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Bankruptcy-Definition Of "Farmer" For Purposes Of Relief Through Agricultural Compositions And Extensions

CASE COMMENTS

BANKRUPTCY—DEFINITION OF "FARMER" FOR PURPOSES OF RELIEF THROUGH AGRICULTURAL COMPOSITIONS AND EXTENSIONS. [Federal]

The availability of relief under the agricultural compositions and extensions phases of federal bankruptcy legislation depends on the petitioner's ability to bring himself within the definition of a farmer as set out in Section 75 (r) of the Bankruptcy Act.[1] Prior to 1933, the Bankruptcy Act reference to farmers was merely to those "engaged chiefly in farming or the tillage of the soil."[2] However, the special legislation of 1933 adopted a definition in the alternative, providing that persons who are "primarily bona fide personally engaged in" one or more of several enumerated operations, *or*, who derive the "principal part" of their incomes from one or more of such operations, shall be classified as "farmers."[3]

Obviously, the second alternative could have been utilized by the courts to swell the ranks of persons who could be classified as "farmers."[4] That such was the prima facie intent of the Act is indicated by the existence of a large number of cases involving persons seeking, on the basis of the second alternative, the agricultural benefits; and, in one early instance, a court seems to have approved the literal interpretation of this provision.[5] However, the vast majority of the cases discloses an extreme reluctance on the part of the courts to give substantial recognition to the second portion of the definition.

This judicial reluctance is manifested to an unprecedented degree in the recent case of *Smith v. White*.[6] The petitioner had been a farmer

[1]Sampayo v. Bank of Nova Scotia, 313 U. S. 270, 61 S. Ct. 953, 85 L. ed. 1324 (1941). Prior to 1938, § 75 (r) defined the term "farmer," for purposes of § 75 and § 4 (b), substantially in the same words as at present. However, the incorporation of another definition in the Act in 1938, in § 1 (17), gave rise to the argument that § 75 (r) was impliedly repealed. The Sampayo case rejected this contention as to § 75, but whether or not § 75 (r) applies to § 4 (b) is a matter of dispute. See 1 Collier, Bankruptcy (14 ed. 1940) § 4.15.

[2]Section 4 (b), Act of 1898. U. S. Stat., 55th Cong., c. 541, § 4 (b), p. 547. This reference concerned persons who were not subject to involuntary bankruptcy.

[3]11 U. S. C. § 75 (r) (1938) as amended by Act of March 4, 1940, § 2, 54 Stat. 40. Enumerated operations include (1) "producing products of the soil," (2) "dairy farming," (3) "production of poultry or livestock" and (4) "production of poultry products or livestock products in their unmanufactured state."

[4]Some authorities have viewed this possibility with alarm. P. L. I., Significant Developments in the Law, Glenn, Creditors Rights (1946) 35.

[5]In re Shonkwiler, 17 F. Supp. 697 (E. D. Ill. 1935), see note 14, infra.

[6]166 F. (2d) 269 (C. C. A. 9th, 1948).

but had given up farming and entered a contracting business during World War II. After operating this venture at a loss for a period of years, he terminated his activities as a contractor in 1945, and returned to full-time farming. During the contracting interval he seems to have lived at the farmhouse part of the time and retained some indefinite measure of supervisory control over the farm, but at least part of the land had been leased to another, and the court determined that "substantially more of appellant's time and energy during this period were devoted to his contracting venture than to his farming activities."[7] Though his post-war farming had returned some profit, petitioner in March, 1947, sought relief under Section 75 of the Bankruptcy Act, relating to agricultural compositions and extensions.

Even though appellant had returned to farming operations, and even though the principal part of his income had been derived from his farm during the war years, the district court denied his petition, and the Circuit Court of Appeals for the Ninth Circuit affirmed the decision, holding that "appellant is not entitled to the status of a farmer within Section 75 of the Bankruptcy Act."[8] The court's failure to give effect to the prima facie meaning of the second alternative of Section 75 (r), providing that a person may be classified as a "farmer" on the basis of having derived the "principal part" of his income from farming operations, is explained by the conclusion that "In every case the totality of the facts is to be considered and appraised," and by the determination that the key factor in the "totality of the facts" in this case was the source of the indebtedness.[9]

Disregarding the fact that the petitioner had admittedly resumed his farming operations well in advance of seeking relief, it is clear that he could not have successfully claimed, on the basis of the first alternative, that he had been a "farmer" during the interval in which he was engaged in the contracting business. Moreover, this decision, as to the second alternative, can readily be fitted into the pattern of the earlier cases limiting the scope of the farmer class as defined in Section 75 (r) since 1933. Because of the broad inclusiveness of the definition, the courts have repeatedly thought it necessary to refuse relief to persons who contend they come within the words of the statute, but whom the courts believe to be beyond the intent of the Act.

Except for a few cases in which the petitioner failed to show any connection at all between the "principal part" of his income and some

[7]166 F. (2d) 269, 270 (C. C. A. 9th, 1948).
[8]166 F. (2d) 269, 273 (C. C. A. 9th, 1948).
[9]166 F. (2d) 269, 272 (C. C. A. 9th, 1948).

farming activity,[10] the courts have had to meet the elusive issue of what *degree* of relation between the source of income and some farming operations is to be required.

In cases involving "absentee landlordism" in the clearest sense, the connection between income and farming has been deemed not close enough. In *Shyvers v. Security-First Nat. Bank*,[11] the same court which later decided the principal case held that the benefits of Section 75 could not be extended to an owner of farm land in California who resided in England, regardless of the fact that the major portion of the owner's income came from the rentals. Significantly, the court said, concerning the second alternative, "We conclude that to come within this subdivision, the debtor must *personally be engaged* in farming."[12] This view in effect incorporates one of the requisites of the first alternative into the seemingly separate and independent second alternative.

The ordinary landlord cases, in which the owners do not reside so far away as to make direct participation in the control of the farm unlikely, are decided with more difficulty but still demonstrate the hesitancy of the courts to apply the second alternative. In a leading case the court pointed out: "The cash rentals which [the petitioner-landlord] received were not dependent upon the results of the operation of the ranch by his tenants, and he retained no control over their activities in operating the ranch."[13] It was noted that if some degree of control (not defined) were retained, or if the rentals were dependent on the results of the tenant's operation (which in itself would indicate supervision on the part of the landlord), the status of farmer could be proved. This requirement amounts to *personal participation* to a greater or lesser degree, though perhaps not *"primary" participation.* With possibly one exception, all of the circuit courts of appeals have substantially adopted the same requirement, or have left the way open to do so.[14]

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[10]In re Cox, 22 F. Supp. 925 (S. D. Idaho 1938); In re Cresap, 99 F. (2d) 722 (C. C. A. 7th, 1938); Perry v. Baumann, 128 F. (2d) 727 (C. C. A. 9th, 1942); Skinner v. Dingwell, 134 F. (2d) 391 (C. C. A. 8th, 1943).

[11]108 F. (2d) 611 (C. C. A. 9th, 1939).

[12]108 F. (2d) 611, 612 (C. C. A. 9th, 1939) [italics supplied].

[13]Jordan v. Federal Land Bank of Omaha, 139 F. (2d) 203, 206 (C. C. A. 8th, 1943). It was held that an erstwhile farmer who "had definitely ceased farming, had removed from the farm, had leased it to a tenant, and had no further connection with its operation," was no longer a farmer so as to take advantage of § 75, regardless of the fact that he had no occupation other than that of landlord. See also Mulligan v. Federal Land Bank of Omaha, 129 F. (2d) 438 (C. C. A. 8th, 1942), to the effect that the status of non-resident landlord cannot provide grounds for relief under § 75.

[14]*First Circuit.* Benitez v. Bank of Nova Scotia, 125 F. (2d) 523, 530 (C. C. A. 1st,

The effect of these decisions—either adopting or failing to reject the personal participation requisite—justifies the conclusion that the courts have substantially reworded the second alternative, so that only persons "personally" *and* "primarily" engaged, or persons "personally" engaged *and* deriving the "principal part" of their income from farming may be classified as farmers.

Whether the two parts of the definition coincide, or whether a person may be classified as a farmer under the second alternative when he could not be so classified under the first, is still an open question. In

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1942). The court adopted and summarized the requirement of personal participation. Citing several earlier cases decided in other courts, the court said, "It follows, therefore, that even if the principal part of appellant's income has been derived from farming operations of the Comunidad, she is not thereby qualified as a 'farmer' within the definition because she has not been 'personally' engaged in such operations."

Second Circuit. In re Beach, 86 F. (2d) 88 (C. C. A. 2d, 1936), the court tried to extend to the debtor-landlord the benefits of § 75 squarely on the basis of his having derived the principal part of his income from farming. The Supreme Court of the United States affirmed this decision, but placed the decision on the fact that the debtor-landlord was personally engaged in farming. First National Bank and Trust Company v. Beach, 301 U. S. 435, 57 S. Ct. 801, 81 L. ed. 1206 (1937).

Third Circuit. In re Noble, 19 F. Supp. 504 (D. C. N. J. 1937). The court refused to classify as a farmer a mortgagor of a farm who performed some farm work, restricted in extent because of his ill-health. No issue was made as to the source of his income, though it may be inferred that he had no other occupation. See also Beamesderfer v. First Nat. Bank & Trust Co., 91 F. (2d) 491 (C. C. A. 3d, 1937).

Fourth Circuit. The attitude of this circuit court of appeals, demonstrated in Chaney v. Stover, 123 F. (2d) 945 (C. C. A. 4th, 1941), is comparable to that of the Supreme Court of the United States as displayed in the Beach case. On the basis of the Beach case, the circuit court of appeals reversed a decision of the District Court for the Western District of Virginia to the effect that the owner of farmland could not be classified as a farmer where she cultivated not over 20 acres out of 130 acres, but derived the principal part of her income from the commercial exploitation of a cave on the land. It should be noted that the appellate court's reversal of this decision does not preclude a requirement to the effect that one must be "personally engaged" in farming to claim the benefits of § 75.

Fifth Circuit. Dimmitt v. Great Southern Life Ins. Co., 124 F. (2d) 40 (C. C. A. 5th, 1941); Williams v. Great Southern Life Ins. Co., 124 F. (2d) 38, 40 (C. C. A. 5th, 1941): "He does not become a farmer by merely receiving rents or revenues without more, where he has another business in which he is primarily engaged, although such rents and income may exceed that of such other business or occupation."

Sixth Circuit. No decisions in point, but see Stoller v. Cleveland Trust Co., 133 F. (2d) 180, 182 (C. C. A. 6th, 1943), citing the Beach case and saying, "We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation."

Seventh Circuit. Previous to the Beach case, the District Court for the Eastern District of Illinois allowed a housewife, who owned the greater part of a farm in a state other than that of her residence, to claim the benefits of § 75 squarely on the basis that she had no other occupation than housewife, and derived her entire in-

First National Bank and Trust Company v. Beach,[15] the only Supreme Court decision on the issue, some of the statements in the opinion seem to recognize an independent second alternative,[16] but as an ultimate test for all cases the Court here created the "totality of the facts" concept.[17] Such a test enables the courts to reach a conclusion without specifically indicating which part of the definition is relied upon.[18] The difficulty of analyzing the decisions in this respect is well demonstrated by *In re Moser*.[19] Here the petitioner was definitely "personally" engaged, although it was not indicated that he was "primarily" engaged, in farming. The principal part of his income, however, was clearly derived from farming. The court said, "It seems that debtors should be considered farmers both because they (or the husband) personally engage in the farming operations, and because the principal part of the income is derived therefrom."[20] Since a person cannot, under the statute, be a farmer merely because he is "personally engaged," it could be said that the court used the word "personally" to mean "primarily." However, on the facts of the case, it is doubtful whether the petitioner was "primarily" engaged in farming.

When viewed in the light of these decisions, the principal case seems based on good precedent, if the petitioner's admitted return to farming is not regarded as having any bearing on his qualification

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come from the farm. This is perhaps the strongest effect given by any court to the second alternative. In re Shonkwiler, 17 F. Supp. 697 (E. D. Ill. 1935). As to the probable effect of the Beach decision, see In re Horner, 104 F. (2d) 600 (C. C. A. 7th, 1939).

Eighth Circuit. Jordan v. Federal Land Bank, 139 F. (2d) 203 (C. C. A. 8th, 1943). See text at note 13, supra.

Ninth Circuit. Shyvers v. Security-First Nat. Bank, 108 F. (2d) 611 (C. C. A. 9th, 1939). See text at note 11, supra.

Tenth Circuit. No decisions in point, but see Kaslovitz v. Reid, 128 F. (2d) 1017, 1018 (C. C. A. 10th, 1942) to the effect that the term farmer is "not susceptible of exact definition...."

[15]301 U. S. 435, 57 S. Ct. 801, 81 L. ed. 1206 (1937).

[16]301 U. S. 435, 438, 57 S. Ct. 801, 803, 81 L. ed. 1206, 1208 (1937). "For the purpose of the case at hand... the simpler phraseology of the section as it stood at the beginning may be accepted as the test. Was respondent a farmer because 'personally bona fide engaged primarily in farming operations' or because 'the principal part of his income was derived from farming operations' "? The Court also said "The two are not equivalents." 301 U. S. 435, 438, 57 S. Ct. 801, 803, 81 L. ed. 1206, 1208 (1937).

[17]301 U. S. 435, 439, 57 S. Ct. 801, 803, 81 L. ed. 1206, 1208 (1937).

[18]Williams v. Great Southern Life Ins. Co., 124 F. (2d) 38 (C. C. A. 5th, 1942); Stoller v. Cleveland Trust Co., 133 F. (2d) 180 (C. C. A. 6th, 1943). See also, First State Bank of Stratford, Tex. v. Roach, 124 F. (2d) 325 (C. C. A. 5th, 1941) as opposed to Baxter v. Savings Bank of Utica, 92 F. (2d) 404 (C. C. A. 5th, 1937).

[19]95 F. (2d) 944 (C. C. A. 9th, 1938).

[20]95 F. (2d) 944, 945 (C. C. A. 9th, 1938).

under Section 75 (r). Ownership of the farm together with slight supervisory participation did not serve to make petitioner a "farmer," even though the "principal part" of his income was derived from farming throughout the contracting interval as a whole. The fact that the principal part of the income was derived from farming could, under the decisions, justify holding him a farmer only if he was "personally engaged" to an, as yet, indefinite extent. In view of the undisclosed degree of his personal participation and the earlier "landlord" cases, it is apparent that petitioner would have had no legitimate claim to relief under Section 75, had he not returned to farming.

But *Smith v. White* goes farther than merely applying preconceived standards, for here the petitioner had definitely returned to farming long before his petition was filed. In view of the fact that the debts were incurred in non-farming activities, the court denied the benefits sought, with the general explanation that "We do not believe that the bankruptcy privileges accorded to farmers were meant to cover such a case. To arrive at another conclusion would violate the unmistakeable purpose of Section 75 and would throw wide a gateway for evasion and chicanery."[21] In no previous case has the source of the indebtedness appeared to be a significant factor in denying relief under Section 75.

Prior to 1938, however, a parallel problem had existed in relation to Section 4 (b), exempting farmers and wage earners from involuntary bankruptcy, and the courts early reached a solution with which the principal decision accords in spirit. In *In re Crenshaw,*[22] decided in 1907, the defendant in involuntary bankruptcy proceedings had been a merchant when the acts of bankruptcy occurred, but before the petition was filed he had evidently become a wage-earner, and had thus moved from a non-exempt classification into an exempt classification. At this time Section 4 (b) did not specify as of what date such a party's status should be determined, but the court said, "He may have subsequently become a wage-earner; but it has been said that the exemption from involuntary proceedings in favor of wage-earners is not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in other occupations recently engaged in."[23] While the statute now expressly sets the date of commission of the act of bankruptcy as the time which controls the exemption under Section 4 (b), there is no such specific provision governing proceedings under

[21]Smith v. White, 166 F. (2d) 269, 273 (C. C. A. 9th, 1948).
[22]156 Fed. 638 (S. D. Ala. 1907).
[23]156 Fed. 638, 640 (S. D. Ala. 1907).

Section 75. However, in the principal case as in *In re Crenshaw,* it is clear that the debtor was trying to enter a classification given certain privileges *after* he had accumulated debts, as a member of an unprivileged class, in such amounts that his creditors' interests were in immediate danger and were beginning to crystallize and attach to ascertainable property then in the hands of the debtor. To allow such a transition would open a way for almost any debtor to escape involuntary bankruptcy and to pervert the intention of Congress to extend relief by agricultural compositions and extensions to bona fide farmers only.

Because the commission of a specific act of bankruptcy is not a condition to the operation of Section 75, the test date used in Section 4 (b) cases is not applicable, and setting an exact time for determining the "farmer" status is difficult. However, inasmuch as insolvency or the inability to meet debts as they mature[24] is essential to relief for the farmer-debtor under Section 75, it may be that a petitioner's status as a "farmer" should be judged as of the date after which he has continuously been insolvent or generally unable to pay maturing obligations.

BENJAMIN L. WESSON

CONFLICT OF LAWS—APPLICATION OF FULL FAITH AND CREDIT CLAUSE TO STATE COURT'S FINDING IN SUPPORT OF ITS JURISDICTION. [United States Supreme Court]

The recent United States Supreme Court decision of *Sherrer v. Sherrer*[1] constitutes the final step in the development of the rule that the finding of jurisdiction by the court of one State, where this jurisdiction has been contested and litigated, is res judicata and must be given full faith and credit by the courts of a sister State.[2]

The first step in establishing this rule was taken in the decision of *Baldwin v. Iowa State Traveling Men's Association,*[3] in which the controversy involved was between two federal district courts. It was there held:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result

[24]Section 1 (19) of the Bankruptcy Act, defining insolvency in terms of assets insufficient to pay debts, controls in most issues in bankruptcy proceedings, but in §75c, as in a few other places in the Act, insolvency in the sense of inability to meet debts as they mature is also brought into play.

