. The further distinction exists that whereas in the primary cases the discrimination prevented the casting of the ballot, here it occurs after the votes have been cast and counted. But the principle would seem to be the same as that of the *Classic* case, wherein corrupt election officials falsely counted votes, or of a case where an official simply destroys a ballot after it has been voted. In each instance the result is the same, for plaintiff is deprived of his proper voice in the government whether it be by the exclusion of the entire vote or roughly ten-elevenths of the vote as in the prin-

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[17]The candidate receiving the plurality of votes within the county is awarded the total number of unit votes to which the county is entitled by statute. The county is entitled to two unit votes for each Representative it has in the lower house of the General Assembly of Georgia. The apportionment of Representatives, however, is as follows: to the eight most populous counties, 3 representatives each or six unit votes; to the thirty counties having the next largest, two each and four unit votes; and, one representative or two unit votes to each of the remaining counties. Ga. Code (1930) § 2-1401. The unit vote, then, is only nominally based upon population. Thus, it was possible for Eugene Talmadge to gain the governorship in 1946 with only 297,245 popular votes, which gave him 105 unit votes, defeating James V. Carmichael who had 313,389 popular votes which represented only 44 unit votes. The illustration is revealing. See Ogg & Ray, Introduction to American Government (9th ed. 1948) 252.

[18]As pointed out by the dissenting opinion, a vote in 45 counties is worth twenty times that of plaintiff, and in one county the disparity results in a rural vote worth 120 times the value of an urban vote in Fulton County. South v. Peters, 339 U. S. 276, 278, 70 S. Ct. 641, 643, 94 L. ed. 834, 837 (1950).

[19]South v. Peters, 339 U. S. 276, 277, 70 S. Ct. 641, 642, 94 L. ed. 834, 837 (1950).

[20]United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. ed. 1368 (1941); Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. ed. 759 (1927).

cipal case. Yet discrimination as found in the *South* case is not, at present, within the justiciable arena. Such a result was not tenable in the view of Justice Douglas, with whom Justice Black concurred. They dissented on the ground that the discrimination in the present case, though admittedly not complete disfranchisement, infringed for practical purposes the right to have a vote counted for full value. The form which the discrimination assumed and the time at which it occurred seemed to them immaterial. It was pointed out that state action which attempted directly what the Georgia statute accomplishes indirectly, would be immediately struck down.[21] The dissent would construe the Fourteenth, Fifteenth and Seventeenth Amendments to mean that "there shall be no inequality in voting power by reason of race, creed, or color or *other invidious discrimination*."[22]

Although the present holding is consistent with the Court's earlier decisions where the Georgia Vote System was in issue[23] and with the Court's reluctance to intervene in similar electoral controversies,[24] it is felt that a more exhaustive opinion at a later date must be awaited before the precise position of the Supreme Court can be known. The decisions in *Colegrove v. Green*[25] and *MacDougall v. Green*,[26] upon which the *South* case relies, are somewhat ambiguous as to the exact grounds for the results reached.

In the *Colegrove* case, plaintiff and two others brought suit under the Federal Declaratory Judgment Act for a decree declaring invalid the Illinois Congressional Districting Act because the districts were not approximately equal in population. A decree for plaintiff would have resulted in restraining the holding of an election. Relief was denied on the basis of the political question doctrine.[27] The ambiguity

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[21]The illustration used was a law expressly reducing the Negro or Catholic vote. In the South case it was said that only in the urban areas have the Negroes been able to vote in important numbers. South v. Peters, 339 U. S. 276, 277, 70 S. Ct. 641, 642, 94 L. ed. 834, 837 (1950).

[22]South v. Peters, 339 U. S. 276, 281, 70 St. Ct. 641, 644, 94 L. ed. 834, 839 (1950) [italics supplied].

[23]Cook v. Fortson, 68 F. Supp. 624 (N. D. Ga. 1946), aff'd 329 U. S. 675, 67 S. Ct. 21, 91 L. ed. 596 (1946); Turman v. Duckworth, 68 F. Supp. 744 (N. D. Ga. 1946), aff'd 329 U. S. 675, 67 S. Ct. 21, 91 L. ed. 596 (1946). In both cases, it should be noted that the granting of injunctive relief prayed for would have invalidated elections which had already been held. This was not true in the principal case, for there was still time to prevent the holding of the election.

[24]MacDougall v. Green, 335 U. S. 281, 69 S. Ct. 1, 93 L. ed. 1 (1948); Colegrove v. Green, 328 U. S. 549, 66 S. Ct. 1198, 90 L. ed. 1432 (1946).

[25]328 U. S. 549, 66 S. Ct. 1198, 90 L. ed. 1432 (1946).

[26]335 U. S. 281, 69 S. Ct. 1, 93 L. ed. 1 (1948).

[27]Justice Holmes has said: "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns

as to the precise rationale of the decision results from examining the three separate opinions filed by the seven justices who participated in the case. Justice Frankfurter, with Justices Reed and Burton concurring, decided that the question was a political one. Justice Rutledge concurred in denying relief but decided that the question was justiciable. Justices Black, Douglas and Murphy dissented, arguing that relief should granted on the merits. Thus, a majority of the justices sitting regarded the question as a justiciable one; but a differently composed majority decided relief should be denied. Inasmuch as the controlling opinion, which designated the question political and non-justiciable, was a minority view on that issue, the case cannot stand as strong authority for identifying the nature of a political question. It was said in the controlling opinion that plaintiff had another remedy in exerting force at the polls by electing those who would correct what the Court said was an admitted inequality; but the possibilities of successfully invoking such a remedy seem remote, to say the least. The decision could have been made to rest upon an earlier holding[28] discussed in the *Colegrove* case and cited in the majority opinion of the *South* case, or upon the ground advanced by Justice Rutledge that even though the question was justiciable, the relief requested was within the discretionary power of equity to grant or deny, and that it should be denied in this case because of practical difficulties.[29]

In the *MacDougall* case plaintiff and others sued for an injunction to restrain the Governor of Illinois from enforcing an Illinois statute which requires that a petition to form, and nominate candidates for, a new political party be signed by at least twenty-five thousand voters and

political action but it alleges and seeks to recover for private damage." Nixon v. Herndon, 273 U. S. 536, 540, 47 S. Ct. 446, 71 L. ed. 759, 761 (1927). This suggests that the difficulty may be procedural only and that a suit for damages might have been successful in the Colegrove case.

[28]Wood v. Broom, 287 U. S. 1, 53 S. Ct. 1, 77 L. ed. 131 (1932). Justice Frankfurter said in the Colegrove case: "The legal merits of this controversy were settled in that [Wood v. Broom] case...." 328 U. S. 549, 551, 66 S. Ct. 1198, 1199, 90 L. ed. 1432, 1433 (1946). The Wood case held that the Federal Apportionment Act of 1929 had no requirements as to equality of population, contiguity or compactness of districts in providing for the election of Representatives.

[29]Among other reasons the following were given: possible involvement of the judiciary in the politics of the people; invasion of the power of Congress to regulate apportionment; the fact that glaring disparities have always existed in apportionment throughout history; and the possibility that invalidation would require supervision of electoral processes by the Supreme Court. Colegrove v. Green, 328 U. S. 549, 564, 66 St. Ct. 1198, 1208, 90 L. ed. 1432, 1442 (1946) (concurring opinion).

contain two hundred signatures from each of at least fifty counties within the state. Plaintiff contended that the great disparity of population among the counties enable voters of the less populous counties to block the nomination of candidates whose support is confined to a limited geographical area. The Court denied relief on the ground that a state has the right to require that support of a candidate be diffused throughout the state. Justice Rutledge concurred in denying relief, but upon the same grounds he had taken in the *Colegrove* case. Here, issuance of the injunction would have invalidated millions of existing ballots on the eve of a presidential election, with insufficient time remaining to print new forms.

In considering the circumstances out of which the principal case arose, Justice Douglas was of the opinion that no such difficulties in granting relief were presented. No new ballots were needed; time was not a vital factor since election day was more than two months away; the decree sought by plaintiff involved no encroachment by the Court upon the province of Congress to see that apportionment is fairly made, as did the relief sought in the *MacDougall* case; and the decree would affect only the selection of names to be placed on the general election ticket.[30] Plaintiff could be given the full value of his vote without the practical difficulties presented in the *Colegrove* and *MacDougall* cases.

It cannot be logically argued that invalidation of the present system in Georgia would necessarily disparage the Electoral College method used in selecting the President of the United States.[31] While the Electoral College provides for unit voting and makes it possible for a candidate to be elected without acquiring a plurality of votes nationwide, there is no discrimination in allocating electoral votes to a state, for that distribution is based directly upon population. Therefore, the ratio of unit votes to total number of people is approximately the same for all states. In the Georgia system the discrimination exists because the unit votes are allocated to the counties without giving due regard to population, so that the ratio of unit votes to number of people varies greatly between the different counties.

Opponents of the County Unit System of voting may yet hope for vindication at a future date.[32] The observation has often been made

[30]339 U. S. 276, 277, 70 S. Ct. 641, 642, 94 L. ed. 834, 837 (1950) (dissent).

[31]See Note (1947) 47 Col. L. Rev. 284 (critical appraisal of Georgia County Unit Vote System).

[32]Tennessee has struck down a similar unit vote system as a violation of the equal protection clause of the Tennessee Constitution. Gates v. Long, 172 Tenn. 471, 113 S. W. (2d) 388 (1938).

that the Supreme Court is not hesitant to reverse itself where the true merits later appear.[33] Until such time the present decision, like the *Colgrove* and *MacDougall* cases, points to a loophole which may be used to dilute the franchise of large numbers of American citizens.

EMMETT E. TUCKER, JR.

CONSTITUTIONAL LAW—RIGHT TO ASSISTANCE OF OUT-OF-STATE COUNSEL IN CRIMINAL CASES AS ELEMENT OF DUE PROCESS OF LAW. [Federal]

Under Supreme Court decisions, the Due Process Clause of the Fourteenth Amendment brings within its protection as against state action, only such of the guarantees of the federal Bill of Rights as involve fundamental principles "implicit in the concept of ordered liberty."[1] The determination of whether a specific guarantee in the Bill of Rights is so fundamental as to be included within the scope of the Fourteenth Amendment has been left to case by case determination.[2]

In *Cooper v. Hutchinson*,[3] the United States Court of Appeals for the Third Circuit was recently presented with the question whether the Due Process Clause of the Fourteenth Amendment guarantees to a defendant in a capital proceeding in a state court the right to the assistance of out-of-state counsel. The accused parties had been represented by court-appointed counsel in a trial for murder, wherein an appeal from a conviction and death sentence resulted in a remand for a new trial.[4] While this appeal was pending, certain out-of-state counsel were admitted *pro hac vice* in accordance with a long-recognized custom[5] that an attorney in good standing from any other state of the United States may, in the discretion of the New Jersey

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[33]See Smith v. Allwright, 321 U. S. 649, 665, 64 S. Ct. 757, 765, 88 L. ed. 987, 998 (1944).

[1]Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937). Also, Buchalter v. New York, 319 U. S. 427, 63 S. Ct. 1129, 87 L. ed. 1492 (1943).

[2]The case of Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949), noted (1950) 7 Wash. & Lee L. Rev. 51, pointed out that courts have refused to lay down any strict rule as to what will constitute due process, but have made their determinations on a basis of judicial inclusion and exclusion, as the cases have been presented.

[3]184 F. (2d) 119 (C. A. 3d, 1950).

[4]State v. Cooper, 2 N. J. 540, 67 A. (2d) 298 (1949).

[5]This custom was recognized as early as 1629 by English judges of Common Pleas. Thursby v. Warren, 4 Car. 1, 79 Eng. Rep. 738 (1629).

court in which any cause is pending, be admitted to speak in such cause in the same manner as an attorney of that state.[6] After remand of the case for a new trial, these lawyers proceeded with various motions and other preliminary matters prior to the retrial, but thereafter the trial judge, without a hearing or any charge of misconduct against the lawyers, entered an order depriving them of further authority to appear in the case. The *Cooper* case was a suit in a federal district court by the accused to enjoin the state trial judge from proceeding with the retrial of the murder case until the out-of-state counsel were admitted. Plaintiff's contention was that, in view of the decision in *United States v. Bergamo* holding that the Due Process Clause of the Fifth Amendment guarantees a defendant in a federal court the right to have the assistance of out-of-state counsel if he so desires,[7] the Due Process Clause of the Fourteenth Amendment in like manner guarantees such a right to a defendant in a capital case before a state court. It was argued that the request for relief from the federal court was justified under the Civil Rights Act,[8] which gives these tribunals the power to enjoin a state court proceeding before the available state remedies have been exhausted, as well as the right to take direct action against the state officer whose official act has invaded the constitutional rights of the petitioners. The district court dismissed the complaint and denied plaintiff's motion for an injunction.

Although the Court of Appeals refused a specific answer to plaintiff's contention that he had a constitutional right to out-of-state counsel, it did hold that since counsel had been admitted in pursuance of the state rule on admission *pro hac vice* and were to be treated the same as local counsel, their arbitrary removal was violative of constitutional due process, and that plaintiff had a right to have them serve for the entire cause.[9] Although agreeing that an injunction should not issue, the Court of Appeals vacated the judgment dismissing the ac-

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[6]N. J. Rule 1:8-10(b). This was a rule promulgated by the Supreme Court of New Jersey to govern practice and procedure in the courts of that state.

[7]154 F. (2d) 31 (C. C. A. 3d, 1946). It is well settled that the Fifth Amendment constitutes a restriction on the federal government, but not upon the states. See cases cited, 16 C. J. S. 1146.

[8]17 Stat. 13 (1871), 8 U. S. C. A. § 43 (1942).

[9]Here the court referred to instances where a person, through voluntary action by another, acquires rights which he did not have before. Black v. New York, N. H. & H. R. Co., 193 Mass. 448, 79 N. E. 797 (1907); Restatement, Torts (1934) §§ 323-325; Restatement, Torts (1934) § 342. Thus, though the accused may not initially have had a constitutional right to use out-of-state counsel, once they have been granted that privilege and those counsel have taken over the defense, the court cannot revoke the privilege without cause.

tion and remanded the case with instructions to retain jurisdiction to give the New Jersey courts an opportunity to rectify the deprivation of the constitutional right.[10]

In order to obtain relief in a federal court against prosecution in a state court, the plaintiff must show a great and immediate need to prevent irreparable loss or an infraction of some constitutional right.[11] While the plaintiff in the *Cooper* case has met the latter requirement, it would seem that the court was correct in refusing to issue an injunction until the state remedies had been utilized. Although the Civil Rights Act empowers a federal court to stay proceedings in a state court[12] before the state remedies have been exhausted[13] and permits a direct action against the state official whose act deprives accused of his constitutional right,[14] the courts have apparently been extremely reluctant to exercise that authority.[15] Such an attitude is certainly in

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[10]Judge Kalodner, dissenting in part, said that the retention of jurisdiction by the federal court implied that the state courts might act improperly and that it was not the function of the federal courts to police the state judiciary. Cooper v. Hutchinson, 184 F. (2d) 119, 125 (C. A. 3d, 1950).

[11]Fenner v. Boykin, 271 U. S. 240, 46 S. Ct. 492, 70 L. ed. 927 (1926); Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. ed. 255 (1923). Chief Justice Stone, in Douglas v. City of Jeannette, 319 U. S. 157, 160, 63 S. Ct. 877, 880, 87 L. ed. 1324, 1329 (1943), seemed to sum up the attitude of the federal courts toward this question of enjoining state proceedings when he said "the power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation.... Congress... has adopted the policy... of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal question involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent...."

[12]62 Stat. 968 (1947), 28 U. S. C. A. § 2283 (1950) provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress...." 17 Stat. 13 (1871), 8 U. S. C. A. § 43 (1942) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[13]Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281 (1939).

[14]Picking v. Pennsylvania R. Co., 151 F. (2d) 240, 250 (C. C. A. 3d, 1945).

[15]An injunction was issued in International Longshoremen's and Warehousemen's Union v. Acherman, 82 F. Supp. 65 (D. C. Hawaii 1949), the court saying that in connection with the exercise of discretion of a district court of the United States to restrain criminal actions, good faith in prosecution is material under the Civil Rights Act. This is the only case found in which a federal court has enjoined

harmony with the general policies of the courts in their efforts to maintain that balance between the state and federal judiciary which is essential to a system of dual sovereignty.[16]

The rules of procedure for the state of New Jersey provide that "Any attorney or counsellor from any other of the United States, of good standing there, may, at the discretion of the court in which any cause is pending, be admitted, *pro hac vice,* to speak in such cause in the same manner as an attorney or counsellor of this state,"[17] and a state statute provides for an appeal to the Supreme Court of New Jersey when necessary to preserve and maintain the status quo pending final judgment in a case and to prevent irreparable injury.[18] Since there is every indication that the appellants can successfully require the trial judge to admit the out-of-state lawyers for their defense, or, failing in this, can appeal to the Supreme Court of the United States on due process grounds, and in view of the well-founded reluctance of federal courts to enjoin state criminal proceedings, issuance of the injunction sought by the plaintiffs would have constituted an unjustifiable interference with the state judiciary.

On the broader issue raised by the contention that the accused in a state criminal proceeding has a constitutional right to be represented by out-of-state counsel, the courts have not yet taken a positive stand. The Sixth Amendment, controlling federal court proceedings, provides that "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense,"[19] and in 1932 the Supreme Court in *Powell v. Alabama,*[20] established that the

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criminal proceedings on the basis of the Civil Rights Act. In Keegan v. New Jersey, 42 F. Supp. 922 (D. C. N. J. 1941), it was said that a federal court could enjoin a trial proceeding in a state court where such trial would invade constitutional rights.

[16]The general rule that a federal court will seldom issue an injunction to stay proceedings in a state court has long been established, Covell v. Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390 (1884), and followed upon the principle of comity, and the policy of avoiding unnecessary friction between two systems of courts sometimes having concurrent jurisdiction. Hale v. Bimco Trading, Inc., 306 U. S. 375, 59 S. Ct. 526, 83 L. ed. 771 (1939); Wells Fargo and Co. v. Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. ed. 205 (1920). See Lockwood, Maw, Rosenberry, The Use of The Federal Injunction (1930) 43 Harv. L. Rev. 426, 428, wherein it is said "The tendency of federal injunctions to arouse the antagonism of the states... gains added signifance from the fact that, *ex hypothesi,* the subject matter in dispute involves the distribution of power between the nation and the states. The task of setting the limits of these powers is at best one of great delicacy, conducive to the excitement of ill-feeling even without the added provocation of an injunction."

[17]N. J. Rule 1:8-10(b).

[18]N. J. Rule 4:2-2.

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

[20]287 U. S. 45, 53 S. Ct. 55, 73 L. ed. 158 (1932). Since the defendants were young,

right to counsel in criminal cases is one of the fundamental rights protected also in state proceedings by the Due Process Clause of the Fourteenth Amendment. However, *Betts v. Brady*[21] limited the federal constitutional right in this respect to capital cases. Subsequently, the same federal court which decided the principal case held that the Sixth Amendment gives a defendant the right to counsel of his own choosing, even if they are not residents of the state wherein the federal court is located and have not been admitted to practice there.[22] The question now arises whether a defendant in a capital case in a *state court* can choose out-of-state counsel as he can in a case before a federal court. The few federal decisions mentioning the question may be thought to indicate an affirmative answer, by asserting that a defendant has a right to counsel of his own choice.[23] Further support for this view is provided by the Supreme Court's declaration in *Glasser v. United States,* that "the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing ... may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. . . ."[24]

It is submitted, however, that these assertions that the defendant has a right to *counsel of his own choice* mean only that he can insist on employing his choice of counsel from those admitted to practice before the courts of the state in which he is being tried, and that the *Bergamo* case rule that a defendant in a criminal action before a federal court can demand out-of-state counsel is the result of federal procedure and is not binding upon the state courts, as no fundamental rights of due process are involved. The demand for use of out-of-state counsel obviously goes beyond the recognized principal that the Federal Constitution guarantees a defendant in a capital case before a state court the right to assistance of counsel[25] as part of the due

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ignorant, away from home, and were tried in emotionally charged surroundings, the Court felt that adequate representation by counsel was necessary to insure the basic elements of fairness.

[21]316 U. S. 455, 62 S. Ct. 1252, 86 L. ed. 1595 (1942). The Court declared that in the majority of the states it was the considered judgment of the people, their representatives, and their courts that appointment of counsel was not a fundamental right, and that the Due Process Clause does not obligate the states to furnish counsel in every criminal case where accused is unable to obtain counsel.

[22]United States v. Bergamo, 154 F. (2d) 31 (C. C. A. 3d, 1946).

[23]Andrews v. Robertson, 145 F. (2d) 101 (C. C. A. 5th, 1944); Yung v. Coleman, 5 F. Supp. 702 (S. D. Idaho 1934).

[24]315 U. S. 60, 70, 62 S. Ct. 457, 464, 86 L. ed. 680, 699 (1942).

[25]Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158 (1932).

process requirement of the Fourteenth Amendment. Even when courts appoint counsel for a destitute defendant, due process requires only that he have effective counsel, not the best available.[26]

In view of the fact that the licensing and regulation of attorneys-at-law fall within the powers of the states,[27] the plaintiff's assertion that he has a constitutional right to bring any lawyer he chooses into a state court is rather surprising. The right to practice law is not a privilege or immunity within the provisions of the Fourteenth Amendment,[28] nor is there any rule of comity requiring one state to admit to its courts attorneys qualified to practice in other states.[29] A decision sustaining the plaintiff's contention in the principal case would seriously interfere with and diminish the control of the states over the persons they would admit to practice before their courts.

ANDREW D. OWENS

CONSTITUTIONAL LAW—STANDARDS FOR TESTING VALIDITY OF STATE REGULATIONS AFFECTING INTERSTATE COMMERCE. [United States Supreme Court]

In the recent case of *Dean Milk Co. v. City of Madison*[1] the Supreme Court has again employed the Commerce Clause[2] to invalidate a state regulation of commerce in the absence of congressional legislation. The function, and even the very power, of the Court in this type of case has been the subject of much dispute in American constitutional history.[3] The subject was thought to have been laid to rest when, sev-

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[26]Conley v. Cox, 138 F. (2d) 786 (C. C. A. 8th, 1943); United States v. Thompson, 56 F. Supp. 683 (S. D. N. Y. 1944). The Constitution does not require that counsel appointed for an accused shall measure up to his notions of ability, and it is enough if a qualified counsel is appointed to represent the accused and that the attorney appear, advise with and represents the interests of his clent.

[27]In re Day, 181 Ill. 73, 54 N. E. 646 (1899); In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); Application of Christy, 362 Pa. 347, 67 A. (2d) 85 (1949).

[28]Ex parte Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929 (1894).

[29]State v. Perkins, 138 Kan. 899, 28 P. (2d) 765 (1934). The license or permission to practice law in one state is not extraterritorial.

[1]71 S. Ct. 295, 95 L. ed. 228 (1951).

[2]U. S. Const. Art. I § 8, cl. 3.

[3]In Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. ed. 23, 73 (U. S. 1824), Chief Justice Marshall, in reply to the argument of counsel that the congressional power over commerce was *exclusive*, said, "There is great force in this argument, and the Court is not satisfied that it has been refuted." Cf. Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412 (U. S. 1829), and the interpretation given to these two cases by Chief Justice Taney in the License Cases, 5 How. 504, 584, 12 L. ed. 256,

eral times in the past decade, the Court reaffirmed the principle of *Cooley v. Board of Wardens*[4] that the validity of state regulation is to be determined by balancing national and local interests; but in 1949 the tenor of the opinion by Justice Jackson in *H. P. Hood & Sons v. Du Mond*[5] again put the issue in doubt.[6] The contribution of the *Dean* case lies in the light it reflects upon the true standard applied by the Court to test the validity of state regulations affecting commerce.

Under attack in the *Dean* case was a provision of the Madison, Wisconsin milk ordinance that no milk should be sold within the city as pasteurized milk, unless pasteurized and bottled within five miles of the central portion of the city.[7] The Dean Company operates pasteur-

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292 (U. S. 1847) to justify his theory of a concurrent power in the states to regulate commerce until congressional legislation displaces that power. A compromise between these conflicting views was accomplished in Cooley v. Board of Wardens, 12 How. 299, 319, 13 L. ed. 996, 1005 (U. S. 1851), whereby subjects national in character imperatively demanding one uniform rule were beyond state regulation, while in subjects local in character admitting of diversity the states might regulate in absence of congressional legislation. Although the court often obscured this principle by stating conclusions in terms of "direct" and "indirect" burdens, it was evident that the Cooley case was still the guiding doctrine, with "direct" designating the national interest and "indirect," the local. See Simpson v. Shepard, 230 U. S. 352, 399, 33 S. Ct. 729, 740, 57 L. ed. 1511, 1541 (1912). In a dissent in Di Santo v. Pennsylvania, 273 U. S. 34, 43, 47 S. Ct. 267, 271, 71 L. ed. 524, 530 (1927), Justice Stone attacked the use of the "burden" terminology, contending that it was a deviation from the Cooley principle. He asserted that the Cooley doctrine was correctly applied only when the court "balanced" the conflicting local and national interests involved to determine the validity of state laws affecting interstate commerce. The views of this dissent were adopted by the Court in California v. Thompson, 313 U. S. 109, 61 S. Ct. 930, 85 L. ed. 1319 (1941). See Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1; and Dowling, Interstate Commerce and State Power—Revised Version (1947) 47 Col. L. Rev. 547.

[4]12 How. 299, 13 L. ed. 996 (U. S. 1851). Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945); Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315 (1943); Duckworth v. Arkansas, 314 U. S. 390, 62 S. Ct. 311, 86 L. ed. 294 (1941); South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (1938).

[5]336 U. S. 525, 69 S. Ct. 657, 93 L. ed. 865 (1949). By a five to four decision the Court held invalid a New York law under which an interstate shipper was denied a license to construct a milk cooling plant, from which he planned to ship milk to Massachusetts, on the ground the supply was low in New York.

[6]See 336 U. S. 525, 545, 69 S. Ct. 657, 679, 93 L. ed. 865, 882 (1949), where Justice Black, in dissent, charges that the Court abandoned the Cooley principle in favor of a "mechanistic formula" which in effect held that the states had no power to regulate commerce. Several writers adopted a similar interpretation. See Mendelson, Recent Developments in State Power to Regulate and Tax Interstate Commerce (1949) 98 U. of Pa. L. Rev. 57, 62; Notes (1950) 30 B. U. L. Rev. 113; (1949) 34 Minn L. Rev. 60.

