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Constitutional Law—Damages Judgment for Breach of Racial Restrictive Covenant as Violation of Fourteenth Amendment. [Weiss v. Leaon, Mo. 1949]

RECENT CASES

ADMINISTRATIVE LAW—DELEGATION OF LEGISLATIVE POWER TO PRIVATE GROUPS TO SET WAGE STANDARDS FOR PUBLIC CONSTRUCTION CONTRACTS. [Kentucky]

A fundamental principle in a government of delegated and divided powers, and one universally recognized in both state and federal constitutions, is that a legislature may not abdicate nor delegate its lawmaking function. However, it is apparent that a legislature in effectuating by law a general policy cannot predict every possible contingency upon which the law shall become operative. Frequently, therefore, resort must be had to administrative aid. Generally, it is held that where a legislature has declared a policy with respect to the subject matter of the law and a standard or framework to which administrative action must conform in the execution of that policy, the essential legislative function has been accomplished, even though the administrative agency must necessarily exercise a limited discretion in the application and furtherance of the law in particular circumstances. The essence of legislative power, delegation of which to administrative officials is prohibited, is the declaration of policy and standard.[1]

The prohibition against the delegation of legislative power to private groups is applied even more strictly. Laws to which objection has been made on the ground of such invalid delegation of legislative power fall into three general categories:[2] (1) Laws depending for their initiation upon the action of private groups. Examples are those cases in which the administrative official may act only at the behest of a private group or in execution of an agreement submitted by such group.[3] (2) Laws depending in some manner upon the consent of

[1]"Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." Chief Justice Hughes, in Panama Refining Co. v. Ryan, 293 U. S. 388, 415, 55 S. Ct. 241, 246, 79 L. ed. 446, 456 (1935). See, also, J. W Hampton, Jr. & Co. v. United States, 276 U. S. 394, 409, 48 S. Ct. 348, 352, 72 L. ed. 624, 630 (1928), for a similar view of the essential legislative function.

[2]Omitted from this classification are cases involving the delegation to private groups of administrative duties, such as powers of appointment of public officers. State v. Schorr, 65 A. (2d) 810 (Del. 1949); Ashmore v. Greater Greenville Sewer Dist., 211 S. C. 77, 44 S. E. (2d) 88 (1947).

[3]Such laws generally are held valid if the administrative official may modify a submitted plan or submit one of his own, but invalid if initiation depends entirely on the action of the private group. Maryland Co-op Milk Producers v.

private persons, either by requiring their approval before going into effect,[4] or by allowing modification or waiver of the law's effect through the consent of interested persons. Laws subject to local option or state-wide referendum[5] and zoning laws[6] subject to the discretion of the landowners are examples falling within this category. (3) Laws whose essential contents or standards are determined by reference to rules, standards or agreements established by private groups. Laws adopting the safety standards,[7] professional requirements,[8] wage scales[9] or commercial practices [10] promulgated by lay groups fall within this category.

Within the last-mentioned classification is the law questioned recently in *Baughn v. Gorrell & Riley*.[11] A Kentucky statute[12] required that every public authority, in contracting for the construction of public works, should ascertain, specify, make part of the contract, and pay the local prevailing wages for the particular classes of work employed in the construction. The statute further provided that the

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Miller, 170 Md. 81, 182 Atl. 432 (1936); Arnold v. Board of Barber Examiners, 45 N. M. 57, 109 P. (2d) 779 (1941); Ex parte Herrin, 67 Okla. Crim. 104, 93 P (2d) 21 (1939); La Forge v. Ellis, 175 Ore. 545, 154 P (2d) 844 (1945); Van Winkle v. Fred Meyer, Inc., 151 Ore. 455, 49 P (2d) 1140 (1935); Revne v. Trade Commission, 192 P (2d) 563, 3 A. L. R. (2d) 169 (Utah 1948); Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N. W 420 (1935).

[4]Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441 (1938); Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160 (1936); Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S. W 1086, 27 A. L. R. 920 (1922).

[5]The majority of the courts hold local option laws valid, but laws depending on state-wide referendum invalid. In re Opinion of Justices, 42 S. (2d) 81 (Ala. 1949); People ex rel. Thomson v. Barnett, 334 Ill. 62, 176 N. E. 108, 76 A. L. R. 1044 (1931); Re Municipal Suffrage to Women, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113 (1894); Bank of Chenango v. Brown, 26 N. Y. 467 (1863); Gaud v. Walker, 214 S. C. 451, 53 S. E. (2d) 316 (1949).

[6]Seattle Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. ed. 210 (1928); Thomas Cusack Co. v. Chicago, 242 U. S. 526, 37 S. Ct. 190, 61 L. ed. 472 (1917); Eubank v. Richmond, 226 U. S. 137 , 33 S. Ct. 76, 57 L. ed. 156 (1912). See, also, Leighton v. City of Minneapolis, 16 F. Supp. 101 (D. C. Minn. 1936); Whitaker v. Green River Coal Co. et al., 276 Ky. 43, 122 S. W (2d) 1012, 119 A. L. R. 1456 (1938); Union Trust Co. v. Simmons, 211 P (2d) 190 (Utah 1949).

[7]Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S. W (2d) 517 (1946).

[8]Allen v. State Board of Veterinarians, 72 R. I. 372, 52 A. (2d) 131 (1947).

[9]Wagner v. City of Milwaukee, 177 Wis. 410, 188 N. W. 487 (1922). Similar cases involving prices and hours standards fixed by the particular industries affected are: Arnold v. Board of Barber Examiners, 45 N. M. 57, 109 P. (2d) 779 (1941); La Forge v. Ellis, 175 Ore. 545, 154 P (2d) 844 (1945); Revne v. Trade Commission, 192 P. (2d) 563, 3 A. L. R. (2d) 169 (Utah 1948).

[10]Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936); Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N. W. 420 (1935).

[11]311 Ky. 537, 224 S. W. (2d) 436 (1949).

[12]Ky. Rev. Stat. (1946) § § 337.510, 337.520.

public authority should establish as "prevailing" those wages prevailing in the locality under collective bargaining agreements, if such agreements applied to a sufficient number of employees to furnish a reasonable basis for considering the wages as "prevailing" in the locality. The defendant public authority (the Daviess County Board of Education) and the defendant contractor failed to comply with the provisions of the statute, and plaintiffs filed suit to have the contract between defendants cancelled and to require the Board to comply with the statute. The contractor contested the validity of the statute. The Kentucky Court of Appeals declared the statute constitutional and the contract invalid. Though recognizing as sound the principle "that neither the Legislature nor any political subdivision possessing legislative power may delegate the exercise of such power to private persons or corporations,"[13] the court denied defendant's contention that the statute required the public authority to accept, without discretion, wage rates fixed by private contracts between labor organizations and employers, on the grounds (1) that the statute had fixed the legislative policy, (2) that it had established a not unreasonable standard for the guidance of the public authorities—i.e., the local prevailing union wage rates—and (3) that the public body remained vested with a discretion in determining the reasonable prevailing wage.

The decision was not without dissent. Justice Thomas maintained that the standard set up by the statute was unreasonable, inasmuch as the only discretion left within the public authority was the finding that a prevailing wage existed, and not the determination that such prevailing wage was fair or reasonable. Underlying his argument, apparently, was the proposition that a prevailing wage law affecting a public authority must, to be valid, meet the approval of that public authority as to reasonableness and fairness.[14] He further construed the Kentucky statute in question to be substantially identical to that under consideration by the Wisconsin court in *Wagner v. City of Milwaukee*.[15] In that case a city ordinance, rather than a state statute, had required payment of wages under public contracts to be made

[13]Baughn et al. v. Gorrell & Riley et al., 311 Ky. 537, 224 S. W (2d) 436, 438 (1949).

[14]But compare: "A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will." City of Trenton v. New Jersey, 262 U. S. 182, 187, 43 S. Ct. 534, 537, 67 L. ed. 937, 941 (1923).

[15]177 Wis. 410, 188 N. W 487 (1922).

equal to local prevailing union wages. The Wisconsin court held the ordinance invalid as "nothing less than a surrender by the members of the common council of the exercise of their independent, individual judgments in the determination of a matter of legislative concern."[16] Despite the fact that the ordinance required a final approval by a majority of the city council before the wage scale went into effect, the court held that the ordinance must be assumed to have been made in good faith and to bind the council to approval and that, therefore, no discretion as to the standard remained in the council.

The majority of the Kentucky court distinguished the Kentucky statute from the ordinance involved in the *Wagner* case, however, on two grounds: that nowadays the union wage scale is generally accepted as a reasonable standard for a prevailing wage, the opposite having been true at the time the *Wagner* case was decided, in 1922; and that the Wisconsin court construed the Milwaukee ordinance as depriving the city council of discretion, while the Kentucky statute left an exercisable discretion with the public authority.

The underlying significance of discretion in the public authority emerges from the decisions in the *Wagner* and *Baughn* cases. Lack of discretion in the *Wagner* case was a factor requiring invalidation, apparently because the city council had neither by the exercise of its independent, individual judgment established its own standard in the ordinance, nor left within itself the ability to do so subsequently, when the ascertained prevailing union wage scale should be presented to it for approval by resolution. Even if the city council had been admitted to possess a discretion in the use of the union scale, the effect of such admission would have been to allow the council to ignore the standard which it had set up in the ordinance and to substitute instead a different standard—to make that which was intended to be binding non-binding and in effect a nullity. On the other hand, in the *Baughn* case a discretion exercisable by the public authority rendered valid the legislation which would have been invalid had it required acceptance of the union wage scale whether that scale was or was not reasonably conformable to a *prevailing* wage standard. The holding indicates that the prevailing wage was the basic standard, and that the union scale was at most but an alternative or sub-standard, binding only if substantially identical with the local prevailing wage. Discretion was significant, then, in permitting the use of the union wage as a standard only if such use was consistent with the basic standard as applied by the public authority.

[16] 177 Wis. 410, 188 N. W. 487, 489 (1922).

The question remains whether a wage law would be invalid because it adopts, outright, a union scale, without reference to the prevailing scale. The validity of a law requiring payment to public employees of the local prevailing wage has been established.[17] The standard adopted by such law may be said to depend on the law of supply and demand[18] rather than on the action of persons, even though the standard be a variable, and be obviously affected to some degree by the actions and contracts of private persons. However, the validity of a law whose standard depended to a much less degree on the law of supply and demand and to a much greater degree on the action of private persons—as one adopting as its standard such wage scale as may be agreed upon by a single private manufacturer and his employees—has not been established. Such a law would appear invalid because it would leave the establishment and variation of the standard too much within the control of private individuals.[19]

A law embracing a union wage standard would lie somewhere between a prevailing wage law and the hypothetical law last mentioned, in its susceptibility to private control. However, union wage scales seem not yet so universal as to be identical with prevailing wages. They are established by parties neither disinterested nor with interests concurrent with the public, but on the contrary by parties

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[17]Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. ed. 148 (1903) (local current rate of per diem wages): Ryan v. New York, 177 N. Y. 271, 69 N. E. 599 (1904) (local prevailing rate for a day's work in the same trade); Norris v. Lawton, 47 Okla. 213, 148 Pac. 123 (1915) (local current rate of per diem wages); Malette v. City of Spokane, 77 Wash. 205, 137 Pac. 496 (1913) (going rate of wages). Furthermore, that a legislature may adopt in its presently existing form a wage scale established by private groups seems undeniable. The legislature in such case may be presumed to have considered the applicability of the adopted standard to its own policy, and to have exercised its judgment in making the standard its own. Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S. W (2d) 517 (1946) (adoption of safety rules in privately published pamphlet); Allen v. State Board of Veterinarians, 72 R. I. 372, 52 A. (2d) 131 (1947) (statute requiring state veterinarians to be graduated from schools approved by veterinarians' associations construed to adopt only the then-existing standard).

[18]Long Island Railway Company v. Department of Labor, 256 N. Y. 498, 177 N. E. 17 (1931). In Morse v. Delaney, 128 Misc. 317, 218 N. Y. Supp. 571 (1926), the court defined "prevailing rate of wages" as the "fair market rate," and in holding valid a statute providing for the payment of the prevailing rate, over objections of indefiniteness, pointed out the superiority of a wage scale variable by the law of supply and demand.

[19]That such a law would conflict also with due process requirements because not a reasonable means of attaining the legislative policy is not improbable. However, the prohibition against delegation of legislative power appears a more positive protection of the public interest than are due process requirements in this type of case, in requiring legislative acts of public concern to be accomplished by governmental officials answerable to the public for their actions.

strongly self-interested. Since a standard so established could scarcely be classified as a mere impersonal fact governed by the law of supply and demand, adoption of it, subject to future change by private action, would appear contrary to the rule against delegation of legislative power. The *Baughn* decision itself impliedly agreed with this proposition, in holding discretion within the public authority to be necessary to the validity of the Kentucky statute. This being so, the decision seems proper.

However, not all decisions upholding the validity of legislation protested as in contravention of the rule against delegation of legislative power to private groups have had such apparent justification as did the *Baughn* decision. Zoning legislation allowing avoidance of its restraint upon the consent of adjacent landowners, for instance, has been the source of conflicting decisions based on tenuous distinctions: whether an included restraint is first absolute and then avoidable, or becomes absolute only when property owners act;[20] and whether the restraint is otherwise in conflict with due process requirements as embodying unreasonable, arbitrary and non-uniform features.[21] Legislation regulating particular groups or industries and becoming effective only upon such groups' affirmative votes has been upheld in some cases as the mere exercise of a legislative power to append a condition to the circumstances in which a law becomes operative.[22] Legislation allowing local option has been distinguished

[20]"From an analysis of the cases, it is clear that, where the law is complete in itself and its operation does not depend on an act of property owners, a consent provision is valid; but, where the law is not complete in itself, is not effective until the property owners act, and it is their action that imposes the restriction and that has the force and effect of law, it is invalid, because it then contains an unauthorized delegation of legislative power." Leighton v. City of Minneapolis, 16 F. Supp. 101, 106 (D. C. Minn. 1936). Seattle Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. ed. 210 (1928); Thomas Cusack Co. v. Chicago, 242 U. S. 526, 37 S. Ct. 190, 61 L. ed. 472 (1917); Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76, 57 L. ed. 156 (1912).

[21]Occasionally courts seek reconciliation of conflicting decisions on the ground that consent legislation held void because involving an invalid delegation of legislative power was also invalid because it was class legislation, unreasonable, or violative of procedural due process in permitting deprivation of property at the arbitrary will of a private group. The bases of the decisions themselves are sometimes ambiguously expressed, perhaps because the laws in question are often subject to both objections. However, such reconciliation, insofar as it may indicate non-recognition of the rule against delegation of legislative power as invalidating in itself, would appear improper. Whitaker v. Green River Coal Co. et al., 276 Ky. 43, 122 S. W (2d) 1912, 119 A. L. R. 1456 (1938).

[22]Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441 (1938); Holcombe v. Georgia Milk Producers Confederation, 188 Ga. 358, 3 S. E. (2d) 705 (1939). Application of such a rule to its logical extreme would seem to wipe out the principle against abdication of the legislative function.

from that allowing state-wide referendum on the ground that in the exercise of local option the local group is not acting as that state body which has delegated its law-making power to the state legislature.[23] Delegation by a legislature of appointive power to private groups has been said to be justifiable if the appointing body has some reasonable relationship to the body appointed.[24]

Lack of any substantial basis for distinction in these cases has led to the view that delegation of essential legislative power is frequently permitted,[25] and has led even to comment advocating a relaxation of the rule against such delegation.[26] Undoubtedly a few courts have failed to apply the prohibition when they might have done so. However, it does not follow that the rule should be abandoned. Some sacrifice of efficiency may result from application of the prohibition, but until the law-making process becomes much more complex than it is at this time, and until the legislative bodies are proved to have exhausted the law-making resources they now possess, no sufficient reason appears for the abandonment of a rule basic to representative government.

FRANK E. BEVERLY

CONSTITUTIONAL LAW—DAMAGES JUDGMENT FOR BREACH OF RACIAL RESTRICTIVE COVENANT AS VIOLATION OF FOURTEENTH AMENDMENT. [Missouri]

Though the Supreme Court's decision in *Shelley v. Kraemer*[1] has been widely hailed as a virtual nullification of racial restrictive covenants in deeds,[2] that decision, of course, actually involved only the specific question of whether state court enforcement of racial restrictive covenants, by injunction or specific performance, denied the

[23]Bank of Chenango v. Brown, 26 N. Y. 467 (1863).

[24]Ashmore v. Greater Greenville Sewer District, 211 S. C. 77, 44 S. E. (2d) 88 (1947).

[25]See Hale, Our Equivocal Constitutional Guaranties (1939) 39 Col. L. Rev. 563; Jaffe, Law Making by Private Groups (1937) 51 Harv. L. Rev. 201; Ray, Delegation of Power to State Administrative Agencies in Texas (1937-1938) 16 Tex. L. Rev. 20; Note (1932) 32 Col. L. Rev. 80.

[26]See Note (1937) 37 Col. L. Rev. 447.

[1]334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161, 3 A. L. R. (2d) 441 (1948). The early case of Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149 (1917), held that legislation imposing racial segregation was unconstitutional.

[2]Barnett, Race-Restrictive Covenants Cases Restricted (1948) 28 Ore. L. Rev. 1; Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203; Notes (1948) 48 Col. L. Rev. 1241; (1948) 61 Harv. L. Rev. 1450; (1949) 6 Wash. and Lee L. Rev. 192.

Negro the equal protection of the laws in contravention of the Fourteenth Amendment.[3] It was conceded that voluntary enforcement *by the parties* is legal,[4] but the Court did not discuss or pass upon the validity of a judgment for damages for breach of such covenants against the white vendor or lessor.

The recent case of *Weiss v. Leaon*[5] is the first case since *Shelley v. Kraemer*[6] to render a decision on the specific question of whether a white property owner, entitled to the benefit of a racial restrictive covenant, may recover damages against a white property owner who breaches such covenant by selling or leasing the restricted property to a Negro. Plaintiff and defendant are white covenantees of lots subject to a racial restrictive agreement which provides that none of the lots may be devised, sold, leased, or occupied by Negroes. Defendant sold or was about to sell his lot to a Negro, and plaintiff brought an action to enforce the covenant or, in the alternative, to recover damages for breach of such covenant. The trial court dismissed the entire action on the authority of the *Shelley* case. The Supreme Court of Missouri held that the dismissal as to the injunctive relief was proper, but reversed as to the dismissal of the count for damages and remanded the case for trial against the white vendor.

It was conceded that the *Shelley* case precluded any form of *"judicial enforcement"*[7] of racial restrictive covenants, but the position was taken that a judgment for damages was not such enforcement. Noting the dictum in the *Shelley* case that the covenant standing alone was valid,[8] the Missouri court declared: "For the breach of

[3]U. S. Const. Amend. XIV provides that, "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." The Shelley case held that judicial enforcement of racial restrictive covenants by state courts was state action.

[4]Shelley v. Kraemer, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. ed. 1161, 1180 (1948): "That Amendment [Fourteenth] erects no shield against merely private conduct, however discriminatory or wrongful. We conclude. that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, ..there has been no action by the state and the provisions of the Amendment have not been violated."

[5]225 S. W (2d) 127 (Mo. 1949).

[6]334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).

[7]The Shelley case reversed a state court's decision which had granted specific enforcement and cancellation of the deed. However, the language of the Court was broader than the factual question presented. The Court did not say that it was the specific enforcement that was unconstittuional but "judicial enforcement." 334 U. S. 1, 20, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1183 (1948). See Note (1950) 21 Tenn. L. Rev. 441.

[8]This dictum is criticized in Frank, The United States Supreme Court 1947-48 (1948) 16 U. of Chi. L. Rev. 1, 24.

a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages unless it, too, is unconstitutional under the circumstances. Under the facts of this case, we hold that according to the law as we now understand it, the trial court may hear and determine an action for damages for the breach of the restriction agreement in question without violating any provision of the Federal or State Constitutions."[9]

Very little affirmative argument is advanced to support the pivotal point of the decision that a suit for damages for breach of covenant does not involve judicial enforcement of the covenant. Most of the opinion is devoted to demonstrating the generally accepted fact that the *Shelley* case did not determine the issue of a damages recovery as presented in the present controversy, but merely ruled against the availability of specific enforcement by the courts. Having thus excluded, to its own satisfaction, the effect of the United States Supreme Court's decision, the Missouri court resolved the basic issue of the case by observing that "Except for the constitutional issue advanced under Shelley v Kraemer there is no question under the general law but that the remedy of damages for breach of the agreement would be available."[10]

The Missouri court drew an analogy to cases,[11] decided before the *Shelley* case, which employed the principle that even though an equity court has jurisdiction it may in its discretion deny specific enforcement of restrictive covenants because of hardship or changed neighborhood conditions, without impairment of the right to recover damages for breach of such covenants. These decisions were accepted as demonstrating that the fact a covenant is not specifically enforceable does not prevent the awarding of damages for its breach. However, the court failed to notice the significant distinction that in such cases decided *subsequent* to the *Shelley* case, an equity court would not be at liberty to exercise its discretion but *must refuse* specific enforcement of restrictive covenants because to grant the relief would be a violation of the Fourteenth Amendment.[12] It is certainly argu-

[9]Weiss v. Leaon, 225 S. W (2d) 127, 131 (Mo. 1949).

[10]Weiss v. Leaon, 225 S. W 127, 130 (Mo. 1949).

[11]Borssuch v. Pantaleo, 183 Md. 148, 36 A. (2d) 527 (1944); Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S. W (2d) 545 (1931); Welitoff v. Kohl, 105 N. J. Eq. 181, 147 Atl. 390 (1929).

[12]See Note (1950) 63 Harv. L. Rev. 1062.

able that the court would also be without power to give damages as an alternative relief.[13]

In taking the view that a judgment for damages was not judicial enforcement of restrictive covenants, the court in *Weiss v. Leaon*[14] apparently has both overlooked prominent authority and disregarded policy considerations. Contracts which contravene public policy or are barred by the Statute of Limitations are held unenforceable and not void, yet a judgment for damages for breach of such contracts is considered enforcement and may be reversed.[15] The American Law Institute's *Restatement of the Law* considers a judgment for damages for breach as *enforcement* of the contract.[16]

Most cases subsequent to the *Shelley* case which have considered the problem involved enforcement by injunction, and the *Shelley* case was followed. However, the decisions of two important cases indicate that the *Shelley* case will not be limited to its specific facts but will nullify any judicial process which effectuates or sanctions racial restrictive covenants. *Clifton v. Puente*[17] involved a deed which contained a covenant that prohibited the sale or lease of the property to persons of Mexican descent. The covenant stipulated that if the land was sold to one of the restricted race, all title of the then owner would be forfeited to the original grantor. The land was sold to a Mexican but before he took possession the grantor entered the premises. The Mexican vendee brought a suit in statutory trespass to try title, and the court refused to allow the grantor to use the

[13]The Missouri court substantiated its argument that the question as to the right to maintain an action for damages for breach of a racial restrictive covenant remained open by citing Note (1948) 3 A. L. R. (2d) 466, 473, which took this view and cited two cases prior to the Shelley case. Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930), allowed a recovery of damages in an action for deceit based on the vendor's fraudulent representation that all the lots in the subdivision were racially restricted. Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930) held that a purchaser of a racially restricted lot had a cause of action for damages against his vendor based upon the latter's breach of a covenant that none of the lots in the subdivision should be sold to or occupied by Negroes. It is submitted that these two cases would not now in the light of the Shelley case be authority for the principle on which they were originally decided.

[14]225 S. W. (2d) 127 (Mo. 1949).

[15]Oakland Motor Car Co. v. Indiana Automobile Co., 201 Fed. 499, 504 (C. C. A. 7th, 1912); Marvin v. Solvental Chemical Products, 298 Mich. 296, 298 N. W. 782, 784 (1941); Wilhelm Lubrication Co. v. Brattrud, 197 Minn. 626, 268 N. W. 634, 637 (1936); St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N. Y. 30, 138 N. E. 495, 497 (1923); Cianciarulo v. Caldarane, 69 R. I. 86, 30 A. (2d) 843, 845 (1943).

[16]Restatement, Contracts (1932) §§ 13, 14, 178-225, 598-609. See Ames, Specific Performance For and Against Strangers to the Contract (1903) 17 Harv. L. Rev. 174, 177; Note (1949) 12 U. of Detroit L. J. 81.