[1]334 U. S. 343, 68 S. Ct. 1087 (1948).

[2]Restatement, Conflict of Laws (1934) § 112, sets out a caveat as to this question.

[3]283 U. S. 552, 51 S. Ct. 517, 75 L. ed. 1244 (1931).

> of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."[4]

This was a case involving a commercial transaction, but the rule as stated by the Court is broad enough to cover also situations involving the marital status of the parties.

The case of *Davis v. Davis*[5] constitutes the second step in the development. There the Court went as far as possible on the facts before it to reach the holding which has just been attained in the *Sherrer* case. The question involved in the *Davis* case was whether the District Court of the District of Columbia was bound to give full faith and credit to a divorce decree rendered by a Virginia court where the jurisdiction of the Virginia court over the subject matter had been put in issue and found to exist. The Supreme Court held that the decree of the Virginia court was not subject to collateral attack and must be accorded full faith and credit by the District of Columbia tribunal. It is to be noted that this was a case involving domestic relations rather than a commercial transaction.[6]

Writers have reached the conclusion that the *Davis* case, extending the rule of the *Baldwin* decision, fully established the rule that the full faith and credit mandate applies as between courts of different States in such situations.[7] However, it is arguable that the *Davis* decision did not meet that issue, but rather that the United States Supreme Court in its broad supervisory control over the law to be applied by the lower courts in the federal system was merely directing one of the courts, over which it had control, to recognize the decree of a court of one of the States as a matter of res judicata.[8] This case did

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[4]283 U. S. 522, 525, 51 S. Ct. 517, 518, 75 L. ed. 1244, 1247 (1931).

[5]305 U. S. 32, 59 S. Ct. 3, 83 L. ed. 26, 118 A. L. R. 1518 (1938).

[6]"There are obvious distinctions between the subject matter of divorce and the usual controversy over civil matters. The state is in theory a legally interested party in a divorce proceeding; it has a legal interest against the consensual dissolution of the marriage status. In the ordinary civil litigation, however, the state's interest is that of a bystander, and its chief concern is that the controversy be settled by peaceable means...." Gavit, Jurisdiction of the Subject Matter and Res Judicata (1932) 80 U. of Pa. L. Rev. 386, 388.

[7]Notes (1939) 39 Col. L. Rev. 274, (1939) 7 Geo. Wash. L. Rev. 648, (1939) 52 Harv. L. Rev. 683, (1939) 24 Iowa L. Rev. 365, (1939) 23 Minn. L. Rev. 673, (1939) 6 U. of Chi. L. Rev. 290, (1939) 25 Va. L. Rev. 487.

[8]For example: "...enforcement of restrictive covenants in these cases is judicial

not definitely decide the controversy as between two States, but only the question of recognition by one of the federal courts of a State court's decision.

The United States Supreme Court was brought directly face to face with this issue where two States were involved in the *Sherrer* case. The defendant, a citizen and resident of Massachusetts, contested a divorce suit instituted by his wife in Florida. He expressly alleged that she was not a resident as required by Florida statute,[9] and that the Florida court was therefore without jurisdiction of the subject matter.[10] The Florida court found that the wife was a resident and granted her a divorce. The husband, in a subsequent proceeding in Massachusetts, attempted to make a collateral attack on the Florida decree on the basis of lack of jurisdiction by the Florida court, and the Massachusetts Supreme Court affirmed a lower court decree in his favor.[11] The Massachusetts court's decision was based on the view that the full faith and credit clause did not preclude it from looking into the jurisdiction of the Florida court; and since the Massachusetts court found that the wife was not domiciled in Florida, it ruled that the Florida court lacked jurisdiction and that the decree was invalid.

On writ of certiorari the United States Supreme Court reversed the Massachusetts decision, holding "that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree."[12]

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action contrary to the public policy of the United States, and as such *should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia.*" [italics supplied] Hurd v. Hodge, 68 S. Ct. 847, 853 (1948).

Section 240 (a) of the Judicial Code, 43 Stat. 938 (1925), 28 U. S. C. A. § 347 (a) (1928) gives the Supreme Court of the United States this supervisory power over the courts of the District of Columbia.

[9]Fla. Stat. Ann. (1941) § 65.02 provides: "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

Residence in this regard has been interpreted by the Florida Supreme Court to mean domicile. Wade v. Wade, 93 Fla. 1004, 113 So. 374 (1927).

[10]"Legal residence or domicile in this state... is sufficient to give the court jurisdiction of the subject matter in a cause involving the duties and obligations arising out of his or her marital status with another...." Warren v. Warren, 73 Fla. 764, 75 So. 35, 36 (1917).

[11]Sherrer v. Sherrer, 320 Mass. 351, 69 N. E. (2d) 801 (1946).

[12]Sherrer v. Sherrer, 334 U. S. 343, 351, 68 S. Ct. 1087, 1091 (1948).

The majority opinion relied upon the holdings in the *Baldwin* case[13] and the *Davis* case[14] to substantiate its holdings, though neither decision was controlling. As the dissent indicated, the *Sherrer* case is distinguishable from the *Davis* case in that the latter "did not depend for its results on the fact that there had been an adjudication of the jurisdiction of the court rendering the divorce enforced, inasmuch as this Court found that the State granting the divorce was in fact that of the domicile."[15] The United States Supreme Court had itself found that the party granted the divorce was actually domiciled in Virginia, and did not depend upon the Virginia court's determination of this fact.

This dissenting opinion of Justice Frankfurter, which was joined in by Justice Murphy, tends to strengthen the majority opinion rather than weaken it in all cases except those involving family relations. If this controversy had been any but one involving the status of citizens, the dissent would seemingly agree with the majority of the Court.

The very vital interest of the state in the regulation of the status of its citizens would, under the dissenting view, require a different rule from that announced for commercial transactions. As stated by Justice Frankfurter, "the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers. Therefore, the constitutional power of a State to determine the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another State, *even though in other types of controversy considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.*"[16]

As this case does involve family relations in which the State is an interested party, the question arises as to the res judicata effect the finding of jurisdiction of one court would have on a criminal suit brought by the State of the last matrimonial domicile of the parties for bigamous cohabitation, as in *Williams v. North Carolina.*[17] Under the majority opinion, the State would most likely be precluded from

[13]283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931).

[14]305 U. S. 32, 59, S. Ct. 3, 83 L. ed. 26, 118 A. L. R. 1518 (1938).

[15]Sherrer v. Sherrer, 334 U. S. 343, 358, 68 S. Ct. 1087, 1098, note 1 (1948).

[16]Sherrer v. Sherrer, 334 U. S. 343, 358, 68 S. Ct. 1087, 1098 (1948) [italics supplied].

[17]325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1577, 157 A. L. R. 1366 (1945).

examining into the jurisdiction of the divorce court and would be required to give full faith and credit to the decree.[18] It is arguable, however, that as the State of the matrimonial domicile is an interested party to a divorce proceeding and was not made a party to the proceedings in a sister State, it would not be precluded by the doctrine of res judicata from later examining into the jurisdiction of the court granting the decree.[19]

Notwithstanding the arguments against the basis of the Court's decision and in support of the interest of the State in the control of the status of its citizens, the decision goes a long way in reaching the much-desired certainty in matters relating to divorce. No longer will there be doubt or apprehension by the parties as to the validity of a divorce in all other States after the jurisdiction of the court rendering the divorce has been litigated in the proceedings and found to exist. The vital rights and interests involved in a divorce litigation may not "be held in suspense pending the scrutiny by courts of sister States of finding of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated."[20]

Though it may promote the cause of certainty in divorce law, the Court's decision in this case may also give rise to several undesirable consequences in the same field of the law. It will surely have the effect of making sham jurisdictional requirements of such States as Nevada and Florida more popular, by reducing further the power of other State courts to disregard divorces granted in such States.[21] Collusive divorces in which there is only a semblance of a contest will be valid and binding and not subject to collateral attack in sister States. Thus, by agreement of the parties, the interest of the domiciliary State may be foreclosed. On the other hand, the decision will also tend to promote uncontested divorce suits, in that if the defendant does not

[18]"If in its application [full faith and credit clause] local policy must at times be required to give way, such 'is part of the price of our federal system'." Sherrer v. Sherrer, 334 U. S. 343, 355, 68 S. Ct. 1087, 1093 (1948), citing Williams v. North Carolina, 317 U. S. 287, 302, 63 S. Ct. 207, 215, 87 L. ed. 297, 288 (1942).

[19]It has been recognized in numerous decisions that a marriage contract is not merely one between the husband and wife but also one to which the state of domicile is an interested party. Potter v. Potter, 101 Fla. 1199, 113 So. 94 (1931); Van Koten v. Van Koten, 323 Ill. 323, 154 N. E. 146, 50 A. L. R. 347 (1926); Parks v. Marshall, 322 Mo. 218, 14 S. W. (2d) 590, 62 A. L. R. 835 (1929). See Gavit, Jurisdiction of the Subject Matter and Res Judicata (1932) 80 U. of Pa. L. Rev. 386, 388.

[20] Sherrer v. Sherrer, 334 U. S. 343, 356, 68 S. Ct. 1087, 1092 (1948).

[21]This possibility of arranged divorces constitutes the essence of the dissent's opposition to the decision of the majority of the court. 334 U. S. 343, 362, 68 S. Ct. 1087, 1100 (1948).

appear and contest the jurisdiction of the court he may subject the decree to collateral attack in a subsequent proceeding in his home State.[22]

In those cases not involving domestic relations there is no reason why the rule of the *Baldwin* case[23] should not be enlarged to cover the question where it arises between State courts as well as federal courts. On the basis of the *Baldwin* decision that due process does not require the same matter to be twice litigated, the *Sherrer* decision would have been warranted. There can be little argument against the desirability of this rule in cases involving commercial transactions.[24] The defendant has had full notice, he has voluntarily appeared, he has had his chance to put up any and all defenses available by the law of the land, and rightly he should, under the doctrine of res judicata, be thereafter precluded from again litigating the matters in controversy.

HENRY C. CLARK

CONSTITUTIONAL LAW—CONFLICT BETWEEN INVESTIGATORY POWERS OF CONGRESS AND CONSTITUTIONALLY GUARANTEED INDIVIDUAL LIBERTIES. [Federal]

A source of front-page news for a decade, the Un-American Activities Committee of the House of Representatives has provoked more criticism than any other congressional committee in modern times.[1] Its investigations are concentrated in the area of the undefined line which separates individual liberties on the one hand, and the nation's duty to withdraw those rights when its existence is threatened, on the other. Hence, the constitutionality of the Committee's activities is both confirmed and denied by lawyers and judges, both sides advancing ample authority and convincing logic.

The present Committee is a continuation of the original Dies Committee, formed in 1938,[2] with authority to investigate subversive

[22]This incidental consequence seems to inhere frequently in decisions passing on the validity of divorce decrees. See Helman v. Helman, 73 N. Y. S. (2d) 32 (1947), discussed in Note (1948) 5 Wash. and Lee L. Rev. 80, 82.

[23]283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931).

[24]"Certainly a court of equity.... should not grant an injunction through distrust of the court of its sister state and the fear that the latter may not do its duty." United States Fire Insurance Co. v. Fleenor, 179 Va. 268, 272, 18 S. E. (2d) 901, 903 (1942).

[1]For example, see Yale Law Faculty's "Manifesto" (1948) 34 A. B. A. J. 16, urging that the Committee be abolished.

[2]H. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568 (1938). The McCormack

and un-American propaganda activities within the United States, whether from foreign or domestic sources. The propaganda referred to was that "which attacks the principle of the form of government as guaranteed by our Constitution." The House debate on the Resolution establishing the Committee contained an accurate forewarning of the difficulties to follow,[3] its opponents predicting direct violations of the freedoms guaranteed by the First Amendment.[4] But the adoption of the Resolution indicated Congress' concern over the very real fact that communism has invaded the United States.

The Committee was renewed each year by resolutions, and, in 1945, it was made a standing committee[5]—the only one authorized to sit when Congress is not in session. The vote of 208-186 indicated reluctance of some to make the Committee a standing one; nevertheless, it has permanently reestablished under the Legislative Reorganization Act of 1946,[6] and it does not appear that changes in the political complexion of Congress will affect its existence. Thus, the House now has as its permanent function the investigation of subversive and un-American propaganda activities.

The Committee's authority is the same now as in 1938. It is authorized to "make investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."[7]

The Committee has investigated a wide range of activities, but its recent searches have been almost exclusively for communists. In one phase of this activity, it heard complaints that the Joint Anti-Fascist Refugee Committee was using its funds for political propaganda and not for relief. The congressional Committee thereupon sought to require the officers of that organization to account for the expenditure

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Committee (H. Res. 198, 73d Cong.) investigated propaganda some five years before, principally of Nazism in the United States.

[3]83 Cong. Rec. 7568-7586 (1938).

[4]Some Congressmen regarded the Committee as an "expedition" devoted variously to "fishing," "witch-pursuing," and "bogey-chasing." One budget-minded member thought its purpose merely to provide Committee members with room and board during Congress' summer recess. 83 Cong. Rec. 7568-7586 (1938).

[5]H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (1945).

[6]60 Stat. 812, 828-829 (1945).

[7]Pub. L. No. 601, 79th Cong., 2d Sess., Ch. 753, Sec. 121 (b) (1) (q) (Aug. 1946).

of its money.[8] When the officers refused to produce the records, which might or might not have revealed whether the Refugee Committee was communistic, they were charged with contempt of the House Committee, indicted, and convicted.[9] On appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed in the controversial decision of *Barsky v. United States*,[10] holding that it is not unconstitutional for the Un-American Activities Committee to require records to be produced which might reveal communist activity, since communism has been represented to Congress to be a potential threat to the nation and Congress is under a duty to preserve the nation from destruction.

Congress' power to regulate communism by legislation is the principal gauge by which to measure the power to investigate it. To outlaw communism as a political faith would be an extreme measure, and Congress has attempted no such legislation. Nor has it attempted to outlaw the Communist Party.[11] But, under its constitutional mandate to preserve the nation from destruction, Congress has enacted numerous statutes, designed to cope with those persons who advocate overthrow of the government by force or violence.

One writer has grouped into three categories the efforts of Congress to confine communist activities.[12] "A large group of existing federal statutes is directed at the prevention of those more gross activities deemed destructive of the existence of an independent government.[13] A further group comprehends activities not entirely on the crassly

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[8]The Committee was acting at that time under the authority of the 1945 resolution. Note 5, supra.

[9]Motion to dismiss the indictment for alleged failure to state an offense against the United States, was denied in United States v. Bryan, 72 F. Supp. 58 (D. C. D. C. 1947). Barsky's objection to the evidence used by the Government in the Committee hearings were overruled in United States v. Barsky, 72 F. Supp. 165 (D. C. D. C. 1947).

[10]167 F. (2d) 241 (App. D. C. 1948), cert. denied Barsky v. United States, 334 U. S. 843, 68 S. Ct. 1511 (1948). Certiorari had been denied in an earlier and similar case, Josephson v. United States, 333 U. S. 838, 68 S. Ct. 609, 92 L. ed. 425 (1948). Facts and opinion of the Josephson case are found at 165 F. (2d) 82 (C. C. A. 2d 1947).

[11]Writers recently have recommended that the Party be outlawed immediately, on the assumption that the Communist Party in America is an agency of international communism, to overthrow our government by violence. See, Ober, Communism vs. The Constitution: The Power To Protect Our Free Institutions (1948) 34 A. B. A. J. 645.

[12]Note (1948) 96 U. of Pa. L. Rev. 381, 401.

[13]"Treason: 35 Stat. 1088 (1909), 18 U. S. C. § 1 (1940); criminal correspondence with foreign governments: 35 Stat. 1088 (1909), as amended, 18 U. S. C. § 5 (1940); injuries to fortifications: 35 Stat. 1097 (1909), as amended, 18 U. S. C. § 96 (1940); revolt and mutiny; 35 Stat. 1146 (1909), 18 U. S. C. § 484 (1940)."

physical level, but including exhortation to action by others,[14] and leading off into beliefs inimical to the present government, and into the teaching or advocacy of such beliefs."[15] When Congress approaches the third category—"beliefs inimical to the present government"—it encounters the dilemma in which the Un-American Activities Committee now finds itself.

At some not yet defined point, the power of Congress to act with respect to potential threats to the nation's existence is subject to the constitutional guarantees of individual liberties. And, as there are limitations on the power of legislation, there are limitations on the power to investigate. The Constitution does not specifically empower Congress to investigate, but that power "is an essential and appropriate auxiliary to the legislative function;"[16] and, therefore, the scope of investigation is at least as broad as the scope of permissible legislation.[17] Futhermore, the court in the *Barsky* case notes that the power to investigate "is not limited to the scope or the content of contemplated legislation,"[18] but that the inquiry is valid if legislation is potential[19] and *might* follow from the facts discovered.[20]

[14]"Inciting rebellion or insurrection: 35 Stat. 1088 (1909), 18 U. S. C. § 4 (1940); seditious conspiracy: 35 Stat. 1089 (1909), 18 U. S. C. § 6 (1940); enticing desertion from army and navy: 19 Stat. 253 (1877), 18 U. S. C. § 483 (1940); inciting revolt or mutiny: 35 Stat. 1146 (1909), 18 U. S. C. § 483 (1940)."

[15]"1940 Sedition Act: 54 Stat. 670, 18 U. S. C. §§ 9-13 (1940); Voorhis Anti-Subversive Activities Act: 54 Stat. 1201, 18 U. S. C. §§ 14-17 (1940); 1917 Espionage Act: 40 Stat. 219 (1917), 50 U. S. C. § 33 (1940)." Notes 13, 14, and 15 appear in Note (1948) 96 U. of Pa. L. Rev. 381 at 401.

