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Constitutional Law-Inclusion of Corporation as "Person" Within Meaning of Equal Protection Clause [Wheeling Steel Corp. v. Glander, U. S. Sup. Ct 1949]

RECENT CASES

CONFLICT OF LAWS—RIGHTS OF INNOCENT PURCHASER OF AUTOMOBILE FROM OUT-OF-STATE CONDITIONAL SALES VENDEE. [Kentucky]

Courts are frequently presented with the problem of who should bear the loss as between a conditional sales vendor in one state and an innocent purchaser from the wrongdoing conditional sales vendee in another state where there is no notice, actual or constructive, of the conditional sales contract. And no other type of personal property makes the problem more acute than the automobile, a readily movable chattel usually of considerable value ordinarily sold under some type of credit finance arrangement, such as a conditional sales contract, which protects the interest of the vendor. The greatest difficulty arises when the innocent purchaser from the wrongdoing conditional sales vendee would be protected if the law of the forum state, wherein he bought the automobile from the vendee, was applied instead of the law of the state in which the vendee entered into the conditional sales contract.[1]

Presenting the problem in a typical fact situation and demonstrating the result reached by a majority of the courts[2] is *Denkins Motor Co. v. Humphreys*.[3] In Tennessee, Humphreys bought a used automobile from plaintiffs under a conditional sales contract which provided that title to the property should remain in plaintiffs until completion of the installment payments and that the purchaser should not remove the property from certain premises. Three months later in Kentucky, where he had had it registered and licensed, Humphreys sold the automobile to defendant. Humphreys defaulted in his payments to plaintiffs and they brought suit in Kentucky to obtain delivery of the automobile from defendant. The law of Tennessee does not require recordation of this type of contract to protect the vendor from a bona fide purchaser for value from the vendee. "In Kentucky such an agreement,

[1]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847 (1949); Securities Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1929); Goetschius v. Brightman, 245 N. Y. 186, 156 N. E. 660 (1927); Reising v. Universal Credit Co., 50 Ohio App. 289, 198 N. E. 52 (1935); Rodecker v. Jannah, 125 Wash. 137, 215 Pac. 364 (1923).

[2]11 Am. Jur., Conflict of Laws § 78; Note (1933) 87 A. L. R. 1309. The Restatement of Conflict of Laws (1934) has accepted the majority rule and states it in § 275 as follows: "If, after a valid sale, a chattel is taken into another state without the consent of the vendor, the interest of the vendor is not divested as a result of any dealings with the chattel in the second state."

[3]310 Ky. 344, 220 S. W. (2d) 847 (1949).

construed as a chattel mortgage, must be recorded to protect the seller's rights against innocent third parties."[4]

Notwithstanding the Kentucky construction of such an agreement, the court, applying the conflict of laws rule followed by the majority of courts, said, "It is . . . the well established rule in Kentucky, the forum in this case, that a conditional sales contract, wherein the seller retains title, if valid and enforced according to its terms in the state where executed, will be recognized and given effect in this state."[5] It was reasoned that "if a conditional vendee in another state acquires no title to the property in that jurisdiction, he cannot create title in himself by merely passing over the state line into Kentucky."[6] No exceptions were found by which the case could be removed from the application of the general principle.[7]

It seems that the court could, wholly without censure, have protected the admittedly innocent purchaser, but it chose rather to follow principles of comity (which is the basis of the rule in the case though nowhere in the report is comity mentioned), thus defeating the interests of the forum's own citizen.

That this result is unfortunate is obvious, and two justices dissented,[8] though they gave no reasons for their dissents. Purchasers of used automobiles in Kentucky will never be sure of exactly what they are getting. As the law is, they cannot rely on the domestic laws of Kentucky, and they have no way of knowing to which of the other forty-seven states they should look to determine their rights in the event some dishonest act has occurred somewhere along the chain of title to the automobile.

Courts following the majority rule feel bound by the logic of the maxim that one can convey no better title to a chattel than he had,

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[4]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847, 848 (1949).

[5]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847, 848 (1949).

[6]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847, 848 (1949), relying on Fry Bros. v. Theobold, 205 Ky. 146, 265 S. W. 498 (1924).

[7]The defendant attempted to bring himself within the exception that where the parties to the conditional sales contract contemplate removal of the chattel to another state, the laws of the latter state will apply. The court stated that the fact that Humphreys gave the town of Murray, Kentucky as his address when the conditional sales contract was executed, in view of the evidence that this was for Humphrey's convenience in receiving installment notices and also of the proximity of Puryear, Tennessee and Murray, Kentucky, was not enough to show that plaintiffs anticipated or intended that the situs of the vehicle would be Kentucky and thus make the laws of that state control the transfer. "The terms of the conditional sales contract to the effect that Humphreys should not remove it from Puryear, Tennessee, is a specifically expressed provision to the contrary." Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847, 849 (1949).

[8]Denkins Motor Co. v. Humphreys, 310 Ky. 344, 220 S. W. (2d) 847, 849 (1949).

and certainly this logic is generally irrefutable. But not always applicable is the general rule that "If, by the law of the state where the contract is entered into, the reservation of title in the vendor is valid, and such title is good as against the vendee and third persons claiming under the vendee, and such property is later removed to another state where conditional sales contracts reserving title in the vendor are not recognized, the rights of the vendor will, under the rules of comity, be held superior to those of the purchasers ... of, the vendee in the second state ...."[9] An exception is said to exist where the vendor ships the chattel into another state to the vendee or consents to its removal there by the vendee.[10] The legal effect of the shipment or consent is that the vendor impliedly intends or consents that the transaction shall be governed by the laws of the latter state.[11] However, not often is this exception present to protect innocent purchasers from wrongdoing vendees, and several means, varying in amount of protection, have been adopted to effect the desired result.

One of these means, giving absolute protection to the bona fide purchaser, is the view of the small minority of courts[12] which find public policy stronger than rules of comity. In the leading case of *Turnbull v. Cole,* the Colorado Supreme Court declared: "It is settled in this jurisdiction that contracts like that here under consideration, reserving a secret lien to the vendor, will not be recognized as leaving title in the vendor, as against interested parties without notice .... [T]he contract, though valid in Utah, could not be enforced in this state, because such action would be contrary to public policy, and would result in detriment to the interests of a citizen of this state. Both of these grounds furnish exceptions to the general rule of comity, as applied to the enforcement of contracts."[13] As an additional reason for its holding, the court could have used language similar to that employed in a Pennsylvania case involving a chattel mortgage where it was said: "Futhermore, applying the universally accepted principle that when one of two innocent persons must suffer through the fraud of a third person, the one who made it possible for the fraud to be perpetrated must bear the

[9]Note (1933) 87 A. L. R. 1309.

[10]Anglo-American Mill Co. v. Dingler, 8 F. (2d) 493 (N. D. Ga. 1925); Johnson v. Sauerman Bros., Inc., 243 Ky. 587, 49 S. W. (2d) 331 (1932); Finance Security Co., Inc. v. Mexic, 188 So. 657 (La. App. 1939).

[11]See note 10, supra.

[12]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). See First Nat. Bank of Jamestown v. Sheldon, 161 Pa. Super. 265, 54 A. (2d) 61 (1947), a case involving a chattel mortgage, where the rule of comity was rejected in favor of public policy.

[13]70 Colo. 364, 201 Pac. 887 (1921).

loss, it readily appears that the loss in this case should be borne by the mortgagee who, by permitting the mortgagor to remain in possession of the automobile, placed him in a position to perpetrate a fraud upon innocent purchasers without notice of the mortgage which he did in fact perpetrate on appellants."[14]

From the standpoint of legal principles and of the fact that in order to protect the innocent purchaser a controversial factor called "public policy" must be invoked, the minority view is not the better of the two. No attempt is made to refute the logic of the majority view, and the court, in saying what the public policy of the state is, invades what is ordinarily the province of the legislature.

Enactment of the Uniform Conditional Sales Act by a number of the state legislatures evidences a desire to protect the interests of both the conditional sales vendor and the innocent purchaser from the vendee, but in the cases where state lines are crossed during the course of the transactions, it is obvious that the emphasis is heavily on providing protection for the vendor. Before the rights of an innocent purchaser from the conditional sales vendee can begin to arise, the conditional sales vendor must have notice of the "filing district to which the goods have been removed."[15] "Notice" has been construed to mean actual notice,[16] oral or written; and notice of the vendee's removal of the chattel from the state is not imputed from the length of time it was absent from the state.[17] Upon receiving notice of the "filing district to which the goods have been removed," the vendor has a certain length of time[18] to record the conditional sale there. Only when the vendor fails to comply with this recording requirement can his interests be defeated by the rights of an innocent purchaser from the conditional sales vendee. Otherwise, the Act operates only in an indirect manner to prevent fraud on innocent purchasers by imposing criminal penalties[19] which are calculated to deter conditional sales

[14]First Nat. Bank of Jamestown v. Sheldon, 161 Pa. Super. 165, 54 A. (2d) 61, 63 (1947).

[15]Uniform Conditional Sales Act § 14.

[16]In re Bowman, 36 F. (2d) 721 (C. C. A. 2d, 1929).

[17]Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 293, 241 Pac. 305 (1925).

[18]The Uniform Act requires refiling within ten days. Lengths of time vary among the various jurisdictions to as long as twelve months in Mississippi.

[19]§15 provides: "When, prior to the performance of the condition, the buyer... shall sell, mortgage, or otherwise dispose of such goods under claim of full ownership, he shall be guilty of a crime and upon conviction thereof shall be imprisoned [in the county jail] for not more than [one year] or be fined not more than [$500] or both." Among the jurisdictions adopting the statute, the fines imposed vary from $5 to $1,000. The periods of imprisonment vary from fifteen days to ten years.

vendees from reselling the chattels in violation of the conditional sales contract.

Perhaps the best method of protecting innocent purchasers of automobiles is exemplified by the registration system provided for in the Virginia motor vehicles registration statute.

Every person owning a motor vehicle intended to be operated in Virginia must register the vehicle with the Division of Motor Vehicles and obtain from the Division a certificate of title.[20] The owner must, under oath, certify his application for a certificate of title,[21] and the application must "contain a statement of the applicant's title and of all liens or encumbrances upon the vehicle and the names and addresses of all persons having any interest therein and the nature of every such interest."[22] If the vehicle is a foreign one, this fact must be stated in the application, and if it has been registered in another state, the owner must exhibit to the Division the certificate of title and registration card or such other evidence as will satisfy the Division that the applicant is the lawful owner or possessor of the vehicle.[23] An applicant who knowingly makes a false statement or conceals a material fact or otherwise commits a fraud in his application for registration or for a certificate of title, is subject to punishment by fine and imprisonment.[24]

When the Division issues the certificate of title, stated thereon in the order of their priority are all liens or encumbrances as disclosed by the application.[25] Liens or encumbrances created subsequent to the issuance of the original certificate are shown on a new certificate issued upon the surrender of the old certificate to the Division by the owner, or, if there were liens or encumbrances on the original certifiate, by the lienor holding the certificate.[26] The certificate of title, showing a lien or encumbrance, is deemed adequate notice to the Commonwealth, creditors and purchasers, and the recording elsewhere of such reservation of title, lien or encumbrance is not required.[27] The certificate of title is delivered to the holder of the first lien on the vehicle and is retained until the lien is paid by the owner. Then the certificate of

[20]Va. Code Ann. (Michie, 1950) § 46-42.
[21]Va. Code Ann. (Michie, 1950) § 46-49.
[22]Va. Code Ann. (Michie, 1950) § 46-50.
[23]Va. Code Ann. (Michie, 1950) § 46-51.
[24]Va. Code Ann. (Michie, 1950) §§46-63, 46-66.
[25]Va. Code Ann. (Michie, 1950) § 46-69.
[26]Va. Code Ann. (Michie, 1950) § 46-70.
[27]Va. Code Ann. (Michie, 1950) § 46-71.

title is delivered to the next lien holder, and so on, until all liens are satisfied; then the certificate goes to the owner.[28]

Two important factors are evident from this review of the Virginia registration system. First, if an owner secures a certificate of title fraudulently, he subjects himself to severe criminal penalties.[29] And second, it appears that no purchaser could be a bona fide purchaser in Virginia unless he demanded and received from his vendor the certificate of title to the automobile.[30]

Under motor vehicle statutes similar to that of Virginia,[31] the one case in which an innocent purchaser who has taken a certificate of title from his vendor may lose arises when his vendor or some prior owner of the vehicle has secured the certificate of title by fraud. As yet the Virginia Supreme Court of Appeals has not decided a case with this exact problem,[32] but the highest court of another state with a similar title certificate statute has done so. The Supreme Court of Arizona denied relief to the innocent purchaser, holding that the automobile lien filing statute[33] was intended to apply only to liens arising in the state.[34] So deeply embedded in the minds of the court was the sanctity of the rules of comity that it stated: "It is inconceivable that the legislature contemplated that it had the authority or was attempting to set forth

[28]Va. Code Ann. (Michie, 1950) § 46-74.

[29]Va. Code Ann. (Michie, 1950) § 46-66.

[30]Va. Code Ann. (Michie, 1950) §§46-71, 46-74.

[31]Leary, Horse and Buggy Lien Law and Migratory Automobiles (1948) 96 U. of Pa. L. Rev. 455, 459: "The title certificate statutes fall into three categories, based upon their treatment of liens upon motor vehicles. One group enters on the certificate only those liens upon the car disclosed in the application for a certificate.... A second group of states issue certificates of title which have the same defect [of not showing liens subsequent to the issuance of the certificate] but these laws provide a partial solution by requiring all liens upon automobiles to be recorded centrally, usually in the office of a Commissioner of Motor Vehicles or some similar office. There is a third group of thirteen jurisdictions which have gone further and made the certificate of title a positive recording device, denying protection to liens not entered on a certificate of title." Virginia is in this third group.

[32]On the bass of the decision in C. I. T. Corp. v. Crosby & Co., 175 Va. 16, 7 S. E. (2d) 107 (1940) it is assumed that the court would hold in favor of the innocent purchaser. There the conditional sales vendee operated the vehicle in Virginia without obtaining temporary registration as required by statute. He thus became liable for permanent registration, and since he did not obtain the necessary certificate of title showing liens or encumbrances, a lien of attachment was held superior to the lien of the conditional sales vendor in Georgia.

[33]Ariz. Code Ann. (1939) § 66-231. "No chattel mortgage affecting title to any registered motor vehicle in Arizona is valid as against subsequent purchasers without notice until a copy of the instrument, executed in accordance with Arizona Law has been deposited with the Arizona Highway Department."

[34]Ragner v. General Motors Acceptance Corp., 66 Ariz. 157, 185 P. (2d) 525 (1947).

the manner in which other states might create the means for establishing liens."[35]

It is evident from this case that even with statutes providing protection to only those liens or encumbrances entered on the certificate of title, the problem is still not satisfactorily solved. It is submitted that not until all states require that all liens be stated on the certificate of title, and refuse to issue a certificate of title for an automobile from another state unless the certificate of title from the latter state is surrendered, will both the innocent purchaser and the lienholder be afforded with a means of protecting themselves against loss at the hands of the wrongdoing vendee.

GEORGE H. GRAY

CONSTITUTIONAL LAW—APPLICABILITY OF DUE PROCESS CLAUSE TO PROHIBIT ADMISSION OF ILLEGALLY OBTAINED EVIDENCE IN STATE COURT TRIAL. [United States Supreme Court]

The recently decided case of *Wolf v. Colorado*,[1] while effecting one specific extension in the scope of federal constitutional protection of civil liberties, is of further significance as an indication that the controversy evidenced in the dissenting opinion in *Adamson v. California*[2] two years earlier has produced another wide split of opinion between the members of the Supreme Court.

In the *Adamson* case, the Court, by a majority of five justices, held that the due process clause of the Fourteenth Amendment does not draw all of the civil rights guaranteed by the first eight amendments under its protection, and, specifically, that it does not protect the accused from being required to give testimony under compulsion in state trials. Two vigorous dissenting opinions were entered by the minority of four. Justice Black, with Justice Douglas concurring, argued that the due process clause of the Fourteenth Amendment makes all the first eight amendments applicable to the states. Justice Murphy, with Justice Rutledge concurring, agreed with Justice Black's position, but in a separate opinion made it clear that he would not limit the protection given by the due process clause merely to the rights enumerated in the first eight amendments.

[35]Ragner v. General Motors Acceptance Corp., 66 Ariz. 157, 185 P. (2d) 525, 528 (1947).

[1]338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1356 (1949).

[2]332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903 (1947).

With the membership of the Court unchanged, the *Wolf* case presented for the first time the question whether the prohibition against unreasonable search and seizure, as embodied in the Fourth Amendment, is enforceable against the states under the due process clause of the Fourteenth Amendment. In this case the petitioner had been convicted by a state court for conspiring to commit abortion. The evidence upon which the conviction rested had been obtained by state officers in the process of a search conducted without a warrant. Petitioner, contending that there had been a denial of the due process of law required by the Fourteenth Amendment, relied upon the rule of *Weeks v. United States*[3] which makes evidence so obtained inadmissible in a federal court.

The Supreme Court, in a six to three decision, held that the admission of such evidence by a state court does not constitute reversible error. Justice Frankfurter, speaking for the majority, adopted the traditional view as expressed by Justice Cardozo in *Palko v. Connecticut*[4] that only those immunities contained in the first eight amendments found to be "implicit in the concept of ordered liberty"[5] are included within the protection of the Fourteenth Amendment and, therefore, are enforceable against the states. Though the prohibition against unlawful searches and seizures contained in the Fourth Amendment was held to be "implicit in the concept of ordered liberty," the majority of the Court concluded that, since the state had made remedies other than the exclusion of the illegally obtained evidence available to the petitioner, the Fourteenth Amendment had not been violated by the admission of that evidence. The position of the Court as then constituted was clearly that, although the states are subject to the prohibition against unreasonable searches and seizures, the due process clause of the Fourteenth Amendment does not establish the exclusion of the illegally obtained evidence as the only means of enforcing the prohibition.

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[3]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914). Petitioner was convicted in a federal court by evidence obtained in a fashion similar to that used in the Wolf case. Petitioner filed application prior to the time of trial for the return of the evidence, but the application was refused and the evidence was admitted. Justice Day, speaking for the court, held that the exclusion of such evidence was the only effective way of enforcing the prohibition against searches and seizures contained in the Fourth Amendment and held that such admission was a violation of the due process clause of the Fourteenth Amendment.

Interestingly enough, there is no mention in either the state report or the Supreme Court report of the Wolf case of a timely demand for the return of the illegally obtained evidence. Perhaps the necessity of such demand has been abandoned.

[4]302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

[5]302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937).

Justice Black, in a separate concurring opinion,[6] maintained the position he had taken in the *Adamson* case, saying that the Fourteenth Amendment had made all the first eight amendments, not merely a select few, enforceable against the states. In the *Wolf* case he agreed, however, with "the plain implication of the Court's opinion" that the rule of the *Weeks* case is merely a judicial rule of evidence which Congress could overthrow, and therefore is not to be enforced upon the states.

Justices Rutledge, Murphy and Douglas, the minority of three,[7] concurred with the position taken by Justice Black that the Fourteenth Amendment had made all the first eight amendments enforceable against the states, but further adopted the view of Justice Day in the *Weeks* case, that the exclusion of illegally obtained evidence was the only way of enforcing the prohibition against such unreasonable searches and seizures. They would hold that the state's failure to exclude the evidence was a denial of the accused's constitutional rights.

The question whether the failure of a state court to exclude illegally obtained evidence violates the due process clause of the Fourteenth Amendment thus turns on a difference of opinion as to the effectiveness of the alternative remedies offered by the state as a means of enforcing the prohibition against unreasonable searches and seizures Justice Frankfurter, for the Court, concedes that if it could be shown that a state had affirmatively sanctioned the violation of this prohibi tion, the Court would not hesitate to hold that due process had been denied.[8]

A quesion which will be of much more importance in future civil rights controversies is the basis upon which the protection accorded by the Bill of Rights is drawn within the protective orbit of the Fourteenth Amendment so as to be made enforceable against the states. The answer given in the opinion of the Court was that the protection from unreasonable searches and seizures is "implicit in the concept of ordered liberty" and, therefore, is guaranteed by the due process clause of the Fourteenth Amendment against state infringement. The opposing view, on the other hand, was that all the civil rights guaranteed by

[6]338 U. S. 25, 39, 69 S. Ct. 1359, 1367, 93 L. ed. 1356, 1364 (1949).

[7]338 U. S. 25, 40, 69 S. Ct. 1359, 1368 93 L. ed. 1356, 1365 (1949). Of these three, Justice Murphy and Justice Rutledge are now deceased.

[8]Justice Murphy's dissenting opinion is well supported by statistical evidence taken from various surveys and reports concerning the lack of effectiveness of the various other state remedies in preventing illegal searches. The question arises: how much more evidence will be required to convince the majority that exclusion is the only effective means of enforcing the Fourth Amendment?

the first eight amendments are automatically applicable to the states by force of the Fourteenth Amendment.

Although renewed attention is focused on this issue by the recent *Adamson* and *Wolf* cases, the problem is one which has troubled the Court since the adoption of the Fourteenth Amendment. It is generally conceded today that the amendment was passed by a vindictive Congress with the express intent of making the individual immunities enumerated in the first eight amendments enforceable against the states.[9] The constitutional position of these earlier amendments, prior to the passage of the Fourteenth Amendment, had been quite clear. In 1833, Chief Justice Marshall had ruled in *Barron v. Baltimore*[10] that they were "intended solely as a limitation on the exercise of power by the government of the United States,"[11] and refused to apply them against the states. This view was reaffirmed several times in the years immediately preceding the adoption of the Fourteenth Amendment in 1868.[12]

Lawyers were quick to seize upon the chance offered by the Fourteenth Amendment to protect their clients against state action which would violate one of the first eight amendments if such action had been taken by the federal government. The theory on which they proceeded was that the rights guaranteed by the first eight amendments were "Privileges or Immunities" of citizens of the United States and were therefore protected against state action by the Privileges or Immunities Clause of the Fourteenth Amendment.

The Court, following the lead taken in the *Slaughter House Cases*,[13] consistently rejected the Privileges or Immunities contention,[14] saying

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[9]Brannon, The Fourteenth Amendment (1901) 14; Corwin, The Supreme Court and the Fourteenth Amendment (1909) 7 Mich. L. Rev. 643; Note (1948) 33 Iowa L. Rev. 666.

[10]7 Pet. 243, 8 L. ed. 672 (U. S. 1833).

[11]7 Pet. 243, 250-51, 8 L. ed. 672 (U. S. (1833).

[12]Fox v. Ohio, 5 How. 410, 12 L. ed. 213 (U. S. 1847); Smith v. Maryland, 18 How. 71, 15 L. ed. 269 (U. S. 1855); Withers v. Buckley, 20 How. 84, 15 L. ed. 816 (U. S. 1857).

[13]16 Wall. 36, 21 L. ed. 394 (U. S. 1873). The Slaughter House Cases was the first to decide the scope of the Privileges or Immunities clause. It was there contended that the state of Louisiana, in conferring upon a slaughter house company a twenty-five year monopoly, had deprived the rest of its citizens of privileges or immunities of citizens of the United States. The Court rejected this argument, holding that the privilege of doing business was conferred by the state, and that the Fourteenth Amendment did not apply to privileges or immunities which were derived from the state.