[7]71 S. Ct. 295 at 296, 95 L. ed. 228 at 229 (1951) note 1. Another section of the ordinance provided that all farms producing milk for sale in Madison should be

izing and bottling plants in Illinois, 65 and 85 miles from Madison, to process milk collected from a great number of farms in northern Illinois and southern Wisconsin and sells through local distributors in that area.[8] Dean was denied a license to sell milk in Madison, whereupon a suit for declaratory judgment was brought in a state court to test the constitutionality of the denial. The Wisconsin Supreme Court upheld the "five mile" provision on the reasoning that it was a permissible method of protecting public health within the discretion of a municipal corporation.[9]

On appeal to the Supreme Court of the United States the decision of the Wisconsin court was reversed on the ground that the ordinance was in contravention of the Commerce Clause. Justice Clark, writing the opinion for the Court, declared that the section in question "in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."[10] Moreover, the regulation was described as a *discriminatory burden*[11] upon interstate commerce, because it erected an economic barrier protecting local industry.[12] The protection of public health was held not to be a justification for obstructing the flow of commerce, when reasonable and adequate alterna-

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inspected, but the city would assume no obligation to inspect farms beyond 25 miles. The Supreme Court did not consider the validity of this section, since it was not passed on by the Wisconsin courts. There it was held that Dean was not a proper party to raise the constitutional question, as the company owned no farms affected by the provision. 257 Wis. 308, 43 N. W. (2d) 480, 483 (1950); cause remanded, 71 S. Ct. 295, 299, 95 L. ed. 228, 232 (1951).

[8]Dean Milk Company had previously experienced difficulty in expanding its market due to ordinances in other cities. Dean Milk Co. v. City of Elgin, 405 Ill. 204, 90 N. E. (2d) 112 (1950); Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N. E. (2d) 827 (1949); Dean Milk Co. v. City of Waukegan, 402 Ill. 597, 87 N. E. (2d) 751 (1949); see Note (1950) Ill. L. Forum 142. These cases were disposed of favorably to Dean on the ground that the extra-territorial effect of the ordinances contravened Illinois law. In Dyer v. City of Beloit, 250 Wis. 613, 27 N. W. (2d) 733 (1947), a local distributor of Dean's milk challenged an ordinance similar to Madison's, which was sustained by the Wisconsin Supreme Court. The question was mooted when the ordinance was repealed, and the United States Supreme Court dismissed an appeal. 333 U. S. 825, 68 S. Ct. 450, 92 L. ed. 1111 (1948).

[9]257 Wis. 308, 43 N. W. (2d) 480 (1950).

[10]71 S. Ct. 295, 298, 95 L. ed. 228, 230 (1951). Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 at 521, 55 S. Ct. 497 at 500, 79 L. ed. 1032 at 1037 (1935).

[11]Justice Black, in a dissent, adduced that such a characterization was merely a statement of result. 71 S. Ct. 295, 299, 95 L. ed. 228, 232 (1951). Cf. Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890).

[12]The city sought to justify the ordinance on the ground that Dane County, in which Madison is located, produces ten times the amount of milk consumed within the city. 71 S. Ct. 295, 296, 95 L. ed. 228, 229 (1951).

tive methods of assuring a pure milk supply to the city were available.[13]

Justice Black, joined by Justices Douglas and Minton in dissent,[14] argued that the ordinance did not exclude wholesome milk coming from Illinois, but merely required that milk from all points be pasteurized within the prescribed limits. "Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison."[15] Justice Black particularly disapproved of the Court's using the "reasonable alternative" device in invalidating the ordinance. He asserted that no case involving the Commerce Clause had ever used such a concept for the purpose of invalidating a health law, and further contended that even if the propriety of using the available alternatives as a limitation upon state action were conceded, still the proof was insufficient to show that the alternatives would assure as healthful a quality of milk as provided by the law being invalidated.

Regardless of the apparent lack of explicit precedents for employing the "reasonable alternative" concept, a majority of the Court saw fit to extend the balance of local and national interests to include an inquiry into the necessity for such a drastic health measure, and to invalidate it upon finding that other means, less burdensome to interstate commerce, were available.

The traditional inquiry made by the courts has been thus stated by Justice Stone in *South Carolina State Highway Dept. v. Barnwell Bros.*:

> "In the absence of such [congressional] legislation the judicial function, under the commerce clause as well as the Fourteenth

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[13]The Court suggested two such alternatives: (1) The city could adopt U. S. Public Health Service Model Milk Ordinance, Sec. 11, cited at 71 S. Ct. 295, 298, 95 L. ed. 228, 231 (1951) note 5, which in effect would amount to reliance by Madison upon inspections made by Chicago officials and spot checks made by U. S. officials. (2) The Madison officials could have inspected these distant plants personally, charging the actual and reasonable cost of the inspection to Dean.

A letter received from Mr. Jacob Geffs, attorney for the Dean Milk Co., indicates that pursuant to the decision of the Supreme Court the city repealed the two contested sections of the milk ordinance and enacted Sec. 11 of the Model Milk Ordinance. According to Mr. Geffs, the city officials set the inspection fees at an absolute minimum, and issued a license to Dean. Mr. Geffs estimated that the cost of having the Madison officials conduct their own inspections would be so great as to make it unprofitable for Dean to sell in the city. The cooperation of the city officials in adopting the "alternative" least burdensome to the importer has possibly saved the Court the embarrassment of having its own dictum employed to keep Illinois milk out of Madison, the very evil that the dictum sought to alleviate.

[14]See 71 S. Ct. 295, 299, 95 L. ed. 228, 232 (1951).

[15]71 S. Ct. 295, 299, 95 L. ed. 228, 232 (1951). If Dean had any *preference* under the "5 mile" provision, it was obviated by the "25 mile" provision. Dean could not comply with this provision and still sell Illinois milk in Madison, since only Wisconsin farms are located within that 25 mile radius.

Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted *within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.*"[16]

Applying this principle in *Southern Pacific Co. v. Arizona,*[17] the Supreme Court found that the state was not acting within its province, inasmuch as the national interest predominates with respect to the length of trains necessary to an adequate transportation system. Moreover, even though the state's purpose was to promote safety, a valid police power objective, the means chosen were not reasonably adapted to the end sought, in view of the finding that shorter trains would tend to increase rather than diminish the number of injuries. Earlier the Court had held that a state was not acting within its province when it excluded additional interstate buses from operating within the state on the ground of present adequacy of interstate service.[18] The same result was reached in the holding that a state was acting beyond its power when it endeavored to erect an economic barrier to the importation of wholesome, but less expensive, extra-state milk,[19] and when it obstructed the exportation of milk for the purpose of curbing an increasing shortage.[20]

On the other hand, a state was found to have acted within its sphere when it excluded additional interstate buses from overcrowded highways to protect the safety of those already using the roads,[21] or when it forbade interstate trucks with excessive loads from using the highways of the state to prevent undue destruction of the road sur-

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[16]303 U. S. 177, 190, 58 S. Ct. 510, 516, 82 L. ed. 734, 742 (1938) (italics supplied).

[17]325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945).

[18]Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286 (1925).

[19]Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. ed. 1032 (1935).

[20]H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 69 S. Ct. 657, 93 L. ed. 865 (1949). Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658, 67 L. ed. 1117 (1923), held invalid a state statute requiring that the demands of natural gas consumers within the state be met before shipment of gas could be made out of state. Cf. Sligh v. Kirkwood, 237 U. S. 52, 35 S. Ct. 501, 59 L. ed. 835 (1915), upholding a state law prohibiting the exportation of green citrus fruit to protect the reputation of local industry; Hudson Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. ed. 828 (1908), sustaining a state law prohibiting the piping of water to other states; Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 (1896), upholding a state prohibition against the exportation of wild game.

[21]Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92, 53 S. Ct. 577, 77 L. ed. 1053 (1933).

faces.[22] Prohibitions against the importation of diseased cattle[23] and impure foods[24] are within the province of the state to protect public health.

In the foregoing cases the Court has balanced the national and the local interests in determining under the *Cooley* principle whether the state regulation could stand as against a Commerce Clause objection. This balance was also struck in the *Dean* case. The avowed purpose of the Madison ordinance was to protect health, a matter conceded to be "within the sphere of state regulation even though interstate commerce may be affected."[25] On the other hand the practical effect of the ordinance was to keep Illinois milk out of Madison. This, the Court held, is beyond the state's power, even to protect the health and safety of its people, when reasonable and adequate alternative methods of protecting health, which are less obstructive to the free flow of commerce, are available.

In these cases in which the Court sustained state regulations concerning the use of highways, there was no discussion of the existence of reasonable and less drastic alternatives.[26] However, in an earlier quarantine case the Court asserted that in the absence of congressional legislation the question still arises "whether the police power of the state has been exerted beyond its province.... exerted to exclude without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine.*"[27] In *Southern Pacific Co. v. Arizona,* Chief Justice Stone stated that the train-limit law "passes beyond what is *plainly essential* for safety."[28] The existence of reasonable alternative methods is but a factor

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[22]South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (1938).

[23]Mintz v. Baldwin, 289 U. S. 346, 53 S. Ct. 611, 77 L. ed. 1245 (1933).

[24]Price v. Illinois, 238 U. S. 446, 35 S. Ct. 892, 59 L. ed. 1400 (1915); Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234, 48 L. ed. 401 (1904).

[25]Dean Milk Co. v. City of Madison, 71 S. Ct. 295, 297, 95 L. ed. 228, 230 (1951).

[26]South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (1938) and Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92, 53 S. Ct. 577, 77 L. ed. 1053 (1933). In both of these cases the prohibitions struck directly at the evils—trucks too heavy for the roads and buses too numerous for safety. Therefore, these regulations were probably the *most reasonable* available. In contrast, the Madison ordinance aimed at the evil—impure milk—indirectly, by prohibiting all milk beyond 25 miles, which was *not the most reasonable* method.

[27]Smith v. St. Louis & S. W. Ry., 181 U. S. 248, 255, 21 S. Ct. 603, 605, 45 L. ed. 847, 850 (1901).

[28]325 U. S. 761, 781, 65 S. Ct. 1515, 1526, 89 L. ed. 1915, 1931 (1945) (italics supplied).

bearing on whether the present regulation goes beyond what is "necessary" or "plainly essential" to achieve the end sought. This was implicit in *Minnesota v. Barber*,[29] where it was decided that a state could insure a pure meat supply by less drastic means than requiring meat to be inspected by a Minnesota inspector within 24 hours after slaughter. On the other hand, the existence of the reasonable and less drastic alternative of sterilization was explicitly made the basis for holding invalid under the Due Process Clause[30] a state law forbidding all use of shoddy in comfortables.[31]

The *Dean* case appears, therefore, not to depart from the *Cooley* doctrine of balancing the national against the local interests in determining the validity of state regulations under the Commerce Clause, but to reaffirm that ancient principle.[32] In considering the existence of reasonable and less drastic alternatives to the means adopted by the state, the *Dean* case adds a factor to the traditional "balance" which may tip the scales in favor of the national interest in free interstate trade in the same way that this factor has heretofore weighted the balance in favor of the individual interest in free production.

RAYMOND W. HAMAN

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[29]136 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890). Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. ed. 49 (1898) held a state law prohibiting the sale of oleomargarine to be an unreasonable means of protecting health; Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213, 34 L. ed. 862 (1891) held unreasonable a health measure prohibiting the sale of meat more than 100 miles from the place of slaughter.

[30]U. S. Const. Amend. XIV.

[31]Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. ed. 654 (1926). See the dissenting Opinion by Justice Holmes, in which Justices Brandeis and Stone concurred, 270 U. S. 402, 415, 46 S. Ct. 320, 323, 70 L. ed. 654, 658 (1926). Because these justices dissented from the use of the "reasonable alternative" concept under the Due Process Clause, does not necessarily indicate that they would object to its use in the Dean case, for the interests being balanced are not the same. Under the Due Process Clause individual interests are weighed against state interests, while under the Commerce Clause the Court must consider the interests of an entire nation. See Ribble, State and National Power Over Commerce (1937) at 98 and 126, for discussions of the relationships between these two clauses.

[32]Nor does H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 69 S. Ct. 657, 93 L. ed. 865 (1949), depart from the Cooley doctrine, notwithstanding the contrary interpretation cited in note 6, supra. The misconception is rooted in Justice Jackson's refusal to "balance" in Duckworth v. Arkansas, 314 U. S. 390, 397, 62 S. Ct. 311, 314, 86 L. ed. 294, 298 (1941); but he concurred in a "balancing of the interests" in Cities Service Gas Co. v. Peerless Oil & Gas Co., 71 S. Ct. 215, 95 L. ed. 156 (1950), and in Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945). Regardless of the construction given to the Hood case, the more recent decisions reaffirm the authority of the Cooley principle.

DAMAGES—RECOVERY FOR LOSS OF USE OF DAMAGED AUTOMOBILE DURING ABNORMAL PERIOD REQUIRED FOR REPAIR. [Mississippi]

When an automobile has been damaged short of complete destruction by a wrongful act creating liability in the tortfeasor, all courts are agreed that the owner's recoverable damages should include a sum to compensate him for the injury to the car. This sum is measured either by the difference in the value of the car immediately before and after the infliction of the injury[1] or by the cost of repairing it to as good a condition as before the injury.[2] Loss of use is a second item of damages recognized by most courts.[3] There is no exact formula for measuring value of lost use, and typical instructions to the jury are to the effect that plaintiff is "entitled to recover the rental value of an automobile similar to the one injured during the period of detention and loss of use. . . ."[4] Some courts draw a distinction between the terms "rental value" and "usable value," ruling that a plaintiff cannot recover rental value because it includes allowance for depreciation, to which plaintiff's car is not subjected while being repaired.[5]

The jury must set sums on the basis of whatever relevant evidence parties can bring in,[6] such as cost of hiring a substitute vehicle, rental value of a like vehicle for like use, perhaps necessary curtailment of business, and so on.[7] Most courts agree that damages cover loss of po-

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[1]Hawkins v. Garford Trucking Co., Inc., 96 Conn. 337, 114 Atl. 94 (1921); Southern Ry. Co. in Kentucky v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162 (1915); Union City Transfer Co. v. Texas & N. O. Ry. Co., 55 S. W. (2d) 637 (Tex. Civ. App. 1933); 17-18 Huddy Automobiles (9th ed. 1931) § 252.

[2]Carruthers v. Campbell, 195 Iowa 390, 192 N. W. 138, 28 A. L. R. 949 (1923); Hooper, McGaw & Co. v. Kelly, 145 Md. 161, 125 Atl. 779 (1924); Bauer v. Fahr, 282 S. W. 150 (Mo. App. 1926); 17-18 Huddy, Automobiles (9th ed. 1931) § 253.

[3]McCormick, Damages (1935) § 124.

However loss of use is not allowed if the automobile is completely destroyed, the measure of damages in such a case being the reasonable market value of the automobile before it was destroyed. Langham v. Chicago, R. I. & P. Ry. Co., 201 Iowa 897, 208 N. W. 356 (1926). Some courts deny recovery for loss of use where the automobile can be repaired but will not be as good as its pre-injury condition. Here the measure of damages is said to be the difference in value immediately before and after the injury. Helin v. Egger, 121 Neb. 727, 238 N. W. 364 (1931). Just why loss of use is not allowed in such a situation as this is not explained. A possible theory is that the time required for repair is taken into consideration when the post-injury value is decided.

[4]Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158 (1915).

[5]Cook v. Packard Motor Car Co., 88 Conn. 590, 92 Atl. 413 (1914).

[6]"To make out a prima facie case, plaintiff should bring himself, by his allegation and proof, within the recognized measure of damages that is applicable to the facts." 17-18 Huddy, Automobiles (9th ed. 1931) § 262.

[7]Loss of profits may be considered. 17-18 Huddy, Automobiles (9th ed. 1931) § 256; McCormick, Damages (1935) § 124.

tential use that the car could have been put to, not merely actual use that probably would have been made of it.[8] Included is loss of pleasure[9] as well as business use. The basic objective is to compensate plaintiff fully for being deprived of any reasonable use of the car for the time it was out of operation due to defendant's wrongdoing.

The recent case of *Parsons v. Lambert*[10] presents the question of whether the fulfillment of this objective requires that defendant pay damages to plaintiff for loss of use which extended for an abnormally long period through the fault of neither party. Plaintiff, owner of a 1931 Model-A Ford, brought an action against the defendant for the negligent injury of the car. Plaintiff sought to recover for the damages done to the car plus loss of use for a period of one hundred and twenty-five days, during which time the car could not be repaired because parts were not readily available for that particular model. The trial court allowed such recovery, but on appeal the Supreme Court of Mississippi reversed the decision as far as it pertained to damages for loss of use, declaring that since the defendant was not responsible for the long delay in getting the car repaired, he should not be liable for plaintiff's loss of use during the abnormally long period. The rule laid down as the proper guide for this item of recovery was that plaintiff is entitled to "such reasonable damages as he may have sustained in the loss of the use of his automobile for such time as would have been required for its repair under normal conditions."[11]

The only primary authority cited in the opinion is a California case[12] which clearly appears to be contra to the principle the Mississippi court adopts. There plaintiff's car could not be repaired for a period of twenty-three days because parts had to be shipped from the East. The court allowed plaintiff to recover damages for loss of use for the entire period, even granting recovery for the amount of the salary she paid her driver for this period, since she was under contract to pay regardless of whether any services were rendered. The court reasoned that she was "entitled to damages for deprivation of its use during the time necessarily consumed in making the proper repairs. It was due

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[8]1 Sedgwick, Damages (9th ed. 1920) § 243a.

[9]Cook v. Packard Motor Car Co., 88 Conn. 590, 92 Atl. 413 (1914); Perkins v. Brown, 132 Tenn. 294, 177 S. W. 1158 (1915); 1 Sedgwick, Damages (9th ed. 1920) § 243b.

[10]48 S. (2d) 143 (Miss. 1950).

[11]Parsons v. Lambert, 48 S. (2d) 143, 144 (Miss. 1950).

[12]Lyle v. Seller, 70 Cal. App. 300, 233 Pac. 345 (1924). The only secondary authority cited in the Parsons case was two sections from C. J. S. which contain only general statements not authority for proposition for which cited.

to no fault of hers that the collision occurred, and she was not responsible for the delay made necessary by reason of the fact that the parts were not immediately available."[13]

The several courts which have passed specifically on this point have been in agreement that plaintiff's damages should be determined on the basis of the actual period during which use of the car was lost without fault of the plaintiff.[14] Thus, where the delay in making repairs was due to a scarcity of parts,[15] to the necessity of ordering parts from a long distance,[16] and to a shortage of painters,[17] recovery for deprivation of use for the entire period was allowed, provided the period was reasonable. In a case closely resembling the principal decision,[18] the court pointed out that recovery would be allowed in the absence of any evidence to show that the time consumed in making repairs was an unreasonable or unusual length of time, considering all the circumstances. The factor that distinguishes this decision from the *Parsons* case is that the Mississippi court took into consideration reasonableness under *normal conditions* and necessarily implied that inability to secure parts promptly was not a normal condition.

In one instance, an allowance of damages for an extended loss of use was approved where the chattel was completely destroyed, and the failure to obtain a replacement promptly was due to plaintiff's financial inability to buy a new car.[19] Though this is contrary to the general view that no loss of use damages can be recovered where total destruction has been caused,[20] the Kentucky court saw no reason why the

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[13]Lyle v. Seller, 70 Cal. App. 300, 233 Pac. 345, 346 (1924).

[14]Brooks Transp. Co. v. McCutcheon, 154 F. (2d) 841 (App. D. C. 1946); Lyle v. Seller, 70 Cal. App. 300, 233 Pac. 345 (1924); Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1936); Independent Oil Refining Co. v. Lueders, 17 La. App. 154, 134 So. 418 (1931); Town v. State, 49 N. Y. S. (2d) 924 (1944).

[15]Brooks Transp. Co. v. McCutcheon, 154 F. (2d) 841 (App. D. C. 1946).

[16]Lyle v. Seller, 70 Cal. App. 300, 233 Pac. 345 (1924).

[17]Independent Oil Refining Co. v. Lueders, 17 La. App. 154, 134 So. 418 (1931).

[18]Brooks Transp. Co. v. McCutcheon, 154 F. (2d) 841 (App. D. C. 1946).

[19]Chesapeake & O. Ry. Co. v. Boren, 202 Ky. 348, 259 S. W. 711 (1924). In Lucas v. Andress, 136 So. 207 (La. App. 1931), the court pointed out that a thing could not ordinarily be damaged beyond its true value, but damages to an automobile is an exception to this rule.

[20]Langham v. Chicago R. I. & P. Ry. Co., 201 Iowa 897, 208 N. W. 356 (1926); Helin v. Egger, 121 Neb. 727, 238 N. W. 364 (1931). Two considerations support this position: First, the plaintiff is under a duty to use any reasonable means of minimizing his damages, and it is ordinarily reasonable for him to prevent loss of use damages by replacing the destroyed car with a new one. Of course, if he is financially unable to do so, either with his own resources or by borrowing, he does not fail to act reasonably by failing to get a replacement. Second, the total award for plaintiff's losses—damage to car plus loss of use—is not allowed to exceed the

injured party should not be permitted to recoup her whole loss, including damages for loss of use, when her personal property is completely destroyed, as well as when it is injured.

Not only is the principal case against the weight of authority, but it is also clearly not consistent with the fundamental purpose of tort damages to put the plaintiff in as good a position as he would have been had the wrong never occurred.[21] If the plaintiff cannot recover for loss of use and damages up to the value of the chattel before it was injured, then the plaintiff has not been put back in a position comparable to his pre-injury position. It is not disputed that the defendant did not cause the delay, yet it was his negligence which gave the condition significance, and it seems more just to make the defendant bear the burden than to put it on the plaintiff who neither caused the delay nor brought the condition into play.

The only possible justification which can be deduced for the Mississippi decision lies in the general limitation imposed by most courts that the combined awards for damage to the car and loss of use must not exceed the total value of the car before the accident.[22] In the principal case the jury awarded $300 for damages to a car which was a nineteen year old Ford, and the addition of a substantial sum for loss of use might well have placed the total recovery in excess of the pre-accident value. In such a situation, the position is taken—not always reasonably—that the owner should have replaced the wrecked automobile with another car rather than having attempted to have it repaired at such an expenditure of time and money. However, that view assumes that the owner can always determine in advance how much the car has been damaged and what the monetary loss of use during the repair period will be, and so will know whether he is legally justified in having the repairs made. The principal case is a

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full value of the car immediately before defendant's wrong. This limitation is again based on the idea that if those damages are so extensive and difficult to repair as to amount to such a large sum, the plaintiff should abandon the car and replace it with another one.

[21]"Compensation is the fundamental and all pervasive principle governing the award of damages. Compensation, not restitution, value, not cost, is the measure of relief... the end in view is the same,—that plaintiff be made whole." Hale, Damages (1896) § 2. One wonders whether the Mississippi court would hold that a defendant who injures a person whose earning capacity is one hundred thousand dollars per year, could plead that since such an income is not a normal one, he need not compensate the plaintiff for full amount of lost earning capacity.

[22]Southern Ry. Co. in Kentucky v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162 (1915); Helin v. Egger, 121 Neb. 727, 238 N. W. 364 (1931); McCormick, Damages (1935) § 124.

good demonstration of the fallacy of such an assumption, inasmuch as it is probable that no one could foretell how long a time would be required for securing the needed parts. Therefore, if the overall award limitation was the unexpressed basis for the Mississippi court's refusal of full loss of use damages, an unfortunate application of a general rule was made to a fact situation not appropriate for its operation.

S. MAYNARD TURK

EVIDENCE—ADMISSIBILITY IN NEGLIGENCE ACTION OF EVIDENCE OF PRIOR ACTS OF NEGLIGENCE IN SIMILAR SITUATION. [Texas]

It is a settled rule in most jurisdictions that evidence of prior acts of negligence in a similar situation is not admissible in a suit based on a particular act of negligence attributed to the defendant.[1] One of the most obvious reasons for the rule is the fact that each case is concerned solely with the specific act, and hence evidence of prior acts is highly irrelevant, for even the most prudent of men will be negligent at one time or another. Additional reasons are that the evidence presents undesirable collateral issues that are likely to confuse the jury, and often works an unfair surprise upon the opposing party.[2] Nevertheless, experience often dictates that the fact that the defendant was negligent under similar circumstances in the past is strong evidence tending to show the particular act of negligence charged to him. This furnishes a fourth reason for the rule: that such evidence is unduly prejudicial in that it may be given too much weight by the jury in reaching the verdict.[3]

This latter justification also forms the basis for an exception to the rule, that when the evidence of the past acts has some element, besides mere similarity in events, which gives it a stronger relevancy as to

[1]Pugsley v. Tyler, 130 Ark. 491, 197 S. W. 1177 (1917); City & County of Denver v. Brubaker, 97 Cal. 501, 51 P. (2d) 352 (1935); Gannon v. Sisk, 95 Conn. 639, 112 Atl. 697 (1921); Cox v. Norris, 70 Ga. App. 580, 28 S. E. (2d) 888 (1944); Park Circuit & Realty Co. v. Coulter, 233 Ky. 1, 24 S. W. (2d) 942 (1930); Johnson v. Maine Central Ry. Co., 141 Me. 38, 38 A. (2d) 884 (1944); Moore v. American Stores Co., 169 Md. 541, 182 Atl. 436 (1936); Cook v. Boston Elevated Ry. Co., 256 Mass. 27, 152 N. E. 58 (1926); Parsonnet v. Keil's Newark Bakery, 119 N. J. L. 301, 196 Atl. 661 (1938); Rayburn v. Day, 126 Ore. 135, 268 Pac. 1002, 59 A. L. R. 1062 (1928); Klein v. Weissberg, 114 Pa. Super. 569, 174 Atl. 636 (1934); Texas & N. O. R. Co. v. McNeill, 270 S. W. 1038 (Tex. Civ. App. 1925).

[2]1 Wigmore, Evidence (3d ed. 1940) 678.