[16]McGrain v. Daugherty, 273 U. S. 135, 174, 47 S. Ct. 319, 328, 71 L. ed. 580, 593 (1927). See In re Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154 (1897); Sinclair v. United States, 279 U. S. 263, 49 S. Ct. 268, 73 L. ed. 692 (1929). Cf. Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377 (1880), holding that Congress has no general power to inquire into a person's private affairs, but not deciding whether Congress could investigate in aid of its legislative function. That case was distinguished in McGrain v. Daugherty; some writers suggest that it has been overruled. See Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; Cousens, Purposes and Scope of Investigations under Legislative Authority (1938) 26 Geo. L. Rev. 905.

[17]Excellent historical developments of the powers to inquire and to punish for contempt are found in Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691 and 780.

[18]167 F. (2d) 241, 245 (App. D. C. 1948).

[19]"If the subject under scrutiny may have any possible relevancy and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter." United States v. Bryan, 72 F. Supp. 58, 61 (D. C. D. C. 1947).

[20]McGrain v. Daugherty, 273 U. S. 135, 178, 47 S. Ct. 319, 330, 71 L. ed. 580, 594 (1927). See Gose, The Limits of Congressional Investigating Power (1936) 10 Wash. L. Rev. 138, 151, contending that the power of inquiry is unlimited, as long as the facts found could be used for *some* legislation.

Those who believe the Committee's activities to be unconstitutional have assigned several reasons, other than the limitation that investigation is confined to the scope of permissible legislation.

(1) It is argued that Congress cannot undertake completely unlimited inquiry in the area protected by the First Amendment. "The power of investigation . . . stops short of restricting the freedoms protected by the First Amendment."[21]

Judge Edgerton, dissenting in the *Barsky* case, observes that the Committee's investigation did not "stop short." Rather, it restricted freedom of speech by publishing unpopular views, thereby exposing "the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment."[22]

The court, through Judge Prettyman, readily admits that freedom of speech is "invaded" in this instance, but holds that there is justification for the "invasion." Congress has "reasonable cause for concern," in light of the fact that the communist philosophy is antithetical to the principles of our government and constitutes a potential menace. The court is of the opinion that these facts sufficiently justify Congress' overstepping the line which separates public interest from private rights. "That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer."[23]

Justice Holmes, in *Schenck v. United States*,[24] laid down the rule that the rights of speech, press, and assemblage can be restricted only when there is a "clear and present danger" that the exercise of those rights will cause some harm to the government, which it may prevent. Though a recognized evil which Congress may prevent is the threat or advocacy of overthrow of government by force or violence,[25] Judge Edgerton contends that there was no evidence of danger that the United States Government will be overthrown by force or violence.[26] But the court rejects the limitation summarily as far as the power of *investigation* is concerned. "In our view, it would be sheer folly as a matter of governmental policy for an existing government to refrain

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[21]Judge Edgerton, dissenting, in Barsky v. United States, 167 F. (2d) 241, 253 (App. D. C. 1948).

[22]167 F. (2d) 241, 254 (App. D. C. 1948).

[23]167 F. (2d) 241, 249 (App. D. C. 1948).

[24]249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470, 473 (1918).

[25]Alien Registration Act, 54 Stat. 670 (1940), 18 U. S. C. A. § 9 (1947); constitutionality upheld in Dunne v. United States, 138 F. (2d) 137 (C. C. A. 8th, 1943), cert. denied 320 U. S. 790, 4 S. Ct. 205, 88 L. ed. 476 (1943).

[26]Barsky v. United States, 167 F. (2d) 241, 258 (App. D. C. 1948).

from *inquiry* into potential threats to its existence or security until danger was clear and present."[27] *Legislation* may not be necessary until danger is clear and present, but *inquiry* is necessary when danger is reasonably represented as potential.[28] And that the danger is potential is a view "held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject."[29]

(2) It is urged by the dissent that the Resolution under which Barsky was investigated provided no definite standard of guilt, and that therefore his conviction was invalid.

The argument is based on the rule that a criminal statute authorizing the imposition of penalties for its violation must define the crime by reference to some reasonable standard of guilt.[30] This requirement affords guidance to those who would avoid violating the statute, to those accused of violating it, and to the court in trying those accused.

Judge Edgerton contends that no such standard of guilt is afforded witnesses before the Committee. The Act under which Barsky was convicted makes it a disdemeanor for one summoned before the Committee to refuse to produce records upon "any matter under inquiry."[31] In regard to Barsky's failure to produce records, the standard of guilt is simply that the records relate to "any matter under inquiry." The "matter" was his organization's possible dissemination of un-American propaganda, and Barsky was fully acquainted with the fact at the hearing. It would seem that such standard is clear enough, because Barsky could not have mistaken the subject of the inquiry.

But Judge Edgerton looks to the Resolution which established the Committee rather than to the criminal statute which provides the penalties. He contends that the words of the Resolution are so vague that

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[27]167 F. (2d) 241, 246 (App. D. C. 1948). The "clear and present danger" rule is obviously not a fixed standard, nor was it intended to be. Justice Holmes conceived each case to be a question of "proximity and degree." Later cases and articles have criticized its use as an "absolute test." Pennekamp v. Florida, 328 U. S. 331, 352, 66 S. Ct. 1029, 1040, 90 L. ed. 1295, 1306 (1945); Bridges v. State of California, 314 U. S. 253, 261, 62 S. Ct. 190, 193, 86 L. ed. 192, 202 (1941); Ober, Communism vs. the Constitution: The Power To Protect Our Free Institutions (1948) 34 A. B. A. J. 645, 746.

[28]167 F. (2d) 241, 247 (App. D. C. 1948).

[29]167 F. (2d) 241, 247, n. 20 (App. D. C. 1948). Here Judge Prettyman cites many authorities, ranging from Supreme Court decisions to the Communist Manifesto itself!

[30]United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298, 65 L. ed. 516 (1921); Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. ed. 888 (1939); Musser v. State of Utah, 333 U. S. 95, 68 S. Ct. 397, 92 L. ed. 355 (1948). See Aigler, Legislation in Vague or General Terms (1923) 21 Mich. L. Rev. 831.

[31]52 Stat. 942 (1938), 2 U. S. C. A. § 192 (1947).

a witness before the Committee "cannot know whether or not he will be committing a crime if he fails to respond."[32] This argument would cause the requirement of a reasonable standard of guilt, which is applicable to criminal statutes, to be imposed on a House Resolution which does not purport to specify a crime. It gives the Resolution substantially this construction: If a witness before the Committee refuses to produce records relating to subversive and un-American propaganda activities, he shall be guilty of a misdemeanor. From this construction, it is argued that the "criminal" resolution fails because the words "subversive" and "un-American" and "propaganda" are too vague and provide no reasonable standard of guilt. Such a construction of the Resolution seems unwarranted.[33]

However, the prevailing opinion does not reach its result by holding that the authorizing Resolution requires no specification of a crime. Rather, it appears to agree that the Resolution would indeed be unconstitutional if the words were too vague. In this respect, the court does not deny that the words, separately considered, are capable of various meanings, as suggested by the dissent.[34] Nevertheless, the opinion refuses to look beyond what is the generally understood meaning of the *whole* Resolution, for "it conveys a clear meaning, and that is all that is required."[35]

(3) It is argued that, since Congress cannot, by legislation, outlaw communism as a political faith, it cannot outlaw it by exposure of those who adhere to it. The dissenting opinion in the *Barsky* case[36] contends that it is not permissible for the Un-American Activities Committeee to expose a person's beliefs merely *because* they are unpopular. This is another aspect of the burden on free speech—that an admission

[32]Barsky v. United States, 167 F. (2d) 241, 261 (App. D. C. 1948).

[33]In United States v. Dennis, 72 F. Supp. 417, 422 (D. C. D. C. 1947), on facts similar to the Barsky case, the court rejected the defendant's objection that the Resolution was not clear to him. "His contention is a collateral attack upon a resolution designed to instruct and limit a Congressional Committee." And, since the criminal statute is specific, the defendant acts at his peril when he refuses to comply.

"... we think that the word 'any' ... refers to matters within the jurisdiction of the two houses of congress, before them for consideration and proper for their action, ... and to facts or papers bearing thereon." In re Chapman, 166 U. S. 661, 667, 17 S. Ct. 677, 680, 41 L. ed. 1154, 1158 (1897). This indicates that as long as Congress can validly investigate the matter, it can compel the production of records pertaining to the matter. It is obvious that activities which threaten to destroy the nation are subject to investigation.

[34]For example, could not "propaganda" mean the usual campaign literature of the major parties?

[35]167 F. (2d) 241, 247 (App. D. C. 1948).

[36]167 F. (2d) 241, 254 (App. D. C. 1948).

by the witness, and even a refusal to admit, that he is a communist, subjects him to embarrassment and damage and social ostracism.[37] Also, a person universally recognized not to be a communist,[38] might become stigmatized with "guilt by association"[39] if he were merely investigated by the Committee.

This is the most disturbing by-product of the committee's investigations. And unfortunately, the Committee has lost favor with some courts because of the indiscreet statements of its members and indeed because of their distorted viewpoint of its true function. A statement from the Committee's reports is typical: "While Congress does not have the power to deny its citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity on their activities."[40] However, this factor does not diminish Congress' power to require a witness to produce records.[41] The Act[42] provides that embarrassment is no justification for refusal to answer. Furthermore, the prevailing opinion in the *Barsky* case denies that Congress is the cause of embarrassment. "This reuslt would not occur because of the Congressional act itself; that is, the Congress is not imposing a liability, or attaching by direct enactment a stigma. The result would flow from the current unpopularity of the revealed belief and activity."[43]

Whether the Committee can expose simply to disseminate information remains in issue. Chief Justice Hughes has said: "Information bearing upon activities which are within the range of Congressional power may be sought not only by Congressional investigation as an aid to appropriate legislation, but through the continuous supervision of an administrative body."[44] That statement has been criticised by writers, in view of the fact that "since investigatory and contempt powers were given to Congress in order to protect its integrity and force as a legislative body, exercise of those powers should be confined

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[37]See Gellhorn, Report on a Report of the House Committee on Un-American Activities (1947) 60 Harv. L. Rev. 1193.

[38]Such as the late Wendell Willkie, who defended a Communist in Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. ed. 1796 (1943).

[39]Gellhorn, Report on a Report of the House Committee on Un-American Activities (1947) 60 Harv. L. Rev. 1193, 1221.

[40]H. Rep. No. 2, 76th Cong., 1st Sess., 13 (1939). See other statements noted in the Barsky case, 167 F. (2d) 241, 256, n. 19 (App. D. C. 1948).

[41]Note (1948) 46 Mich. L. Rev. 521, 531.

[42]52 Stat. 942 (1938), 2 U. S. C. A. § 192 (1947).

[43]167 F. (2d) 241, 249 (App. D. C. 1948).

[44]Electric Bond & Share Co. v. S. E. C., 303 U. S. 419, 437, 58 S. Ct. 678, 684, 82 L. ed. 936, 945 (1938).

to that purpose."[45] Some writers have favored the informing function of Congress for policy reasons,[46] based on the belief that the operation of government is controlled largely by public opinion and that, therefore, the populace must be well informed; others favor it only insofar as it is confined to implementing other powers of Congress.[47] It is to be hoped that there may become established a rule of decision which, without abandoning all control over the investigatory power, will acknowledge that the importance of an enlightened people will justify Congress' urge to inform them.[48]

Possibly the strongest argument in favor of the Committee's investigation is that the very nature of communism as a potential threat to the nation gives Congress power to investigate it. The "power . . . rests upon a foundation deeper than a mere auxiliary to the ordinary legislative or administrative process."[49] It is basic in America that government is an instrumentality created by the people, to protect their rights. Congress is a part of that government and has the power to inquire into potential threats to itself, "not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part . . . ."[50]

LUTHER W. WHITE

CONSTITUTIONAL LAW—VALIDITY OF ORDINANCE PROHIBITING USE OF LOUD SPEAKERS IN PUBLIC PLACES. [United States Supreme Court]

The principle that freedom of speech, press, religion and other rights included in the First Amendment are protected against abridgement by state action is relatively new in the field of constitutional law. As late as 1922, the Supreme Court held that interference with these rights by the states was not within the sphere of state action prohibited

[45]Note (1947) 14 U. of Chi. L. Rev. 256, 258, n. 12.

[46]Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691 and 780, 811.

[47]Note (1947) 47 Col. L. Rev. 416, 425.

[48]Herewitz and Mulligan, The Legislative Investigating Committee (1933) 33 Col. L. Rev. 1, 6.

[49]167 F. (2d) 241, 245 (App. D. C. 1948).

[50]167 F. (2d) 241, 246 (App. D. C. 1948).

by the Fourteenth Amendment.[1] However, in 1925, the Court did an about face in *Gitlow v. People of State of New York*,[2] and speaking through Justice Sanford, declared:

> "For present purposes, we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[3]

With the decision in the *Gitlow* case, the way was opened for an ever-enlarging and seemingly endless stream of attacks on state legislation which allegedly took from the individual some of those fundamental rights which were guaranteed to him by the Federal Constitution. As the number of cases increased, so did the tendency of the Court to emphasize individual freedom at the expense of state powers.[4]

The path towards absolute freedom of the individual was further smoothed by the Court's decision in 1948, in *Saia v. People of State of New York*.[5] Here, a majority of five justices held that freedom to speak included freedom to speak over a loud speaker. A city ordinance

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[1]Prudential Insurance Company v. Cheek, 259 U. S. 530, 42 S. Ct. 516, 66 L. ed. 1044, 27 A. L. R. 27 (1922).

[2]268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925).

[3]268 U. S. 652, 666, 45, S. Ct. 625, 630, 69 L. ed. 1138, 1145 (1945).

[4]The first case to strike down a state statute under this theory was Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108 (1927), which held that a statute providing punishment for any person who advocated criminal syndicalism was unconstitutional as applied to the situation presented. Other such cases and the type of statute which was involved include: Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940) (prohibited picketing); Carlson v. People of State of California, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940) (prohibited carrying a placard in vicinity of business); Jones v. City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L. ed. 1290 (1943), and Follett v. Town of McCormick, 321 U. S. 573, 64 S. Ct. 717, 88 L. ed. 938 (1943) (required a license to sell books); Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949 (1938), Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. ed. 869 (1943), and Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. ed. 1292 (1943) (required permit to distribute pamphlets or literature); Martin v. City of Struthers, 319 U. S. 141, 63 S. Ct. 862, 87 L. ed. 1313 (1943) (required a permit to conduct a door-to-door campaing); Marsh v. State of Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. ed. 265 (1945) (required permit to distribute literature on streets of a company-owned town); Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 1213 (1940) (prohibited solicitation of money for any "alleged religious, charitable, or philanthropic cause... unless such cause shall have been approved by secretary of public welfare council.").

[5]334 U. S. 558, 68 S. Ct. 1148, 92 L. ed. 1087 (1948). Appellant, a member of the religious sect known as Jehovah's Witnesses, had been convicted of violation of a city ordinance of Lockport, New York. The violation consisted of conducting religious programs over a loud speaker in a public park after a permit to use the speaker had been refused on the ground that the neighbors had complained of the disturbance caused by the noise of it.

which prohibited the use of such a speaker *except for specified purposes which were approved by the chief of police* was, therefore, declared unconstitutional as violating the Fourteenth Amendment.

Justice Frankfurter, dissenting,[6] argued that the unregulated use of a loud speaker might easily be classed as a nuisance, and thus the ordinance could be approved as a valid exercise by the city of its police power. Under his view, no constitutional objection could be made to the ordinance itself, and any complaint of abuse by the chief of police of his discretionary power should be made in a personal action against him by the aggrieved party.

This decision has been the subject of much controversy by both lawyers and laymen.[7] A caustic statement of the practical effect of the Court's ruling is found in an editorial in the *American Bar Association Journal* which points out that "ordinances and regulations by which countless communities have protected their people, . . . have been obliterated . . . and the prospect is that years will elapse before American municipalities can know with reasonable certainty what substitute measures they can enact."[8]

However, in the recent case of *Kovacs v. Cooper*[9] the Court seems to have taken a position directly opposed to that which it had announced in the *Saia* decision just six months previously. The ordinance here differed from that in the earlier case in two respects only: (1) the ordinance was directed only at loud speakers attached to vehicles operated or standing upon the streets, and (2) it did not provide for exceptions under any conditions. In spite of the fact that the *Saia* case had already struck down "a more moderate exercise of the state's police power"[10] a majority (again of five justices) decided that the ordinance in this case did not interfere with freedom of speech to such a degree as to be unconstitutional.

An attempt was made by Justice Reed[11] to distinguish the two cases on the ground that the statute in the earlier case had allowed an official to use his discretion in granting loud speaker permits, thus establishing a censorship of what was to be broadcast. The ordinance under

[6]Saia v. People of State of New York, 334 U. S. 558, 562, 68 S. Ct. 1148, 1151, 92 L. ed. 1087, 1090 (1948).

[7]Notes (1948) 1 Ala. L. Rev. 85; 28 Ore. L. Rev. 54; 2 Vanderbilt L. Rev. 113.

[8]Striking Down the Communities' Self-Protection, 34 A. B. A. J. 589, 591 (1948).

[9]69 S. Ct. 448, 93 L. ed. 379 (January, 1949). Appellant had violated an ordinance of Trenton, New Jersey, by using a loud speaker mounted on a truck standing on a city street. The speaker was being used to comment on a labor dispute then in progress.

[10]69 S. Ct. 448, 459, 93 L. ed. 379, 392 (1949).