[14]For example, in Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (1900), the court specifically held that neither the Fourth, Fifth, nor Sixth Amendment guarantees were protected against state action by the Due Process Clause of the Fourteenth Amendment.

that these unprotected rights were conferred on the individual by the states. The position adopted by the Court is well summed up by Justice Pitney in *Prudential Insurance Co. v. Cheek*:[15] "... as this Court more than once has pointed out, the privileges or immunities of citizens protected by the Fourteenth Amendment against abridgement by state laws are not those fundamental privileges and immunities in *state* citizenship, but only those which owe their existence to the Federal Government, its national character, its constitution, or its laws."[16]

Contemporaneously with the Privileges and Immunities controversy, there was developing a new concept that there are certain fundamental human rights, the abridgement of which by any government would be a violation of due process. In large measure, this concept was developed by the minority of the Supreme Court in the face of continual rejection by the majority of the Privileges and Immunities argument.[17] The first majority recognition of the possible validity of the due process concept is found in the opinion in *Downes v. Bidwell*,[18] decided in 1901. Here it was admitted that there might be certain natural rights of the individual which should be protected against all government. A short time thereafter the Court said, in *Twining v. New Jersey*,[19] "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[20]

The dicta in these decisions furnished the key to the door which had so long been closed to those who sought to protect individual rights at the expense of the states' power to determine what rights were entitled to protection within their boundaries. In the space of the succeeding twenty years, many of the rights guaranteed by the first eight amendments were tested under this concept. A list of those held to be fundamental would include freedom of religion,[21] speech,[22] press,[23]

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[15]259 U. S. 530, 42 S. Ct. 516, 66 L. ed. 1044 (1922).

[16]259 U. S. 530, 539, 42 S. Ct. 516, 520, 66 L. ed. 1044, 1052 (1922).

[17]This concept may have had its origin in the dissenting opinions registered in the Slaughter House Cases. In this decision four Justices dissented on the grounds that the privileges and immunities sought to be protected were such fundamental rights that they should be protected from infringement against all government. 16 Wall. 36, 83, 111, 124, 21 L. ed. 394, 410, 420, 424 (U. S. 1873).

[18]182 U. S. 244, 280, 21 S. Ct. 770, 784, 45 L. ed. 1088, 1104 (1901).

[19]211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908).

[20]211 U. S. 78, 99, 29 S. Ct. 14, 19, 53 L. ed. 97, 106 (1908).

[21]Hamilton v. University of California, 293 U. S. 245, 55 S. Ct. 197, 79 L. ed. 343 (1934).

[22]De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 287 (1937).

[23]Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 44, 80 L. ed. 660 (1936).

assembly,[24] and freedom from illegal searches and seizures.[25] Among those held not to be so fundamental as to demand protection are the right to bear arms,[26] the right to indictment by grand jury,[27] the right to a jury trial in criminal cases,[28] and the privilege against self-incrimination.[29]

Justice Cardozo's "implicit in the concept of ordered liberty" test used in obtaining the results above, though admittedly of a somewhat nebulous nature, did have the advantage of striking a compromise. Those rights which the majority of the Court deemed natural, or inalienable rights of the individual, were protected against abridgement by all government. Those held not to be natural were left where they seemingly should belong, within the power of the local legislatures and courts. In spite of personal differences of opinion as to which rights should be so protected, the tests had given considerable promise of effectuating a working solution to the problem until the old uncertainties were resurrected by the dissenting opinions in the *Adamson* and *Wolf* cases.

This, then, as demonstrated by the split in these two cases, is a problem which obviously is not to be decided on the basis of stare decisis. Had it been so, it would have become mere legal history some sixty years ago. Apparently, the problem will eventually be decided largely on the basis of the social and political philosophy of the members of the Court.[30]

JAMES C. LEE, JR.

CONSTITUTIONAL LAW—INCLUSION OF CORPORATION AS "PERSON" WITHIN MEANING OF EQUAL PROTECTION CLAUSE. [United States Supreme Court]

The established view of the Supreme Court that a corporation is a "person" within the meaning of the Equal Protection Clause of the Constitution was strongly challenged by Justice Black in 1938, not

[24]De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937).
[25]Wolf v. Colorado, 388 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1356 (1949).
[26]Presser v. Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615 (1886).
[27]Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232 (1884).
[28]Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (1900).
[29]Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903 (1947).
[30]See Powell, Behind the Split in the Supreme Court, New York Times Magazine (Oct. 9, 1949), where Thomas Reed Powell characterizes the Court that decided the Wolf and Adamson cases as being composed of men, some of whom are governed by the head and others by the heart.

long after he became a member of the Supreme Court.[1] In the companion cases of *Wheeling Steel Corp. v. Glander* and *National Distillers Products Corp. v. Glander*,[2] the challenge has now been repeated, this time in a dissent by Justice Douglas in which Justice Black concurred.

Under an Ohio statute,[3] Delaware and Virginia corporations having their principal business offices in West Virgina and New York, respectively, were required to pay an *ad valorem* tax on their accounts receivable, which each derived from shipments originating at Ohio manufacturing plants.[4] Ohio corporations were not required to pay this tax. The Delaware corporation, Wheeling Steel, had also paid an *ad valorem* tax to the State of West Virginia on its accounts receivable, including those which furnish the subject of this action.[5] Both corporations paid all franchise or other taxes required by Ohio in order to do business in that State.

The Supreme Court of Ohio upheld the assessments, and the cases were appealed to the Supreme Court of the United States. That court, by a vote of 7 to 2, reversed on the ground that the "discriminations" of the Ohio statutory scheme denied these corporations the "equal protection of Ohio law."[6] However, Justice Jackson, speaking for the Court, discarded any argument against the tax on the ground that the corporations were denied due process of law as outlined in the first section of the same amendment, by terming such question inappropriate for decision. The Supreme Court felt that the division of corporations into two classes, resident and non-resident, for the purposes of this tax was an inequality, "not because of the slightest difference in

[1]Connecticut General Life Insurance Co. v. Johnson, 303 U. S. 77, 83, 58 S. Ct. 436, 439, 82 L. ed. 673, 678 (1938).

[2]337 U. S. 562, 69 S. Ct. 1291, 93 L. ed. 1234 (1949).

[3]Ohio Gen. Code Ann. (1945) §§ 5328-1, 5328-2, 5325-1, 5638, and 5327.

[4]The Ohio court, interpreting the statute as applying to these corporations, held that the accounts receivable sought to be taxed fulfilled the statutory requirement that they both be used in a business in the state and arise out of business transacted within the state. National Distillers Products Corporation v. Glander, 150 Ohio St. 229, 80 N. E. (2d) 863 (1948).

[5]In Wheeling Steel Corporation v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. 1143 (1936), an ad valorem property tax laid by the State of West Virginia upon the accounts receivable and bank deposits of the Wheeling Steel Corporation, a foreign corporation, which receivables and deposits were in several states, and from which tax was deducted the amount assessed in another state (Ohio), was held valid. The corporation maintained its chief place of business in West Virginia, kept its books and accounting records there, and controlled all moneys and expenditures from there.

[6]Wheeling Steel Corp. v. Glander, 337 U. S. 562, 574, 69 S. Ct. 1291, 1298, 93 L. ed. 1234, 1240 (1949).

Ohio's relation to the decisive transactions, but solely because of the different residence of the owner."[7]

The dissenting justices, in delevoping the argument that the corporations in this case were not entitled to equal protection, appeal to the text of the first section of the Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Only by a strained interpretation can it be maintained that the word "person," as used therein, was meant to mean anything other than a human being. Only human beings may be born or naturalized within the meaning of the first clause. The word "citizen" in the Privileges or Immunities Clause does not include any but natural persons, both by logic and decision.[8] In the Due Process Clause a corporation is not a person as to the first two fields of exclusion, life and liberty,[9] but suddenly it does become one as to the last field of exclusion, property.[10] Further, corporations have been included within the scope of " person" as used in the Equal Protection Clause.[11] As a result of this interpretation process, the original import of the section has been revised.[12] The word "person" as used in the first and second clauses

[7]Wheeling Steel Corp. v. Glander, 337 U. S. 562, 572, 69 S. Ct. 1291, 1297, 93 L. ed. 1234, 1240 (1949).

The State's contention that the reciprocity provisions of the Ohio statute reestablished equality was rejected. The essence of the reciprocity feature was that Ohio would tax the accounts receivable of nonresident corporations but would not tax its resident corporations having accounts receivable in other states. Such other states were to tax those accounts receivable but were not to tax the accounts receivable of resident corporations.

[8]Western Turf Ass'n v. Greenberg, 204 U .S. 359, 363, 27 S. Ct. 384, 386, 51 L. ed. 520, 522 (1907); Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126, 33 S. Ct. 69, 72, 57 L. ed. 146, 152 (1912).

[9]Western Turf Ass'n v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 385-386, 51 L. ed. 520, 522 (1907).

[10]It has been so held ever since Minneapolis & St. Louis Railway Co. v. Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. ed. 585 (1889).

[11]The length of the list of such cases makes citing them impractical. For a fair representation see Justice Douglas' footnote 3 in the principal case dissent at 337 U. S. 562, 580, 69 S. Ct. 1291, 1301, 93 L. ed. 1234, 1243-1244 (1949).

[12]This was pointed out by Justice Black in his dissent in Connecticut General Life Insurance Co. v. Johnson, 303 U. S. 77, 88, 58 S. Ct. 436, 442, 82 L. ed. 673, 681 (1938):

means "citizen" and hence, a human being; if the Amendment is to effectuate the purpose of its framers,[13] the word should keep that meaning throughout the section.

One of the first cases arising when the framing of the Amendment was still fresh in the minds of the people and the courts was *Insurance Co. v. New Orleans*,[14] decided by Circuit Judge Woods, who later was appointed to the Supreme Court of the United States, denying to any corporation the protection of the Equal Protection Clause of the Fourteenth Amendment.[15]

In the *Slaughter House Cases*,[16] Justice Miller, speaking for a bare majority of the Court, emphatically declared that corporate inclusion was definitely not intended by the framers of the Amendment; they desired the protection of the Negro in the southern States. The most forceful of the three dissenting opinions is that of Justice Field. Clearly, his thinking on the idea of corporations under the Amendment had not reached the complete form it was to assume later. However, he was

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"In other words, this clause is construed to mean as follows:

'Nor shall any State deprive any *human being* of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law.'

"The last clause of this second sentence of section 1 reads: 'Nor deny to any person within its jurisdiction the equal protection of the laws.' As used here, 'person' has been construed to include corporations."

[13]This purpose is most effectively set out in the Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394 (1873) by Justice Miller.

[14]1 Woods 85, 13 Fed. Cas. 67, No. 7051 (C. C. D. La. 1870). Unfortunately, the complete record of this case has been lost and the only record available is that submitted by Judge Woods himself for printing. How forceful were the arguments of counsel on the theory that corporations should be included within the Fourteenth Amendment is not known. However, as has been pointed out by Graham, The "Conspiracy Theory" of the Fourteenth Amendment: Part II (1938) 48 Yale L. J. 171, 172-188, the insurance companies and other corporations at this time were carrying on an almost concerted campaign to gain relief from what they considered arbitrary state legislation. They were primarily interested in an expansion of the concept of "due process" so as to protect their interests. Certainly, an expansion of the Equal Protection Clause of the Fourteenth Amendment to include corporations would have served their interests.

[15]"If we adopt the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal." 1 Woods 85, 86, 13 Fed. Cas. 67, 68, No. 7051 (C. C. D. La. 1870).

[16]16 Wall. 36, 21 L. ed. 394 (1873).

quite clear on the point, as were the other dissenters, that the Amendment did apply to the general economic life in the States;[17] Justice Bradley was vehement on this point.[18]

In his dissenting opinion in *Munn v. Illinois*,[19] Justice Field forcefully argued that the State of Illinois was depriving the grain elevator operator of his property by regulating the amount he could charge, in violation of the Due Process Clause of the Fourteenth Amendment. At the time of the decision in the *Munn* case, there were five companion cases decided,[20] all of which concerned State statutes regulating railroad rates, and in all of them Justice Field dissented on the same basis. From these cases it is a short step in Justice Field's thinking to his circuit court decision in the *Railroad Tax Cases*.[21]

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[17]Justice Field, after reciting the hardships attendant upon a validation of the monopoly, said: "The question presented is... nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it." 16 Wall. 36, 89, 21 L. ed. 394, 413 (1873). The right to slaughter cattle was such a common right to Justice Field.

[18]"*Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property.* These are the fundamental rights which can only be taken away by *due process of law*, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the *citizens* of every free government." 16 Wall. 36, 116, 21 L. ed. 394, 421 (1873). Admittedly, none of the three dissenting opinions contend explicitly that a corporation comes under the Amendment as a person, but all of them do want the Amendment expanded to place restriction upon the States from interfering in the economic life of the nation. With the corporate form of business organization rapidly becoming dominant in that life, it certainly is a short step to include such organizations within the protections granted by the Amendment.

[19]94 U. S. 113, 136, at 141-142, 24 L. ed. 77, 88, at 89-90 (1877).

[20]Southern Minn. R. R. Co. v. Coleman, 94 U. S. 181, 24 L. ed. 102 (1877); Winona and St. Peter R. R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99 (1877); Chicago Milwaukee, & St. Paul R. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99 (1877); Peik v. Chicago & Northwestern Rwy. Co., 94 U. S. 164, 24 L. ed. 97 (1877); Chicago, Burlington, & Quincy R. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94 (1877).

[21]13 Fed. 722, 744 (C. C. D. Cal. 1882). Herein Justice Field specifically and fully develops the idea that corporations are persons under, and entitled to, the protection of the Fourteenth Amendment. Circuit Judge Sawyer brought up the question of the applicability of the Fourteenth Amendment to corporations due to its effect on their "natural person" owners. 13 Fed. 722, 760. Judge Sawyer goes on to challenge the decision of Judge Woods in Insurance Co. v. New Orleans, 1 Woods 85, 13 Fed. Cas. 67, No. 7,051 (C. C. D. La. 1870). The contention put forth by Judge Sawyer is easily answered by the clear intent of the framers to restrict the Amendment's application to Negroes. Cf. Justice Miller in the Slaughter House Cases, 16 Wall. 36, 71-72, 21 L. ed. 394, 407 (1873).

When this case came before the Supreme Court[22], it involved an argument, now famous in history, by Roscoe Conkling of New York on behalf of the railroad. Conkling had been on the Joint Congressional Committee, sometimes called the Committee of Fifteen on Reconstruction, which had framed the Fourteenth Amendment.[23] Conkling hinted to the Court that it had been the Committee's intention to include corporations within the scope of the first section of the Amendment, buttressing his contention with carefully chosen passages from the hitherto unpublished journal.[24]

Whatever might have been the effect of Conkling's presentation in the *San Mateo* case, by the time the *Santa Clara* case[25] was decided in 1886, the Supreme Court had made up its mind. Chief Justice Waite was able to announce that all members of the Court agreed that corporations were included within the Amendment, so there was no necessity for even hearing argument.[26] Justices Field and Bradley were still on the bench, but so was Justice Miller, and during the intervening years Justice Woods had been appointed to the high court along with five other new men. No explanation has ever been given for the strange silence of these two men, Justices Miller and Woods, on a matter in which they had previously taken such a definite and opposite stand.[27]

The announcement *prior to argument* in the *Santa Clara* case that

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[22]The citation usually given for the case is San Mateo County v. Southern Pacific, 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589 (1885). However, this is misleading. That citation merely refers to the brief opinion given upon the motion to dismiss due to no controversy. The case was not decided on its merits. Conkling's argument on the merits took place sometime between Dec. 19 and Dec. 21, 1882. This argument does not appear in the United States Reports, but may be found in Vol XVII, Unreported Cases, United States Supreme Court.

[23]Another counsel for the Southern Pacific in the case Senator George F. Edmunds of Vermont, had been a member of the Committee. Sen. Edmunds also appeared as counsel for the Southern Pacific in the Santa Clara case.

[24]According to Graham, The "Conspiracy Theory" of the Fourteenth Amendment, Part I (1938) 47 Yale L. J. 371, 382-3, Conkling in his presentation of argument based on the undisclosed Journal intentionally misquoted it in order to drive across his point. The effect of Conkling's argument is in some dispute. Beard and Beard, Rise of American Civilization (1927) 111-114, take an extreme position in emphasizing its effect on the Court. Graham takes a middle position, while Boudin, Truth and Fiction About the Fourteenth Amendment (1938) 16 N. Y. L. Q. Rev. 19, seems to attempt to minimize the importance of Conkling's presentation. Note especially pp. 58-59, n. 28 for a fair synopsis of Boudin's views.

[25]Santa Clara County v. Southern Pacific R. R., 118 U. S. 394, 30 L. ed. 118 (1886).

[26]118 U. S. 394, 396, 30 L. ed. 118 (1886).

[27]One explanation for the silence of Justice Woods may be that this was his last active term on the Court as he died the next year after a prolonged illness. However, this still leaves totally unexplained the silence of Justice Miller, an unusually forceful and courageous judge.

corporations were included within the Amendment certainly seems a surprising way in which to dispose of such an important constitutional issue. This announcement has had a prolonged and wide effect, and has never been subjected by the full Court to a critical reexamination on the issue involved. In view of the present Court's willingness to reexamine the basis of its constitutional decisions,[28] the adherence of Justice Douglas to the original position of Justice Black gives added significance to the present decision.

If it is assumed that the Santa Clara case is wrong, it does not seem that it would be inappropriate to overrule it. Decisions of much greater antiquity have been overruled.[29] It has been pointed out by at least one member of the present Court that the doctrine of *stare decisis* has a limited application to the field of constitutional law.[30] Certainly this should be true where an amendment to the Federal Constitution has been previously interpreted by the Court in a manner so contrary to the intent of its framers.

However, this still leaves the problem of what the dissenting justices shall do prior to an overruling of the *Santa Clara* case. Justice Jackson, in a trenchant separate opinion in the principal case "to complete the record," considers their present course inappropriate. Both dissenters, presently, are following a seemingly inconsistent position. If a majority of the Court will sustain state regulatory action of corporations, they are quite willing to concur,[31] or even write the majority opinion,[32] based on the applicability of the Fourteenth Amend-

[28]Cf. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. ed. 1628 (1943), where the lone dissent of Justice Stone in Minersville School District v. Gobitis, 310 U. S. 586, 601, 60 S. Ct. 1010, 1016, 84 L. ed. 1375, 1382 (1940), becomes the majority rule.

[29]Erie Railroad Co. v. Tompkins, 304 U .S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938) overruling Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1843), a decision 95 years old; Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466 (1939), overruling Collector v. Day, 11 Wall. 113, 20 L. ed. 122 (1871), a decision 68 years old; United States v. Southeastern Underwriter's Ass'n, 322 U. S. 533, 64 S. Ct. 1162, 88 L. ed 1440 (1944) overruling in part Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (1869), a decision 75 years old. On at least a dozen other occasions the Supreme Court has overruled its earlier decisions.

[30]The reference is to Justice Douglas. See New York v. United States, 326 U. S. 572, 590, 66 S. Ct. 310, 318, 90 L. ed. 326, 338 (1946).

[31]Justice Black gave a concurring opinion in such a case in International Shoe Co. v. State of Washington, 326 U. S. 310, 322, 66 S. Ct. 154, 161, 90 L. ed. 95, 105, 161 A. L. R. 1057, 1065 (1945).

[32]Railway Express Agency, Inc. v. New York, 336 U. S. 106, 69 S. Ct. 463 (1949); Ott v. Mississippi Valley Barge Co., 336 U. S. 169, 69 S. Ct. 432 (1949); Queenside Hills Realty Co. v. Saxl, 328 U. S. 80, 66 S. Ct. 850, 90 L. ed. 1096 (1946); Lincoln

ment to the situation. However, if the majority wish to strike down the State's action under the aegis of the Fourteenth Amendment as applied to corporations, these two justices retreat to an original position that the Amendment's protection does not extend to corporations.[33]

Clearly, the main significance to the present decision is the adherence of one more member of the Court, Justice Douglas, to the original position of Justice Black as typified in his dissent in the *Connecticut General Life Insurance* case.[34] This change of position by one justice bears watching in view of the recent change in the composition of the Court. The addition of one more adherent to the position of Justice Black becomes especially important if either of the new justices, or any of the old, for that matter, silently participate in the application of the Fourteenth Amendment to corporations in those decisions wherein the Court upholds the State law, but thereafter vocally disclaim the Amendment's applicability where a majority vote to strike down the State law.

ALVIN N. WARTMAN

EMINENT DOMAIN—RIGHT OF ABUTTING OWNER TO DAMAGES FOR MINERALS REMOVED FROM ROADBED OF HIGHWAY IN WHICH HE OWNS THE FEE. [Ohio 1948]

In the field of the law concerning the rights of abutting land owners in the materials below the surface of land over which the public has a highway easement, the principles developed during the nineteenth century have stood steadfast with only minor encroachments. Although there are instances where the public owns a highway in fee,[1]

National Life Insurance Co. v. Read, 325 U. S. 673, 65 S. Ct. 1220, 89 L. ed. 1861 (1945); Illinois Central R. R. v. Minnesota, 309 U. S. 157, 60 S. Ct. 419, 84 L. ed. 670 (1939). In each case Justice Douglas wrote the opinion of the Court, admitting for its purposes that a corporation could claim the protection of the Fourteenth Amendment. In none of the cases cited in this and the previous footnote have either of these two Justices used the Fourteenth Amendment to strike the State's action down.

[33]Connecticut General Life Insurance Co. v. Johnson, 303 U. S. 77, 83, 58 S. Ct. 436, 439, 82 L. ed. 673, 678 (1938), and the instant case.

[34]Connecticut General Life Insurance Co. v. Johnson, 303 U. S. 77, 83, 58 S. Ct. 436, 439, 82 L. ed. 673, 678 (1938).

[1]Under some state statutes, not only the right of user but the ownership of the fee is in the public or in the state or municipality in trust for the public, and the rights of the public are those incident to ownership. 3 Tiffany, Real Property (3d ed. 1939) § 923. That a state legislature may validly provide for the taking of the fee

usually the abutting owner is the owner of the fee subject to the highway easement in the public.[2] In such cases, the abutting owner owns the soil, rock, gravel, and other materials within the limits of the highway, including those materials below the surface,[3] and may exercise all the rights of ownership over such materials if there is no injury to the highway or interference with the public easement.[4] He may remove gravel,[5] quarry stone,[6] and mine minerals[7] under the right of way, so long as he does not interfere with the public use of the highway.

It is recognized that the materials within the limits of the highway easement may be used by the public, as a matter of right, if they are needed for improving or repairing the highway.[8] The cases are not in harmony as to the scope of the right; some hold that the materials may be used for repair or improvement of any highway,[9] others restrict the use to streets forming part of the same general development plan as

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and divesting the owner of all proprietary interest therein and vesting the fee in the municipal corporation, see Sauer v. City of New York, 206 U. S. 536, 27 S. Ct. 686, 51 L. ed. 1176 (1907); Carroll v. Village of Elmwood, 88 Neb. 352, 129 N. W. 537 (1911); as to statute vesting the fee in the county, see Gould v. City of Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496 (1884); as to statute vesting the fee in the state, see Daly v. Georgia Southern and Florida R. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286 (1888).

[2]Smith v. City Council of Rome, 19 Ga. 89, 63 Am. Dec. 298 (1855); Campbell v. Covington County 161 Miss. 374, 137 So. 111 (1931); Jackson ex dem. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263 (N. Y. 1818); Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58 (1871); Western Union Telegraph Co. v. Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908 (1890); Kiser v. Douglas County, 70 Wash. 242, 126 Pac. 622 (1912).