[17]218 S. W. (2d) 272 (Tex. Civ. App. 1948).

forfeiture clause as a defense, on the reasoning that it would violate the spirit of the *Shelley* case.

In *Claremont Improvement Club v. Buckingham,*[18] the court, while recognizing that the *Shelley* case did not hold restrictive covenants invalid, refused to grant a declaratory judgment to declare their validity. It was reasoned that a declaratory judgment would serve no useful purpose because the *Shelley* case prohibited the use of "any" judicial process to give the judgment effect. This decision seems to imply that judicial process forbidden by the *Shelley* case includes a judgment for damages for breach of the covenant as well as specific performance.

Many of the comments on the *Shelley* case took the view that a judgment for damages for breach of a covenant would fall within the scope of judicial enforcement prohibited by the Supreme Court's decision.[19] The law reviews which have commented on the *Weiss* case have taken the same view and have stated that the decision will probably be reversed if appealed.[20] Other indirect methods that will probably be used to avoid the *Shelley* decision have been commented upon, but the conclusion is that there is no effective method, if the courts must sanction the action, to evade the rule of the *Shelley* case.[21] A judgment for damages for breach of a racial restrictive covenant should be considered *enforcement* of a covenant as well as the equitable remedy of specific performance. The two remedies are simply different methods of enforcement of a legal obligation.[22]

Weiss v. Leaon,[23] on its facts, can be distinguished from the *Shelley* case on the ground that the forms of relief are different. Also, it has been argued that the court's enforcement of damages against the white vendor has such a remote detrimental effect on the constitutional right of the colored race to purchase property without discrimination that the court's granting a judgment for damages

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[18]200 P (2d) 47 (Cal. 1948).

[19]Ming, Racial Restrictions and the Fourteenth mendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203, 217; Scanlan, Racial Restrictions in Real Estate—Property Values Versus Human Values (1948) 24 Notre Dame Law. 157, 182; Notes (1948) 46 Mich. L. Rev. 978, 48 Col. L. Rev. 1241, 1244.

[20]Notes (1950) 30 B. U. L. Rev. 273, 18 Geo. Wash. L. Rev. 417, 63 Harv. L. Rev. 1062, 98 U. of Pa. L. Rev. 588, 21 Tenn. L. Rev. 441.

[21]Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203, 224: "When the various proposals are considered, the conclusion seems warranted that the *Restrictive Covenant* decisions render ineffective any devise for maintaining residential segregation whose usefulness depends on utilization of governmental authority to achieve its end."

[22]See Notes (1950) 30 B. U. L. Rev. 273, 18 Geo. Wash. L. Rev. 417, 418.

[23]225 S. W (2d) 127 (Mo. 1949).

does not infringe the constitutional right of the Negro which the *Shelley* case protects. However, there are many social elements, not including judicial action, which produce a reluctance of the white property owner to sell to Negroes.[24] If this reluctance is considered with the inevitable threat of a pecuniary liability, it can hardly be said that the detrimental effect to the Negro is so remote as to remove the case from the scope of the protection given the Negro in the *Shelley* case.

The *Shelley* case does not state or imply that *only* injunctive relief granted by a court would be a denial of the equal protection of the laws. The use of judicial process or judicial enforcement held unconstitutional seems to refer not to specific performance alone, but to any judicial action which results in substantial pressure on a party to perform the covenant. Certainly, the threat of having to pay damages for breach is a strong force to induce parties to perform. Thus, the recognition of the damages remedy tends to defeat the policy which the Supreme Court must have intended to promote in the *Shelley* case. Since the damages recovery cannot be obtained without the authority of a court being invoked, the spirit of the *Shelley* case is violated by the view of the *Weiss* case.

It is conceded that specific performance is a more effective remedy to enforce restrictive covenants than a judgment for damages for breach of the covenant, but enforcement by damages would indirectly obtain the result which the *Shelley* case held to be a denial of the equal protection of the laws. The Negro is limited in his power to purchase property due to his meager income. Even though a white property owner was willing to sell, he would indemnify himself by including in the price of the property the amount of damages his breach of a restrictive covenant would cost him, and this would make the purchase price of the property prohibitive in the usual case. An effective means of racial segregation through private agreements or restrictive covenants would thus be sanctioned and effectuated by the coercive power of judicial fiat.

OTIS E. PINION

[24]Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203.

CONSTITUTIONAL LAW—VALIDITY OF SEARCH AND SEIZURE WITHOUT WARRANT AS INCIDENT TO LAWFUL ARREST. [United States Supreme Court]

The Fourth Amendment of the United States Constitution, prohibiting unreasonable searches and seizures,[1] was framed against a background in which the English authorities had used general search warrants in England and writs of assistance in Colonial America to search for and suppress elements of political discontent and to help enforce harsh duties and customs imposed on the Colonies.[2] Such searches and seizures greatly embittered the Colonists and have been regarded as one of the chief causes of the American Revolution.[3]

The broad provisions of the Amendment have been interpreted to mean that generally a "reasonable search" is a search based on a valid search warrant—that is, a search warrant based on probable cause and sworn to under oath.[4] As an effective means of enforcing the Amendment, a rule has been established that evidence obtained by a search and seizure in violation thereof by federal officers is inadmissible in the federal courts.[5] As exceptions to the general rule, warrantless searches have been permitted under the following circumstances: (1) in the case of moving vehicles where probable cause exists that a crime has been committed, searches have been permitted without a warrant since otherwise the vehicle might move out of the locality while a warrant is being obtained;[6] (2) as incident to a valid arrest, the person arrested may be searched in order to seize means of escape, or means of harming the officers, and to prevent the destruction of evidence of the crime;[7] (3) as incident to a valid arrest, the "premises

[1]The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Amendment is a restriction on the Federal Government and not on the states. Adams v. New York, 192 U. S. 585, 24 Ct. 372, 48 L. ed. 575 (1904). In the recent case of Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949), the Amendment was stated to be applicable to the states through the Due Process Clause of the Fourteenth Amendment, but such statement was dictum.

[2]See Boyd v. United States, 116 U. S. 616, 624, 6 S. Ct. 524, 529, 29 L. ed. 746, 749 (1886); Fraenkel, Concerning Searches and Seizures (1921) 34 Harv. L. Rev. 361, 362.

[3]See Boyd v. United States, 116 U. S. 616, 624, 6 S. Ct. 524, 529, 29 L. ed. 746, 749 (1886); Cooley, Constitutional Limitations (5th ed. 1883) 365.

[4]Rottschaefer, Constitutional Law (1939) 743; Cooley, Constitutional Limitations (5th ed. 1883) 369.

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

[6]Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. ed. 543 (1925).

[7]Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925).

in the immediate control" of the person arrested may be searched.[8] The third exception has been a source of much litigation in the federal courts due to the ever-changing definition by the courts of "premises in the immediate control" of the arrested person.

After *Weeks v. United States*[9] established the federal exclusionary rule in 1914, the decisions had been so limited that objects "in the immediate control" of the arrested person meant only visible objects in his immediate presence.[10] However, *Harris v. United States*,[11] decided in 1947, abolished the visibility requirement and broadened the phrase "in the immediate control" to include a four-room apartment of the person arrested. The action of the police officers was countenanced even though the objects seized and for the possession of which the defendant was convicted had nothing to do with the crime for which he was arrested. This search most certainly would have fallen into the classification of general exploratory searches for evidentiary matters prohibited by earlier cases.[12] The *Harris* case has gone further in broadening the scope of a reasonable search than any of the other cases on the subject.

In 1948, the Supreme Court in *Trupiano v. United States*[13] introduced the requirement that where practicable a search warrant must be obtained prior to the search. Since this requirement had not been met, the search was illegal, notwithstanding the fact that the person was lawfully arrested in a barn and the objects seized were plainly visible and within easy reach of the officers. The Court took care to distinguish the *Harris* case on a factual basis and said that that case was concerned with the scope of a general search as incident to arrest.[14] Both cases were five-to-four decisions, and the sudden change in the law was due to the shifting of Justice Douglas from the majority

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[8]Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925); Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927).

[9]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

[10]Compare United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. ed. 877 (1932) and Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. ed. 374 (1931) with Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927). The Lefkowitz case and the Go-Bart case limited the holding of the Marron case to visible objects.

[11]331 U. S. 145, 67 S. Ct. 1098, 91 L. ed. 1399 (1947).

[12]United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. ed. 877 (1932); Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. ed. 374 (1931).

[13]334 U. S. 699, 68 S. Ct. 1229, 92 L. ed. 1663 (1948).

[14]However, it appears that even in the Harris case there was ample time to get a search warrant.

side in the *Harris* case to join the members of the dissent in that case who formed the majority side in the *Trupiano* case.[15]

Against this background, the recent case of *United States v. Rabinowitz*[16] came before the Court, but in the interim since the *Trupiano* decision Justices Clark and Minton had replaced Justices Murphy and Rutledge, the two latter justices having been on the majority side in the *Trupiano* case. In the *Rabinowitz* case, federal officers, learning of defendant's dealing in stamps bearing forged overprints, arranged a plot whereby a postal employee went to defendant's office and purchased four stamps which were found to have forged overprints. A week later an arrest warrant was obtained and officers, accompanied by stamp experts, went to defendant's one-room office, arrested him, searched a desk, safe, and file cabinets, and found 573 stamps bearing forged overprints. The search was made without a warrant and over the defendant's objections. On trial for selling, possessing, and concealing stamps with forged overprints with intent to defraud, the defendant was convicted after he had made a timely motion to suppress the 573 stamps as evidence. The Court of Appeals reversed, relying on the *Trupiano* case, holding that since the officers had had time to get a search warrant and had failed to do so, the search was invalid under the Fourth Amendment and thus the 573 stamps were inadmissible as evidence.[17]

The Supreme Court reversed the decision of the Court of Appeals, overruling the *Trupiano* case to the extent that a search warrant is required if it is practicable to get one, and decided that a search incident to lawful arrest is valid without a warrant if it is "reasonable." What is reasonable is not a fixed formula but is to be decided according to the circumstances of each case. The Court declared that the search was reasonable here because: "(1) the search and seizure were incident to a valid arrest; (2) the place of search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room

[15]In the Harris case Chief Justice Vinson, Justices Black, Reed, Douglas, and Burton were on the majority side, with Justices Frankfurter, Murphy, Rutledge, and Jackson dissenting. In the Trupiano case, the Court's members being the same, Justices Frankfurter, Murphy, Rutledge, Jackson, and Douglas formed the majority.

[16]339 U. S. 56, 70 S. Ct. 430, 94 L. ed. 407 (1950). In the five-to-three decision, Chief Justice Vinson, Justices Minton, Clark, Burton, and Reed formed the majority, with Justices Frankfurter, Jackson, and Black dissenting. Justice Douglas did not participate.

[17]United States v. Rabinowitz, 176 F. (2d) 732 (C. A. 2d, 1949).

used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."[18]

The *Harris* case was cited as ample authority for the holding, and the Court said that the *Trupiano* case had been based on an erroneous interpretation of *Taylor v. United States*.[19] Furthermore, it was reasoned that hasty searches can be redressed by the courts, and some leeway should be given to officers in their efforts to capture criminals.[20]

In a separate dissent by Justice Frankfurter, in which Justice Jackson concurred, the Court's opinion was strongly criticized as being contrary to the Fourth Amendment.[21] It was stated that the Amendment was framed after a bitter experience with the general search warrants of the English and that it was the framers' intent that a search without warrant should be made only in cases of absolute necessity,[22] such cases being: (1) searches of moving vehicles; (2) searches of the person incident to arrest; (3) searches and seizures of visible objects in the immediate presence of the person arrested. Otherwise it was argued that the Amendment requires an impartial magistrate to pass upon the propriety of whether a search will be made. Furthermore, the test of reasonableness laid down by the Court furnishes no guide at all to the lower courts; it restricts and endangers privacy by giving too much leeway to officers; it permits the result of

[18]United States v. Rabinowitz, 339 U. S. 56, 64, 70 S. Ct. 430, 434, 94 L. ed. 407, 412 (1950).

[19]286 U. S. 1, 52 S. Ct. 466, 76 L. ed. 951 (1932). Officers had received complaints of defendant's activities for about a year, but they searched his garage without a warrant and prior to arresting him. Thus, there was no prior arrest to legalize the entry and search.

[20]The Court stated: "Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers in daily battle with criminals for whose restraint criminal laws are essential." United States v. Rabinowitz, 339 U. S. 56, 65, 70 S. Ct. 430, 435, 94 L. ed. 407, 413 (1950).

[21]United States v. Rabinowitz, 339 U. S. 56, 68, 70 S. Ct. 430, 436, 94 L. ed. 407, 415 (1950). Justice Black dissented separately on the grounds that even though he regarded the Trupiano rule as merely a judicially-created rule of evidence rather than a constitutional command, still it should be adhered to because: (1) otherwise, existing confusion will be increased; (2) the rule should be given enough time to see how it works; (3) the interest of privacy outweighs the fact that now and then a criminal may go free. 339 U. S. 56, 66, 70 S. Ct. 430, 444, 94 L. ed. 407, 414 (1950).

[22]"Words must be read with the gloss of the experience of those who framed them." United States v. Rabinowitz, 339 U. S. 56, 70, 70 S. Ct. 430, 436, 94 L. ed. 407, 415 (1950).

a general search forbidden by the Fourth Amendment by legalizing a search made incident to arrest even if the arrest is for a minor or trumped-up charge. Finally, the dissent contended that cases should not be overruled at a time when the Court's members are changing, in the absence of manifest need therefor, since it makes the law look like a matter of chance.

The past cases on the subject are conflicting and are full of technical distinctions, so that either the majority or the Frankfurter dissent could find authority for its holding. The *Harris* case is ample authority for the holding of the majority opinion, and the *Trupiano* case would be authority for the dissent. However, in the light of the *Trupiano* case there seems to be some inconsistency in the present stand of the Frankfurter dissent. In the *Trupiano* case a search warrant was a *sine qua non* to the validity of a search if there was time to get one, even though the objects seized were visible, but in the principal case the Frankfurter dissent dispenses with the search warrant requirements if the objects seized are visible.

As a practical matter the test of reasonableness offers no hope of clarifying the status of the law in this confused field, whereas the dissent's standard does, and such clarity should be a most important consideration at the present time. Furthermore, though the majority opinion will give officers more leeway in making searches and seizures, and by broadening the scope of a warrantless search will reduce the protection accorded the defendant by the federal exclusionary rule, the gain is questionable since it must be offset against the loss of the individual's privacy. And the protection of privacy seems more important than ever before, in view of the enormous growth of government in recent years with its influences reaching into nearly every phase of private life, making it uncertain where government ends and individual rights begin. Thus, it would seem desirable to have a constitutional sanction of a prior-search-warrant requirement guarding the rights of privacy, rather than to leave this fundamental liberty to the mercy of a "rule of reasonableness" to be administered by the lower federal courts.

RUSH P WEBB

CONSTITUTIONAL LAW—VALIDITY OF ZONING ORDINANCE PROHIBITING ESTABLISHED PERMISSIVE USE OF PROPERTY. [Nebraska]

The recognized purpose of zoning is to regulate and stabilize the growth of communities, this regulation being justified by the conse-

quent protection it affords to the health, safety, and welfare of the general public.[1] For this reason the enactment of zoning legislation is deemed necessary even though it places restrictions on the use of property that in days past would have been considered an unreasonable and unlawful interference with private ownership.[2]

The constitutionality of comprehensive zoning ordinances in general as a valid exercise of the state's police power[3] was established in 1926 by the Supreme Court of the United States in *Village of Euclid v. Ambler Realty Company*.[4] Such ordinances must bear a rational relation to the public health, safety, or welfare and they must not be clearly unreasonable or arbitrary.[5]Inevitably, some degree of arbitrariness will be evidenced, for the reasonableness of the ordinance must be determined by the balancing of social utility against individual rights. If it is determined that the overall public benefit reasonably warrants restrictions placed on certain individual uses of property, then the courts ordinarily will uphold such exercise of legislative discretion.[6]

However, the general rule is that a vested right must not be destroyed arbitrarily by such enactments.[7] This problem of vested rights is the most usual basis of litigation in zoning controversies now that the constitutionality of zoning ordinances in general has been been established. The recent case of *City of Omaha v. Glissman*[8] is illustrative of this frequent basis for attack on zoning regulations.

The *Glissman* case involved an action brought by the city to enjoin the defendant from further construction or operation of a tourist and trailer camp. Defendant was the lessee of a golf course and had

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[1]3 McQuillin, Municipal Corporations (2d ed. 1943) § 1026.

[2]See Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 387, 47 S. Ct. 114, 118, 71 L. ed. 303, 310 (1926): "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."

[3]The municipality's power to zone must be granted by the state as it is not an inherent power of the city itself. Clements v. McCabe, 210 Mich. 207, 177 N. W 722 (1920); 58 Am. Jur., Zoning § 7.

[4]272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926).

[5]Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926); Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W (2d) 600 (1944).

[6]Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. ed. 348 (1915); Eggebeen v. Sonnenburg, 339 Wis. 213, 1 N. W (2d) 84, 138 A. L. R. 495 (1941); 3 McQuillin, Municipal Corporations (2d ed. 1943) 419.

[7]Reynolds v. McArthur, 2 Pet. 417, 7 L. ed. 470 (U. S. 1829); Baker v. Somerville, 138 Neb. 466, 293 N. W. 326 (1940); Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W (2d) 600 (1944).

[8]39 N. W. (2d) 828 (Neb. 1949).

leased the adjoining property when the zoning ordinance permitted his intended purpose of building a tourist camp. Some work toward developing the camp was done immediately upon obtaining the lease. After applying for the proper permit and having it approved by the City Board, but before actually receiving it because of technical difficulties,[9] the defendant proceeded to expend more money and work on the project. Although he was then notified that a rezoning of the area was to be considered and that he should await the final outcome, the defendant continued his work, and after the area had been rezoned to a residential district he completed the project, most of the work having been done after the area was rezoned. The defendant then claimed that he had a vested right of which he could not be deprived and so should be allowed to continue operations as a non-conforming user. By a four to three decision the Supreme Court of Nebraska affirmed the issuance of an injunction against such operation.[10]

This problem of rights becoming vested before zoning or rezoning may be divided into three main categories: where, prior to zoning, (1) there is an existing permissive use, (2) the owner is in the act of constructing a permissive use, or (3) the owner contemplates and has acquired the property with the intention of putting it to a permissive use.

In the first category the general rule of law is that a subsequent ordinance rezoning the district cannot be applied retroactively so as to deprive a person of his vested right acquired in a formerly permissive use.[11] In deference to this rule, courts will ordinarily allow a formerly permissive use to continue as a non-conforming use, particularly if its nature is such that its interference with the new restriction is negligible.[12] However, the nature or character of the existing

[9]The request for a permit was granted by the city council but made subject to the approval of the city's building department so that the actual plans would conform with the technical building regulations of the city. This authorized permit was never issued, for when the plans were presented the inspector refused to accept them because a petition for reconsideration has been presented in the meantime.

[10]It should be noted that the dissent made no mention of the vested rights issue, but based its opinion on the ordinance itself being arbitrary and unreasonable. In stating that zoning ordinances are in derogation of the common law and should be strictly construed, the dissent conformed to the minority view of confining rather than broadening the zoning power.

[11]Reynolds v. McArthur, 2 Pet 417, 7 L. ed. 470 (U. S. 1829); Baker v. Somerville, 138 Neb. 466, 293 N. W 326 (1940); Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W (2d) 600 (1944); 43 C. J., Municipal Corp. § 370; U. S. Const. Amend. 14 (deprivation of property without due process).

[12]3 McQuillin, Municipal Corporations (2d ed. 1943) § 1046. An example of this would be a two family house that existed in an area rezoned to one family dwellings.

use may give rise to exceptions to this general rule. Occasionally, if the use is causing a harm of an uncertain or intangible nature but its removal is deemed best for the public health and welfare, then the owner may be compelled to discontinue his business.[13] Thus, where a drug or grocery store has existed in an area that is subsequently made first class residential, its continued operation might be allowed for a year or two to enable a more equitable liquidation.[14] If the use is considered harmful and would amount to some type of nuisance, its continued operation may be immediately prohibited.[15] Thus, where an owner had been operating a brickyard in an area originally outside of the city limits, and this area was later incorporated and zoned residential, he was no longer permitted to manufacture bricks at that site even though such prohibitions entailed the abandonment of his business.[16]

These situations indicate that a zoning ordinance validly can be made to act retrospectively. In fact, it would seem that with respect to the use of property that has already been purchased, all zoning is retroactive to some degree in that it prevents unrestricted use of the land which was open to the owner when he acquired it. Although a zoning ordinance is almost always interpreted as being prospective only, it may sometimes be specifically enacted by the legislature to be retroactive and when it is so enacted it has a good chance of being upheld because the courts are prone to rely on the discretion of the legislature.[17]

In the principal case defendant evidently attempted to claim a vested right under the second category, wherein property is in the process of being developed and a subsequent rezoning makes such a use non-conformable. The primary consideration in this field is the amount of work that has been done and the liabilities incurred before the zoning or rezoning.[18] Here, too, the nature of the use being developed will be an underlying consideration. Most courts will be less prone to assent to the prohibition if the development is of a use

[13]City of New Orleans v. Liberty Shop, Ltd., 157 La. 26, 101 So. 798 (1924).

[14]See State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, 614 (1929); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314, 315 (1929).

[15]Reinman v. Little Rock, 237 U. S. 171, 35 S. Ct. 511, 59 L. ed. 900 (1915).

[16]Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. ed. 348 (1915).

[17]Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. ed. 348 (1915); Eggebeen v. Sonnenberg, 239 Wis. 213, 1 N. W (2d) 84, 138 A. L. R. 495 (1941); 3 McQuillin, Municipal Corporations (2d ed. 1943) 419.

[18]Trans-Oceanic Oil Corporation v. City of Santa Barbara, 85 Cal. App. (2d) 776, 194 P. (2d) 148 (1948); Pelham View Apartments v. Switzer, 130 Misc. 545, 224 N. Y. Supp. 56 (1927); 9 Am. Jur., Buildings § 8; Bassett, Zoning (1948) 178.

that is inherent to the particular site, such as drilling for oil or digging gravel[19] whereas they might not have such compunctions if the use is one that can be carried on as easily elsewhere, such as manufacturing.[20] However, this inherent quality of the use is not such a prime consideration that it will invalidate the ordinance if the use is deemed noxious to the health or safety of the public.[21]

The defendant's claim in the *Glissman* case is not well substantiated by the facts, and the court found that defendant "had not established any vested right to use these premises for the purpose here contended when the change was made."[22] If the case had been before a court that is inclined to be more liberal with the property owner, the defendant might have prevailed, for he had expended time and money in investigating other camps, and had expended labor and money in clearing the site of the camp. Actually, defendant's permit was originally granted by the city, but issuance was delayed for the technical approval of the building department and this delay caused it to be withheld pending the rezoning hearing. However, the fact cannot be overlooked that the defendant did most of the work after the ordinance was changed and without securing a permit.

It would seem by the court's decision that the principal case comes more nearly within the purview of the third category, wherein an owner contemplates or intends the development of a use that becomes non-conformable by a change in zoning. The rule here is that the mere acquiring of property for a certain use or the intention of developing one's property for a certain use will not give the owner a vested right of which he cannot be deprived by a subsequent ordinance.[23] An example is *West Bros. Brick Co., Inc. v. City of Alexandria*[24] where the owner, a brick maker, paid a considerable sum for a tract of land because of its underlying clay deposits with the intention of using it in the future. After a number of years had elapsed but before digging was begun, the zoning classification was changed. In affirming an injunction restraining the owner from digging the clay, the court

[19]Village of Terrace Park v. Errett, 12 F. (2d) 240 (C. C. A. 6th, 1926); Ex parte Kelso, 147 Cal. 609, 82 Pac. 241 (1905); Trans-Oceanic Oil Corporation v. City of Santa Barbara, 85 Cal. App. (2d) 776, 194 P (2d) 148 (1948).

[20]Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. ed. 348 (1915); Village of Terrace Park v. Errett, 12 F. (2d) 240, 243 (C. C. A. 6th, 1926).

[21]See Trans-Oceanic Oil Corporation v. City of Santa Barbara, 85 Cal. App. (2d) 776, 194 P (2d) 148, 156 (1948).

[22]39 N. W (2d) 828, 834 (Neb. 1949).