[11]69 S. Ct. 448, 451, 93 L. ed. 379, 384 (1949).

consideration in the *Kovacs* case, he argued, was not of the same character since there was no provision for the exercise of discretion by an administrative official.

Such an argument might be accepted as providing a means for distinguishing the cases were it not for the fact that five of the justices, all of whom had taken part in the *Saia* case, agreed that the *Kovacs* case amounted to a repudiation of the earlier decision.[12]

That the two decisions are clearly incongruous is further evidenced by the fact that some of the basic points of the dissent of the earlier case were adopted in the reasoning of the Court in the later decision. For example, Justice Jackson, dissenting in the *Saia* case, contended that the complaining party had not presented a free speech issue, since "he demands even more than the right to speak and hold a meeting in this area which is reserved for other and quite inconsistent purposes."[13] This same point is stressed in the opinion of Justice Reed, who announced the judgment of the Court in the *Kovacs* case, in these words:

> "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."[14]

Although the two cases thus seem to be in direct conflict, the later case did not overrule the earlier one. This seems especially regretable since the *Saia* decision was, from its inception, inconsistent with the general weight of authority as evidenced by prior state court decisions involving statutes somewhat analagous in nature.[15] Although the Su-

[12]Justices Frankfurter and Jackson concurred with the judgment in the Kovacs case but each of them felt that the Saia case could not be distinguished and therefore should be overruled. Justices Black, Douglas, and Rutledge dissented on the ground that this judgment was inconsistent with that in the Saia case which they believed to have been correctly decided.

[13]334 U. S. 558, 566, 68 S. Ct. 1148, 1153, 92 L. ed. 1087, 1093 (1948).

[14]69 S. Ct. 448, 454, 93 L. ed. 379, 386 (1949).

[15]In a case with facts similar to those in the two principal cases the Supreme Court of Colorado failed to find anything unconstitutional in an ordinance which prohibited using a "loud or offensive device as a means of attracting a crowd." That court recognized the danger in allowing civil liberties to be invaded under the guise of providing for the public welfare, but it also expressed a fear "lest using the bill of rights as a cloak, an individual is allowed to commit a nuisance or worse against the public in general." Hamilton v. City of Montrose, 109 Colo. 228, 124 P. (2d) 757, 759 (1942).

In State v. Langston, 195 S. C. 190, 11 S. E. (2d) 1 (1940) the Supreme Court of

preme Court had never before passed on the exact issue of the *Saia* case, the language employed in similar cases seemed to point to a different result. In *Cox v. State of New Hampshire*[16] a conviction based on an ordinance prohibiting the staging of a parade or procession without a license was upheld. Chief Justice Hughes, in delivering the opinion of the Court, declared that "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[17] And even Justice Murphy, who dissented in the *Kovacs* case, had, in *Chaplinsky v. State of New Hampshire*,[18] admitted that, "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances."[19]

This apparent vacillation of the Justices gives support to Professor Corwin's observation that the "Court, one suspects, has not thought its problem quite through . . . ."[20]

The true crux of the problem seems to be approached more realistically by Justice Frankfurter, whose separate concurring opinion in the *Kovacs* case takes issue with the use by the other justices of the term "preferred position of freedom of speech." After a scholarly discussion of the history of the term in past decisions, he charges that the phrase has practically become a formula used to avoid controversial issues

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South Carolina sustained the conviction (for breach of the peace) of members of the Jehovah's Witnesses sect who were driving around town on Sunday morning using a loud speaker to play phonograph records and make announcements of services. The court declared that the civil liberties guaranteed in the Constitution did not give a person the right to disturb others. Cert. denied 311 U. S. 685, 61 S. Ct. 59, 85 L. ed. 442 (1940).

A similar result was reached in Delk v. Commonwealth, 166 Ky. 39, 178 S. W. 1129 (1915) in upholding a fine imposed on a minister for using language in a sermon calculated to disturb the peace. According to the Kentucky court, "one will not be permitted to commit a breach of the peace, under the guise of preaching the gospel." 166 Ky. 39, 178 S. W. 1129, 1132 (1915).

Most of the older cases involved ordinances prohibiting, or requiring a license for, the use of musical instruments on the streets. Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889); State v. White, 64 N. H. 48, 5 Atl. 828 (1886). Also see Note (1941) 133 A. L. R. 1412. More recently, in Commonwealth v. Hessler, 141 Pa. Super. 421, 15 A. (2d) 486 (1940), an ordinance was involved which prohibited parades, unless a permit was obtained from the burgess, on the ground that it is to the public interest to keep the streets clear.

[16]312 U. S. 569, 61 S. Ct. 762, 85 L. ed. 1049 (1941).

[17]312 U. S. 569, 574, 61 S. Ct. 762, 765, 85 L. ed. 1049, 1052 (1941).

[18]315 U. S. 568, 62 S. Ct. 766, 86 L. ed. 1031 (1942).

[19]315 U. S. 568, 571, 61 S. Ct. 766, 769, 86 L. ed. 1031, 1035 (1942).

[20]Corwin, The Constitution and What It Means Today (9th ed. 1947) 200.

which might arise in the decision of free speech cases. As a substitute for this "mechanical jurisprudence," he suggests that the Court should not interfere with such matters, which are "for the legislative judgment controlled by public opinion."[21]

From this discussion it might be suggested that the "preferred position" formula is sometimes employed as an abbreviation of the answer to the problem of what part the Court should play in balancing the rights of the individual against the demands of society. Those who are opposed to the Court's placing any part of the Constitution in a preferred position contend that the balancing of interests should be done by the legislature, for "to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[22] They are answered by the argument that the right "to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[23]

In failing to admit these fundamental differences in philosophy as the controlling factors in reaching their decisions, the Justices seem to have allowed their rulings to be influenced by the particular facts of each case rather than by the broad principles of law which are applicable to each set of facts.[24] This policy has created a state of confusion as to what the *law* on the subject is. The presence of such confusion is shown by the fact that five separate opinions were written in the *Kovacs* case without a majority concurring in any one of them.[25] Even stronger evidence of the confusion is to be found in the apparent reversal of the *Saia* case within six months after it was decided.

Such a practice, if continued, will have the effect of placing the Supreme Court decisions in "the same class as a restricted railroad

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[21]69 S. Ct. 448, 458, 93 L. ed. 379, 391 (1949).

[22]Justice Frankfurter in Minersville School District v. Gobitis, 310 U. S. 586, 600, 60 S. Ct. 1010, 1016, 84 L. ed. 1375, 1382 (1940).

[23]Jutice Jackson in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 638, 63 S. Ct. 1178, 1185, 87 L. ed. 1628, 1638 (1942).

[24]The two principal cases serve as examples of this practice: in the Saia case the ordinance which was asserted against a *religious worker* was held bad, but in the Kovacs case a similar ordinance was upheld when asserted against a *labor agitator.*

[25]Justice Reed announced the judgment of the Court and wrote an opinion in which the Chief Justice and Justice Burton concurred; Justices Frankfurter and Jackson delivered separate concurring opinions; Justice Black delivered a dissenting opinion in which Justices Douglas and Rutledge concurred; Justice Rutledge also delivered a separate dissenting opinion; and Justice Murphy dissented without an opinion.

ticket, good for this day and train only."[26] The state of indecision which the Court demonstrated in these two decisions may in time "endanger the great right of free speech by making it ridiculous and obnoxious, more than the ordinance in question menaces free speech by regulating the use of loud speakers."[27]

WILLIAM J. LEDBETTER

CONSTITUTIONAL LAW—VALIDITY OF STATE GROSS RECEIPTS TAX ON CARRIER OPERATING BETWEEN TERMINI WITHIN STATE OVER ROUTE THROUGH OTHER STATE. [United States Supreme Court]

The Supreme Court of the United States has recently had occasion, in *Central Greyhound Lines, Inc. v. Mealey*,[1] to deal with two commerce clause problems which have received varying treatment in earlier decisions: first, whether transportation between termini in the same state where part of the route lies in an outside state is interstate commerce; second, whether a state tax on the gross receipts of such transportation is sustainable if apportioned to the mileage within the taxing state.

Central Greyhound operated buses over numerous routes from New York City to Buffalo and other cities in upstate New York. These routes, which cut across sections of New Jersey and Pennsylvania, were the most direct possible and comprised 57.47% of New York mileage, and 42.53% of New Jersey and Pennsylvania mileage. Under a New York statute, which taxed the gross income of utilities doing business within that state, a tax was imposed on appellant's gross receipts derived from continuous transportation of passengers between New York points over such routes. The New York Court of Appeals sustained the tax,[2] holding that the transportation "is not interstate commerce." The Supreme Court reversed, holding that the transportation was interstate, and that an unapportioned tax on gross receipts for the entire route would subject interstate commerce to the unfair burden of mul-

[26]Justice Roberts dissenting in Smith v. Allwright, 321 U. S. 649, 669, 64 S. Ct. 757, 768, 88 L. ed. 987, 1000 (1944). It is interesting to note that this criticism was made by Justice Roberts in regard to the action of the Court in overruling a decision which had been rendered some *nine years* earlier, while the Kovacs case in effect overruled a decision which had been given only *six months* previously.

[27]Justice Jackson dissenting in the Saia case, 334 U. S. 558, 566, 68 S. Ct. 1148, 1152, 92 L. ed. 1087, 1092 (1948).

[1]334 U. S. 653, 68 S. Ct. 1260, 92 L. ed. 1235 (1948).

[2]Central Greyhound Lines, Inc. v. Mealey, 296 N. Y. 18, 25, 68 N. E. (2d) 855, 859 (1946).

tiple taxation. The case was thereupon remanded to permit the New York court to decide whether the taxing statute permitted apportionment, in which event the constitutional objection would be removed. Justice Rutledge concurred in the result and Justices Murphy, Black and Douglas dissented.[3]

On the first question as to the interstate character of the transportation, Justice Frankfurter, for the majority, takes issue with the New York court and his dissenting colleagues. "To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the *Lehigh Valley* case,[4] a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction,"[5] wrote Justice Frankfurter. "Nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation."[6]

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[3]The dissent is based on the local nature of the transportation. "From a standpoint of physical movement, there is a crossing of state lines and a journey over territory belonging to more states than one—a movement that is undeniably interstate. At the same time, however, the business of transporting passengers or freight between points in the same state is essentially local in character despite the interstate movement." 334 U. S. 653, 666, 68 S. Ct. 1260, 1267, 92 L. ed. 1235, 1242 (1948). "The rule requiring apportionment of gross receipts taxes to the activities carried on within a state is one that is necessarily predicated upon the existence of some interstate activities which the commerce clause places beyond the taxing power of the State.... But this rule obviously is inapplicable where the tax is not levied on what is appropriately labelled interstate commerce.... Inasmuch as the restrictive force of the commerce clause is non-effective, New York is entitled to tax the total gross receipts from this local commerce." 334 U. S. 653, 670, 68 S. Ct. 1260, 1269, 92 L. ed. 1235, 1245 (1948).

[4]Lehigh Valley Railroad v. Pennsylvania, 145 U. S. 192, 12 S. Ct. 806, 36 L. ed. 672 (1891). A Pennsylvania statute taxed the gross receipts of the Lehigh Valley Railroad derived from transportation on its line between Mauch Chunk, Pa., and Phillipsburgh, N. J. A connecting line between Phillipsburgh and Philadelphia was operated by the Pennsylvania Railroad, and the two railroads had arranged for continuous transportation of through passengers and freight between Mauck Chunk and Philadelphia. Actually, the total receipts from the transportation were apportioned between the companies upon a mileage basis, the Pennsylvania taxed only that proportion which the railroads attributed to Lehigh Valley as its share of Pennsylvania earnings. The Court sustained the tax on the grounds that the transportation involved was "purely internal."

[5]Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653, 659, 68 S. Ct. 1260, 1264, 92 L. ed 1235, 1239 (1948).

[6]334 U. S. 653, 661, 68 S. Ct. 1260, 1265, 92 L. ed. 1235, 1240 (1948). The majority opinion relies strongly on Hanley v. Kansas City Southern R. Co., 187 U. S. 617, 23 S. Ct. 214, 47 L. ed. 333 (1903). That case established the doctrine that a route between two points within the same state, lying partially within a neighbor-

On the "real question" whether an unapportioned tax on gross receipts from this bus transportation was sustainable, the Court said that "by its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of local government whose protection it enjoys'." In the Court's opinion, "the vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by witholding, for the use of the State, a part of every dollar received in such transactions'." The Court was quick to admit, however, that on the record presented "the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State."[7]

An earlier decision had held that a state tax on gross receipts from the transportation of persons by vessel in interstate and foreign commerce was invalid.[8] The same result was reached as to gross receipts from interstate rail transportation, even though the railway lines were

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ing state or states, is one of an interstate nature so far as the right of the states to legislate is concerned.

Justice Holmes pointed out in the Hanley case that the earlier Lehigh Valley Railroad tax was determined in respect to receipts for the proportion of transportation within Pennylvania (see note 4, supra), and that "... such a proportioned tax had been sustained in the case of commerce admitted to be interstate." 187 U. S. 617, 621, 23 S. Ct. 214, 216, 47 L. ed. 333, 336 (1903). Justice Frankfurter explains in the Greyhound Lines case the reason for the Court's failure in the Lehigh Valley case to uphold the Pennsylvania tax on an apportionment basis rather than on the internal nature of the commerce involved. Several months before the Lehigh Valley Case, the Court had sharply divided in Maine v. Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994 (1891) on the issue of an excise tax to be determined by the amount of gross receipts of an interstate railroad. "... Mr. Justice Bradley and his fellow dissenters in the *Grand Trunk* case were evidently content to sustain the Pennsylvania tax in Lehigh Valley as a tax on 'domestic transportation' 'internal intercourse,' in short as not 'interstate commerce,' for thereby they would not bring into question the views so vigorously expressed by them a few months before." 334 U. S. 653, 659, 68 S. Ct. 1260, 1264, 92 L. ed. 1235, 1238 (1948).

"The *Hanley* case has been followed in virtually all subsequent cases where the issue involved was one ... of transportation itself. It is to be noted that it is immaterial as to how much of the route, quantitatively or proportionately, ran through the other state. The principle remains the same regardless of the extent of the mileage outside of the home state." Tarney, Methods For Differentating Interstate Transportation From Intrastate Transportation (1938) 6 Geo. Wash. L. Rev. 553, 634. For other excellent discussions of this commerce problem, see Kauper, State Regulations of Interstate Motor Carriers (1933) 31 Mich. L. Rev. 1097, and Note (1927) 41 Harv. L. Rev. 260.

[7]334 U. S. 653, 663, 68 S. Ct. 1260, 1266, 92 L. ed. 1235, 1241 (1948).

[8]Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200 (1887). This case rejects the view of State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164 (1872), which upheld a tax on gross receipts of freight carried between states on the ground that the receipts had become a fund in possession and intermingled with other property of the carrier when the tax was levied.

wholly within the taxing state.[9] The implication was that no such gross receipts tax could be sustained unless it was in lieu of property taxes.[10] Later decisions,[11] however, had clearly indicated that "a tax, properly apportioned, [was] not likely to be condemned merely because its measure or subject [happened] to be gross receipts derived from interstate transportation."[12] The principal case fulfills this prediction, and follows the inferential approval given in 1938, in *Adams Mfg. Co. v. Storen*[13] to an apportioned tax on gross receipts from interstate business.

Justice Rutledge concurred in the result in the principal case, without opinion. It seems clear that his refusal to join in the majority opinion is based on the Court's continued use of a "direct burden" test in determining the validity of State interferences with interstate commerce. In his concurring opinion in *Freeman v. Hewitt*[14] he stated his view regarding the use of the label "direct:"

> "Again, an apportioned tax on interstate commerce is a 'direct' tax bearing immediately upon it in incidence, but such a tax is not for that reason invalid. Decisions have sustained such taxes repeatedly, regardless of their direct bearing, providing the apportionment were fairly made and no other vitiating element were present...."

Even though the majority explicitly held that the New York tax would be valid if apportioned, and restricted the invalidating label "direct"

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[9]Galveston, Harrisburg & San Antonio R. R. v. Texas, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031 (1908).

[10]It was contended that the constitutionality of the tax in the Galveston R. R. case was supportable under Maine v. Grand Trunk R. Co. (see note 6, supra). Nevertheless, the tax was condemned, and Justice Holmes expressed the opinion that unless the earlier decision could be sustained on the ground that the tax was a commutation tax in lieu of taxation on other rolling stock and right of way of the railroad, then the Grand Trunk case could be called a departure from the Philadelphia S. S. case. 210 U. S. 217, 226, 28 S. Ct. 638, 640, 52 L. ed. 1031, 1037 (1908). Speaking of these cases, it is said in Note (1930) 18 Calif. L. Rev. 512, 514: "It is first to be noted that the court assumed that if the tax questioned is not a property tax, it cannot be sustained. Thus the court flatly takes the position not only that a tax levied in terms directly on gross receipts from interstate commerce is void... but also that no excise tax can be measured by such receipts."

[11]Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814 (1937); Southern Pacific v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. ed. 586 (1939); McGoldbrick v. Berwind-White Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 565 (1940); McGoldrick v. Felt-Tarrant Mfg. Co., 309 U. S. 70, 60 S. Ct. 404, 84 L. ed. 584 (1940).

[12]Lockhart, State Tax Barriers on Interstate Trade (1940) 53 Harv. L. Rev. 1253, 1263.

[13]304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938).