[3]See Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675 (1906) which emphasizes this reason under its facts.

the issues in the case, it is admissible.[4] Where common sense shows that the past actions are a strong indication of future acts, the element of stronger relevance is present, and the evidence is allowed. Illustrations of this situation are the numerous cases in which the defendant is charged with negligently maintaining a dangerous physical condition, or a dangerous mechanical instrumentality. Evidence that under similar circumstances in the past, mishaps had occurred at this place,[5] or that the machine had demonstrated a dangerous tendency[6] is universally admitted. Both logic and experience justify the obvious inference that once a dangerous condition in these inanimate objects is shown to exist, it will continue to exist until human intervention corrects it.[7]

When the human actor alone is concerned, however, this reasoning loses its force. Man is possessed of a free will and is presumably able to exercise a certain amount of self-control; hence, the inference that his past acts indicate what his future ones will be is not permissible. The general rule is therefore almost universally applied in cases involving evidence of a negligent or careless character.[8] In many jurisdictions, however, evidence of the past acts is admitted if this pattern of conduct has become so fixed and invariable as to amount to habitual carelessness in a certain situation.[9] Experience and reason would seem to sustain these holdings, for the argument that even the most prudent of

[4]Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675 (1906) contains an excellent discussion of the general rule, and an exposition of the type situation in which the exception can be applied.

[5]Meyers v. Capital Transit Co., 75 App. D. C. 256, 126 F. (2d) 231 (1942); Robins v. Pitcairn, 124 F. (2d) 734 (C. C. A. 7th, 1942); City of Birmingham v. Levens, 241 Ala. 47, 200 So. 888 (1941); Moses v. Kansas City Public Service Co., 188 S. W. (2d) 538 (Mo. App. 1945). It is always necessary, of course, that the circumstances under which the prior accidents occurred be similar to those under which the particular event occurred. Thompson v. B. F. Goodrich Co., 48 Cal. App. (2d) 723, 120 P. (2d) 693 (1941). The converse seems also true—i.e., that evidence of no prior accidents is admissible to show that the condition was not dangerous. Lewis v. Washington Ry. & Electric Co., 52 App. D. C. 243, 285 Fed. 977 (1923).

[6]Wight v. H. G. Christman Co., 224 Mich. 208, 221 N.W. 314 (1928); Aspind v. Pearce, 175 Minn. 445, 221 N. W. 679 (1928); Perry v. Branning Mfg. Co., 176 N. C. 68, 97 S. E. 162 (1918).

[7]Sears, Roebuck & Co. v. Copeland, 110 F. (2d) 947 (C. C. A. 4th, 1940).

[8]1 Wigmore, Evidence (3d ed. 1940) 481. The so-called "eye-witness rule," by which evidence of a negligent character is admissible where there are no eye-witnesses to the mishap, is stated by Professor Wigmore to have a limited following.

[9]Witney v. Gross, 140 Mass. 232, 5 N. E. 619 (1885); Stenson v. Payne, 231 Mich. 158, 203 N. W. 831 (1925); Allman v. Gulf & S. I. R. Co., 149 Miss. 489, 115 So. 594 (1928); Hodges v. Hill, 175 Mo. App. 441, 161 S. W. 633 (1913); State v. Manchester & Laurence Railroad, 52 N. H. 528 (1873).

men may occasionally be negligent presents no opposition when the course of conduct in a particular situation has become unvarying.

When the evidence falls short of establishing habitual negligence, a more difficult problem is presented. The question was resolved in the recent Texas case of *Dallas Railway & Terminal Co. v. Farnsworth*[10] in favor of admitting the evidence, and although common experience may offer some support for the decision, both authority and logic seem strongly opposed to it. The plaintiff, an elderly lady, was a passenger on one of defendant's street cars one busy afternoon in Dallas. After a ride of several blocks, she was the last passenger to alight at a place from which the car tracks turned to the left. Two eyewitnesses corroborated the testimony of plaintiff that before she had time to remove herself to a place of safety, the operator of the car started it around the curve, and in doing so, caused her to be struck by the rear of the car, which extended beyond the tracks when taking a curve. Thus, there was ample evidence to support the finding of the jury that the operator was negligent in not giving plaintiff a reasonable time to find safety before starting the car. On appeal from a judgment for plaintiff, defendant assigned as error that the plaintiff had been allowed to testify that at three stops preceding the one at which she was injured, the operator of the car had started so quickly that the then alighting passengers had scarcely had time to get off before the car was moving again. It was urged that this was contrary to the general rule with regard to evidence of prior negligent acts.

While the court admitted the existence of the general rule, it held that this case presented a proper situation for the application of the exception, because this evidence was of a higher degree of relevance in that "it tended to prove the state of his [the operator's] mind or the condition of his nerves, that is, that he was in a hurry, and so was relevant and of some probative value on the issue as to whether he failed to give respondent an opportunity to get beyond the overhang of the car before starting it."[11]

Before the case can be correctly interpreted, it is necessary to determine what was meant by "state of mind." Obviously the court did not have reference to this mental state as being an ingredient of a cause of action based upon negligence, for the law regards negligence as conduct, and not a mental condition.[12] And although one of the

[10]227 S. W. (2d) 1017 (Tex. 1950).
[11]Dallas Ry. & Terminal Co. v. Farnsworth, 227 S. W. (2d) 1017, 1020 (Tex. 1950).
[12]See Terry, Negligence (1915) 29 Harv. L. Rev. 40.

two cases cited by the court was an assault and battery case,[13] and thus involved the element of intent, the principle on which evidence was admitted in that case is not applicable to the instant situation because, by definition, negligence is an unintentional wrong. When speaking of this mental element, therefore, the court must have had reference to a sort of subjective "mood"—that is, that the operator was in a careless or negligent mood on that afternoon. Thus, the court felt that evidence showing the existence of this mood was relevant because a person in this state is more likely to be negligent. It is difficult to support this reasoning, however, for the law is not interested in subjective tendencies, but rather in the overt act; there is no different standard of care for one who is in a negligent mood as distinguished from one who is not. Hence, this evidence would appear to be irrelevant.

It is equally difficult to substantiate the ruling of the court on the basis of authority. A close examination of *Cunningham v. Austin & N. W. Rd. Co.*,[14] an earlier Texas case upon which the Court relied heavily, shows that it furnishes no real support for this decision. There the plaintiff was an employee of defendant railway company, and was injured in a wreck caused by the breaking of one of the wheels on a railway car. The defense was that an inspection of the car on the morning of the accident had disclosed no defect in the wheel, but plaintiff denied that any inspection had been made and charged defendant with negligence in employing an incompetent car inspector. In this manner the *competency* of defendant's car inspector was put into issue. At the trial the inspector testified that he had inspected the car on the morning of the accident, and had found no defects; that he knew that he had inspected on that particular morning because it was his duty to make such inspections, and he always performed his duty. Plaintiff then offered to show that on some six mornings subsequent to the morning of the accident, the inspector had not performed his duty, but the evidence was excluded. On appeal, the Supreme Court thought that the evidence should have been received, saying that some people are "by nature inattentive or thoughtless, and, as a result thereof, frequently neglect the performance of important duties without any intention so to do. This mental quality can only be evidenced by the outward acts of a person, and, where its existence or nonexistence is in issue, evidence of such acts is admissible."[15] The court insisted that this did not refer

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[13]Harshbarger v. Murphy, 22 Idaho 261, 125 Pac. 180, 44 L. R. A. [N.S.] 1173 (1912).

[14]88 Tex. 534, 31 S. W. 629 (1895).

[15]Cunningham v. Austin & N. W. Rd. Co., 88 Tex. 534, 31 S. W. 629, 630 (1895).

to a character for negligence, but only to a careless disposition in a particular job or duty when that disposition itself is an issue in the case. So interpreted,[16] the *Cunningham* case offers no support for the holding of the principal case, because in the latter case the competency of the operator of the street car was not in issue. Furthermore, though no attempt will be made to weigh the comparative relevancies, there is the distinction between the transitory, irregular "mood," and the more enduring, continuous "disposition."

In one of the rare cases in which the issue has been passed on in other jurisdictions, the Missouri court in *Moss v. Wells*[17] admitted the evidence on facts quite similar to those of the present case. There plaintiff had been allowed to testify that she had had to ring the bell at three different stops before the operator of the street car would stop and let her off. She was then injured when the car started while she was still in the process of alighting. The Missouri court decided that her testimony was proper, since "it tended to prove that the conductor was heedless of his business that morning because he was in a hurry, or for some other reason, and therefore it was evidence tending to prove he negligently started the car forward without giving plaintiff a reasonable time to alight...."[18] The reasoning of the two cases seems identical.

Practically all of the other cases in which such evidence was allowed can be explained on the basis that the evidence tended to prove habitual negligence in a particular situation,[19] or on some other basis

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[16]This is the interpretation given the case in 1 Wigmore, Evidence (3d ed. 1940) 701.

[17]249 S. W. 411 (Mo. App. 1923).

[18]Moss v. Wells, 249 S. W. 411, 413 (Mo. App. 1923).

[19]Illustration is given by two close cases. See also 1 Wigmore, Evidence (3d ed. 1940) 530 for a collection of cases explicable on the basis of habit. In Brouillette v. Conn. River Ry. Co., 162 Mass. 198, 38 N. E. 507 (1894) plaintiff, an employee of defendant, was injured in an accident caused by a misplaced wire in defendant's electric signal system. Plaintiff's injury occurred while he was enroute to work through a part of the yards known to him to be dangerous. The court admitted evidence, as bearing on the issue of contributory negligence, that plaintiff had boasted on many prior occasions that he had great ability to keep out of the way of trains and not get hurt. This had a "bearing upon the question of his carelessness, or readiness to take risks." 162 Mass. 198, 38 N. E. 507, 508 (1894). Although upon the basis of the short opinion alone it might be concluded that the evidence went to character rather than habit (as indicated in 1 Wigmore, Evidence (3d ed. 1940) 531), it certainly did not go to a "mood." In Allard v. Northwestern Contract Co., 64 Wash. 14, 116 Pac. 457 (1911), plaintiff was an employee of defendant working in defendant's rock quarry. The injury occurred when plaintiff was struck by a rock hurled by a blast. Plaintiff claimed that he was given no warning, but defendant offered evi-

not related with the issues herein presented.[20] Perhaps the scarcity of these decisions is accounted for by the fact that the prior acts offered in evidence to show the existence of the careless frame of mind at the time of the accident would of necessity have to have occurred in a similar situation and within a short time before the specific act for which liability is alleged. This factor of close relation to the particular act in time and space was mentioned in a collateral manner by both the Texas and Missouri courts, the former saying in the present decision that the prior acts testified to by plaintiff "were not so far removed either in place or in time as to be considered 'conduct on other occasions,' but were so closely related to the occurrence on which this suit is based that they may be considered, as in effect, part of the conduct of the operator that caused respondent's injury."[21] Apparently the court had in mind those cases in which evidence of the prior acts is admissible if they are but a part of one continuing transaction.[22] But it is arguable that the three stops alluded to in plaintiff's testimony made each stop and start a separate and distinct transaction, and not a part of a chain of continuous events leading up to the injury. The court apparently was aware of this, for it said that the acts could be "considered" as a part of the same occurence, thereby implying that they were separate acts. However, there is no magic to the fact that

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dence, which was allowed, that on prior occassions plaintiff had failed to take cover when a blast was imminent. The court, in admitting the evidence, felt that it related to the issue of contributory negligence and upon the issue of whether or not warning was actually given. The opinion contains a habit approach.

[20]An interesting case of this nature is Rowe v. Bregenzer, 161 Mich. 684, 126 N. W. 706 (1910) which involved a fire that destroyed plaintiff's timber. It appeared that plaintiff had his timber stacked in defendant's slashing; that the fire occurred on Tuesday or Wednesday; that on the Saturday preceeding the day of the fire, a fire had been seen in the slashing by the witness. The witness was allowed to testify that defendant had come out of the slashing and had said something to the effect that it would be a good time to burn out the slashing. A few minutes later the fire was discovered. The witness testified further that the fire he saw on Saturday had gone out by Monday. The court felt that the evidence of the statements of defendant with regard to the Saturday fire were admissible because they tended to show that he either started a fire on Saturday with full knowledge that the wood was there and would burn, or had started the fire a day or two later, if the Saturday fire had indeed gone out. Hence, it would appear that the court held the evidence admissible because it showed that defendant was in the mood to start a fire in his slashing whether plaintiff's timber was there or not. Actually, however, plaintiff had charged *intentional* as well as negligent setting of the fire, and this fact considerably weakens the case from the standpoint of the relevance of a negligent mood.

[21]Dallas Ry. & Terminal Co. v. Farnsworth, 227 S. W. (2d) 1017, 1020 (Tex. 1950).

[22]E.g., Wilson v. Fleming, 89 W. Va. 553, 109 S. E. 810 (1921); 1 Wigmore, Evidence (3d ed. 1940) 532.

distinct acts are related closely to each other in time and/or space, for that does not detract from the fact that they are separate acts, nor does it overcome the objections of irrelevancy, collateral issues, and so forth.[23]

Comparison of the two cases shows that the *Moss* case can be supported on this basis of a close connection in time and space, for in that case the failure to stop when signalled (which was the substance of the admitted testimony) blended the prior acts with the particular one into a continuous single event. It being all one transaction, the objections are not present.[24] Since the Texas court in the principal case cited no authority and made no further discussion of this proposition, it is not believed that it formed a basis for the decision, but rather was simply referred to as being additional support for the ruling.

It appears, therefore, that the decision in the instant case is difficult to support, unless on the basis that common experience teaches that negligence is more likely when the actor is in a careless mood. If the rationale of the decision was that experience shows that a negligent mood is an accurate indicator of a negligent act, thus giving the evidence of the prior negligence a higher degree of relevance, the evidence would not be limited to prior acts in a similar situation, but could in-

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[23]See Steinberger v. California Electric Garage Co., 176 Cal. 386, 168 Pac. 570 (1917). Defendant was towing a gasoline car with an electric car by means of a rope from twelve to twenty feet in length. It was dusk, and plaintiff was injured when she attempted to walk between the cars and tripped on the rope. Evidence that four other persons had almost done the same thing during the same trip was not admitted. In Greer v. Richard's Adm'r, 273 Ky. 91, 115 S. W. (2d) 568 (1938), defendant, a cab driver, had stopped his cab at the scene of an accident. He put the owner of the wrecked automobile and its passengers in his cab to take them home. While in the process of doing this, he had a collision with another vehicle, in which plaintiff's decedent was killed. Evidence that after defendant had picked up these extra passengers at the scene of the first accident, he had turned his vehicle around in a careless and reckless manner, almost striking bystanders, was not admitted. These acts had occurred but a short time before the fatal accident, and at a place not far distant from the scene of that wreck. Cf., however, Kelty v. Fisher, 101 Ore. 110, 199 Pac. 188 (1921). Defendant, a physician, had treated two patients, who were in the same room, for influenza. Both later died, and evidence that defendant had negligently administered morphine to one of the patients was admitted in a suit brought by the personal representative of the other patient. The court clearly based its decision on the closeness in time, place and circumstance of the other act to the particular one. The circumstances of the case, however, show that defendant was treating the two patients as if they were one, for they both fell ill at about the same time, were both in the same room and when making his calls to one, he treated both. These factors give the case an extraordinary tendency to blend into one act the treatment of both patients, and this is undoubtedly what the court had in mind.

[24]1 Wigmore, Evidence (3d ed. 1940) 532.

clude any prior acts of negligence that would show the existence of this mood. Obviously, such a rule would open the door to multitudinous collateral issues that would present a tremendous obstacle to orderly justice. It is impossible to determine whether the Texas court consciously gave way to what it felt the weight of common experience to be, or whether it merely decided that the contested evidence actually played a small part in the case (in view of the ample evidence to uphold the jury's verdict without it), and hence simply found a way to prevent a unnecessary new trial. Nevertheless, on the basis of authority and logic, it appears that the court has promulgated an unsound doctrine, and one which may, in the future, give rise to unsatisfactory decisions.

HARRY A. BERRY, JR.

EVIDENCE—APPLICATION OF OPINION RULE TO EXCLUDE OPINION EVIDENCE OF SANITY OF ACCUSED IN HOMOCIDE CASE. [Nevada]

The opinion rule, though branded as a "most annoying rule in its application,"[1] is simple of statement: "Where the data observed can be exactly and fully reproduced by the witness so that the jury can equally well draw any inference from them, the witness' opinion is not wanted, and will be excluded."[2] Conversely, if a witness can offer an inference or opinion which the jury itself could not accurately ascertain from so-called "facts" presented, then such testimony is of value and hence admissible within the scope of the rule. Uncertainties arise[3] from the fact that conflicting policies must be reconciled or compromised in any given application of the rule. From an affirmative point of view it is most desirable that all relevant evidence be made available to the jury to enable it to reach a fair decision on the issues entrusted to its judgment. On the other hand, the jury should not be influenced by testimony the reliability of which is highly questionable.

The recent Nevada decision of *State v. Butner*[4] is illustrative of the

[1]See Judge Learned Hand, Lectures on Legal Topics (N. Y. C. Bar Ass'n, 1926) 97: "No rule is subject to greater abuse. It is frequently an obstacle to any intelligible account of what happens.... I know of none more baffling to a witness.... Whatever its logical justification, it is the most annoying rule in its application that I know."

[2]Wigmore, Evidence (Students' ed. 1935) § 127.

[3]Apparently these uncertainties are a result of purely American controversy; the English courts do not experience the same degree of difficulty. See Note (1942) 7 Mo. L. Rev. 60.

[4]66 Nev. 127, 206 P. (2d) 253 (1949), petition for rehearing denied, 220 P. (2d) 631 (Nev. 1950).

difficulty of balancing these policies where the primary issue is the sanity of an accused in a homocide case. On the night of the crime the defendant, who had consumed a considerable quantity of intoxicants,[5] entered the house in which his wife resided. Shortly thereafter the wife arrived in a taxi and insisted that the driver, Watkins, accompany her into the house. After a brief exchange of words, the wife indicated her intention to return to town with the taxi driver. In the course of her attempted departure the defendant shot his wife three times, then pointed the gun at Watkins and directed him to turn over the body and see if she was dead. Watkins assured him of this fact and managed to execute a hasty withdrawal. At the trial defendant pleaded insanity, and considerable testimony, both expert and non-expert, was introduced on that issue, opinion being rather evenly divided. Though Watkins had never known the defendant before the homocide and his observation in this instance lasted only from three to eight minutes, he was permitted to testify that: "I noted at the time of the occurrence that when he pointed the gun at me and told me to roll her over and see if she was dead, that he wasn't drunk, or he wasn't crazy. I mean, he was deliberate and cold."[6] On appeal from the conviction, it was contended that the admission of that testimony tipped the scales in favor of the prosecution.

The Supreme Court of Nevada cited the rule that "in this state... opinion evidence of a layman or nonexpert as to the sanity or insanity of an accused... may properly be received in evidence, provided the witness possesses adequate knowledge, based on an opportunity to observe the conduct of the one whose mental condition is in issue."[7] The court took cognizance of the temporal limitation of Watkins' observation, but emphasized that the witness was present immediately before, during, and after the shooting, and argued that the precariousness of his position during the entire situation rendered his perceptive faculties more acute.[8] Since no abuse of discretion by the trial court

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[5]"The defendant, on that day, December 30, 1947, had drunk, as appeared from the evidence, 'a pint of whiskey, followed by several drinks at the Golden Gulch Bar and a drink or two at Dougherty's Bar, and that he drank the contents from a bottle of Cheracol, containing one grain of codeine and two grains of chloroform, within 20 minutes prior to the homocide'." State v. Butner, 220 P. (2d) 631, 649 (Nev. 1950).

[6]State v. Butner, 66 Nev. 127, 206 P. (2d) 253, 255 (1949).

[7]State v. Butner, 66 Nev. 127, 206 P. (2d) 253, 255 (1949). This rule was cited as having been established in Nevada by State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889).

[8]An assertion that a state of excitement and fear produces accurate analytical powers would certainly seem contestable. Furthermore, having one's life placed

was disclosed, the court unanimously affirmed the judgment,[9] but on a later petition for rehearing Chief Justice Horsey, who had been absent during all previous proceedings,[10] vigorously dissented. His entire argument presupposes the necessity for an acquaintance or association by the witness with the person whose conduct is in issue sufficient to constitute a basis for comparison of usual and specific conduct. Such acquaintance was asserted to be essential to the formation of an opinion worthy of admission as testimony.

Such cases present two legal issues upon which American courts are in disagreement: First, whether lay opinion should be admitted on the issue of the sanity of an accused felon, when the witness manifestly has sufficient knowledge on which to base an opinion; and second, whether, if the witness is allowed to express his opinion, he must also state the facts on which the opinion is based.

Both factions of the court in the principal case agreed that on the first point the policy in Nevada is in conformity with the practice of an overwhelming majority of states to admit lay opinion.[11] In support of this view, it is contended that a witness who has had an opportunity to observe the behavior and mannerisms of another individual cannot in many instances lay before the jury distinct facts which would enable it to pronounce a decision thereon with any reasonable assurance of truth.[12] The jury is not equipped to derive as accurate an inference as is the witness. Further, it must be recognized that any

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in jeopardy by another could certainly give rise to a feeling of vindictiveness which might color the testimony of one in the capacity of a witness.

[9]State v. Butner, 66 Nev. 127, 206 P. (2d) 253 (1949).

[10]The Chief Justice had been ill when the case first came up on appeal. When the first petition for rehearing arose he had returned to the bench, but deemed it appropriate that those who decided the appeal should hear the petition. His convictions were so strong on the subject that he gave vent to his feelings on the second petition. Considerable disagreement was evidenced among the court as to the propriety of entertaining a second petition grounded on the same arguments as the first.

[11]State v. Madena, 165 La. 474, 115 So. 661 (1928); Watts v. State, 99 Md. 30, 57 Atl. 542 (1904); Genz v. State, 58 N. J. L. 482, 34 Atl. 816 (1896); State v. Schneider, 158 Wash. 504, 291 Pac. 1093 (1930); Note (1931) 72 A. L. R. 579.

[12]"... the restriction of the evidence to a simple narration of facts having or supposed to have a bearing on the question of capacity would, if practicable, shut out the ordinary means of obtaining truth...." Clary v. Clary, 24 N. C. 58, 60 (1841); "From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it." Dissent in Boardman v. Woodman, 47 N. H. 120, 144 (1866); "... but few persons, without giving an opinion, could so describe the pathological condition of his mind, as to communicate to a jury a distinct idea of his true condition." Norris v. State, 16 Ala. 776, 779 (1849).

attempt to elicit pure "facts" from an observer of mental phenomena is a practical impossibility. If the witness' impressions are bound to color his "factual testimony," a frank acceptance of opinion, as such, would seem the better approach. As the Alabama court has pointed out, if the witness is required to limit his assertions to facts which cannot be readily stated in words, the value of his testimony may depend, not on what he may know, but on his ability to pantomime or imitate.[13]

Although the minority view on the subject has a relatively small following, its support stems from the important states of Massachusetts and New York. The Massachusetts case of *Pool v. Richardson*[14] was one of the first American decisions to reject a layman's opinion on the subject of sanity, and it has been asserted that the holding in this case contributed to a misconception of the context of the term "opinion," in that "the phrase 'mere opinion' (opinion not resting on observed data) 'is not evidence' came to be distorted into the phrase 'opinion is not evidence'."[15]

The later case of *Commonwealth v. Brayman*[16] suggests a practical criticism of the rule favoring admission. The court stated that it saw no reason to admit testimony other than that of experts unless "*all* persons who have had opportunities for observation of the mental state of the individual in question are allowed to give opinions upon the subject...."[17] This inference that the introduction of many witnesses' testimony would tend to prolong the trial unnecessarily, and that the end result might indicate a fairly even split of opinion is borne out by reference to the principal case. Chief Justice Horsey's condemnatory dissent in the second *Butner* rehearing emphasizes the fact that the trial judge's allegedly erroneous discretion in admitting Watkins' testimony was especially regrettable because of the impact it had upon a jury weary from the monotony of a long trial. Undeniably, administrative convenience is served by the minority rule, for it relieves trial judges from the difficult task of passing on the qualifications of lay witnesses to express opinions and makes unnecessary a decision on

[13]"Must the prisoner lose the benefit of such testimony altogether, or shall the witness be required to furnish as well as he may, a pantomimic delineation of the wild look.... Were such the law, the force of the testimony would be made to depend upon the powers of the witness for imitation." Norris v. State, 16 Ala. 776, 780 (1849).

[14]3 Tyng 330 (Mass. 1807).

[15]7 Wigmore, Evidence (3d ed. 1940) § 1933.

[16]136 Mass. 438 (1884).

[17]Commonwealth v. Brayman, 136 Mass. 438, 440 (1884) [italics supplied].

the controversial question of whether the witness must support his opinion with a statement of facts sufficient to sustain the conclusion drawn.

The New York decisions on the subject have been inconsistent in the past, and the current view[18] represents a compromise: a witness may characterize the acts of an individual whose sanity is in question as being rational or irrational, but is not permitted to offer an opinion as to an individual's general state of mind. This view represents no more than a token adherence to the minority position and fails even to reflect any unanimity of opinion within the state.[19]

While majority and dissenting judges in the *Butner* case agreed that as a general proposition lay opinions as to sanity are admissible, they differed sharply in regard to the conditions under which such opinions could be admitted, and this disagreement reflects the conflicting decisions in the several states. A substantial majority of states refuse to allow a witness to state an opinion independent of the facts within his own knowledge, but demand that he detail those facts prior to submitting the conclusion that he has derived therefrom.[20] These facts of course must indicate that the witness has had "an acquaintance... of such intimacy and duration as to clearly indicate that he was well enough acquainted with such person to render his testimony of value."[21] Other courts have imposed similar tests requiring that the witness must have had an "ample opportunity for observation" of the accused,[22] or an opportunity to observe defendant and form an "opinion satisfactory to himself."[23]

This restriction is worthwhile to the extent that it is intended to insure introduction of only reliable testimony before the jury. If the witness knows that his opinion must be justified, then he will be

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[18]People v. Spencer, 179 N. Y. 408, 72 N. E. 461 (1904). Also see Note (1931) 72 A. L. R. 586.