[23]Marblehead Land Co. v. City of Los Angeles, 47 F. (2d) 528 (C. C. A. 9th, 1931); Osborn v. Town of Darien, 119 Conn. 182, 175 Atl. 578 (1934); West Bros. Brick Co., Inc. v. City of Alexandria, 169 Va. 271, 192 S. E. 881 (1937).

[24]169 Va. 271, 192 S. E. 881 (1937).

said, "It was bought, as we are told, for future use, and not having been used at all, the doctrine of non-conforming uses has no application."[25]

The only consideration that may be classified as a main one in this category is the reasonableness of the ordinance itself. The courts hold that there is no problem of an ordinance having a retroactive effect, for a mere intention does not make the use a reality, and, therefore, cannot give a vested right.

In perspective, it would seem that vested rights are not as inviolable as first appearances might lead one to believe. Actually, they are always subject to the police power, one writer stating that "it is not entirely clear how anyone can perfect a vested right against a police power regulation."[26] It is held that a person cannot be deprived of a vested right arbitrarily, but here "arbitrary" evidently bears the connotation that the enactment of the ordinance is unreasonable only if a certain lack of overall public benefit makes it so. Since it is said that zoning looks to the future and concerns itself with future conditions more than with present ones, it would seem that this would influence the courts in not regarding an individual's past or established property rights in such a sacred light as they formerly were. As urban life increases in complexity, it is obvious that zoning authority must expand accordingly, for the necessity of increased protection must be met. However, the development of the trend of allowing a broad zoning power should not be allowed to go to such an extent that the basic concept of individual ownership will be ignored.

JACK E. GREER

COURTS—VALIDITY OF ORDER OF JUDGE EXCLUDING PUBLIC FROM CRIMINAL TRIALS. [Federal]

An order by the judge conducting a criminal trial directing the exclusion of orderly spectators is difficult to reconcile with the absolute guarantee of a public trial found in the Sixth Amendment of

[25]West Bros. Brick Co., Inc. v. City of Alexandria, 169 Va. 271, 284, 192 S. E. 881, 886 (1937).

[26]Bassett, Zoning (1948) 178. This is given a fuller explanation on page 112 where the author states, "If the police power can be invoked to prevent a new nonconforming building because of its relation to the community health . and general welfare, it follows that the police power can be invoked to oust existing nonconforming uses. Theoretically the police power is broad enough to warrant the ousting of every nonconforming use, but the courts would rightly and sensibly find a method of preventing such a catastrophe."

the Federal Constitution[1] and in the constitutions of most states.[2] The problem is squarely presented to the appellate court when the trial judge has made, over the objection of the defendant, a sweeping order clearing from the courtroom members of the general public, allowing only the defendant, officers of the court, witnesses, and one or more other limited groups to remain.[3] Such action has not been uncommon in criminal trials involving, by their nature, the revelation of human depravity.

Demonstrating the occurrence of this problem is the recent case of *United States v. Kobli*,[4] in which the defendants were charged with violation of the Mann Act[5] and conspiracy to violate that Act. On the day the trial was to begin, the courtroom was filled to overflowing with spectators, among them a great many young girls. Over

[1]U. S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial " The Sixth Amendment is not applicable to trials in state courts. See Gaines v. Washington, 277 U. S. 81, 85, 48 S. Ct. 468, 469, 72 L. ed. 793, 795 (1928). It is not thought that the due process clause of the Fourteenth Amendment would make the public trial provision applicable to trials in state courts. See Palko v. Connecticut, 302 U. S. 319, 323, 58 S. Ct. 149, 151, 82 L. ed. 288, 291 (1937).

[2]A compilation of state constitutional and statutory provisions requiring public trial in criminal prosecutions is set forth in connection with Justice Black's opinion. In re Oliver, 333 U. S. 257, 268, 68 S. Ct. 499, 505, 92 L. ed. 682, 691 (1948). Forty-one states have constitutional provisions; two states have statutory provisions. A few states, however, have limited constitutional provisions and expressly allow exclusion in certain cases. See, e.g., Miss. Const. (1942) § 26 (in prosecutions for rape, adultery, fornication, sodomy or crime against nature all except those "necessary in the conduct of the trial" may be excluded). For an interesting exception in state statutes dealing with public trial, see Va. Code Ann. (Michie, 1950) § 19-219. "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any or all persons whose presence is not deemed necessary." For a thorough study of the general problem, see Note (1949) 49 Col. L. Rev. 110.

[3]The precise wording of the exclusion order differs in each individual case. Among the groups allowed to remain are "all persons directly interested in the case," Robertson v. State, 64 Fla. 437, 60 So. 118, 119 (1912); "students at law," Benedict v. People, 23 Cal. 126, 46 Pac. 637, 638 (1896); "those having business with and in the court," People v. Byrnes, 190 P (2d) 290, 291 (Cal. App. 1948); "reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial," People v. Kerrigan, 73 Cal. 222, 14 Pac. 849, 850 (1887). In State v. Johnson, 26 Idaho 609, 144 Pac. 784, 785 (1914) an order excluding all spectators was upheld, but the opinion states that "friends of the defendant who desired to be present" and "officers of the court, including members of the bar," should not be excluded in such cases. In the usual exclusion order, named relatives of the defendant or "persons directly interested in the case" or "friends of the defendant" almost inevitably form one of the excepted groups. See, however, Grimmett v. State, 22 Tex. Crim. Rep. 36, 2 S. W 631 (1886) where only officers, jurors and counsel were allowed to remain.

[4]172 F (2d) 919 (C. A. 3d, 1949).

[5]62 Stat. 812 (1948), 18 U. S. C. A. 2421 (Supp. 1949).

the objection of defendant Kobli,[6] the trial judge directed that the courtroom be cleared of all people except "the defendants, their counsel, witnesses and members of the press." Shortly thereafter the trial judge offered to allow the readmission of any of the excluded persons having a connection with the case whom the defendants wished to be present. However, the record revealed nothing to indicate that the exclusion order was later modified or rescinded.

The accused was convicted, but on appeal to the United States Court of Appeals, Third Circuit, the judgment of the district court was reversed and the cause was remanded for a new trial. It was held that such an order applicable to the public generally denied the objecting defendant the public trial to which she was entitled under the Sixth Amendment. The trial judge's order of exclusion should have been limited to those members of the public for whom space was not available in the courtroom or whose conduct was such as to interfere with the administration of justice, or those minors who in the interest of public morals ought not to have been permitted to hear the expected testimony. The decision was in accord with the views of two other federal appellate courts which have passed upon the precise question.[7]

Where substantially the same problem has faced the state courts, there is disagreement as to the scope of protection afforded by the right of public trial which springs from a controversy as to the essential nature and the historical basis of the guarantee. In courts where the right to a public trial has been highly regarded and zealously guarded, it has been determined that a violation necessarily implies prejudice, and the defendant need not point out any definite injury.[8]

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[6]The better rule is that the technical failure to object to order at the proper time does not constitute a waiver. Wade v. State, 207 Ala. 1, 92 So. 101 (1921); State v. Hensley, 75 Ohio, St. 255, 79 N. E. 462 (1906); State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923). Contra: Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); Benedict v. People, 26 Colo. 126, 46 Pac. 637 (1896). It has been suggested that where the accused affirmatively requests the exclusion, he should not be permitted to appeal from an adverse decision on the grounds of deprivation of public trial. However, intelligent waiver by the accused should be allowed since the community's interest is protected by the need for agreement to the waiver by the public prosecutor and judge. See Patton v. United States, 281 U. S. 276, 312, 50 S. Ct. 253, 263, 74 L. ed. 855, 870 (1930). Note (1949) 49 Col. L. Rev. 110.

[7]Davis v. United States, 247 Fed. 384 (C. C. A. 8th, 1917); Tanksley v. United States, 145 F. (2d) 58 (C. C. A. 9th, 1944).

[8]Despite some state decisions to the contrary, this seems to be the prevailing and better state and federal view. Davis v. United States, 247 Fed. 394 (C. C. A. 8th, 1917); Tanksley v. United States, 145 F. (2d) 58 (C. C. A. 9th, 1944); People v. Yeager, 113 Mich. 228, 71 N. W 491 (1897); State v. Beckstead, 96 Utah 528, 88 P (2d) 461 (1939). Contra: Reagan v. United States, 202 Fed. 488 (C. C. A. 9th, 1913).

While respectable authority has stated that "the requirement of a public trial is for the benefit of the accused,"[9] it seems more accurate in the light of historical perspective to say that the guarantee of a public trial is of a *dual* nature, of benefit to both the general public and the accused. It is generally conceded that the common law concept of a public trial had, at the time the Constitution was framed, come to be regarded as an essential assurance against any attempt to employ the courts as instruments of persecution[10] and as a vital means of facilitating the administration of justice.[11]

The right to public trial has been held subject to some practical limitations by all courts. Any individual whose conduct tends to interfere with the administration of justice may, of course, be removed.[12] In the extraordinary event that the entire group of spectators

[9]An unfortunate statement from the ambiguous, often quoted, and misunderstood passage from 1 Cooley, Constitutional Limitations (8th ed. 1927) 647. "The requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed, if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." This particular passage has furnished the basis for decisions upholding exclusion orders. Robertson v. State, 64 Fla. 437, 60 So. 118 (1912); State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914); Grimmett v. State, 22 Tex. Crim. 36, 2 S. W 631 (1886); and, also, the passage has been quoted in decisions holding similar exclusion orders invalid. State v. Hensley, 75 Ohio St. 255, 79 N. E. 462 (1906); State v. Bonza, 72 Utah 177, 269 Pac. 480 (1928).

[10]"Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." In re Oliver, 333 U. S. 257, 270, 68 S. Ct. 499, 505, 92 L. ed. 682, 692 (1948). But see, Radin, The Right to a Public Trial (1932) 6 Temp. L. Q. 381, who attributes the origin of the American public trial provision to a "fortuitous circumstance" that the jury trial system in England involved a large panel, thereby insuring the presence of a substantial part of the public.

[11]Public trials were thought to produce circumstances under which witnesses were less likely to perjure themselves. Tanksley v. United States, 145 F. (2d) 58 (C. C. A. 9th, 1944). Public trials might attract important witnesses unknown to the parties who might voluntarily come forward to testify. It was also thought that the conduct of trials in public would enable the spectators to learn about their government and acquire confidence in their judicial remedies. 6 Wigmore, Evidence (3d ed. 1940) § 1834. Since truthful witnesses and unknown witnesses who present themselves are quite as likely to aid the prosecution as the defendant, it is impossible to support Cooley's contention that the requirement of a public trial is necessarily for the benefit of the accused. It seems correct to speak of it only as a means of facilitating the administration of justice, whatever justice may be, and not as a benefit to either the prosecution or the accused.

[12]State v. Genese, 102 N. J. L. 134, 130 Atl. 642 (1925) (individuals excluded

becomes disorderly, the trial judge may order their exclusion.[13] He may also take steps to prevent armed men from attending a trial.[14] The right does not require that the trial be held in a place large enough to accommodate all those who desire to attend.[15] Nor does complete exclusion of the public for a temporary period constitute a deprival of a public trial when it is the only means of securing testimony from a youthful witness.[16] Likewise, as stated in the *Kobli* case, "there is agreement that in cases involving sexual offenses youthful spectators may be excluded when the evidence is likely to involve the recital of scandalous or indecent matters which would have a demoralizing effect upon their immature minds."[17]

It is quite a different matter to carry these practical limitations to their ultimate extreme of complete exclusion of the orderly, nonpartisan spectator. However, a small minority of state courts have upheld such exclusion orders, with minor exceptions such as those made by the trial judge in the *Kobli* case, in the face of state constitutional provisions as unqualified and unlimited as that included in the Sixth Amendment. The unsatisfactory nature of these decisions is reflected in the curious course of reasoning employed.

While it seems logical to hold that a public trial is "a trial at which the public is free to attend,"[18] the Florida Supreme Court in *Robertson v. State*[19] utilized a definition found in the dictum of an early, now disregarded California case[20] to the effect that the word

because they persisted in laughing). In Davis v. United States, 247 Fed. 394, 395 (C. C. A. 8th, 1917) the following statement was made: "An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose conduct outside the courtroom made their presence within a menace might have been excluded."

[13]Lide v. State, 133 Ala. 43, 31 So. 953 (1902). It is extremely unlikely that the *entire* group of spectators should become disorderly.

[14]People v. Mangiapane, 219 Mich. 62, 188 N. W 401 (1922). For elaborate precautions which may be taken to preserve order and to protect the court from a notorious criminal, see Pierpont v. State, 49 Ohio App. 77, 195 N. E. 264 (1934).

[15]Davis v. United States, 247 Fed. 394, 395 (C. C. A. 8th, 1917); Myers v. State, 97 Ga. 76, 25 S. E. 252, 260 (1895).

[16]Hogan v. State, 191 Ark. 437, 86 S. W (2d) 931 (1935); State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933).

[17]172 F. (2d) 919, 922 (C. A. 3d, 1949). See State v. Adams, 100 S. C. 43, 84 S. E. 368 (1915). Statutes provide for exclusion of minors in four states. Ariz. Code Ann. (1939) § 21-904; Mich. Comp. Laws (Mason, 1929) § 13887; Minn. Stat. (Henderson, 1945) § 631.04; Nev. Comp. Laws Ann. (1929) § 8404.

[18]Davis v. United States, 247 Fed. 394, 395 (C. C. A. 8th, 1917).

[19]64 Fla. 437, 60 So. 118 (1912).

[20]People v. Swafford, 65 Cal. 223, 3 Pac. 809 (1884). Cf. People v. Byrnes, 190 P. (2d) 290 (Cal. App. 1948).

"public" as used in the public trial provision of the California Constitution is in opposition to the word "secret." In *Keddington v. State*,[21] the Arizona Supreme Court turned to a similar definition in holding a public trial to be "the opposite of a secret trial or a trial in camera or at star chambers."[22] By thus defining "public trial" in negative terms, the first step toward circumvention of the unqualified constitutional guarantee was completed.

Noting that the word "public" was all-embracing and that it would be quite impossible for the *entire* public to attend a trial, the minority courts logically deduced that the word was subject to a practical limitation in degree. The *Roberston* decision termed a "public trial" as one where "a reasonable proportion of the public"[23] was allowed to attend. Referring to those who were allowed to remain in the courtroom as the necessary parties to a trial and as those "directly interested in the case,"[24] the court found that a "reasonable portion of the public" was present. To strengthen the action of the trial judge in excluding all spectators, the court by implication branded all spectators except those "directly interested," as "drawn thither by a prurient curiosity."[25]

The *Keddington* case developed a more original approach to the problem. Noting that the courtroom need not be large enough to accommodate all who wish to attend a criminal trial, the court could proceed further: "Some of the public not actually engaged in the trial must be privileged or allowed to attend the trial to constitute it public, *but no irreducible minimum has ever been proposed or named as yet.*"[26]

Observing that modern stenographic records and the wide public distribution of news of judicial oppression through newspapers afforded the defendant protection from prejudice in lower courts, the *Keddington* case held that if members of the press were present during the trial, there was a "public trial." Thus, the Arizona court turned the responsibility of directing public attention to acts of judicial oppression to those whom the *Kobli* decision referred to as "the more seasoned but sometimes blasé professional gatherer of news."[27] If rationalizations of the minority courts are directed toward the protection of public morals through exclusion of adult spectators, this

[21]19 Ariz. 457, 172 Pac. 273, 274 (1918).
[22]Keddington v. State, 19 Ariz. 457, 172 Pac. 273, 274 (1918).
[23]64 Fla. 437, 60 So. 118, 119 (1912).
[24]Robertson v. State, 64 Fla. 437, 60 So. 118, 119 (1912).
[25]Robertson v. State, 64 Fla. 437, 60 So. 118, 119 (1912).
[26]19 Ariz. 457, 172 Pac. 273, 274 (1918) [italics supplied].
[27]United States v. Kobli, 172 F. (2d) 919, 923 (C. A. 3d, 1949).

is done with disregard to what the *Kobli* case terms "the franker and more realistic attitude [which] precludes a determination that all members of the public, the mature and experienced as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the grounds of public morals."[28]

The assumption that there is no danger from judicial oppression, certainly an unwise one in the light of modern history, and a misapprehension of the dual nature of the right to public trial appear to have led the minority courts astray. In the *Keddington* case, the public right was irresponsibly delegated to the press representatives; in the *Robertson* case there was complete identification of the public's interest with that of the "directly interested" group—almost inevitably a partisan group.

There are obvious practical difficulties in limiting exclusion orders to certain designated classes. It is often difficult to find the source of disorder in a courtroom. And, too, it is impossible to determine at times which youthful spectators should be excluded because of potential damage to public morals. But these are practical considerations wisely left in the discretion of the judge; and in carefully making his exclusion order in a form which limits it to groups or individuals who may be rightfully excluded, he may facilitate the administration of justice while yet protecting the valuable right to a public trial. Mere absence of judicial oppression in any given case does not decrease the value of a constitutional guarantee designed in part to guard against such oppression.[29] It is evidence only of a high decree of public morality which has made unnecessary the invoking of the protection in that case.

The public and the accused both have significant interests in the constitutional guarantee which are, however, based on different considerations: the public has the general, long-range concern that the administration of criminal prosecutions proceed according to standards which a democratic society thinks will bring justice in the

[28]172 F. (2d) 919, 923 (C. A. 3d, 1949). In Ex Parte Wade, 207 Ala. 241, 92 So. 104, 105 (1922) it was suggested that a definite choice had been made: "Evidently the framers of the Constitution conceived that the necessity for the 'public trials' required by the organic law was more important, more vital to the welfare and to the safety of the people of the state, than the possibility or probability that, upon occasions ... morals might be shocked or impaired through the voluntary attendance of the idle and morbidly curious upon 'public trials' where matters of a salacious character were involved."

[29]Some courts, however, do not regard the right to public trial as logical. Note, for example, the statement in the principal case: "While as has been suggested, the right thus accorded to members of the public as mere spectators may not be wholly logical " United States v. Kobli, 172 F. (2d) 919,, 924 (C. A. 3d, 1949).

greater number of cases, while the accused has the specific, immediate concern in having his case presented in the most favorable light for securing an acquittal. Recognition of the existence of both of these divergent interests by the courts would have precluded much of the confusion which has beset the subject.

H. CRAIG CASTLE

EMINENT DOMAIN—EVALUATION OF MERCHANT SHIPS REQUISITIONED BY GOVERNMENT UNDER WAR EMERGENCY POWERS. [United States Supreme Court]

As an outgrowth of the wartime shipping emergency, the problem of evaluating merchant vessels requisitioned for title or charter by the government is again facing the courts. Because of the nature of the property, the complexity of the factors on which its value depends, and the fluctuating conditions of the industry generally, ordinary rules of evaluation for damages purposes do not provide satisfactory results.

At the conclusion of the first World War in 1918, through continuation of the wartime building program, the American government had in its possession by 1922 a vast surplusage of ships beyond this country's ordinary peacetime needs. Because the government adopted a restrictive pricing policy in regard to the sale of these ships, costs to buyers became excessive. The foreign shipbuilding yards were soon rehabilitated and produced ships at lower costs than was possible in the United States. The result was that the government lost money, the shipping operators (especially those purchasing prior to the collapse of the market) were ruined, and the American merchant marine was seriously crippled. By 1935, American merchant shipping had reached such a condition that it imperiled the national defense due to its age, lack of numbers, and the demoralization of employer-employee relations.[1]

In 1936, the first really comprehensive merchant marine act in the Nation's history was passed, it purpose being stated as follows:

> "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United

[1]See pages 18-21, 32, 44, Merchant Marine for Trade and Defense, United States Maritime Commission, Washington (1946). Revised, 1949. United States Government Printing Office.

> States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign waterborne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. *It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.*"[2]

The Act set up the present Maritime Commission[3] which was to administer the provisions of the Act and become the general steward for all maritime matters in the United States.

Certain titles provided for "construction-differential" subsidies,[4] and "operating-differential" subsidies,[5] and gave power to the Maritime Commission to construct ships for its own account.[6] Under a 1939 amendment,[7] the Commission is given power, in the event of the proclamation of a national emergency by the President, to requisition for charter, hire, or title any vessel owned by an American citizen or which is being constructed in an American shipyard. For such vessels the Commission is obligated to pay "just compensation," and if the party objects to the evaluation set by the Commission, it may elect to take seventy-five per cent of the predetermined amount and sue for the balance it believes is due.[8] The difficulty which immediately presents itself is the determination in each particular case of what is "just compensation."

The recent case of *United States v. Toronto, Hamilton & Buffalo Navigation Co.*[9] involved an action by the company against the United States in the Court of Claims to recover just compensation in the amount of $711,753 for a Great Lakes car ferry requisitioned by the

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[2]49 Stat. 1985 (1936), 46 U. S. C. §1101 (1946) [italics supplied].

[3]49 Stat. 1985 (1936), 46 U. S. C. § 1111 (1946), as amended 63 Stat. 880 (1949).

[4]49 Stat. 1995 (1936), 46 U. S. C. §§ 1151-1161 (1946). "In 1937 there were only 10 shipyards in the country, employing 60,000 workers, which were capable of building 400-foot oceangoing vessels." Page 45, Merchant Marine for Trade and Defense, United States Maritime Commission, Washington (1946). Revised, 1949. United States Government Printing Office.

[5]49 Stat. 2001 (1936), 46 U. S. C. §§ 1171-1182 (1946). See pages 4-16, Economic Survey of the American Merchant Marine, United States Maritime Commission, Nov. 10, 1937. United States Government Printing Office, Washington (1937).

[6]49 Stat. 2008 (1936), 46 U. S. C. §§ 1191-1204 (1946).

[7]Tit. IX, § 902; 53 Stat. 1255 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. § 1242 (1946).

[8]53 Stat. 1255 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. § 1242 (1946).

[9]338 U. S. 396, 70 S. Ct. 217, 94 L. ed. 162 (1949).

War Shipping Administration in 1942. The government, pursuant to the statute,[10] fixed the vessel's value at $72,500 and tendered that amount. In 1943, the company exercised its statutory option and accepted 75% of that figure because it was dissatisfied with the total offered and desired to bring suit for what it considered the fair value. The Court of Claims declared the full value of the ship to be $161,833.72.[11]

The vessel had originally been a railroad ferry built in 1916, but its use had been abandoned as such since 1932. It could have been easily converted for use as an automobile ferry.[12] It had been acquired at a cost of nearly $400,000 to the company, substantial additions had been made, and the earnings had never been sufficient to offset the total initial cost, plus cost of operation and maintenance, plus replacement of a similar vessel or replacement of the original capital when the life of the vessel expired. Thus, unless a substantial sum above that amount allowed by the government could be recovered, the company would suffer a serious depletion of its capital account, unless, contrary to the experience of almost the entire industry, it had been able to maintain a sufficiently high level of cash reserves between 1928 and 1938 so as to be able to finance replacement.[13]

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[10]53 Stat. 1255 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. § 1242 (1946).

[11]"The Court of Claims (81 F. Supp. 244), finding that 'the property condemned' was 'unique, peculiarly situated' and without relative comparison on the Great Lakes, concluded that the *Maitland* was worth more than 'the residual value of an obsolete car ferry,' thus requiring resort to 'a consideration of the earnings , in conjunction with the contemporaneous transaction in vessels of close similarity in determining a fair value.' It called 'the average mean residual value of an obsolete car ferry' $50,000; 'attributing this value to the *Maitland,*' the captialized value of an annual income comparable to that of the *Maitland* for the sixteen years ending in 1932 was the figure of $389,767.15, 'according to actuarial tables in evidence.' The court then deducted the percentage difference between the life expectancy of the vessel in fresh and salt water (20%), the cost of conversion to salt water and sailing it to Florida, and the necessary repairs. Under this formula, $161,833.72 was the fair value for 'its highest available and most profitable use for which it was adaptable at the time of its taking.'" United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U. S. 396, 70 S. Ct. 217, 221, 94 L. ed. 162, 165 (1949).

[12]The Court points out that there had been sales for this purpose between 1936 and 1940 which ranged from $25,000 to $65,000 for vessels not in as good a state of repair as the *Maitland*. United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U. S. 396, 70 S. Ct. 217, 220, 94 L. ed. 162, 165 (1949).