[14]329 U. S. 249, 266, 67 S. Ct. 274, 284, 91 L. ed. 265, 279 (1946).

to the unapportioned tax, they failed to meet Justice Rutledge's earlier insistence that the term is misleading and, therefore, wholly unacceptable in Commerce Clause cases.[15]

CARTER C. CHINNIS*

COURTS—NECESSITY OF EXISTENCE OF DE JURE OFFICE AS CONDITION FOR RECOGNITION OF DE FACTO JUDGE. [Arkansas]

The doctrine of the de facto public officer has long been recognized as essential to the practical administration of our legal system. Lord Ellenborough's frequently-quoted statement that a de facto officer "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law," expresses the essence of the doctrine.[1] It sprang from a common-sense recognition of the fact that it would be unreasonable to require the public to ascertain at its own risk the validity of each public officer's claim to the office which he professes, and is reputed, to hold. Thus, of necessity, the rule developed that the law would recognize the acts of a de facto officer as valid, even though it should be determined that the individual in question did not have a perfect legal right to his office. To have held otherwise would

[15]In Joseph v. Carter-Weeks Stevedoring Co. the City of New York subjected the receipts of stevedoring services rendered entirely within the city's limits to a general gross receipts tax. The services were for ships engaged in foreign and interstate commerce. The Court, in condemning the tax, declared: "Stevedoring... is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business... is invalid." 330 U. S. 422, 433, 67 S. Ct. 815, 821, 91 L. ed. 993, 1004 (1946).

A dissenting opinion in which Justice Rutledge joins takes issue with the Court's use of the discarded "labelling" or "tagging" practice to determine tax validity, and expresses a concern over the Court's failure to follow the "philosophy of recent cases." 330 U. S. 422, 444, 67 S. Ct. 815, 827, 91 L. ed. 993, 1010 (1946). The dissent essentially advocates the approach of Adams Mfg. Co. v. Storen (see note 13, supra) to problems of commerce taxation—the true criteria for determining the validity of a tax should be practical considerations and consequences.

In "Much Ado About Gross Receipts Taxes" (1947) 60 Harv. L. Rev. 710, 747, Professor Thomas Reed Powell writes that the decision in the Stevedoring case "...should naturally be taken to mean that five of the Justices now on the Court would vote against state gross receipts taxes on interstate transportation except when in lieu of property taxes." Yet apportionment alone, without the "in lieu" feature, would have saved the New York tax in the Greyhound Lines case.

Whether the principal case will control where an apportioned tax is laid on receipts from transportation between termini not within the same state is not clear. Perhaps this is an additional reason for Justice Rutledge's failure to join in the Court's opinion.

*In collaboration with the Editors.

[1]Rex v. Bedford Level Corpn., 6 East 356, 368, 102 Eng. Rep. 1323, 1328 (1805).

have subjected the public to a ruinous degree of uncertainty, and even peril, in all its dealings with public officers.[2]

A majority of American courts, however, have engrafted upon this salutary doctrine the qualification that it may be applied only to an officer who purportedly holds an office which is validly in existence; or, as the rule is generally stated, that a de jure office is a condition for a de facto officer. The practical difficulties which may result from an application of this qualification are dramatically demonstrated by the tortuous course of recent litigation in Arkansas.

Early in 1948, the Arkansas Supreme Court attracted nationwide comment by its holding in the case of *Howell v. Howell.*[3] In an appeal from a decision of the Second Division of the Pulaski County Court of Chancery, the Supreme Court held the statute creating the Second Division to be unconstitutional, and ruled that the court had no legal existence. Then, adhering to the rule that there can be no de facto officer in the absence of a de jure office, the Supreme Court declared all the decrees of the chancellor of the Second Division null and void. Since the chancellor in question had handed down almost 2000 divorce decrees prior to this decision, many of which affected parties no longer residing in Arkansas, it is not surprising that the *Howell* decision attracted considerable attention, and spread consternation among local attorneys and their former clients.

Within four months the same court, in *Pope v. Pope,*[4] reversed its former position and overruled the *Howell* case. This result was reached by recognizing the severability of the objectionable section of the contested Act, and sustaining the sections creating the court. Since the court was thus constitutionally established, the de facto status of its chancellor was recognized, and his decrees validated. However, while so holding, the court reiterated the rule that, without a de jure office, there could be no de facto judge.

In view of its repudiation, the significance of the *Howell* case lies less in its holding than in the confusion it created. Furthermore, as pointed out in a strongly-worded dissent by Chief Justice Griffin Smith in the *Pope* case,[5] it placed the Arkansas Supreme Court in the unfortunate position of apparently making an abrupt shift in conformance to a vociferous clamor by the public and the bar. When such undesirable consequences result from the application of a generally accepted

[2]For a general discussion of the de facto doctrine, see 46 C. J., Officers §§ 366-379.

[3]208 S. W. (2d) 22 (Ark. 1948). Stevens v. Stevens, 208 S. W. (2d) 22 (Ark. 1948), involving the same controversy, was decided at the same time.

[4]210 S. W. (2d) 319 (Ark. 1948).

[5]210 S. W. (2d) 319, 321 (Ark. 1948).

rule, it would seem worthwhile to inquire as to the origin of this rule, and to consider the necessity of its application in situations where the office was created by an apparently valid statute which is later declared unconstitutional.

The foundation case which enunciates and exemplifies the general principle that de jure office is a condition for a de facto officer is *Norton v. Shelby County,*[6] dealing with a factual situation similar to that of the *Howell* case. The Tennessee legislature undertook to create a board of county commissioners, and defined its duties. The officials assumed office, and, within the scope of their duties, issued county bonds. The Tennessee Supreme Court later declared the Act creating the board unconstitutional. On appeal to the Supreme Court of the United States, it was contended that, even though the statute creating the board was invalid, the purported commissioners should be recognized as de facto officers so as to validate the bonds issued by them. The Supreme Court answered with an unequivocal negative: "But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure,* they were nevertheless officers *de facto,* and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto,* if there be no office to fill."[7]

The Court reasoned that, necessarily, "... the idea of an officer implies the existence of an office which he holds."[8] This premise is self-evident, but the Court took the position that this implication of office may be satisfied only by a de jure office, since a de facto office under a constitutional government was considered a legal impossibility. Having espoused this view, Mr. Justice Field perforce concluded that, since an unconstitutional Act is legally "as inoperative as though it had never been passed," an office created by such an Act must be a legal nullity, so that its incumbent could never have de facto standing.

It will be seen that the crucial point in this pattern or reasoning is the assumption that *there may be no such thing as a de facto office under our governmental system*—that is, that the office is either validly created or a nullity, and can have no intermediate de facto status, resulting from public acceptance and reliance, such as the officer himself may have.

From the dearth of authority cited by the Supreme Court in support of this basic proposition, one must conclude that it was considered

[6]118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178 (1886).
[7]118 U. S. 425, 441, 6 St. Ct. 1121, 1125, 30 L. ed. 178, 186 (1886).
[8]118 U. S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. ed. 178, 186 (1886).

self-evident. Though a number of cases were distinguished as *not* holding that there *could* be a de facto office, only one decision was cited which held that there *could not* be a de facto office.[9] This was the 1829 Kentucky case of *Hildreth v. M' Intire,*[10] apparently the first reported decision holding that there cannot be a de facto office under a constitutional government.[11] This case is noteworthy in that not a single authority is cited throughout the entire opinion.

Whatever may be the deficiencies discoverable in the *Norton* case, the fact remains that its holding has been followed by the majority of courts considering the question. However, a respectable body of authority does exist to the contrary, some cases announcing a different rule, and others merely refusing to apply the *Norton* rule to the facts of a given case.[12]

Outstanding in the line of authority opposed to the *Norton* case is the New Jersey decision of *Lang v. Bayonne,*[13] which exemplifies the case against the de jure condition.[14] In this opinion Chief Justice Gum-

[9]The Court quoted from the opinion in the unreported Tennessee case of Butterworth v. Shelby County, and from the dictum of Mr. Justice Manning in Carlton v. People, 10 Mich. 249 (1862), as authority for its position. However, though the two quotations do support the Court's conclusion, neither considers the basic premise that there may be no de facto office under a constitutional government. Since the Butterworth case is unreported, no examination of this opinion has been possible, but a reading of the Carlton case reveals that the point relied upon in the Norton case was merely dicta, and that neither reasoning nor authority was presented in its support.

[10]24 Ky. (1 J. J. Marsh.) 206, 19 Am. Dec. 61 (1829). While this case clearly announced the principle that a de facto office under a written constitution is a legal impossibility, the actual holding on the facts appears no broader than that, where the constitution provides for but one Court of Appeals, a de facto Court of Appeals cannot exist while a de jure Court of Appeals is in operation. If this decision is so restricted, it is in entire accord with the accepted principle that, where an office is in the possession of a de jure officer, no other person can be the de facto incumbent of the same office. Hamlin v. Kassafer, 15 Ore. 456, 15 Pac. 778 (1887), Hallgrene v. Campbell, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408 (1890), Tooele County v. De La Mare, 90 Utah 46, 59 P. (2d) 1155, 106 A. L. R. 182 (1936).

[11]This is the earliest case appearing in the American Digest which denies the possibility of a de facto office under the constitutional government.

[12]For a collection of cases departing from the Norton rule, see Note (1935) 99 A. L. R. 294, 303.

[13]73 N. J. L. 109, 62 Atl. 270 (1905), aff'd 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N.S.) 93 (1907).

[14]It is interesting to note that both the Norton and the Lang opinions recognize the case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409 (1871) as an eminent authority in the de facto field, and each relies on this case in support of the conclusion reached. An analysis of State v. Carroll and its background indicates that the interpretation by Chief Justice Gummere in the Lang case was correct. On this point see the opinion of Justice Spear in State v. Poulin, 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N.S.) 408 (1909).

mere overruled an earlier decision,[15] and took Mr. Justice Field to task for his opinion in the *Norton* case.[16] Then he called attention to a settled doctrine which provides the most telling argument against the inherent necessity of the de jure condition: that a municipal corporation, though created by an unconstitutional Act, is treated in all respects as a valid organism up to the time the state itself successfully questions its existence.[17] Yet, as the opinion pointed out, "if it be true that there cannot be such a thing as a de facto officer, unless there be a de jure office, on what theory can the acts of such officers [of defective municipal corporations] be recognized as valid?"[18] The question is unanswered, and the Chief Justice concludes that it should be the responsibility of the courts, and not of the citizen, to determine the validity of statutes creating public offices.[19]

In a number of other cases, the courts, though reluctant to take such direct issue with general rule, have, while recognizing it, refused to apply it to a given situation. A clear example is found in the case of *Chicago, R. I. & P. Ry. Co. v. Carroll, Brough, Robinson & Humphrey*,[20] wherein a statute creating a special county court was held unconstitutional. In order to prevent the confusion which would have resulted from declaring all its acts invalid, the judge of this court was recognized as a de facto judge. Yet, when a second judge was appointed to the invalid court, the same tribunal held that the judge so appointed could not be even a de facto judge for the specific reason that there can be no de facto officer where there is no office de jure, and cited the *Norton* case as authority.[21]

The vigor of the *Norton* rule may be attributed in part to the prestige of the court announcing it, and in part to a simplicity which makes

[15]State v. Camden, 56 N. J. L. 244, 28 Atl. 82 (1893).

[16]"The vice of the doctrine of Norton v. Shelby County, as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law." 74 N. J. L. 455, 68 Atl. 90, 92, 15 L. R. A. (N.S.) 93, 101 (1907).

[17]City of Albuquerque v. Water Supply Co., 24 N. M. 368, 174 Pac. 217, 5 A. L. R. 519 (1918).

[18]74 N. J. L. 455, 68 Atl. 90, 92, 15 L. R. A. (N.S.) 93, 102 (1907).

[19]The inconsistency of the de facto qualification was presented by the Chief Justice as follows: "In my judgment the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally justifies his obedience to every other law which the Legislature has seen fit to enact, until such has been judicially declared to be invalid." 74 N. J. L. 455, 68 Atl. 90, 93, 15 L. R. A. (N.S.) 93, 107 (1907).

[20]114 Okla. 193, 245 Pac. 649 (1925).

[21]Koch v. Keen, 124 Okla. 270, 255 Pac. 690 (1927).

the result appear self-evident. Obviously, the idea of an officer implies the existence of some office which he holds. Likewise, the rule that an unconstitutional law is void is an established doctrine. Thus, when a court holds that an office created by an unconstitutional statute is void ab initio and can give no color of authority to the acts of its incumbent, this conclusion appears to be unavoidable. However, admitting that this result *is legally defensible,* it fails to take into account the nature of the de facto doctrine, which does not purport to stem from legal principles, but rather from a variation of such principles for the purpose of protecting the public. The majority rule, in effect, restricts the de facto doctrine by means of the very technicalities it was intended to vary, and produces the very risk to the public it was intended to avoid.

When the officer himself is *appointed* by virtue of an invalid Act, all courts find it possible to recognize him as a de facto officer. Why cannot a similar view be taken of the office upon which his authority depends, so that the acts of the officer, prior to the declaration of the unconstitutionality of his office, may be valid as to the public? Because, it is said, the idea of an officer necessarily implies the existence of some office which he holds, and there can be no de facto office under a constitutional government. Yet, as was pointed out in the *Lang* opinion, the rule validating the acts of officers of an irregularly created municipal corporation until the corporation is attacked by the state, seems justifiable only on the theory that such officers are incumbent of de facto offices.

Thus, there appears to be no inherent legal difficulty in holding that there may be a de facto office. On the other hand, strong reasons of policy favor such a view, for, when the invalidity of the office results from a judicial declaration that an apparently valid statute was unconstitutional, the office, even if a legal nullity, has certainly been a factual actuality. In short, there seems neither theoretical compulsion nor practical justification for a rule which invalidates the previous acts of a public officer when the apparently valid statute creating his office is declared unconstitutional. Since the basis of the de facto doctrine is that the public is allowed to rely on the reasonable appearance of public authority, consistency of principle would seem to be with the minority of jurisdictions which refuse to qualify this doctrine by the requirement of a de jure office.

EDWARD P. LYONS, JR.

LABOR LAW—VALIDITY OF STATE ANTI-CLOSED SHOP LEGISLATION. [United States Supreme Court]

On January 3, 1949, the United States Supreme Court in *American Federation of Labor v. American Sash & Door Co.*,[1] *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, and *Whitaker v. North Carolina*[2] upheld the constitutionality of state anti-closed shop legislation,[3] and in so doing appears to have buried the mouldering remains of *Adair v. United States*[4] and *Coppage v. Kansas*.[5]

The history of the doctrine of unlimited freedom of contract, as articulated in the ill-fated *Adair* and *Coppage* cases, is well known.[6] Starting as a bulwark supporting anti-union practices, those cases came to their demise by degrees, as the Supreme Court proceeded to hold them "inapplicable" to legislation in furtherance of collective bargaining.[7] The case of *Texas and N. O. Ry. Co. v. Brotherhood of Railway and Steamship Clerks*,[8] followed by Section 3 of the Norris- La Guardia Act,[9] and later by *Virginia Railway Co. v. System Federation No. 40*,[10]

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[1]335 U. S. 538, 69 S. Ct. 260, 93 L. ed. 209 (1949).

[2]335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 201 (1949).

[3]Sixteen states have outlawed the closed shop either by constitutional amendment or by statute: Arizona, Arkansas, Delaware, Florida, Georgia, Iowa, Louisiana, Maryland, Nebraska, Nevada, North Carolina, Noth Dakota, South Dakota, Tennessee, Texas and Virginia. See A. F. of L. v. American Sash & Door Co., 335 U. S. 538, 554, 69 S. Ct. 260, 266, 93 L. ed. 209, 217 (1949) n. 12.

[4]208 U. S. 161, 174-5, 28 S. Ct. 277, 280, 52 L. ed. 436, 442-3 (1908). The decision invalidated a federal statute prohibiting an interstate carrier from discharging an employee because of membership in a labor union. The statute was held to impair the basic liberty of contract guaranteed by the due process clause of the Fifth Amendment, and employees were declared to have a constitutional right to discharge employees for any reason whatsoever and to discriminate against union labor by use of the so-called "yellow-dog contract." "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it... In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

[5]236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441 (1915). The Court reaffirmed the reasoning of the Adair case and invalidated a state statute prohibiting the "yellow-dog contract," as a violation of the due process clause of the Fourteenth Amendment.

[6]For criticisms of the decisions, see: Olney, Discrimination against Union Labor—Legal?, 42 Am. L. Rev. 161 (1908); Powell, Collective Bargaining Before the Supreme Court, 33 Pol. Sci. Quar. 396 (1918); Notes (1915) 2 Va. L. Rev. 540; 28 Harv. L. Rev. 496; 13 Mich. L. Rev. 497.

[7]See Note (1948) 5 Wash. & Lee L. Rev. 216 for a detailed consideration of the cases so ruling.

[8]281 U. S. 548, 50 S. Ct. 427, 74 L. ed. 1034 (1930).

[9]47 Stat. 70 (1932), 29 U. S. C. A. § 101 (1947).

[10]300 U. S. 515, 57 S. Ct. 592, 81 L. ed. 789 (1937).

and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[11] finally brought the Court to declare in *Phelps Dodge Corp. v. National Labor Relations Board* that "The course of decisions in this court since *Adair v. United States*... and *Coppage v. Kansas*... have completely sapped those cases of their authority,"[12] thus indicating that for all practical purposes these cases were overruled.[13]

Organized labor could claim a great victory. The courts, realizing that the manifest inequality of the bargaining positions of employers and individual unorganized workers was such that the individual workman had no actual liberty to bargain for an advantageous contract, had fully co-operated with Congress' efforts to remedy this unbalance, and had refused to allow liberty of contract to be used as a means of discriminating against the union worker. The Supreme Court, by holding the *Adair* and *Coppage* cases inapplicable to legislation in furtherance of collective bargaining, had removed a festering thorn from the flesh of unionism.