[19]See 7 Wigmore, Evidence (3d ed. 1940) § 1929: "In 1939 the Judicial Council of the State of New York formulated the following provision for proposal as a new § 345-a in the Civil Practice Act: 'Statement of inference or opinion permitted. Testimony of a non-expert witness shall not be excluded from evidence on the ground that it is in the nature of an inference or opinion, provided that the facts upon which such inference or opinion is based have been personally observed by the witness and are stated by him, if, in the opinion of the court, they are capable of being stated'."

[20]Russell v. State, 17 Ala. App. 436, 87 So. 221 (1920); People v. Delhantie, 163 Cal. 461, 125 Pac. 1066 (1912); Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892); People v. Phipps, 268 Ill. 210, 109 N. E. 25 (1915); Note (1931) 72 A. L. R. 579.

[21]State v. Schneider, 158 Wash. 504, 291 Pac. 1093, 1096 (1930).

[22]Voice v. Commonwealth, 284 Ky. 416, 145 S. W. (2d) 45, 48 (1940).

[23]State v. Nall, 211 N. C. 61, 188 S. E. 637, 638 (1936).

more inclined carefully to evaluate his thoughts and impressions before offering them in court. Further, requiring the witness to submit a basis for his opinion serves to aid both the trial judge in deciding whether the witness is qualified by knowledge to state an opinion and the jury in determining the weight that should be accorded such opinion testimony as is admitted.

Despite the apparent logic of this reasoning, the courts of several jurisdictions,[24] including Nevada, have determined that the right of the witness to state his opinion on the sanity of an accused is not conditioned on his first reciting facts supporting the opinion. This minority view, which is advocated by Dean Wigmore,[25] seems consistent with the argument for admission of lay opinions generally. In the first place it is readily believable that the witness' first impression, absent a retrospective evaluation of its validity, would be the most accurate representation of his thoughts. Secondly, since the testimony to be offered deals with description of an intangible, it may be that the very lack of capacity of a witness for expression makes impossible an adequate explanation of the facts which support his conclusions.[26] Furthermore, the necessity of a preliminary statement of facts as a condition precedent to the acceptability of a conclusion drawn therefrom, would seem of technical importance only; by cross-examination the opposing counsel should be able to impeach inferences drawn from data found to be inadequate to support the witness' opinion.[27]

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[24]State v. Rumble, 81 Kan. 16, 105 Pac. 1 (1909); State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889). See Wood v. State, 58 Miss. 741, 743 (1881); Garrison v. Blanton, 48 Tex. 299, 303 (1877).

[25]7 Wigmore, Evidence (3d ed. 1940) § 1935.

[26]"There are many things which the mind may clearly apprehend, and yet the mental process cannot be explained, so as to be understood by others. A witness may state, with much certainty, that one, with whom he was associated daily for years, has become insane; and yet he cannot clearly explain to others, how it is, that he knows the individual in question to be insane.... In all these cases, the opinion of the witness is received, because the facts which constitute the cause, from which the opinion proceeds, as an effect, cannot themselves be presented or communicated to the mind of a jury, so as to impart to them knowledge which the witness actually possesses... the true reason, why the opinions of witnesses may be given to a jury, upon questions not involving skill and science... is, because witnesses have a knowledge of the thing about which they speak, and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable, in their very nature, of being explained to others, that they may state what they know, in the best way they can. This best way is... in the form of an opinion...." Cooper v. State, 23 Tex. 331, 337, 338 (1859).

[27]"... the qualification that the opinion of the non-expert must be accompanied by a statement of the facts upon which it is based, is not very important, since, whether the witness be an expert or non-expert, the grounds of his belief and

In light of the nearly universal view that qualified lay opinions should be admitted on the issue of the sanity of an accused criminal, it appears that the desire to make all relevant evidence available to the jury has prevailed in America over the fear that the jury may be unduly influenced by unreliable testimony. It is submitted that the minority view that preliminary factual support is unnecessary is the only approach consistent with the general admission of such lay opinion, inasmuch as the nature of the issue of sanity makes it extremely difficult to detail the facts which produce the opinion. The danger of decisions being swayed by testimony of ill-founded opinion is minimized by the trial judge's discretion to deny admission of an opinion of a witness who is not sufficiently qualified by knowledge, and by opposing counsel's opportunity to discredit the opinion through cross-examination of an unqualified witness. The basic weakness of this stand is that it presumes existence of a trial judge whose discretion is unerring, or of counsel adept at cross-examination, and the principal case suggests that this presumption may not always be safely indulged. However, an occasional lapse by court or counsel is not enough to condemn a salutary rule of law. In most instances it would seem that by allowing the witness to offer his testimony in the manner he thinks best, the most accurate result will be achieved and the ends of justice thereby furthered.

JAMES A. ANDERSON, III

LABOR LAW—DENIAL OF UNEMPLOYMENT COMPENSATION TO WORKERS MADE IDLE BY STRIKE IN ANOTHER PLANT. [Georgia]

State unemployment compensation statutes generally disqualify from the benefits of the act an employee whose unemployment "is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed."[1] This limitation as to the area of the labor dispute has made

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his opportunities of observation may always be elicited; and whether the witness be of the one class or the other, his testimony should be rejected by the court where it consists of a mere naked declaration of opinion, with neither learning, observation, nor acquaintance to support it." Wood v. State, 58 Miss. 741, 743 (1881).

[1]Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (1937) § 5 (d). This limitation as to the area of the dispute is not only contained in those acts which have been patterned after the Draft Bill of the Social Security Board but is also in the statutes of the nine states which have adopted more stringent labor dispute qualifica-

it necessary for the courts of several states[2] to determine what constitutes a "factory or establishment." The problem of interpretation is important because often a strike at one plant may force unemployment upon non-striking persons employed at another plant dependent upon the striking plant for materials, and if the plants be considered as one unit the non-strikers will be barred from unemployment benefits. In such situations where the plants are under different ownership there has been general agreement that separate establishments exist,[3] but where different plants of the same employer are involved, the decisions have not been unanimous.[4]

The first courts to handle the problem of single ownership of two or more plants construed the term "establishment" to include all plants integrated into one production unit, and workers in non-struck plants closed by a strike elsewhere were thus excluded from unemployment benefits. To reach this conclusion the Wisconsin court in *Spielmann v. Industrial Commission*[5] and the Michigan court in *Chrysler Corporation v. Smith*[6] looked at the " 'physical proximity, functional integrality and general unity' of the plants involved."[7] The Connecticut court, in *General Motors Corporation v. Mulquin*,[8] distinguished these decisions on the basis of statutory difference and refused to find that the two plants concerned by its decision constituted a single unit.[9] While

tions than those suggested by the Board. The fact that some of these states merely use "in the establishment," rather than "factory, establishment, or other premises," does not alter the problem. On this latter point see Note (1949) 33 Minn. L. Rev. 758, 764.

[2]Alabama, Connecticut, Georgia, Maryland, Michigan, Minnesota, New Jersey, Wisconsin, and Virginia. See cases cited in following notes.

[3]See Chrysler Corporation v. Smith, 297 Mich. 438, 298 N. W. 87, 93, 98 (1941); Nordling v. Ford Motor Co., 42 N. W. (2d) 576, 586 (Minn. 1950); Fierst and Spector, Unemployment Compensation in Labor Disputes (1940) 49 Yale L. J. 461, 488; Note (1949) 33 Minn. L. Rev. 758, 764.

[4]See Note (1949) 33 Minn. L. Rev. 758, 764.

[5]236 Wis. 240, 295 N. W. 1 (1940).

[6]297 Mich. 438, 298 N. W. 87 (1941).

[7]Spielmann v. Industrial Commission, 236 Wis. 240, 295 N. W. 1, 3(1940). The two plants were owned by an automobile manufacturer, one being a body plant located at Milwaukee, Wisconsin, and the other being an assembly plant located forty miles away in the same state. The production in each plant was so highly synchronized and integrated that a body built in the Milwaukee plant against a given car order would meet the chassis at the assembly plant according to a pre-established schedule. The court found that the two plants "were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building." 236 Wis. 240, 295 N. W. 1, 4 (1940).

[8]134 Conn. 118, 55 A. (2d) 732 (1947).

[9]The Connecticut statute contained the phrase "factory, establishment or

that court admitted that physical proximity was important, it also insisted that such factors as the source of authority in hiring, paying and discharging employees, the methods of handling accounts, and whether or not one plant was under the immediate control of the other were equally significant in determining plant autonomy.[10] The courts of Alabama and Maryland applied the test used in the *Spielmann* and *Chrysler* cases but failed to find that physically separated plants constituted one establishment.[11]

This was the confused state of the law when in May, 1949, the employees of the Ford Motor Company's Dearborn, Michigan, automobile assembly plant struck in protest against a company attempt to speed up production. The parts plant workers at the same location then struck in sympathy with the assembly line workers. As a result, various Ford assembly plants in Georgia, Minnesota, New Jersey, and Virginia were forced to close for lack of parts, and workers there were laid off. This strike was called by two local unions of the United Automobile Workers and was subsequently sanctioned by the International Union of United Automobile Workers of which the two locals were members. All of Ford's employees within the United States were members of the International and subject to a master labor employment contract existing between Ford and the International, but the locals in the various states were separate and distinct from the striking locals in Michigan. Furthermore, the locals outside of Michigan did not take a strike vote, did not join in the strike, remained at work until laid off by the company, and returned immediately when called back to work.

While unemployed, the workers in Georgia, Minnesota, New Jersey, and Virginia applied for unemployment compensation. Ford protested these payments in each of the four state courts on the ground that the strike in Michigan was the same as a strike in the other plants because the Michigan plant and each of the local plants were, in contemplation of the unemployment compensation laws, to be considered

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other premises" while the Wisconsin statute interpreted in the Spielmann case used the phrase "in the establishment." The Connecticut court thought that this difference in statutes was a ground for distinction. However, as was pointed out in Note (1949) 33 Minn. L. Rev. 758, 764, this difference in words does not alter the basic problem. Also on this point see Ford Motor Co. v. Unemployment Compensation Commission, 63 S. E. (2d) 28, 32 (Va. 1951).

[10]General Motors Corporation v. Mulquin, 134 Conn. 118, 55 A. (2d) 732, 738 (1947).

[11]Tennessee Coal, Iron and R. Co. v. Martin, 33 Ala. App. 502, 36 S. (2d) 535 (1948), aff'd 251 Ala. 153, 36 S. (2d) 547 (1948); Tucker v. American Smelting and Refining Co., 189 Md. 250, 55 A. (2d) 692 (1947).

as one.[12] Although there was some divergence between the Minnesota statute and the identical statutes of New Jersey and Virginia,[13] the Minnesota court in *Nordling v. Ford Motor Co.*,[14] the New Jersey court in *Ford Motor Co. v. New Jersey Department of Labor and Industry*,[15] and the Virginia Court in *Ford Motor Co. v. Unemployment Compensation Commission*,[16] decided against the contention of the automobile manufacturer. However, the Georgia court in *Ford Motor Co. v. Abercrombie*,[17] construing a statute[18] identical to those of New Jersey and Virginia reached a contrary result by determining the Georgia plant and the Michigan plant to be "inseparable and indispensable parts of one and the same 'factory establishment, or other premises'."[19]

In defining what constitutes "a factory, establishment, or other premises," the Georgia court relied heavily on the *Spielmann* and *Chrysler* cases as precedents, and yet it completely ignored two of the three parts of the test advanced in those cases. The court seemed to think that the presence of functional integration between the two production units was conclusive, and that therefore it was not necessary to consider whether physical proximity and general unity were also present. Nevertheless, as the Minnesota court in the *Nordling* case points out, many factories which are separately owned are functionally integrated, but no one would contend in such a circumstance that the integrated plants are one.[20]

The Georgia court ignored contrary decisions from other jurisdictions, dismissing them without discussion by simply saying "we must construe our own law by applicable controlling rules of construction and apply the facts as shown by the record to the law as thus

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[12]Ford Motor Co. v. Unemployment Compensation Commission, 63 S. E. (2d) 28, 32 (Va. 1951).

[13]The Minnesota statute uses the words "at the establishment." Minn. Laws (1943) c. 650, § 5. The New Jersey and Virginia statutes use "at the factory, establishment, or other premises." N. J. S. A. (West, 1950) 43:21-5(d); Va. Code Ann. (Michie, 1950) § 60-47. The Virginia court has determined that the effect of the language in each Act is the same. Ford Motor Co. v. Unemployment Compensation Commission, 63 S. E. (2d) 28, 33 (Va. 1951).

[14]42 N. W. (2d) 576 (Minn. 1950).

[15]5 N. J. 494, 76 A. (2d) 256 (1950).

[16]63 S. E. (2d) 28 (Va. 1951).

[17]207 Ga. 464, 62 S. E. (2d) 209 (1950).

[18]Ga. Laws (1937) 806, 813.

[19]Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S. E. (2d) 209, 215 (1950).

[20]Nordling v. Ford Motor Co., 42 N. W. (2d) 576 at 586 (Minn. 1950).

construed."[21] Consequently, the court did apply its own rules of construction of the law and reached the conclusion that the legislature had intended that unemployment benefits should be paid only to those workers whose unemployment was involuntary. Strangely enough, this determination of legislative intent was identical to the intent findings announced in some of the conflicting cases which the court ignored.[22] However, the Georgia court disagreed with those cases in the interpretation of what constitutes involuntary unemployment, and found that unemployment in the Ford incident was voluntary. It is apparent that the court feared that a labor union might bring about a stoppage of work elsewhere through a strained construction of a labor contract and thus force employers to pay for idleness of colluding workers at the non-striking plant through tax contributions to the unemployment fund.[23] Evidence supporting this interpretation of the court's opinion can be found in the detailed effort on the part of the court to show that the local Georgia union sanctioned the strike because it was a member of the same International as the Michigan local and might benefit indirectly from any gains made by the actual strikers.[24]

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[21]Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S. E. (2d) 209, 213 (1950). The Nordling case had been decided several months before the Georgia court rendered its decision in the Abercrombie case. The court also insisted, without explaining why, that Tucker v. American Smelting and Refining Co., 189 Md. 250, 55 A. (2d) 692 (1947) was irrelevant, and yet admitted that the Maryland court had been correct in ruling that a Baltimore refinery and a Utah copper smelter which supplied blister copper to the refinery were not one establishment although both plants were owned by the same company. It would seem from this that the court was unwilling or unable to meet the logic of the Tucker case.

[22]Tennessee Coal, Iron and R. Co. v. Martin, 33 Ala. App. 502, 36 S. (2d) 535 (1948), aff'd 36 S. (2d) 547 (Ala. 1948); Tucker v. American Smelting and Refining Co., 189 Md. 250, 55 A. (2d) 692 (1947); Nordling v. Ford Motor Co., 42 N. W. (2d) 576 (Minn. 1950).

[23]"The funds from which benefits are paid under the state unemployment compensation systems are obtained almost uniformly from payroll taxes levied on employers. In most states the tax is a differential tax. Rates are varied with relation in some degree to the past employment experience of each employer, in accordance with widely differing methods. The variation of employers' tax rates by these methods is known today as experience rating." Arnold, Experience Rating (1945) 55 Yale L. J. 218.

[24]The Georgia Supreme Court reasoned that since the same collective bargaining agreement applied to all Ford employees, any liberalization in the interpretation of the agreement to favor the strikes would inure to the benefit of the non-strikers. Thus when the International sanctioned the Dearborn strike it acted as agent for all the employees at assembly plants closed because of lack of parts and therefore made all of Ford's non-striking employees a party to the strike. The fallacy of this argument may be seen when it is realized that the union constitution did not give the Georgia workers any power to interfere in the Michigan strike. According to the Georgia Court of Appeals, which the Supreme Court reversed,

Just a week before the Georgia decision against the claims of the employees of the Georgia assembly plant was handed down, the New Jersey Supreme Court's decision flatly rejected the standard of functional integration. That court refused to engage in metaphysical ponderings and straightforwardly insisted that in the absence of a special legislative identification, the words of the phrase "factory, establishment, or other premises" should be given their common usage. Thus the court depended on the normal usages of business and applied the dictionary definitions to the respective words in the phrase, saying:

> "In its primary sense the word 'factory' has reference to a place where goods are fabricated, while 'establishment' and 'other premises' comprehend places for the transaction of business and other pursuits not in the category of a manufactory. The phrase ' " factory, establishment or other premises" takes color, not from "establishment" as the plaintiff would have it, but rather from the word "factory." In common parlance the latter ordinarily means a single industrial plant'."[25]

Once the New Jersey court had defined the terms of the statute in this manner, it had only to say that geographical separation of the plants prevented them from being one.[26] Although this would have been sufficient to substantiate its decision, the New Jersey court went further and adopted the view of the *Nordling* case. There, the Minnesota court developed an attitude similar to that of the earlier Connecticut case of *General Motors Corp. v. Mulquin*[27] in holding that, while the test of the *Spielmann* case might be considered, the really determinative element is the employment practices of the organization involved in the dispute. Under this approach, hiring and firing policies, seniority rights systems, and local union activity should be scrutinized

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the International "was not the agent except to do certain things as set out in the constitution and the contract. In connection with the labor dispute, it was acting solely as agent for the members of the union in Michigan. It so happened that what it did for them was in conflict with the wishes and desires of the members of the union in Georgia, the undisputed evidence showing that both employers and employees wanted to continue work and were satisfied therewith. Where there is such a conflict between the interests of principals, the rule is that the principal is not bound unless he has assented to or ratified the act." Abercrombie v. Ford Motor Co., 81 Ga. App. 690, 59 S. E. (2d) 664, 670 (1950).

[25]Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N. J. 494, 76 A. (2d) 256, 261 (1950).

[26]This in actuality was an application of the physical proximity test. Because the two plants were at such a great distance from each other it was impossible that they could be one in terms of common parlance.

[27]134 Conn. 118, 55 A. (2d) 732 (1947).

to determine whether or not the units under consideration are separate entities.

In the most recent of the cases growing out of Ford's Dearborn, Michigan, labor dispute, the Virginia court in *Ford Motor Co. v. Unemployment Compensation Commission*[28] adopted substantially the same test. It was found that the words "factory," "establishment," and "premises" characterize the place at which work is carried on and not the manner of its operation. "The circumstances of employment," the court reasoned, "rather than those of management and operation, are of primary importance in determining the unity and integration, or the lack of unity and integration, of the plants."[29]

The result reached by the Minnesota, New Jersey, and Virginia cases appears to be further sustained by the announced policy of the unemployment compensation laws. Fundamentally the laws were passed to relieve workmen from the effects of the periodic involuntary unemployment that is a concomitant of modern industrialism.[30] Protection against that hazard is afforded by taxing employers and setting aside the revenue as reserves to be paid to persons becoming unemployed through no fault of their own. The acts, however, are limited in scope by labor dispute qualification clauses because the legislatures want the states to remain neutral in employer-employee controversies in so far as unemployment compensation is concerned;[31] but it must

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[28]63 S. E. (2d) 28 (Va. 1951).

[29]63 S. E. (2d) 28, 34 (Va. 1951).

[30]"Declaration of State Public Policy. Section 2. As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern, which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker or his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." Ga. Laws (1937) 806, 807. N. J. S. A. (West, 1950) 43:21-2 is substantially the same. For a general discussion of the social aims of unemployment compensation legislation see Burns, Unemployment Compensation and Socio-Economic Objectives (1945) 55 Yale L. J. 1.

[31]See Chrysler Corporation v. Smith, 297 Mich. 438, 298 N. W. 87, 90 (1941); Ford Motor Co. v. Abercrombie, 207 Ga. 464, 62 S. E. (2d) 209, 215 (1950). "The labor

be pointed out that this policy of neutrality appears to have been confined to that limited situations where benefits are denied to actual strikers and their direct supporters. In that circumstance it would be manifestly unneutral to pay benefits so as to support the strikers, while the denial of benefits would merely leave the strikers in the same position as they would have been in had there been no unemployment compensation act. If the clause is extended to secondary situations so as to exclude persons becoming unemployed at plants dependent on the struck plant for materials, here again the state can keep the status of the parties as it was before the passage of the unemployment compensation act only by denying benefits. However, if the state denies the benefits, the non-striking workers will bring pressure against the strikers to resume work, while if it grants the benefits it destroys the status quo by depriving the employer of the advantage of this pressure that the unemployed non-strikers might exert. Nevertheless, as was pointed out above, where the non-striking plant is owned by a company other than the one which owns the struck plant there has been general agreement that the non-striking employees should receive unemployment benefits. Therefore, it becomes obvious that the neutrality policy of the legislatures has not been carried beyond the actual strike situation, and it is apparent that that policy is to be restricted in favor of of the fundamental purpose of relieving wage earners from the ravages of unemployment.

The Minnesota, New Jersey, and Virginia cases looked to the policy of providing temporary financial assistance to workmen who become unemployed involuntarily, pointing out that since the unemployment statutes are remedial in nature they should be liberally construed.[32]

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dispute disqualification is based on the theory that so far as unemployment compensation is concerned, the state should remain neutral in employer-employee controversies, *i.e.*, the compensation funds, which are accumulated through taxes imposed on employer, should not be used to aid employees whose work stoppage results from a labor dispute with the employer." Note (1949) 33 Minn. L. Rev. 758, 759. The soundness of the neutrality theory is questioned in Schindler, Collective Bargaining and Unemployment Insurance Legislation (1938) 38 Col. L. Rev. 858, 869. There the author states: "Specifically in respect of our labor relations, the American government has never adopted any hands-off policy. Beginning with the very earliest criminal prosecutions more than a century ago, the federal government and the states have interfered with (= been unneutral in connection with) the disputes between labor and capital. The interference (= unneutrality) may not have been consistent, it can be granted, to any striking degree. But the background is one of interference; of traditional neutrality there is none."

[32] "Our unemployment compensation law is remedial in nature and therefore should be liberally construed." Ford Motor Co. v. New Jersey Department of Labor and Industry, 7 N. J. Super. 30, 71 A. (2d) 727, 732 (1950). "The statute as a whole,

Therefore, the words of the legislature were given their ordinary lay connotations, and the legislative policy behind the acts was shown great deference. The Georgia court, although recognizing this general policy, attempted to base its view specifically on the legislative policy of neutrality in labor disputes. Consequently, that court fell into error by overlooking the fact that it was faced with one of those secondary situations where the legislature has not intended that the neutrality policy should be applied, and thus it approached the labor dispute qualification provision of the act in a spirit of mutilating narrowness[33] which neither served the ultimate purpose of safe-guarding against unemployment nor the legislative policy of neutrality.[34] However, in light of the conflicting attitude of the Georgia court, it appears that legislative clarification may be needed in some states to prevent further judicial constriction of the remedial effects of the unemployment compensation laws.

WILLIAM C. BEATTY

LABOR LAW—LEGALITY OF EXPULSION FROM UNION MEMBERSHIP OF WORKERS SEEKING CHANGE OF BARGAINING AGENTS UNDER CLOSED SHOP CONTRACT. [Virginia]

The emergence of the labor union as a dominant influence in the political and economic life of the nation has produced an acute social and legal problem in the form of a conflict between the constitutionally guaranteed right to work and statutory or judicial recognition of the validity of the closed-shop contract. As a corollary to the valid closed

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as well as the particular sections here involved, should be so interpreted as to effectuate that remedial purpose implicit in its enactment." Ford Motor Co. v. Unemployment Compensation Commission, 63 S. E. (2d) 28, 34 (Va. 1951). Also see A. H. Phillips, Inc. v. Walling, 324 U. S. 490, 493, 65 S. Ct. 807, 808, 89 L. ed. 1095, 1098 (1945), wherein the Court emphasized that exemption from humanitarian and remedial legislation must be narrowly construed.

[33]It should be remembered that "Claimants who are unemployed because of a labor dispute would, of course, still be subject to the regular waiting periods and would receive benefits for less that their wages. Anyone foolhardy enough to provoke a labor dispute in the hope of thriving on this meagre pittance would be subject to disqualification if he subsequently refused suitable employment." Fierst and Spector, Unemployment Compensation in Labor Disputes (1940) 49 Yale L. J. 461, 490.

[34]If Ford could have obtained parts to supply the non-striking assembly plants, the facts make it clear that the employees of those plants would have been willing to work (the Virginia plant did continue operation for six days after the strike was called). Therefore, in effect, the decision of the Georgia court made the non-strikers unwilling participants in a labor dispute in order to save the Ford Company's experience rating under the act.

shop contract there arises the problem of refusal, to individual members of labor organizations, of any opportunity to change bargaining agents while employed under such an agreement.[1]

One solution to this problem, as well as the effect of the Rutland Court Doctrine,[2] has been brought into Virginia law, at least persuasviely on the trial court level, by the January, 1951 refusal of an appeal in the case of *Local Union 549, International Brotherhood of Teamsters v. Clark*,[3] decided in equity in the Corporation Court of the City of Bristol in September, 1948. By rejecting the appeal the Supreme Court of Appeals also abstained from overruling an exception to the general rule, announced in Virginia labor cases as dicta,[4] and accepted as the law,[5] that members of a labor union must, as members of a voluntary association, exhaust their remedies within the organization before going to the courts for relief.[6]

The Rutland Court Doctrine, announced in 1942 as a policy by the N. L. R. B., gave to individual members of labor unions operating under closed-shop contracts the right to engage in attempts to change bargaining agents during a period before the expiration of closed shop contracts. Since the typical closed-shop contract provides that union

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[1]In Newman, the Closed Union and the Right to Work (1943) 43 Col. L. Rev. 42, the author points out that the conflict is between the individual's right to work and the absolute control a union is allowed over its qualifications for membership. By exclusion from a union the worker is effectively left without a means of livelihood.

Damned as he now is for espousal of the union as contrasted with the individual member, President Roosevelt did recognize a need for a resolution of the conflict. In January, 1942 he submitted to Congress a report from the National Resources and Planning Board in which the first mentioned amplification of the Atlantic Charter was "The right to work, usefully and creatively through the productive years." 43 Col. L. Rev. 42.

[2]In the Matter of Rutland Court Owners, Inc., 46 N. L. R. B. 1040 (1943) (supplemental decision), 44 N. L. R. B. 587 (1942).

[3]Corporation Court of the City of Bristol, September, 1948 (not reported). Opinion of the trial court per Cantwell, T. J. Other references to the Clark case herein are from typewritten copy of the opinion of the court.