[3]Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956 (1904); Viliski v. City of Minneapolis, 40 Minn. 304, 41 N. W. 1050 (1889); Jackson ex dem. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263 (N. Y. 1818); Holladay v. Marsh, 3 Wend. 142, 20 Am. Dec. 678 (N. Y. 1829); 25 Am. Jur. 437.

[4]Town of West Covington v. Freking, 71 Ky. 121 (1871); Campbell v. Covington County, 161 Miss. 374, 137 So. 111 (1937); Walsh, The Law of Property (2d ed. 1934) 705.

[5]Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956 (1904).

[6]Dean v. Carroll, 143 N. Y. Supp. 12 (1913). The court held that the abutting owner had the right to quarry stone under a country highway, he constructing and maintaining a good temporary road during the time of removal and thereafter restoring the highway.

[7]Breisch v. Locust Mountain Coal Co., 267 Pa. 546, 110 Atl. 242, 9 A. L. R. 1330 (1920).

[8]Hamby v. City of Dawson Springs, 126 Ky. 451, 104 S. W. 259 (1907); Anderson v. Van Tassel, 53 N. Y. 631 (1873); Baxter v. Winooski-Turnpike Co., Vt. 114, 52 Am. Dec. 84 (1849); Felch v. Gilman, 22 Vt. 38 (1849).

[9]The City of New Haven v. Sargent, 38 Conn. 50, 9 Am. Rep. 360 (1871); Dennison v. Clark, 125 Mass. 216 (1878); Bissel v. Collins, 28 Mich. 277, 15 Am. Rep. 217 (1873).

the street from which the materials are taken,[10] while others limit the use to that part of the highway actually under construction.[11] If the materials are taken for purposes other than for the improvement or repair of the highway, liability to the abutting owner results.[12]

In the case of *Campbell v. Monaco Coal Mining Co.*,[13] an Ohio court was recently confronted with a unique factual situation involving the rights of an abutting owner in coal removed from the roadbed of a public highway under construction. Plaintiff is the fee owner of real estate over which the Director of Highways of the State of Ohio appropriated an easement for highway purposes. The Director filed a proceeding to determine compensation and damages, but prior to trial of the issue, the parties, by negotiation, reached an agreement on the sum of $20,000 as full payment to plaintiff, who released all claim for further compensation or damages resulting from the construction of the highway over his property. Approximately fifty feet below the surface of a ridge over which the easement ran, lay a seam of coal six feet in depth, which is a regular formation found at substantially the same elevation in all parts of the county. Its existence and location was a matter of common knowledge, as was the fact that the coal was within the depth of the excavation to be made for the highway. Plaintiff testified that he had knowledge of the coal and that from a mining standpoint, it was not considered of value. In the plat filed by the Highway Department, the seam of coal was shown in cross section and marked as "waste," meaning, in engineering parlance, that the material was unfit for road-building and must be disposed of otherwise. The Highway Department made a contract with the defendant, A. J. Baltes, Inc., a contracting company, to do the excavation work for the proposed highway. When the contractor had excavated to the top of the seam of coal, he asked the Highway Department for advice as to the disposition of the coal, and was told that the highway Department had no interest in the material designated as "waste," and that it was the duty of the contractor to remove the coal along with the contiguous strata and waste it. Thereupon, the contractor salvaged the coal and sold it to the defendant, Monaco Coal Mining Company, for the total sum of $11,099.52. Plaintiff contended that the defendants unlawfully

[10]City of Aurora v. Fox, 78 Ind. 1 (1881); Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861 (1887); Higgins v. Reynolds, 31 N. Y. 151 (1865); Walsh, The Law of Property (2d ed. 1934) 706.

[11]Smith v. City Council of Rome, 19 Ga. 89, 63 Am. Dec. 298 (1855).

[12]City of Dubuque v. Maloney, 9 Iowa 451, 74 Am. Dec. 358 (1859); Makepeace v. Worden, 1 N. H. 16 (1816).

[13]85 N. E. (2d) 138 (Ohio App. 1948), appeal denied, 151 Ohio St. 380, 85 N. E. (2d) 800 (1949).

converted 30,000 tons of coal which was his property, and prayed for damages in the sum of $135,000.

The court, stressing plaintiff's knowledge of the existence of the coal seam and his failure to make a specific claim for compensation for it during the condemnation proceedings, held for the defendants. It was declared, somewhat ambiguously, that "To permit recovery in such case would, in effect at least, modify if not abrogate the generally accepted theory of the law of contracts."[14] Although the decision does not purport to be a departure from the usual views, it is apparently inconsistent with the established rules of law in this field. An analysis of the court's reasoning may disclose the factors which justify the decision.

Throughout the opinion, language is used which indicates that the court favors the position of the defendants,[15] but is unable to satisfy itself that the authority available is sufficient to support its decision. Just prior to the end of the opinion, the statement is made:

> "The court, after diligent search, has found no case in this or other jurisdictions wherein it was held that the landowner could recover for known minerals or other materials that it was necessary to remove in makng an improvement where the factual situation is at all comparable to the facts in this case."[16]

It was a matter of common knowledge that the coal was there and all parties concerned knew of its existence. No reference was made to the coal in the condemnation proceedings, though it was marked as "waste." The plaintiff, in the agreement with the Director, "released all claim for further compensation or damages resulting from the construction of the said highway improvement."[17] Thus, it might be assumed that the value of the coal was figured in the condemnation price, but this does not necessarily follow. The law declares that the plaintiff is the owner of the fee[18] and remains the owner even after the

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[14]85 N. E. (2d) 138, 147 (Ohio App. 1948). One of the three judges dissented without opinion.

[15]85 N. E. (2d) 138, 145 (Ohio App. 1948) The court quotes from Upham v. Marsh, 128 Mass. 546 (1880): "And, upon the whole case, we cannot see that more was done in this case than was reasonably necessary and incidental to the convenient and proper execution of the work of repairing the road where it crossed the plaintiffs' land." At 85 S. E. (2d) 138, 146 (Ohio App. 1948) the statement is made: "If no attempt had been made to salvage the coal, and it had been excavated with the other waste materials, it would have been of no value and no claim would have been made; and, therefore, he cannot now be heard to complain of the action of the contractor."

[16]85 S. E. (2d) 138, 147 (Ohio App. 1948).

[17]85 S. E. (2d) 138, 139 (Ohio App. 1948).

[18]Hamby v. City of Dawson Springs, 126 Ky. 451, 104 S. W. 259 (1907); Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861 (1887); Breisch v. Locust Mountain Coal Co., 267 Pa. 546, 110 Atl. 242, 9 A. L. R. 1330 (1920).

severed coal becomes personal property unless needed for repair or improvement,[19] and so it is not conclusive that he was selling the coal. It is true that plaintiff failed to make any agreement expressly covering the coal, but it can be fairly said that this was no more the fault of the plaintiff than of the Director of Highways.

The coal was fifty feet below the surface of the ground and was of relatively little value in its natural location, because the cost of getting it out of the ground was large compared with its value. But the defendant contractor had to incur most of that expense anyway in order to do the necessary grading for the proposed highway. This should not be considered an undeserved benefit to the plaintiff; a deduction of the extra expense incurred in salvaging the coal from the price paid for the coal would take away plaintiff's only undeserved gain. It may be argued that the plaintiff could never have realized on the value of the coal had not the highway come through as it did. The fact is that the highway did come through, and one of the incidental effects was that the coal was brought to the surface. There appears no convincing reason to deprive the abutting owner of the gain from his accidental good fortune.[20] The court puts considerable emphasis on the fact that the contractor could have removed the coal intermixed with other strata and deposited the mixture on a waste dump since it was unfit for any use, and he would not have been liable to the plaintiff.[21] Then the court carries its reasoning one step further to say that if there could have been no liability for dumping the coal in a mixture, there should be no liability against the defendants for salvaging and selling the coal. Although this is appealing logic, the fact remains that the salvaging of the coal did not transfer the title to the coal from the plaintiff to the Director of Highways or to the contractor. Perhaps the initiative taken by the defendant contractor in salvaging valuable substance which would otherwise have been lost to society may have influenced the court, but if the defendant has converted the property of the plaintiff, however innocently, then the plaintiff should be compensated.

[19]Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861 (1887).

[20]In some instances, the value of the abutting land is enhanced by the highway construction and the amount of compensation is ordinarily reduced to take into account this increase in value. Perhaps the compensation set in this case for the easement taken was diminished to make allowance for the owner's getting the benefit of having his coal uncovered. There is no showing that this is true, but neither is there any showing to the contrary.

[21]85 N. E. (2d) 138, 146 (Ohio App. 1948).

During the discussion of the background law of the case, the court touches on a point that may well be the underlying reason for the decision. The court states:

> "Attention is called to the fact that most of the cases applicable to the subject under consideration here are in the venerable class and were decided when the work of excavation was performed with pick and shovel and consequently no more excavation was made than absolutely necessary. In contrast, such work is now performed with giant power shovels capable of removing several cubic yards of excavated material in one operation. If the law is that a contractor must separate all valuable substances found in the excavation from the mass for the benefit of the owner, many practical difficulties would be encountered and additional expense incurred. In most cases this would be impractical."[22]

This language indicates that the difficulty may lie in trying to apply general rules formulated under conditions of a bygone day to greatly changed modern conditions. The construction of a modern highway often involves the moving of enormous quantities of material and excavations exceeding one hundred feet, as compared with removal of trees and moving relatively small quantities of gravel and soil in building roads back in the days when the principles of law in this field were developed.[23]

Because of the complexity of modern excavation methods, large crews of workers involved, and the use of heavy equipment representing huge investments, the contractor must necessarily be free to use his own discretion as to the manner in which he fulfills his contract. It would seem a sound conclusion that unless the abutting owner contracts with the authorities as to known materials within the limits of a highway easement at the time the agreement as to compensation and damages is made, there will be a strong presumption that by failing to do so, he relinquished his rights in the material to the public.

If the above theory is the basis for the decision in the *Campbell* case, perhaps new rules of law are needed to give a more stable foundation for determining rights of the abutting owner, the public, and the contractor, than the temporary impressions of individual courts on the various facts of each case.

RUFUS B. HAILEY

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[22]85 N. E. (2d) 138, 145 (Ohio App. 1948).

[23]Smith v. City Council of Rome, 19 Ga. 89, 63 Am. Dec. 298 (1855); Viliski v. City of Minneapolis, 40 Minn. 304, 41 N. W. 1050 (1829); Makepeace v. Worden, 1 N. H. 16 (1816).

EVIDENCE—EXTENT OF STATUTORY PRIVILEGE IN REGARD TO CONFIDENTIAL COMMUNICATIONS OF HUSBAND AND WIFE. [Virginia]

Under the common law rule establishing the incompetency of husband and wife to testify for or against the other in civil and criminal cases,[1] a distinction existed between the absolute disqualification of one spouse to testify for the other, and the privilege of one spouse not to be testified against by the other.[2] Behind the incompetency as to favorable testimony lay the premise that husband and wife are so closely identified in their interests as to be one person in legal contemplation.[3] As the law followed the changing social structure through enactments of statutes granting legal and political equality and independence of man and wife, it became apparent that the prohibition against favorable testimony was without justification in the general rules regarding competency of witnesses.[4] Behind the incompetency as to adverse testimony lay the premise that marital harmony would be disrupted if one spouse were allowed to testify against the other.[5] Although this rule of the common law has been repudiated in most jurisdictions by statute, the theory is so thoroughly entrenched that many state legislatures have retained a segment of the rule in the form of a statutory privilege as to confidential communications between husband and wife.[6]

Typical is the Virginia statute, which provides:

> "Neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted."[7]

The Virginia court has interpreted the word of the statute "privately" to be synonymous with the word "confidential,"[8] which is used in many privilege statutes.[9]

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[1]Commonwealth v. Allen, 191 Ky. 624, 231 S. W. 41, 42, 16 A. L. R. 484, 486 (1921); Model Code of Evidence (1942) Rule 215; 58 Am. Jur., Witnesses § 175.

[2]2 Wigmore, Evidence (3d ed. 1940) § 601, and 8 Wigmore § 2228.

[3]Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913); Jones, Evidence (3d ed. 1924) § 733.

[4]2 Wigmore, Evidence (3d ed. 1940) § 602; Hines, Privileged Testimony in California (1931) 19 Calif. L. Rev. 390.

[5]Jones, Evidence (3d ed. 1924) § 733.

[6]1 Elliot, Evidence (1904) § 628; 2 Wigmore, Evidence (3d ed. 1940) § 488, and 8 Wigmore § 2245.

[7]Va. Code. Ann. (Michie, 1942) § 6212, now (Michie, 1950) § 8-289.

[8]Thomas v. First National Bank of Danville, 166 Va. 497, 186 S. E. 77 (1936).

[9]Ky. Code (Carroll, 1948) § 606 n.1; Mo. Rev. Stat. (1939) § 1892; N. Y. Penal

The Virginia Supreme Court of Appeals was recently faced with the difficult problem of determining the scope of the statutory privilege in the case of *Menefee v. Commonwealth*,[10] which presents an issue of first impression in Virginia. The defendant was indicated for robbery, and convicted, largely through the damaging circumstantial evidence presented in the testimony of Ocie Wade Menefee, who had been the wife of the defendant at the time the crime was committed, but had divorced him almost five months prior to the indictment. At the trial, she testified that on the day of the robbery, the defendant left home in his automobile about 3:00 o'clock p.m. and did not return until sometime between 12:00 and 2:00 o'clock a.m. It was established that the robbery occurred at about 9:00 o'clock that night. On arriving home, the defendant placed a pistol on the mantel. The wife identified a pistol which was offered in evidence at the trial as the one she saw her husband place on the mantel on the night of the robbery, and this pistol was proved to have fired one of the two bullets found embedded in a wall at the scene of the crime. She testified that shortly after the date of the crime, she observed the defendant in the back yard of their home "messing with the lid" to the trunk of his car with a razor blade. During the trial, it was established by expert testimony that paint on the safe taken in the robbery and particles of paint found on the inside of the trunk of defendant's automobile could have and most probably "originated from the same source." The wife also testified that she drove defendant around in the vicinity of Ferrum, Virginia, several times after the robbery. The stolen safe was ultimately located in a junk pile in that community.

The defendant objected to the introduction of this testimony on the ground that all of the information was imparted to his wife privately and by reason of the existing marital relation and that this constituted communications "privately made" within the ban of the Virginia statute. The contention of defense was that "any communication privately made" includes all knowledge and information, however imparted, whether by acts, conduct, spoken or written words. The Commonwealth argued that the wife's testimony concerning accused's actions did not violate the privilege because the language of the Virginia statute refers and is limited solely to written or spoken words between spouses.

Recognizing that there is a marked split of authority on the point

Law (Baldwin, 1938) Art. 218 § 2445; N. C. Stat. (Michie, 1943) § 8-56; Pa. Stat. (Purdon, 1930) Art. 19 § 684; Tex. Stat. (Vernon, 1936) Art. 3715.

[10]189 Va. 900, 55 S. E. (2d) 9 (1949).

evidenced in conflicting decisions and different views taken by eminent text writers,[11] the Virginia Supreme Court of Appeals adopted the contention of the defense, and held that reversible error had been committed by the trial court in permitting the defendant's wife to testify in violation of Virginia statute.

By virtue of this decision, Virginia is aligned with the majority of jurisdictions wherein the scope of the privilege is extended to include all knowledge acquired by reason of the confidential relationship of the marital status, regardless of how such knowledge is imparted, whether by verbal communication or from the observance of disclosive acts.[12] This extension is based on the reasoning that, if it were not for the confidence existing between spouses by reason of the marital state, the acts would not have been performed, and that a confidence may be imparted by an act alone, as clearly as if it were accompanied by descriptive words.[13] The position is taken that since the privilege is founded on the public interest in preserving the peace, good order, and limitless confidence between the spouses, it should not be limited by technical construction.[14]

The courts of a minority of jurisdictions place a more restricted interpretation on the privilege statutes.[15] Their view is that, although the confidence between spouses is protected by the legislature to the extent of spoken or written words, the privilege should not be extended, because the danger of protecting crime and fraud outweighs the harm of possible exposure of confidences of the marital status.[16]

Apparently, the justification for extension of the scope of the privilege is found by the majority of the courts in the strength of the public

[11]189 Va. 900 at 908, 55 S. E. (2d) 9 at 13 (1949).

[12]Todd v. Barbee, 271 Ky. 381, 111 S. W. (2d) 1041 (1937); Allcock v. Allcock, 174 Ky. 665, 192 S. W. 853 (1917); People v. Gessinger, 238 Mich. 625, 214 N. W. 184 (1927); Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913); People v. Daghita, 299 N. Y. 194, 86 N. E. (2d) 172 (1949); In re Ford's Estate, 70 Utah 456, 261 Pac. 15 (1927).

[13]Todd v. Barbee, 271 Ky. 381, 111 S. W. (2d) 1041 (1937); Allcock v. Allcock, 174 Ky. 665, 192 S. W. 853, 854 (1917); People v. Gessinger, 238 Mich. 625, 214 N. W. 184, 186 (1927); People v. Daghita, 299 N. Y. 194, 86 N. E. (2d) 172, 174 (1949); In re Ford's estate, 70 Utah 456, 261 Pac. 15, 28 (1927).

[14]Mercer v. Florida, 40 Fla. 216 at 227, 24 So. 154 at 157, 74 Am. Rep. 135 at 142 (1898).

[15]Fraser v. United States, 145 F. (2d) 139 (C. C. A. 6th, 1944); Posner v. New York Life Ins. Co., 56 Ariz. 202 106 P. (2d) 488 (1940); In re Pusey's Estate 180 Cal. 368, 181 Pac. 648 (1919); State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927); Howard v. State, 280 S. W. 586 (Tex. Crim. App. 1926).

[16]Fraser v. United States, 145 F. (2d) 139 (C. C. A. 6th, 1944); 8 Wigmore, Evidence (3d ed. 1940) § 2228.

policy of maintaining the confidences of the marital relation.[17] The Virginia court in the principal case shows the extremity to which some courts are willing to go in ardently following this reasoning. "It is far better that occasional hardships be suffered and that crime sometimes go unpunished than to limit confidential communications between husband and wife to mere spoken or written words."[18]

The majority rule decisions often put emphasis on the necessity of maintaining the sanctity of the home. However, it is to be noted that this argument goes too far in that it would apply quite as effectively to extend the privilege to all members of the household, whether parent, son, brother, or servant. In fact, the privilege as granted does not concern itself with the home as such, but is limited solely to the protection of the marital relation and confidences induced by it. Therefore, it is the confiding in the wife that is privileged and not the fact that an act was perfomed in the home.[19] As stated by Wigmore: "Domestic conduct... may doubtless be private and confidential, but the confidence is towards the family at large, and not towards the wife in particular. It is only so far as there has been a special confiding of it to the wife (or husband) that it comes within the privilege."[20]

Perhaps the point most relied on by the advocates of extending the statutory privilege is the natural repugnance of compelling one spouse to be the source of the other's condemnation. Authorities in this field concede that this feeling is prevalent but argue that it is no more than a sentiment and, as such, not a proper basis for a rule of law.[21] Therefore, neither is sentimentality a justification for extending the privilege so as to hinder the detection of crime and fraud "... the law ... does not proceed by sentiment, but aims at justice."[22]

The cases construing the scope of privilege statutes show the problem created by the wide variety of acts that must be classified by the court as privileged or unprivileged.[23] The Virginia court in deciding

[17]See cases cited at note 12, supra; 1 Elliot, Evidence (1904) § 629.

[18]Menefee v. Commonwealth, 189 Va. 900, 912, 55 S. E. (2d) 9, 15 (1949).

[19]8 Wigmore, Evidence (3d ed. 1940) § 2337.

[20]8 Wigmore, Evidence (3d ed. 1940) § 2337.

[21]8 Wigmore, Evidence (3d ed. 1940) § 2228(3b).

[22]8 Wigmore, Evidence (3d ed. 1940) 228.

[23]United States v. Mitchell, 137 F. (2d) 1006 (C. C. A. 2d, 1943) (husband transported wife in interstate commerce for prostitution); Posner v. New York Life Ins. Co., 56 Ariz, 202, 106 P. (2d) 488 (1940) (husband purchased insulin for wife); Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927) (wife received purchase money from husband); Smith v. State, 198 Ind. 156, 152 N. E. 803 (1926) (wife observed husband dump trunk containing body of his murdered grandmother); State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927) (husband gave wife stolen articles).

the *Menefee* case observed that "It is difficult to formulate any rule by which various matters transpiring between spouses may be readily catalogued and correctly classified as 'communications privately made'."[24]

However, the court went on to classify all of the various acts there in issue as privilege without regard to their nature or mode of performance. Even if it be conceded that the husband's act of placing the pistol on the mantel while in the known and immediate presence of the wife involved a communication induced by the confidential relationship of the spouses, surely it is clear that the act of removing particles of paint from the trunk lid of an automobile outside the house without actual knowledge of the wife's observance is different in nature and mode of performance. As Wigmore points out, "the mere doing of an act by the husband in the wife's presence is not a communication of it by him; for it is done for the sake of the doing, not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written."[25]

Although the words of the statutes commonly refer to a confidence,[26] some courts in following the majority view blanket all types of acts as privileged, however performed. For example, in the case of *People v. Gessinger*,[27] the husband brought home stolen property and this fact came to the wife's knowledge by the voluntary acts of the husband. The wife's testimony was held privileged—a proper result under the majority view—but this same result was reached in the case of *Pierson v Illinois Central R. Co.*,[28] where the testimony of the husband was based on mere observations of the wife's involuntary conduct tending to show her mental condition. Though the acts testified to in these cases were not of the same nature, no distinction was made between them, and the court did not consider whether or not there was an invitation by the husband of the wife's presence and attention or whether acts were done merely for the sake of the doing.

Even the courts adopting the majority rule of broad construction of privilege statutes do not always follow this view to its logical conclusion, but rather apply it with reservations. Although Kentucky sup-

[24]189 Va. 900, 912, 55 S. E. (2d) 9, 15 (1949).
[25]8 Wigmore, Evidence (3d ed. 1940) 649.
[26]See note 9, supra.
[27]238 Mich. 625, 214 N. W. 184 (1927).
[28]159 Mich. 110, 123 N. W. 576 (1909).

ports the majority view and several Kentucky cases[29] were cited with approval in the *Menefee* case, in that jurisdiction the privilege is apparently not extended as far in criminal cases[30] where the public interest is involved as in civil cases involving only private interests. And in Tennessee, where the majority rule is followed[31] under a statute[32] stating the privilege more broadly than does the Virginia statute, it has been declared that "the public policy which regards and protects as confidential the private communications, or the acts which are their equivalent, between husband and wife, does not, under the law of Tennessee, necessarily extend to those acts which are in furtherance of a fraud, ..."[33]

The conflict between the courts supporting the majority and minority views in the construction of the confidential communication statutes is one of inconsistent purposes. The majority view emphasizes the importance of the sanctity of marriage while the minority view emphasizes the importance of discovering all relevant information and of hearing all the evidence in a case. Some information must be suppressed, but since suppression may hinder the administration of justice, it should not be carried any further than is necessary to achieve essential ends. The rule which includes all types of conduct of the accused which the spouse has observed in any manner as within the area of "confidential communications" may well cause more harm to society by defeating the attainment of justice than it does good by promoting the stability of marriages.