Thus fortified, strong and powerful unions, by use of the closed shop contract, could virtually control the hiring of workmen, because a man who declined to join the union could not obtain employment. And by use of the union shop agreement, a workman who refused to join the union could not retain his employment. The former underdog, organized labor, having gained its freedom from economic oppression, was now in position to become the despot of the economic sphere.[14]

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[11]301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937).

[12]313 U. S. 177, 187, 61 S. Ct. 845, 849, 85 L. ed. 1271, 1279 (1941). The authority of the Board was recognized to compel an employer to hire certain workmen even where no prior employment relationship had existeed. For an argument that that the Adair and Coppage decisions should not have been regarded as having lost force entirely, see Note (1948) 5 Wash. & Lee L. Rev. 216.

[13]J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 64 S. Ct. 576, 88 L. ed. 762 (1944) apparently resolved any possible doubts remaining after the Phelps Dodge decision that the doctrine of absolute freedom of contract had been discarded.

The courts passing on the validity of the state anti-closed shop legislation before the Supreme Court in the principal cases gave no weight to the Adair and Coppage decisions. "State laws... which outlaw 'yellow-dog contracts' were first ruled unconstitutional but are now regarded as valid." State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, 873 (1947): "... outdated and overruled cases and annotations holding anti-yellow-dog-contract legislation invalid." American Federation of Labor v. American Sash & Door Co., 67 Ariz. 20, 189 P. (2d) 912, 919 (1948). The Adair and Coppage cases were not even mentioned in Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 149 Neb. 507, 31 N. W. (2d) 477 (1948) which upheld Nebraska's anti-closed shop amendment and American Federation of Labor v. Watson, 60 F. Supp. 1010 (S. D. Fla. 1945) sustaining Florida's anti-closed shop amendment. The latter decision was reversed in 327 U. S. 582, 66 S. Ct. 761, 90 L. ed. 873 (1946) but on jurisdictional grounds only.

[14]In regard to organized labor's arbitrary use of power, see Richberg, Significant Developments in Labor Law, 1941-46 (1946) 14 Geo. Wash. L. Rev. 537.

Recognizing the system of compulsory unionism as a barrier to free employment, several states proceeded to adopt statutes or constitutional amendments prohibiting union security devices and outlawing the closed shop agreement.[15] Inasmuch as the closed shop is the ultimate objective of the unionist, these laws were bitterly denounced, and their constitutionality was attacked in the three principal cases which were ultimately decided together by the United States Supreme Court in January, 1949.[16] Their invalidity was argued on three basic grounds: (1) violation of the right of freedom of speech and assembly guaranteed by the First Amendment, (2) impairment of the obligation of contract in violation of Article I, Section 10 of the Constitution, and (3) violation of the equal protection and due process clauses of the Fourteenth Amendment.

The Arizona constitutional amendment was considered in a separate opinion because of the contention that the amendment denied equal protection of the laws in that it provided that no person should be denied employment or the right to retain his employment because of non-membership in a labor organization, and prohibited employment contracts which discriminate against non-union workers, but contained no prohibitions against discrimination because of union membership. The Court overruled this objection on the reasoning that even though the amendment itself did not prohibit discrimination against union workers, a state anti-yellow-dog-contract law afforded the same protection to union workers that the amendment provided for non-union workers.[17]

In *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.* and *Whitaker v. North Carolina*[18] the other arguments were directed against a Nebraska constitutional amendment and a North Carolina statute providing that no person shall be denied employment because of membership or non-membership in a labor organization, and prohibiting contracts which exclude persons from employment be-

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[15]See note 3, supra.

[16]American Federation of Labor v. American Sash & Door Co., 335 U. S. 538, 69 S. Ct. 260, 93 L. ed. 209 (1949); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., and Whitaker v. North Carolina, 335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 201 (1949).

[17]American Federation of Labor v. American Sash & Door Co., 335 U. S. 538, 69 S. Ct. 260, 93 L. ed. 209 (1949) upholding Ariz. Laws (1947) p. 399.

[18]335 U. S. 525, 69 S. Ct. 251, 93 L. ed. 201 (1949), upholding Neb. Const. Art. XV, §§ 13, 14, 15 (1946) and N. C. Laws (1947) c. 328, § 2. The Nebraska case arose from an action for a declaratory judgment on the constitutionality of the amendment, while the North Carolina case arose from a criminal prosecution of a building contractor and local union officials for the violation of the statute.

cause of such membership or non-membership. Because the issues involved were substantially the same, the Court consolidated these cases and rendered a single opinion on the validity of both laws.

The appellants' contention that the laws in question violated the right of freedom of speech and assembly was based on the proposition that "... a closed shop is ... 'an indispensable concomitant' of 'the right of employees to assemble into and associate together through labor organizations' ... 'that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected'."[19]

This unique argument (especially when compared with the appellants' further contention that the laws also denied equal protection to the union members) was deemed "rather startling" by the Court and was sharply rejected.

> "The constitutional right of workers to assemble to discuss and formulate for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans."[20]

As to the contention that the laws in question deprived them of equal protection, the Court found that the appellants' own argument repudiated any equal protection objections:

> "It is precisely because these state laws command equal opportunities for both groups that appellants argue that the constitutionally protected rights of assembly and due process have been violated."[21]

And the appellants' contention that the laws impaired the obligations of existing contracts was curtly dismissed with a reference to *Home Bldg. & Loan Ass'n v. Blaisdell*.[22]

The Court then turned to the crucial and decisive question of due process. In attacking the validity of the Arizona and Nebraska amendments and the North Carolina statute as violating the due process clause, the proponents of the closed shop placed themselves in a rather

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[19]335 U. S. 525, 530, 69 S. Ct. 251, 254, 93 L. ed. 201, 205 (1949).

[20]335 U. S. 525, 531, 69 S. Ct. 251, 254, 93 L. ed. 201, 205 (1949).

[21]335 U. S. 525, 532, 69 .S Ct. 251, 255, 93 L. ed. 201, 206 (1949).

[22]290 U. S. 398, 54, S. Ct. 231, 78 L. ed. 413 (1934), upholding, against an attack under the contract impairment clause, a state statute empowering courts, within limitations, to extend the time for redeeming from mortgage foreclosure sales.

peculiar position. In contending that the right to enter into a closed shop agreement was constitutionally protected, they found it necessary to rely upon the liberty of contract theory of *Adair v. United States* and *Coppage v. Kansas.* The reasoning of these decisions, which for years had been obnoxious to labor and a stumbling block to collective bargaining, was now invoked in aid of labor. How the unionists expected to restore the absolute liberty of contract doctrine and yet retain the victories won by circumvention and restriction of that doctrine was not made clear.

However, the Supreme Court declined to revive the rejected philosophy of the *Adair* and *Coppage* cases, and, just as it had done in the *Railway Clerks,* the *Virginia Railway, Jones & Laughlin* and *Phelps Dodge* decisions, refused to allow the due process clause to be used to strike down legislation designed to protect the worker in obtaining employment free from discrimination—in this instance, discrimination because of *non-membership* in a union.[23]

In sustaining the validity of the "right to work" laws over the due process objection, the Supreme Court recognized the flexibility of due process as applied to legislation regulating conditions deemed detrimental to the public welfare, and indicated that the due process philosophy of the *Adair* and *Coppage* cases has definitely been superseded by the philosophy of *Nebbia v. New York*[24] and *West Coast Hotel v. Parrish.*[25]

In reaffirming the principles of the latter decisions, Justice Black, speaking for the Court, said:

> "... states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, ... Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait-jacket when they

[23]"Appellants now ask us to return ... to the due process philosophy that has been deliberately discarded .... Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers." 335 U. S. 525, 537, 69 S. Ct. 251, 257, 93 L. ed. 201, 208 (1949).

[24]291 U. S. 502, 525, 54 S. Ct. 505, 510, 78 L. ed. 940, 950 (1934): "... the guaranty of due process ... demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

[25]300 U. S. 379, 391, 57 S. Ct. 578, 581, 81 L. ed. 703, 708 (1937): "But the liberty safeguarded is liberty in a social organization which requires the protection of law against evils which menace the health, safety, morals and welfare of the people .... regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

> attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[26]

This very broad language could be interpreted as giving the legislatures, as far as due process is concerned, a free rein in the regulation of commercial and business practices deemed adverse to the public interest. Although the significance of this declaration of principle is as yet a matter of pure speculation, due process limitations may prove to be a relatively minor importance in future industrial regulation.

No strike was involved in these cases contesting the validity of the anti-closed shop laws, and an acute problem remains as to the effect of such laws on the right of union workers to refuse to work with non-union employees, in the light of the provisions of the Thirteenth Amendment against involuntary servitude. Justice Rutledge, in a concurring opinion, raised this question and made it clear that his concurrence in the right of the states to prohibit the making of closed shop contracts did not go so far as to authorize the states to enjoin strikes in protest against working with non-union employees. He would not decide such a "momentous question" until "it is squarely and inescapably presented."[27]

The possible dilemma posed by Justice Rutledge arises from the fact that, while the right of union employees has long been recognized,[28] yet a strike for an unlawful purpose is tortious[29] (though not necessarily enjoinable),[30] and an unlawful purpose would surely be in-

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[26]335 U. S. 525, 536, 69 S. Ct. 251, 257, 93 L. ed. 201, 208 (1949).

[27]335 U. S. 525, 559, 69 S. Ct. 251, 268, 93 L. ed. 201, 220 (1949). In United States v. Petrillo, 68 F. Supp. 845 (N. D. Ill. 1946) one of the grounds for holding the Lea Act, 60 Stat. 89, 47 U. S. C. A. § 506 (1946) invalid was that the Act violated the Thirteenth Amendment in that it interfered with the employee's right to strike. However, on appeal the United States Supreme Court held that the Act, on its face, did not so violate the Thirteenth Amendment, but made no decision as to whether a particular application of the statute would amount to involuntary servitude prohibited by the Thirteenth Amendment. United States v. Petrillo, 332 U. S. 1, 67 S. Ct. 1538, 91 L. ed. 1877 (1947).

[28]Cohn & Roth Electric v. Bricklayers,' Masons' and Plasterers' Local Union, No. 1, 92 Conn. 161, 101 Atl. 659 (1917); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906); Kingston Trap Rock Co. v. International Union of Operating Engineers, 129 N. J. Eq. 570, 19 A. (2d) 661 (1941). Cf. Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917).

[29]Southern S. S. Co. v. N. L. R. B., 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 1246 (1942); Yankee Network v. Gibbs, 295 Mass. 56, 3 N. E. (2d) 228 (1936); Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900); Carew v. Rutherford, 106 Mass. 1 (1870); Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941); American Guild of Musical Artists, Inc. v. Petrillo, 286 N. Y. 226, 36 N. E. (2d) 123 (1941).

[30]The Norris-LaGuardia Act or comparable State Acts may prevent injunctive relief, even though the union action be tortious,

volved in an attempt to compel an employer to violate a state law by refusing to hire non-union workers. However, the difficulty concerning strikes may be more apparent than real. The right of unionists to refuse to work in an open shop has been doctrinally formulated, but there is no authority that it is constitutionally protected, and therefore it might be abrogated by statute. If union members simply refused to work with non-union employees, there would be no necessity for any attempt to be made to enjoin the strike. Rather, the union employees having voted themselves out of a job, the employer could then proceed to hire non-union workers without being guilty of discrimination.

However, if the union employees should resort to picketing to implement their purpose of compelling the employer to refrain from hiring non-union labor, a very real problem would be presented, because peaceful picketing is protected by the constitutional guarantee of freedom of speech.[31] A direct indication of how the Supreme Court of the United States would resolve this problem is afforded by the very recent case of *Giboney v. Empire Storage and Ice Co.*,[32] decided on April 4, 1949, by a unanimous Court. There it was held that the free speech doctrine does not protect peaceful picketing directed at forcing a violation of a state anti-trust law, and an injunction against such picketing was sustained. The *Giboney* decision confirms the result previously reached by the Massachusetts court, which has squarely held that the free speech doctrine does not prohibit an injunction against peaceful picketing aimed at forcing an employer to discharge a majority of its employees in violation of the provisions of the State Labor Relations Act.[33] The California court has recently evaded a similar issue in *Park & Tilford Import Corp. v. International Brotherhood of Teamsters*.[34] There the defendant union peacefully picketed the plaintiff for the purpose of obtaining a closed shop agreement,

[31]Bakery and Pastry Drivers and Helpers, Local 802 v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. ed. 1178 (1942); A. F. of L. v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. ed. 855 (1941); Carlson v. People of California, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940); Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1092 (1940).

[32]17 U. S. L. Week. Justice Black, delivering the opinion of the Court, declared: "It has rarely been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding." 17 U. S. L. Week 4307, 4309.

[33]R. H. White Co. v. Murphy, 310 Mass. 510, 38 N. E. (2d) 685 (1942).

[34]27 Cal. (2d) 599, 165 P. (2d) 891, 162 A. L. R. 1426 1946).

which the plaintiff could not legally make because to do so would violate the National Labor Relations Act, inasmuch as the defendant union did not represent a majority of plaintiff's employees. The court enjoined defendant from demanding that plaintiff violate the law, but otherwise permitted the picketing as a form of free speech.

If, in North Carolina, Nebraska or Arizona, a union should now illegally demand a closed shop, and peacefully picket an open shop employer to coerce him into such an agreement, the Supreme Court of the United States may be "squarely and inescapably" confronted with the problem anticipated by Justice Rutledge—the problem of reconciling the free speech doctrine with the constitutionality of anti-closed shop legislation.

HUGH T. VERANO*

PROPERTY—RIGHT OF SUBSEQUENT GRANTEE BY QUITCLAIM DEED OR WITH ACTUAL NOTICE TO TAKE ADVANTAGE OF PRIOR GRANTEE'S FAILURE TO RECORD. [Arkansas]

Though the systems for recording interests in land vary greatly in details throughout the various jurisdictions, it is generally conceded that the primary purpose of recordation is to protect subsequent purchasers of a prior conveyed interest who have parted with value on the strength of the public record.[1] The fundamental object of recording statutes, then, is to create a dependable source of title information upon which prospective buyers or lenders may rely to avoid being misled by the appearances outside of the record.

Despite the general accord on this point, however, courts and legislatures occasionally combine to disregard the underlying design of title registration systems. This unfortunate process is demonstrated in the recent Arkansas decision of *Dill v. Snodgress*,[2] where the correct result was achieved in the face of some peculiar reasoning and illogical

*In collaboration with the Editors.

[1]Williams v. Jackson, 107 U. S. 478, 2 S. Ct. 814, 27 L. ed. 529 (1883); Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 168 (1892): "The object of these recording acts is to give constructive notice of the contents thereof to subsequent purchasers and mortgagees.' [And] ... the only persons as to whom the failure to record a deed makes it void are subsequent purchasers and mortgagees in good faith and for a valuable consideration ...." Phoenix Title & Trust Co. v. Old Dominion Co., 31 Ariz. 324, 253 Pac. 435, 439, 59 A. L. R. 625, 632 (1927): "We think, therefore, that we should construe the recording acts so as to afford the greatest possible protection to the man who in good faith endeavors to comply with them." Walsh, Mortgages (1934) 136-7.

[2]211 S. W. (2d) 440 (Ark. 1948).

rules. L had contracted to sell land for $2200 to M, who assigned the contract with its equity to S, the assignment being properly recorded. S conveyed to O, who recorded. A year later O reconveyed to S, but S failed to record this retransfer. D, with actual notice of S's interests, obtained a quitclaim deed from O, the record owner, for $100. D brought suit to determine the title, and the court, after revealing some of the inconsistencies of the state's law in this field, properly held in favor of S.

The Arkansas legislature has contributed to the confusion of issues in title recording cases by failing to set up a uniform recording system to apply to both deeds and mortgages. In one section it has provided that an unrecorded *deed* shall not be valid against a subsequent purchaser for value who is *without actual notice* of the prior deed.[3] Another section, however, provides merely that a *mortgage* shall not be a lien on the mortgaged property until it is filed for record.[4] The Arkansas courts, noting the different language of the two sections, have concluded that in the case of an unrecorded mortgage, a subsequent mortgagee or purchaser takes free of the lien even though he has actual notice of the prior mortgage.[5] But the courts have refused to follow this process of literal interpretation to its logical extreme, for they hold that the unrecorded mortgage does create a valid lien as between the parties to the mortgage, the failure to record affecting the interests of third parties only.

There seems to be no plausible reason for the legislature's distinction between the consequence of failure to record a deed and a mortgage.[6] Surely the mortgagee's security interest in the land may be as valuable in a given situation as in the grantee's ownership in another. Third parties, whom recording systems are designed to protect, are as likely to be misled by failure to record the one instrument as the

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[3]Ark. Stat. (Pope Digest, 1937) § 1847: "No deed ... for the conveyance of any real estate, ... shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; ..."

[4]Ark. Stat. (Pope Digest, 1937) § 9455: "Every mortgage ... shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

[5]Sims v. Petree, 206 Ark. 1023, 178 S. W. (2d) 1016, 1019 (1944): "We have often held that an unrecorded mortgage is no lien on the property as against a stranger, although he may have actual knowledge of its existence."

[6]Similar inconsistent rules exist in other jurisdictions. For example, in Randall v. Hamilton, 156 Ga. 661, 119 S. E. 595 (1923), the court held that a subsequent deed grantee must record his own deed in order to prevail over a prior unrecorded *deed*, but that it was not necessary to record his own deed in order to prevail over a prior unrecorded *mortgage*.

other. If a subsequent taker with actual notice is denied the protection of the recording statute in the one case, he should be under the same disability in the other. One with actual notice should not be able to upset prior equities based on a mortgage instrument, where in the same court he is not so permitted if the instrument is a deed. Where the purposes for the laws are the same, there should be consistency of effect.