Petition for review was presented orally to one judge in vacation and was refused by the whole Supreme Court of Appeals in session in January, 1951. This information was received from Stant and Roberts of Bristol, Va., counsel for plaintiff.

[4]See International Brotherhood v. Bridgeman, 179 Va. 533, 544, 19 S. E. (2d) 667, 671 (1942) (the union was held to be estopped to assert the defense that the plaintiff had not exhausted his remedies within the union); Campbell v. Brotherhood of Locomotive Firemen, 165 Va. 8, 15, 181 S. E. 444, 447 (1935) (the plaintiff was held to have exhausted his remedies within the union).

[5]11 Mitchie's Jur., Labor § 4; Parker, Current Trends in Labor Law in Virginia (1946) 32 Va. L. Rev. 1050.

[6]1Teller, Labor Disputes and Collective Bargaining (1940) § 100; Restatement, Torts (1939) § 811; Note (1947) 168 A. L. R. 1462.

membership is prerequisite to employment, and since union constitutions generally provide expulsion for disloyalty or dual-unionism,[7] the individual worker, though he may feel dissatisfied with his union, may not compaign for another on pain of expulsion and resulting loss of employment. This fact was recognized by the N. L. R. B. in the *Rutland Court* case when the board, ruling that an employer must reinstate employees discharged at the request of the union because of such dual-unionism, announced the doctrine as follows:

> "The employees right to select representatives to be meaningful must necessarily include the right at some appropriate time to change representatives.... effectuation of the basic policies of the Act requires, as the life of the collective contract draws to a close, that the employees be able to advocate a change in their affiliation without fear of discharge by an employer for so doing.
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> "A contrary construction would in large part nullify the statutory scheme by which questions concerning the representation of employees are to be determined by the Board, using the machinery created for that very purpose under the act.... The discharge of the very employees whose representation is in issue, because they have placed their representation in question, is clearly inconsistent with the whole policy and general scheme of the Act.
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> "The A. F. of L. Local, in its argument, recognizes that were its view to prevail the strike would be the only weapon remaining to the employees who wished to transfer their affiliation to the C. I. O. Local immediately prior to the negotiation of a new contract. That the Act was designed to avert industrial strife, however, is clear beyond dispute.... The view advocated by the respondent and the A. F. of L. Local is inconsistent with basic policy.... The stability intended by the Act is not that involved in a perennial suppression of the employees' will."[8]

Although the doctrine was subsequently approved by several of the United States Courts of Appeals, it was rejected by the Supreme Court

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[7]See 3 Teller, Labor Disputes and Collective Bargaining 1940) Forms Nos. 49, 50, for typical union constitutions. C.I.O. Art. VII, § 5: "No person shall hold membership or office in more than one local union... or in any other labor union having the same or similar jurisdiction." Art. XI, § 1: "Members may be fined, suspended or expelled for any of the following acts... (A) Wilful violation ,of this constitution... (G) Working in the interest of any trade union organization other than that of... [the local] which claims or exercises jurisdiction similar to that... [of] the International...." A. F. of L. § 88: "No member shall at any given time belong to more than one local... or become a member of any dual organization...." § 271: "Any member... who violates any article or section of the constitution... shall be fined or expelled at the discretion of the local union."

[8]44 N. L. R. B. 587, 596 (1942).

in 1949 in *Colgate Co. v. Labor Board*[9] on the reasoning that Congress had expressly approved closed-shop contracts in the Wagner Act,[10] and that the Board would not be allowed to undermine the statute by reading into the N. L. R. B. a policy which was not intended by Congress. The Court pointed out that Congress had rejected the Tydings Amendment[11] to the Act, which amendment would have freed employees from coercion "from any source," necessarily including fellow employees and unions as well as employers. Two justices dissented on the ground that "The use of the closed-shop privilege to interfere with the free exercise of the laborers' choice does not seem . . . to be within the purpose of the Labor Act."[12]

In the *Clark* case, the employer, acting on request of the Teamsters Local, under a closed-shop contract, discharged several employees who had circulated a petition among fellow employees trying to secure an election on union representation to be conducted by the N. L. R. B. These employees, after being expelled or suspended by their local union, went before union tribunals for a review of their punishment. Losing the appeal at each stage, they filed a bill in equity instead of taking their complaint to the highest tribunal of the organization, the union Convention. The Corporation Court of the City of Bristol took jurisdiction and declared that the acts of the union were

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[9]"We reject the application of the so called Rutland Court doctrine." 338 U. S. 355, 364, 70 S. Ct. 166, 171, 94 L. ed. 161, 170 (1949).

In the opinion, the Court listed the Second [Labor Board v. Geraldine Novelty Co., 173 F. (2d) 14 (1949); Colonie Fibre v. Labor Board, 163 F. (2d) 65 (1947); Labor Board v. American White Cross Laboratories, 160 F. (2d) 75 (1947], Third [Labor Board v. Public Service Transport Co., 177 F. (2d) 119 (1949)], and Ninth [Labor Board v. Colgate-Palmolive-Peet Co., 171 F. (2d) 956 (1949); Local 2880 v. Labor Board, 158 F. (2d) 365 (1946)] Circuits approving the doctrine, and the Seventh Circuit as disapproving [Aluminium Co. v. Labor Board, 159 F. (2d) 523 (1946); Lewis Meier & Co. v. Labor Board, 21 L. R. R. M. 2093 (Nov. 1947)]. Colgate Co. v. Labor Board, 338 U. S. 355, 70 S. Ct. 166, 94 L. ed. 161 (1949) n. 6, 7, 8, 9.

On rehearing the case of N. L. R. B. v. Public Service Co-Ordinated Transport, 177 F. (2d) 119 (1949) the Third Circuit followed the Supreme Court and rejected the Rutland Court doctrine. 177 F. (2d) 119, 125 (1950).

[10]§ 8 (3) of the National Labor Relations Act of 1935 before Taft-Hartley Amendment.

[11]"During consideration of the bill on the Senate floor Senator Tydings proposed to amend it by adding to § 7 the words, "free from coercion or intimidation from any source." In the debate which followed it came clear that the amendment would deal with employee-against-employee relations, while the bill was designed to deal only with employee-employer relations, and the amendment was defeated. See 79 Cong. Rec. 7653-7658, 7675." Colgate Co. v. Labor Board, 338 U. S. 355, 363, 70 S. Ct. 166, 171, 94 L. ed 161, 169 (1949), n. 16.

[12]See Colgate Co. v. Labor Board, 338 U. S. 355, 365, 70 S. Ct. 166, 172, 94 L. ed. 161, 170 (1949).

void, which necessarily required the reinstatement of the ousted employees, and awarded damages of wages lost during the time of discharge.[13]

This decision was not rested on legislative policy, but rather on constitutional rights. The court observed that the word "liberty" as used in the Virginia and Federal Constitutions had been interpreted to mean the right to earn a livelihood by any lawful means,[14] and that the right to work is fundamental:

> "A man's right to work is not something to be lightly trifled with. It is the backbone of our economic well being; it is the source of all the storied examples of fabulous rise to fame and wealth of men born in poverty; it is the essence of America. It is one of the fundamental liberties honored and accorded full recognition in our organic law, both State and Federal."[15]
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> "These words are not 'sounding brass and tinkling cymbals,' but are expressions of the vitality of phrases known to every school child, and constituting the roots of our system of free men. This philosophy must prevail so long as our institutions stand, and any new concept must be so modified as to accord herewith."[16]

Stating that the validity of the closed shop contract was not in issue, but that the grievance was exclusion from membership in the union, the court held that a union operating under a closed-shop contract

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[13]It is interesting to compare the similarity of relief received in the Clark and the Rutland cases. The Clark case awarded damages to be computed "on the basis of the rate paid each at the time of discharge, less the amount earned elsewhere during the interval." Corporation Court of the City of Bristol, Sept. 1948, p. 17. In the Rutland Court case the damages were "a sum of money equal to the amount he normally would have earned as wages ... less his net earnings ...." 44 N. L. R. B. 587, 602 (1942). Note that both the Board and the Corporation Court awarded actual loss of wages, instead of contract wages less amount the complainant ought to have earned in mitigation. While the Corporation Court declared the acts of the union to be void, thus necessarily re-instating the complainants, the N. L. R. B. commanded the employer to "offer ... immediate and full reinstatement to their former or substantially equivalent positions ...." 44 N. L. R. B. 587, 602 (1942).

[14]The court cited the Virginia cases of Moore v. Sutton, 185 Va. 481, 39 S. E. (2d) 348 (1946); Goe v. Gifford, 168 Va. 497, 191 S. E. 783 (1937); and Young v. Commonwealth, 101 Va. 853, 45 S. E. 327 (1903) for the language used. A passage from the Young case quoted by the court in turn cites Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 (1897); Powell v. Pennsylvania, 127 U. S. 678, 18 S. Ct. 992, 1257, 32 L. ed. 253 (1888); People v. Gillson, 109 N. Y. 389, 17 N. E. 343 (1888); and State v. Dalton, 22 R. I. 77, 46 Atl. 234 (1900).

[15]Local Union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept., 1948, p. 5.

[16]Local Union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept. 1948, p. 7.

must admit all competent workers. The reasoning was that a union can not be considered a voluntary association when a closed-shop agreement is in effect, for when "the scope of an association is so broad, and its power so great that it deprives individuals of rights unconnected with the incidents of membership, simply by depriving them of membership ... then public policy requires that it must lose the right to control the selection of its membership, when such control, in turn, deprives the individual of his fundamental constitutional rights."[17]

Having thus bound the union to accept all such competent applicants,[18] the court ruled that the complainants' circulation of a paper, attempting to obtain the views of other employees as to a proposed N. L. R. B. election, was in the exercise of the right of free speech, and that such right being inalienable, any action of the union attempting to infringe upon it was void. Further, that since the attempt to infringe

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[17]Local Union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept., 1948, p. 11.

[18]Action by a court of equity to compel acceptance of the excluded applicant was the first solution offered by Newman, The Closed Union and the Right to Work (1943) 43 Col. L. Rev. 42. He states that courts shy away from such forced admissions of members by the assimilation of a labor union to a voluntary association, and apply the rule that "membership in a voluntary association is wholly a matter of agreement and cannot be judicially imposed." 43 Col. L. Rev. 42, 45. While further saying that no court in a common law jurisdiction has regulated admission requirements for new members to a closed-shop closed-union, the author cites as the only direct authority for so doing four reported cases which regulated readmission requirements for old members; Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 Atl. 70 (1921) (readmitted a member expelled for petitioning the legislature in violation of a union rule); Walsche v. Sherlock, 110 N. J. Eq. 223, 159 Atl. 661 (1932) (enjoined union discrimination in issuing work permits); Cameron v. InItIernational Alliance, 118 N. J. Eq. 11, 176 Atl. 692 (1935) (set aside seniority regulations of a union); Collins v. International Alliance, 119 N. J. Eq. 230, 182 Atl. 37 (1935) (held that a practice of requireing juniors to do the work of seniors violates the constitutional rights of the members). The Circuit Court of Milwaukee County, Wisconsin in Wolter v. Ulick (July 24, 1940) (not reported) refused to enjoin prior members of a union from continuing to work in violation of a contract between them and plaintiff union; this court declared that the contract violated public policy in restricting defendants' right to contract for their labor.

In the Clark case, the Corporation Court of Bristol considered the alternatives of (1) invalidating the closed shop contract, or (2) upholding the right of labor unions to exclude qualified members. Stating that the closed-shop contract was to be considered only to the extent of its bearing on exclusion, and that the second alternative was "too ridiculous to contemplate," the court met the problem head-on and said:

"Therefore, this Court will adopt the course which requires labor unions, in the situation at hand, to admit all competant workers ...." Local Union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept., 1948, p. 10.

the right of free speech is void, "Any adjudication of defendant having the effect of abrogating such right is likewise void...."[19]

The court denied the contention of the defendant that the ousted members were not entitled to maintain the suit because they had not exhausted their remidies within the union. It reasoned that "The action of the defendant herein is void for the reason... that it deprives the complainants of basic constitutional rights, and cannot be allowed to stand for any reason. Being so void, resort may be had directly to this court."[20]

The effect of this decision is to open to such ousted members the closed unions which still maintain valid closed-shop contracts under the Taft-Hartley Act[21] and the Virginia Right to Work Statute.[22] Since the Supreme Court of the United States has upheld the validity of right to work acts,[23] it does not seem probable that it would reverse such a decision as the instant case. For to do so, it would be necessary to decide that there is no constitutional right to work, and such a decision would appear to be extremely unlikely by a tribunal dedicated upholding human rights. It also would seem necessary for the Court to hold that individual workers do not have the same freedom of speech accorded even to stranger pickets[24] and employers[25] by court decisions.

Even if the United States Supreme Court should decide that the Taft-Hartley Act guarantees the right to a union shop in those states with a right to work statute, and that the right of the unions to

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[19]Local union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept., 1948, p. 15.

[20]Local Union 549, International Brotherhood of Teamsters v. Clark, Corporation Court of the City of Bristol, Sept., 1948, p. 16. The court based its ruling that the union decision was void on lack of jurisdiction: "It is the view of this court that no alleged cause for expulsion is within the 'jurisdiction of the tribunal of the association' when the result is, by reason of a closed shop agreement, to deprive an individual of his inalienable right to work." Corporation Court of the City of Bristol, Sept. 1948, p. 15.

[21]Section 102 of the Labor-Management Relations Act as amended expressly permits valid pre-evisting closed-shop contracts to remain in effect. 61 Stat. 152 (1947), 29 U. S. C. A. § 158, n. 9 (1949).

[22]Va. Code Ann. (Michie, 1950) § 40-74.

[23]Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U. S. 535, 69 S. Ct. 251, 93 L. ed. 212 (1949).

[24]Cafeteria Employees Union v. Angelos, 320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58 (1943); Baker and Pastry Drivers and Helpers v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. ed. 1178 (1942).

[25]N. L. R. B. v. Virginia Electric and Power Co., 314 U. S. 469, 62 S. Ct. 344, 86 L. ed. 348 (1941); N. L. R. B. v. American Tube Bending Co., 134 F. (2d) 993 (C. C. A. 2d, 1943).

maintain membership requirements is superior to the right of the worker not to be fired from a union shop at the request of the union except for the non-payment of dues, this decision may be thought to guarantee to the workers of Virginia the right to join a closed union.[26] For the difference between a closed and a union shop is more in name than in substance, and in view of the *Clark* case there is reason to believe that if fundamental rights were denied the worker by a union shop, a court of equity would intervene to secure them for him.

EMORY WIDENER, JR.

LABOR LAW—VALIDITY OF STATUTE PROHIBITING PICKETING OF BUSINESS BY NON-EMPLOYEES. [Virginia]

A marked reluctance to recognize the picket line as a legitimate labor pressure device led many earlier American courts to look upon such activity as a prima facie tort, necessitating proof of justification to avoid liability.[1] Later some states refused to enjoin picketing if carried on in a peaceful manner and for a purpose deemed lawful by the particular tribunal hearing the case.[2] As late as 1921 the Supreme Court of the United States characterized picketing as "sinister" but consented to its allowance under strict regulation.[3] An important step toward a more general acceptance of the picket line came in 1937 in *Senn v. Tile Layers Protective Union*,[4] wherein a sharply divided court determined that a state could constitutionally *permit* peaceful picketing.[5] Only

[26]Section 8 (a) (3) of the Taft-Hartley Act specifically allows a union shop and forbids discriminatory discharge for non-membership for any other ground than non-payment of dues. Section 8 (b) (1) provides in part: "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." And later in section 8 (b) (2): "It shall be an unfair labor practice for a labor organization or its agents... to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to render the periodic dues...." 61 Stat. 140 (1947), 29 U. S. C. A. § 158 (1949).

The apparent conflict in this section has not yet been resolved by the courts.

[1]Typical of the early cases are Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896). For other cases see 1 Teller, Labor Disputes and Collective Bargaining (1940) §§ 38, 84-102, 117-20.

[2]See Gregory, Labor and the Law (2d ed. 1949) 334-341; Schlusselberg, The Free Speech Safeguard for Labor Picketing (1945) 33 Ky. L. J. 257.

[3]American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72, 66 L. ed. 189 (1921).

[4]301 U. S. 468, 57 S. Ct. 857, 81 L. ed. 1229 (1937).

[5]Speaking for the majority in a 5 to 4 decision, Justice Brandeis conceded

three years were to pass before the Court in *Thornhill v. Alabama*,[6] declared that a state *could not prohibit* peaceful picketing. Specifically, the case invalidated an Alabama statute which imposed a blanket prohibition on picketing in the vicinity of a labor dispute on the ground that such an enactment violated the right of freedom of speech protected by the First and Fourteenth Amendments.[7] Manifestly, this decision represented a fundamental change in judicial attitude toward one of the most effective weapons in labor's arsenal.

The Virginia General Assembly apparently ignored the mandate of the *Thornhill* case, at least as that mandate was originally interpreted, as the third section of the state's so-called "Right-to-Work Act" outlawed any picketing of a business by non-employees.[8] In the recent case of *Edwards v. Commonwealth*,[9] the Virginia Supreme Court of Appeals was called upon to determine the validity of this provision. The defendant Edwards and another, while peacefully patrolling in front of a Norfolk theatre in an effort to secure the employment of a Negro manager, were arrested and charged with a violation of the Right-to-Work Act. The employees of the theatre were not then out on strike and neither defendant was nor had been employed there, or in the motion picture industry. After being found guilty and fined in the trial court, the defendants, on writ of error to the Supreme Court of Appeals, asserted that the statute infringed their right of free speech. This contention was upheld in an unanimous decision by the Virginia court.

To arrive at this conclusion, however, it was necessary for the court to examine not only the *Thornhill* case but also a series of Supreme Court decisions which applied and, as a whole, tended greatly to restrict the scope of the new free speech doctrine. In *Milk Wagon Drivers*

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that the picketing in question might annoy the petitioner and perhaps even prevent him from securing tile-laying jobs he hoped to get, but pointed out, nonetheless, that such annoyance was not an invasion of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, nor was a hoped-for job a property right within the meaning of that provision. For an interesting discussion of the Senn case, see Gregory, Labor and the Law (2d ed. 1949) 337-341.

[6]310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).

[7]A county ordinance which prohibited picketing if solely for the purpose of interfering with another's business, was struck down for the same reason in the companion case of Carlson v. California, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940).

[8]Va. Code Ann. (Michie, 1950) § 40-64: "No person who is not, or immediately prior to the time of the commencement of any strike was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or such business or industry."

[9]191 Va. 272, 60 S. E. (2d) 916 (1950).

Union v. Meadowmoor Dairies,[10] it was held that a state could enjoin even peaceful picketing when such picketing was set against a background of violence. But in a companion case, *American Federation of Labor v. Swing,*[11] an attempt to limit the picketing of a business establishment to employees of that business alone was struck down. Later in *Bakery and Pastry Drivers Local v. Wohl,*[12] the Court held that an individual need not be in a "labor dispute" as defined by state law to have a right to picket peacefully, but in *Carpenters and Joiners Union v. Ritter's Cafe,*[13] an injunction against the picketing of a business having "no industrial connection" with a labor dispute was allowed.[14]

Seven years after the *Ritter* decision the next limitation to the *Thornhill* holding emerged in the form of a revival of the "unlawful purpose doctrine." In *Giboney v. Empire Storage and Ice Co.,*[15] the Supreme Court upheld an injunction against picketing by a union

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[10]312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836 (1941).

[11]312 U. S. 321, 61 S. Ct. 568, 85 L. ed. 855 (1941).

[12]315 U. S. 769, 62 S. Ct. 816, 86 L. ed. 1178 (1942).

[13]315 U. S. 722, 62 S. Ct. 807, 86 L. ed. 1143 (1942).

[14]In Cafeteria Employees Union v. Angelos, 320 U. S. 293, 64 S. Ct. 126, 88 L. ed. 58 (1943), two restaurant proprietors had sought injunctions against the peaceful picketing of their establishments by the cafeteria workers' union. Since the proprietors had no employees, the New York courts found that no "labor dispute" existed within the meaning of the state's "Little Norris-LaGuardia Act" and therefore issued the injunctions. The Supreme Court reversed the judgment, however, and relied upon the principles set forth in the Senn, Swing and Wohl cases in holding the picketing to be constitutionally protected conduct.

By this time a spirited debate was beginning to develop among law review writers regarding the fundamental soundness of the free speech doctrine. There were those who contended that picketing was not an exercise of free speech at all but a form of economic pressure designed primarily to impede the picketed person's access to a free and open market. It was argued that picketing derived its effectiveness not from an appeal to reason but rather because of its tendency to play upon the public's sympathy or sense of embarrassment, and from observance of the unwritten rule among workers that picket lines are not to be crossed. See Teller, Picketing and Free Speech (1942) 56 Harv. L. Rev. 180; Teller, Picketing and Free Speech: A Reply (1943) 56 Harv. L. Rev. 532; Gregory, Labor and the Law (2d ed. 1949) 341-363.

Other writers, however, maintained that picketing correctly was not excluded from the area of free speech simply because it was not a "traditional" form of speech. Moreover, they believed it was time that labor reaped some of the benefits of the Fourteenth Amendment which so ofter had been relied upon to protect business interests. Any apparent inconsistency in the Thornhill and Ritter cases could be explained on the ground that even the constitutional protection of a civil liberty may be qualified. See Dodd, Picketing and Free Speech: A Dissent (1943) 56 Harv. L. Rev. 513; Jaffe, In Defense of the Supreme Court's Picketing Doctrine (1943) 41 Mich. L. Rev. 1037.

[15]336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834 (1949).

of ice and coal drivers to compel an ice plant to agree not to sell its product to non-union peddlers. Acceptance of the agreement proposed by the union would, it was declared, be a violation of the state's anti-trade restraint statute. The purpose of the picketing was unlawful, then, not because it sought to accomplish an end which in the eyes of the courts or legislature was broadly opposed to the best interests of the state, but because the result it was intended to bring about would require the violation of a specific law. Hence, it may be said the unlawful purpose concept was applied in its more narrow or restricted sense.

The principles enunciated in the *Giboney* case apparently formed the basis for Supreme Court decisions in the three most recent picketing cases, all decided May 8, 1950. An injunction against picketing was issued and damages awarded in *Building Service Employees International Union v. Gazzam*[16] against a union which sought to compel an employer to sign a contract requiring his employees to become union members against their expressed will. Since coercion by an employer of his employees' choice of a bargaining representative was opposed to the public policy of the state of Washington as declared by statute, the Supreme Court affirmed.[17] Here, as in the *Giboney* case, the purpose of the picketing was regarded as unlawful in a narrow sense.

In *International Brotherhood of Teamsters v. Hanke*,[18] an injunction was upheld which prohibited the picketing of a combined garage and used car lot in Seattle to secure an agreement for a union shop. Because the business was operated by the owner himself without employees, the Supreme Court of Washington decided that preservation of self-employer economic units was of greater importance than the protection of the element of communication in picketing. To strike such a balance as this, according to the federal Supreme Court, was not to violate the Constitution. By agreeing to a union shop as the brotherhood demanded, Hanke would have violated no state law. If, then, the purpose of the picketing was unlawful it was so only in the broad sense—i.e., because of the adverse effect the curtailment of self-employer business units might have on the state's social and economic well be-

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[16]339 U. S. 532, 70 S. Ct. 784, 94 L. ed. 1045 (1950).

[17]The Gazzam case is similar to the Giboney decision in that the employer would have violated the public policy of the state as expressed by statute if he had submitted to the union's demand. The former decision, however, indicates that the statute in question need not be a criminal one to justify equitable relief on behalf of the employer.

[18]339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995 (1950).

ing. The majority opinion by Justice Frankfurter also reveals a fundamental change in approach toward the solution of the picketing problem. After the *Thornhill* case, restraints upon picketing, like purported abridgements of more conventional forms of speech, were subjected to the "clear and present danger" test, a standard which stripped the state action of its usual presumption of validity and cast upon its proponents the burden of showing the necessity for such action.[19] In the *Hanke* case, however, the Court unquestionably shifts to the so-called "rational basis" test by scrutinizing the state's curtailment of picketing as it would any regulation in the social or economic field.[20]

In the third of the recent cases, *Hughes v. Superior Court*,[21] the Supreme Court upheld a California court injunction against the picketing of a business establishment to secure compliance with a demand that its employees be selected in proportion to the racial origin of its customers. The picketing in question, the Court felt, was to *promote* discrimination, not to *abolish* it, and was, therefore, an appropriate subject for state control. In the course of the opinion it was categorically stated that "Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."[22] Hardly a more concise restatement of the unlawful purpose doctrine could be found.[23]

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[19]The "clear and present danger" test was enunciated by Justice Holmes as follows: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 473 (1919).

This test was restated and applied by Justice Murphy in Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940), and by Justice Douglas in a concurring opinion in Bakery and Pastry Drivers Local v. Wohl, 315 U. S. 769, 775, 62 S. Ct. 816, 819, 86 L. ed. 1178, 1184 (1942). Although the Court did not always expressly spell out the "clear and present danger" test in the other picketing cases following Thornhill, a realization that such test was applied is implicit from a reading of the opinions.

[20]"A State's judgment on striking such a balance [between the protection of the speech element in picketing and the power to regulate the contest between capital and labor] is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect." Justice Frankfurter in International Brotherhood of Teamsters v. Hanke, 339 U. S. 470, 474, 70 S. Ct. 773, 776, 94 L. ed. 995, 1001 (1950).

[21]339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950).

[22]Hughes v. Superior Court, 339 U. S. 460, 465, 70 S. Ct. 718, 721, 94 L. ed. 985, 992 (1950).

[23]For a discussion of the Hughes, Hanke and Gazzam cases and their effect on the Thornhill doctrine, see Howard, The Unlawful Purpose Doctrine in Peaceful Picketing and its Application in the California Cases (1951) 24 So. Calif. L. Rev. 145.