[13]Frequently, in a large fixed capital industry, many capital assets which are still of great worth have been depreciated to the point where they have no book value, but they may (usually) or may not have any actual worth. If the company is able to replace out of cash reserves maintained as depreciation was taken, it suffers no capital depletion, either real or through loss of earning capacity; this

The Supreme Court, in remanding the case to the Court of Claims, assigned as the two principal causes of error of that court the capitalization of the ship's earnings previous to 1932 to reach an evaluation figure, and the consideration given to *possible* prices that would be paid on the Florida market for a similar ship *if* anyone would buy it *if* it were there.

The courts in this case have given consideration to the several factors which are normally applied to the evaluation of individual merchant vessels, but the principal problem is whether those factors will give a fair "value" consonant with the intent of the maritime policy of the United States as expressed in various statutes.

The first factor mentioned by Justice Clark is that of original building cost. This is obviously out of line with present costs due to the fact that the vessel was constructed some thirty years previous to the institution of this suit. Labor and materials costs have completely changed as have methods of vessel construction. To equate such costs to those of today would be a tenuous and unsatisfactory procedure at best, with uniformly poor results.[14] The cost to the company here had been $394,560.

The insured valuation of the vessel is a sounder basis. It may prove unsatisfactory due to a policy of not insuring up to full value (the usual practice) because of excessive cost of the insurance or the unwillingness of the insurance companies to do so. However, it does have some reasonable relation to the issue in that it gives some indication of what the company thinks its own ship is worth. The insured valuation of the vessel here was $100,000 in 1942.

Consideration of the scrap value of a vessel, even though such vessel has little utility value immediately, especially when the vessel

is not true in the shipping industry due to the lack of large cash reserves by nearly all of the shipping companies. See page 28, Economic Survey of the American Merchant Marine, United States Maritime Commission, Nov. 10, 1937. United States Government Printing Office, Washington (1937). Also see the Annual Reports to Congress of the United States Maritime Commission which for the last five years have shown a steady decrease in the amount of cash and U. S. Government securities on deposit in the statutory capital and special reserve funds of the subsidized operators. This has been due largely to the "recapture" provisions of the Act of 1936 and not due to any acquiring of ships. The total reserve stood at about $86,000,000 on June 30, 1949. Though the reserves of the private operators are currently at a high level due to the earnings of the last ten years, these two sources are still inadequate to provide for constant replacement of our over-age vessels.

[14]The original cost of this vessel is a "false standard of the past" where the present market value does not reflect that cost in any way. United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U. S. 396, 70 S. Ct. 217, 220, 94 L. ed. 162, 166 (1949), footnote 4.

is of sizeable tonnage, would seem directly to contravene the policy of the Merchant Marine Act. If shipping companies are only to be given scrap value for vessels requisitioned by the government[15] or traded in to the government,[16] it is to be expected that there will be little replacement of the present merchant marine; the shipping companies simply do not have the resources.[17] The scrap value of the vessel was $13,500.

Probably the hardest factor to consider is that of earning, the Court of Claims' handling of which the Supreme Court assigned as error. The Court said at that point: "We see no relevance in the *Maitland's* earnings between 1916 and 1932 on the issue of capacity to earn after 1942, on the Great Lakes or elsewhere. On this record they are entirely too remote to bear on the vessel's value when taken."[18]

Possibly, if the facts concerning earnings are taken as isolated facts without remembering the overall purposes of the Merchant Marine Act of 1936,[19] the Supreme Court was correct. However, the courts, in making ship evaluation, should consider that one of the purposes of that Act was to promote the continued life of American shipping, and in doing so, much leeway must be given to the evaluation of seemingly obsolete and useless vessels.[20]

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[15]Under 53 Stat. 1255 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. § 1242 (1946).

[16]Under §§ 8-9 of the Ship Sales Act, 60 Stat. 45-49, 50 U. S. C. §§ 1741-1742 (1946).

[17]For the conditions prevalent in 1937, see pages 27-35, Economic Survey of the American Merchant Marine, United States Maritime Commission, Nov. 10, 1937. United States Government Printing Office, Washington (1937). For an example of the present reluctance or inability of American companies to order new ships note the following: "Foreign nations were far ahead of the United States in construction of new ships. Their 1949 fleets were to be augmented by over 1,000 vessels of approximately 7,500,000 gross tons under construction or on order in foreign yards. By comparison, we had in this country on August 1, 1949, a total of only about 55 new oceangoing vessels under construction or on order, and of this total one-fourth were for foreign account." Page 2, Ships of the American Merchant Marine, U. S. Maritime Commission, United States Government Printing Office, Washington (1950).

[18]United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U. S. 396, 70 S. Ct. 217, 222, 94 L. ed. 162, 166 (1949).

[19]As set out in the preamble to the act, 49 Stat. 1985 (1936), 46 U. S. C. § 1101 (1946). See also amendments: 53 Stat. 1254 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. §§ 1202, 1212 (1946)), and 60 Stat. 41, 50 U. S. C. §§ 1735-1746 (1946).

[20]Of course, when a ship has a "present earning capacity" of a substantial nature, the evaluation process becomes vastly more simple; less emphasis must be given to its intangible value as an essential portion of a fleet which the Government owes a duty by statute to develop because ordinary evaluation methods will reach a more equitable result in view of the statute.

The second ground of error and the final evaluation factor considered is that of market value. The Court of Claims, in arriving at its evaluation of the vessel, found that there was no Great Lakes market for this vessel; with this the Supreme Court agreed. However, the lower court then proceeded to consider possible Florida demand for a ship of the *Maitland's* type for use as an automobile ferry between Florida and Cuba. This the Supreme Court declared was error due to the lack of evidence on the point, there having been but one sale on the Great Lakes to a Florida buyer for Florida use, and that one following the war. However, the Supreme Court in remanding the case conceded that if the company, bearing the burden of the proof, can show a Florida market for the vessel in 1942, such market will be considered as a valid evaluation factor. It was expressly recognized that in property of this type, market value at the situs of the property is not the only market value to be considered; all markets reasonably available to the seller should also be relevant.[21]

An examination of other evaluation cases decided since the institution of the 1936 Act brings a rather unsatisfactory conclusion as to the status of the law on this subject. Almost all of the cases have cited as authority *Brooks-Scanlon v. United States*,[22] decided twelve years before the passage of the present Merchant Marine Act. That case held that the Government's obligation to pay "just compensation" for merchant vessels was the same as its obligation to pay "just compensation" under the Fifth Amendment. Possibly the 1936 Act adds something more to the obligation of the government than is indicated in the ordinary evaluation case.

In one of the most oft-quoted passages in all of these cases, the Supreme Court observed: "It [just compensation] is the sum which, considering all the circumstances—uncertainties of the war and the

[21]"But we do not think a similar rule practical or fair in the requisition of property which most owners would, if possible, sell without geographic restriction. We doubt, for example, that owners of ocean liners would, under ordinary circumstances, fail to negotiate beyond the port in which the vessels lay—whether or not ocean liners are 'goods' and subject to the law of sales. Were market conditions normal, we could hardly call an award 'just compensation' unless relevant foreign sales, in available markets, were considered." [Footnotes and cited authority omitted.] United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U. S. 396, 70 S. Ct. 217, 222, 94 L. ed. 162, 167 (1949). It is to be noticed that the Court, in the instant case, did not take up the matter that the circumstances surrounding the taking should have no effect upon the value paid by the Government. 53 Stat. 1255 (1939), 46 U. S. C. § 1242 (1946). The most recent decision on this point is United States v. Cors, 337 U. S. 325, 69 S. Ct. 1086, 93 L. ed. 1392 (1949), which adjudication has left both private attorneys and those of the Government in complete confusion as to the law on this factor.

[22]265 U. S. 106, 44 S. Ct. 471, 68 L. ed. 934 (1924).

rest—probably could have been obtained ., that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."[23]

However, taking a cross section of the recent cases at random, it is to be found that the government shipping agency, in the first instance, and the courts, in the second instance, by applying this standard of "just compensation" based on the ordinary factors considered in evaluating property have arrived at a value for most vessels entirely inconsistent with the purposes of the 1936 Act and the subsequent amendments.[24] A shipping corporation, given little more than scrap value for its property, cannot maintain a modern, efficient fleet and adequate service over its assigned routes in the face of investor reluctance[25] and low-cost foreign competition.

In ordinary suits between private parties to declare the value of merchant vessels, it is undoubtedly quite proper to maintain the ordinary factors constituting just compensation. But, where the government is obligated by statute to maintain and develop such a merchant marine as is described in Section 101 of Title I,[26] and is directed by that same statute into such paternalistic measures as subsidies, it would seem to be a fair proposition that the courts should not adhere to a method of evaluation which experience shows has had a crippling influence on the merchant marine.[27]

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[23]Brooks-Scanlon Corporation v. United States, 265 U. S. 106, 123, 44 S. Ct. 471, 475, 68 L. ed. 934, 941 (1924).

[24]United States v. Cors, 337 U. S. 325, 69 S. Ct. 1086, 93 L. ed. 1392 (1949); United States v. Buxton Lines, 165 F. (2d) 993 (C. C. A. 4th, 1948); Baltimore Steam Packet Co. v. United States (Four cases), 81 F. Supp. 707, 711, 713, 715 (Ct. Cl. 1949); Wilson Line v. United States, 78 F. Supp. 821 (Ct. Cl. 1948); Seven-Up Bottling Co. of Los Angeles, Inc. v. United States, 68 F. Supp. 735 (Ct. Cl. 1946); Eastern S. S. Lines, Inc. v. United States, 74 F. Supp. 37 (D. C. Mass. 1947). But see National Bulk Carriers, Inc. v. United States, 73 F. Supp. 622 (D. C. Del. 1947), wherein the court used the market value and reached a reasonable solution with a vessel approximately one year old.

[25]See page 35, Economic Survey of the American Merchant Marine, United States Maritime Commission, United States Government Printing Office, Washington (1937).

[26]49 Stat. 1985 (1936), 46 U. S. C. § 1101 (1946).

[27]In 1937 it was announced that the United States would embark upon a ten year, five hundred ship building program to produce fifty new oceangoing ships per year. The program finally got under way in 1939 and in the next two years a total of 185 ships were built or enough to replace the total 1937 fleet at a rate of 6% a year roughly. See pages 22-24, Merchant Marine for Trade and Defense, United States Maritime Commission, Washington (1946), Revised 1949, United States Government Printing Office; and also pages 26-27, Economic Survey of the American Merchant Marine, United States Maritime Commission, Nov. 10, 1937, United States Government Printing Office, Washington (1937). It should be remembered that this replacement rate was under the impetus of a war demand and

Many cases say that just compensation consists of putting an owner in as good a position as he was previous to the taking of his property.[28] Perhaps if this concept were to include a consideration of the intangible value of a vessel, beyond its physical evaluation for actual sale, by its being part of a fleet with which the government is charged by statute to develop, it could be used as a standard of departure.[29]

A survey of the cases in this field leads to the conclusion that the courts have not kept the tenor of the statute in mind. Courts have historically accepted the job of so construing the individual portions of a statute as best to effectuate the purposes either stated therein or intended by the framers as shown by other evidence.[30] In view of the obligation with which the government is charged by statute, it is recommended, that in ascertaining just compensation which must be paid *by the government,* that obligation with which the government is charged should be considered as a separate and perhaps all-pervading factor in the correct ascertainment of the value of an individual vessel. Evaluation of such a factor might include a consideration of the ability of the company to replace the vessel at present prices

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emergency and did not reflect normal demand; that normal demand might be more fairly indicated by the two year delay from 1937 to 1939.

[28]Seaboard Air Line Ry. v. United States, 261 U. S. 299, 304, 43 S. Ct. 354, 356, 67 L. ed. 664, 669 (1923); Kansas City Southern Ry. Co. v. Commissioner of Internal Revenue, 52 F. (2d) 372, 381 (C. C. A. 8th, 1931); Eastern S. S. Lines, Inc. v. United States, 74 F. Supp. 37, 38 (D. C. Mass. 1947).

[29]This would be more than mere "utility" value and probably would need to include a prohibition against "circumstances surrounding the taking." [53 Stat. 1255 (1939), amended 57 Stat. 49 (1943), 46 U. S. C. § 1242 (1946), and see United States v. Cors, 337 U. S. 325, 69 S. Ct. 1086, 93 L. ed. 1392 (1949)] such as the abnormal demands caused by war, etc.

[30]"Nothwithstanding their genius for the generation of new law from that already established, the common law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by the courts as significant, either as social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded."

" I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning."

" .It is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by the habit of narrow construction of statutes and by the failure to recognize that they are as significant as recognitions of social needs and rightly as much a part of the law as the rules declared by judges." Stone, The Common Law in the United States, taken from The Future of the Common Law (1937) 131-3.

in view of its present resources, the necessity for replacement in order that the company may continue to carry its portion of the Nation's commerce, the competitive position in which various alternative amounts would leave the company both domestically and with regard to foreign competitors, and many other similar considerations.[31] It is submitted that only in this way will the true purpose of the Merchant Marine Act be fulfilled.

ALVIN N. WARTMAN

EVIDENCE—CONCLUSIVENESS OF EVIDENCE OF EXCLUSIONARY RESULTS OF BLOOD TESTS IN PATERNITY PROCEEDINGS. [Maine]

Although many courts have overcome their reluctance to admit in evidence in paternity proceedings the results of blood tests which exclude an alleged father, there still remains a general failure to recognize the conclusiveness of such tests.[1] Statutes which allow exclusionary results of blood tests to be admitted in evidence exist in eight states,[2] similar in nature to the pioneer statute passed in New York in 1935. Courts in a number of other jurisdictions have, without

[31]At least two concrete sets of "rules" upon which to fix just compensation have been established. The first of these was drafted by the Advisory Board on Just Compensation established by authority of Executive Order 9387, 8 Fed. Reg. 14105, 3 Code Fed. Regs. 1943 Supp., which board consisted of Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr. The second attempt is that found in § 8 (b) of the Ship Sales Act of 1946, 60 Stat. 45, 50 U. S. C. § 1741 (b) (1946).

[1]Excellent references dealing with the scientific and legal aspects of blood test exclusions are: Boyd, Protecting the Evidentiary Value of Blood Group Determinations (1943) 16 So. Calif. L. Rev. 193; Britt, Blood Grouping Tests and The Law: The Problem of "Cultural Lag" (1937) 21 Minn. L. Rev. 671; Galton, Blood Grouping Tests and Their Relationship to the Law (1938) 17 Ore. L. Rev. 177; Maguire, A Survey of Blood Group Decisions and Legislation in the American Law of Evidence (1943) 16 So. Calif. L. Rev. 161; 1 Wigmore, Evidence (3d ed. 1939) §§ 165 a, 165 b; see Note (1946) 163 A. L. R. 939.

[2]New York, N. Y. Civ. Prac. Act § 306 a (1935), N. Y. Domestic Relations Law § 126 (1935), N. Y. Crim. Code § 684 a (1938), Domestic Relations Act of the City of New York § 34 (1942); Maine, Me. Rev. Stat. (1944) c. 153 § 34; Maryland, Md. Ann. Code Gen. Laws (Flack, Supp. 1943) Art. 12 § 17; New Jersey, N. J. Stat. Ann. (Supp. 1946) § 2: 99—3, 4; North Carolina, N. C. Gen. Stat. (Michie, et al., Supp. 1945) § 49-7; Ohio, Ohio Gen. Code Ann. (Page, Supp. 1946) § 12122-1, 2; South Dakota, S. D. Code (1939) 36.0602, Sup. Ct. Rule 540 (1939); Wisconsin, Wis. Stat. (Brossard, 1943) § 166.105, 325.23; Mo. H. B. No. 119 § 8 Pending in Legislature. Shatkin, Disputed Paternity Proceedings (2d ed. 1947) 183-206 [citations taken from Note (1948) 34 Corn. L. Q. 72]. Each statute has provisions requiring the parties to submit to the tests at the request of the defendant, and allowing results which show a definite exclusion to be admitted in evidence. However, none of the statutes specify what shall be the weight in evidence of the tests.

specific statutory authority, recognized the biological law relative to the inheritance of blood groups and types, but with varying effect.

California is one state allowing blood test evidence in paternity suits without legislative approval, but in practice the results of this progressive judicial attitude have not been encouraging. In 1937, the Supreme Court of that state rendered its opinion in the case of *Arais v. Kalensnikoff*,[3] a decision which aroused a storm of criticism from legal writers.[4] The court, in holding that blood test results are entitled to no greater weight than other expert testimony, declared: "Whatever claims the medical profession may make for the tests, in California 'no evidence is by law made conclusive or unanswerable, unless so declared by this code' . . .Expert testimony 'is to be given the weight to which it appears in each case to be justly entitled' . The law makes no distinction whatever between expert testimony and evidence of other character."[5]

The unfortunate consequences of that decision were demonstrated nine years later in the highly publicized case of *Berry v. Chaplin*.[6] A California Appellate Court, conceding that the testimony of the complainant was in part "unique" and "extraordinary,"[7] that the blood tests excluded the putative father, and that the scientific law of blood groupings is unquestioned, nevertheless ruled that it could not upset the jury's verdict for the complainant because of the Supreme Court's decision in the *Arais* case.[8]

In Ohio, the experience of the courts in this field closely resembles that of California. Although Ohio has direct statutory authority al-

[3]10 Cal. (2d) 428, 74 P (2d) 1043, 115 A. L. R. 163 (1937). In this case a verdict for the complainant was sustained despite evidence showing the mother had named another man as the father on the child's birth certificate, that the defendant was seventy years of age and had been impotent for several years, according to his wife, and that blood tests definitely excluded him as the father.

[4]Britt, Blood-Grouping Tests and More "Cultural Lag" (1938) 22 Minn. L. Rev. 836, 837. Professor Britt, in observing the result in the Arais case, stated that it "is probably the most flagrant example thus far of what may happen when a court is blinded to scientific truths because of emotional factors." See Notes (1938) 26 Cal. L. Rev. 456, (1939) 53 Harv. L. Rev. 285.

[5]Arais v. Kalensnikoff, 10 Cal. (2d) 428, 74 P (2d) 1043, 1046, 115 A. L. R. 163, 165 (1937).

[6]74 Cal. App. (2d) 652, 169 P (2d) 442 (1946).

[7]Berry v. Chaplin, 74 Cal. App. (2d) 652, 169 P (2d) 442, 450 (1946).

[8]The force of stare decisis in the Berry case is illustrated by Justice McComb's concurring opinion. Feeling bound by the precedent set in the Arais case, he nevertheless said: "In the case at bar a widely accepted scientific method of determining parentage was applied. Its results were definite. To reject the new and certain for the old and uncertain does not tend to promote improvement in the administration of justice." Berry v. Chaplin, 74 Cal. App. (2d) 652, 169 P (2d) 442, 453 (1946). Also see, Note (1947) 4 Wash. & Lee L. Rev. 199.

lowing the results of blood tests to be admitted in evidence,[9] the Supreme Court of that state in passing on the weight to be accorded exclusionary results has held that such evidence is "admissible for whatever weight it might be given in establishing that fact,"[10] citing with approval the *Arias* decision.

In New York there appear to have been only lower court decisions involving the use of blood tests in filiation, divorce, annulment proceeding, and actions for support of a child, and the trial courts have not been uniform in their views of the effect of the evidence of exclusionary results. In 1940, the Domestic Relations Court of the City of New York took a decidedly conservative view in an action for support of a child, stating that the "results of blood tests by reason of their involved experimentation, have no greater claim to credibility than other evidence."[11] However, two years later another court in an action for absolute divorce and the determination of the legitimacy of a child, felt the exclusionary results of blood tests were enough to overcome the strong presumption of legitimacy.[12] Similarly, in 1944, a husband was granted an absolute divorce on the grounds of adultery when the blood tests excluded him as the father of a child born during wedlock, despite strong testimony to show access by the husband during the period when conception took place.[13] It has been said that the Court of Special Sessions of the City of New York has even gone so far as to make the results of these tests conclusive in every case.[14]

The Wisconsin Supreme Court has also indicated a favorable view toward the results of blood groupings tests in *Euclide v. State*,[15]

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[9]Ohio Gen. Code Ann. (Baldwin 1940) § 12122-1, 2.

[10]State ex rel. Walker v. Clark, 144 Ohio St. 305, 58 N. E. (2d) 773, 777 (1944). In State ex rel. Slovak v. Holod, 63 Ohio App. 16, 24 N. E. (2d) 962 (1939), the court openly questioned the biological law of blood groupings, thereby illustrating the over-cautious, suspicious, and sometimes uninformed attitude of a large part of the bench in regard to the use of this scientific weapon against injustice. For an analysis of these assertions by one of the outstanding medical authorities on blood groupings, see, Weiner, The Judicial Weight of Blood Grouping Test Results (1940) 31 J. Crim. L. 523.

[11]Harding v. Harding, 22 N. Y. S. (2d) 810, 821 (1940). The same court, however, seems to have reversed its stand since 1940 on the weight of such tests. In Saks v. Saks, 71 N. Y. S. (2d) 797 (1947), Judge Panken found the respondent not the father where the new rh factor excluded the accused, despite the fact that the MN and AB tests did not show exclusion and where other evidence indicated access by the respondent.

[12]Schulze v. Schulze, 35 N. Y. S. (2d) 218 (1942).

[13]Dellaria v. Dellaria, 183 Misc. 832, 52 N. Y. S. (2d) 607 (1944).

[14]Note (1948) 34 Corn. L. Q. 72.

[15]231 Wis. 616, 286 N. W 3 (1939). In sustaining the trial court's judgment awarding the respondent a new trial, the court said: "In view of the several unsatis-

although the question of the weight of such evidence was not properly before the court in that case.

In the case of *Jordan v. Mace*[16] the Supreme Judicial Court of Maine has recently had, for the second time in two years, the opportunity to pass on the question of the weight to be accorded blood tests. The evidence clearly established that the respondent had had illicit relations with the complainant during the crucial period, and the complainant testified that "there is no other to accuse "[17] Against this strong evidence the respondent could offer no contradictory evidence except the results of blood tests which showed a definite exclusion. In spite of this scientific proof of non-paternity, the jury returned a verdict for the complainant,[18] and the respondent's motion for a new trial was rejected by the trial judge. On appeal, the judgment of the trial court was reversed by the Supreme Judicial Court and a new trial was granted.[19]

In reaching its conclusion, the court emphasized the care with which the tests were conducted, and declared: "If the jury found that the results of the blood groupings tests were inaccurate, such findings must have been based on mere conjecture or understandable sympathy for the complainant and prejudice against the respondent. Such finding is not supported by any believable evidence in the record."[20]

But the most significant language employed in the opinion con-

factory and improbable aspects of the testimony, and in view of the positive exclusion of defendant by the blood tests, however irregularly offered, we feel that in the interests of justice this case should be retried under circumstances that will give to the plaintiff in error an opportunity to present in proper form medical conclusions based upon blood tests." 231 Wis. 616, 286 N. W 3, 4 (1939).

[16]69 A. (2d) 670, (Me. 1949).

[17]69 A. (2d) 670, 672 (Me. 1949).

[18]The emotional factor is one of the greatest obstacles to justice in paternity cases. Professor Britt aptly describes the situation: "A decision can easily rest on sympathy for a particular woman, or it can rest on addiction to the vague symbols of 'Womanhood' and 'Motherhood.' The judge and jury may hear how a poor, innocent girl was taken advantage of by a hard, cruel man. He is a rascal, they may say, even to be accused in this affair—make him pay!" Britt, Blood Grouping Tests and the Law: The Problem of "Cultural Lag" (1937) 21 Minn. L. Rev. 671, 699.

[19]In its opinion, the court did not mention the contentions upon which the arguments of counsel were based. However, respondent's counsel in the Mace case stated that one of its arguments was based on the principle that "the court should take judicial notice and accept the biological law relative to the inheritance of blood types and groups and that the only material evidence from the doctor performing the tests is as to the results obtained, the conclusion to be drawn from that result being a question of law for the court." (Letter to writer of this comment dated March 15, 1950 from H. W Blaisdell, counsel for the respondent.)