The modern trend in both legislation and judicial decisions is toward the removal of the bar of incompetency of witnesses to testify. The law is moving steadily in the direction of allowing the trier of the facts to hear all of the evidence, regardless of interest and relationship of the witnesses, and to weigh its value in determining the issues.[34] This trend,

[29]Cited in Menefee v. Commonwealth, 189 Va. 900, 908, 55 S. E. (2d) 9, 13 (1949): Todd v. Barbee, 271 Ky. 381, 111 S. W. (2d) 1041 (1938); Prudential Ins. Co. of America v. Pierce's Adm'x, 270 Ky. 216, 109 S. W. (2d) 616 (1937); Wiley v. Howell, 168 Ky. 466, 182 S. W. 619 (1916).

[30]Hall v. Commonwealth, 309 Ky. 74, 215 S. W. (2d) 840 (1948); Smith v. Commonwealth, 237 Ky. 317, 35 S. W. (2d) 546 (1931).

[31]McCormick v. State, 135 Tenn. 218, 186 S. W. 95 (1916); Cavert v. State, 158 Tenn. 531, 14 S. W. (2d) 735 (1929).

[32]Tenn. Code (Michie, 1942) § 9777, states: "In all civil actions . . . neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." As to criminal cases, § 9778 of the statute simply states: "In all criminal cases, the husband or the wife shall be a competent witness to testify for or against each other." However, this section has been construed to contain the same privilege as to confidential communications as set out in § 9777. See cases cited, note 31, supra.

[33]Fraser v. United States, 145 F. (2d) 139, 144 (C. C. A. 6th, 1944).

[34]See Yoder v. United States, 80 F. (2d) 665, 668 (C. C. A. 10th, 1935).

as well as the intent of the statutes making husbands and wives competent witnesses for all purposes except as to privileged communications, is defeated by a broad construction of these statutes which is a retrogression to the old common-law rule of incompetency.

FRANK A. BERRY, JR.

FEDERAL PROCEDURE—SCOPE OF POWER OF FEDERAL SUPREME COURT TO REVIEW STATE COURT DECISIONS. [United States Supreme Court]

The limited scope of the United States Supreme Court's power to review decisions from the state courts is clearly traceable to the early distrust of Americans for a central government. An independent people, jealous of their individual rights and regarding the states as the primary guardians of their liberties, were reluctant to lodge extensive powers in a national high court. Constant control by the federal Supreme Court of adjudications of the state courts would, it was argued, "dissatisfy the people, and weaken the importance and authority of state judges."[1]

The Judiciary Act of 1789,[2] subsequently modified by the Act of 1867,[3] reflected this philosophy in delineating the appellate jurisdiction granted by the Constitution to the Supreme Court. And the Court, itself, recognized the limitations on its powers by observing that "The object of the present judiciary act was not to give a right of review wherever an act of congress was drawn in question, but to prevent the courts of the several states from impairing... the authority of the federal government, by giving a constitution to its statutes adverse to such authority."[4]

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[1] 1 Annals of Cong. 798 (1789). One member of the House of Representatives even intimated that, despite the provisions of the Constitution, such a court should not be established at all. 1 Annals of Cong. 783 (1789). And there were occasions, in the early days of the Republic, while the lines separating federal and state power were first being drawn, when it was argued that the Supreme Court's appellate power in no event extended to a case decided by a state court. Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257 (U. S. 1821); Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97 (U. S. 1816).

[2] 1 Stat. 25 (1789).

[3] 14 Stat. 485 (1867).

[4] State of Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 499, 11 S. Ct. 385, 387, 34 L. ed. 1012, 1014 (1891). This view is supported in Commonwealth Bank of Kentucky v. Griffith, 14 Pet. 56, 10, L. ed. 352 (U. S. 1840). It is interesting to note that while the Griffith case was heard under the original Judiciary Act, and the Andriano case arose after that Act was amended in 1867, the results were the same, a point of some value in view of the changes made by the later Act.

It is only when a federal claim has been denied by a state court that the United States Supreme Court may review a state decision.[5] The Judiciary Act of 1789, after setting out what state decisions the Supreme Court could "re-examine,"[6] provided specifically that "no other error shall be assigned or regarded as a ground of reversal ... than such as appears on the face of the record and immediately respects the beforementioned questions ...."[7] This provision was omitted in the amended Act of 1867, and in 1874, the Supreme Court found it necessary to consider the effect of that omission. In the much-cited case of *Murdock v. City of Memphis,*[8] it was strongly urged that as a result of the omission the Supreme Court could examine the whole case, and need not confine its consideration to the points raised in the lower courts and there decided. In a lengthy opinion this contention was rejected, and the Court adhered to the established rule that it could only consider those questions already raised and decided in previous stages of the litigation. Further, it set forth certain requirements to be fulfilled before the Supreme Court would review a state case: a question mentioned in the Judiciary Acts as being one over which the Supreme Court had appellate jurisdiction must have been raised and decided by the state court, and its decision must have been against the claim of plaintiff-in-error "under the Constitution, treaties, laws, or authority of the United States."[9] "These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court."[10] And the court declared that if no error is found in the matter authorizing re-examination, the "nature and fitness of things demand that ..."[11] the judgment should be affirmed.

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[5]62 Stat. 929 (1948), 28 U. S. C. A. § 1257 (1949).

[6]These decisions were ones in which "... is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission ...." 1 Stat. 25 (1789).

[7]1 Stat. 25 (1789).

[8]20 Wall. 590, 22 L. ed. 429 (U. S. 1874).

[9]20 Wall. 590, 636, 22 L. ed. 429, 444 (U. S. 1874).

[10]20 Wall. 590, 636, 22 L. ed. 429, 444 (U. S. 1874).

[11]20 Wall. 590, 627, 22 L. ed. 429, 441 (U. S. 1874).

The pattern set out in the *Murdock* decision has been consistently followed by cases since that time.[12]

It is basic that the Supreme Court has jurisdiction only over questions in which a federal claim has been denied,[13] and "A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the ... effect ... of a judgment ... silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never set up ...."[14] Nor is it sufficient that

[12]It has been said that the errors relied upon must be set out in order to let the court and opposing counsel perceive the points to be argued. Seaboard Air Line Ry. Co. v. Watson, 287 U. S. 86, 53 S. Ct. 32, 77 L. ed. 180 (1932). "One having obtained certiorari to review specified questions is not entitled here to obtain decision on any other issue." General Talking Pictures Corp. v. Western Electric Co., Inc., 304 U. S. 175, 179, 58 S. Ct. 849, 851, 82 L. ed. 1273, 1275 (1938); Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417 (1909). It is to be noted that there is a difference in the scope of review when the case comes from a federal court of original jurisdiction, and when it comes from a state court of original jurisdiction. In the former situation, "the jurisdiction of this court does not depend upon the queston whether the right claimed under the constitution of the United States has been upheld or denied in the court below ...", and the court is not confined to consideration of the constitutional question, but may review the whole case. Holder v. Aultman, Miller & Co., 169 U. S. 81, 88, 18 S. Ct. 269, 272, 42 L. ed. 669, 671 (1898). This right has often been exercised. Davis, Director General of Railroads v. Wallace, 257 U. S. 478, 42 S. Ct. 164, 66 L. ed. 325 (1922); Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 30 S. Ct. 581, 54 L. ed. 877 (1910). When Congress wishes to give the Supreme Court jurisdiction of the whole case, it gives original jurisdiction to a federal court, and not to a state court. Murdock v. City of Memphis, 20 Wall. 590, 22 L. ed. 429 (U. S. 1874). The court has said that it could look beyond the federal question only when it had been decided erroneously, and could do so then only to determine if any other grounds 'adjudged" by the state court are sufficiently broad to maintain the judgment. McLaughlin v. Fowler, 154 U. S. 663, 14 S. Ct. 1192, 26 L. ed. 178 (1880). "In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right ... claimed under the Constitution ... or statute of the United States, such title, right ... must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the tiral court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State; it cannot be asserted in this court." Morrison v. Watson, 154 U. S. 111, 115, 14 S. Ct. 995, 997, 38 L. ed. 927, 929 (1894).

[13]Dewey v. City of Des Moines, 173 U. S. 193, 19 S. Ct. 397, 43 L. ed. 665 (1899); The Bridge Proprietors v. The Hoboken Co., 1 Wall. 116, 17 L. ed. 571 (U. S. 1864).

[14]Dewey v. City of Des Moines, 173 U. S. 193, 200, 19 S. Ct. 379, 381, 43 L. ed. 665, 667 (1899). In that case, plaintiff-in-error had assigned one federal question: that, since there had not been sufficient service on him, the imposition of a personal liability for a property assessment contravened the Fourteenth Amendment. Counsel, however, in addition, argued in the Supreme Court that there had been a taking of property without just compensation. The Court refused to consider the latter point, since it had not been raised below, and was not decided there. The Court

the necessary effect of the judgment was to deny a federal claim, for it must appear that that claim was brought to the attention of the court as one upon which reliance was placed.[15]

Despite this supposedly settled procedure, the Supreme Court in *Terminiello v. City of Chicago*,[16] has taken a step which caused Justice Frankfurter in a vigorous dissent to declare: "For the first time in the course of the ... 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court."[17]

Petitioner Arthur Terminiello had made a vitriolic address in Chicago, in which much of his effort was spent in appealing to racial prejudices and in condemning the New Deal. The speech was most inflammatory in character, and a crowd of several hundred pickets had gathered outside the assembly hall, causing a near riot during the meeting. Petitioner was charged with disorderly conduct by causing a breach of the peace in violation of an ordinance of Chicago.[18] The trial court instructed the jury that "breach of the peace" consists of "misbehavior which violates the public peace and decorum;" and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[19] The accused took no exception to that instruction, but he did maintain throughout that the ordinance as applied to him violated his right of free speech under the Federal Con-

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said that if this second question had been "only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment," then it would have been considered by the Supreme Court. 173 U. S. 193, 197, 19 S. Ct. 379, 380, 43 L. ed. 665, 666 (1899).

[15]Dewey v. City of Des Moines, 173 U. S. 193, at 200, 19 S. Ct. 379, at 381, 43 L. ed. 665, at 667, (1899).

[16]337 U. S. 1, 69 S. Ct. 894, 93 L. ed. 865 (1949).

[17]Terminiello v. City of Chicago, 337 U. S. 1, 8, 69 S. Ct. 894, 898, 93 L. ed. 865, 870 (1949).

[18]"All persons who shall make, aid, contenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city... shall be deemed guilty or disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." Rev. Code. City of Chicago (1939) c. 193, § 1 (1).

[19]Terminiello v. City of Chicago, 337 U. S. 1, 3, 69 S. Ct. 894, 895, 93 L. ed. 865, 867 (1949).

stitution. The jury found Terminiello guilty, and a fine was levied against him. The Illinois Appellate Court and the Illinois Supreme Court affirmed the conviction,[20] and certiorari was granted by the United States Supreme Court, which reversed the State Court. Justice Douglas, writing for the majority, declared that "The ordinance as construed by the trial court seriously invaded..."[21] petitioner's right of free speech. Reversal was ordered because of the trial court's instructions, the Court finding it unnecessary to consider the substance of the speech.

Chief Justice Vinson, in an individual dissent, saying that the "offending sentence" in the instructions had gone completely unnoticed until "ferreted out" by the Court's "independent research," pointed out that the procedure of the majority was a departure from principles governing review of decisions from a state court.[22]

Justice Frankfurter, in his dissent, noting that the United States Supreme Court has no power of review of a state decision unless a claim arising under the United States Constitution or its laws has been made before the State court and the claim denied there, then inquired: "How could there have been a denial of a federal claim... when no such claim was made?"[23]

The majority contended that error was committed by the state courts, and insisted that the point upon which it decided the case had been decided below. Justice Douglas, for the Court, declared that: "The ordinance as construed by the trial court seriously invaded this province [of free speech]." His theory is that the ordinance "As construed and applied... contains parts that are unconstitutional;" that, the verdict being a general one, it might rest on the invalid parts; and, inasmuch as petitioner attacked the inclusion of his speech within the ordinance, he necessarily attacked the instructions construing it.

This result does not necessarily follow from the reasoning. The ordinance set out the elements of a certain offense; the instructions extended the scope of the offense and brought in other elements. To attack the validity of an ordinance is one thing; to attack the validity of an enlargement of that ordinance is another thing. Petitioner did

[20]City of Chicago v. Terminiello, 332 Ill. App. 17, 74 N. E. (2d) 45 (1947); 400 Ill. 23, 79 N. E. (2d) 39 (1948).

[21]Terminiello v. City of Chicago, 337 U. S. 1, 5, 69 S. Ct. 894, 896, 93 L. ed. 865, 868 (1949).

[22]Terminiello v. City of Chicago, 337 U. S. 1, at 7, 69 S. Ct. 894, at 897, 93 L. ed. 865, at 869 (1949).

[23]Terminiello v. City of Chicago, 337 U. S. 1, 10, 69 S. Ct. 894, 898, 93 L. ed. 865, 871 (1949).

not object to the instructions, but only to the ordinance itself. The claim before the Illinois courts was that the ordinance in and of itself, and independently of the instructions, deprived petitioner of his constitutional rights, and that was the only claim decided below.

However, Justice Douglas reasons that "The statute as construed in the charge to the jury was passed on by the Illinois court...."[24] Exception must be taken to that statement, for at no place in the opinions of the Appellate Court or the Supreme Court of Illinois, is any mention made of the instructions upon which the majority of the United States Supreme Court rely. The State Supreme Court quoted parts of the ordinance, and the Appellate Court merely referred to it by citation. The only thing passed upon was the ordinance, and whether or not petitioner's speech was an abuse of his right of free speech. In the Appellate Court, petitioner's only contention with relation to the United States Constitution was that the speech delivered was protected by the First and Fourteenth Amendments; the only such contention in the State Supreme Court was that "his speech was protected by the constitutional guarantee of freedom of speech."[25]

Even if it be admitted that "The ordinance as construed... invaded this province"[26] of free speech, and that "As construed and applied it at least contains parts that are unconstitutional,"[27] the signal fact remains that the ordinance "as construed and applied" was not before the state courts or the United States Supreme Court, either expressly or by implication. The only question was: Was petitioner's right to speak protected by the Constitution against the ordinance, and, if it were, did the speech step beyond the limits of such protection so that it might be punished as an abuse of freedom of speech?

The sole authority relied upon by the majority of the court was *Stromberg v. California*.[28] It is submitted that this reliance was wholly misplaced. That case involved a statute setting out disjunctively three ways in which it might be violated. On demurrer to the information, it was argued that the statute violated the Fourteenth Amendment of the United States Constitution. The demurrer was overruled, and the case submitted to the jury in the form of the statute—that is, each of

[24]Terminiello v. City of Chicago, 337 U. S. 1, 5, 69 S. Ct. 894, 896, 93 L. ed. 865, 868 (1949).

[25]City of Chicago v. Terminiello, 400 Ill. 23, 79 N. E. (2d) 39, 43 (1948).

[26]Terminiello v. City of Chicago, 337 U. S. 1, 5, 69 S. Ct. 894, 896, 93 L. ed. 865, 868 (1949).

[27]Terminiello v. City of Chicago, 337 U. S. 1, 5, 69 S. Ct. 894, 896, 93 L. ed. 865, 868 (1949).

[28]283 U. S. 359, 51 S. Ct. 532, 75 L. ed. 1117 (1930).

the three possible methods of violation were given alternatively. A general verdict was returned. No objection was taken to the instructions, and any claim of error as to the instructions was specifically waived. The District Court of Appeals of California held the statute divisible, and said that though one part of it might be unconstitutional, still it could be disregarded and the constitutionality of the rest of the statute upheld. But the United States Supreme Court found one clause unconstitutional, held the statute indivisible and all of it invalid. As the jury had returned a general verdict, declared the Court, it could not be said that they had not convicted on the invalid ground. For that reason, the case was reversed.

It should be observed that, though waiving objection to the instructions, Stromberg, like Terminiello, at all times objected to the constitutionality of the statute. In challenging the whole, she challenged each part individually, and this was the ground giving the Supreme Court the power to review and reverse. After the case left the trial court, the propriety of the instructions was never in issue, nor did the Supreme Court rely on them in reversing. Further, the instructions in the cases differ greatly in character and effect. In *Terminiello v. City of Chicago,* the instructions extended the application and meaning of the ordinance; they defined the offense of "breach of the peace" and added elements which were not included in the ordinance. But in the *Stromberg* case, the instructions merely stated the statute in its own disjunctive terms, and explained it without extending its effect.

The only conclusion to be drawn from a study of the *Terminiello* case, and the background against which it rests, is that the case makes an unauthorized extension of the powers of the Supreme Court, and a usurpation of the jurisdiction of the state courts. It is to be hoped that this decision does not foreshadow a further trend toward the expansion of the federal judiciary's power to interfere with state court decisions.

PHILIP M. LANIER

FEDERAL PROCEDURE—VALIDITY OF STATUTE EXTENDING DIVERSITY JURISDICTION TO CITIZENS OF DISTRICT OF COLUMBIA. [United States Supreme Court]

Since 1789, the citizens of the states have been able to bring suits in the federal district courts on the ground of diversity of citizenship, but for over a century the citizens of the District of Columbia could not

sue or be sued in the federal district courts on that ground. The landmark case which closed the doors of the federal courts in diversity cases to the citizens of the District of Columbia is *Hepburn and Dundas v. Ellzey*.[1] Chief Justice Marshall, interpreting the section of the Judiciary Act of 1789 which gave the federal courts jurisdiction of suits "between a citizen of the State where the suit is brought, and a citizen of another State,"[2] held that, as the word "State" used in the Constitution does not include the District of Columbia, the word "State" as used in this Act does not include the District. Though this precedent has been followed for 136 years,[3] some of the courts have indicated that they are following the *Hepburn* case on the theory of stare decisis, and have expressed the desire that the unreasonable rule be overthrown.[4]

To rectify the unjust situation brought about by the *Hepburn* case and adherence to the doctrine of stare decisis, Congress, in 1940, passed an amendment to Section 24 (1) (b) of the Judicial Code,[5] giving the district courts jurisdiction over suits between a citizen of a State and a citizen of the District of Columbia, the territory of Hawaii or Alaska. Since the amendment was passed, three district courts have held it constitutional, nine have held it unconstitutional,[6] and the circuit courts of appeals for two circuits in which the question has been litigated have held the amendment unconstitutional.[7]

On an appeal of one of these latter cases, the Supreme Court has

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[1]2 Cranch 445, 2 L. ed. 332 (1805).

[2]1 Stat. 73, 78 (1789).

[3]Corporation of New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44 (1816); Barney v. Baltimore City, 6 Wall. 280, 18 L. ed. 825 (1867); Hooe v. Jamieson 166 U. S. 395, 17 S. Ct. 596, 41 L. ed. 1049 (1897); Duehay v. Acacia Mutual Life Ins. Co., 70 App. D. C. 245, 105 F. (2d) 768 (1939); See Note (1948) 5 Wash. & Lee L. Rev. 205.

[4]After commenting on the extended rule of the Hepburn case, the court in Watson v. Brooks, 13 Fed. 540, 543 (C. C. D. Ore. 1882) said: "But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown .... But so long as this ruling remains in force, the judgment of this court must be governed by it."

[5]54 Stat. 143 (1940), 28 U. S. C. § 41 (1) (b) (Supp. 1947). The amended statute provides: "The district Courts shall have original jurisdiction ... of all suits of a civil nature ... where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and ... is between citizens of different States, or citizens of the District of Columbia, the territory of Hawaii, or Alaska, and any state or territory ...."

[6]See Note (1948) 5 Wash. & Lee L. Rev. 205, clearly stating the problems that were before the courts which had considered the constitutionality of the amendment to the Judicial Code, and commenting on the validity of the opinions rendered in a few of the cases.

[7]Central States Co-ops v. Watson Bros. Transp. Co., 165 F. (2d) 392 (C. C. A. 7th, 1947); National Mut. Ins. Co. v. Tidewater Transfer Co Inc., 165 F. (2d) 531 (C. C. A. 4th, 1947)

finally, by a five to four decision in *National Mut. Ins. Co. v. Tidewater Transfer Co., Inc.*,[8] upheld the Act. The plaintiff, a corporation created by the District of Columbia, had a claim arising out of an insurance contract against defendant, a corporation chartered by Virginia, which, being licensed to do business in Maryland, was amenable to suit in the latter state. Plaintiff started its action in the United States District Court for Maryland, contending that the district court had jurisdiction based upon diversity of citizenship, because plaintiff is a "citizen" of the District of Columbia and defendant is a "citizen" of a state. The district judge concluded that plaintiff's allegation of diversity of citizenship met jurisdictional requirements under the Act of Congress but that the Act did not comply with diversity requirements of Article III of the Constitution,[9] and the case was dismissed.

Hearing the case on writ of certiorari, the Supreme Court was faced with the question whether the Constitution granted Congress the power to pass the enabling Act which conferred on the federal district courts jurisdiction over a suit, involving the requisite amount, between a citizen of the District of Columbia and a citizen of the state where the suit is brought.[10] A majority of the Court held that the enabling Act was valid, but this majority of five was divided three to two on the reasons for the result.

The opinion of Justice Jackson in which Justices Black and Burton concurred, announced the decision of the Court. At the beginning of Justice Jackson's opinion it is indicated that because of the nature of the issue, the Constitution should be liberally construed in deciding the validity of the enabling Act. He observed:

> "This constitutional issue affects only the mechanics of administering justice in our federation .... we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times."[11]

This decision, sustaining the power of Congress to pass the Act, was rested not on Article III, the judiciary article of the Constitution,

[8]337 U S. 582, 69 S. Ct. 1173, 93 L. ed. 1118 (1949).

[9]U. S. Const. Art. III, § 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States... to controversies... between Citizens of different States...."

[10]This question is divided into the following issues: 1. Is Congress' power to legislate for the District of Columbia, which is granted by Article I, Section 8 (17), the authority for holding the Act valid? 2. Is the District of Columbia, for diversity purposes, a state within the meaning of Article III?

[11]337 U. S. 582, 585, 69 S. Ct. 1173, 1174, 93 L. ed. 1118, 1122 (1949).

but on the grants of legislative power in Article I, Section 8 (17) and (18). The extension of diversity jurisdiction, to include citizens of the District of Columbia, was a valid and reasonable exercise of the plenary power which Article I, Section 8 (17) of the Constitution grants to Congress to legislate for the District of Columbia.[12] The necessary implication from this holding is that even though the federal district courts are Article III courts, Congress is granted authority by other provisions of the Constitution to expand the judicial powers of courts set up under Article III to include jurisdiction over cases not enumerated in that Article.[13] Justice Jackson confirmed this view by declaring:

> "It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III, for it has been done with this court's approval."[14]

On this point, reference was made to the 1933 decision of *O'Donoghue v. United States*,[15] which had held that, although District of Columbia Courts are Article III courts, they can also exercise judicial power conferred by Congress pursuant to Article I.

The Court of Claims was created and received its jurisdiction pursuant to power given to Congress by Article I.[16] Thus, the Tucker Act of 1887, which conferred jurisdiction on the federal district courts concurrent with that of the non-article III Court of Claims in all matters up to the amount of $10,000 over which the Court of Claims would have jurisdiction, was an exercise of Article I, and *not* Article III, powers.[17] Also, Congress' authority for enacting the Federal Tort

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[12]Dykes and Keeffee, The 1940 Amendment to the Diversity of Citizenship Clause (1946) 21 Tulane L. Rev. 171; See Notes (1949) 9 Ohio State L. J. 309; (1949) 16 Geo. Wash. L. Rev. 381. These citations commented on the possibility that Congress' power to legislate for the District of Columbia would be the ground on which the Supreme Court might hold the Act valid.