Though the Arkansas court in the principal case specifically acknowledged the mortgage recording rule that an unrecorded mortgage is not a lien on the property as against a third party even with actual notice, the opinion does not attempt to justify the proposition.[7]

One reason which may be advanced in defense of the Arkansas view[8] is that it stimulates speedy recording of all mortgages.[9] This in itself is a worthy objective, but it should not be extended to protect undeserving parties. One who already has notice can hardly be misled by an incomplete record and should not be permitted to use the recording acts to injure the rights of the prior lienor. Where the carelessness of the prior claimant has not deceived the subsequent purchaser, the latter should not be allowed to profit by deliberately accepting a seemingly foolhardy risk.

Another purpose of protecting the subsequent purchaser with notice is said to be to forestall the possibility of a false inducement of credit. It is argued that the mortgagee by failing to record permits the mortgagor to contract further debts that his property will not adequately se-

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[7]211 S. W. (2d) 440, 443 (Ark. 1948).

[8]Several other jurisdictions allow some subsequent takers with notice to prevail over prior unrecorded interests. Va. Code Ann. (Michie, 1946) § 5194: "... every deed ... conveying real estate ... shall be void as to all purchasers for valuable consideration without notice ... and lien creditors, until and except from the time it is duly admitted to record ...." In Neff's Adm'r v. Newman, 150 Va. 203, 209, 142 S. E. 389, 390 (1928) the court said, "... nowhere does it appear that since the enactment of section 5194 this court has held that an unrecorded deed of trust would be protected against judgment creditors with or without notice." Similarly, in Tennessee it is held that, while subsequent purchasers with notice cannot cut off prior unrecorded interests, creditors with notice can do so. Lookout Bank v. Noe, 86 Tenn. 21, 5 S. W. 433 (1887). Decisions and statutes in Louisiana, North Carolina and Ohio support the Arkansas doctrine. Ridings v. Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. ed. 401 (1888); County Sav. Bank of Abbeville v. Tolbert, 192 N. C. 126, 133 S. E. 558 (1926); Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72 (1921); Building Ass'n v. Clark, 43 Ohio 427, 2 N. E. 846 (1885).

[9]See 2 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 649 on the general American policy of stimulating prompt recording. The same policy has been used to justify the requirement that the subsequent bona fide purchaser must himself have recorded his interest. Note (1935) 15 Ore. L. Rev. 66, 70; 5 Tiffany, Real Property (3d ed. 1939) § 1276.

cure.[10] This contention has little practical import, however, for any lender with actual notice of prior interests in the security sought cannot be said to be falsely induced to part with his money.

It is further suggested that as the first mortgagee's negligence in failing to record occasioned the controversy, he should suffer the consequences.[11] Having put the power in his grantor to mislead and raise money thereby, the prior claimant should bear the consequences. But, again, the subsequent purchaser has not been deceived; having had actual notice, it appears that he was merely gambling.

None of these lines of reasoning seems adequate to refute the plain logic that in view of the basic purposes of the recording act, if recordation of the prior interest will defeat the subsequent purchaser, so also should his actual notice. Recordation is but a substitute for actual notice. If a person already knows that some one other than his grantor is the real owner, the record books can impart no new warning to him.[12] Further, the law should diminish the possibility of sharp practice, rather than assume the embarrassing position of encouraging it. Under the doctrine of the Arkansas statute, a subsequent purchaser with knowledge of a prior mortgage plus knowledge that it is unrecorded, may still cut off the prior interest, thereby effectuating something closely akin to a fraud,[13] with the apparent encouragement of the law.

The court in the principal decision was correct in pointing out that the rule concerning unrecorded mortgages did not govern the case because it "does not protect one who, with notice that the record owner of property has conveyed it, procures from such owner a quitclaim deed."[14] Inasmuch as the plaintiff was found to have had actual notice of the defendant's prior interest, the only authority necessary to resolve the case against him was, of course, the recording statute on deeds, which provides that only a subsequent purchaser *without notice* will

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[10]Mayham v. Coombs, 14 Ohio 429, 434 (1846): "... that mischief was ... that a man might take a mortgage of his neighbor's property, and keep it concealed ..., thereby enabling that neighbor to contract further debts, which he would be unable to pay, and thereby defraud the community around him." See also 1 Jones, Mortgages (8th ed. 1928) § 671.

[11]Stafford v. Ballou, 17 Vt. 329 (1845); Briggs v. Jones, L. R. 10 Eq. 92 (1870); Rice v. Rice, 2 Drew 73, 61 Eng. Rep. 646 (1853).

[12]People's Bldg. & Loan Ass'n v. Leslie Lumber Co., 183 Ark. 800, 38 S. W. (2d) 759 (1931); Am. Jur. 234: "Of course when a person knows of a thing he has notice' thereof, as no one needs notice of what he already knows. In other words, actual knowledge supersedes a requirement of notice."

[13]Se 2 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 660.

[14]Dill v. Snodgrass, 211 S. W. (2d) 440, 443 (Ark. 1948).

prevail over a prior unrecorded deed. The added mention of the quitclaim feature of the deed taken by the subsequent purchaser was not necessary to the decision,[15] but this reference reveals another questionable point of view which not infrequently appears in recording controversies—the conclusive presumption against the good faith of quitclaim grantees.

One of the reasons given for this disrespect for quitclaim takers is that the very form of the conveyance puts the purchaser on inquiry to discover possible defects in his grantor's title.[16] It is said that his suspicions should be aroused as to the validity of his grantor's title. But the mere fact that the grantor declines to warrant his title should not in itself be enough to arouse any suspicions. If it was ever true that quitclaim deeds were used only where the title conveyed was in doubt, no such conveyancing practice is followed in the present age.[17] Certainly it is conceivable that one may be willing to accept the common quitclaim for the very reason that he is confident he is getting a perfect title. Furthermore, the grantor may want his purchaser to satisfy himself as to the condition of the title either from the records or from other sources, and may be quite unwilling to burden his estate by convenants running into the future against possible defects of which he has no knowledge but which he does not wish to risk.[18] Finally, the fact that a personal convenant of title is required may itself be just as suspicious a circumstance as the failure to obtain a warranty. The fact that one takes a conveyance of "right, title and interest" in certain

[15]It is to be noted that the court was apparently in error in citing Skelly Oil Co. v. Johnson, 209 Ark. 1107, 194 S. W. (2d) 425 (1946) for the broad proposition that failure to record a deed cannot be utilized by a subsequent quitclaim grantee with actual notice. The opinion in that case clearly indicates that it was based on the deed recording statute of Arkansas which, unlike the mortgage recording statute, expressly stipulates that for a subsequent purchaser to prevail over a prior unrecorded deed, he must be without actual notice. There was no emphasis in that decision on the quitclaim form of the deed used; rather, the court stressed the actual notice of the grantee.

[16]Townley v. Corona Coal & Iron Co., 200 Ala. 627, 77 So. 1 (1917); Hannan v. Seidentopf, 113 Iowa 658, 86 N. W. 44 (1901); Backus v. Cowley, 162 Mich. 585, 127 N. W. 775 (1910); Muller v. McCann, 50 Okla. 710, 151 Pac. 621 (1915).

[17]See Staggs v. Joseph, 158 Ark. 133, 249 S. W. 566, 567 (1923): "A quitclaim deed is a substantive form of conveyance, and a party holding under such a deed may be entitled to protection as an innocent purchaser." Walsh, Mortgages (1934) 152-3.

[18]This fact has been specifically recognized by the Arkansas court in Staggs v. Joseph, 158 Ark. 133, 249 S. W. 566, at 567 (1923). And see McDougall v. Murray, 57 Wash. 76, 106 Pac. 490, 491 (1910): "There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty, ... even when the title is known to be perfect.... he may be unwilling to do so [assume any personal responsibility] from notions peculiar to himself...."

property should not ordinarily indicate that he intends merely to take a chance of title.[19]

It is further contended, however, that since by a quitclaim deed the grantor undertakes to convey only his right or interest in the property, whatever that right or interest may be, such a deed can pass only the interest that may remain in the grantor, and so the rights of the prior taker are not affected.[20] This reasoning ignores the fact that the normal effect of recording statutes is to confer on the grantor a power to convey to a second grantee the interest of which he has already divested himself by previous conveyance to another party who has failed to record. Recording does not have the effect of vesting the intended interest in the prior grantee; the deed or mortgage accomplishes that purpose. The failure to record simply puts the grantor in position to *divest* that interest.[21] The grantor's power to divest depends not on *how* he shall convey to the second taker—i.e., by quitclaim or otherwise—but on his first grantee's carelessness in failing to preserve his priority of interest.

Still another defense of the quitclaim deed is available. One may be a bona fide purchaser despite a quitclaim appearing in his chain of title.[22] It is difficult to see how a quitclaim grantee whose deed is insufficient by itself to defeat a prior unrecorded conveyance may nevertheless serve as a valid link in the chain of his grantee's title, thereby upsetting the prior unrecorded conveyance, after all. "The practical necessity . . . of protecting a subsequent claimant under the grantee in the quitclaim deed, tends strongly to indicate the propriety of protecting the grantee himself."[23]

The continued acceptance of such apparently irrational rules as were embraced by the court in the principal case emphasizes the need

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[19]Moelle v. Sherwood, 148 U. S. 21, 13 S. Ct. 426, 37 L. ed. 350 (1893); Schott v. Dosh, 49 Neb. 187, 68 N. W. 346 (1896); Babcock v. Wells, 25 R. I. 23, 54 Atl. 596 (1903).

[20]Virginia & Tenn. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426 (1896); Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co., 116 Va. 211, 81 S. E. 93 (1914). See 5 Tiffany, Real Property (3d ed. 1939) § 1277.

[21]Aigler, The Operation of the Recording Acts (1924) 22 Mich. L. Rev. 405, 415; 5 Tiffany, Real Property (3d ed. 1939) § 1262.

[22]Stanley v. Schwalby, 162 U. S. 255, 277, 16 S. Ct. 754, 763, 40 L. ed. 960, 967 (1896): "... mere knowledge that the deed is in that form [quitclaim] cannot affect the title of one claiming under a subsequent deed of warranty from the grantee."; Meikel v. Borders, 129 Ind. 529, 29 N. E. 29 (1891). See also 5 Tiffany, Real Property (3d ed. 1939) § 1277, at 44: "... even if the grantee in a quitclaim deed cannot claim protection as a bona fide purchaser, a purchaser from him for value holding under a warranty deed can so claim."

[23]5 Tiffany, Real Property (3d ed. 1939) § 1277, at 45.

for thorough-going revision in a number of jurisdictions of the law concerning recording controversies.

First, the failure to record a mortgage or deed should incur the same consequences. There is no sound basis for distinction between the hardship involved in cutting off one interest or the other. Second, a subsequent taker with actual notice of a prior interest should not be allowed to take advantage of the previous failure to record. The advantage that the contrary rule might bring in stimulating prompt recording is more than offset by the unfair losses visited on prior takers and the undeserved gain bestowed on subsequent takers. Third, quitclaim grantees should be treated the same as warranty deed grantees in so far as the issue of their good faith is concerned. That issue should be decided on the particular facts of each case.

Poorly-phrased, piecemeal legislation and ill-advised judicial application of statutes or out-worn common law concepts have resulted in the abandonment or at least the inadequate employment of these salutary principles in some states. Where the law has drifted into this unsatisfactory condition, the only practicable remedy would seem to be in the adoption of a comprehensive recording statute adopting a rational set of rules to govern recording controversies.

JACK B. COULTER

RELEASE—SETTLEMENT WITH ORIGINAL TORT-FEASOR AS RELEASE OF NEGLIGENT PHYSICIAN WHO AGGRAVATED INJURY. [Virginia]

When a dentist,[1] physician, or surgeon negligently treats injuries caused by the tort of another, it is generally true that the injured party can recover damages from the original tort-feasor for the original harm and also for aggravated or increased injuries resulting from the negligence or lack of skill of the physician.[2] This rule, however, is not unqualified; the injured party must have used reasonable care in

[1]The rules governing duty and liability of physicians and surgeons in performing professional services are applicable to dentists. McTyeire v. McGaughy, 222 Ala. 100, 130 So. 784 (1930); Smith v. McClung, 201 N. C. 648, 161 S. E. 91 (1931); 21 R. C. L. 386. The term "physician" will be used hereafter to refer to all three types of professional practitioners.

[2]O'Quinn v. Alston, 213 Ala. 346, 104 So. 653, 39 A. L. R. 1263 (1925); City of Covington v. Keal, 280 Ky. 237, 133 S. W. (2d) 49, 126 A. L. R. 905 (1939); Yarrough v. Hines, 112 Wash. 310, 192 Pac. 886, 887 (1920): "such negligent or mistaken treatment of the physician does not become an intervening cause, and... the injured party may recover damages for the injury he has sustained, including the aggravation thereto resulting from the mistaken or improper treatment." Prosser, Torts (1941) 362.

selecting the attending physician,[3] and it must be shown that the injuries caused by the physician are proximately traceable to the original tort, not a separate and independent wrong.[4] The usual reason given for placing this additional liability on the original tort-feasor is that the law regards his negligence in causing the original injury as the proximate cause of damages flowing from the subsequent negligence of the physician.[5] Of course, the injured person, if he so desires, may instead recover damages from the negligent physician in an action for malpractice, to the extent that the negligent treatment aggravated the original injury.[6]

If the injured party can recover from either the original tort-feasor or the physician for any aggravation of the initial injury due to the negligence or lack of skill on the part of the physician, it would seem reasonable that he may release the original wrongdoer from liability for the original injury and still recover from the physician for any aggravation. However, in the recent decision of *Corbett v. Clarke*,[7] a case of first impression in Virginia, the opinion indicates by way of dictum that the courts are not prone to follow such logic, but prefer to hold that a release of the original tort-feasor operates as a release of the negligent physician.

In the *Corbett* case the plaintiff sought dental treatment from one Dr. Temple, of the Standard United Dental Corporation, who, in the course of extracting a tooth, left part of the root in the gum and refused to give further treatment. A few months later plaintiff consulted defendant, Dr. Clarke, who located the broken tooth root and also recommended pulling other teeth. Soon thereafter, defendant treated plaintiff, removing one of her teeth and then proceeding to the job of extracting the broken root. In the course of this latter operation

[3]Wright v. Blakeslee, 102 Conn. 162, 128 Atl. 113 (1925); City of Covington v. Keal, 280 Ky. 237, 133 S. W. (2d) 49, 126 A. L. R. 905 (1939); Texas & P. R. Co. v. Hill, 237 U. S. 208, 214, 35 S. Ct. 575, 577, 59 L. ed. 918, 924 (1915): "all liability on the part of the defendant [was excluded] for any injury resulting from the intervening malpractice of the surgeon ... if the plaintiff had failed to exercise reasonable care in the selection of a competent surgeon ...." See also 15 Am. Jur., Damages §§ 84, 85.

[4]Piedmont Hospital v. Truitt, 48 Ga. App. 232, 172 S. E. 237 (1933); Purchase v. Seelye, 231 Mass. 434, 121 N. E. 413, 8 A. L. R. 503 (1918); 15 Am. Jur., Damages § 83.

[5]O'Quinn v. Alston, 213 Ala. 346, 104 So. 653, 39 A. L. R. 1263 (1925); J. Ray Arnold Lumber Corp. v. Richardson, 105 Fla. 204, 141 So. 133 (1932); Mitchell v. Peaslee, 63 a. (2d) 302 (Me. 1948).

[6]Hoffman v. Houston Clinic, 41 S. W. (2d) 134 (Tex. Civ. App. 1931); Restatement, Torts (1939) § 879, comment (a).

[7]187 Va. 222, 46 S. E. (2d) 327 (1948).

defendant inserted a packing into the cavity from which he had just pulled the other tooth, and thereafter he negligently sewed up the wound without removing the packing. Infection resulted, and subsequently plaintiff discovered the presence of the packing. On August 6, 1946, plaintiff had brought suit against the Dental Corporation and Dr. Temple, and on October 24, 1946, plaintiff brought suit against the present defendant, Dr. Clarke. On November 26, 1946, she dismissed the action against the Dental Corporation and Dr. Temple, executing to them a full release. When the action against Dr. Clarke came to trial, the court entered judgment on the release and dismissed the case. On writ of error to the Supreme Court of Appeals of Virginia the decision was reversed and the case remanded.

The result on the particular facts presented was entirely sound. Speaking through Chief Justice Hudgins, the court, in pointing out the ineffectiveness of the plea of release, said:

> "the consideration stated in the release was only $225 and was said to be a consideration for the injuries inflicted upon plaintiff by the original wrongdoers. Dr. Clarke had no connection, either contractual or otherwise, with the original *tort feasors.* It is alleged that he, and he alone, inflicted the specific injuries for which compensation is now claimed. If Dr. Clarke's contention is sustained, he will be relieved of all liability for his own separate and distinct wrongs and plaintiff will remain uncompensated for these specific injuries. Under these circumstances, the release of the original wrongdoers should not affect plaintiff's right to recover damages for specific injuries which she now alleges were inflicted upon her by the gross negligence of Dr. Clarke."[8]

This language clearly suggests that the court based its decision on the fact that the injuries caused by the defendant were separate and distinct from the original wrong. That being the nature of the injuries, the original tort-feasor would not have been liable for the subsequent negligence of the defendant in any event, and, therefore, a release given to them would have no reference to the later injuries. Rather than adopt this obvious conclusion, however, the court chose to base the non-liability of the original wrongdoer for the injuries caused by the defendant on the equally sound, but rather nebulous grounds of unforeseeability and lack of proximate causation.[9]

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[8]Corbett v. Clarke, 187 Va. 222, 229, 46 S. E. (2d) 327, 330 (1948).