[20]69 A. (2d) 670, 673 (Me. 1949).

cerned the weight which must be given the negative proof of blood tests. The court said: " a jury may not give such weight as it may desire to biological law Such a law goes beyond the opinion of an expert. The jury has the duty to determine if the conditions existed which made the biological law operative. That is to say, were the tests properly made? If so made, the exclusion of the respondent as father of one child follows irresistibly."[21] These words alone seem to give conclusive weight to blood test evidence, and the court made its position even more clear with this statement: "The blood grouping test statute was enacted to provide, in our view, for the very situation in which a respondent, as a matter of ordinary proof without the tests, can do no more than create a doubt about the paternity of a child. Exclusion of paternity by blood groupings tests under biological law is scientific proof that a respondent is not the father."[22]

The *Mace* case outwardly appears to be irreconcilable with the decision of the same court in *Jordan v. Davis*,[23] rendered one year earlier. The factual situations in the two cases were practically identical. The respondent in each instance was found to have had sexual intercourse with the complainant near the time of conception. In neither case did the respondent deny access or attempt to prove access by others. The blood tests were conducted by the same serologist, and in each case the results showed the respondent was not the father.[24] Identical also was the manner in which the cases came before the court of last resort for review. In each, the jury found for the complainant and exception was taken to the trial judge's refusal to grant a new trial. However, the Supreme Judicial Court in the *Davis* case upheld the judgment of the trial court, basing its decision on the ground that the "jury could in considering all

[21]69 A. (2d) 670, 672 (Me. 1949).

[22]69 A. (2d) 670, 672 (Me. 1949). It is interesting to note that the result here reached by the Maine court was under a statute which merely allows the results of blood tests to be introduced in evidence, without provision for the weight to be given such evidence. Me. Rev. Stat. (1944) c. 153 § 34.

[23]57 A. (2d) 209 (Me. 1949).

[24]Indeed, the only real factual difference between the two cases, as indicated by the court's opinion, was that the Mace case involved twins and the blood tests excluded only one of them. This unusual question in the case was answered in testimony given by the serologist to the effect that if the respondent was excluded as the father of one child, it necessarily followed that he could not be the father of the other child, since the father of twins has to be one and the same person. (Medical authorities, however, are not in complete agreement with this conclusion.) The court did not accept or reject the accuracy of this statement, preferring to side-step the issue by saying "the verdict that the respondent is the father of the twins is indivisible. If paternity of one child is excluded, the verdict may not stand." Jordan v. Mace, 69 A. (2d) 670, 671 (Me. 1949).

the testimony have rejected the accuracy of the blood groupings tests "[25]

No testimony was pointed out by the court in its opinion from which such an inference of error could be drawn. Counsel for the respondent in both cases has pointed out certain testimony which perhaps provides an explanation.[26] The doctor who performed the tests in the *Davis* case did not testify as to the number of times the tests had been made. He did state that the results were checked, but it could be inferred that the tests had been performed only once. This may have been the reason the Maine court was willing to allow the jury to disregard those tests, but not the same type of tests in the *Mace* case which had there been employed eleven times.

Some of the language employed in the *Davis* opinion also seems contrary in principle to the rule enunciated by the court in the *Mace* decision. Thus, it was said by Judge Thaxter in the *Davis* opinion: "We do not believe that the statute intending to make the result of a blood grouping test as reported in court conclusive on the issue of non-paternity. It says only that the result of such test 'shall be admissible in evidence.' "[27] In using the qualifying phrase, "as reported in court," the court may have been indicating that the results alone should not be conclusive without ample evidence being offered to rule out any possible inference of error in the application of the scientific techniques used in conducting the tests. If this implication is justifiable, an apparent inconsistency in principle tends to disappear, the opposite result in the cases being based solely on the inference in the *Davis* case that one set of tests was not sufficient to make the biological law operative. This reconciliation is further supported by the observation in the *Mace* decision that: "Jordan v Davis is not authority for the proposition that a jury may give such weight as it may desire to biological law."[28]

Although the court did not state positively in either opinion that where the evidence leaves no reasonable inference of error in the application of the tests there is conclusive proof of non-patrnity, it is submitted that the result in the *Mace* case, on its facts, supports such a conclusion.

It is significant that the *Mace* case is the first decided by a court of last resort which has been found tending to give the results of

[25]57 A. (2d) 209, 211 (Me. 1948).

[26]Letter to writer of this comment dated March 15, 1950 from H. W Blaisdell, counsel for respondent.

[27]57 A. (2d) 209, 210 (Me. 1948).

[28]69 A. (2d) 670, 672 (Me. 1949).

blood tests their just weight. The failure of other courts to apply scientific truth in place of unreliable and often contradictory testimony from the parties, who may not even know who is the true father, and who often are more desirous of concealing than proving the true facts, has caused a tremendous amount of criticism from the legal and medical writers during the last fifteen years. One of the outstanding authorities in this field has recently declared: "The courts can no longer afford to ignore this scientific achievement. Blood tests are no longer in the experimental stage. They are an accomplished fact of science and an immutable law of nature. Their capacity to prove the innocence of more than half of the men incorrectly accused is a mandate to the courts to abandon their skepticism, doubt and misbelief, and accept blood test exclusions, competently and conscientiously performed, as decisive evidence of non-paternity."[20]

It is hoped that other courts in the future will accept the enlightened view of the Maine court and give unqualified approval to the impartial scientific truth which may be found through the use of blood tests.

ERNEST M. HOLDAWAY

FEDERAL PROCEDURE—DISPOSITION OF CASE BEFORE COURT ON CERTIORARI AFTER PETITIONER HAS FLED JURISDICTION. [United States Supreme Court]

The Supreme Court of the United States recently was called upon to decide the question of its jurisdiction[1] on a seemingly unique set of facts. Specifically, the Court's problem was whether it still had jurisdiction in a certiorari proceeding after the petitioner had fled from the United States, and if jurisdiction did not exist, as a matter of its own practice, what disposition to make of the case.

Since the days of the first President, the Supreme Court has steadfastly refused to give advisory opinions or to take part in a proceeding not a "case" or "controversy,"[2] but over the course of a century and a half, the Court has expressed in varying terms its

[20]Shatkin, Law and Science in Collision: Use of Blood Tests in Paternity Suits (1946) 32 Va. L. Rev. 886, 901.

[1]As limited by Article III of the United States Constitution relating to the necessity of there being a "case" or "controversy."

[2]See 3 Johnston, Correspondence and Public Papers of John Jay (1891) 486, and 10 Sparks, Writings of George Washington (1839) 542, for a discussion of the several questions relating to the legal power of the President which Washington sought to have the Court decide.

conception of what is necessary to constitute a case or controversy. In 1864, Chief Justice Taney stated that "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."[3] Justice Field, while a federal circuit court judge, in defining "controversy" concluded that "The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."[4] But in 1937, the Supreme Court took the view that "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."[5]

In the recent case of *Eisler v. United States*,[6] the Court seems to have passed over an excellent opportunity to clarify the law applicable in this field. Gerhart Eisler, an Austrian national, was summoned to appear before the House of Representatives Committee on Un-American Activities on February 6, 1947 On February 4, Eisler was taken into custody to prevent his departure from the country. Two days later, he appeared before the Committee, with counsel, and refused to be sworn unless allowed to speak first. The Committee voted to cite Eisler for contempt of Congress, and subsequently, an indictment was returned against Eisler by the Grand Jury for the District of Columbia, charging him with contempt of Congress.[7] Eisler was tried before a jury in the District Court of the United States for the District of Columbia and found guilty. He appealed to the United States Court of Appeals for the District of Columbia Circuit, and on June 14, 1948, that court by a vote of two to one affirmed the judgment of the lower court.[8] The Supreme Court granted certiorari,[9] and the case was argued March 28, 1949 and waited only final disposition when, on May 6, 1949, Eisler fled the United States.

After a futile attempt by the Attorney General to secure the return of Eisler, the Government advised the Court of this state of affairs and suggested informally that the case be dismissed. The Supreme Court, on June 27, 1949, announced its first decision in the principal case, ordering, by a five to four majority, that after the term the cause be left off the docket until a direction to the contrary.[10]

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[3]Gordon v. United States, 117 U. S. 697, 702, 76 L. ed. 1347, 1350 (1864).

[4]In re Pacific Ry. Com., 32 Fed. 241, 255 (C. C. N. D. Cal., 1887).

[5]Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 244, 57 S. Ct. 461, 465, 81 L. ed. 617, 623 (1937).

[6]338 U. S. 189, 69 S. Ct. 1453, 93 L. ed. 1897 (1949), rev'd per curiam 338 U. S. 883, 70 S. Ct. 181, 94 L. ed. 117 (1949).

[7]2 U. S. C. A. § 192 (1937), Contempt of Congress.

[8]84 App. D. C. 404, 170 F. (2d) 273 (1948).

[9]335 U. S. 857, 69 S. Ct. 130, 93 L. ed. 404 (1948).

[10]338 U. S. 189, 69 S. Ct. 1453, 93 L. ed. 1897 (1949).

The majority opinion was a brief Per Curiam[11] to the effect that "Since the petitioner by his own volition *may* have rendered moot any judgment on the merits, we must, as a matter of our own practice, decide whether the submission should be set aside and the writ of certiorari dismissed or whether we should postpone review indefinitely by ordering the case removed from the docket, pending the return of the fugitive Our practice, however, has been to order such cases to be removed from the docket."[12] The reasoning behind this decision might have been either that the Court now lacked jurisdiction or that the Court did not wish to decide the case at this point; thus Eisler was left a timely perfected appeal indefinitely before the Court.

In the first of three dissenting opinions, Justice Frankfurter, with whom Chief Justice Vinson joined, argued that the Government's motion to dismiss should have been granted on the ground that the Court had been deprived of jurisdiction to adjudicate the case. It was reasoned that "the Constitution gave this Court no power to give answers to legal questions as such but merely the authority to decide them when a litigant was before the Court."[13] And since Eisler has repudiated the jurisdiction of this country. "The upshot is that the abstract questions brought before the Court by Eisler are no longer attached to any litigant. No matter remains before us as to which we could issue process."[14] "If legal questions brought by a litigant are to remain here, the litigant must stay with them Since the Court is without power effectively to decide against him, it is without power to decide at all. In short, the Court no longer has jurisdiction "[15] This being true, it seems that the writ of certiorari should have been dismissed, thus leaving the decision of the Court of Appeals intact and precluding subsequent appeal by Eisler.

In two able separate dissenting opinions, Justices Murphy and

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[11]Justices Rutledge, Douglas, Reed, Black and Burton, for the Court.

[12]338 U. S. 189, 190, 69 S. Ct. 1453, 1454 (1949) [italics supplied]. The Court cited as authority Smith v. United States, 94 U. S. 97, 24 L. ed. 32 (1876), and Bonahan v. Nebraska, 125 U. S. 692, 8 S. Ct. 1390, 31 L. ed. 854 (1887).

[13]338 U. S. 189, 191, 69 S. Ct. 1453, 1454, 93 L. ed. 1897, 1900 (1949).

[14]338 U. S. 189, 191, 69 S. Ct. 1453, 1454, 93 L. ed. 1897, 1899 (1949).

[15]338 U. S. 189, 192, 69 S. Ct. 1453, 1455, 93 L. ed. 1897, 1900 (1949). This case was distinguished from Smith v. United States, 94 U. S. 97, 24 L. ed. 32 (1876), and Bonahan v. Nebraska, 125 U. S. 692, 8 S. Ct. 1390, 31 L. ed. 854 (1887), in that the Court suspended disposition of those cases temporarily until the recapture of the fugitives who were at large in this country. The situation at hand is totally different. "Since the Court's power to reassert jurisdiction has been incontestably denied, the motion should be granted." 338 U. S. 189, 193, 69 S. Ct. 1453, 1455, 93 L. ed. 1897, 1900 (1949).

Jackson both concluded that the Court continued to have jurisdiction of the case and that a decision on the merits should have been handed down. Justice Murphy argued that, though the Court has no power to decide a "moot" case, such a case "is one in which the particular controversy confronting the Court has ended. That is not true when a prisoner has simply escaped."[16] The petitioner having subjected himself to the Court's jurisdiction by filing a petition for review, these dissenters argued that he cannot revoke or nullify it and prevent adjudication merely by leaving the country. "[It] is the importance of the legal issues, not the parties, which bring the case to this Court. Those issues did not leave when Eisler did. They remain . of the utmost importance to the profession and to the public."[17] Justice Jackson concurred in this position, pointing out that "it is due to Congress and to future witnesses before its committees that we hand down a final decision."[18] The questions presented are certain to recur, and "No can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here."[19] And Eisler's rights would not be prejudiced, because "The case is fully submitted and all that remains is for members of the Court to hand down their opinions and the decision. Eisler's presence for that would be neither necessary nor usual."[20]

The record in the case remained thus until October 8, 1949, when the Government appeared before the Court and filed a formal motion to dismiss. On November 21, 1949, the Court entered the following order: "The motion to dismiss is granted and the writ of certiorari is dismissed."[21] Apparently, this ended a litigation that had caused the Government to expend a considerable amount of time and money, yet produced inadequate results. Of course, if Eisler should return to the United States, the sentence as affirmed by the Court of Appeals would be binding, but the judgment of the Court of Appeals on the merits has not the persuasive weight that a decision of the Supreme Court would have carried.

Admittedly, this set of facts is unique in that no case has been found in which a person convicted of a federal offense has used the stay of execution of sentence, while the Supreme Court is reviewing

[16] 338 U. S. 189, 194, 69 S. Ct. 1453, 1455, 93 L. ed. 1897, 1901 (1949). See United States v. Evans, 213 U. S. 297, 29 S. Ct. 507, 53 L. ed. 803 (1909).
[17] 338 U. S. 189, 194, 69 S. Ct. 1453, 1456, 93 L. ed. 1897, 1901 (1949).
[18] 338 U. S. 189, 196, 69 S. Ct. 1453, 1456, 93 L. ed. 1897, 1902 (1949).
[19] 338 U. S. 189, 196, 69 S. Ct. 1453, 1456, 93 L. ed. 1897, 1902 (1949).
[20] 338 U. S. 189, 195, 69 S. Ct. 1453, 1456, 93 L. ed. 1897, 1901 (1949).
[21] 338 U. S. 883, 70 S. Ct. 181, 94 L. ed. 117 (1949).

the conviction, as a means of escaping from this country. The two cases[22] cited as authority by the majority of the Court in the first decision are distinguishable from the principal case in that in those cases the escape of the prisoners was not likely to be permanently successful and the Court suspended final decision until the recapture of the fugitives. This seems to have been done as a matter of expediency and not due to a rule of law.

A review of the case law of the several states shows a line of authorities for dismissal of appeals in cases presenting the same problem. In *Madden v. Georgia,*[23] the rule was laid down that escaped prisoners who have not surrendered or been recaptured cannot prosecute a writ of error. The Louisiana court has reached the same conclusion in *State v. Butler*[24] This seems to be a reasonable and just result where one who seeks justice from a court nevertheless refuses to submit his person to the jurisdiction of that court. The Georgia and Louisiana decisions lay down the rule that if the time limit set for perfecting an appeal or writ of error is passed while the fugitive is still at large, it is too late for him to appeal after he is apprehended. In *Allen v. Georgia,*[25] the United States Supreme Court held that dismissal of a writ of error by the state court because of the appellant's escape was not denial of due process of law. The appellant in that case had been given sixty days to surrender before the writ of error was dismissed.

If the Supreme Court felt that it had lost jurisdiction of Eisler's case after his flight, it would seem proper and within the spirit of the Rules of Court and statutes pertaining to appeals for the Court to have ruled that this voluntary action on the petitioner's part should lead to a dismissal of the appeal and the running of the time limit set for appeals.

Rule 43 of the Federal Rules of Criminal Procedure states that "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."[26] This rule is declaratory of existing federal case law, and shows that the defendant's voluntary absence after proceedings have

[22]Smith v. United States, 94 U. S. 97, 24 L. ed. 32 (1876), and Bonahan v. Nebraska, 125 U. S. 692, 8 S. Ct. 1390, 31 L. ed. 854 (1887).

[23]70 Ga. 383 (1883).

[24]35 La. Ann. 392 (1883).

[25]166 U. S. 138, 17 S. Ct. 525, 41 L. ed. 949 (1897).

[26]Rule 43, Federal Rules of Criminal Procedure, 18 U. S. C. A., 1949 Cumulative Annual Pocket Part, 330.

commenced will not cause the courts to suspend action in the trial or to lose jurisdiction pending the return of the fugitive. In *United States v. Billingsley*,[27] the court refused to pass on assignments of error until the defendant-fugitive surrendered, but gave him a specific time in which to surrender. If this procedure is proper in the District Courts and the Courts of Appeals, it seems that it should be proper in the Supreme Court as well.

More than half a century ago in *Falk v. United States*,[28] the same Federal Court of Appeals which was involved in the *Eisler* case clearly indicated its recognition of the broad aspects of the problem:

> "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute[29] . he is entitled as a matter of right to be at large upon bail 'in all criminal cases where the offense is not punishable by death;' and, therefore, in all such cases, he may, by absconding, prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered."[30]

It is obvious from the standpoint of public policy and the administration of justice that some other rule than that laid down by the Court's majority opinion in the *first* decision was needed. The Court's *final* order appears more in line with the authority in this field, but the best interests of justice would seem to require the Court to retain jurisdiction in criminal cases of the nature of the principal case. The question of jurisdiction over the person of the petitioner is one that should be settled when he submits his case to the Court on certiorari. If that jurisdiction is to be contested thereafter, it is the petitioner who should bear the burden of argument. Unless he does so, his absence from the proceedings should not preclude a decision on the merits of the points of law advanced.

J. STANLEY LIVESAY, JR.

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[27]242 Fed. 330 (W D. Wash. 1917), aff'd 249 Fed. 331 (C. C. A. 9th, 1918), cert. denied 247 U. S. 523 (1918).

[28]15 App. D. C. 446 (1899).

[29]Now § 3141 of the New Title 18. See F. C. A. 18 § 3141 (1950).

[30]15 App. D. C. 446, 454 (1899).

MORTGAGES—RIGHT OF MORTGAGOR TO HAVE LIEN BARRED BY STATUTE OF LIMITATIONS REMOVED AS CLOUD ON TITLE. [Illinois]

When a mortgage or deed of trust given to secure a debt becomes barred by the statute of limitations, it is universally accepted that the mortgagor may plead the statute as a defense to any action brought by the mortgagee; however, considerable uncertainty remains as to whether in such a situation the mortgagor may bring an affirmative action to have the mortgage removed from record as a cloud on his title. The recent case of *Gary-Wheaton Bank v. Helton*[1] is one of the relatively rare instances in which this question has been presented in a court of record. Plaintiff acquired title to the land in question through a sheriff's deed made under an order of execution and sale. The record disclosed a lien on this land, represented by a trust deed securing two notes of $1,000 each. At the time of the execution sale, the notes and deed of trust were barred by the statute of limitations, and the plaintiff now brings this action to have the lien removed as constituting a cloud on his title. The trial court, in granting the relief prayed for, took the position that since the trust deed was a mere incident of the barred debt, the trust deed was also barred and should be released. In reviewing that decision, the Illinois Appellate Court viewed the sole issue as being whether the trial court was in error in deciding that the statute of limitations "not only barred the remedy but also barred the lien."

The court defined a cloud on title as "an outstanding claim or encumbrance, which, if valid, would affect or impair the title of the owner, and which appears on its face to have that effect, but which can be shown by extrinsic evidence to be invalid. A cloud exists where a title of an adverse party to land is valid upon the face of the instrument or the proceedings sought to be set aside, and it requires extrinsic facts to show the supposed conveyance to be inoperative and void' "[2] The court approved the reasoning that the debt alone gave rise to the substantive rights in the mortgagee and that the lien created by the deed of trust is a mere incident of the debt. When the debt is barred by the statute of limitations, it becomes invalid, thereby making the lien created by the deed of trust invalid.[3]

[1]337 Ill. App. 294, 85 N. E. (2d) 472 (1948). Only an abstract of the case is reported in the Northeastern Reporter. The statement of facts and the holding set out in this comment were taken from a copy of the opinion of the Illinois Appellate Court furnished by the Clerk of the Illinois Appellate Court, Second District.

[2]Quoting Roby v. South Park Com'rs, 215 Ill. 200, 203, 74 N. E. 125, 126 (1905).

[3]See Ill. Rev. Stat. (1948) c. 83 § 116: "The lien of every mortgage, trust deed

The purported lien then stands as a cloud on title under the stated definition, and the court determined that it must remove the cloud in order to avoid creating a situation in which "there is a right to a lien and no remedy to enforce it."

This approach to the problem involves two questionable determinations. First, the court adopted the view at the outset that a debt barred by the statute of limitations is "invalid," and language was quoted from several Illinois decisions[4] to support that position. However, in these earlier cases the term "invalid" seems to have been used in the sense of "unenforceable" rather than "extinguished," since, in effect, the question in issue was whether a mortgagee could foreclose a mortgage on which the statute of limitations period had not yet run when the debt it secured was barred by limitations. To adhere to the rule accepted in Illinois and a minority of jurisdictions, that once the debt is barred by the statute of limitations the mortgage, subsisting as a lien only for the purpose of securing the debt, is also barred,[5] it was not necessary that the court go so far as to declare the debt *invalid* to allow the mortgagor to interpose the statute of limitations as a defense. The unenforceability of the debt is sufficient reason for refusing to enforce the mortgage, inasmuch as the mortgage exists only to provide a means of obtaining payment of the debt. This analysis is strengthened by a more recent decision in which the Su-

in the nature of a mortgage, and vendor's lien, the due date of which is stated upon the face, or ascertainable from the written terms thereof . shall cease by limitation after the expiration of twenty years from the time the last payment on such mortgage, trust deed in the nature of a mortgage, or vendor's lien becomes due upon its face and according to its written terms...." The defendant argued that the deed of trust should not be removed as a cloud on title since twenty years had not elapsed as stated in the above section of the statute. The Illinois Appellate Court discounted this argument, stating: " this section has no application to the problem under consideration. The sole purpose is to provide a twenty year limitation for unrecorded extensions."

[4]In reaching this conclusion the court relied on Pollock v. Maison, 41 Ill. 516 (1866); Harris v. Mills, 28 Ill. 44 (1862); Gibson v. Rees, 50 Ill. 383 (1869). " where the debt, the principal thing, is gone, the incident, the mortgage, is gone also, and ..a foreclosure in any mode cannot then be had, either by ejectment, *scire facias*, bill in equity or otherwise." Pollock v. Maison, 41 Ill. 516, 521 (1866).

[5]The majority of jurisdictions hold that even though the debt be barred by the statute of limitations, the mortagagee may still assert his rights to foreclosure under the mortgage so long as the statute of limitations has not run as to it. 2 Glenn, Mortgages (1943) § 141. It would seem, however, that the problem of a barred mortgage being a cloud on title would be the same regardless of which rule the jurisdiction follows. The only apparent difference would concern the element of time, in that the problem would arise upon the running of the shorter limitation period for debts in the minority of states, whereas the problem would not arise in the majority jurisdictions until the running of the longer statutory period for mortgages.

preme Court of Illinois declared explicitly that "the theory of limitation laws is that they bar the right to sue but do not extinguish the debt or the property right."[6]

Applying this doctrine to the instant case, it would seem that the court's basic assumption of an invalid debt is not well founded because the debt is still valid, though unenforceable. As the deed of trust is a mere incident of the debt it, too, is not invalid but unenforceable. Since one of the basic elements in the definition of a cloud on title is an *invalid claim* and since a barred deed of trust is merely unenforceable, it does not properly fall within the definition, and therefore, is not a cloud on title.

Even if it be assumed that the barred deed of trust does create a cloud on title, the problem remains as to whether it is one which an equity court will remove by affirmative action instituted by the mortgagor. This phrase of the question apparently received no consideration in the principal decision; it was merely assumed that if the lien is found to be "invalid," the cloud will be removed at the request of the land owner. However, the same result has been reached where this issue was specifically argued. In *Ramiller v. Ramiller*[7] the mortgage had become barred by the statute of limitations through the mortgagee's failure to execute properly an extension of the instrument of the debt. The Supreme Court of Iowa granted affirmative relief to the mortgagor by releasing the barred mortgage of record saying it constituted a cloud on his title. The mortgagee argued "that since appellees were seeking equity they must do equity, and since the debt was unpaid it would be inequitable and against conscience to grant them affirmative relief by quieting title to the land as against his mortgage."[8] This argument was rejected by the Iowa Court with the terse statement "There is also a maxim, in substance stating, that equity aids the vigilant and not those who slumber on their rights."[9] Another state has provided the answer by including in the statute

[6]Fleming v. Yeazel, 379 Ill. 343, 40 N. E. (2d) 507, 508 (1942).