[13]See O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933). The Court deciding whether or not the salary of a judge of the federal district court for the District of Columbia could be reduced while he was on the bench, held that it could not. Even though this court receives jurisdiction from Article I, it is an Article III court. This decision was the first deviation from the judicial doctrine that the jurisdiction of courts created under Article III and courts established under other provisions of the Constitution was mutually exclusive.

[14]337 U. S. 582, 591, 69 S. Ct. 1173, 1177, 93 L. ed. 1118, 1126 (1949).

[15]289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933). The O'Donoguhe case is discussed in Note (1933) 47 Harv. L. Rev. 133.

[16]U. S. Const. Art. I, § 8 (1) grants Congress power to pay the debts of the United States and clause (18) of this Article gives them the power to use the "necessary and proper" means of carrying out this grant. Williams v. United States, 289 U. S. 553, 53 S. Ct. 751, 77 L. ed. 1372 (1933).

[17]United States v. Sherwood, 312 U. S. 584, 61 S. Ct. 767, 85 L. ed. 1058 (1941).

Claims Act,[18] and the Bankruptcy Act,[19] was power granted Congress by Article I. These Acts, like the Tucker Act, imposed on the federal district courts jurisdiction over cases which did not involve a federal question and were not enumerated in Article III.

The conclusions reached in this opinion for the Court cannot be stated more clearly than in Justice Jackson's own words:

> "We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship....
>
> "We therefore hold that Congress may exert its power to govern the District of Columbia by imposing the judicial function of adjudicating justiciable controversies on the regular federal courts...."[20]

The Court considered the *Hepburn* case but declined to overrule its holding that the District of Columbia is not a State within Article III of the Constitution. Moreover, the view was taken that Chief Justice Marshall's language—"this is a subject for legislative not for judicial consideration"[21]—left it open to Congress to confer on the federal district courts sitting in the several states jurisdiction over a suit between a citizen of the District of Columbia and a citizen of the state where the suit is brought.[22] Justice Rutledge, with whom Justice

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[18]Brooks v. United States, 337 U. S. 49, 69 S. Ct. 918, 93 L. ed. 884 (1949), indicates that federal courts will take jurisdiction over cases arising under the Federal Torts Claims Act which was passed pursuant to Article I power granted to Congress to pay the debts of the United States.

[19]Schumacher v. Beeler, 293 U. S. 367, 55 S. Ct. 230, 79 L. ed. 433 (1934); Williams v. Austrian, 331 U. S. 642, 67 S. Ct. 1443, 91 L. ed. 1718 (1947).

[20]337 U. S. 582, 600, 69 S. Ct. 1173, 1182, 93 L. ed. 1118, 1130 (1949).

[21]2 Cranch 445, 453, 2 L. ed. 332, 335 (1805). Speaking of citizens of the District of Columbia, Chief Justice Marshall stated: "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them. But this is a subject for legislative, not for judicial consideration."

[22]When necessary adequately to adjudge controversies involving a citizen of the Distrcit and a citizen of a state, Justice Jackson indicates that the power to legislate for the District of Columbia grants Congress authority to empower a federal court within the District to run its process to summon defendants to the District from any part of the country. Moreover, courts could be established the nation over to handle litigation involving citizens of the District. Why, then, cannot Congress combine this function, under Article I with those under Article III, in district courts of the United States? 337 U. S. 582, 590, 69 S. Ct. 1173, 1177, 93 L. ed. 1118, 1125 (1949).

Murphy agreed, in a separate opinion concurred in the Court's judgment that the enabling Act is valid, but based his decision on different reasons. He argued that if Congress did not have the power to pass the Act under Article III, it cannot disregard this prohibition and say that another Article of the Constitution grants the power to do what cannot be done under Article III: "The Constitution is not so self-contradictory."[23] Being opposed to holding that Congress has power to confer jurisdiction on the federal district courts, sitting in the states, beyond the constitutional limits of Article III, Justice Rutledge preferred to sustain the Act by construing the word "State" as it is used in Article III to include the District of Columbia. This should be done, not by distinguishing the *Hepburn* decision, but by overruling it.[24]

The arguments of the four Justices who dissented in the principal case are forcefully delineated in two opinions. Both opinions agreed with Justice Rutledge that Article I, Section 8 (17) and (18) does not support the validity of the 1940 Act of Congress which extended diversity jurisdiction to citizens of the District of Columbia.

Justice Frankfurter, with whom Justice Reed concurred, emphasized the fact that jurisdiction conferred on the federal courts by the Tucker Act and the Bankruptcy Act is federal-question jurisdiction which is therefore within the scope of Article III. But both Justices would follow the legal principle of *expressio unius est exclusio alterius* in determining the outer limits of power granted Congress by Article III to confer jurisdiction on the federal district courts created under Article III. Under this view, Article III is strictly construed and the meaning of the word "State" is not to be expanded to include the District of Columbia. Justice Frankfurter said:

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[23]337 U. S. 582, 605, 69 S. Ct. 1173, 1184, 93 L. ed. 1118, 1133 (1949). Justice Rutledge disapproved the authority Justice Jackson relied on, by saying that the following language of O'Donoghue v. United States denies that its doctrine can be extended beyond the geographical limits of the District of Columbia: "... Congress derives from the District clause distinct powers in respect of the constitutional courts of the District which Congress does not possess in respect of such courts outside the District." 289 U. S. 516, 551, 53 S. Ct. 740, 750, 77 L. ed. 1356, 1371 (1933). Further, Justice Rutledge points out that the cases which fall under the jurisdiction of the federal courts by virtue of the Tucker Act are controversies to which the United States is a party; therefore, the jurisdiction Congress conferred on the federal courts is not derived from Article I but Article III of the Constitution. Justice Rutledge also states that the bankruptcy jurisdiction conferred on the district courts is derived from Article III because the cases arising under the Bankruptcy Act fall within the federal-question jurisdiction of the district courts.

[24]337 U. S. 582, 25, 69 S. Ct. 1173, 1195, 93 L. ed. 1118, 1143 (1949). Justice Rutledge observed: "... I think the *Hepburn* decision was ill-considered and wrongly decided .... Although I agree wth the Court's judgment, I think it overrules the *Hepburn* decision in all practical effect."

"The very subject matter of Sections 1 and 2 of Article III is technical in the esteemed sense of that term. These sections do not deal with generalities expanding with experience."[25]

Chief Justice Vinson, with whom Justice Douglas concurred, agreed with the views expressed by Justice Frankfurter but stated that he was constrained to express his views individually. His opinion made reference to the fact that it was a struggle to establish a federal system, and the framers intended that the terms of Article III were to be strictly construed. Also, he pointed out that no other Article of the Constitution permits Congress to confer jurisdiction on the federal district courts. These courts are constitutional courts created under Article III and they can receive jurisdiction only over cases enumerated in that Article. The Constitution authorized Congress to grant diversity jurisdiction to the United States District Courts over controversies "between Citizens of different States."[26] The District of Columbia is not included within the scope of the term "States" as used in the diversity provision of Article III.

Adding the votes of the Court on the two grounds set forth for holding the enabling Act valid indicates this paradoxical situation: Six of the Justices state that Congress did not have the power under Article I, Section 8 (17) to pass the Act. Three Justices believe this to be the constitutional authority for the Act. Seven Justices adhere to the *Hepburn* decision and say that the word "State" in Article III does not include the District of Columbia. The other two would overrule the *Hepburn* decision. Despite this confusion of reasoning and counter-reasoning, it would seem that the Court's judgment, holding the Act valid, is desirable. As long as the present federal judicial system exists and citizens of the several states and aliens can bring a suit in a district court on the grounds of diversity of citizenship, there is no practical reason for denying this privilege to citizens of the District of Columbia.

O. E. PINION

LABOR LAW—SCOPE OF STATUTORY PROHIBITION AGAINST EXPENDITURES BY LABOR UNIONS IN CONNECTION WITH FEDERAL ELECTIONS. [Federal]

As a means of combatting the increasing exercise of political influence by large aggregations of wealth, the Federal Corrupt Practices

[25]337 U. S. 582, 654, 69 S. Ct. 1173, 1199, 93 L. ed. 1118, 1148 (1949).
[26]U. S. Const. Art. III, § 2.

Act of 1907[1] prohibited corporations from making "money contributions" in connection with federal elections. In 1925 the Act was amended so as to change "money contributions" to "contributions,"[2] and in 1943 labor organizations were included within its coverage.[3]

Labor unions avoided this interdiction by influencing federal elections with indirect contributions to political campaigns, such as by printing pamphlets or advertising or broadcasting rather than with direct gifts of money to campaign funds as had been their practice before they were included within the purview of the Act. Dispute arose as to whether these expenditures were prohibited; some Congressmen were of the opinion that the Act prohibited such indirect contributions,[4] but labor took the view that the word "contributions" as used in the statute applied only to direct gifts to campaign funds. In order to prevent continued avoidance of the Federal Corrupt Practices Act by such indirect methods, Congress in 1947 enacted Section 304 of the Taft-Hartley Act[5] amending the Federal Corrupt Practices Act so as to prohibit "expenditures" as well as "contributions" made

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[1]34 Stat. 864 (1907).

[2]43 Stat. 1070 (1925).

[3]57 Stat. 167 (1943), 2 U. S. C. § 251 (1947).

[4]House Rep. No. 2739, 79th Cong. 2d Sess. (1946) 39-40: "There is evidence before the committee that some organizations which are prohibited from making contributions in a political campaign have made expendtiures and have engaged in activities the purpose of which were to endeavor to influence the election or defeat of candidates.

"It is noted that the act prohibits contributons and does not expressly prohibit expenditures. It is reported to the committee that a former Attorney-General had issued a ruling to the effect that the activities above-mentioned do not constitute the making of contributions. It is conceivable that the word 'contribution' might imply a giving on one hand and accepting on the other, yet from the study of the history of this provision of the act, the committee feels that the activities hereinabove referred to, which are carried on on an extensive scale, constitute violations of the spirit and intent of the act."

But the majority of a Senate Committee investigating campaign expenditures of 1944 opposed the extension of the Act to include expenditures as well as contributions because: "An expenditure made in connection with an election may well be for the publication of pamphlets, or newspaper articles or speeches justifying the point of view of the organization paying for it. An editorial in a newspaper states its position. The reproduction of that editorial in the form of a pamphlet or speech based on that pamphlet may state the position of the organization paying for it.

"...the prohibition of an expenditure as distinguished from a contribution comes in an entrely different category from the prohibition of contributions in the meaning of the Corrupt Practices Act." Sen. Rep. No. 101, 79th Cong. 1st Sess. (1945) 83-84.

[5]61 Stat. 150 (1947), 2 U. S. C. § 610 (Supp. 1949). This operated to amend § 313 of the Federal Corrupt Practices Act.

in connection with federal elections. Two principal purposes of expanding the scope of the Act were: (1) to remove the undue influence that accumulations of wealth have on federal elections,[6] and (2) to protect those stockholders and union members who do not share the political views of the union or corporation from having their money, in the form of corporate funds or union dues, expended to further a candidate of whom they do not approve.[7] In the congressional debates, the minority protection feature of the Act was emphasized principally, because it was intended to be the basis of the test to determine which union and corporate activities were legitimate and which were prohibited. During these debates the Senators almost invariably indicated that union activities would be a violation of the law if the funds expended were secured from the general treasury as distinguished from funds established for political purposes.[8]

Organized labor was alarmed by this section of the Taft-Hartley Act, and immediately a determination of the constitutionality of the section was sought by the C. I. O. To test the constitutionality of the legislation a statement of political advocacy was placed in a regular edition of the organization's newspaper, "The CIO News," and one thousand extra copies were printed and distributed in the area where the election in question was to take place. For this the union was indicted and brought to trial.

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[6]A minority comment in a Senate Report indicates this purpose: "There is no doubt in our minds that Political Action Committee primary and preconvention activity carried over into and influenced greatly the general election result, and the loop-holes in the law which purportedly permitted this should be closed." Sen. Rep. 101, 79th Cong. 1st Sess. (1945) 24.

[7]The following excerpt from the Congressional debates indicates this purpose: Mr. Magnuson. "I think all union members know that a part of their dues in these cases go for the publication of some labor organ."

Mr. Taft. "Yes. How fair is it? We will assume that 60 percent of a union's employees are for a Republican candidate and 40 percent are for a Democratic candidate. Does the Senator think the union members should be forced to contribute, without being asked to do so specifically, and without having a right to withdraw their payments, to the election of someone whom they do not favor?" 93 Cong. Rec. 6440 (1947). For other similar statements see, 93 Cong. Rec. 6436-6441, 6446-6448 (1947).

[8]93 Cong. Rec. 6440 (1947): Mr. Taft. "If they [union members] are asked to contribute directly to the support of a newspaper or to the support of a labor political organization, they would know what their money was to be used for and presumably approve it. From such contribution the organization can spend all the money it wants to with respect to such matters. But the prohibition is against labor unions using their members dues for political purposes, which is exactly the same as the prohibition against a corporation using its stockholders money for political purposes, and perhaps in violation of the wishes of many of its stockholders." For other similar statements, see 93 Cong. Rec. 6436-6441, 6446-6448 (1947).

In the Federal District Court the Act was declared unconstitutional as a violation of the freedom of expression guaranty of the First Amendment.[9] An appeal was taken directly to the Supreme Court where the constitutional issue was avoided by limiting the scope of the Act by holding that the C.I.O. did not violate the Federal Corrupt Practices Act in issuing, in the regular course of publication, a statement of political advocacy in a union newspaper distributed substantially to members or purchasers.[10]

In the recent case of *United States v. Painters Local Union No. 481*[11] the Court of Appeals for the Second Circuit has employed the reasoning of the *C. I. O.* decision to restrict further the scope of the Act. The alleged violation consisted of an expenditure of union funds by a small local union to pay for an advertisement in a commercial newspaper of general circulation and for the purchase of radio time from a commercial radio station. Both the advertisement and the broadcast were directed specifically at the Connecticut Republican Convention, the Republican National Convention and the Connecticut Republican Congressional Convention, and recommended the rejection of Senator Taft as Republican nominee for the presidency and the rejection of six Republican Congressmen from Connecticut. The expended funds were derived from the union treasury and had not been allocated for any particular purpose. The defendant was indicted and brought to trial, where the sole defense was that the Act as amended was unconstitutional in that it violated the First, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution.

In the Federal District Court those arguments against the statute were rejected and its validity was sustained. Judge Hincks easily distinguished the *C. I. O.* case as dealing with statements of political opinion in a union newspaper rather than in a commercial newspaper. In the principal case he found a violation of the statute because "the Con-

[9]United States v. C. I. O., 77 F. Supp. 355 (D. C. D. C. 1948).

[10]United States v. C. I. O., 335 U. S. 106, 68 S. Ct. 1349, 92 L. ed. 1849 (1948). In the opinion of the Court it was stated that if the statute were construed to prohibit such a publication as was under consideration "the gravest doubt would arise in our minds as to its constitutionality," and for that reason the Court in this case should recognize its obligation "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." 335 U. S. 106, 120-121, 68 S. Ct. 1349, 1356-1357, 92 L. ed. 1849, 1860-1861 (1948). Four members of the Court concurred only in result, taking the position that the statute should be construed to cover expenditures as made by the C. I. O., and thus construed should be held to be in violation of the First Amendment. 335 U. S. 106, 129, 68 S. Ct. 1349, 1361, 92 L. ed. 1849, 1865 (1948).

[11]172 F. (2d) 854 (C. A. 2d, 1949).

gressional history of the Act makes it abundantly plain that the expenditures upon which this prosecution is based were of that very kind which Congress intended to forbid."[12]

Upon defendant's appeal from the judgment of conviction the Court of Appeals avoided the constitutional issue by turning the case on statutory interpretation,[13] deciding, on the authority of *United States v. C. I. O.*, that the defendant had not violated the Federal Corrupt Practices Act as amended. The court found it "impossible, on principle, to differentiate the scope of that decision from the case we have before us."[14] In justification of this decision, it was said:

> "It is hard to imagine that a greater number of people would be affected by the advertisement and broadcasting in the present case than by publication in the union periodical dealt with in the CIO litigation. In a practical sense the situations are very similar, for in the case at bar this small union owned no newspaper and a publication in the daily press or by radio was as natural a way of communicating its views to its members as by a newspaper of its own."[15]

Notwithstanding this decision, it seems clear that the *Painters Local* case can be distinguished from the *C. I. O.* case on at least two fundamental grounds: In the instant case (1) the advertisement and broadcast were not in the regular course of publication, and (2) the distribution went far beyond the union membership.

The court's position that placing an advertisement in a newspaper with a circulation of 91,000 and sponsoring a radio broadcast over the only commercial radio station in a city of 69,000 is the normal means for a union, which does not operate a newspaper of its own, to communicate its views to the union members seems extremely weak. But because it was a "normal means," it was considered equivalent to be-

[12]United States v. Painters Local Union No. 481, 79 F. Supp. 516, 519 (D. C. Conn. 1948).

[13]The Court inferred that, like the Supreme Court in the C. I. O. case (see note 10, supra), it was constrained to adopt the restricted construction of the statute in order to avoid the possible necessity of declaring the statute unconstitutional. United States v. Painters Local No. 481, 172 F. (2d) 854, 856 (C. A. 2d, 1949). The problem of the constitutionality of this Act, not being a subject of decision in the principal case, is beyond the scope of this comment. For extended discussions of the point, see United States v. Painters Local Union No. 481, 79 F. Supp. 516 (D. C. Conn. 1948); United States v. C. I. O., 77 F. Supp. 355 (D. C. D. C. 1948); and the concurring opinion of Justice Rutledge in United States v. C. I. O., 335 U. S. 106, 129, 68 S. Ct. 1349, 1361, 92 L. ed. 1849, 1865 (1948).

[14] United States v. Painters Local Union No. 481, 172 F. (2d) 854, 856 (C. A. 2d, 1949).

[15]172 F. (2d) 854, 856 (C. A. 2d, 1949).

ing in the "regular course of publication," this latter apparently being regarded as a requisite of legitimacy in the *C. I. O.* decision.[16]

The tenor of the majority opinion in the *C. I. O.* case is that the action is lawful provided the distribution is substantially among members or stockholders or purchasers.[17] In the Supreme Court opinion nothing was said about the number of people affected, an extremely difficult, if not impossible factor to determine; yet this was the corresponding test adopted in the instant case. Even if those persons, not members of the union, who read the advertisement can be considered "purchasers," as the term was used in the *C. I. O.* decision, it is difficult to see how the nonmembers who heard the radio broadcast can be classified as such.[18] In addition, the argument for distinguishing the cases is supported by the fact that the circumstances presented in the *Painters Local* case are more similar to pamphleteering, which in the *C. I. O.* case was expressly distinguished from the point decided,[19] than they are to a union publishing its political opinions in a union newspaper.

The court's construction of the scope of the statute does not appear to be in accordance with the intent of the legislature. If one of the purposes of the Act was to prevent the great wealth of unions from playing a part in federal elections, then it is abrogating that purpose of the legislation to permit labor unions to place advertisements and make radio broadcasts in relation to those elections. Further violation of the legislative intent that:

> "... it seems unreasonable to suppose that the members of the union objected to its policy in criticizing candidates for federal

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[16]In a concurring opinion, Justice Rutledge, joined by three other members of the Court, indicated that in his opinion publication in regular course was a requisite to legitimacy under the view of the majority. 335 U. S. 106, 131, 68 S. Ct. 1349, 1361, 92 L. ed. 1849, 1866 (1948). This view seems warranted by the majority opinion where the phrase "in regular course" was used several times in describing the publication in question. 335 U. S. 106, 112, 123, 68 S. Ct. 1349, 1352, 1357, 1358, 92 L. ed. 1849. 1861, 1862 (1948).

[17]Throughout the opinion, legitimate publications are described as being published for members, stockholders or purchasers. 335 P. S. 106, 112, 121, 123, 68 S. Ct. 1349, 1352, 1357, 1358, 92 L. ed. 1849, 1856, 1861, 1862 (1948).

[18]It is interesting to note that during the congressional debates, Senator Taft said that it would be a violation of the law for a labor union "to put speakers on the radio for Mr. X against Mr. Y." 93 Cong. Rec. 6440 (1947).

[19]"It is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 and quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden." 335 U. S. 106, 122-123, 68 S. Ct. 1349, 1357, 92 L. ed. 1849, 1861 (1948).

> offices. In the CIO case this was thought to be true because the publication was 'a normal organizational activit[y]' .... In the case at bar, the expenditures were authorized by a vote of the union members at a meeting duly held."[20]

Admittedly it seems unreasonable to suppose that a majority of the members of the union objected to the expenditures, but it seems equally unreasonable to suppose that *all* of the members approved of incurring the expenses involved; therefore, the decision conflicts with the minority protection purpose of the legislation.

Inasmuch as both the *C. I. O.* decision and the present case place unwarranted restrictions on the statute,[21] and have only decided what are *not* violations of the legislation, it is extremely difficult to determine what the scope of the statute's application will ultimately be.[22] Obviously, labor organizations are forbidden to make direct contributions to campaign funds; and possibly if the organization were to support a candidate whom the majority of the members clearly opposed a violation would be found. But the decisions have thus far *presumed* that the union's views represented the view of the majority of the members, in the *C. I. O.* case because it was a "normal organizational activity," and in the instant case because the expenditures were approved "at a meeting duly held." Another limitation is suggested by the *Painters Local* case in that the expenditures were described by the court as "trifling." This may indicate that labor organizations will be permitted to participate in federal elections so long as their expenditures are not excessive.

Whatever the scope of Section 304 of the Taft-Hartley Act eventually proves to be, it appears that it will not greatly limit the ability of labor organizations to influence federal elections.

ALBERT F. KNIGHT

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[20]172 F. (2d) 854, 856 (C. A. 2d, 1949).

[21]To the effect that the C. I. O. decision is not in accordance with the statute, see: Kallenbach, The Taft-Hartley Act and Union Political Contributions and Expenditures (1948) 33 Minn. L. Rev. 1 (Supreme Court has not properly interpreted the Act); Notes (1949) 47 Mich L. Rev. 408 (Not a proper interpretation); (1948) 34 Va. L. Rev. 461 (union activities clearly violated the statute); 1949 Wis. L. Rev. 184 (test adopted by the court illogical and contrary to the terms of the section and its legislative history).

[22]It may be that the statute will be declared unconstitutional. Concerning this possibility, see: Kallenbach. The Taft-Hartley Act and Union Political Contributions and Expenditures (1948) 33 Minn. L. Rev. 1; Mulroy, The Taft-Hartley Act in Action (1948) 15 U. of Chi. L. Rev. 595, 626-628; Sutherland, Reasons in Retrospect (1947) 33 Corn. L. Q. 1, 26-28; Notes (1948) 96 U. of Pa. L. Rev. 888; (1949) 2 Vand. L. Rev. 322; (1948) 34 Va. L. Rev. 461; 1949 Wis. L. Rev. 184; (1948) 57 Yale L. J. 806.