Thus, it would seem that after ten intermittently stormy years the problem of picketing and free speech has at last achieved a state of some repose. Although it is impossible to trace an unbroken thread of doctrinal consistency through all the cases from *Thornhill* to *Hughes,* the Virginia court could readily observe the Supreme Court's slow but inexorable withdrawal from its original position and, with every withdrawal, a contraction of the area in which picketing finds constitutional protection.[24]

Despite the corrosive effect of these decisions on the concept of peaceful picketing as a form of free speech, the Virginia court found that the Supreme Court had not departed from its holding that "a statute so broadly drawn as to prohibit picketing for a lawful purpose, unaccompanied by the threat or the fact of force, and limited to truthful publication of the facts of a dispute, is invalid."[25]

The section of the Right-to-Work Act under which the defendants were convicted clearly fell within this prohibition. By restricting the right to picket to employees of the picketed business alone, the statute attempted to do what the Supreme Court in the *Swing* case said could not be done by injunction. Even if it assumed on the basis of the *Hughes* decision that the purpose of the picketing was unlawful, the Virginia court still could not sustain the disputed statute, for to do so would be to determine that it was "a valid enactment and free from all constitutional objections."[26]

In view of the holdings in the *Hanke* and *Hughes* cases, it would seem that the theatre management could have obtained an injunction against the picketing by convincing the court that the purpose of the

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[24]Since Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940), the Supreme Court has decided that a state may prohibit picketing when it is so enmeshed in a background of violence that it loses its identification with free speech, Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836 (1941); when it is carried on in support of a secondary boycott in violation of statute, Carpenters and Joiners Union v. Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807, 86 L. ed. 1143 (1942); when the immediate purpose of the picketing is to compel the violation of a specific state law, Giboney v. Empire Storage and Ice Co., 336 U. S. 490, 69 S. Ct. 684, 93 L. ed. 834 (1949); or valid order of a state administrative agency, Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 315 U. S. 437, 62 S. Ct. 706, 86 L. ed. 946 (1942); or when its purpose is to achieve a result which the state might reasonably conclude was opposed to the best interests of its people, Hughes v. Superior Court, 339 U. S. 460, 70 S. Ct. 718, 94 L. ed. 985 (1950). Furthermore, to justify a restriction on picketing a state now need only show that it acted upon a reasonable basis in the circumstances of the case, International Brotherhood of Teamsters v. Hanke, 339 U. S. 470, 70 S. Ct. 773, 94 L. ed. 995 (1950).

[25]Edwards v. Commonwealth, 191 Va. 272, 284, 60 S. E. (2d) 916, 922 (1950).

[26]Edwards v. Commonwealth, 191 Va. 272, 285, 60 S. E. (2d) 916, 922 (1950).

picketing was unlawful and, of course, by satisfying the requirements for equitable relief. And if there was a reasonable basis for holding the purpose to be unlawful, there could be no constitutional objection to the issuance of the injunction. If the picketing was to compel the employment of a new manager on the basis of his race alone, then its purpose might be deemed unlawful as an effort to promote discriminatory hiring which, according to the *Hughes* case, might validly be enjoined by a state court. On the other hand, if the pickets could have proved that their efforts were directed solely toward the elimination of an existing policy of discrimination practiced against Negroes by the theatre management, it would have been difficult to label such conduct as unlawful.

The Supreme Court of Appeals would appear to be clearly correct in holding unconstitutional such an all-inclusive restriction on picketing as the third section of the Right-to-Work Act. With the reappearance of the unlawful purpose doctrine, however, this decision may be representative of all that remains of the identification of peaceful picketing with the right of free speech.

WILLIS M. ANDERSON

MUNICIPAL CORPORATIONS—PROOF OF PECUNIARY LOSS AS CONDITION TO TAXPAYERS' SUIT TO ANNUL TRANSACTION IN WHICH PUBLIC OFFICIAL HAS PERSONAL INTEREST. [Arizona]

Recognition of the possibilities of waste, squandering, and abuse of public funds and property by public officers early led to the establishment at common law of the rule that a public official could not have any direct or indirect personal interest in a contract made by the governing body of which he was a member.[1] Enforcement of this rule, however, was left primarily to designated officers, and the protection of public rights was, of course, entirely thwarted when these officials were the very ones guilty of the illegal acts. The apparent need for additional remedies has been met in practically all states by statutory

[1]This law was based primarily upon the principles of agency, Smith v. City of Albany, 61 N. Y. 444 (1875); and public policy, Trainer v. City of Covington, 183 Ga. 759, 189 S. E. 842 (1937); Montgomery v. Atlanta, 162 Ga. 534, 134 S. E. 152, 47 A. L. R. 233 (1926); Bay v. Davidson, 133 Iowa 688, 111 N. W. 25, 9 L. R. A. (N.S.) 1014 (1907). See also City of Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133 (1895); 2 Dillon, Municipal Corporations (5th ed. 1911) 1140-1142. For a good discussion of the philosophy behind the taxpayer's action, see opinion of Chief Justice Winslow in State v. Frear, 148 Wis. 456, 134 N. W. 673 (1912).

provisions granting the taxpayers some means of redress against such illegal employment of public funds and property.[2] Constantly arising in connection with litigation brought under these statutes is the question of what qualifications a person must possess in order to maintain a taxpayer's action to test the legality of a contested contract.

The mere fact that illegal, unlawful, or unauthorized acts have been or are about to be committed is not, by the weight of authority, sufficient to give a taxpayer capacity to sue.[3] Generally, it is held that "in order to maintain such a proceeding, the taxpayer and taxpayers as a class must have sustained or will sustain some pecuniary loss."[4] An illustration of the consequences of the application of this rule is found in the recent case of *Henderson v. McCormick*,[5] where the taxpayer-plaintiffs brought an action against W. J. Henderson and Taylor Henderson, and members of the Town Council, under a statute prohibiting a town officer from having an interest in a public contract. The complaint alleged that while the defendant Taylor Henderson was a member of the Town Council, his nephew, W. J. Henderson, purchased a truck from the city for the use and benefit of himself and councilman Taylor Henderson, who were co-partners in business. In accordance with prescribed procedure, the Council had directed the Town Clerk to sell the truck and to call for bids on it. The highest of the three bids received being that of defendant W. J. Henderson for $225, the truck was sold to him. Evidence showed that the truck was not worth more than $175 and that the sale was financially advantageous to the town and its taxpaying inhabitants. Plaintiffs, as property owners and taxpayers, brought suit to nullify the transaction, and the trial court held the sale to be void and ordered the truck restored to the Town. On appeal, the Supreme Court of Arizona unanimously reversed the

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[2]Ariz. Code Ann. (Bobbs-Merrill, 1939) § 12-401 furnishes a typical example: "*Officers not to be interested in public contracts.* Members of the legislature, state, county, city and precinct officers shall not be interested directly or indirectly in any contract or in any sale or purchase made by them in their official capacity, or by any body or board of which they are members. Every contract, sale or by any body or board of which they are members. Every contract, sale or purchase made in violation hereof, may be avoided at the instance of any party except the officer interested." Among the other states having the same or similar statutes are Alabama, California, Idaho, Illinois, Indiana, Michigan, New Jersey, New York, Montana, and Virginia.

[3]See 52 Am. Jur., Taxpayers' Actions § 21, and cases cited, notes 4 to 10 infra.

[4]McClutchey v. Malwaukee County, 239 Wis. 139, 300 N. W. 224, 917, 137 A. L. R. 628, 629 (1941).

[5]70 Ariz. 19, 215 P. (2d) 608 (1950).

judgment and dismissed the complaint, declaring that "The suit was improvidently brought by plaintiffs."[6]

The court did not dispute the jury's determination that the transaction came within the purview of legislation prohibiting a public officer from having any interest in such contracts. Noting the declaration of the statute that "Every contract, sale or purchase made in violation hereof, may be avoided at the instance of any party except the officer interested,"[7] the court ruled that the determinative issue of the appeal was whether a taxpayer's action would lie under the facts as presented. Two obvious alternative interpretation of the phrase "any party" as meaning broadly "any person" or narrowly "any party to the contract" were both rejected in favor of an intermediate construction. The court said:

> "In conformity with sound reason and the decisions of many courts we do hold that the words should be construed to include a taxpayer of the town whose right to maintain the action depends upon his ability to show some pecuniary loss to the taxpayers as a class.... the Town... having received all that the truck was worth, the only right to be vindicated by its return to the municipality was the securing of a determination that the sale was within the prohibition.... We are convinced that such a determination cannot be accomplished by a taxpayer's suit in the absence of proof of pecuniary loss to the taxpayers."[8]

Strong support for the decision was drawn from a New York case,[9] in which it was declared:

> "Mere illegality is not enough. The very nature and purpose of a taxpayer's action... presume that there will be more than illegality in order to enable him to intervene. The basic theory of such an action is that the illegal action is in some way in-

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[6]70 Ariz. 19, 216 P. (2d) 608, 611 (1950).

[7]70 Ariz. 19, 215 P. (2d) 608, 610 (1950).

[8]70 Ariz. 19, 215 P. (2d) 608, 610 (1950). Though the principal case speaks solely of "pecuniary loss," other authorities have used varying terminology to connote this same requirement, such as: "special damage," Ruark v. International Union of Operating Engineers, 157 Md. 576, 146 Atl. 797 (1929); "injury," Smart v. Graham, 179 Md. 476, 20 Atl. (2d) 574 (1941); "waste," Tillamook Peoples' Utility Dist. v. Coates, 174 Ore. 476, 149 P. (2d) 558 (1944); "burden," Miller v. Huntington and Ohio Bridge Co., 123 W. Va. 320, 15 S. E. (2d) 687 (1941); "financial injury," Jaeger v. City of Hillsboro, 164 Kan. 533, 190 P. (2d) 420 (1948); "peculiar injury," Turner v. King, 117 Md. 403, 83 Atl. 649 (1912); "injuriously affect," Blanton v. Merry, 116 Ga. 288, 42 S. E. 211 (1902); "substantial interest in the subject-matter," Zoercher v. Alger, 202 Ind. 214, 172 N. E. 186, 70 A. L. R. 1232 (1930); and "special interest in the subject matter," Mayor, etc. v. Keyser, 72 Md. 108, 19 Atl. 706 (1890).

[9]Western New York Water Co. v. City of Buffalo, 242 N. Y. 202, 151 N. E. 207 (1926).

jurious to municipal and public interests, and that, if permitted to continue, it will in some manner result in increased burdens upon, and dangers and disadvantages to the municipality and to the interests represented by it and so to those who are taxpayers. It was not the intention of the statute that a taxpayer shall be allowed to intervene and bring to the decision of the courts every act of a municipal officer which may be claimed to be illegal...."[10]

In jurisdictions which adhere to the general rule, it would seem that a careful scrutinization of the facts and circumstances of each particular case would be necessary to ascertain whether the requisite pecuniary loss has been suffered. Yet, in most of the decisions sustaining the taxpayers' proceedings, the courts do not expound in any length upon what the nature or extent of such loss must be, but merely state that the plaintiffs are subject to financial burden, and then proceed to the merits of the case. However, the Maryland court has pointed out one source of loss in observing that "The special damage which the taxpayer... sustains in a public wrong is the prospective pecuniary loss incident to the increase in the amount of taxes he will be constrained to pay by reason of the illegal or ultra vires act...."[11] Some further indications as to the meaning of the term "pecuniary loss" or "special damage" in this respect may be obtained through an examination of circumstances under which taxpayers' suits have been sustained or denied.

The requisite was met and the right of action recognized where taxpayers sought to set aside an allegedly illegal purchase of a highway toll bridge on the basis that the maintenance and operation of the bridge would impose a burden on the public;[12] where taxpayers sought to have declared illegal an assessment made pursuant to an unlawful construction contract with a company in which a councilman was a large stockholder;[13] where it was asserted that the object of an ordinance was to tax property and people of the city for the benefit of a railroad;[14] where the terms of a building lease entered into be-

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[10]242 N. Y. 202, 206, 151 N. E. 207, 208 (1926). The court here assumed illegality in the city's action of selling water to a corporation which transported it outside the city, but then dismissed the complaint on finding no possible waste or injury to any property or funds of the municipality or the taxpayer.

[11]Ruark v. International Union of Operating Engineers, 157 Md. 576, 146 Atl. 797, 802 (1929).

[12]Miller v. Huntington and Ohio Bridge Co., 123 W. Va. 320, 15 S. E. (2d) 687 (1941).

[13]Montgomery v. City of Atlanta, 162 Ga. 534, 134 S. E. 152, 47 A. L. R. 233 (1926).

[14]New Orleans, Mobile & Chattanooga R. Co. v. Dunn, 51 Ala. 128 (1874).

tween the city and a brother of a selectman were intentionally made extremely detailed in order to eliminate true competitive bidding;[15] and where a county clerk was about to refer an ordinance to the voters and the mailing and printing cost entailed would materially increase taxes.[16] In general, it seems that the courts will recognize pecunairy loss where the taxpayer's purse has been or will be affected by an assessment, an increased tax levy, a bond issue, or the creation of a debt which must be paid out of public funds.

On the other hand, no pecuniary loss was found where a city's money was paid to a company, whose manager was also mayor, for gasoline supplies which were consumed by municipal agencies in the operation of city business;[17] where city officials accepted a proposition to lease part of a public park for horse racing because the use of the park for this purpose was not foreign to the object for which it was purchased, inasmuch as it would give recreation and pleasure to many people, and the city derived a benefit from the lease;[18] where a salary was paid to an illegally appointed employee who adequately and efficiently performed services;[19] where an ordinance was passed for the city to operate a liquor dispensary, all the expenses and debts to be paid out of the profits and no town funds to be appropriated;[20] and where a public officer made an ultra vires contract for the purchase of water supply equipment and had actually borrowed money in pursuance thereof, there being no allegations that current funds would be used to repay the debt or that a tax levy had been made or threatened as a result of the transaction.[21]

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[15]Tuscan v. Smith, 130 Me. 36, 153 Atl. 289, 73 A. L. R. 1344 (1931).

[16]Tillamock Peoples' Utility Dist. v. Coates, 174 Ore. 376, 149 P. (2d) 558 (1944).

[17]Grady v. City of Livingston, 115 Mont. 47, 141 P. (2d) 346 (1943). In spite of the typical prohibitive "officers interest in contracts" statute, the Montana court declared: "A contract may be obviously void, but if the parties thereto elect to proceed thereunder they may do so if no other parties are injured. If the city... chose to accept the goods it would be absurd to contend that...any party... could be compelled to bring an action to have the contracts declared void." 141 P. (2d) 346, 350 (1943).

[18]Bryant v. Logan, 56 W. Va. 141, 49 S. E. 21 (1904).

[19]McClutchey v. Milwaukee County, 239 Wis. 139, 300 N. W. 224, 137 A. L. R. 628 (1941).

[20]Blanton v. Merry, 116 Ga. 288, 42 S. E. 211 (1902).

[21]McCloy v. Christian, 206 Ga. 644, 58 S. E. (2d) 171 (1950). The court stated that a complaint based upon mere speculation and apprehension was not enough.

In order to cover adequately the requirements necessary for the maintenance of a taxpayer's action, two other rules which are respected by most courts should be noted: (1) A taxpayer's suit will not lie to control or interfere with the discretion of a municipal board or officer unless there is fraud or gross abuse of discretion,

Considerations of public policy rather than technical legal principles appear to be the basis of support for the majority rule as announced in the *Henderson* case.[22] The Arizona court discloses this to be its true concern in saying that "to uphold the judgment of the lower court would encourage disgruntled citizens to resort to the courts in the guise of taxpayers' suits, thereby, in effect, taking over and throttling the administration of municipal affairs."[23] The West Virginia Supreme Court of Appeals has summed up the policy considerations succinctly:

> "... it is of high import that the action of constituted authority of government should not be hampered and delayed by assailment by any and every individual from disappointment, whim, or caprice. The door would be open wide to multitudinous suits, filling the courts with litigation. They would arise constantly to carry out the individual idea of each person on good and bad grounds. Public policy argues against this. Though bad action of the city authorities would loudly call for redress, better that some instances of it go without redress, and that such redress be left to the public officials."[24]

It must be conceded that there is some reason behind such contentions for restriction of the taxpayer's action; nevertheless, it is extremely hard to accept a "policy" rule which declares that officials should not be "delayed and hampered" or be subject to redress when they are acting unlawfully. Since the remedy of prosecution by constituted law-enforcement agencies, advocated by some courts as sufficient,[25] often

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Christie v. Port of Olympia, 27 Wash. (2d) 534, 179 P. (2d) 294 (1947); 52 Am. Jur., Taxpayers' Actions § 19. (2) In the absence of a controlling statute, the taxpayer as a condition precedent must request proper authorities to bring an action, See Mississippi Road Supply Co. v. Hester, 185 Miss. 839, 188 So. 281, 124 A. L. R. 574 (1939); 52 Am. Jur., Taxpayers' Actions § 26; or show that such a demand would have been useless, Darnell v. City of Broken Bow, 139 Neb. 844, 299 N. W. 274, 136 A. L. R. 101 (1941); Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867 (1902).

[22]In the comparatively older case of Brill v. Miller, 140 App. Div. 602, 608, 125 N. Y. Supp. 865, 869 (1910), Justice Laughlin in a strong dissenting opinion stated in effect that such a rule was necessary to prevent the administration of government from being taken over by the courts at the instance of the taxpayers and to protect public officials from undue interference.

[23]Henderson v. McCormick, 70 Ariz. 19, 215 P. (2d) 608, 611 (1950).

[24]Bryant v. Logan, 56 W. Va. 141, 49 S. E. 21, 22, 3 Ann. Cas. 1011, 1012 (1904).

[25]In Milwaukee Horse & Cow Commission Co. v. Hill, 207 Wis. 420, 241 N. W. 364, 366 (1932), the Wisconsin court, which is among the leading proponents of the general rule, compared the taxpayer's action to those brought by a person to abate a nuisance, to challenge the constitutionality of a law and to challenge the validity of a franchise; and McClutchey v. Milwaukee County, 239 Wis. 139, 300 N. W. 224, 137 A. L. R. 628 (1941), held that if a mere public right is to be vindicated or evasion

proves illusory, a taxpayer's action may be the only means by which illegal proceedings may be thwarted.[26]

A limited number of courts, perhaps best represented by California, have disputed the position taken by the principal case, and have given a literal construction and application of the statutes authorizing taxpayers' suits. In *Hobbs, Wall & Co. v. Moran*,[27] where one of the councilmen was merely the business manager of a company from which the city purchased supplies, the court allowed the action to be contested without a showing of pecuniary loss to the public, declaring that "It is not necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty."[28] Further support is given the minority view by the Georgia court in *Trainer v. City of Covington*,[29] which held invalid a contract of sale of a truck to the city by its mayor. Although the contract was fair and free from fraud and based on the lowest and most advantageous bid, the court stated that even though there was no statute or charter prohibiting such contracts, they were nevertheless prohibited by public policy.

It has been forcefully pointed out that decisions following the majority rule are in direct violation of an established public policy as formulated by prohibitions of the legislature and well-considered court decisions; that the prohibitions of the legislature cannot be disregarded by the courts; that to permit an official to contract with the body of which he was a member is to throw the door wide open to

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of the law prevented by injunction, the action should be brought by the officer or body expressly charged with the duty of enforcing the law.

[26]Some courts would further limit the taxpayer's action by making a distinction between preventive and remedial relief, Tuscan v. Smith, 130 Me. 36, 153 Atl. 289, 73 A. L. R. 1344 (1931); City of Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133 (1895). However, in Cawker v. City of Milwaukee, 133 Wis. 35, 113 N. W. 417, 418 (1907), the court said: "The power to successfully maintain such an action has never been limited to cases where the work has not yet been done.... The right does not depend upon the speed with which the law is broken." To make such a restriction without qualification would render it practically impossible to prevent the despoiling of the public treasury or property. See also dissenting opinion in Grady v. City of Livingston, 115 Mont. 47, 141 P. (2d) 346, 355 (1943).

[27]109 Cal. App. 316, 293 Pac. 145 (1930).

[28]109 Cal. App. 316, 293 Pac. 145, 147 (1930). In another California case, Miller v. City of Martinez, 28 Cal. App. (2d) 364, 82 P. (2d) 519 (1938). A taxpayer brought an action to recover money paid to a company for products purchased while the company's manager was also the mayor. Even though the city had received the benefits of the merchandise and had not suffered financially by reason of the contracts, the court declared the contracts void and allowed recovery.

[29] 183 Ga. 759, 189 S. E. 842 (1937).

fraud and corruption; and that contracts made in violation of statutes expressly forbidding the same contravene public policy and are absolutely void and of no legal effect.[30]

As the whole issue seems to revolve around principles of public policy, no rule should be adopted until there has been a careful weighing and balancing of all pertinent factors and considerations. Thus, it may be said that the majority rule does result in less litigation, less work for the courts, and in protection for public officials against the harassment of having to justify legally their every official act. However, most of the majority courts do not question the propriety of the law, either common or statutory, rendering it illegal for officers to be interested in public contracts; yet these same courts have greatly reduced the effect of this salutary doctrine by judicially construing or legislating "pecuniary loss" into the rule as a requisite for its enforceability by the taxpayer. A condition which makes possible wilful violations and disobedience of the law, such as is created by the rule of the *Henderson* case, is undesirable. The sounder position is that when power is vested in public authorities there should go with it an implied right in the taxpayer to use every useful process of law to see that the power conferred is lawfully employed. Even though, as in the *Henderson* case, it cannot be shown that the illegal transaction caused any monetary loss to the public, more is at stake than merely the specific result of the acts in controversy. The principle involved is "the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the services to be performed.... [And] the policy of the law [is] that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large."[31]

HARRY G. CAMPER, JR.

PROPERTY—EFFECT OF LACK OF NOTICE OF SEVERANCE OF MINERAL ESTATE ON ADVERSE POSSESSION CLAIM OF SURFACE HOLDER. [Federal]

The branch of the law of adverse possession[1] dealing with estates in minerals becomes of increasing importance as the greatly expanded

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[30]See Grady v. City of Livingston, 115 Mont. 47, 141 P. (2d) 346, 355 (1943) (dissenting opinion).

[31]Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 601, 229 Pac. 1020, 1024 (1924).

[1]Acquisition of title by adverse possession is, of course, the result of statutes limiting actions for the recovery of land, rather than the purpose thereof, and the

modern demands for coal, gas, and other minerals are reflected by prices making the exploitation of such minerals, even by individual landowners, economically feasible. It is not unlikely that the next few years will see an increased number of suits involving title to minerals in those sections where minerals occur in usable quantities. In that event, the long-standing question as to what constitutes adverse possession will recur frequently, perhaps imposing upon the courts the necessity for re-examination of the laws as developed chiefly for the quieting of surface titles, and for adaptation of that law to meet the somewhat different circumstances involved in mineral estates.[2]

In accord with the rules governing adverse possession generally,[3] for the acquisition of title to a mineral estate it is required that the possession be "actual," so as to prevail over the absentee owner's constructive possession in law and entitle him to an action for the land's recovery; "continuous" and "uninterrupted," so that the owner's constructive possession not revest in him nor the running of the statute of limitations be stopped;[4] "adverse," "exclusive," and "under claim

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"law of adverse possession" is really but the converse side of the law of limitations of actions for the recovery of land. The basic policy underlying such statutes is exemplified by Stat. 21 Jac. I, c. 16 (1623), the opening phrase of which asserts the purpose "For quieting of men's estates, and avoiding of suits...."

[2]Analysis of the purely physical situation of a separate mineral estate, as underlying rather than surface, and having a vertical as well as horizontal joinder with the surrounding estates, suggests the probability that courts must take into account, in determining the existence of possession, possessory acts different from those encountered with surface estates. A mineral vein is not fenced, farmed, grazed, nor built on in the ordinary manner. The greater necessity of color of title to an adversely held mineral interest is evident; so is the fact that the true owner of a mineral estate is almost always out of any truly *actual* possession or occupancy. In addition to these differences the doctrine of severance, subsequently discussed in this comment, is frequently encountered in the adjudication of adverse claims to mineral estates.

[3]These rules have been developed by the courts in the interpretation of the statutes, and are rarely mentioned in the statutes themselves. For more elaborate discussions of the general law relating to adverse possession see 1 Am. Jur., Adverse Possession, especially §§ 126-184; 4 Tiffany, Real Property (3d ed. 1939) § 1132 et seq.

[4]"Tacking"—the adding of periods of adverse possession by different possessors to meet the statutory time requirements— by successive holders with privity of estate existing between them is universally permitted. For examples of conflicting views as to the necessity of privity, dependent upon whether the policy of the statutes are to be construed to reward the adverse possessor, or to punish the owner out of possession for his laches, see Ballantine, Title by Adverse Possession (1918) 32 Harv. L. Rev. 135, who states the real object of such a statute to be "not... to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing."

or color of title,"[5] so as to manifest an intention and dominion inconsistent with a holding in subjection to the owner; "open and notorious," both as indicating the adverse nature of the holding and in order that the owner may be apprized of the invasion of his interests so as to bring action for the recovery of possession;[6] and "continuing," of course, for the time established by the statute limiting actions for the recovery of land. It is apparent, however, that those customary acts of dominion whereby a surface tract is reduced to possession would be impractical, impossible, or insufficient with regard to a mineral estate. Different actions must be taken into account. It is not surprising, in view of the courts' latitude in determining what weights are to be ganted those acts operative to create adverse title, to find that in states where the extraction of minerals comprises an important part of the total industry the courts evidence a greater hostility toward the adverse possession of minerals than is likely to exist in states having small mineral resources.[7]

Perhaps the chief distinctive consideration involved in cases dealing with title to minerals is that of the effect of severance of an under-

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[5]For effect and examples of color of title see I Am Jur., Adverse Possession §§ 185-209; 4 Tiffany, Real Property (3d ed. 1939) § 1155.

[6]Statements are common to the effect that possession is or is not adverse because it did or did not "give notice to the owner... that his rights were being invaded or subject the possessor to suit at his hands, which is the crucial test of adverse possession." United Fuel Gas Co. v. Dyer, 185 F. (2d) 99, 103 (C. A. 4th, 1950).