[7]236 Iowa 323, 18 N. W (2d) 622 (1945).

[8]Ramiller v. Ramiller, 236 Iowa 323, 18 N. W (2d) 622, 626 (1945).

[9]Ramiller v. Ramiller, 236 Iowa 323, 18 N. W 2d) 622, 626 (1945). The maxim that "equity aids the vigilant" is a remedial principle adopted by courts of equity in earlier times as an analogy to the statutes of limitations which were expressly confined to law courts. As the modern statutes of limitations apply to equity courts as well as to the law courts, the doctrine operates only on those cases not falling within the scope of the statutory limitations. 2 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 419a. Since the statute of limitations clearly covered the controversy in this case it would seem that the Iowa Court has unduly extended the application of the principle, in that it should work in conjunction with the more general principle "that he who seeks equity must do equity," and not be antagonistic to it.

of limitations a provision that the lien is *extinguished* upon the running of the statutory period.[10] By such a statute the legislature has impliedly given its sanction to suits of quia timet in cases where the mortgage or deed of trust has become barred by the statute of limitations.

The continuing moral obligation of the debtor to pay, even after legal remedies are barred, has led several courts to deny such relief. In *Booth v. Hoskins*[11] the plaintiff had given a deed, intended as a mortgage, to the defendant in return for a loan. This debt became barred by the statute of limitations, which also barred foreclosure on the mortgage. The California court, in refusing plaintiff's requested relief of removing the mortgage as a cloud on his title, declared: "The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is.. that he who seeks equity must do equity . we think the plaintiffs should be denied any affirmative relief until the money justly due to the defendant is paid."[12] In other cases[13] it has been ruled that the barred instrument may be removed as a cloud only on condition that the mortgagor pay the amount which in equity he owes, which seems merely an affirmative way of saying what the California court stated negatively. This same principle was applied in *House v. Carr*[14] in which the New York court refused to enjoin a sale being made under a power of sale when both the debt and mortgage were barred by the statute of limitations. The court held the statute was not a basis of affirmative relief,[15] and a sale made out of court would pass good title even though the mortgagor would have a valid defense in a foreclosure action.

This rule, that a party's title will not be quieted against a mortgage barred by limitations unless he pays the mortgage debt is subject

[10]Mont. Rev. Codes (1907) § 5728, as interpreted by Berkin v. Healy, 52 Mont. 398, 158 Pac. 1020 (1916).

[11]75 Cal. 271, 17 Pac. 225 (1888).

[12]Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225, 227 (1888). The same was held to be true where, as in the principal case, the mortgagor had conveyed his interest to a third party. As the grantee is presumed not to have paid full value, he is in the same position as the grantor. De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74 (1889).

[13]Power & Irrig. Co. v. Capay Ditch Co., 226 Fed. 634 (C. C. A. 9th, 1915); Provident Mut. Bldg. & L. Ass'n v. Schwertner, 15 Ariz. 517, 140 Pac. 495 (1914).

[14]185 N. Y. 453, 78 N. E. 171 (1906).

[15]"It must be borne in mind that the statute of limitations in this state never pays or discharges a debt, but only affects the remedy... [I]f there be another remedy not affected by the statute .a creditor may enforce his claim through that remedy." House v. Carr, 185 N. Y. 453, 78 N. E. 171, 172 (1906).

to qualifications. In *Gardner v. Terry,* the plaintiff, claiming "that he and his grantors have been in actual, open, notorious, adverse possession of the lots ,"[16] brought suit to enjoin the defendants from exercising the power of sale in a trust deed which had become barred. The court in granting the injunction held the above rule was not applicable where the plaintiff holds title adversely to the deed of trust. "In general, the statute of limitations is in defense only, but 10 years' adverse possession of real estate will not only bar an action of ejectment, but it will confer title upon the possessor It is therefore difficult to see why a title thus acquired is not entitled to the same protection as a title acquired in any other way."[17] As the plaintiff could successfully interpose adverse possession as a defense to an action of ejectment brought by the purchaser at the foreclosure sale, then a court of equity has power "to prevent a cloud being cast upon the title to real estate as well as power to remove one already created."[18]

Further, affirmative relief has been allowed to a purchaser who "acquired the [mortgaged] land for a consideration after the lapse of the time within which an action to foreclose the mortgage could have been brought "[19] Since the purchaser was not personally liable for the debt, and was under no moral obligation to the mortgagee to discharge it, the California court felt that all privity had been severed between the grantees of the mortgagor and the mortgagee, and therefore gave affirmative relief as an exception to the general rule.[20]

The argument denying affirmative relief to the mortgagor or his

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[16]99 Mo. 523, 12 S. W 888 (1890). See also Klumpke v. Moreno, 24 Cal. App. 35, 140 Pac. 289 (1914).

[17]Gardner v. Terry, 99 Mo. 523, 12 S. W 888, 889 (1890).

[18]Gardner v. Terry, 99 Mo. 523, 12 S. W 888, 889 (1890). The court did not make it clear how the adverse possession came about.

[19]Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, 925 (1913). This exception was again upheld by the California court in Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 Pac. 669, 675 (1926), in which the court held, "The instant case presents a situation far less favorable to respondent than the ordinary relation of mortgagor and mortgagee, or the assigns of either. Here the law intervened and absolutely severed all privity that may have existed between the original parties or their assigns." It must be noticed, however, that in both cases the original mortgagor died subsequent to the running of the statute of limitations and the plaintiff based his claim of title on a deed from the executor of the mortgagor which necessarily required the approval of the probate court. In neither case did the mortgagee attempt to prove his claim in the probate proceedings. De Sazara v. Orena, 80 Cal. 132, 22 Pac. 74 (1889) indicates that this exception would not apply to one who purchased from the mortgagor.

[20]As adopted in Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225 (1888).

successor in title, centers around the well-known maxim of equity that he who comes into equity must do equity.[21] Unless there is present some statutory authority, or some factor such as adverse possession or lack of privity, which, in the minds of the court, would justify the release of the lien, courts of equity generally feel constrained to deny the mortgagor relief from his moral obligation to pay the debt. The mortgagor might well argue that the law favors the avoidance of restrictions on the alienability of land, and that to allow a barred lien to remain of record would prejudice the public interest in that the owner likely would be deterred from making the most effective use of his property.[22] Granting that both the mortgagor and the mortgagee are supported in their arguments by considerations of public policy, it would seem doubtful that courts of equity should be expected to overthrow, of their own accord, the fundamental principle that one seeking the aid of equity must himself be willing to act equitably. If policy considerations are strong enough to demand that affirmative relief be afforded to a mortgagor to clear his land of the cloud cast by a barred but unsatisfied lien, the legislature, as the branch of the government primarily vested with the function of determining matters of policy, is the proper authority to provide for such relief.

WILLIAM E. QUISENBERRY

MUNICIPAL CORPORATIONS—OBLIGATIONS ARISING FROM OPERATION OF MUNICIPAL UTILITIES BEYOND CORPORATE LIMITS. [Virginia]

The increasing tendency of Virginia municipalities to operate their utilities beyond the corporate limits for the sole purpose of

[21]A request by a mortgagor for the removal, as a cloud on title, of a just moral obligation appears to be sufficient to shock the conscience of a court of equity. In addition, the court must consider that a policy of removing barred mortgages as a cloud on title would permit the mortgagor to enjoin any attempt by the mortgagee to realize the benefit of his security, without the aid of the courts, through advertisement and sale. Further, such a policy could conceivably prevent the eventual satisfaction of the debt if the relationship of the parties were ever to result in the debtor being a legatee or distributee of the creditor. In this event the creditor's personal representative may normally set-off the barred indebtedness against the debtor's legacy or distributive share.

[22]The argument in favor of removing a mortgage barred by the statute of limitations is that it is in the public interest that property be applied to its most effective use, that it not be withdrawn from commerce, and that it be improved. 2 Tiffany, Real Property (3d ed. 1939) § 392. The mortgagor might further argue that refusal of affirmative relief would result in a perpetual, unenforceable lien which will avail the mortgagee of nothing and therefore be a detriment to the public interest.

acquiring additional revenue has created dual problems in the relationship between municipal water departments and out-of-city water consumers to whom surplus supplies may be sold under Virginia law.[1]

The general principle is that a municipal corporation possesses and can exercise no other powers than those granted in expressed words in its charter, those necessarily or fairly implied in or incidental to the powers expressly granted, and those essential—not simply convenient, but indispensable—to the declared object and purpose of the corporation.[2] Dillon states the basic rule in regard to the city's function in operating water works: "The purpose for which a municipality is authorized to construct water works or to contract for a supply of water is usually to supply its own needs, and the needs of its inhabitants, and it may be laid down as a general rule that a grant of power to a municipality for these purposes gives it by implication no authority to enter into the business of furnishing water to persons beyond the municipal limits."[3]

In Virginia, however, the situation is complicated by the fact that on the one hand the term "surplus" has, in practice, been construed to cover as large a quantity of water as the city might desire to sell to outside users,[4] and that on the other hand a state statute of 1918 requires a city to furnish water to out-of-city consumers formerly served by a plant taken over by the city from a public utility company.[5]

Though the purpose of the statute to protect persons against an abrupt interruption of their water supply is obvious, the effect of the legislation might readily create an evil as great as the one sought to be remedied. In seeking to assure the non-resident consumer of an adequate supply of water, it forces an obligation on the municipalities which could deprive them of the necessary means of serving their own inhabitants.

While this potentially troublesome problem has not yet been directly met in the courts, the recent case of *City of South Norfolk v.*

[1]See City of South Norfolk v. City of Norfolk, 58 S. E. (2d) 32 (Va. 1950); Mt. Jackson v. Nelson, 151 Va. 396, 145 S. E. 355 (1928).

[2]1 Dillon, Municipal Corporations (3d ed. 1911) § 89.

[3]3 Dillon, Municipal Corporations (5th ed. 1911) § 1299.

[4]See notes 9 and 10, infra.

[5]Va. Code Ann. (Michie, 1950) § 15-716. "2. Whenever any city or town shall lease or purchase any gas, electric or water plant operating within territory contiguous to such city or town . . any city or town acquiring or leasing any said property hereunder shall rest under obligation to furnish, from the said property so leased or acquired, or from any other source, an adequate supply of gas, electricity or water to the consumers, of any said company whose plant is so purchased or leased."

City of Norfolk,[6] is the latest pronouncement of the Virginia Supreme Court of Appeals bearing on the legal relation of city and outside water consumers in regard to the obligation of a city to serve customers beyond the corporate limits. The court was not required to determine the full scope of the obligation of municipalities under the statute, though the situation involved exemplifies the existence of the problem.

Prior to 1918, the City of South Norfolk had for many years been receiving its water supply from various water companies serving a large area. In that year, the water company then serving South Norfolk, conveyed its plant to the City of Portsmouth, subject to an option previously granted to the City of Norfolk. Norfolk exercised its option in 1923, by acquiring a portion of the water system serving South Norfolk, but continued to serve the outside consumers under a succession of contracts. When the last contract between Norfolk and South Norfolk expired on October 18, 1948, Norfolk denied any obligation to serve outside consumers further, and refused to furnish water except at greatly increased rates. South Norfolk paid the increased rates under protest and sought a declaratory judgment decreeing Norfolk's obligation to serve.

The court held that under the 1918 statute Norfolk was obligated to serve the complainant, but it was declared that a provision of a charter granted to Norfolk in 1918 also, limiting the rights of Norfolk to sell water beyond its boundaries to the disposal of surplus water only, placed restrictions on the statutory obligation to supply water, and both provisions were to be construed together. In this specific case, then, the fortunate accident that the Norfolk city charter contained a provision for sale of surplus water enabled that city to be spared the possibility of excessive demands of outside customers.

The *South Norfolk* decision determines no more than that Norfolk is obligated to furnish the City of South Norfolk water under the 1918 statute, and that obligation is qualified by the charter provision given to Norfolk in 1918. The court, however, went on to some length to indicate the nature and extent of this qualification: "But this duty is subject to further limitations . There may be others to whom Norfolk owes a duty under that statute or under its deed equal to the duty it owes South Norfolk and its inhabitants. The statute does not give South Norfolk a right superior to the rights of other persons protected by the statute. Neither does it warrant a construction that would put a legal duty on Norfolk to forego all other commitments

[6]City of South Norfolk v. City of Norfolk, 58 S. E. (2d) 32 (Va. 1950).

of its surplus supply in order to serve the additions to South Norfolk and its inhabitants that have occurred since Norfolk took over from Portsmouth under its option and that may occur in the future."[7]

Thus, it seems that Norfolk can be called upon to furnish water to the outside areas only to the extent of its surplus supply over the needs of its own inhabitants, and that even this obligation cannot be expanded beyond the consumer demand of the area as of the time Norfolk took over from Portsmouth the facilities of the public utility company which had been supplying water to those consumers.[8]

Though the city of Norfolk seems to be protected from the oppressive effect of the 1918 statute, it remains to be seen how other cities without the saving clause in their charters will fare in similar situations. The willingness of the Virginia court to recognize broad qualifications of the obligation of Norfolk under this statute may indicate an inclination to afford protection to a city threatened with real prejudice from the demands of outside consumers for continued water service. But the plain words of the statute proclaiming the obligation leave little opportunity for restrictive interpretation. It appears that in many cases the city would be forced to an unwilling expansion of its water facilities.

The second phase of the out-of-city water service problem chiefly concerns the municipality which willingly undertakes to supply adjoining areas, as a means of raising revenue. Since it has been determined that cities may put their surplus water supplies to such use,[9] and since "surplus" seems to mean whatever amount the city can and wishes to make available for outside sale,[10] and since the city

[7]City of South Norfolk v. City of Norfolk, 58 S. E. (2d) 32, 37 (Va. 1950).

[8]City of South Norfolk v. City of Norfolk, 58 S. E. (2d) 32, 37 (Va. 1950): "We hold, therefore, that the legal obligation of Norfolk to furnish South Norfolk and its inhabitants with water from its surplus supply extends only to the consumers, whether residents of the city of South Norfolk, or beyond its boundaries, who were being supplied by the facilities which the city of Norfolk purchased and took over on June 30, 1923. Such consumers are not limited to the particular individuals who were being supplied at that time, but include all inhabitants within the area which was being supplied, or which was capable of being supplied, by the facilities so acquired."

[9]Mt. Jackson v. Nelson, 151 Va. 396, 407, 145 S. E. 355, 357 (1928): "It is a common custom for municipal corporations in Virginia to furnish water to those who live beyond their limits. This is a source of profit to them, contributes to the sanitation of the outlying districts, and indirectly to that of the towns themselves. To discontinue this would, in many instances, be disastrous, and would result in the injury of all concerned without corresponding benefit of any kind to anybody. When to sell and when not to sell must be left, as other matters of business are left, to their sound judgment."

[10]See Mt. Jackson v. Nelson, 151 Va. 396, at 403, 145 S. E. 355, at 357 (1928).

is free to set its own rates for the service,[11] this enterprise can obviously be made richly rewarding.

Virginia has taken adequate precautions concerning rate regulations of utilities for the protection of those living under municipal rule, and those being served by a public utility. The first group finds relief through the all-powerful ballot, which enables citizens to turn out an administration charging excessive rates; the latter are under the protection of the State Corporation Commission, which sets the standard rates to be charged by the public utilities.[12] But the members of a third group, living just beyond the municipal boundary line and compelled to look to the municipality for their water supply because the municipality has bought their water system, find themselves without protection against exorbitant charges.

Such a group is not only excluded from the protection of the State Corporation Commission, because served by a municipal utility,[13] but, being non-residents of the city, they are deprived of any control of the municipal government through the ballot. Such a group may be required to pay extortionate rates for the same services received by city residents, or to accept inferior services.[14]

The Supreme Court of Appeals in the principal case did not decide the rate regulation question, but remanded it to the trial court.[15] If the latter court finds that the City of Norfolk is free from all regulation in fixing its charges for water, the consumers will probably have no alternative to paying whatever rates Norfolk may see fit to assess, and already these are claimed to be excessive. Also, the

[11]Va. Const. (1902) Art. XII, § 153: "As used in this article, the term 'corporation' or 'company' shall include all trusts, associations and joint stock companies having any powers or privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the state; .. "

[12]Va. Const. (1902) Art. XII, § 156 (b).

[13]Va. Const. (1902) Art. XII, § 153.

[14]There are at least three distinct situations in which such an outside consumer may find himself: Where the municipality has bought a water company's facilities for future use if expansion comes, but continues to serve those outside consumers then being served, calling the water surplus as of that time. In this situation, the water sold as surplus does not at any time, pass within the municipal limits. Rates charged for this water are not subject to regulation because the water is furnished by a municipal utility.

Where the city brings in water from a source beyond its boundary and the non-residents hook up, withdrawing the "surplus" before it passes into the corporate limits.

Where the outside consumer taps the regular water system primarily located within the municipality. In all three situations, the city may charge what the traffic will bear.

[15]City of South Norfolk v. City of Norfolk, 58 S. E. (2d) 32, at 38 (Va. 1950).

way would be open by which the city could nullify its obligation to serve under the 1918 statute, inasmuch as rates could easily be placed beyond the ability of the consumers to pay, thereby stifling the demand that the city furnish water.

If the court finds the authority and the means to set what it deems to be a reasonable rate, a cumbersome system of rate control by judicial decree would be established. The inadequacy of this system of rate fixing has been so widely conceded that regulation by administrative agencies has generally supplanted court control. The Virginia legislature, itself, has recognized the advantages of administrative control by vesting in the State Corporation Commission the authority to fix rates of public utility companies.[16]

If the court would accept the fact that a municipality dealing beyond its boundary is engaging in acts of a private nature,[17] and in such situation should fall within the purview of the jurisdiction of the State Corporation Commission, the difficulties would be reduced to a minimum. But unless that step is taken, the only means of obtaining a prompt and satisfactory definition of the rights and obligations between a city and its non-resident water customers seems to be in a thorough-going revision of the pertinent statutes.

ROBERT C. LOUTHIAN, JR.

PROCEDURE—CONCLUSIVENESS OF LOWER COURT'S JUDGMENT AFTER DISMISSAL OF APPEAL ON BASIS OF MOOTNESS. [Federal]

As a branch of the broad rule of res judicata, the doctrine of collateral estoppel operates as a bar to relitigation of matters once actually litigated and determined in an initial suit between the parties who subsequently seek to renew the controversy under a different cause of action. Under this doctrine only those matters which were not at issue in the first proceeding may be litigated in the second.[1] Its application must necessarily be flexible since the doctrine is subject to the somewhat vague limitation that it should

[16]Va. Const. (1902) Art. XII, § 156 (B).

[17]See Light v. City of Danville, 168 Va. 181, 213, 190 S. E. 276, 289 (1937) (dissenting opinion).

[1]The doctrine was expressly interpreted by the Supreme Court in Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. ed. 195 (1876). It has recently been repeated unmodified in Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, 597, 68 S. Ct. 715, 719, 92 L. ed. 898 (1948). Under this rule issues which were not, but which might have been litigated in the prior suit are not barred from litigation under a second cause of action.

not be applied if injustice would result. Thus, its specific scope has never been absolutely defined.

That an outstanding diversity of opinion as to the operation of the doctrine still exists was recently illustrated in the case of *United States v. Munsingwear, Inc.*[2] The controversy arose as a result of the dismissal, on the grounds of mootness, of an appeal[3] brought by the plaintiff, United States, from a judgment[4] denying a decree enjoining the defendant, Munsingwear, Inc., from an alleged violation of maximum price regulations. The original complaint in two counts, first for injunction and second for damages, had been separated into two suits, and by agreement between the parties the damages suit was continued pending the outcome of the injunction suit. After the federal district court had entered judgment on the merits for the defendant in the injunction suit, and while appeal thereon was pending, the commodities involved were decontrolled by government order, thus rendering the appeal moot. Having been denied the injunction, the plaintiff then sought, in the case here under discussion, to recover damages, as provided in the Emergency Price Control Act, for the alleged violation thereof. Such an action would involve a relitigation of the precise questions brought into issue in the injunction case. The complaint in this action for damages was dismissed by the district court as barred by the previous adjudication, and from this dismissal the plaintiff appealed. The judgment was affirmed in the Court of Appeals[5] but with one Justice dissenting.

The majority of the court held that the judgment of the appellate court in the injunction case was an "unconditional dismissal" of the appeal and, as such, did not disturb the conclusiveness of the lower court's judgment with regard to issues litigated therein. The dissent maintained that unconditional dismissal of the appeal on the basis of mootness did not leave the judgment of the lower court conclusive as to issues not considered on appeal.[6]

When confronted with the obligation of disposing of an appeal on the grounds of mootness,[7] the courts have sometimes anticipated

[2]178 F. (2d) 204 (C. A. 8th, 1949).

[3]Fleming v. Munsingwear, Inc., 162 F. (2d) 125 (C. C. A. 8th, 1947).

[4]Bowles v. Munsingwear, Inc., 63 F. Supp. 933 (D. C. Minn. 1945). Chester Bowles, Administrator, Office of Price Administration, filed the original complaint. Paul A. Porter, as Administrator of the Office of Price Admiinstration, succeeded Bowles. Porter was succeeded by Phillip B. Fleming, Administrator, Office of Temporary Controls, and Fleming was eventually succeeded by the United States, which, of course, was at all times the real party in interest.

[5]United States v. Munsingwear, Inc., 178 F. (2d) 204 (C. A. 8th, 1949).

[6]United States v. Munsingwear, Inc., 178 F. (2d) 204, 209 (C. A. 8th, 1949)

[7]Where some event has intervened without fault of either party, while appeal

the effect of their judgments as res judicata. Where it has been felt that to leave the judgment of the lower court in force would work a hardship on one party, appellate courts have taken steps to avoid such a result.[8] One method adopted by reviewing courts to qualify the scope and effect of their judgments as res judicata has been expressly to reserve to the parties the right to relitigate rights, questions, or facts brought into issue in the lower court.[9]

For example in *Gelpi v. Tugwell*,[10] where a writ of mandamus was sought by the plaintiff to restore her to her government position, her term of office expired while appeal was pending. In order to prevent the lower court's judgment from becoming res judicata as to issues which the plaintiff might wish to resubmit in a subsequent action, such as an action for past salary, the court, in dismissing the appeal as moot, expressly reserved to the plaintiff the right to relitigate those issues. This procedure affords the courts a method of declaring a judgment res judicata as to particular issues and not as to others if such specific definition be deemed necessary for just results.

However, where it has been desirable to leave all issues open to relitigation, some courts have adopted the method of reversing the lower judgment and remanding the cause with directions to the

is pending, which renders the relief sought impossible, the appeal must be dismissed. Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. ed. 293 (1895).

[8]Shaw v. Birk, 67 F. (2d) 851 (C. C. A. 5th, 1934); Chicago and N. W Ry. Co. v. Fueland, 289 Fed. 783 (C. C. A. 8th, 1923); National Surety Co. v. Shafer, 57 Colo. 56, 140 Pac. 199 (1914); Bigham v. Yundt, 158 Ga. 600, 123 S. E. 870 (1924); Mercer v. Gray, 109 S. W (2d) 1107 (Tex. Civ. App. 1937). Motion to dismiss appeal without prejudice is denied where the facts are before the court and the interests of the parties demand termination of the controversy. Quinn v. Kenton and Campbell Benevolent and Burial Ass'n, 221 Ky. 750, 299 S. W 989 (1927).

[9]In Blackman v. Stone, 300 U. S. 641, 57 S. Ct. 514, 81 L. ed. 856 (1937), an injunction was sought against omitting the Communist Party nominees from ballots. The election having been held while the appeal was pending, the Supreme Court dismissed the appeal as moot, but expressly "without prejudice" to any action which might have remained in the cause. The Court apparently felt that such stipulation was essential to prevent the judgment of the lower court's operating as a bar to a relitigation of the issues involved.