NEGOTIABLE INSTRUMENTS—APPLICATION OF "IMPOSTOR RULE" TO CHECK ISSUED BY GOVERNMENTAL AGENCY. [Federal]

While it is agreed that, in the absence of an estoppel,[1] the drawer of a negotiable instrument cannot be charged when payment is made in reliance on a forged endorsement,[2] the risk is shifted to the drawer in the so-called "imposter" cases.[3] According to the "imposter rule" "the drawer of a . . . negotiable instrument, cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the . . . instrument is drawn and delivered to an impostor under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the . . . instrument is made payable, and the intermediary bank acquires it from the impostor upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement . . . ."[4]

This rule was recently adopted by the Federal Court of Appeals of the Fifth Circuit,[5] as being applicable to a check issued by the Veterans' Administration, a government agency, in *United States v. Continental-American Bank & Trust Co.*[6] In this case one Bertha Smith made a fraudulent application to the Veterans' Administration posing as Beulah Mitchell Gibbs, the un-remarried widow of Ben Gibbs, Jr. An officer of the Treasury Department drew six checks on the Treasury of the United States payable to Beulah Mitchell Gibbs. The checks were delivered to Bertha Smith, posing as Beulah Mitchell Gibbs. Bertha Smith endorsed the checks by signing her name as Beulah Gibbs and received payment on the checks from the defendant.[7] The defendant bank endorsed the check "Prior Endorsement Guaranteed" and received payment from the Treasury of the United States through normal banking channels. The United States brought suit to recover on the defendant bank's endorsement.[8]

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[1]Britton, Bills and Notes (1943) § 132.

[2]Britton, Bills and Notes (1943) § 128.

[3]Brannan, Negotiable Instruments Law (7th ed., Beutel 1948) 470.

[4]United States v. First National Bank, Albuquerque, N. M., 131 F. (2d) 985, 987 (C. C. A. 10th, 1942).

[5]It had already been adopted in the Tenth Circuit. United States v. First National Bank, Albuquerque, N. M., 131 F. (2d) 985 (C. C. A. 10th, 1942).

[6]175 F. (2d) 271 (C. A. 5th, 1949).

[7]There were six checks issued. Five of the checks were cashed with one of the banks, and the other check with another bank. The suit was against both of the banks for their respective checks cashed.

[8]A summary judgment for the government was reversed by this court in 1947 in Continental-American Bank v. United States, 161 F. (2d) 935 (C. C. A. 5th, 1947). That case is cited as controlling here. It is interesting to note that Judge Hutcheson, who dissented in the principal case, did not sit in on this earlier decision.

The Supreme Court of the United States had previously decided that when the federal government becomes a party to commercial paper, it is bound by the same rules which govern private persons under the same circumstances,[9] and that federal rather than local law governs controversies over commercial paper issued by the government, which law, in the absence of an applicable Act of Congress, the federal courts must fashion.[10] The question remaining in the principal case was whether the impostor rule should be adopted into the federal commercial law and govern in a case in which the government has issued a check to an impostor.

The majority of the court, after distinguishing the cases relied upon by the government as being cases of forgery and thus not being subject to the impostor rule, decided that, absent an expression by the Supreme Court, a case[11] decided by the Tenth Circuit correctly sets out the federal law—that the impostor rule does apply in cases where the government issues checks to impostors.

Judge Hutcheson, dissenting, stated that while there may be some reason for the impostor rule where the drawer deals personally with the impostor and the bank, it should not apply to impersonal governmental transactions.[12]

In support of the rule, it is said that "most courts hold that while the drawer acts in the mistaken belief that the person with whom he deals either in person or by correspondence is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill, or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement; and that accordingly payment to him or his endorsee merely effectuates the intent of the drawer."[13] The drawer is said to have a dual intent: (1) an intent to pay the party to whom the check is given, and (2) an intent to pay the impersonated party, to whom the obliga-

[9]Clearfield Trust Co. v. United States, 318 U. S. 363, 63 S. Ct. 573, 87 L. ed. 838 (1943). In this case a check was sent to one whom the government actually owed. It was not received by the creditor but was stolen and endorsed with the payee's name. This was not a case of imposture, but a simple case of forgery, and the decision of the Supreme Court did not, therefore, decide the issue of the principal case.

[10]National Metropolitan Bank v. United States, 323 U. S. 454, 65 S. Ct. 354, 89 L. ed. 383 (1945).

[11]United States v. First National Bank, Albuquerque, N. M., 131 F. (2d) 985 (C. C. A. 10th, 1942).

[12]175 F. (2d) 271, 273 (C. A. 5th, 1949).

[13]United States v. First National Bank, Albuquerque, N. M., 131 F. (2d) 985, 988 (C. C. A. 10th, 1942).

tion is owed. It is the first intention that is generally held to prevail, with the resulting loss on the drawer.[14] It is argued that the bank should not have the "burden of correcting a mistake made or detecting a fraud committed."[15] The responsibility of the bank is to make certain that the indorsement is made by the person to whom the check was issued and delivered. "They [the bank] guarantee that the person to whom the check was issued has indorsed it, but not that the check was honestly procured from the drawer."[16]

As a further reason for applying the impostor rule in the principal case, it is pointed out that government checks are freely employed in the commerce of the country, and if more than a reasonable identification is the regular course of business is required it would tend to destroy the free negotiability of the government's obligations.[17]

On the other hand, it would appear that logic is against the adoption of this impostor rule in general, and especially in cases where the government is dealing through its agencies.

It has been suggested that this rule was developed upon a false analogy to the same situation in the law of sales wherein it is recognized if goods are delivered to an imposter, the imposter can pass good title to a bona fide purchaser. "The sales cases involving ordinary personal property bear no warning as to the requisite of any indorsement, whereas the very word 'order' on negotiable paper should be a warning to the purchaser that he cannot rely on possession alone, but must be sure the order payee's authentic indorsement is on the instrument."[18]

In the instant case the check in question was made payable to the order of Beulah Gibbs, and no title could pass without the endorsement of Beulah Gibbs. Of this fact the bank was aware, as it did require an endorsement. The difficulty arose in the endorsement, made, not by the real Beulah Gibbs, but by Bertha Smith, who was posing as Beulah Gibbs. At this point the fiction of the impostor rule is applied by saying the "objective" intent of the drawer, here the government,

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[14]Brannan, Negotiable Instruments Law (7th ed., Beutel 1948) 476.

[15]United States v. Continental-American Bank & Trust Co., 175 F. (2d) 271, 272 (C. A. 5th, 1949).

[16]United States v. Continental-American Bank & Trust Co., 175 F. (2d) 271, 272 (C. A. 5th, 1949).

[17]United States v. Continental-American Bank & Trust Co., 175 F. (2d) 271 (C. A. 5th, 1949).

[18]McDowell, Ambiguous Payees of Negotiable Paper (1942) 2 Wash & Lee L. Rev. 44, 51. It might be well to note here that in the law of sales if the impersonation is made through the mails, the imposter cannot pass good title. Cundy v. Lindsay, 3 App. Cas. 459 (1878); Newberry v. Norfolk & Southern Ry., Co., 133 N. C. 45, 45 S. E. 356 (1903).

was to pay the party making the fraudulent application—i.e., Bertha Smith—and so title to the check passes to the bank, thus carrying out the "objective" intent of the drawer. Although no cases have been found on the point, it would seem that if this fiction were extended to its logical conclusion the real Beulah Gibbs would commit a forgery by endorsing the check, had she gained possession from Bertha Smith, as it would be contrary to the "objective" intent of the drawer.

It was argued by the dissent, that while "There is some reason in the 'impostor rule' when it is applied to a transaction in which the drawer deals personally with the imposter and with the bank, and thus furnishes the identification on which the bank relies,"[19] here there seems to be little reason to adopt the rule. The Veterans' Administration, by its requirements of application, established the identity of the party as well as possible where the operation is on such a large and impersonal scale. The check was made payable to the "order of Beulah Gibbs," and requirements of identification were placed on the bank.

The record is not clear on the method of identification required by the defendant bank before cashing the check. It appears, however, that a local concern would have a better opportunity to make certain of the identification of the payee than would the Veterans' Administration. In cases of checks made payable to "order," positive identification is required by the payor.[20] Should the drawer by letters or other means of identification put the impersonator in the position of misleading the payor, then a true estoppel could work against the drawer.

The dissent further points out that the bank voluntarily assumed the burden of positive identification by its own endorsement.[21] The argument seems sound that while the bank may be relieved of liability under the impostor rule, it can, voluntarily, assume liability on its own endorsement by guaranteeing the prior endorsement.

Since the question is ultimately one as to which of two negligent parties should bear the loss of the fraud, it is believed that a more ob-

[19]United States v. Continental-American Bank & Trust Co., 175 F. (2d) 271, 273 (C. A. 5th, 1949).

[20]Uniform Negotiable Instruments Law § 23. "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

[21]United States v. Continental-American Bank & Trust Co., 175 F. (2d) 271, 273 (C. A. 5th, 1949).

jective standard should be adopted in preference to the present "dual intent" theory of the impostor rule. It seems illogical that where a drawer negligently leaves a check payable to order on a bank counter or negligently loses it and the finder forges an endorsement he is protected under the Uniform Negotiable Instruments Law[22] and may require the bank to recredit his account, while if he negligently gives it to an impostor he has no such rights.[23] In the first instances, there is a forgery to break the chain of title, whereas in the latter case it is said title can pass through an impostor. It is hardly reasonable that the manner in which the forger or imposter gets control of the instrument should affect the requirements of identification of the endorser. In the impostor cases some courts argue that the burden will be imposed on the drawer because his negligence first facilitated and made the loss possible.[24] However, the negligence of the drawer in losing a check should fit under this same rule; but the contrary result is reached, as there forgery enters to "break the chain."

One possibility of a more objective standard in the impersonation cases would be to let the question go to a jury to determine which of the parties had a better opportunity to uncover the impostor. The drawer could show that the named payee was an actual creditor of his, or one with whom he normally did business so that his suspicions were not aroused by the request for payment. The payor could offer the method it required for proper identification of the payee.

The comparative fault approach indicates the specific objection to the rule as applied against a governmental agency in a situation like that of the principal case. As the dissent contended, it is entirely inappropriate because a governmental drawer often does not have an adequate opportunity to make a sufficient investigation in many cases, whereas the bank does have such an opportunity.

Adoption of the impostor rule by the courts of two of the federal circuits seems to be an unfortunate development. It is to be hoped that the Supreme Court will ultimately see fit to point out the reasons why the rule should not apply, as it is now used, against governmental agencies.[25]

RAY S. SMITH, JR.

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[22]Uniform Negotiable Instruments Law § 23; Brannan, Negotiable Instruments Law (7th ed., Beutel 1948) § 23.

[23]Under the impostor rule. See the collected cases in Brannan, Negotiable Instruments Law (7th ed., Beutel 1948) 470-480.

[24]United States v. First National Bank, 124 F. (2d) 484 (C. C. A. 10th, 1941); Missouri Pacific Railway Co. v. Cohn Co., 164 Ark. 335, 261 S. W. 895 (1924).

[25]In the proposed Uniform Commercial Code, May, 1949 Draft, the impostor

PROCEDURE—DIVISIBILITY OF RIGHT TO RECOVER DAMAGES FOR INJURIES TO PERSON AND PROPERTY SUSTAINED IN SAME ACCIDENT. [Virginia]

The majority of the American courts agree that a single cause of action arises when injury occurs to both the person and his property from the same tortious act.[1] Thus, if the injured party recovers a judgment for either element of his damage, he is barred from any further recovery, since it is a universally accepted maxim of common law that a single cause of action cannot be divided into several distinct suits.[2] The basis for this rule is two-fold: 1. Interest rel publicae, ut sit finis litium. (It concerns the commonwealth that there be a limit to litigation.), and 2. Nemo debet bis vexari pro una et eadam causa (No one ought to be twice vexed for one and the same cause).[3]

Though long established as a rule of law, this principle nevertheless continues to be subjected to challenge in the courts. Thus, in *Carter v. Hinkle*,[4] a recent case of first impression in Virginia, the plaintiff, having suffered injury to both his person and his automobile as a result of the negligent operation of another automobile by defendant, recovered a judgment for the damages to his automobile, and then sued

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rule is adopted: § 3-404 "Impostors; Signature in Name of Payee (1) With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons... (a) an impostor who through the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee...."

[1]Southern Ry. Co. v. King, 160 Fed. 332 (C. C. A. 5th, 1908); Birmingham Southern R. R. Co. v. Linter, 141 Ala. 420, 38 So. 363 (1904); Jenkins v. Skelton, 21 Ariz, 663, 192 Pac. 249 (1920); Seger v. Town of Barkhampsted, 22 Conn. 290 (1853); Georgia R. & Power Co. v. Endsley, 167 Ga. 439, 145 S. E. 851 (1928) Fiscus v. Kansas City Public Service Co., 153 Kan. 493, 112 P. (2d) 83 (1941); Cassidy v. Berkovitz, 169 Ky. 785, 185 S. W. 129 (1916); Pillsbury v. Kesslen Shoe Co., 136 Me. 235, 7 A. (2d) 898 (1939); Baltimore & Ohio R. R. v. Richie, 31 Md. 191 (1869); Dearden v. Hey, 304 Mass. 639, 24 N. E. (2d) 644 (1939); Szostak v. Chevrolet Motor Co., 279 Mich. 603, 273 N. W. 284 (1937); King v. Chicago, M. & St. P. R. Co., 80 Minn. 83, 82 N. W. 1113 (1900); Kimball v. Louisville & N. R. vo., 94 Miss. 396, 48 So. 230 (1909); Chamberlain v. Mo.-Ark. Coach Lines, Inc., 354 Mo. 461, 189 S. W. (2d) 538 (1945); Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686 (1929); Anderson v. Jacobson, 42 N. D. 87, 172 N. W. 64 (1919); Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 Atl. 59 (1922); Holcombe v. Garland & Denwiddie, Inc., 162 S. C. 379, 160 S. E. 881 (1931); Boos v. Claude, 69 S. D. 254, 9 N. W. (2d) 262 (1943); Mobile & O. R. Co. v. Matthews, 115 Tenn. 172, 91 S. W. 194 (1906); Smith v. Lenzi, 74 Utah 362, 279 Pac. 893 (1929); Moultroup v. Gorham, 113 Vt. 317, 34 A. (2d) 96 (1943); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926); Booth v. Frankenstein, 209 Wis. 362, 245 N. W. 191 (1932).

[2]1 C. J. S., Actions § 102 (b).

[3]United States v. Throckmorton, 98 U. S. 61, 65, 25 L. ed. 93, 95 (1878).

[4]189 Va. 1, 52, S. E. (2d) 135 (1949). Justice Eggleston wrote a dissenting opinion, in which Chief Justice Hudgins concurred.

for his personal injuries in a different action. The Supreme Court of Appeals of Virginia, in holding that the plaintiff's recovery of judgment for damages to his property did not bar his maintaining a separate action for personal injuries resulting from the same wrongful act, adopted the English[5] and minority American view[6] that there are two separate causes of action where both the person and his property are injured.

The minority view is based upon the reasoning that mere negligence in the air is not actionable, and it is only when the rights of another have been violated that a cause of action arises.[7] Thus, one cause of action arises when the person is injured and another arises when his property is damaged. However, these courts do not rely solely on such syllogistic reasoning but justify their holding by pointing to marked differences in the two causes of action which make it inconvenient to require them to be combined. The differences most commonly stated are: 1. creditors can levy only on a claim for injury to property, 2. the claim for property damage is the only one which passes to a trustee in bankruptcy, 3. the injury to property alone survives the death of the injured party, 4. different periods of limitation apply to each claim, and 5. only the cause of action for injury to property is assignable.[8]

Either of the first two considerations would appear to involve disadvantages to the injured party in that an attaching creditor or a trustee in bankruptcy would acquire the claim concerning property damage and upon reducing it to judgment would deprive the injured party of his claim for personal injuries. However, it seems that their importance is minimized by the fact that as far as it can be ascertained there are no American cases[9] arising from such such situations.[10] The

[5]Burnsden v. Humphrey, 14 Q. B. D. 141 (1884).

[6]Borden's Condensed Milk Co. v. Mosby, 250 Fed. 839 (C. C. A. 2d, 1918); Boyd v. Atlantic Coast Line R. R., 218 Fed. 653 (S. D. Ga. 1914); Schermerhorn v. Los Angeles Pac. R. R. Co., 18 Cal. App. 454, 123 Pac. 351 (1912); Clancy v. McBride, 338 Ill. 35, 169 N. E. 729 (1930); Smith v. Red-Top Taxicab Corp., 111 N. J. L. 439, 168 35, 169 N. E. 729 (1930); Smith v. Red-Top Taxicab Corp., 111 N. J. L. 439, 168 Atl. 796 (1933); Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772 (1902); Vasu v. Kohlers, 145 Ohio St. 321, 61 N. E. (2d) 707 (1945); Baltimore American Insurance Co. of New York v. Cannon, 181 Okla. 244, 73 P. (2d) 167 (1937); Wilson v. Portland, 153 Ore. 679, 58 P. (2d) 257 (1936); Watson v. Texas Pac. Ry., 8 Tex. Civ. App. 144, 27 S. W. 924 (1894).

[7]Burnsden v. Humphrey, 14 Q. B. D. 141, 150 (1884).

[8]Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, 44, 62 N. E. 772, 773 (1902).

[9]However, in the English case of Wilson v. United Counties Bank, Ltd., [1920] App. Cas. 102, it was held that, in a case where a bankrupt had suffered injury to both his property and person by a single wrongful act, both the trustee in bankruptcy and the bankrupt could maintain separate actions, this holding being con-

third difference is of little importance, inasmuch as most states, including Virginia, have by statute declared that a cause of action for injuries to the person who will survive his death, regardless of whether death resulted from the injuries or not.[11] Similarly, the fact that the limitations on the two causes of action differ appears to offer no difficulty. Whether the tort is considered as whole or separable, the injured party would in either event have to bring his suit before the lapse of the shorter statute of limitations or else lose that portion of his claim to which the shorter limitation applies; but the running of the shorter limitation period should not bar the whole claim but merely that portion of the claim to which it applies.[12] However, the fact that only the portion of the claim relating to property damage can be assigned may, in some cases, be sufficient justification for holding that two causes of action arise from a single negligent act which injures both the person and property of another.

It should be noted that practically all the cases which have adopted the single-cause-of-action rule concern situations where the plaintiff is suing in his own behalf for both his personal injuries and property damages.[13] As a result of the operation of the principle, the injured party suffered the loss of part of his original dual right because he had failed to assert both aspects in a single cause of action, as he could have readily done, and instead sought unnecessarily to subject the defendant to the burden of two suits.

However, most cases arising today involving injury to the person and his property are automobile accident cases, and in the majority of these cases the insured receives payment for his property damage from an insurance company, to which the claim against the negligent party

sistent with the English separate-cause-of-action theory. See also, Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127, 145 (1886) and Rose v. Buckett [1901] 2 K.B. 449.

[10]It might be argued that the absence of cases concerning these differences indicates that the injured party has invariably allowed the creditor or trustee in bankruptcy to take that portion of the claim relating to property and reduce it to judgment, thereby losing whatever claim he had for personal injury. Following this argument, the first two differences would appear to be of the utmost importance. However, it seems unlikely that all such impoverished parties would be so timid as never to have pursued their claims for personal injuries to a court of record.

[11]McCormick, Damages (1935) § 93. Va. Code Ann. (Michie, 1942) § 5790. "... and, where an action is brought by a person injured for damage caused by the wrongful act, neglect, or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative."

[12]Notes (1940) 20 B. U. L. Rev. 398, 400; (1930) 25 Ill. L. Rev. 219, 221.

[13]See note 1, supra.

is assigned.[14] It is an accepted principle that one cannot evade the prohibition against splitting a cause of action by assigning a portion of his claim to another, but this principle should not be made applicable to a situation where the automobile owner has by contract, before any injury to his person or property has occurred, agreed that the insurance company shall have certain equitable rights.[15] Thus, where these rights intervene, there does not appear to be anything vexatious in allowing the insurance company to assert its rights received by assignment against the wrongdoer, who is, after all, the cause of the difficulty by his tortious conduct. True, even a murderer can be put in jeopardy but once for the same offence; but the negligent party here has violated the rights of two different parties and therefore can fairly be called upon to stand separate suits by each to enforce his own claim.

Adoption of such a system has the advantage of eliminating troublesome practical problems involved in bringing a joint action in behalf of both the injured party and the insurance campany—the difficulties of coordinating the efforts of counsel for the two claimants and of satisfying both as to the mechanics of prosecuting the suit. Furthermore, the interest of the public in maintaining insurance rates at a low level would seem sufficient to warrant protecting automobile insurance companies against the risk of having their assigned claims barred by the assignor's bringing suit for personal injuries against the negligent party before the insurer can enforce its claim in the courts.

It is to be noted, however, that the Virginia court has chosen to recognize the divisibility of the damages claims in a case in which no insurance factor appears to have been involved, and in which the injured party was suing in his own behalf. His election to bring two separate suits to enforce rights which could seemingly have more easily been asserted in a single action gives weight to the warning sounded by the dissenting justices that "The . . . rule, now adopted by the majority of this court, is an invitation to a plaintiff to prolong the litigation

[14]It should not be overlooked, however, that most automobile insurance policies have deductible minimums—that is, the insured must bear the loss for damage to his automobile up to a certain amount, usually fifty dollars. Consequently, the insured will still have a claim for property damage after assignment to the insurance company, which is generally recovered by having the insurance company include this amount in its suit.

[15]A condition of the standard automobile insurance policy in Virginia states: "Subrogation—In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

and to harass a defendant with a number of suits by making each element of damage a separate cause of action."[16] The majority opinion does make passing reference to "Questions involving the rights of automobile insurance carriers... [and] rights of assignees...."[17] But it would seem that the interests of such insurance companies could be protected adequately by recognizing an exception to the single-cause of-action theory where they are subrogated to the insured's claim for property damages, rather than by adopting in toto a separate-cause-of-action rule which would allow the injured party arbitrarily to bring two suits instead of one where there is no need for so doing. At least two states[18] have followed this compromise course. Although they adopt the majority view as a general rule, they recognize an exception where an insurance company has been subrogated to the injured party's claim for property damage.

WILLIAM S. HUBARD

TORTS—CAUSE OF ACTION OF MINOR CHILD FOR ENTICEMENT OF ITS PARENT. [Minnesota]

During the past few years repeated assertion in the courts of a hitherto unrecognized type of liability has raised the question whether a minor child has such a right in the parent-child relationship, or in the family unity,[1] as to make one who entices the parent away liable in damages to the child. Decisions that the child does have such a right indicate a considerable growth in the field of domestic relations with respect to the rights, duties, and liabilities of family members.

In early Roman law the pater-familias was allowed an action for physical injury to his wife, child, or servant. The action was based on the status created by law; the subordinate members were so identified with the family head that an injury to one of them was considered an

[16]189 Va. 1, 13, 52 S. E. (2d) 135, 141 (1949).

[17]189 Va. 1, 12, 52 S. E. (2d) 135, 140 (1949).

[18]Lloyds Insurance Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686 (1929).

[1]In Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. (2d) 810 (1947), the court allowed assertion of the child's right as growing out of the family unity, following Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464, 466, 167 A. L. R. 232, 235 (1946) wherein it was stated: "Moreover, as to criminal conversation and alienation of affections, these involve rights which all members of the family have a right to protect. Not only does every member of the family have a right to protect the family relationship but the State likewise has an interest in the sacredness of the family relationship."

injury to him. This liability for physical injury was carried into early common law, but the basis changed in the transition from "identity" to "loss of services."[2] Subsequently, in 1349, the Ordinance of Labourers[3] was passed, declaring liability for loss of services not only for the infliction of physical violence upon a servant, but also for his enticement or harbouring. Inasmuch as a wife or children were considered in practically the same status as servants, the liability created by the statute was extended to cover their enticement and consequent loss of services.[4] The concept on which liability was based gradually changed, however, where family members were involved; although loss of services continued to be spoken of as the gist of an action for enticement of children, once that loss was established damages were allowed for mental suffering, loss of companionship, and for any expenses incurred in regaining the child.[5] Courts eventually construed the basis to be *right to,* rather than *loss of,* services,[6] and some, frankly admitting the actual injury to be due to the closeness of the relationship, have held the basis to be the mental suffering and loss of companionship resulting from the enticement.[7] Indeed, the husband's interests in the marital relationship received broad recognition at an early period, as a bundle of rights, called "consortium," to the services, society, and sexual intercourse of his spouse.[8] His legally protected interests were increased by recognition of his right to her affections and allowance of an action for their alienation.[9] Married Women's Acts, by removal of

[2]Robert Marys's Case, 9 Co. Rep. 11b, 77 Eng. Rep. 895 (1612). For a period the action for abduction of a child lay only where the child was the son and heir, with the father's action based on his right to his son's marriage. Barham v. Dennis, 2 Cro. Eliz. 770, 78 Eng. Rep. 1001 (1600). See Prosser, Torts (1941) 930, 976.