[7]Thus the Court of Appeals of Kentucky has said that an adverse holder's possession on the surface may be extended by construction through color of title, "... but, when he gets below the surface and attempts to take possession of minerals, he can have no immediately potential use or occupation of the whole of the minerals over which the law can by construction extend his actual possession; therefore, he can have no posession of the unmined portion. Their [the adverse possessors'] possession was never in advance of their operations, unless they surrounded a block; then they had possesion of that block, but no more. They got no more than they loosened or around which they had established a confine." Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S. W. (2d) 394, 400 (1934). Such a view would appear unduly strict, if the propriety of title by adverse possession be admitted at all, and would seem practically to nullify the doctrine of adverse possession as far as minerals are concerned. A better view, applicable to surface and minerals alike, and more in harmony with the general precepts of adverse possession, appears in the statement that "Much must depend upon the uses to which the land may be put. To be adverse the possession is not required to be more full than the character of the land admits. What acts constitute adverse possession are necessarily varied, depending upon the nature, locality, and use to which the property may be applied." Davis v. Haines, 349 Ill. 622, 182 N. E. 718, 720 (1932). For sufficiency of acts to constitute adverse possession of minerals generally, see Hooper v. Bankhead, 171 Ala. 626, 54 So. 549 (1911); Campbell v. Tennessee Coal, Iron & R. Co., 150 Tenn. 423, 265 S. W. 674 (1924); Central Trust Co. v. Harless, 108 W. Va. 618, 152 S. E. 209 (1930); Thomas v. Young, 93 W. Va. 555, 117 S. E. 909 (1923).

lying mineral estate from the rest of the land.[8] Prior to severance, in accord with the historical concept of land ownership as extending indefinitely above and below the surface, *cujus est solum ejus est usque ad coelum et ad inferos,* and in recognition of the impossibility of *actual* possession of all that inverted pyramid[9] of land of which ownership may be claimed, adverse possession of the surface is deemed to extend, as does lawful ownership, to all land and minerals underneath the surface.[10] Severance, however, is held to create entirely separate and distinct estates analogous to those existing in horizontally adjoining parcels after the alienation by a landowner of only a part of his land,[11] and after such severance of a mineral estate, courts universally agree in holding adverse possession on the surface not to extend to the severed mineral estate, at least in the absence of separate hostile, actual, etc., action taken with respect to such minerals.[12]

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[8]Severance may be accomplished by direct deed of the minerals, or by exception or reservation of them. It has been held accomplished by mining underneath an adjoining tract by the owner of the minerals underlying both tracts, so as to defeat a claim to the minerals by the adverse possession of the surface. Delaware & Hudson Canal Co. v. Hughes, 183 Pa. St. 66, 38 Atl. 568 (1897).

[9]This term is intended to be illustrative only; it will not be argued that this is the true geometric shape of the land owned.

[10]Virginia Coal & Iron Co. v. Hylton, 115 Va. 418, 79 S. E. 337 (1913). For cases the comment on the adverse possession of coal both before and after severance, see notes (1934) 93 A. L. R. 1232; (1930) 67 A. L. R. 1440; (1921) 13 A. L. R. 372.

[11]See Tiffany, Real Property (3d ed. 1939) § 1158, and cases cited therein. Courts sometimes make the analogy to surface estates complete by taking a cross-sectional view so that the land and mineral estates appear in alternate strips, and apply the rules of law developed for the determination of conflicting interests in horizontally adjoining parcels to determine conflicting interests in vertically adjoining parcels. See Pyramid Coal Corp. v. Pratt, 92 N. E. (2d) 858 (Ind. 1950), criticized in this law review, page... That such a view may not be taken in every case is indicated by the fact that interests such as easements necessary for the full enjoyment of surface or minerals may need to be more freely granted where surface and underlying estate are severed, and by the fact that though in the absence of severance possession of the surface tract extends to the minerals, it does not so extend to adjoining parcels on the surface.

[12]The seeming inconsistency resulting from the fact that the very same acts which before severance constitute adverse possession do not constitute such possession after severance vanishes when due consideration is given another requisite for the acquisition of adverse title additional to action by the adverse possessor, that being the failure of the owner of the estate to assert the cause of action which has arisen for the recovery of the land. Court, manifesting a not unreasonable sympathy with the owner, have required that the acts of possession be such as would be brought home to a diligent landowner so that some laches may be imputed to him in the failure to oust such possessor. Thus the possession of the surface by another, without more, would not apprise a mineral owner not owning the surface of an adverse holding, whereas the owner of both the general and the mineral estate might justifiably be taken to be placed on notice of adverse claim to the entire estate by the possession of the surface.

In the recent case of *United Fuel Gas Company v. Dyer*[13] an exception was sought to be engrafted upon the general rule regarding severance which would have been a departure not only from that generally more restrictive view taken with regard to adverse possession of *minerals*, but also from the rules of notice applicable to adverse possession generally. In about 1870, one Neece had taken possession of the tract in controversy, through an oral sale to him by Hinkle, the holder under an admittedly invalid junior patent from the Commonwealth of Virginia. In 1874, however, his wrongful possession under such claim of title was interrupted by an ejectment judgment and writ of entry obtained by the then holders under the superior senior patent, the effect of which judgment and writ was to bar any further claim under the previous adverse possession by either Neece or Hinkle, his vendor, because of the privity of estate existing between them.[14] In 1879, no entry having been made under the writ, and Neece still remaining in possession, the holders under the senior patent executed a "severance" deed to him—i.e., a deed conveying the surface but excepting the minerals, so as to create separate estates.[15] The following year plaintiffs' predecessor, Dyer, took a deed of the tract, without reservation or exception of the minerals, from Neece's predecessor, Hinkle, and shortly thereafter, through a collateral agreement with Neece, Dyer was allowed possession of the tract.[16] He had no knowledge of the severance deed previously executed when he went into possession.

Plaintiffs, holders and lessees under Dyer, sought a declaratory judgment as to their title to the minerals and cancellation of the severance deed to Neece as a cloud on title, in spite of the fact that no sufficient separate acts of adverse possession had been taken with regard to the minerals to vest title to them if the severance were to be considered effective as to Dyer and plaintiffs holding under him.

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[13]185 F. (2d) 99 (C. A. 4th, 1950).

[14]Thus, at this point the entire adverse claim of title was cut off, making it necessary for Neece or Hinkle, if either would assert an adverse possession, to start the period once again.

[15]Though the rule is that severance through a deed to another by the absentee owner during the adverse possession of the general estate is ineffective against the adverse possessor in the absence of an actual entry under the severance deed, Rio Bravo Oil Co. v. Staley Oil Co., 138 Tex. 198, 158 S. W. (2d) 293 (1942), the lower court found, and the Court of Appeals approved its finding, that Hinkle's color of title under the junior patent was rendered invalid by the ejectment judgment, and that Neece's adverse possession after such judgment was in his own right, which possession's adverse nature was changed by the severance deed to him. Dyer v. United Fuel Gas Co., 90 F. Supp. 859, 865 (S. D. W. Va. 1950).

[16]Thus, Dyer at this point had lawful possession of the surface as grantee under the senior patent. He claimed the general estate, however, including the minerals, under the invalidated junior patent.

One of the theories asserted by plaintiffs was that since Dyer was without notice of the severance deed it was ineffective as to him and those holding under him, and that therefore their possession of the surface extended to the minerals. The lower court sustained this argument, stating that the fact that the severance deed may have been made before possession began made no difference, and that although such deed may have been perfectly valid as between the grantor and the grantee and those claiming under them, "as against one holding possession adversely under color of a hostile title, if the severance deed is to prevent his actual possession of the surface from extending to the minerals, notice thereof must in some way be brought home to him."[17]

Such a view is startling, amounting to a rule that in the absence of notice of severance to the adverse possessor mere possession of the surface, beginning after such severance, constitutes an adverse holding of the minerals, and being an absolute inversion of the general rule requiring the adverse possessor, rather than the true owner, to give notice or do acts imputing such notice to the owner. But the lower court's decision was reversed upon appeal to the United States Court of Appeals for the Fourth Circuit, and Judge Parker stated the general rule in writing the court's opinion when he said that "a deed effecting a severance is not binding upon a subsequent grantee without notice unless it is recorded; but there is nothing in this that requires notice to an adverse possessor not claiming under the same chain. Such adverse possessor is manifestly not entitled to any notice with respect to the estate of the true owner which he is invading. On the contrary, it is he who must give notice by exercising possession of such character as will apprise the true owner that the right of the latter is being challenged."[18] Thus, if there has been a valid prior severance the adverse possessor's possession of the surface will be ineffective against the severed mineral estate, whatever may have been his belief as to the extent of his possession, unless, indeed, the possessor has gone further and done those overt and unequivocal adverse acts with reference to the mineral estate which impute notice to the mineral owner and start the running of the limitation period.

It may be wondered how the view overruled could ever have arisen,

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[17]Dyer v. United Fuel Gas Co., 90 F. Supp. 859, 866 (S. D. W. Va. 1950). The court pointed out, in addition, the fact that Dyer, claiming in a different chain of title from Neece, had no constructive notice of the severance.

[18]United Fuel Gas Co. v. Dyer, 185 F. (2d) 99, 102 (C. A. 4th, 1950).

considering the strongly established contrary doctrine. The error appears to have had its origin in a misconception of the subsequent purchaser doctrine embraced in the recording statute, and an extension of the protection therein granted to persons not contemplated within the statute. In 1918, in *Midkiff v. Colton*,[19] a basis for equity's jurisdiction to re-establish a lost or destroyed and unrecorded severance deed reserving the minerals to the grantor was found in the possibility that the conveyee in such deed might, by a later conveyance to a purchaser for value without notice of the severance, cut off the reserved title to the minerals.[20] And in 1926, in *Gill v. Colton*,[21] in an opinion written by Judge Parker himself, upon which the district judge in the *Dyer* case placed much reliance, the contention of plaintiffs that there had been a severance in that case, so as to prevent adverse possession of the surface from extending to the minerals, was denied "(1) because there was no acceptance of the deed relied upon to create the severance...; (2) because Holton had contracted for the purchase of the land prior to the attempted delivery to the Gills; and (3) *because Holton had no notice of the deed, which was unrecorded, or of the attempted reservation of the mineral interests therein.*"[22] Judge Parker further stated that "even if there had been an acceptance of the deed by the Gills and

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[19]252 Fed. 420 (C. C. A. 4th, 1918).

[20]It is submitted that no such possibility actually existed, since the mineral estate purportedly conveyed by the grantee to his purchaser certainly was not derived from the original grantor, who had expressly reserved the mineral estate. Such new claim of title to the minerals must be taken as in a separate adverse chain. See last paragraph in this comment. That a grantor reserving either a vendor's lien or the mineral underlying the tract conveyed cannot be deprived thereof in favor of his purchaser's grantees by failure of the purchaser to disclose his rights or to record has been established. Carter v. Thompson, 167 Ark. 272, 267 S. W. 790, 38 A. L. R. 1053 (1925); Chapman v. Kendall, 145 Oklo. 107, 291 Pac. 97 (1929). See 55 Am. Jur., Vendor & Purchaser § 708 and cases cited therein in spport of the general rule that a purchaser is charged with notice of what appears in the deed or muniments in his grantor's chain of title regardless of lack of recordation or actual notice.

[21]12 F. (2d) 531 (C. C. A. 4th, 1926). It may be noted that the same tract in cluded in the senior patent to Smith and the same holders under Smith were involved in the Midkiff, Gill and Dyer cases. A diagram of the fact situation in the Gill case shows lines almost identical to those of the Dyer case, the significant difference being that in the Gill case the severance deed executed to the former claimant under the inferior chain was not accepted by him, and that the immediate claimant's predecessor, Holton, had been in possession claiming title to the whole by previous contract with the Gills before even any attempt was made to effect the severance. Either of these two factors alone would have rendered the attempted severance ineffective, so that Holton's lack of notice of the deed was unnecessary to the decision reached.

[22]12 F. (2d) 531, 533 (C. C. A. 4th, 1926) [italics supplied].

no conveyance or contract to convey to Holton until afterwards, still, as there is no evidence that he had knowledge of the deed or of the reservation contained therein or the estoppels created thereby, and as it was not recorded, he could not be affected by it. It was not within the chain of title under which he claimed, and consequently he was not chargeable with notice of its provisions .... And in West Virginia it is well settled that an unrecorded deed is void as to a subsequent purchaser for value and without notice."[23]

Thus, for some time the idea of requiring notice to an adverse possessor, at least in supporting decisions determined in part by other factors, had been in evidence within the jurisdiction, so as to mislead the lower court in its decision. That the Court of Appeals corrected a trend toward a departure from the proper rules governing adverse possession of minerals appears evident. The general view taken under most recording systems is that the subsequent purchaser intended to be protected by the recording acts is only that purchaser of the same interest or title previously conveyed to another by a grantor common to both prior and subsequent grantees–i.e., a subsequent purchaser without actual notice who on searching his record chain of title finds no conveyance of the same interest from his grantor or any of his predecessors recorded prior to the conveyance by such grantor or predecessor to the grantee under whom he (subsequent purchaser) claims.[24] the subsequent purchaser contemplated is not that one who, even though innocent and paying value, purchases some *other* interest or claim not derived from a common grantor.[25] It is apparent that

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[23]12 F. (2d) 531, 534 (C. C. A. 4th, 1926). While it appears true that the mere acceptance of a severance deed by the Gills *during* the adverse possession by Holton in his own right would not have accomplished a severance effective against Holton, at least in the absence of entry by the Gills so as to interrupt his possession, if his entry under the conveyance or contract had occurred *after* the severance by deed to the Gills no basis appears for holding his possession to extend to the minerals. The fact situation in such case would be the same as that if the Midkiff case. See note 20 and text for which it is cited.

[24]This reasoning is applicable where the ordinary grantor-grantee recording system is in effect. That the rule may be otherwise where recordation is by reference to the tract rather than to grantors and grantees in the chain of title, see Philbrick, Limits of Record Search and Therefore of Notice (1944) 93 U. of Pa. L. Rev. 125, 165; 5 Tiffany, Real Property (3d ed. 1939) § 1265.

[25]"... the recording acts do not affect the fact that a man who *has no title* can convey none, and that no would-be purchaser can be a purchaser merely because he gives value, whatever his innocence. Those statutes presupposes a *title holder* who gives title to a first grantee, but who, though left without title, retains a power to divest his first grantee and give title to a second under the conditions imposed by the statutes." Philbrick, Limits of Record Search and Therefore of Notice (1944) 93 U. of Pa. L. Rev. 125, 169.

within this view a possessor of the surface whose possession begins after severance, and whose claim or color of title to the minerals is derived from some source entirely foreign to the valid record title, cannot be a purchaser within the protection of the recording acts; this being so, the usual rule applies that one claiming adversely to the true owner must, if his possession is to ripen into title, do those overt acts in the exercise of dominion which are taken to impart notice to an absentee owner. The decision of the Court of Appeals in the *Dyer* case is in accord with the general view; it may only be regretted that the court did not at this point unequivocally overrule or limit the erroneous or ambiguous language in the *Gill* case.[26]

FRANK E. BEVERLY

PROPERTY—REMEDIES OF OWNER AGAINST ENCROACHMENT BY TREES FROM ADJOINING PROPERTY. [District of Columbia]

It has long been generally stated[1] that overhanging tree branches and penetrating tree roots are a nuisance and that the person whose land is invaded by these encroachments has the right to abate the nuisance by trimming the branches or cutting the roots[2] at the property boundary, has an action at law for any damages sustained and has a right to require the owner of the offending trees to abate the nuisance. Yet despite the fact that these three alternative remedies have been said to be available, the majority of the American courts have been reluctant to allow the injured landowner the use of any but the right of self-help,[3] and those courts which have allowed damages or injunc-

[26]The court dismissed the Gill case with but little more than the statement that there was nothing contrary to its present decision in the Gill case. United Fuel Gas Co. v. Dyer, 185 F. (2d) 99, 103 (C. A. 4th, 1950). Is this to be taken to mean that the contrary language in that case, being mere dicta, was of no effect, or that the hypothetical situation mentioned in the Gill decision, which seems to be just the situation involved in the Dyer case, is actually distinguished from it? The Dyer decision appears effectively to have overruled such language. See notes 20 and 23 and text for which cited.

[1]Wood, The Law of Nuisances (2d ed. 1883) § 108; 2 C. J. S., Adjoining Landowners § 38; Notes (1922) 18 A. L. R. 655, (1932) 76 A. L. R. 1111, (1940) 128 A. L. R. 1221.

[2]That encroaching tree branches and roots have been considered to be of the same general character see: Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931); Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188, 189 (1884).

[3]Cases involving the specific point of damages or injunctive relief in jurisdictions following the common law rule: Sterling v. Weinstein, 75 A. (2d) 144 (Mun. Ct. of App., D. C. 1950) (no court remedy in case of invading non-noxious limbs and roots); Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931) (injunction and dam-

tive relief have done so on the basis of nuisance statutes.[4]

Illustrative of the effect of the usual operation of the common law rule is *Sterling v. Weinstein*,[5] a recent case of first impression in the Municipal Court of Appeals for the District of Columbia. The plaintiff alleged that branches from trees growing on defendant's land extended over the plaintiff's house, that one of the trees leaned at a dangerous angle and that buds and leaves from these limbs had fallen on the roof of the building, causing the drainage gutters to be clogged. As a result, water which normally would have drained off overflowed the wall of the building, making it necessary for plaintiff to expend money to have the gutters cleaned and the walls waterproofed. The plaintiff asked for damages and abatement of the nuisance constituted by the encroaching branches and the leaning tree.

The trial court allowed the action for damages and issued an order requiring the defendant to keep the encroaching branches cut. No mention was made of the allegation concerning the leaning tree and presumably the contention concerning it was rejected. On appeal,

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ages refused in case of invading tree roots); Granberry v. Jones, 188 Tenn. 51, 216 S. W. (2d) 721 (1949) (damages and injunction denied in case of non-noxious encroaching hedge limbs); Smith v. Holt, 174 Va. 213, 5 S. E. (2d) 492 (1939) (damages and injunction refused in case of non-noxious encroaching hedge).

Other jurisdictions which follow the common law rule and presumably would deny damages and injunctive relief: Harndon v. Stultz, 124 Iowa 440, 100 N. W. 329 (1904); Hickey v. Michigan C. R. Co., 96 Mich. 498, 55 N. W. 989 (1893); Tanner v. Wallbrunn, 77 Mo. App. 262 (1898); Countryman v. Lighthill, 24 Hun. 405 (N. Y. 1881); Murray v. Heabron, 74 N. E. (2d) 648 (Ohio Com. Pl. 1947); Cobb v. Western Union Telegraph Co., 90 Vt. 342, 98 Atl. 758 (1916). Contra: Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188 (1884) (damages can be recovered if the encroaching part extended from a planted tree); Ackerman v. Ellis, 81 N. J. L. 1, 79 Atl. 883 (1911) (damages, however slight, caused by invading tree parts can be recovered by an action at law).

[4]Stevens v. Moon, 54 Cal. App. 737, 202 Pac. 961 (1921); Mead v. Vincent, 199 Okla. 508, 187 P. (2d) 994 (1947); Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298, 18 A. L. R. 650 (1921). In Stevens v. Moon, 54 Cal. App. 737, 202 Pac. 961, 962 (1921), the court set out the statutory provisions which made the action allowable. Cal. Code of Civ. Pro. § 731: "'An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor'." Cal. Civ. Code § 3479 defines a nuisance as, "anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment thereof...." That without statutory provisions, relief would not be given see Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298, 300, 18 A. L. R. 650, 653 (1921) where the court said, "were it not for our statute of nuisances, the respondents herein would not be accorded any judicial relief. But our statutes accord a remedy to one 'whose personal enjoyment is lessened,' or for a very slight nuisance...."

[5]75 A. (2d) 144 (Mun. Ct. of App., D. C. 1950).

the court decided that trees ordinarily are not nuisances, nor are overhanging branches unless they do substantial damage, and that, whether nuisances or not, the landowner always has the right to cut away to his property line branches and roots from trees of the adjoining landowner. Self-help being regarded as a simple and certain remedy affording protection to the owner of property subjected to non-noxious encroachments, damages and injunctive relief were denied. The policy of the decision was summed up in the court's declaration that, "The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject the other to the annoyance, and the public to the burden, of actions at law, which would likely be innumerable and, in many instances, purely vexatious."[6]

In dissent, the chief justice agreed that though self-help is one of the landowner's remedies and might be sufficient in most instances, it is not his only remedy and is not adequate in this case. In regard to the leaning tree, the dissent would rule that plaintiff has the right to demand that defendant abate the nuisance or pay for any damage caused thereby, just as he would have the right to demand that an adjoining landowner remove an unsafe structure which constituted a threat of danger.

As both elements of the court agreed, self-help does afford an adequate solution to the ordinary tree-encroachment controversy[7] because of the action which is permitted in exercise of the right. In a number of cases the courts have defined the scope of the remedy of the landowner as including the right to cut intruding branches,[8] hedges,[9] or roots[10] back to his property line. The remedy, however, is limited to removal of the overhanging branches or penetrating roots and does not include the right to trespass to remove them[11] or to cut the tree from which they stem.[12] Both the tree and its products are said to be

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[6]Sterling v. Weinstein, 75 A. (2d) 144, 147 (Mun. Ct. of App., D. C. 1950) quoting from Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490, 491 (1931).

[7]One court has stated that the rule is so firmly established that a statute abrogating it would be unconstitutional. See Murray v. Heabron, 74 N. E. (2d) 648, 649 (Ohio Com. Pl. 1947).

[8]2 C. J. S., Adjoining Landowners § 38.

[9]Granberry v. Jones, 188 Tenn. 51, 216 S. W. (2d) 721 (1949); Smith v. Holt, 174 Va. 213, 5 S. E. (2d) 492 (1939).

[10]Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490 (1931); Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188 (1884).

[11]2 C. J. S., Adjoining Londowners § 38.

[12]Butler v. Zeiss, 63 Cal. App. 73, 218 Pac. 54 (1923); Toledo, St. L. & K. C. R. Co. v. Loop, 139 Ind. 542, 39 N. E. 306 (1894).

the property of the person on whose land the tree stands[13] and there is no right to convert the severed parts.[14] No cases have been found which hold that the portions cut off must be returned to the owner of the tree. However, since the owner of the tree also owns the parts which stem therefrom, it would appear that he would be entitled to the parts removed, the same as he is entitled to the fruit on the encroaching part.[15] Where these limitations of the remedy have been exceeded, the courts have subjected the person who abused the privilege to actions for damages for trespass[16] and injunctions restraining further interference.[17]

The majority of the District of Columbia court would make self-help the exclusive form of relief, except where noxious factors are involved. However, as the dissent recognized, situations frequently arise where self-help alone is not sufficient and some additional relief should be provided. In the principal case, where there was danger that the defective tree would fall on adjoining land, the inadequacy of self-help is patently illustrated. Full utilization of the right would not protect the owner of the neighboring land, for he can neither cut the tree nor render it safe without being liable as a trespasser.[18] Another illustration of the incompleteness of self-help is brought out in *Stevens v. Moon*[19] where roots from a long row of eucalyptus trees invaded adjoining land, rendering the soil unproductive and stunting the growth of walnut trees and crops planted thereon. Considerable expense would have to be incurred in removing the roots, yet the cause

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[13]Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728 (1836); Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619, Ann. Cas. 1918B, 1168 (1917); Oglesby v. Town of Winnfield, 27 S. (2d) 137 (La. App. 1946); Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645 (1865).

[14]Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728 (1836).

[15]That he is entitled to the fruit: Hoffman v. Armstrong, 46 Barb. 337 (N. Y. 1866); Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728 (1836).

[16]Fick v. Nilson, 220 P. (2d) 752 (Cal. App. 1950); Luke v. Scott, 187 N. E. 63 (Ind. App. 1933); Oglesby v. Town of Winnfield, 27 S. (2d) 137 (La. App. 1946).

[17]Jurgens v. Wiese, 151 Neb. 549, 38 N. W. (2d) 261 (1949).

[18]As the dissenting justice pointed out, "Under these circumstances it appears highly unrealistic to commend the injured property owner to the 'self-help' remedy." Sterling v. Weinstein, 75 A. (2d) 144, 148 (Mun. Ct. of App. 1950). Query: If self-help does not permit the landowner who is threatened injury by a dangerous or defective tree standing on adjoining land to compel the owner of the tree to render it safe or remove it, or does not allow the party endangered to take this action, should the trunk of the tree be included in the scope of self-help?

[19]54 Cal. App. 737, 202 Pac. 961 (1921). Relief was given in this case under the California nuisance statute. The fact situation of the case is used to demonstrate that damage can be caused by encroaching tree parts.

of the injury would not necessarily be terminated, for the roots would grow back.

Recognizing that self-help is not always satisfactory, some courts have introduced qualifications to the rule based on the nature of the encroachment. One court has said that all such intrusions are actionable nuisances, the insignificance of the injury going to the amount of recovery and not to the cause of action.[20] This obviously is not desirable for it opens the doors to a large amount of petty litigation, the very evil the self-help rule was designed to prevent. Other courts state that if the encroaching growth can be classed as "noxious" the owner of the land invaded may have damages or other appropriate relief.[21] What is to be classed as noxious is not clear, however, and a review of the authorities indicates that the term probably defies definition.[22] The principal case, while accepting the validity of this qualification, rejected another which has gained some recognition, though it is equally difficult to apply with certainty. Under this qualification of the general rule the necessary court remedy may be had if the tree from which the encroaching parts grow is a planted tree—that is, the result of human activity—but only self-help is available if the tree is of natural growth.[23] Such a distinction would seem to be unsound since it bases recovery, not on the injury, but rather on the origin of the tree; and further, the practical difficulty of ascertaining whether or not the tree is of natural growth would render the remedy ineffective in many cases.

It seems clear that in the usual case of encroaching tree branches or roots the common law right of self-help gives the landowner adequate protection since the damage is normally slight and the injury probably could have been prevented by exercise of the remedy available. Further, exercise of the right does not impose too great a burden or hardship on neighboring landowners in the typical situation. How-

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[20]Ackerman v. Ellis, 81 N. J. L. 1, 79 Atl. 883 (1911).

[21]See Granberry v. Jones, 188 Tenn. 51, 216 S. W. (2d) 721, 723 (1949); Smith v. Holt, 174 Va. 213, 219, 5 S. E. (2d) 492, 494 (1939).

[22]The only cases found where relief was given for a "noxious" encroachment are Crance v. Hems, 17 Cal. App. (2d) 450, 62 P. (2d) 395 (1936) and Shevlin v. Johnson, 56 Cal. App. 563, 205 Pac. 1087 (1922), and it is possible that those cases were decided under the California nuisance statute rather than under the "noxious" theory, since many of the cases cited in the opinion as authority were based upon such statutes. However, even if the decisions were not based on the statute, they are not helpful in defining "noxious" for it appears that the encroachments in those cases were termed "noxious" because they did substantial injury, not because of any inherent quality of the tree and its parts.