[10]123 F (2d) 377 (C. C. A. 1st, 1941). The dissenting Justice in the Munsingwear case denied that a "reservation" was made in the Gelpi case and asserted that the court in that case stated as a matter of law that its judgment would not become res judicata as to issues litigated in the lower court. However, from the opinion of the majority in the Gelpi case as well as the statement of the dissenting Justice, that " the court, in dismissing the appeal as moot, reserves to appellant the right to raise in subsequent litigation the same issues which she sought to have us pass on in the present case." 123 F. (2d) 377, 379 (C. C. A. 1st, 1941), it seems clear that such a reservation was made.

lower court to dismiss the bill of complaint.[11] The effect of this procedure is to vacate the entire proceedings leaving no judgment on the issues in force.[12]

Thus, in *Leader v. Apex Hosiery Company*,[13] the Circuit Court of Appeals ruled that the action for damages before the court was not barred by a prior judgment on the same issues because the prior judgment had been vacated. The initial suit[14] had been brought for an injunction against a strike which ended after the court had denied the injunction and while appeal was pending. The Supreme Court had reversed the lower court's judgment and remanded the cause with directions to dismiss the complaint since the appeal had become moot.[15] The effect of this action, as subsequently declared by the Circuit Court of Appeals, was to vacate the entire proceedings, thus leaving the parties in the same position as if the original suit for injunction had been as untimely as the appeal.[16] The issues were therefore open to relitigation.

In these cases where the courts have made express qualifications as to the scope of their judgments, the intent has been to prevent the dismissal of the appeal from leaving the judgment of the lower court conclusive as to issues there litigated, when such was necessary to prevent injustice.

Assuming that appeal in the *Munsingwear* case was unconditionally dismissed, the question arose as to the conclusiveness of the judgment of the court of first instance in that event. In holding that the prior judgment was a bar to subsequent litigation, the majority of the court invoked the general rule of res judicata as set forth by the Supreme Court of the United States in *Southern Pacific Ry. Co. v. United States* as follows: "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue

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[11]Brownlow v. Swartz, 261 U. S. 216, 43 S. Ct. 263, 67 L. ed. 620 (1923); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U. S. 300, 12 S. Ct. 921, 36 L. ed. 712 (1892); Leader v. Apex Hosiery Co., 108 F. (2d) 71 (C. C. A. 3d, 1939); Knowlton v. Town of Swampscott, 280 Mass. 69, 181 N. E. 849 (1932).

[12]In Brownlow v. Swartz, 261 U. S. 216, 43 S. Ct. 263, 67 L. ed. 620 (1923), a writ of mandamus was sought by the plaintiff, the performance having been completed while the appeal was pending. The Supreme Court, observing that the case had become moot, asserted its inability to decide the case on its merits, and noting its unwillingness to leave the lower judgment in force without reason, concluded that it must reverse and remand in order to vacate the lower judgment.

[13]108 F. (2d) 71 (C. C. A. 3d, 1939).

[14]Apex Hosiery Co. v. Leader, 90 F. (2d) 155 (C. C. A. 3d, 1937).

[15]Leader v. Apex Hosiery Co., 302 U. S. 656, 58 S. Ct. 362, 82 L. ed. 508 (1937).

[16]Leader v. Apex Hosiery Co., 108 F. (2d) 71, 81 (C. C. A. 3d, 1939).

and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."[17] The majority opinion was that since the issues sought to be relitigated had been distinctly put in issue and directly determined on the merits by a court of competent jurisdiction—the lower court in the injunction suit—and since the judgment entered in that action remained unmodified, the controversy fell within the scope of the doctrine and was barred.

The assumption that the doctrine invoked by the majority of the court must rigidly operate as a bar to subsequent litigation under a different cause of action was attacked by the dissenting justice who foresaw in such a view the possibility of harsh results. He relied principally on Scott's view[18] which has been adopted by the American Law Institute: "Where a party to a judgment cannot obtain the decision to an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."[19]

The reasoning of the dissenting justice, and of Scott's,[20] is in this respect that the majority view is an unnecessarily strict application of the doctrine and should not be applied so as to deprive the losing party in a trial court of the opportunity to have the validity of the trial court's action reviewed. Where appeal does not lie, this result is inevitable if the party is prevented from bringing up the issues under a different cause of action.

The majority view, however, is not the unreasoning adherence to rigid policy that the dissent argues, because it invokes the doctrine of collateral estoppel as a bar to subsequent litigations of issues once

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[17]168 U. S. 1, 48, 18 S. Ct. 18, 27, 42 L. ed. 355 (1897).

[18]"The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance.

"One illustration of this is where an appeal is denied because a controversy has become moot. In such a case the judgment itself may stand, but matters decided are not conclusive by way of collateral estoppel in a subsequent controversy between the parties involving a different cause of action." Scott, Collateral Estoppel By Judgment (1942) 56 Harv. L. Rev. 1, 15.

[19]Restatement, Judgments (1942) § 69 (2).

[20]Professor Austin Scott in conjunction with Professor Warren Seavey wrote the Restatement of Judgments for the American Law Institute. It is this authority as well as the article by Scott, Collateral Estoppel By Judgment (1942) 56 Harv. L. Rev. 1, upon which the dissenting justice relies most strongly.

determined only so long as the initial judgment on those issues remains unmodified. That the appellate courts may, in dismissing moot appeals, exercise their discretion to qualify the effect of their judgments has already been illustrated. The opinion of the majority of the court, that some express modification of the lower court's judgment must be made in order to disturb its conclusiveness, protects this discretionary power of the courts. The dissent would declare absolutely that dismissal of a moot appeal would leave the issues open to relitigation. But since, under the majority view, the reviewing court has the power so to modify the effect of its judgment as to avoid the possibility of the appellant's being deprived of an appeal, there seems to be little reason for establishing, with such rigidity, the rule which the dissent seeks to invoke.

In *Johnson Company v. Wharton*,[21] the Supreme Court of the United States clearly pointed out that the fact that a party is prevented from appealing an issue because of circumstances beyond his control does not affect the conclusiveness of the lower court's judgment on that issue.[22] To limit the effect of the doctrine of res judicata to those cases which can be reviewed on the merits by a higher court would be to remove from the scope of the doctrine all judgments which become moot at a time when review can still be sought. The effect of a judgment as res judicata is so important as to make it rather doubtful whether a party should be permitted to defeat this effect merely by showing that the controversy has become moot during this time,[23] when, in fact, no appeal had been sought or contemplated.

The fact that circumstances beyond the control of either party operate to prevent a review of the lower court's judgment on the issues cannot be said to justify, in every case, a relitigation of those issues in subsequent actions. Where allowing such relitigation would be justified, the appellate courts can do so. Where the initial judgment remains undisturbed by the judgment of the appellate court in dismissing a moot appeal, the initial judgment is final within the

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[21]152 U. S. 252, 14 S. Ct. 608, 38 L. ed. 429 (1894).

[22]In discussing the inquiry as to the conclusiveness of a prior judgment after an appeal has been denied, the court stated: "The existence or non-existence of a right, in either party, to have the judgment in the prior suit reexamined, upon appeal or writ of error, cannot, in any case, control this inquiry . Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction." 152 U. S. 252, 261, 14 S. Ct. 608, 611, 38 L. ed. 429, 434 (1894).

[23]Note (1945) 157 A. L. R. 1044.

meaning of res judicata,[24] and this effect cannot be said to subject the appellant to "harsh" results simply because an appeal does not lie. The appellant's constitutional right is satisfied by his "day in court" in the lower tribunal.[25] The fact that the legislature, acting under its constitutional authority to distribute the judicial powers, has provided for a system of appeals does not make the appeal a part of the litigant's constitutional right. Therefore, to hold that a judgment, from which no appeal lies, is within the scope of the rule of res judicata does not prejudice any right of the appellant.[26]

The majority view in the present case clearly appears to be stronger. Until action is taken by the reviewing court expressly for the purpose of modifying the judgment appealed from, such judgment remains unmodified, and, under the general rule as interpreted by the Supreme Court, remains conclusive. The argument that application of the doctrine in the light of this interpretation will lead to injustice is untenable. A highly desirable close adherence to the basic principles of the doctrine, through which it has served to put an end to litigation and to stabilize our jurisprudence, is illustrated by the court in this case.

It has been suggested by Scott that where a controversy has become moot before being passed upon, the reviewing court, instead of merely dismissing the appeal or affirming the judgment of the court below, should reverse or set aside the judgment and dismiss the suit, or direct the lower court to do so.[27] This suggestion appears to be sound, but should be subject to the qualification that such procedure should be adopted only if the reviewing court determines

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[24]It is a general rule that a judgment sought to be used as a basis for the application of the doctrine of res judicata must be a final judgment. Swift v. McPherson, 232 U. S. 51, 34 S. Ct. 239, 58 L. ed. 499 (1914). However, the scope of the term "final judgment" within the meaning of the rule here under consideration, has been declared not to be confined to a final judgment in an action, but to include any judicial decision upon a question of fact or law which is not provisional and subject to change in the future by the same tribunal. Bannon v. Bannon, 270 N. Y. 484, 1 N. E. (2d) 975, 105 A. L. R. 1401 (1936).

[25]If Congress fails to provide for such a review, the initial judgment stands as the judgment of the court of last resort and settles finally the rights of the parties which are involved. Ex parte State of Pennsylvania, 109 U. S. 174, 3 S. Ct. 84, 27 L. ed. 894 (1883).

[26]See Johnson Co. v. Wharton, 152 U. S. 252, 260, 14 S. Ct. 608, 611, 38 L. ed. 429 (1894). Also, it is difficult to see why the appellant in the Munsingwear case should be considered to have been harshly treated when he is merely bearing the consequences of his own election to separate the causes of action. Had he proceeded with the original bill in two counts, the appeal would not have been moot as to the damages count and would not have been dismissed on this basis.

[27]Scott, Collateral Estoppel By Judgment (1942) 56 Harv. L. Rev. 1.

that the issue must be left open to relitigation in order to prevent injustice. Thus, in disposing of moot appeals, the middle ground of dismissal "without prejudice" in which the present controversies arise would be eliminated.

THOMAS R. MCNAMARA

PROCEDURE—EFFECT OF FRAUD IN TOLLING OF STATUTE OF LIMITATIONS OF "SUBSTANTIVE" NATURE. [Federal]

Generally, courts will not imply exceptions not expressly stated in statutes of limitations. Unless the statute specifies otherwise, infancy,[1] mental incapacity,[2] coverture,[3] death of one against whom the statute of limitations has been running,[4] imprisonment,[5] absence from the state[6] and evasion of process[7] will not toll a statute of limitations.[8] Nevertheless, the courts have found it necessary to imply exceptions where the suit is based on fraud[9] or duress,[10] or there has been a fraudulent concealment of the cause of action,[11] or legal proceedings have been instituted which prevent enforcement of the remedy,[12] or

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[1]Vance v. Vance, 108 U. S. 514, 2 S. Ct. 854, 27 L. ed. 808 (1883); Boyle v. Boyle, 126 Iowa 167, 101 N. W. 748, 3 Ann. Cas. 575 (1904).

[2]Collier v. Smaltz, 149 Iowa 230, 128 N. W 396, Ann. Cas. 1912C 1007 (1910); Walrod v. Nelson, 54 N. D. 753, 210 N. W 525 (1926).

[3]Vance v. Vance, 108 U. S. 514, 2 S. Ct. 854, 27 L. ed. 808 (1883); Re Deaner, 126 Iowa 701, 102 N. W. 825, 106 Am. St. Rep. 374 (1905).

[4]McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814 (1887); Griffin v. Hannum, 185 Okla. 433, 93 P. (2d) 1078 (1939).

[5]Mosgrave v. McManus, 24 N. M. 227, 173 Pac. 196, L. R. A. 1918F 348 (1918).

[6]Rock Island Plow Co. v. Masterson, 96 Ark. 446, 132 S. W 216 (1910); Kissane v. Brewer, 208 Mo. App. 244, 232 S. W 1106 (1921).

[7]Amy v. City of Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 L. ed. 953 (1889); Engel v. Fischer, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818 (1886).

[8]For a general discussion of the subject: 34 Am. Jur., Limitation of Actions §§ 186-250.

[9]Exploration Co. v. United States, 247 U. S. 435, 38 S. Ct. 571, 62 L. ed. 1200 (1918); Smith v. Blachley, 198 Pa. 173, 47 Atl. 985, 53 L. R. A. 849 (1901). There is conflict in the cases as to whether fraud should toll statutes of limitations. American Jurisprudence states that it is probably the majority doctrine that fraud should toll statutes of limitations, but Corpus Juris Secundum does not state a majority rule. Equity courts have consistently held that fraud does toll the statutes of limitations. 34 Am. Jur., Limitation of Actions § 163; 54 C. J. S., Limitations of Actions §§ 184, 186.

[10]Allen v. Leflore County, 78 Miss. 671, 29 So. 161 (1901); Spiva v. Boyd, 206 Ala. 536, 90 So. 289 (1921).

[11]Waugh v. Guthrie Gas, Light and Fuel Co., 37 Okla. 239, 131 Pac. 174, L. R. A. 1917B 1253 (1913); Texas & P Ry. Co. v. Gay, 88 Tex. 111, 30 S. W 543 (1895).

[12]Logan v. Yancey, 161 Ga. 579, 131 S. E. 514 (1926); Wakefield v. Brown, 38 Minn. 361, 37 N. W 788, 8 Am. St. Rep. 671 (1888).

where the courts have been closed to the plaintiff because of war,[13] or commencement of suit on the cause of action.[14] The statute begins to run in the case of fraud or fraudulent concealment when the facts become known to the injured party;[15] it commences to run in the case of duress or undue influence when the influence is removed;[16] and if the courts have been closed to the plaintiff because of war, the statute begins to run upon the termination of hostilities.[17]

But the rules set out above are not applied uniformly to all periods of limitation. Courts have widely announced that they apply only to those statutes limiting the time in which the traditional forms of action may be brought. If the period of limitation limits a *new* liability, for which there was not a remedy at common law, and is a part of the statute which creates the liability or applies specifically to such a statute, it is not a statute of limitations. Rather, it is said to be a condition to the right, and failure to bring suit within the period specified bars the *right*,[18] whereas failure to bring suit within the limitation of a customary statute does not affect the right, but merely bars the *remedy*.[19] Those periods of limitation which are held to be a condition to the right are termed "substantive," while the customary statutes of limitations are called "remedial." In accordance with this distinction it is said that substantive periods of limitation are to be regarded "as an absolute bar not removable by any of the ordinary exceptions or answers to the statute of limitations."[20]

Though the federal courts have generally applied the distinction to bar statutory actions based on the Federal Employers' Liability Act and similar enactments,[21] several federal decisions of recent years indicate what may be a trend toward abandonment of the substantive

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[13]Hanger v. Abbot, 6 Wall. 532, 18 L. ed. 939 (U. S. 1867); Perkins v. Rogers, 35 Ind. 124, 9 Am. Rep. 639 (1871).

[14]McIlroy v. Mulholland, 169 Ark. 1212, 277 S. W 16 (1925); Anderson v. Biazzi, 166 Va. 309, 186 S. E. 7 (1936).

[15]See notes 8 and 10, supra.

[16]See note 9, supra.

[17]See note 12, supra.

[18]34 Am. Jur., Limitation of Actions §§ 7, 11; 53 C. J. S., Limitations of Actions §§ 1, 6.

[19]34 Am. Jur., Limitation of Action § 11; 53 C. J. S., Limitations of Actions § 6.

[20]Hill v. Town of New Haven, 37 Vt. 501, 510 (1865).

[21]A. J. Phillips Co. v. Grand Trunk W R. Co., 236 U. S. 662, 35 S. Ct. 444, 59 L. ed. 774 (1915) (dealing with the Interstate Commerce Act); United States ex rel. Texas Cement Co. v. McCord, 233 U. S. 157, 34 S. Ct. 550, 58 L. ed. 893 (1914) (action on bond of a public contractor); United States ex rel. Nitkey v. Dawes, 151 F. (2d) 639 (C. C. A. 7th, 1945) (Informers Act); Pollen v. Ford Instrument Co., 108 F. (2d) 762 (C. C. A. 2d, 1940) (limitation on actions on patents); Rademaker v. E. D. Flynn Export Co., 17 F. (2d) 15 (C. C. A. 5th, 1927) (Jones Act).

limitations concept. The most recent of these cases, *Scarborough v. Atlantic Coast Line R. Co.*,[22] involved a suit under the Federal Employers' Liability Act by a young man injured at the age of seventeen while in the employ of the defendant interstate carrier. The agent of the defendant had admitted liability for the injury, but had suggested that the plaintiff postpone his claim until he had reached his majority at which time the extent of the damages sustained by the plaintiff could be more accurately determined. The defendant's agent had represented that if the plaintiff was not satisfied at that time by the settlement offered, he would have three years after reaching his majority in which to bring suit on his claim. Upon becoming of age the plaintiff again commenced negotiations with the defendant for settlement of the claim. In these negotiations the defendant denied all liability and indicated that it would plead the Statute of Limitations, the period in the Federal Employers' Liability Act being three years. The District Court followed the traditional view and held that the principle of estoppel would not avail the plaintiff because the period of limitation prescribed in the statute was substantive rather than remedial. The Court of Appeals for the Fourth Circuit, although recognizing that the weight of authority sustained the District Court, pointed to three recent cases,[23] each distinguishable on their facts but

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[22]178 F. (2d) 253 (C. C. A. 4th, (1949).

[23]Osbourne v. United States, 164 F. (2d) 767 (C. C. A. 2d, 1947); State of Maryland to Use of Burkhardt v. United States, 165 F. (2d) 869, 1 A. L. R. (2d) 213 (C. C. A. 4th, 1947); Frabutt v. N. Y., Chicago and St. Louis R. Co. 84 F. Supp. 460 (W. D. Pa. 1949).

In the Osbourne case the plaintiff sought to recover for injuries sustained while employed as a merchant mariner on defendant's vessel. The plaintiff was interned by Japan on December 8, 1941 and was not returned to this country until October, 1945. The suit was commenced in July, 1946. The defendant pleaded the period of limitation and the defense was sustained by the District Court. The Circuit Court of Appeals for the Second Circuit reversed.

"Neither do we think that distinction should be made because of the type of statute of limitations involved. All statutes of limitations are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed. Whatever the reasons for describing this type of statute of limitations as substantive rather than procedural we think we do the distinction no violence by holding that either type of statute will toll for one who is a prisoner in the hands of the enemy in time of war." 164 F. (2d) 767, 769 (C. C. A. 2d, 1947).

The plaintiff in the Burkhardt case was the beneficiary of deceased killed in a collision with a United States Army vehicle. The suit was under the Federal Tort Claims Act, the period of limitation specified in the statute being three years. One year was the period of limitation in the wrongful death statute of Maryland, the applicable state law. Suit was brought between one and three years

inconsistent with the substantive statute of limitations theory, and found "that the distinction is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe."[24] The court went on to hold that fraud will toll the period of limitation provided in the Federal Employers' Liability Act because "The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations."[25]

The recognition of a difference between remedial and substantive statutes of limitations seems to be the result of courts applying a different rule of law only because the fact situations differ. Cases developing this distinction merely state that because the period of limitation is a part of a statute creating a right and remedy unknown to the common law, the exceptions to the statute of limitations do not apply. These decisions give no reason for their conclusions; the courts merely state the facts and set out their conclusions in brief opinions,[26]

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after the cause of action accrued. The Circuit Court of Appeals held, reversing the District Court, that the suit was not barred by the statute of limitations.

"And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action and is, to say the best of it, technical and legalistic reasoning, which is not followed in all states." 165 F. (2d) 869, 873, 1 A. L. R. (2d) 213, 220 (C. C. A. 4th, 1947).

In the Frabutt case a resident alien was killed in 1942 while in the employ of the defendant interstate carrier. Suit was commenced in 1948 by the administrator in behalf of the alien beneficiaries, residents of Italy, under the Federal Employers' Liability Act.

"There is no question that the Federal Employers' Liability Act created a cause of action unknown to the common law. The statute of limitations of three years in the Act is a matter of substance which limits the rights given as well as the remedy. That such a limitation, if not complied with, not only bars the remedy but destroys the liability

" taking into consideration that statutes of limitations, in fixing a definite period for the bringing of suits, proceed upon the principle that the courts where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor, and in view of the fact that the law of nations which closed the courts to alien enemies renders compliance with the statute impossible, it is only fair and just that the operation of statutes of limitations should be suspended " 84 F. Supp. 460, 464 (W D. Pa 1949).

Both the Frabutt case and the Osbourne case contain dictum to the effect that fraud will not toll substantive statutes of limitations.

[24]178 F. (2d) 253, 259 (C. C. A. 4th, 1949).

[25]178 F. (2d) 253, 259 (C. C. A. 4th, 1949).

[26]For especially brief discussions: The Harrisburg, 119 U. S. 199, 7 S. Ct. 140,

stated in conceptualistic terms, without pointing to any desirable results to be achieved.[27]

Notwithstanding the insistence of the courts that ordinary statutes of limitations affect the remedy only, all periods of limitation are substantive in that destruction of the remedy amounts for practical purposes to a destruction of the right, inasmuch as it virtually deprives the injured party of all means of recovery. Only in exceptional circumstances is this not true, as where the mortgage debt is barred by the statute of limitations but the mortgage security interest survives the barring of the debt.[28] There it may be argued that only the remedy is affected. But if the value of the security has depreciated below the amount of the debt, the mortgagor cannot get a deficiency decree in a proceeding to enforce the mortgage lien if the debt is barred.[29] Therefore, even in this situation the "remedial" statute affects the plaintiff's right—that is, the plaintiff's ability to recover on his claim. To say that a factor is "procedural" when in most situations for all practical purposes it acts to prevent forever recovery of a claim, seems to expand the idea of what is procedural beyond its natural scope.

One of the characteristics of a "substantive" statute of limitations is that it is contained in a provision of the statute creating the liability or that it applies specifically to the new cause of action. It has been said that under these circumstances "there can be no doubt of the legislative intention. It is manifest, in such a case, that the time element is an integral part of the right created . "[30] But this is not a

30 L. ed. 358 (1886); Munos v. Southern Pacific Co., 51 Fed. 188 (C. C. A. 5th, (1892); Taylor v. Cranberry Iron and Coal Co., 94 N. C. 525 (1886); Bonte v. Taylor, 24 Ohio St. 628 (1874); Hill v. Town of New Haven, 37 Vt. 501 (1865).

[27]The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358 (1886); Munos v. Southern Pacific Co., 51 Fed. 188 (C. C. A. 5th, 1892); Theroux v. Northern Pac. R. Co., 64 Fed. 84 (C. C. A. 8th, 1894); Boyd v. Clarke, 8 Fed. 849 (C. C. E. D. Mich. 1881); Taylor v. Cranberry Iron and Coal Co., 94 N. C. 525 (1886); P. C. & St. Louis R. R. Co. v. Hine, 25 Ohio St. 629 (1874); Bonte v. Taylor, 24 Ohio St. 628 (1874); Hill v. Town of New Haven, 37 Vt. 501 (1865). None of the above cases gives any reason for the results reached other than that the period of limitation is a section of the statute creating the liability. In P. C. & St. Louis R. R. Co. v. Hine, a decision frequently cited, the court supported its position by invoking the rule that statutes in derogation of the common law are to be strictly construed, hardly adequate support for the conclusions reached.

[28]Palmer v. White, 65 N. J. L. 69, 46 Atl. 706 (1900); Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59 (1891); 2 Jones, Mortgages (8th ed. 1928) § 1542.

[29]Slingerland v. Sherer, 46 Minn. 422, 49 N. W 237 (1891); Hulbert v. Clarke, 57 Hun. 558, 11 N. Y. Supp. 417 (N. Y. 1890); 2 Jones, Mortgages (8th ed. 1928) § 1545.

[30]Ailes, Limitation of Actions and the Conflict of Laws (1932) 31 Mich L. Rev. 474, 495.

reason for drawing a distinction between remedial and substantive periods of limitation. There is nothing to indicate that the legislature intended to create a stronger limitation in the one instance than in the other;[31] there is no convincing reason for saying that the so-called substantive statute is any more a part of the statutory cause of action than the ordinary statute of limitations is a part of the common law causes of action. The purpose of the legislature in incorporating the time restriction in the statute creating the right is merely to establish a period of limitation for the new cause of action because the provisions of the general statutes of limitations might not apply to such an action.