[3](1349) 23 Edw. III, st. 1, 2 Stat. at Large 26.

[4]Moran v. Dawes, 4 Cow. 412 (N. Y. 1825); Hall v. Hollander, 4 B. & C. 660, 107 Eng. Rep. 1206 (1825); Gray v. Jefferies, 1 Cro. Eliz. 55, 78 Eng. Rep. 316 (1587).

[5]Badgley v. Decker, 44 Barb. 577 (N. Y. 1865); Ingersoll v. Jones, 5 Barb. 661 (N. Y. 1849).

[6]Soper v. Igo, Walker & Co., 121 Ky. 550, 89 S. W. 538, 1 L. R. A. (N.S.) 362 (1905); Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341 (1858); Badgley v. Decker, 44 Barb. 577 (N. Y. 1865).

[7]"The true ground of action is the outrage, and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rendering agony he must suffer in the destructon of his dearest hopes, and the irreparable loss of that comfort, and society, which may be the only solace of his declining age." Kirkpatrick v. Lockhart, 2 S. C. 133, 134, 2 Brev. 276, 279 (1809). See also, Howell v. Howell, 162 N. C. 283, 78 S. E. 222, 45 L. R. A. (N.S.) 867 (1913); Pickle v. Page, 252 N. Y. 474, 169 N. E. 650, 72 A. L. R. 842 (1930); Restatement, Torts (1938) Sec. 700, comment d.

[8]Winsmore v. Greenbank, Willes 577, 125 Eng. Rep. 1330 (1745).

[9]Heermance v. James, 47 Barb. 120 (N. Y. 1866).

the wife's legal disability, extended the same protection to her interests in the relationship.[10]

Not until quite recently has such recognition been extended to a minor child's right to an undisturbed relationship with its parent as to make one enticing the parent away liable to the child. To date, there appear to have been only ten cases decided in the higher courts presenting the question directly, with four of them allowing,[11] and six disallowing,[12] recovery to the child. In the latest of these, *Miller v. Monsen*,[13] a suit was brought on behalf of a six year old daughter for the enticement of her mother from the home where she had lived with plaintiff, husband and other children, resulting in a deprivation to plaintiff of the maternal love, affection, devotion, care and services flowing to her as a natural consequence of the relationship. The case presents to some degree a summary of the arguments for and against the allowing of such actions.

The arguments presented against allowing the suit may be brought within two broad categories: first, that there is neither common law precedent for allowing the particular action[14] nor a legally recognized common law duty on the part of the parent from which a legally protected right in the child may be deduced, and, consequently, in allowing the action a court would be exercising what is properly a legislative function; second, that there are numerous practical objections to the allowance of this type of action, springing from inherent disabilities in the judicial system, and evidenced by current legislation abrogating the cause for which an extension is sought.[15] These ob-

[10]Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829 (1889); Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389 (1891).

[11]Daily v. Parker, 152 F. (2d) 174, 162 A. L. R. 819 (C. C. A. 7th, 1945); Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. (2d) 810 (1947); Miller v. Monsen, 37 N. W. (2d) 543 (Minn. 1949); Russick v. Hicks, 85 F. Supp. 281 (W. D. Mich. 1949).

[12]McMillan v. Taylor, 160 F. (2d) 221 (App. D. C. 1946); Rudley v. Tobias, 84 Cal. App. (2d) 454, 190 P. (2d) 984 (1948); Taylor v. Keefe, 134 Conn. 156, 56 A. (2d) 768 (1947); Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (1934); Garza v. Garza, 209 S. W. (2d) 1012 (Tex. Civ. App. 1948); Henson v. Thomas, 56 S. E. (2d) 432 (N. C. 1949). See in connection with these cases: Fitzgerald, The Celebrated Case of Daily v. Parker (1947) 15 Kan. City L. Rev. 443; Notes (1935) 20 Corn. L. Q. 255; (1946) 41 Ill. L. Rev. 444; (1947) 19 Miss. L. J. 114; (1946) 26 Ore L. Rev. 63; (1946) 15 U. of Chi. L. Rev. 400; (1934) 83 U. of Pa. L. Rev. 276; (1935) 21 Va. L. Rev. 443; (1948) 34 Va. L. Rev. 359.

[13]37 N. W. (2d) 543 (Minn. 1949).

[14]The same argument has been made against allowing the wife actions for her husband's enticement after Married Women's Acts granted her legal capacity. Farrell v. Farrell, 118 Me. 441, 108 Atl. 648 (1920); Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522 (1890).

[15]"Heart Balm" legislation has been enacted in approximately one-fourth of the states abolishing actions for alienation of affections, enticement, breach of

jections, variously stated, are: (1) allowing the action would lead to a flood of litigation;[16] (2) the nature of the injury is such that there is considerable difficulty in properly assessing damages, and those recoverable may overlap with those of other family members;[17] (3) courts would be unable to define properly the point at which the child's rights arose or would be extinguished by marriage, divorce, emancipation, etc.; (4) actions for enticement, alienation of affections, and criminal conversation, involving as they do an accusation of moral obliqueness, and attended as they are by some publicity, have led to so much extortionate litigation and settlement out of court that many states have abolished them altogether; (5) finally, the child's rights are already sufficiently protected by support statutes and by procedures allowing wronged parents to claim additional damages in their actions where children are present.[18]

The Minnesota court in the *Miller* case refutes, at least to its own satisfaction, each of these objections. To the contention that there was at common law no precedent nor legally enforceable duty on which to base the action, the court answered that if any rule has ever existed for denying recovery it "has been swept away by modern legislation such as married women's acts . . . and by social change which has entirely altered the status, rights, and duties of members of the family . . . ."[19] In any case, "Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common-law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense."[20]

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promise to marry, etc. Fearon v. Treanor, 272 N. Y. 268, 5. N. E. (2d) 815, 109 A. L. R. 1229 (1936). See Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464, 167 A. L. R. 232 (1946); Kane, Heart Balm and Public Policy (1936) 5 Ford. L. Rev. 63; Feinsinger, Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions (1935) 10 Wis. L. Rev. 417.

[16]"I am convinced that to uphold this complaint would open our courts to a flood of litigation that would inundate them. It would mean that everyone whose cheek is tinged by the blush of shame would rush into court to ask punitive damages to compensate them for their distress of body and mind and the damage that their reputation suffered in the community." Morrow v. Yannantuono, 152 Misc. 134, 135, 273 N. Y. Supp. 912 (1934).

[17]The fact that damages awarded sometimes appear disproportionate may be a large factor in decision against allowance of the action. The settlement in the Daily case was for $101,000 according to Note (1946) 41 Ill. L. Rev. 444. See Note (1930) 66 A. L. R. 609 for other awards of damages in alienation of affections suits.

[18]Garza v. Garza, 209 S. W. (2d) 1012 (Tex. Civ. App. 1948).

[19]37 N. W. (2d) 543, 548 (Minn. 1949).

[20]37 N. W. (2d) 543, 547 (Minn. 1949).

The argument that allowing the action would lead to a flood of litigation and to extortionary actions was refuted by the observation that there had been no such misuse of the action since its recognition in other states, that this objection could be made to many recognized actions, and that a mere increase in number of suits would not be sufficient reason for denying the action. It was further pointed out that the difficulties in assessing damages and in defining the child's rights, though undeniable, are the same types of problems met by juries in determination of liability in cases of wrongful death, where damages are awarded beneficiaries in view of their loss of reasonably expected benefits from the deceased.[21] To the objection that the child's right is sufficiently protected by statute or by actions allowed its remaining parent, the court answered that the child is injured directly by the defendant's enticement and the injury is in no wise a derivative of its parent's cause of action.

The issue presented in the *Miller* case has not been litigated sufficiently in the higher courts to establish either view as "majority" or "minority." Although the cases disapproving allowance of the action have a numerical superiority, their standing is somewhat weakened by the fact that in *Morrow v. Yannantuono*[22] the decision appeared controlled by the fear of a "flood of litigation;"[23] that *McMillan v. Taylor*[24] approved the *Morrow* case without discussion of the merits; that the decision in *Rudley v. Tobias*[25] was rendered in accordance with what the court considered a previously expressed preference of the California legislature; and that in *Garza v. Garza*[26] the court admitted the child to have a right to the many benefits flowing from its relationship with its father, but declined to secure them against interference by third parties.[27] Among the cases denying the action, *Taylor v. Keefe*[28] gives the most thorough diagnosis of the controversy;

[21]"The law has never denied recovery to one entitled to damages simply because of uncertainty as to the extent of his injury and the amount which would properly compensate him." Hinish v. Meier & Frank Co., Inc., 16 Ore. 482, 113 P. (2d) 438, 448 (1941).

[22]152 Misc. 134, 273 N. Y. Supp. 912 (1934).

[23]See note 16, supra.

[24]160 F. (2d) 221 (App. D. C. 1946).

[25]84 Cal. App. (2d) 454, 190 P. (2d) 984 (1948).

[26]209 S. W. (2d) 1012 (Tex. Civ. App. 1948).

[27]"We recognize the right of a child to expect from its father support, maintenance, love, affection and counsel. The law of Texas has provided a way in which support and maintenance can be obtained from the father for a child." Garza v. Garza, 209 S. W. (2d) 1012, 1015 (Tex. Civ. App. 1948).

[28]134 Conn. 156, 56 A. (2d) 768 (1947).

the Connecticut court conceded that it possessed the power to allow or disallow the action, adopting the view that in the last analysis the problem is sociological rather than legal,[29] and that the vital issue is whether the courts *should* exercise their admitted power of lawmaking in this instance. But after consideration of most of the practical objections, the court decided against the action.

Common law courts traditionally have exercised a power to disallow an action to certain classes or groups from practical considerations of policy[30] even when the action is theoretically sound and analagous to other categories of liability. But they have exercised also a power to enlarge a particular category of liability by appropriate analogy and recognition of gradually changing interests, rights, and duties. This process having long been the chief source of the growth of the law,[31] no violence is done to traditional common law practices or principles by the imposition of liability in accord with the Minnesota court's arguments in the *Miller* case. The broad principle deducible from decisions imposing liability for unwarranted interference with relational interests—as applied in the categories of defamation, malicious prosecution, invasion of privacy, injurious falsehood in social or economic relations, or even as applied in contractual relations—is not limited by the requirement that the advantage derived from the relationship be enforceable as a matter of legal right between the parties to the relationship. Liability is predicated in such cases on the right of the plaintiff against one interfering with a relationship recognized by custom as worthy of protection. The parent-child relationship is one of those so recognized historically, and extension to the child of the protection already accorded the parent would appear to work no change in the principle.[32]

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[29]Note (1946) 162 A. L. R. 824. Such a distinction does not appear proper when it is considered that most legal problems have sociological implications.

[30]"Practical considerations must at time determine the bounds of correlative rights and duties...." Justice Lehman, in Comstock v. Wilson, 257 N. Y. 231, 177 N .E. 431, 432 (1931).

[31]"Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them." Pasley v. Freeman, 3 T. R. 51, 63, 100 Eng. Rep. 450, 456 (1789).

[32]Three slightly varying rules allowing recovery have emerged from the Daily case, 152 F. (2d) 174, 162 A. L. R. 819 (C. C. A. 7th, 1945), the Miller case, 37 N. W. (2d) 543 (Minn. 1949), and the Johnson case, 330 Ill. App. 598, 71 N. E. (2d) 810

On the other hand, society has interests not only in the protection of its individual members and in the maintenance of the family as an institution, but also in allowing its members the maximum freedom of association possible within reason and in the prevention of a widespread misuse of law for extortion or vengeance. The question remains as to whether the social interest in the protection of the child's rights to parental support, protection, guidance, affection, and freedom from dishonor and stigma outweighs the social interest in the protection of a parent's or third party's freedom of association unhampered by the fear of extortionary proceedings or liability disproportionate to the wrong inflicted. The child's rights and interests as presented have the support of a principle protecting like rights and interests, and objection to their assertion should be great to deny the application of the principle. Where, as here, the objections are to problematic rather than certain faults involved in the allowance of the action, and where the objections based on the action's possible abuse in practice may be susceptible of legislative correction through statutory limitations on the amount of damages recoverable, denial of their claim to the whole class of injured plaintiffs seems too great a cost for the uncertain protection of a group who have acted without regard to plaintiffs' interests in valuable relationships.[33]

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(1947). In the Daily case recognition was extended to the child's right to its parent's services and society notwithstanding the fact that in the interest of family harmony the right is unenforceable against the parent, thus bringing the case within the rule allowing recovery to a parent when he has a right to the child's services and society. In the Miller case the court, although it asserted the child's right to its parent's services, etc., went further and allowed recovery on the broader premise that interference with a beneficial relationship gives rise to an action even though the relationship confers no rights between the parties to it; liability in this case would probably be limited, however, to interference with previously recognized relationships, such as that of parent and child. No such limitation appears in the Johnson case, wherein liability was imposed for an interference with the family unity, and under its rule a defendant might be liable not only to a parent or child but to brothers or sisters as well.

[33]Two of the ten cases which involved the question discussed in this comment were decided after the comment was drafted and are not discussed in the text. In one of them, Russick v. Hicks, 85 F. Supp. 281 (W. D. Mich. 1949), the court allowed the child's action though a typical "heart balm" statute was in force. In the other, Henson v. Thomas, 56 S. E. (2d) 432 (N. C. 1949), the action was disallowed, with a strong dissent being registered by Justice Seawall and concurred in by Justice Ervin.

TORTS—UNCONSCIOUS LAST CLEAR CHANCE OF DEFENDANT AS BASIS FOR ALLOWANCE OF RECOVERY FOR INATTENTIVE PLAINTIFF. [Virginia]

In its beginning, the doctrine of last clear chance represented simply a reasonable qualification of the general rule of contributory negligence, placing emphasis upon the time sequence of events, and the superior opportunity of a defendant to avoid injury to a plaintiff.[1] The doctrine still is the most commonly accepted modification of the strict contributory negligence rule,[2] but its scope has been considerably broadened since its origin.[3]

As now applied in the greater number of American jurisdictions,[4] the last clear chance doctrine involves marked distinctions both as to parties and factual situations. It always presupposes a situation in which the plaintiff is contributorily negligent, and offers him a way to recover, despite his negligence.[5] For the purposes of applying the doctrine, two types of plaintiffs are recognized: (1) a plaintiff whose negligence has placed him in a position of helpless peril, and (2) a plaintiff who is merely inattentive to his surroundings.[6] Similarly, two classes of situations are recognized with regard to the attitude of the defendant: (1) Where a defendant actually sees the plaintiff, and realizes or should realize his peril, and fails to exercise ordinary care to avoid injury, he may be said to have a "conscious" last clear chance. (2) When the defendant is not actually aware of the plaintiff's presence, but in the exercise of reasonable care would have been aware of

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[1]The doctrine had its origin in the celebrated English case of Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. (1842). It was held that plaintiff could recover, regardless of his own negligence in leaving his donkey fettered on the highway, if defendant, by exercising reasonable care, could have avoided driving his carriage against the animal. In its origin, the doctrine seems to have been an application of the doctrine of proximate cause, and many modern cases so consider it. Viewed in such a light, the subsequent negligence of the defendant is considered to be, as between the parties, the proximate cause of the injury, and the plaintiff's negligence then becomes a remote cause. Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711 (1930); Southern Ry. Co. v. Bailey, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N.S.) 379 (1910).

[2]Prosser, Torts (1941) 408.

[3]It is doubtful that the court, in Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842) had any intention of enunciating a new doctrine. 38 Am. Jur. 902. But it cannot be doubted that a full-fledged legal doctrine has been developed. The modern cases involved a wide range of factual situations, including injury to both person and property. For a general discussion of the scope of the last clear chance doctrine, see Note (1934) 92 A. L. R. 47.

[4]Prosser, Torts (1941) 408.

[5]Young v. Southern Pacific Co., 182 Cal. 369, 190 Pac. 36 (1920); Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711 (1930).

[6]Prosser, Torts (1941) 411, 412.

it, and thus had reason to realize the plaintiff's peril, and thereafter fails to use reasonable care to avoid accident, he may be said to have an "unconscious" last clear chance.[7]

The weight of American judicial authority allows both the helpless and the inattentive plaintiff to recover when the defendant's last clear chance is "conscious," but allows only the helpless plaintiff to recover when the defendant has merely an "unconscious" last clear chance.[8] But some authority applies what is styled a "humanitarian" doctrine, which allows an inattentive plaintiff to recover on the basis of an "unconscious" last clear chance, if defendant owed plaintiff a duty of lookout.[9] Such a duty might arise in any one of a number of ways. For example, a motorist is under a duty to keep a lookout for other vehicles and pedestrians on the highway. A railroad company is ordinarily under no duty to keep a lookout to discover trespassers on its tracks, but is under a duty to maintain a lookout for vehicles and pedestrians at a highway crossing.

The Virginia decisions reveal a considerable extension of the scope of the last clear chance doctrine. The early cases show much confusion and uncertainty as to what is the true rule, some of them applying the "humanitarian" doctrine and others rejecting it.[10] But the existing

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[7]See Restatement, Torts (1934) § 479 for an outline of factors involved in last clear chance cases. For use of the terms "conscious last clear chance" and "unconscious last clear chance," see Prosser, Torts (1941) 411, 412.

[8]When defendant's last clear chance is "conscious," and plaintiff is helpless, courts find little difficulty in holding that there may be a recovery. Louisville & Nashville R. Co. v. Johnson, 155 Ky. 155, 159 S. W. 685, 47 L. R. A. (N.S.) 918 (1913); Atchison, Topeka, & S. F. R. Co. v. Baker, 21 Okla. 51, 95 Pac. 433, 16 L. R. A. (N.S.) 825 (1908); Van Sickler v. Washington & O. D. Ry., 142 Va. 857, 128 S. E. 367 (1925). Indeed, there appears to be no contra authority in America. See Note (1934) 92 A. L. R. 47, 85. And although plaintiff is merely inattentive, he may in most jurisdictions, recover when defendant's last clear chance is "conscious:" Chunn v. City & Suburban R., 207 U. S. 302, 28 S. Ct. 63, 52 L. ed. 219 (1907); Standard Oil Co. v. McDaniel, 52 App. D. C. 19, 280 Fed. 993 (1922); United R. & Electric Co. v. Sherwood Bros., 161 Md. 304, 157 Atl. 280 (1931).

If defendant's last clear chance is "unconscious," and plaintiff is helpless, many cases allow a recovery. Kansas City Southern R. Co. v. Ellzey, 275 U. S. 236, 48 S. Ct. 80, 72 L. ed. 259 (1927); Dyer v. Cumberland County Power & L. Co., 120 Me. 411, 115 Atl. 194 (1921); Payne v. Healey, 139 Md. 86, 114 Atl. 693 (1921).

When plaintiff is inattentive and defendant has only an "unconscious" last clear chance, the great majority of cases deny recovery. Dickson v. Chattanooga R. & Light Co., 237 Fed. 352 (C. C. A. 6th, 1916); Bourrett v. Chicago & Northwestern R. Co., 152 Iowa 579, 132 N. W. 973, 36 L. R. A. (N.S.) 957 (1911).

[9]Mayfield v. Kansas City Southern R. Co., 337 Mo. 79, 85 S. W. (2d) 116 (1935).

[10]Richmond and D. Ry. Co. v. Yeamans, 86 Va. 860, 12 S. E. 946 (1890) obviously rejects the "humanitarian" doctrine, as does Norfolk Southern R. Co. v. Crocker, 117 Va. 327, 84 S. E. 681 (1915). Roaring Ford R. Co. v. Ledford's Adm'r, 126 Va.

doubts were apparently dispelled by *Barnes v. Ashworth*,[11] decided in 1930, which held that the "humanitarian" doctrine had been adopted in Virginia.[12] The terminology of many of the early cases is both indecisive and confusing in large measure, apparently, because of a failure to take into account the difference between defendant's knowledge of plaintiff's presence, and his realization of plaintiff's peril. The difference is important, and, unless it is recognized, there is usually difficulty in determining whether or not a court intended to follow the "humanitarian" doctrine.[13] The opinion in the *Barnes* case clearly distinguishes between knowledge and realization and, to this extent, is in harmony with the last clear chance sections of the *Restatement of Torts*.[14]

Against this background of Virginia law, the recent case of *Ander-*

97, 101 S. E. 141 (1919), on the other hand, adopts the doctrine. A very complete list of the early cases illustrating both views is to be found in Restatement, Torts, Virginia Annotations (1944) pp. 258-263.

[11]154 Va. 218, 153 S. E. 711 (1930).

[12]154 Va. 218, 244, 245, 153 S. E. 711, 718 (1930).

[13]It was pointed out earlier (see note 7, supra) that there are three significant factors to be considered in last clear chance cases. They are: (1) defendant's knowledge of plaintiff's presence; (2) defendant's realization of plaintiff's peril; and (3) defendant's subsequent failure to exercise reasonable care to avoid injury to plaintiff. Obviously the existence of both knowledge and realization may be determined by either objective or subjective standards. That is, the knowledge required may be either actual knowledge or the knowledge which defendant would have had had he exercised reasonable care. Similarly the realization required may be either actual or constructive—what defendant would have realized in the exercise of ordinary care. According to prevailing rules, the objective test is applied to both knowledge and realization when the plaintiff is helpless, while in the case of the inattentive plaintiff, the objective test is applied to realization but the subjective test is applied to knowledge. (See note 8, supra.) Under the "humanitarian" doctrine, of course, the objective test is applied to both knowledge and realization, whether plaintiff is helpless or inattentive. Consequently, it becomes important to determine whether what is being tested (either objectively or subjectively) is knowledge or realization. The language of many of the early Virginia cases is indecisive on this point; hence it is not certain whether they follow the "humanitarian" doctrine or not. Examples or early cases and their indefinite language are: Richmond Traction Co. v. Martin's Adm'x, 102 Va. 209, 45 S. E. 886 (1903) ("... knew or ... should have known of plaintiff's negligence"); Brammer's Adm'r v. Norfolk & W. Ry. Co., 104 Va. 50, 51 S. E. 211 (1905) ("knowledge of deceased's peril"); Green's Adm'r v. Southern Ry. Co., 102 Va. 791, 47 S. E. 819 (1904) ("informed of [plaintiff's] peril"). For an exhaustive collection of cases in point, see Restatement, Torts, Virginia Annotations (1944) § 480.