[23]Restatement, Torts (1939) § 840, Comment A, Illustration 4. Adopted in Griefield v. Gibraltar Fire and Marine Insurance Co., 199 Miss. 175, 24 S. (2d) 356 (1946).

ever, it is equally obvious that there are situations in which it does not give complete relief and in which it does impose an undue burden on the landowner. Since the courts have not been able effectively to extend the scope of the self-help remedy by use of undefinable or ineffective classifications so that relief can be obtained in cases where it is needed, legislative action to provide such relief is in order. To give the landowner protection from encroaching tree parts, statutory provisions could appropriately be enacted which adopt the common law rule of self-help, but which also allows damages where actual injury has been incurred and injunctive relief where future or continuing injury is threatened. In the usual case, the result would be the same as it is under the strict common law rule, but where a court remedy is needed, it would be available.

JOHN Q. MILLER, JR.

PROPERTY—RIGHT OF SURFACE OWNER TO EASEMENT OF NECESSITY THROUGH MINERAL STRATUM TO REACH UNDERLYING ESTATE. [Indiana]

An easement of necessity may be created by implication in favor of either the grantor or grantee upon a conveyance of land, if the enjoyment of such an easement is necessary for the beneficial use of the land sold or for the land retained.[1] Public policy has favored easements of necessity, especially rights of way, since land without means of access is practically useless, and it is advantageous to society generally that land be capable of utilization.[2] Although the most frequent application of the policy allowing such easements has been in connection with rights of way by necessity over the surface,[3] the same doctrine has been applied, though with some uncertainty, to underlying estates in land.[4]

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[1]Burby, Real Property (1943) § 67; 3 Tiffany, Real Property (3d ed. 1939) § 792; 17 Am. Jur., Easements § 48.

[2]Simonton, Ways by Necessity (1925) 25 Col. L. Rev. 571, 574.

[3]3Tiffany, Real Property (3d ed. 1939) § 793.

[4]In the cases dealing with the right of access to oil and gas deposits and also to water the right is clearly recognized, but the decisions are not clear as to the basis of the right. Telford v. Jenning Producing Co., 203 Fed. 456 (C. C. A. 7th, 1913); Pennsylvania Central Brewing Co. v. Lehigh Valley Coal Co., 250 Pa. 300, 95 Atl. 471 (1915); Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. 597 (1893). Also see Pace v. State, 191 Miss. 780, 4 S. (2d) 270, 275 (1941). In the decisions relating to access to solid minerals, no such uncertainty exists, as the right is clearly recognized to be an easement of necessity. Baker v. Pittsburgh C. &. W. R. Co., 219 Pa. 398, 68 Atl. 1014 (1908). Also see Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6, 7 (1907).

The problem involving the surface owner's right of access to that part of his estate lying beneath a stratum of coal which has been severed by a conveyance without express reservation of any such right came before the Indiana courts for the first time in the recent case of *Pyramid Coal Corporation v. Pratt.*[5] Plaintiff's predecessor in title had conveyed the coal underlying his twenty-five acre tract to defendant's predecessors in title, without any mention of a reservation of right of way through the coal to that part of the estate beneath the coal seam. After plaintiff became owner of two acres of the land subject to the coal rights, he built a house and drilled a well down through the seam of coal into the strata below, in order to obtain water for his domestic needs. Defendant, while mining coal, destroyed part of the well casing. Plaintiff sued for damages for loss and contamination of his water supply, basing his complaint on an alleged implied right of way by necessity through the coal to reach his underlying estate.

In considering defendant's appeal from a judgment for plaintiff, the appellate court quoted with approval the general rule that the owner of the surface who has sold a stratum of minerals may have a right to penetrate the mineral stratum by shaft or well to reach the underlying estate, apart from any reservation, and can transfer the right to another.[6] However, the case was remanded on the ground that the degree of necessity required to create such an easement was not shown to have existed at the time of severance. Having failed to find such an easement existing in favor of the previous owner, the court felt that there was no way the plaintiff could have acquired one when he purchased the land.[7] It would seem that because of the public need for coal the court felt that a rule of strict necessity should apply. However, it was pointed out that the decision was to be limited to the particular set of facts involved and was not intended to apply to similar situations involving gas and oil or a public water supply.

The dissenting justice set forth two grounds for imposing liability on the defendant. First, it was argued that the right to pass from the surface to the estate below the coal was made available to the owner of the surface at the time the estate in the coal was conveyed under

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[5]92 N. E. (2d) 858 (Ind. App. 1950).

[6]The rule as stated by the court and the cases cited as authority therefor are set out in 58 C. J. S., Mines and Minerals § 160.

[7]An implied easement of necessity is an incorporeal right that arises out of a conveyance and can exist only where there has been unity of ownership of both the dominant and servient tenements. It cannot be acquired over the land of a stranger. Hillery v. Jackson, 56 N. E. (2d) 921 (Ohio App. 1944); Bowles v. Chapman, 180 Tenn. 321, 175 S. W. (2d) 313 (1943).

the modification of the right of way rules as applied to mining law,[8] and passed to the plaintiff when the surface estate was subdivided. Second, it was reasoned that liability could be imposed on the basis of a rule stated in the Virginia case of *Clinchfield Coal Corporation v. Compton*,[9] in which the court said that if a spring of water had been cut off by the removal of the support underlying the plaintiff's surface, the coal company would have been liable. Since the spring would have been in existence prior to the severance of the mineral estate, the Virginia court might have based this supposed liability on the doctrine of "quasi-easements."[10] Though a person cannot have an easement over his own land, yet where before separation takes place the grantor has been using one portion of his land for the benefit of another, the parties should be regarded as assuming that this benefit should continue if the use was apparent as well as necessary for the beneficial enjoyment of the land sold or the land retained. This doctrine is based on the presumption that the parties had in mind the property as it was at the time the division was made, and that afterwards neither party should have the right to change to the detriment of the other a condition which existed while there was a unity of title, so long as it is to a considerable degree necessary to the usefulness of the land.[11] Since in the principal case the plaintiff's well did not exist at the time the coal estate was sold, the same reasoning would not necessarily apply.

In cases involving rights of access to the lower estate where the ownership of the mineral stratum has been severed, courts have not hesitated to find a right of access, but they have not all been clear as to the principles on which it is based.[12] The suggestion has been made that

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[8]The opinion gives no indication as to what these modifications are, but presumably the dissenting judge had reference to at least some of the changes suggested in the body of this comment at notes 17 to 20.

[9]148 Va. 437, 139 S. E. 308, 55 A. L. R. 1376 (1927).

[10]"The so-called quasi easement is... not a legal relation in any sense, but the expression is a convenient one to describe the particular mode in which the owner utilizes one part of the land for the benefit of the other, as bearing on the question... whether, when the two parts subsequently become the property of different persons, an actual easement is to be regarded as existing, which corresponds to the use which was previously made of the land by the owner of both parts." 3 Tiffany, Real Property (3d ed. 1939) § 781.

[11]See Shandy v. Bell, 207 Ind. 215, 189 N. E. 627, 630 (1934); Van Sandt v. Royster, 148 Kan. 495, 83 P. (2d) 698, 700 (1938).

[12]Telford v. Jenning Producing Co., 203 Fed. 456 (C. C. A. 7th, 1913); Pennsylvania Central Brewing Co. v. Lehigh Valley Coal Co., 250 Pa. 300, 95 Atl. 471 (1915); Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. 597 (1893). With the exception of the Central Brewing Co. case, which involves a water supply, the decisions cited deal with the right to extract gas and oil.

the right of access to the underlying strata is a natural right, and "must exist, not because of any grant implied or real, but for the same reasons that riparian rights and rights of support exist."[13] When it is considered that natural rights or natural easements are those given by law to every owner of land, independent of grant or prescription, as contrasted with true easement rights created by acts of the owners in the form of a grant either expressed or implied, it is difficult to see how a right of access to the lower strata could be classified as a natural one. This would be a right in the land of another, whereas natural rights are not rights as to the use of another's land, but merely the rights of the landowner to enjoy the use of his land in its natural condition without interference by adjoining landowners.[14] It has also been asserted that such a natural right would violate a covenant against incumbrances in a deed of the servient tenement, the mineral estate, which further militates against the "natural" designation.[15]

Conceding that the right of access to the lower estate may be entitled to recognition, it would seem that the cases could be more appropriately handled on the principles of true easements created by necessity. Such a surface easement "usually arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers."[16] The situation involved in the mining cases is the same so far as the needs of the surface owner are concerned. Yet in order to establish the right of access to the lower estate on the basis of an easement of necessity some modifications to the strict common law rules must be recognized. It must be admitted that more than one way of necessity may be required,[17] that the proper test is reasonable necessity, not strict

[13]Note (1893) 7 Harv. L. Rev. 47, 48. This is evidently the basis on which the concurring opinion in Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. 597, 600 (1893) would recognize the right. However, instead of the term "natural rights" the words "reciprocal servitudes" are used.

[14]"... the so called natural easements give one landowner neither rights nor privileges in the land of another; they are merely a statement of rights against the world at large that every landowner has as such not to have certain consequences produced upon or with respect to his land: the fundamental characteristics of a true easement is that it is a lessening of the normal rights of the owner in a given piece of land and a transferring of those rights to some third person, ordinarily the owner of another piece of land." Bigelow, Natural Easements (1915) 9 Ill. L. Rev. 541, 546.

[15]Simonton, Ways by Necessity (1925) 25 Col. L. Rev. 571, 595.

[16]17 Am. Jur. 960.

[17]Particularly is this so where gas and oil deposits are concerned, as it is frequently necessary to drill numerous wells in order to extract all the oil and gas.

necessity,[18] that the presumed intention of the parties to create such a right is fictional rather than real,[19] and that implied reservations must be treated the same as implied grants.[20]

In surface cases, where the social interest has been sufficiently strong the courts have been willing to sustain the easement, even though one or more of the suggested modifications had to be adopted.[21] The same social interest is present in the mining cases, with even perhaps a more forceful appeal. The right of the surface owner to access to his underlying estate for the purposes of obtaining water was sustained in an important mining jurisdiction in the Pennsylvania decision of *Pennsylvania Central Brewing Co. v. Lehigh Valley Coal Co.*[22] under a fact situation almost identical with that of the *Pyramid* case. But the nature of the court's reasoning and cited authority makes it impossible to ascertain on what theory the right to obtain water from the lower estate is based.[23]

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[18]If the coal seam completely separates the surface from the lower estate it is absolutely necessary to pass through the coal seam to reach the lower estate. What actually has to be considered, however, is the necessity for the owner of the surface in order beneficially to use his land to pass from the upper to the lower estate.

[19]In most instances the value of the estate below the mineral stratum conveyed is unknown to the parties when the title is severed, and under such circumstances it cannot be concluded that an easement arises because of any real intention of the parties to create such an easement.

[20]If the right is to be based on public policy rather than any real intent of the parties, there could hardly be any justification for construing the grant more strongly in favor of the grantee.

[21]In Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302 (Mass. 1834) it was said that when an impassible barrier separated the dominant tenement into two or more portions so that a way was necessary to reach each portion, more than one way by necessity may arise. In Krueger v. Beecham, 116 Ind. App. 89, 61 N. E. (2d) 65 (1945) it was held that reasonable necessity, rather than strict necessity was sufficient to establish a way over another's land. In Howley v. Chaffee, 88 Vt. 468, 93 Atl. 120, 122 (1915) the court citing Buss v. Dyer, 125 Mass. 287 (1878) said: "It thus appears that in the matter of these ways [surface ways by necessity] implied grants and implied reservations stand alike. The foundation of this rule regarding ways of necessity is said to be a fiction of law, by which a grant or reservation is implied, to meet a special emergency, on grounds of public policy, in order that no land be left inaccessible for the purposes of cultivation."

[22]250 Pa. 300, 95 Atl. 471 (1915). The court treated the law as settled on the basis of the decision reached in Chartiers Block Coal Co. v. Mellon, 152 Pa. St. 286, 25 Atl. 597 (1893). In the Mellon case it was held that the surface owner who had conveyed to another the underlying coal was entitled to access to the strata beneath the coal for purpose of extraction of oil and gas. However, the court said that the basis of the right was one to be worked out by the legislature rather than the judiciary, since to allow the right on the basis of a way by necessity would require a large modification of the common law rules relating to ways by necessity over the surface.

[23]This is probably due to the confusion of ideas manifested in the Mellon case as to the basis for allowing such a right. It has been said "the only admirable thing

In the *Pyramid* case the court decided the problem on the basis of an implied easement of necessity, and the result seems to have turned on the degree of necessity required to create such an easement. The court evidently was of the opinion that if the owner of the twenty-five acre tract had any means of access to the estate below the coal other than down through the actual coal seams, then no easement could have been created when the estate in the coal was severed. But the court seems to have failed to consider the fact that at the time of severance more than one well might have been necessary in order to provide the estate with a reasonable supply of water. This would tend to refute the idea that no easement of necessity could have arisen at the time of severance, so long as there was any space in the twenty-five acre plot where the owner could reach the lower depths of his estate without passing through the coal deposits.

Deciding whether or not a right of way existed in favor of plaintiff necessitated a balancing of conflicting interests—the advantage the surface owner derived from the existence of the well as compared to the detriment suffered by the coal company as a result of the well passing through the coal seam.[24] The result reached would seem to imply that the surface owner's right to use his surface estate is limited so far as a water supply is concerned to uses that will not require any greater disturbance of the coal stratum than would have arisen in the use being made at time of severance. This is contrary to the general policy of the law to protect the unrestricted legitimate use of reality. Of course, the surface owner could not adopt a use which would defeat the coal owner's beneficial enjoyment of his coal estate, but nothing of the sort was involved here, unless the court was afraid surface owners might commence to drill many wells on the tract.

There is nothing to indicate that the owner of the land at the time of the severance of the coal estate expressed an intention to give up the right of access of his lower estate, and in the absence of such an expressed intention, it would seem that the dissenting opinion is more

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about the [Mellon] decision was that it permitted the decree to stand." Simonton, Ways by Necessity (1925) 25 Col. L. Rev. 571, 592.

[24]Also the court might have considered the nature of the coal estate. When the coal has been removed all that was granted will have been carried away. The space occupied by the coal will revert to the surface owner. This means that, at most, the surface owner's right of access to the lower estate is suspended pending the removal of the coal. If there had been a definite time limit set for the removal, then there might have been strong argument for denying the right pending the removal. But here there was no certainty as to when the coal would be mined, if at all, and it would seem unjust to deny the right of access to the surface owner for as long a period of time as the coal company chose to let the coal remain in place.

in line with public policy calling for the maximum utilization of land, and is not so obviously harsh to the plaintiff.

JAMES C. TURK

SALES—RIGHT OF SUB-VENDEE TO RECOVER FROM MANUFACTURER FOR PROPERTY DAMAGE CAUSED BY DEFECTIVE GOODS. [Ohio]

Though the time-honored rule that the action of assumpsit requires privity of contract is still a fundamental principle of the common law,[1] it is said: "There is no general prevailing definition of privity which can be automatically applied to all cases. Who are privies requires careful examination into the circumstances of each case as it arises."[2] One important effect of the rule is to make difficult a recovery by the ultimate consumer against the manufacturer for damages suffered as a result of a breach of a warranty on defective goods.[3]

In the case of *Jordon v. Brouwer*,[4] the Ohio court was confronted with the application of the doctrine in determining whether an automobile owner who purchased defective anti-freeze from a retailer, can maintain an action for breach of warranty against the manufacturer of the defective goods which caused substantial property damage. The court refused to allow a recovery, citing the general rule[5] that a manufacturer is not liable to any person other than his immediate vendee for breach of warranty, because privity, an essential element for a breach of warranty cause of action, exists only as between the vendor

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[1]Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186, 189 (1925): "No good reason [exists] for repudiating or modifying, even in the case of food products, however prepared, the well-established rule that, in order to recover on a warranty, there must be a privity of contractual relations between the parties." Chanin v. Chevrolet Motor Co., 89 F. (2d) 889 (C. C. A. 7th, 1937); Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Nelson v. Armour Packing Co., 76 Ark. 352, 90 S. W. 288 (1905); Welshausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910); Asher Lumber Co. v. Cornett, 22 Ky. L. Rep. 569, 58 S. W. 438 (1900); Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[2]Old Dominion Copper Mining and Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 217 (1909). Bouvier's Law Dictionary (Rev. ed. 1934) 983, defines privity of contract merely as the relationship that exists between two contracting parties. See 50 C. J. 408: "Privity of contract denotes the relationship or connection between two or more contracting parties.... A vendee or an assignee is a privy in contract...."

[3]Pease and Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922); Redmond v. Borden's Farm Product Co., 245 N. Y. 512, 157 N. E. 838 (1927); Thomason v. Ballard and Ballard Co., 208 N. C. 1, 179 S. E. 30 (1935). These cases illustrate the difficulties confronting the sub-vendee.

[4]86 Ohio App. 505, 93 N. E. (2d) 49 (1949).

[5]4 Williston, Contracts (Rev. ed. 1936) § 998.

and his vendee. If the sub-vendee is to recover on the warranty, he must seek the restitution from his immediate vendor, the retailer. Since privity had been broken by the retailer, the consumer is compelled to base his action on a negligence theory if he is to impose on the manufacturer liability for damages for the property loss.[6]

Such rules may have been adequate for the handicraft economic system under which they were developed, but after the industrial revolution brought about mass production and opened up vast new markets on a national and world scale, the law failed to keep the manufacturer's obligation to the ultimate consumer abreast of the changing relations.[7] Although the manufacturer now has a greater potentiality of inflicting harm on unsuspecting consumers by representations made through national advertising, the law is still inclined to provide him with a cloak of immunity, unless privity exists.[8]

While attempts to abolish this requirement of privity have not met with favor, the courts have shown few scruples in developing ingenious

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[6]Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N. E. 95 (1912); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915). Although there are a large number of cases involving personal injury to a sub-vendee from an article placed on the market by the manufacturer, most decisions are based on an action sounding in tort, rather than contract. E.g., Tomlinson v. Armour and Co., 75 N. J. L. 748, 70 Atl. 314 (1908); Thomas v. Winchester, 2 Selden 397, 57 Am. Dec. 455 (N. Y. 1852); Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. Civ. App. 1912).

[7]In Chanin v. Chevrolet Motor Co., 89 F. (2d) 889, 891 (C. C. A. 7th, 1937), plaintiff having purchased from a retailer an automobile which was falsely warranted to be equipped with shatter-proof glass, brought suit against the manufacturer. The court ruled that the complaint did not state a good cause of action against the manufacturer since privity was lacking. Plaintiff insisted that he had stated a valid cause of action ex contractu though privity did not exist in its strict sense since the manufacturer and retailer carried on extensive advertising that certain qualities of workmanship, operation and performance exist, and thus "has brought about a relationship between himself and the consuming public out of which grows a direct contractual liability of the manufacturer to the purchaser from the dealer for breach of warranty." The court implied that there was some merit in such an argument, but concluded: "But such a statement of facts is not disclosed here. We cannot read such allegations into the complaint."

[8]Standard Oil Co. v. Murray, 119 Fed. 572 (C. C. A. 7th, 1902) (Engineer injured by an explosion from oil purchased by his employer cannot maintain an action against a seller for breach of warranty, such action being grounded on a breach of contract of sale to which plaintiff was not a party or privy.); Turner v. Edison Storage Battery Co., 248 N. Y. 73, 161 N. E. 423, 424 (1928) (Plaintiff sub-vendee sued the manufacturer of a battery for injuries sustained due to a defect in the product, but the court ruled: "In pleading the second cause of action, he alleges that defendant warranted the battery to be safe; that he relied on the warranty; and that injury was sustained by breach of warranty.... There can be no warranty where there is no privity of contract."); Jordon v. Brouwer, 86 Ohio App. 505, 93 N. E. (2d) 49 (1949).

ways by which to circumvent the doctrine.[9] Even the Ohio court was quick to point out that in cases involving personal injury the requirement of privity had been relaxed.[10]

Several devices have been created by judicial fiat to rationalize the extension of the manufacturer's warranty to his consumer in the personal injury cases. One court has adopted the fiction of making a warranty run with the chattel,[11] and although this theory has not been widely accepted in the same terms, other courts have reached the same results on the reasoning that "a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and . . . such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade."[12] This convenient logic was developed as a means of imposing absolute liability upon the manufacturer of packaged foods, and could be applied to the sale of anti-freeze in a sealed container. Though the defective anti-freeze caused a *property* damage, it does not seem logical that the type of damage incurred should determine the nature of the cause of action which must be brought.

In *Ward Baking Co. v. Trizzino,* the Ohio court found a way to avoid the harshness of the privity requirement by resorting to a second type of fiction, called the third party beneficiary theory.[13] It was reasoned that the contract warranty between the manufacturer and the dealer was made for the benefit of the third party ultimate consumer, and that he might go directly against the manufacturer on breach of warranty to enforce that contract right.

It has even been suggested that in order to allow the plaintiff to proceed directly against the manufacturer, the retailer's cause of action should be assignable to the sub-vendee. "It is a general rule that one who has a right in contract may assign that right in effect by giving the assignee the power to enforce it in the name and stead of the assignor. There seems no reason why a warranty should be an exception to this rule; and, therefore, a right of action of the first buyer should be assignable to a subpurchaser."[14]

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[9]Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928); Coca-Cola Bottling Co. of Fort Worth v. Smith, 97 S. W. (2d) 761 (Tex. Civ. App. 1936).

[10]Jordon v. Brouwer, 86 Ohio. App. 505, 93 N. E. (2d) 49, 52 (1949); "There are exceptions to the rule of privity, where injury results to the person of plaintiff."

[11]Coca-Cola Bottling Co. of Fort Worth v. Smith, 97 S. W. (2d) 761 (Tex. Civ. App. 1936). Contra: Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925); Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923).

[12]Mazetti v. Armour and Co., 75 Wash. 622, 135 Pac. 633, 636 (1913). Also Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479, 480 (1930).

[13]27 Ohio App. 475, 161 N. E. 557 (1928).

[14]4 Willitson, Contracts (Rev. ed. 1936) § 998.

In some instances courts have created a novel form of privity out of the circumstances in which modern merchandising is carried on. Thus, in *Madouros v. Kansas City Coca Cola Bottling Co.*, it was observed: "Under modern conditions, when products of food or drink have been prepared under the exclusive supervision of the manufacturer and the consumer must take them as they are supplied, the representations constitute an implied contract, or implied warranty, to the unknown and helpless consumer that the article is good and wholesome and fit for use. If privity of contract is required, then, under the situation and circumstances of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons."[15] And in *Baxter v. Ford Motor Co.*,[16] the Washington court implied that representations made in a manufacturer's catalogue were made to the ultimate consumers.

It appears that in the cases involving injuries to the person, the courts have accepted the view that privity is not a condition to bringing an action for breach of warranty. Even in the absence of privity, public policy demands that the warranty of the manufacturer be extended to the ultimate consumer. The same reasoning should be applied to cases covering damages to property. The hardships resulting to the plaintiff are just as real in the one case as in the other, and the legal theory sustaining recovery for one type of damage should apply as well to the other. However, only a few courts have taken that position. In *Timberland Lumber Co. v. Climax Mfg. Co.*,[17] a case involving property damage, a federal court held that it would be possible for a manufacturer to express his warranty in such a manner as to contract not only with his immediate vendee, but also with an ultimate consumer. This view of the transaction serves to eliminate the privity argument, since two contracts independent of each other are regarded as having come into existence, one involving privity between manufacturer and consumer.

On similar reasoning the offer and acceptance theory has developed. It is said that "If the manufacturer's representations were made in such a way that the natural tendency was to induce the sub-purchaser to rely upon them, one could spell out the promise or offer of the manufacturer to be bound. Then if the sub-purchaser accepted this offer and did the acts requested by the manufacturer it would seem proper to

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[15]230 Mo. App. 275, 90 S. W. (2d) 445, 450 (1936).
[16]168 Wash. 456, 12 P. (2d) 409 (1932).
[17]61 F. (2d) 391 (C. C. A. 3d, 1932).

hold the manufacturer liable directly to the sub-purchaser upon the unilateral contract that was thereby created."[18]

In the principal case, the dissenting judge points out that the manufacturer "must be taken to have made the representation and warranty to the ultimate consumer, who would be the only person likely to suffer by reason of the falsity of the representation and the breach of the warranty."[19] On this basis, it is possible to establish the necessary privity: "Placing such a warranty on the article sold brings the producer into jural relations with the ultimate consumer, because the producer so intends. It is a representation and a warranty made by the producer to the ultimate consumer and creates a privity between them."[20]

The consumer who, after purchasing the goods in reliance on an expressed warranty, has been seriously damaged in his property rather than his person, should not be faced with the difficult task of proving negligence. To be sure, he might proceed against his immediate vendor, but a right against an insolvent or irresponsible dealer will give little satisfaction. Such risk should not be cast on a passive victim of circumstances. The injured party should be permitted to base his action on a breach of warranty of the manufacturer, who is, admittedly, the original wrongdoer.

The decision remains with the courts whether to continue to deny recovery on breach of warranty if privity be lacking, to allow an occasional recovery by means of some judicially created fiction,[21] or to recognize that such a rule has no place in contemporary law. The rule has outlived its usefulness, if indeed, there ever existed a need for it.

However, if the courts feel, as presently appears, that the problem is not to be solved by judicial abolition of the privity doctrine, they may still place the responsibility for the damages caused by the defective goods where it should lie. Since handcrafts have given way to modern mass production and the public now buys primarily on the faith of national advertising of the manufacturers, the courts have only to accept the fact that the representations by advertisements are

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[18]Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendees (1938) 24 Va. L. Rev. 134, 150.

[19]Jordon v. Brouwer, 86 Ohio. App. 505, 93 N. E. (2d) 49, 53 (1949).

[20]Jordon v. Brouwer, 86 Ohio App. 505, 93 N. E. (2d) 49, 53 (1949). See Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409, 412 (1932); Mazetti v. Armour and Co., 75 Wash. 622, 135 Pac. 633, 636 (1913).

[21]Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendees (1938) 24 Va. L. Rev. 134, 150.

made to the ultimate purchaser by the producer, thus giving rise to a contract of warranty between them. By applying this reasoning to property damages as well as personal injury damages, the privity problem will be virtually eliminated.

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