The policy underlying statutes of limitations is to compel the settlement of claims within a reasonable time after their origin, and before the facts and circumstances surrounding the claim are likely to be forgotten.[32] The longer the enforcement of the claim is neglected, the more difficult proof and refutation of the claim becomes and the greater the likelihood of a fraud being perpetrated on the court. A party with a valid claim should not be permitted to delay enforcing his claim for such a period as will unreasonably increase the defendant's difficulties in disproving the claim. However, this policy comes into conflict with even stronger policy considerations when the defendant has been guilty of fraud or duress. It is obvious that a party should not be able to benefit by his own conscious wrong by depriving the plaintiff of any knowledge of the wrong he has suffered. Under these circumstances the defendant is responsible for the stale claim presented against him, and he cannot avail himself of the policy of the statute of limitations. The policy seeking prompt adjudication of claims is as strong whether the claim is under a statute creating a liability unknown to the common law or under one of the traditional forms of action. Likewise, it is as undesirable that a person be permitted to profit by his fraud whether the fraud is perpetrated in connection with a traditional cause of action or in connection with a statutory claim.

The decision in the principal case will permit defrauded parties to recover under circumstances where they will not be able to recover

[31]This argument was recognized by the Massachusetts court but denied because in the particular statute before the court a provision requiring that the defendant be given notice of the claim before suit was commenced, contained in the same sentence as the period of limitation, had previously been held to be a condition to the right and therefore the period of limitation must also be of the same nature. McRae v. N. Y., N. H. & H. R. Co., 199 Mass. 418, 85 N. E. 425, 15 Ann. Cas. 489 (1908).

[32]34 Am. Jur., Limitation of Actions §§ 9, 10; C. J. S., Limitations of Actions § 1.

under the traditional view, and it therefore should be a force for discouraging the employment of an obvious fraudulent device to avoid payment of claims. Holdings that fraud does not toll substantive statutes of limitations actually encourage fraud, because the defendant has everything to gain and nothing to lose by pursuing a fraudulent course of action.

The distinction between remedial and substantive statutes of limitations has been refuted by some courts,[33] and the principal case is a hopeful sign that this movement is gaining ground and that the distinction may ultimately be discarded.

ALBERT F. KNIGHT

TORTS—CONSENT AS BAR TO RECOVERY OF DAMAGES FOR ILLEGAL ABORTION. [Virginia]

The general rule has long been recognized in tort law that consent to or participation in an immoral or illegal act is a bar to the recovery of civil damages for injuries received as a result of such act.[1] However, upon the premise that the state is interested in the life of an individual, many courts early adopted the view that the rule will not be applied where the authorized act constitutes a breach of the peace.[2] In a case of first impression in Virginia the Supreme Court of Appeals was recently faced with the applicability of the exception where damages were sought for death resulting from an illegal abortion.

In *Miller v. Bennett*,[3] plaintiff, as administrator of the estate of deceased, brought an action under the Virginia wrongful death statute, alleging that the death was the result of an illegal abortion performed by the defendant upon the plaintiff's decedent. The trial court overruled the contention of defendant that proof of consent to the illegal act would bar recovery, and the jury returned a verdict for the plaintiff. In setting aside this verdict, the Supreme Court of Appeals adhered to the view that consent bars recovery, and denied relief upon the ground that "plaintiff's decedent, a mature married

[33]Chiles v. Drake, 2 Met. 146, 74 Am. Dec. 406 (Ky. 1859); Sharrow v. Inland Lines, 214 N. Y. 101, 108 N. E. 217, L. R. A. 1915E 1192 (1915); Brookshire v. Burkhart, 141 Okla. 1, 283 Pac. 571, 67 A. L. R. 1059 (1929).

[1]Goldnamer v. O'Brien, 98 Ky. 569, 33 S. W. 831, 36 L. R. A. 715 (1896); Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace (1924) 24 Col. L. Rev. 819; 1 Am. Jur., Actions § 17.

[2]The origin of this exception has been traced to a dictum in Matthews v. Ollerton, Comb. 218, 90 Eng. Rep. 438 (1693). For a discussion of the history and growth of the exception see Note (1949) 6 Wash. & Lee L. Rev. 123.

[3]190 Va. 162, 56 S. E. (2d) 217 (1949).

woman,[4] was guilty of moral turpitude and participated in the violation of a general anti-abortion statute, enacted to effectuate a public policy."[5]

Lord Mansfield early laid down the general rule that one who consents to an illegal act cannot recover damages for the consequences of that act, on the maxim "volenti non fit injuria."[6] But an exception to this rule has subsequently been recognized in regard to injuries arising out of an assault or battery, upon the theory that the state was also wronged. "There are three parties here, one being the state which for its own good, does not suffer the others to deal on the basis of contract with the public peace. The rule of law is therefore clear that consent to an assault is no justification."[7] Though the great majority of jurisdictions recognize this reasoning in permitting recovery regardless of consent where there has been a breach of the peace,[8] very few courts have seen fit to extend the exception to permit recovery in the abortion cases where the plaintiff has consented to the operation.[9]

Where civil recovery has been allowed, notwithstanding the consent, the orthodox exception has been adopted as a rule of law.[10]

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[4]The consent to bar recovery must have been freely given by one legally able to consent. True v. Older, 227 Minn. 154, 34 N. W (2d) 700 (1948). Thus, one who is a *minor* by the state law will be allowed damages notwithstanding her consent. Hancock v. Hullett, 203 Ala. 272, 82 So. 522 (1919).

[5]Miller v. Bennett, 190 Va. 162, 171, 56 S. E. (2d) 217, 221 (1949).

[6]Holman v. Johnson, 1 Cowp. 342, 98 Eng. Rep. 1120 (1775). Relief was not denied upon the theory that no wrong had been done to plaintiff because of his consent but on the reasoning that no court will aid a man whose cause of action is founded upon an illegal act.

[7]1 Cooley, Torts (4th ed.) 326. This reasoning has been severely criticized by Bohlen. The statement that the state is a party in interest was true so long as the Crown *and* the individual were interested in the outcome of the writ of trespass. However, the Crown in 1694 began punishing misdemeanors by prosecutions and thus the statement has not been true since then. Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace (1924) 24 Col. L. Rev. 819.

[8]See note 2, supra. Prosser, Torts (1941) 123.

[9]Recovery allowed: Martin v. Hardesty, 91 Ind. App. 239, 163 N. E. 610 (1928); Lembo v. Donnell, 117 Me. 143, 103 Atl. 11 (1918); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N. E. 264 (1924); Miller v. Bayer, 94 Wis. 123, 68 N. W 869 (1869). Recovery denied: Goldnamer v. O'Brien, 98 Ky. 569, 33 S. W 831, 36 L. R. A. 715 (1896); Szadwicz v. Cantor, 257 Mass. 518, 154 N. E. 251 (1926); Martin v. Morris, 163 Tenn. 186, 42 S. W (2d) 207 (1931); Androws v. Coulter, 163 Wash. 429, 1 P (2d) 320 (1931).

[10]See note 9, supra. " certainly no argument is required to demonstrate that an act which is designed to take the life of one and is violative not only of good morals but of the criminal laws of the state, is not one from the consequences of which he who commits the act may be relieved by reason of the previous consent of the injured person." Milliken v. Heddesheimer, 110 Ohio St. 381, 144

"An agreement to do an act which in itself is unlawful . is no defense to an action for damages by a party who has been injured by the doing of such act, though he made the agreement [and gave] consent."[11]

The courts denying recovery revert to the reasoning of Lord Mansfield in *Holman v. Johnson* that "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[12]It is said such aid is refused not to protect the defendant but because the plaintiff has violated a law of the state and thus has no right to be assisted. This reasoning is not entirely convincing, because though the victim has violated the law, she has nonetheless been civilly wronged, and if the state feels its interest has been infringed it may impose the criminal punishment.[13] Likewise, a participant in a voluntary fight has violated the law of the state, and yet the courts allow recovery regardless of this consent.

In view of this discrepancy of result in the two types of cases, several courts have attempted to distinguish the anti-abortion statutes from the assault and battery statutes on the ground that the latter are designed to protect the individual concerned from illegal acts inherently fraught with danger to life and safety, whereas the former were enacted for the protection of the unborn child rather than the mother.[14] Thus, since the anti-abortion statutes are not enacted to benefit the mother-plaintiff, the courts seem to conclude there is no possible basis for saying that the state is a party in interest,[15] the assumption which is necessary if consent is not to bar recovery. However, as the only real basis for thinking of the state as a party in

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N. E. 264, 267 (1924). At least one jurisdiction has gone so far as to allow punitive damages. Martin v. Hardesty, 91 Ind. App. 239, 163 N. E. 610 (1928).

[11]Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230, 233 (1870).

[12]Cowp. 342, 98 Eng. Rep. 1120, 1121 (1775).

[13]Whether or not the anti-abortion statute makes the woman an accomplice has been regarded as immaterial in the civil action for her injuries resulting from the illegal abortion. Miller v. Bennett, 190 Va. 162, 56 S. E. (2d) 217 (1949). If by present state law the person seeking the abortion is not made an accomplice, the state is free to change the existing law, so as to be in position to punish future offenders, if it feels its interest has been invaded.

[14]Nash v. Meyer, 54 Idaho 283, 31 P. (2d) 273 (1934); Herman v. Turner, 117 Kan. 733, 232 Pac. 864 (1925); Bowlan v. Lunsford, 176 Okla. 115, 54 P (2d) 666 (1936).

[15]"It seems the fatal fallacy in giving complete and exclusive recognition to the rule laid down in battery cases [is that] we must assume two false premises, first, that the anti-abortion statute was designed to protect the woman, and, second, that an illegal abortion is fraught with more danger to a woman than a legal abortion or any other serious operation." Bowlan v. Lunsford, 176 Okla. 115, 54 P. (2d) 666, 668 (1936).

interest in assault cases is to prevent breaches of the peace, that reasoning appears to involve a non-sequitur, for certainly the state is also interested in preventing abortions. The only conceivable basis for the distinction growing out of the two statutes is the view that no civil wrong has been done to the mother. If this is true, she would, of course, have no cause of action.[16] The *Miller* case expresses some doubt as to the validity of this distinction, in denying relief not upon the difference between the two classes of statutes but upon the fact of plaintiff's participation in an illegal act.[17]

Even though the anti-abortion statute is for the protection of the child only, the deterrent effect of civil damages which supports the exception allowing recovery in assault cases would best be attained by allowing the mother to sue for her own injuries. Inasmuch as the circumstances virtually preclude a cause of action ever enuring to the child, the wrongdoer will be entirely free from civil liability unless the mother's cause of action is sustained.

The courts which deny recovery argue that sanctioning civil liability is not a proper way for the state to obtain retribution for wrongdoing; if the state desires to punish the wrongdoer it should do so through criminal proceedings.[18] If this be true, however, it seems that the same logic could be applied in arguing in favor of granting plaintiff a recovery, since so far as the state is concerned, punishment for *both* plaintiff and defendant should be in the form of fine or imprisonment, not in denying or allowing civil damages. Likewise if the theory upon which recovery is denied is concerned with setting up a rule to deter future offenses of the same kind,[19] it will not substantiate a denial of civil relief in the abortion cases. When a person submits to an illegal abortion she knows that if the attempt is not successful the chances are high that she will not survive the operation. That being true, she is not likely to calculate in advance whether she can recover damages if the abortion is bungled.[20] Therefore, setting up a

[16]No reported case supports such a view. *All* courts agree the mother has been wronged. The diversity of opinion concerns the consent defense.

[17]Miller v. Bennett, 190 Va. 162, 168, 56 S. E. (2d) 217, 220 (1949).

[18]Hunter v. Wheate, 289 Fed. 604, 31 A. L. R. 980 (App. D. C. 1923). See True v. Older, 227 Minn. 154, 34 N. W (2d) 700, 703 (1948) (dissenting opinion).

[19]The theory is that knowledge of a person that he cannot get damages if he is injured in a voluntary fight may deter him from entering into the affray. Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace (1924) 24 Col. L. Rev. 819.

[20]The right of the administrator to recover damages for wrongful death will depend upon whether the decedent could have recovered had she lived. Street v. Consumer Mining Corp., 185 Va. 561, 39 S. E. (2d) 271 (1946); Note (1947) 167 A. L. R. 894.

rule that no damages can be obtained will not serve to deter persons from seeking illegal abortions.[21]

If deterrence is sought, and certainly civil damages rules should be framed with a view to deterring future wrongs whenever feasible, a rule warning possible aborters that they will be civilly as well as criminally liable may have considerable effect.

I. LEAKE WORNOM, JR.

TORTS—RIGHT OF HUSBAND PAYING MEDICAL EXPENSES TO OBTAIN REIMBURSEMENT FROM INJURED WIFE OUT OF DAMAGES RECOVERED FROM TORTFEASOR. [Virginia]

At common law, one who wrongfully injured a married woman was liable to her husband for medical expenses incurred by him as a result of such injury.[1] The husband's right of recovery in such a case would seem to be predicated upon his common law duty of support, which itself was a necessary concomitant of the rule that upon marriage the husband became owner of his wife's personal property. The tort, insofar as it necessitated the making of expenditures, was therefore a wrong against the husband, rather than the wife, and it was the husband who was entitled to maintain an action for expenses incurred.[2] And even under many modern Married Women's Statutes, the husband still has the right to recover for expenses, except under unusual circumstances, as where the wife has paid the expenses herself or is personally liable for them.[3]

Of interest, because of the novelty of the factual situation and the legal problem involved, the recent case of *Floyd v. Miller*[4] rep-

[21]Several cases, upon somewhat questionable reasoning, have held the scope of consent defense to be limited to the actual damages resulting from the abortion itself, thus allowing recovery for negligent injury inflicted in treatment subsequent to the abortion. True v. Older, 227 Minn. 154, 34 N. W. (2d) 700 (1948); Androws v. Coulter, 163 Wash. 429, 1 P. (2d) 320 (1931).

[1]Atlantic & Danville Ry. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319 (1898); Richmond Ry. & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388 (1896).

[2]"If she be injured in her person by the wrongful act of a stranger, a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts; and such expense is a loss to the husband, for which the wrongdoer is answerable to him in damages." Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 So. 363, 365 (1904). See also, Long, Domestic Relations (3d ed. 1923) § 168.

[3]Butler County R. Co. v. Lawrence, 158 Ark. 271, 250 S. W 340 (1923); Felker v. Bangor Ry. & Electric Co., 112 Me. 255, 91 Atl. 980 (1914); Galtney et al v. Wood, 149 Miss. 56, 115 So. 117 (1928). In general, see Note (1930) 66 A. L. R. 1189.

[4]190 Va. 303, 57 S. E. (2d) 114 (1950).

resents an unusually broad interpretation of the effect of a Married Women's Act upon the right of a husband to maintain an action for medical expenses. The wife sustained personal injuries caused by another's negligence; as a result she became incompetent and a committee was appointed to take charge of her affairs. A judgment was recovered from the tortfeasor, the money being paid into the hands of the committee. The husband, having paid certain hospital and medical bills for his wife's treatment, sought reimbursement from the committee.

By a four to three vote, the Supreme Court of Appeals of Virginia held that the husband was not entitled to recover for the expenses he had incurred. Chief reliance was placed upon the code section governing suits by and against married women, which provides:

> "In an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained including expenses arising out of the injury, whether chargeable to her or her husband and no action for such expenses shall be maintained by her husband."[5]

Justice Miller, delivering the opinion of the court, declared that the statute "is wholly devoid of implication or suggestion that any part of the damages recoverable by the wife is to be held by her for her husband's benefit "[6]

Reliance was placed also upon the husband's common law duty of support. Since "hospital and medical services for one's wife were necessaries at common law for which a husband was liable,"[7] it was concluded that to require the wife to account to her husband for the money received would be to compel her to assume an obligation which "from time immemorial and by force of law was owing by him as part and parcel of her support "[8]

A different view of the statute was taken by the dissenting judges, who urged a construction whereby the wife would be required to account to the husband to the extent that he had incurred expenses. They reasoned that the Act was intended simply to effect a change in the form of the remedy available to the husband, and that "the primary purpose was to avoid harassment of the defendant by multiple litigation and to insure that all of the issues arising out of the tort committed by him would be settled in one action."[9] The dissent,

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[5]Va. Code Ann. (Michie, 1950) § 55-36.
[6]Floyd v. Miller, 190 Va. 303, 309, 57 S. E. (2d) 114, 117 (1950).
[7]Floyd v. Miller, 190 Va. 303, 306, 57 S. E. (2d) 114, 115 (1950).
[8]Floyd v. Miller, 190 Va. 303, 309, 57 S. E. (2d) 114, 117 (1950).
[9]Floyd v. Miller, 190 Va. 303, 310, 57 S. E. (2d) 114, 117 (1950).

agreeing with the majority that the statute did not *destroy* the right of action for expenses but *transferred* it to the wife, took issue with the court's construction of the Act as also transferring to the wife the *beneficial interest* in the right of action. Such a result, it was felt by the dissenting justices, "is contrary to all concepts of equity and justice."[10] Hence it was argued that the wife's right of recovery should be held to be for the benefit of her husband, to the extent that he had actually borne expenses for medical treatment.

It seems too clear to admit of argument that the purpose of a cause of action for medical expenses is to reimburse the party who has paid the expenses or is liable for them.[11] Hence it is that, even under many modern Married Women's Statutes, the husband is entitled to recover for medical expenses,[12] since he is the party liable for their payment. The Virginia statute clearly does not destroy the right of action for expenses, but, as is pointed out in the dissenting opinion in the principal case, transfers the right from the husband to the wife.[13] From a procedural point of view such a transfer seems not undesirable since its result will generally be to expedite the resolution of the controversy by preventing several actions against the tortfeasor.[14] But when the statute is construed as directing a transfer to the wife of the *beneficial interest* in the right of action, a manifest injustice will result unless the wife herself is liable for the expenses. Where the wife has recovered damages for expenses incurred, the purpose of the husband's common law duty to provide her with medical care is satisfied. If, in such a case, the husband has paid the expenses or is liable for their payment, to deny him the right to reimbursement is, in effect, to burden him with the consequences of the tortfeasor's wrong and to compensate the wife twice.[15]

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[10]Floyd v. Miller, 190 Va. 303, 310, 57 S. E. 114, 117 (1950). The dissent pointed out that the result would be particularly adverse to the interest of the husband in cases where the wife is incompetent or the parties are estranged. It was also argued that there would be no incentive on the part of the wife to minimize her expenses because the greater the amount her husband would have to pay, the greater would be her recovery from the wrongdoer. Since the husband could not recoup in any way, the net effect would thus be a transfer of a part of his estate to the wife.

[11]"Payment of the expense of treatment is not essential to a recovery. If plaintiff is liable for the debt incurred, that is all that is necessary . If it was paid by a volunteer, then plaintiff would not be entitled to recover on this item of damage." Sykes v. Brown, 156 Va. 881, 887, 159 S. E. 202, 204 (1931). A difference of judicial opinion exists as to the latter point. McCormick, Damages (1935) § 90.

[12]See cases cited, note 3, supra.

[13]Floyd v. Miller, 190 Va. 303, at 310, 57 S. E. (2d) 114, at 117 (1950).

[14]Floyd v. Miller, 190 Va. 303, at 310, 57 S. E. (2d) 114, at 117 (1950).

[15]It would seem that the wife's recovery for expenses should go to fulfill the purpose of the damages award, which is the reimbursement of the party liable

The contention of the dissent that the primary purpose of the statute was to obviate the necessity for multiple suits against the tortfeasor seems to be well founded. The reason given for abolishing the husband's right to recover for loss of services was the difficulty of separating the damages between husband and wife.[16] But it seems quite clear that there is no practical difficulty involved in determining the amount of expenses actually incurred by the husband.[17] An additional purpose of the legislation might have been to make certain that the damages recovered would be used to pay for the wife's treatments, and not be misapplied by the husband.[18] The construction adopted by the court in the principal case goes further than is necessary in order to satisfy either of these purposes. Manifestly, the interests of the third party tortfeasor do not require that the husband not be allowed to recover from the wife the amount of the expenses incurred; nor is there, in the principal case, any necessity for protecting the wife against misappropriation by her husband, since she has already received the benefit of the expenditures.

The language of the Virginia Act is somewhat broader than that of some other statutes, in that it expressly forbids an action for expenses by the husband.[19] But it does not follow that the Act was

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for the expenses. It appears difficult to justify a holding which allows the wife to pocket the judgment proceeds (which are recovered for the express purpose of paying her expenses) while her husband pays for her treatments. If the wife is to be granted new rights as a legal being independent from her husband, she should be required to assume the legal obligations normally concomitant to those rights.

[16]Judge Burks, one of the Code Revisors of 1919, said (respecting the amendment of that year, which took away the husband's right to maintain an action for loss of his wife's services): " ..but as it is very difficult to sever the damages in such cases and tell what part should be recovered by the wife and what part by the husband .it was deemed best to give her the entire damages and take away the present right of the husband to bring a separate action for the loss of such services." Burks, The Code of 1919 (1919) 5 Va. Law Reg. (N. S.) 108.

[17]See Floyd v. Miller, 190 Va. 303, at 311, 57 S. E. (2d) 114, at 118 (1950).

[18]At least one case has based its decision upon this ground. "It is common knowledge that husbands occasionally squander their substance and sometimes desert their wives and otherwise fail in the performance of their full conjugal duties. So far as policy is to be considered it points to the desirability of recovery by the wife of this element of damage." Cassidy v. Constantine, 269 Mass. 56, 168 N. E. 169, 170, 66 A. L. R. 1186, 1189 (1929). For favorable comment upon this holding, see McCormick, Damages (1935) 334.

[19]Statutes in a number of states have provided simply that damages recovered by a married woman in a personal injury suit are her separate property. Ala. Code (1940) T. 34, § 68; Ind. Stat. Ann. (Burns, 1933) § 38-115; N. C. Gen. Stat. (1943) § 52-10; N. Y. Cons. Laws (1938) Ch. 14, Art. 4, § 51; Wis. Stat. (1947) § 246.07. While the precise point of issue here appears not to have been litigated before (because of the explicitness of the Virginia statute), it has been held that a husband may recover from a wrongdoer for expense of his wife's treatments, notwithstanding

intended to deprive the husband of the right to reimbursement. The provision that no action may be maintained by the husband for expenses quite obviously refers to suits by the husband against the tortfeasor, and not to actions by the husband against the wife.

The court's contention that the statute contains no implication that a right of action is to be created in favor of the husband against the wife[20] seems to be of doubtful merit because it is not necessary that the statute so imply if its purpose is simply to effect a change in the form of the remedy against the tortfeasor. And before the Act was passed, it had been held that the action of assumpsit would lie between husband and wife in Virginia.[21] Hence, it is unnecessary that the husband find express statutory authorization for bringing an action of assumpsit against his wife if the elements of such an action are present.[22] The facts of the principal case lend themselves peculiarly to solution of the issue by an action of assumpsit. The wife has received money which in good conscience she ought not to retain; the husband, having incurred expenses, should as a matter of practical justice, be allowed reimbursement from the wife, who has already received the benefit of the expenditures.

The result contended for by the dissent appears to be a proper one, but that result should be obtained from without the legislation, rather than by an application of it. The dissent's argument that the statute should be interpreted as *requiring* the wife to account to her husband is perhaps unduly broad, but it is submitted that at least the statute should be construed as *not forbidding* reimbursement. Then the court could proceed to decide whether or not reimbursement should be allowed, according to the particular circumstances of each case.

J. Forester Taylor

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a code provision that damages recovered by a married woman and the earnings of a married woman are her separate property. Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 So. 363 (1904).

[20]Floyd v. Miller, 190 Va. 303, at 309, 57 S. E. (2d) 114, at 117 (1950).

[21]Moreland v. Moreland, 108 Va. 93, 60 S. E. 730 (1908). A number of later Virginia cases are in accord with this holding. Buchanan v. Buchanan, 174 Va. 255, 6 S. E. (2d) 612 (1940); Edmonds v. Edmonds, 139 Va. 652, 124 S. E. 415 (1924); Moore v. Crutchfield, 136 Va. 20, 116 S. E. 482 (1923); Newman v. McComb, 112 Va. 408, 71 S. E. 624 (1911).

[22]While the cases cited in note 21, supra, involve suits by a wife against her husband, there seems to be no sound reason for denying the husband the right to bring an action also. Especially is this true in view of Va. Code Ann. (Michie, 1950) § 55-36, which provides that a married woman may sue *and be sued* as if unmarried. The precise point has been decided in at least one jurisdiction. "There is nothing in the public policy of this state which forbids a husband from bringing an action against his wife to adjust property rights between them ..." Schleicher v. Schleicher, 120 Conn. 528, 182 Atl. 162, 163, 104 A. L. R. 572, 574 (1935).