[14]"When the defendant is aware, or ought to be aware ... that the plaintiff is unconscious of his peril, or is in a situation of peril from which he cannot by the exercise of ordinary care ... extricate himself, ... *then, and not until then,* does the rule of the last clear chance become applicable and the new duty of the defendant to use the last clear chance ... to avoid the injury arise." 154 Va. 218, 245, 153 S. E. 711, 719 (1930).

son v. Payne[15] represents a rather perplexing application of the last clear chance doctrine. As plaintiff, shortly after dawn, was walking on the right-hand shoulder of a paved street, she was struck from the rear by defendant's automobile. Defendant was operating his car at a moderate rate of speed, but had neglected to clean the frost from his windshield, and so was precluded from seeing plaintiff until he was very close to her. Upon discovering plaintiff, defendant attempted to avoid the accident, but it was too late to do so. Both parties being guilty of negligence, the question presented was whether plaintiff, despite her contributory negligence, could recover on the theory that defendant had a last clear chance to avoid the injury.

The Virginia court was unanimous in denying recovery, holding that the last clear chance doctrine was inapplicable; but by no means was there unanimity as to the reasons for reaching such a conclusion.[16]

In passing, the court observed that the fact that defendant did not see plaintiff in time to avoid the injury did not in itself preclude recovery, declaring that in Virginia "the doctrine of last clear chance applies not only where the defendant actually saw, but also where, by the exercise of ordinary care, he ought to have seen, the plaintiff in a situation of helpless or unconscious peril."[17]

Although stating the doctrine in a manner liberal toward plaintiffs,[18] the court was careful to point out certain restrictions to be placed upon its application. The doctrine must not be allowed to wipe out or supersede the defense of contributory negligence, nor be extended so as to become, in fact, a rule of comparative negligence.[19] Further, the court remarked that the obligation of observing the last clear chance is mutual,[20] and if plaintiff's negligence continued to the moment of injury and was a "proximate,"[21] rather than a "remote"

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[15]189 Va. 712, 54 S. E. (2d) 82 (1949).

[16]Four justices joined in the opinion of the court, while three justices concurred only in the result reached by the court.

[17]189 Va. 712, 717, 54 S. E. (2d) 82, 84 (1949).

[18]"...we have commented on the fact that it is more liberal to the plaintiff than the rule applied in many other jurisdictions." 189 Va. 712, 718, 54 S. E. (2d) 82, 85 (1949). The court stated the so-called "humanitarian" doctrine, which allows the plaintiff to recover if the defendant, in the exercise of reasonable care, should have seen him in time to avoid injury, irrespective of whether the plaintiff is helpless or merely inattentive. See 38 Am. Jur., Negligence § 224 and Restatement, Torts, Virginia Annotations (1944) § 480 for a discussion of the "humanitarian" doctrine.

[19]189 Va. 712, 718, 54 S. E. (2d) 82, 85 (1949).

[20]189 Va. 712, 719, 54 S. E. (2d) 82, 85 (1949).

[21]Here the court was doubtless using the term "proximate" in the contributory negligence or last clear chance sense—i.e., as between the two parties whose negli-

cause of the injury, the doctrine is not applicable.[22] Because her negligence "continued to the moment of injury," and she was "at all times able to prevent the mishap by the exercise of ordinary prudence," plaintiff was denied a recovery based on the last clear chance doctrine.[23]

Justice Miller, concurring in the result reached by the court,[24] followed the distinctions made in the *Restatement of Torts*[25] contending that the doctrine of "conscious" last clear chance applies irrespective of whether the plaintiff is inattentive or helpless, but that the "unconscious" last clear chance rule is not to be applied unless the plaintiff obtained in the Virginia decisions respecting the last clear chance doc- is in a position of helpless peril.[26] Observing that much confusion has trine,[27] Justice Miller submitted that an adoption of the rules of last clear chance as they appear in the *Restatement of Torts* would go far toward clarifying the Virginia law.[28]

The *Restatement* rule was expressly rejected by the court in favor of the "humanitation" doctrine,[29] which theoretically would allow a recovery. But by limiting the application of the doctrine, the court was able to preclude recovery. The limitation chiefly stressed by the court—where plaintiff's negligence continues to the moment of injury and is a "proximate" cause thereof, the last clear chance rule is inapplicable—seems to have been employed rather typically in cases where the court has felt that an application of the "humanitarian" doctrine would produce an unjust result. Such a device, it has ben observed, is of doubtful utility.[30] Inasmuch as the court is not inclined

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gence caused the accident. A third party is not affected by the last clear chance rule. Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). "If the injury should be to a third person ... the plaintiff's negligence would clearly be recognized as a responsible cause...." Prosser, Torts (1941) 409.

[22]189 Va. 712, 719, 54 S. E. (2d) 82, 85 (1949).

[23]189 Va. 712, 719, 720, 54 S. E. (2d) 82, 86 (1949).

[24]Chief Justice Hudgins and Justice Spratley joined in the concurring opinion.

[25]§§ 479, 480.

[26]The opinion states, in part: "When a plaintiff ... is in a helpless condition ... he may nevertheless recover if the defendant saw or should have seen him in time to avoid the collision by the use of reasonable care, and ... when a plaintiff ... is negligently inattentive ... he may recover if the defendant saw him or was apprised of his presence and realized, or in the exercise of reasonable care, should nave realized his danger in time to avoid the mishap." 189 Va. 712, 723, 54 S. E. (2d) 82, 87 (1949). No such distinction is made in the majority opinion; there both "conscious" and "unconscious" last clear chance are held to apply, without reference to whether the plaintiff is helpless or simply inattentive. 189 Va. 712, 717, 54 S. E. (2d) 82, 84 (1949).

[27]189 Va. 712, 722, 54 S. E. (2d) 82, 87 (1949).

[28]189 Va. 712, 728, 54 S. E. (2d) 82, 90 (1949).

[29]189 Va. 712, 717, 54 S. E. (2d) 82, 84 (1949).

[30]Restatement, Torts, Virginia Annotations (1944) § 480, at p. 265.

to follow the "humanitarian" doctrine consistently, there would seem to be little reason for continuing to pay lip service to it. Especially is this so, since analysis of the doctrine shows a number of infirmities.

From a legalistic viewpoint, allowing an inattentive plaintiff to recover on the basis of an unconscious last clear chance is manifestly unsound, since, in a situation in which both parties are equally able to avoid injury, it requires the defendant to exercise greater care for the plaintiff's safety than the plaintiff himself is required to exercise.[31] The net effect of a doctrine which allows an inattentive plaintiff to recover from an inattentive defendant is virtually to obliterate the defense of contributory negligence.[32]

Hence, it is apparently upon sound legal reasoning that the weight of authority denies recovery in cases where an inattentive plaintiff relies on an "unconscious" last clear chance. Such a view seems to be entirely consistent with the proximate cause view of the rule because the "humanitarian" doctrine dispenses with the necessity of defendant's superior opportunity or later negligence, inasmuch as it allows a recovery when both parties are merely inattentive. It is such later negligence on the part of the defendant which is considered to become, as between the parties, the "proximate" cause of the injury, and the plaintiff's negligence then becomes a "remote" cause.[33]

From a practical standpoint, the "humanitarian" doctrine presents the decided disadvantage of making for confusion in the law.[34]

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[31]Restatement, Torts, Virginia Annotations (1944) § 480, at p. 258.

[32]This proposition was long ago expounded in Virginia in Richmond and Danville Ry. Co. v. Yeamans, 86 Va. 860, 12 S. E. 946 (1890). The case involved an inattentive plaintiff, and an instruction asked for by the defendant stated, in part: "... then the plaintiff was guilty of contributory negligence, and cannot recover, unless the jury should further find ... that the perilous position of the plaintiff was known to the defendant ... and that by the use of ordinary care, after knowledge thereof, the accident could have been avoided." The trial court refused to give the instruction as requested, but modified it by inserting the words "or, by the use of ordinary diligence, could have known," near the end of the instruction. In reversing judgment, the Supreme Court of Appeals declared: "This is saying, in effect, that under no circumstances can the contributory negligence of the plaintiff excuse the defendant; and it utterly destroys the whole doctrine of contributory negligence." 86 Va. 860, 869, 12 S. E. 946, 949 (1890).

[33]See note 1, supra.

[34]The Virginia cases prior to Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711 (1930) showed much confusion as to how the doctrine should be applied, many of them failing to distinguish between knowledge of plaintiff's presence and realization of plaintiff's peril. Restatement, Torts, Virginia Annotations (1944) § 480. See also the comment of Justice Miller in the principal case: "Almost thirty years ago it was apparent to this court that conflict obtained in decisions dealing with the doctrine

And the confusion is not resolved where, as in the principal case, it is sought to soften the effect of the "humanitarian" doctrine by placing restrictions[35] upon its application. Such restrictions as have been employed by the Virginia courts seems to be of questionable utility,[36] sometimes leading to different results in cases involving very similar factual situations. A comparison of *Herbert v. Stephenson*[37] with the principal case illustrates the point. In each of the cases, plaintiff, negligently walking on the right-hand side of the road, was struck from the rear by defendant's automobile. In neither case did defendant actually see plaintiff in time to avoid injury. Hence, in both cases an inattentive plaintiff was seeking to recover on the basis of an "unconscious" last clear chance. A recovery was allowed in the *Herbert* case, but defendant prevailed in the principal case.[38]

Since it represents a return to the confusing terminology of many of the early Virginia cases,[39] the holding of the principal case can hardly contribute to the clarification of Virginia's last clear chance law. But reason for encouragement is to be noted in the fact that three justices joined in the concurring opinion, which advocates an adoption of the rules of last clear chance as they appear in the *Restatement of Torts*.[40] Here, perhaps, is an indication that the court will, in the

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of last clear chance." 189 Va. 712, 722, 54 S. E. (2d) 82, 87 (1949). Also in point is the observation of Justice Gregory: "We will not undertake to discuss or attempt to reconcile the cases in which the doctrine has been applied or withheld. This would be impossible because the cases are irreconcilable." Harris Motor Lines v. Green, 184 Va. 984, 992, 37 S. E. (2d) 4, 7 (1946).

[35]See notes 19-22, supra.

[36]Restatement, Torts, Virginia Annotations (1944) § 480, at p. 265.

[37]184 Va. 457, 35 S. E. (2d) 753 (1945).

[38]The only noticeable factual difference in the cases is that in the Herbert case, plaintiff was walking on the shoulder of the road while plaintiff in the principal case was walking on the pavement. The explanation that the Herbert case presented a jury question whether plaintiff's negligence was a "remote" cause of the injury, while in the principal case plaintiff's negligence was never remote, seems, at best, questionable. One finds it difficult not to agree with Justice Miller that the court, in attempting to distinguish the cases, really said in effect that the plaintiff in the principal case was a "little more negligent" than the plaintiff in the Herbert case. 189 Va. 712, 727, 54 S. E. (2d) 82, 89 (1949).

[39]That is, the cases which appeared before Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711 (1930) was decided. The court in the principal case laid great stress upon the fact that plaintiff's negligence continued to the moment of injury. Cf. Barnes v. Ashworth, in which the court said: "The pertinent question is not, did the negligence of the plaintiff continue up to the time of the injury; but does the evidence show a state of facts under which the rule of the last clear chance becomes applicable.... If so, the continuance of the negligence of the plaintiff is immaterial." 154 Va. 218, 246, 153 S. E. 711, 719 (1930).

[40]§§ 479, 480.

not-too-distant future, reject the "humanitarian" doctrine and, by recognizing the varying situations in which the different types of plaintiffs may under prevailing rules recover, bring its decisions into harmony with the weight of American judicial authority.

FORESTER TAYLOR

TORTS—VIABILITY OF CHILD EN VENTRE SA MERE AS QUALIFICATION FOR RECOVERY FOR PRENATAL INJURY. [Ohio]

Because the courts have been almost solidly opposed to the recognition of any right by a child to recover compensation for injuries received while it was still in its mother's womb, such actions are of rather infrequent appearance on the court dockets. The large majority of courts base their decisions on the ground that a child en ventre sa mere is not a "person" within the meaning of the law and thus has no standing in court to sue in its own right for injuries suffered at the hands of a negligent party. However, the strong dissents registered in two of such cases[1] and the dissatisfaction expressed by text writers[2] served to indicate that the rule of law was not settled with finality.

In the recent case of *Williams v. Marion Rapid Transit, Inc.*,[3] the Supreme Court of Ohio by its decision allowing a *viable* child en ventre sa mere to recover for prenatal injuries has taken the most positive stand against the traditional view which has yet been recorded by an American court. Due to the negligence of the driver of defendant's bus, plaintiff's mother had fallen, injuring herself and causing the plaintiff to be prematurely born at seven months. Because of the premature birth and injuries sustained in the mother's fall, the plaintiff was incurably crippled. The court held that an infant who is a viable child in the mother's womb at the time of injuries sustained through another's negligence is a "person" within the state constitutional provision giving every person a remedy for injury done to him.[4]

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[1]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 640, 48 L. R. A. 225, 228 (1900); Stemmer v. Kline, 128 N. J. L. 455, 26 A. (2d) 684, 685 (1942).

[2]For example, Prosser, Torts (1941) 188; Morris, Injuries to Infants En Ventre Sa Mere (1904) 58 Cent. L. J. 143; Kerr, Action by Unborn Infant (1905) 61 Cent. L. J. 364.

[3]87 N. E. (2d) 334 (Ohio 1949).

[4]It is interesting to note that this case was certified to the Supreme Court of Ohio because the decision was in direct conflict with the decision reached by another Ohio appellate court a short time before in the very similar case of Mays v. Weingarten, 82 N. E. (2d) 421 (Ohio App. 1943). The Court of Appeals decision in the Williams case is reported at 82 N. E. (2d) 423 (Ohio App. 1948).

The *Williams* case stresses the fact that the child was viable at the time of the injury, as have the few preceding decisions that have allowed recovery. These previous cases may be noted for the special circumstances upon which their decisions are based. A recent case in Minnesota allowed the father of a child alleged to be viable to recover under a wrongful death statute where the child and its mother died because of the wrongful acts or omissions of the physician in charge and the hospital in which she was confined;[5] a California case allowed an eleven year old child to recover for injuries sustained through the negligent use of instruments in its delivery;[6] the New Jersey circuit court gave recovery to a five year old child for injuries received because of defendant's negligent diagnosis and treatment of its mother during pregnancy[7] but this decision was later reversed by the Court of Errors and Appeals;[8] in a District of Columbia case the child recovered for injuries sustained because of the physician's negligence during the delivery;[9] a Canadian case granted recovery when a child was born deformed two months after its mother was injured by a fall from defendant's train.[10] It should be noticed that the *Williams* case does not merely cite and follow the cases involving professional malpractice, but offers cogent reasons for its decision on the merits of its own facts.

Dietrich v. Northampton[11] was the first reported American case on the subject of prenatal injuries and set the precedent for denying recovery, on the ground that an unborn child is not a legal person. Justice Holmes stated that the unborn child was a part of the mother at the time of the injury, and that an infant dying *before it was able to live*

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[5]Verkennes v. Corniea, 38 N. W. (2d) 838 (Minn. 1949).

[6]Scott v. McPheeters, 33 Cal. App. (2d) 629, 93 P. (2d) 562 (1939). This case was decided on a statutory provision that a child conceived but not yet born is deemed as an existing person if such is for its interests. Compensation for a tort was considered within the "interests," though the court did stress the fact that the child was viable at the time of the tort.

[7]Stemmer v. Kline, 19 N. J. Misc. 15, 17 A. (2d) 58 (1940).

[8]Stemmer v. Kline, 128 N. J. L. 455, 26 A. (2d) 489 (1942). The court also ruled against the parents recovering damages because of the rule that an act or omission which will not support an action by the child will not give the parents a cause of action. It would seem that if the court declares the child to be a part of the mother, to be consistent, it should allow her to recover damages the same as if she had sustained injuries to an arm or a leg.

[9]Bonbrest v. Kotz, 65 F. Supp. 138 (D. C. D. C. 1946).

[10]Montreal Tramways v. Levielle, 4 Dom. L. R. 337 (1933).

[11]Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884). The mother of the child had slipped on a defective highway when she was five months pregnant, causing the infant to be born prematurely. The child was not viable and did not live.

separated from its mother could not be said to have become a person recognized by the law as capable of having a locus standi in court. The court felt that a man should not have to "owe a civil duty and incur a conditional prospective liability in tort to one not yet in being...."[12] The succeeding cases followed this decision with little deviation.[13] The principal reasons for denying recovery were succinctly summed up by Judge Pound when he stated:

> "The reasons given to defeat recovery in such a case are: Lack of authority; practical inconvenience and possible injustice; no separate entity apart from the mother, and therefore no duty of care; no person or human being in *esse* at the time of the accident."[14]

That there has been an unreasoning adherence to the precedent set by the *Dietrich* case is illustrated by the case of *Allaire v. St. Luke's Hospital,*[15] which was decided only a few years afterwards. The facts were entirely different, the injured child being at such a stage of development as to live after the injury was inflicted. However, the court evidently did not think the distinction between a viable and a non-viable fetus of vital importance (though the *Dietrich* case noted the fact that the child there involved was not viable), or else that the reasoning applied to a non-viable fetus could with equal logic and justice be applied to a viable one. There was not even a mention of this distinction in the majority opinion, but only the citing of the *Dietrich* case and of the Irish case of *Walker v. Great Northern R. Co.*[16] Unfortunately, the *Allaire* case seems to have set the standard for blind-

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[12]Dietrich v. Northampton, 138 Mass. 14, 16, 52 Am. Rep. 242, 244 (1884).

[13]Walker v. Great Northern R. Co., [1891] Ir. L. R. 28 C. L. 69; Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225 (1900); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118 (1901); Buel v. United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N.S.) 625 (1913); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, 917, L. R. A. 1917B, 334 (1916); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921); Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 97 A. L. R. 1513 (1935); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. (2d) 28 (1940); Stemmer v. Kline, 128 N. J. L. 455, 26 A. (2d) 489 (1942).

[14]Drobner v. Peters, 232 N. Y. 220, 222, 133 N. E. 567, 567, 20 A. L. R. 1503, 1504 (1921).

[15]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225 (1900).

[16]Walker v. Great Northern R. Co., [1891] Ir. L. R. 28 C. L. 69. The decision here was based on the fact that the defendant carrier had a contract with the mother but not with the unborn child, and therefore should not be held liable for the injuries of the child.

ly following precedents with no attempt to distinguish the cases on the different facts involved.[17]

In seeking recovery in actions of this kind, plaintiffs have uniformly availed themselves of the argument that the law does recognize an unborn child as a legal person in several situations. "A legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after birth...."[18] The majority of American decisions have held that the common law crime of abortion is committed only when the fetus is mature enough to stir in the mother's womb.[19] The general common law rule in regard to homicide is that one who willfully inflicts an injury on an unborn child is not indictable if the child dies before being born, but if the child is born alive and later dies because of the injury, the offender is indictable.[20] It would appear to be a sounder application of stare decisis to rely on these decisions as precedents for allowing recovery for injuries to an unborn but viable child, rather than to follow the rule of the *Dietrich* case, which did not involve a viable child.

The courts denying recovery have stated that to impute legal personality to an unborn infant is a mere fiction which has not been extended to allow an action by an infant for prenatal injuries. In the *Williams* case the court refuted this view of the majority of courts by concluding:

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[17]In Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225 (1900), the mother was injured while under the care of the defendant hospital so that the plaintiff suffered prenatal injuries. The plaintiff lived and the injuries were of such a type as to be reasonably traceable to the accident. Buel v. United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N.S.) 625 (1913) relies strictly on the Dietrich and the Allaire cases, saying that it is not necessary to rule upon the rationale of these decisions. In Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334 (1916), the mother was injured when the fetus was five months old, and plaintiff was born in due course and alleged that the injury caused epileptic fits. The distinction here is that, in denying recovery, the court said that it went no further than the facts involved required as there might be reasons for a different rule if plaintiff had been viable at the time of the injury. Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921). Plaintiff was viable and lived. In Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937), plaintiff was born 22 days after injury at the end of a normal period of gestation but died shortly afterwards because of the alleged injuries. In Stemmer v. Kline, 128 N. J. L. 455, 26 A. (2d) 489 (1942), defendant doctor wrongly diagnosed and administered X-ray treatment to mother until six weeks before plaintiff was born. At the time of the trial the child was five years old but was a microphalia and an idiot without skeletal structure, sight, speech, hearing or power of locomotion.

[18]27 Am. Jur., Infants § 3.

[19]27 Am. Jur., Infants § 4.

[20]Miller, Criminal Law (1934) 252.

> "To hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified."[21]

It is a biological fact that a fetus reaches a stage of development before it is normally born where it is capable of living outside of the uterus if it is prematurely expelled. *Black's Law Dictiouary* defines viable as:

> "Capable of life. This term is applied to a newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of life."[22]

Thus, by definition, the viable child has the qualities of a separate human personality, and should be recognized as such in law as in fact. It would seem that the capability of separate life and not the actuality of independent existence would be a more appropriate test. For when the child has reached this stage and is injured, it must carry these injuries through life because of another's negligence. It is unfair that it should not be compensated for having to bear such a burden.

Another strong reason for denial of recovery has been the fear of fictitious or fraudulent claims.[23] Apparently the courts have been fearful of enabling fraudulent parties to flood the courts with unfounded claims of injuries being caused by other persons, when in fact the injuries could have been sustained through natural causes or through the mother's fault. No doubt it was envisaged that even good faith claims would put on the defendants an unfair or impossible burden of proving that they had not caused the injuries.

It is not contended that the courts have not been in some degree justified in having such fears, or that they should have dispensed with all caution. However, the progress of medical science has been undeniably great since the *Dietrich* case was decided in 1884. A cursory examination of a modern text on obstetrics will reveal the new facts es-

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[21]87 N. E. (2d) 334, 340 (Ohio 1949).

[22]Black's Law Dictionary (3d ed. 1933) 1814.

[23]See Drobner v. Peters, 232 N. Y. 220, 222, 133 N. E. 567, 567, 20 A. L. R. 1503, 1504 (1821); Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566, 566 (1926); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 950, 97 A. L. R. 1513, 1522 (1935).

tablished and the new techniques used in that field.[24] The cause and extent of prenatal injuries can be more easily ascertained so that false claims will more often be eliminated. This knowledge, though not foolproof, would certainly make such cases more susceptible of discovery.

Difficulty of distinguishing between the fictitious and the meritorious claim has never been a very worthy reason to deny redress when there is a proper cause for it. The administration of justice demands that the law improve techniques of proof instead of evading the problem. That this is capable of being accomplished is illustrated in the "mental disturbance" cases where a similar fear of opening the doors to fraudulent claims was a main reason for denying recovery.[25] The doctrine established was that there should be no recovery for physical harm resulting from mental distress, unless there was "impact" from without at the time the injury was caused. In an early case, Justice Holmes, referring to this doctrine, stated:

> "... it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone."[26]

As medical proof became more reliable many courts rejected the requirement of impact;[27] the "arbitrary exception" gave way in the face of proof based on medical knowledge. It would seem that the fear of fraud in prenatal injury cases could now be dispelled to a reasonable extent for the same reason.

Neither of the main arguments relied upon are any longer adequate reasons for denying recovery in prenatal injury cases. An unborn *viable* child should be recognized as a person entitled to the protection of the law. It may be hoped that the *Williams* case will lead other jurisdictions to grant such recognition.

JACK E. GREER

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[24]De Lee-Greenhill, Principles and Practice of Obstetrics (9th ed. 1947). Among the other information, Chapter LVI, Accident to Child, shows that many causes of the death of the fetus can be ascertained; Chapter LVIII, Roentgenography in Obstetrics, shows the value of the use of the X-ray in obstetrics in observing the fetus.

[25]Prosser, Torts (1941) 214.

[26]Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737, 737, 57 L. R. A. 291, 292 (1902).

[27]Prosser, Torts (1941) 215.