[9]"These subsequent negligent acts were more than the aggravation of the original injury. In the present advanced stage of medical science, it is not reasonable to anticipate that a dental surgeon will be so grossly negligent as to fail to remove absorbent cotton or other foreign substance from an opening in his patient's

That the decision did in fact turn essentially on the finding that the defendant had inflicted a separate and distinct harm is demonstrated by a significant dictum to the effect that had the negligent acts of the defendant actually resulted in an aggravation of the original injuries, the decision would have been different. The court expressly took the position that in those circumstances, since the original wrongdoer would then have been liable for the additional injuries, a settlement with him would have operated as a bar to any action against the defendant.[10]

Undoubtedly the majority rule in such a situation as the dictum contemplates is that where one injured through the fault of another releases the person responsible for the injury from all liability, the release operates as a bar to an action against a physician who has aggravated the injury to recover for malpractice in connection with the treatment.[11] The courts have usually reasoned that since a recovery for the malpractice of the attending physician may be had against the person causing the initial injury, the injured person in settling with the original wrongdoer is receiving full compensation for all injuries arising out of the wrong, and, thus, cannot recover from the physician.[12]

This rule, as nearly as can be found, had its inception in three decisions, most of the later cases in point relying either on them or on cases which in turn rely on them.[13] In *Ross v. Erickson Construction Co.*,[14] it was held that where, under the Washington Workmen's Compensa-

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body before closing or sewing up the incision resulting from an operation. To so hold would strain the usual and normal concept of 'proximate cause' to the breaking point." Corbett v. Clarke, 187 Va. 222, 226, 46 S. E. (2d) 327, 329 (1948).

[10]Corbett v. Clarke, 187 Va. 222, 224, 46 S. E. (2d) 327, 328 (1948). Apparently there is no Virginia case ruling directly on this point, but the court approved decisions from a number of other jurisdictions.

[11]Sams v. Curfman, 111 Colo. 124, 137 P. (2d) 1017 (1943); Phillips v. Werndorff, 215 Iowa 521, 243 N. W. 525 (1932); Smith v. Thompson, 210 N. C. 672, 188 S. E. 395 (1936); Martin v. Cunningham, 93 Wash. 517, 161 Pac. 355 (1916); Prosser, Torts (1941) 1108.

[12]See cases cited, note 11, supra. In Thompson v. Fox, 326 Pa. 209, 192 Atl. 107, 109 (1937), it was said: "For the same injury, however, an injured party can have but one satisfaction and the receipt of such satisfaction, either as payment of a judgment recovered or consideration for a release executed by him, from a person liable for the same injury, necessarily works a release of all others liable for such injury and prevents any further proceeding against them."

[13] Sams v. Curfman, 111 Colo. 124, 137 P. (2d) 1017 (1943); Fienstone v. Allison Hospital, 106 Fla. 302, 143 So. 251 (1932); Keown v. Young, 129 Kan. 563, 283 Pac. 511 (1930); Benesh v. Garvais, 221 Minn. 1, 20 N. W. (2d) 532 (1945); Smith v. Thompson, 210 N. C. 672, 188 S. E. 395 (1936); Mier v. Yoho, 114 W. Va. 248, 171 S. E. 535 (1933).

[14]89 Wash. 634, 155 Pac. 153 (1916).

tion Act, an employee accepted compensation, he was barred from bringing a subsequent action against a negligent physician. The reason given was that the legislature, in passing the Act, intended to consolidate all claims, including aggravation, which an injured employee might have as a result of an industrial accident, and therefore the claim for malpractice had necessarily been included in the award. In *Martin v. Cunningham,*[15] the same court held that a full release of the original tort-feasor required a similar conclusion at common law. However, the court here seemed to treat the case as one of joint tort-feasorship producing a single and indivisible injury, and thus its decision was based on the well-settled doctrine that release of one joint tort-feasor indicates satisfaction for the injury, and releases all other joint tort-feasors. In the Wisconsin case of *Hooyman v. Reeve*[16] the court considered it immaterial whether or not the original wrongdoer and the physician were joint tort-feasors in the technical sense, and arrived at its decision solely on the ground that, full satisfaction having been received from the original wrongdoer in consideration for a release of all claims against him, including claims for aggravation of the original injury, the wrong had been paid for once.

From the rather arbitrary way in which the "release rule" has been applied, it seems that the courts are often motivated by the fear that the injured party will receive double satisfaction for the wrongs done him.[17] Unfortunately, the more recent decisions show, if anything, a trend towards even stricter application of the rule against recovery.[18]

Many of the cases which appear to reach a conclusion different from the general rule are distinguishable on their facts. Thus, where the release is given *before* the malpractice has occurred or has been discovered, it is not a bar, because the parties thereto could not have anticipated future injury, and a release only operates to release liabilities known to be in existence.[19] Or, the injured party in giving the release may reserve his right to sue the physician.[20] Or, if the original tort-

[15]93 Wash. 517, 161 Pac. 355 (1916).

[16]168 Wis. 420, 170 N. W. 282 (1919).

[17]Sams v. Curfman, 111 Colo. 124, 137 P. (2d) 1017 (1943); Smith v. Thompson, 210 N. C. 672, 188 S. E. 395 (1936); Thompson v. Fox, 326 Pa. 209, 192 Atl. 107 (1937).

[18]Sams v. Curfman, 111 Colo. 124, 137 P. (2d) 1017 (1943); Benesh v. Garvais, 221 Minn. 1, 20 N. W. (2d) 532 (1945).

[19]Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464 (1916); Noll v. Nugent, 214 Wis. 204, 252 N. W. 574 (1934).

[20]Staehlin v. Hochdoerfer, 235 S. W. 1060 (Mo. 1921); Amiere v. St. Joseph's Hospital, 159 Misc. 563, 564, 288 N. Y. S. 483 (1936): "...where the instrument expressly reserves the right to pursue the others it is not technically a release but a covenant not to sue, and they are not discharged."

feasor furnishes the physician, using reasonable care in the selection, the tort-feasor is not then liable for the physician's negligence,[21] and a release to him would have no effect on the physician's liabilities.[22]

In applying the general rule it is obvious that some courts have tended to confuse the situation with that in joint tort-feasor cases, for the effectiveness of the release has often been based on the assumption that the injuries are "single and indivisible," when actually the case arises from successive wrongs with the original malefactor being liable for the whole injury and the subsequent wrongdoer liable only for his share of the damage. Application of joint tort-feasor law here appears to be improper for three reasons: (1) the malpractice of the physician gives the injured party a several cause of action against him;[23] (2) the rule that the original tort-feasor is not liable where he selects the psysician, using due care in the selection, recognizes the idea of separate injuries;[24] (3) even in the absence of a specific contribution statute, the original wrongdoer who has been held for the entire harm is allowed to be subrogated to the injured party's claim against the physician.[25]

That the court in the principal case was correct in refusing to extend the effect of the release to the damages caused by the defendant's entirely independent wrongdoing is beyond question. But, in espousing the general rule of automatically applying a release to discharge both tort-feasors in cases involving aggravation of original injuries, the court is adopting a handy rule of thumb which will result in injustice in many cases.[26] The question of whether the consideration for

[21]Where one who injures another procures a physician, using due care in the selection, he is not liable for any aggravation of the original injury resulting from negligent or unskillful treatment by the physician. Such physician, however, is liable to the extent of his own malpractice and a judgment against the original tort-feasor will not bar a subsequent action against the physician. The usual reason given for this rule is that the physician is not an agent or servant of the original tort-feasor, but is an independent contractor, and is personally liable for his own wrong. Nall v. Alabama Utilities Co., 224 Ala. 33, 138 So. 411 (1931); Gosnell v. Southern Ry. Co., 202 N. C. 234, 162 S. E. 569 (1932); Hoffman v. Houston Clinic, 41 S. W. (2d) 134 (Tex. Civ. App. 1931); Secord v. St. Paul, M. & M. Ry. Co., 5 McCrary 515, 18 Fed. 221 (D. C. Minn. 1883). The inconsistency between this rule and the rule where the physician is selected by the injured party is discussed in Note (1925) 22 Va. L. Rev. 231.

[22]Andrews v. Davis, 128 Me. 464, 148 Atl. 684 (1930); Gosnell v. Southern Ry. Co., 202 N. C. 234, 162 S. E. 569 (1932).

[23]Hoffman v. Houston Clinic, 41 S. W. (2d) 134 (Tex. Civ. App. 1931).

[24]See cases cited note 19, supra.

[25]Retelle v. Sullivan, 191 Wis. 576, 211 N. W. 756 (1927); Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57, 180 N. W. 269 (1920).

[26]See Benesh v. Garvais, 221 Minn. 1, 20 N. W. (2d) 532, 534 (1945), where the

the release was in full compensation of all injuries, both original and aggravation, should be a question of fact in each case, not a matter of law requiring a fixed result in varying situations. Careful attention should be given to all facts relevant to the release: the intent of the parties, the general adequacy of the consideration, the terms of the release itself, and whether it was given before or after the malpractice. A full weighing of the particular facts of each case would avoid the possibility of awarding double damages and also the possibility of releasing an independent wrongdoer, not a party to the release, whose wrong caused injuries for which no compensation has been received.

J. MAURICE MILLER, JR.

SUBROGATION—RIGHT OF INSURER TO SUE UNDER FEDERAL TORT CLAIMS ACT AS SUBROGEE OF INJURED PARTY. [Federal]

In its present form the Federal Tort Claims Act provides that, "the United States district court... shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States... on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office... under circumstances where the United States, if a private person, would be liable to the claimant for such damage... in accordance with the law of the place where the act or omission occurred."[1] The Act was passed as a part of the Legislative Reorganization Act of 1946,[2] with the basic purpose of relieving the Congress of the necessity of making committee investigations and passing special legislation to deal with each tort claim against the Federal Government.[3]

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court, in holding that the release barred an action against the physician, quoted with approval from Smith v. Mann, 184 Minn. 487, 488, 239 N. W. 223, 224 (1931), where it was said: "The decisive thing now is not whether plaintiff actually released this defendant, or intended to do so, or got full compensation, but rather, and only, whether she has discharged her whole cause of action. That she did so is plain. The destruction of it is the primary result from which follows necessarily the secondary one of releasing all the wrongdoers, whether their wrongs were concurrent or successive."

[1]61 Stat. 722 (1947), 28 U. S. C. A. § 931 (Supp. 1947). The wording of this section was changed somewhat by the latest revision of Title 28 but as the revisors note indicates, only changes in phraseology were made. See 28 U. S. C. § 2647 (1948).

[2]60 Stat. 812 (1946).

[3]The overburdening of congressional committees and the consequent cumbersomeness of the process of settling such claims has led to the passage of several

One of the more controversial questions that has arisen under this legislation is whether an insurance company, having satisfied the claim of an injured person cognizable under the Tort Claims Act, may be subrogated to the insured's rights against the government. The recent case of *Employers' Fire Ins. Co. v. United States*[4] is typical of the cases which have passed on this point during the past two years, and its facts are exemplary of the general problem. A United States Army airplane, while engaged in training maneuvers, crashed into a restaurant owned by the insured, causing the death of one of the proprietors, damage to the building and the destruction of fixtures and stock. The insurance company, having insured the fixtures and stock, paid $9100 in settlement of its liability to the insured, and sought to intervene in the suit brought by the injured storekeepers against the government. It predicated its claim on the equitable doctrine of subrogation by virtue of its payment of the insured's claim. Although this court ruled in favor of the right of the insurance company to be subrogated to the injured parties' rights under the Act, a review of the cases reveals a distinct split of authority on this question. Of the seventeen decisions handed down thus far, ten have permitted the claim of subrogation in situations in which insurance companies are allowed subrogation against private parties causing injury to the insured under the law of the jurisdiction wherein the suit was brought.[5] Five reported cases and two without

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other acts decreasing the scope of the doctrine of sovereign immunity. For example see, The Tucker Act, 24 Stat. 505 (1887), 28 U. S. C. A. § 250 (1944); Federal Employees' Compensation Act of 1916, 39 Stat. 742 (1916), 5 U. S. C. A. § 751 (1944). For a short discussion of these and similar acts, see Note (1947) 42 Ill. L. Rev. 344.

The specific grant of jurisdiction to the District Courts was necessary because the jurisdiction of the Court of Claims is limited to: "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort...." 36 Stat. 1136 (1911), 28 U. S. C. A. § 250 (1944). The new Title 28 of the United States Code makes only changes in the phraseology of the above version. See 28 U. S. C. § 1491 (1948).

[4]167 F. (2d) 655 (C. C. A. 9th, 1948).

[5]United States v. Chicago, R. I. & P. Ry. Co., 171 F. (2d) 377 (C. C. A. 10th, 1948); Employers' Fire Ins. Co. v. United States, 167 F. (2d) 655 (C. C. A. 9th, 1948); South Carolina Highway Department v. United States, 78 F. Supp. 594 (E. D. S. C. 1948); Town of Amherst v. United States, 77 F. Supp. 80 (W. D. N. Y. 1948); Grace, to Use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174 (D. C. Md. 1948); Insurance Co. of North America v. United States, 76 F. Supp. 951 (E. D. Va. 1948); Niagara Fire Ins. Co. v. United States, 76 F. Supp. 850 (S. D. N. Y. 1948); Hill v. United States, 74 F. Supp. 129 (N. D. Tex. 1947), reversed since this comment was written by United States v. Hill, 171 F. (2d) 404 (C. C. A. 5th, 1948); Wojciuk v. United States, 74 F. Supp. 914 (E. D. Wis. 1947).

In Forrester v. United States, 75 F. Supp. 272 (E. D. Wis. 1947), the court al-

published opinions have denied the subrogee's right.[6] *Employers' Fire Ins. Co. v. United States* is the first decision in this field by a circuit court of appeals, this court aligning itself with the majority view of the district courts.[7]

In the arguments both for and against subrogation, the various courts, lacking direct precedents, have sought authority from the inferences of the Suits in Admiralty Act,[8] the Small Tort Claims Act,[9] and the Anti-Assignment of Claims Act,[10] from the common law rules governing "derivative claims," and from the general rules of construction of waiver-of-immunity statutes.

In several of the cases recognizing the subrogee's right, the courts have drawn an analogy between the Tort Claims Act and the Suits in Admiralty Act, since the language of the two Acts is similar in that they both measure the liability of the government by the corresponding liability incurred by a private person under the same circumstances. Inasmuch as a subrogee's claim has been recognized under the Suits in

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lowed an assignee of the subrogee-insurance company to sue under the Tort Claims Act, apparently assuming that the subrogee could have sued. The court in Gray v. United States, 77 F. Supp. 869 (D. C. Mass. 1948), refused to allow the subrogee to sue in his own name since under Massachusetts law that was not permissible; however, the decision was not put on the ground that the subrogee was not covered by the Tort Claims Act. Likewise, in Yorkshire Ins. Co. v. United States, 171 F. (2d) 374 (C. C. A. 3rd, 1948), the court affirmed the substantive rights of the subrogee-insurance companies, but required that both subrogees join in one action against the United States.

[6]Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1848; [reversed since this comment was written, by 170 F. (2d) 469 (C. C. A. 2d, 1948)]; Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947); Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947); Rusconi v. United States, 74 F. Supp. 669 (S. D. Cal. 1947), reversed by the principal case. The two un-reported cases are: McCasey v. United States, decided in the Eastern District of Michigan and cited in Bewick v. United States, 74 F. Supp. 730, 731 (N. D. Tex. 1947); Mitchell v. United States, decided in the Western District of Washington, cited in Grace, to Use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174, 176 (D. C. Md. 1948).

[7]167 F. (2d) 655 (C. C. A. 9th, 1948).

[8]41 Stat. 525 (1920), 46 U. S. C. A. § 742 (1944). This act waived the sovereign immunity of the United States against appropriate libels for maritime torts, where the United States, if a private person would be liable.

[9]42 Stat. 1066 (1922), 31 U. S. C. A. § 215 (1927), repealed by 60 Stat. 846 (1946). The statute provided for administrative consideration by each department-head of claims not exceeding $1000 against the United States; any claim exceeding this amount was presented directly to Congress. At present, this Act is incorporated into the new Tort Claims Act. See 28 U. S. C. § 2672 (1948).

[10]35 Stat. 411 (1908), 31 U. S. C. A. § 203 (1927). This Act declares that all transfers and assignments made of any claims against the United States shall be null and void unless made after the allowance of such claim and the issuance of a warrant for the payment thereof.

Admiralty Act,[11] it has been reasoned that the same result should be reached in the Tort Claims Act cases in which the cause of action is of such a nature that an individual defendant would be answerable to a subrogee.[12] However, another court has repudiated this theory entirely and construed the indecisive language in the Admiralty Act to be more inclusive than that of the Tort Claims Act.[13] In *Niagara Fire Ins. Co. v. United States,* a district court, while conceding that the analogy between the Acts is not conclusive, directed attention to the essential inquiry by observing that the phraseology of the two statutes, while varying slightly, indicates "a satisfaction on the part of Congress with the formula 'where the United States, if a private person, would be liable'."[14]

Further support for recognition of the subrogee's right has been drawn from the factor of congressional intent as expressed in the Small Tort Claims Act,[15] which was in force from 1922 to 1946 and was the direct ancestor of the present Tort Claims Act. Though the issue of the principal case seems not to have been litigated under the earlier statute, the Attorney General of the United States rendered an opinion affirming the view that the subrogees could avail themselves of the Act.[16] Since Congress was content to enact the present statute in similar language, without indicating any intent to overrule that official interpretation of its predecessor, the earlier construction may be regarded as still having some weight.[17]

In *United States v. Hill*[18] the court applied the Anti-Assignment of Claims[19] to defeat the subrogee's claim, saying that subrogation

[11]U. S. Fidelity & Guaranty Co., for use of Walsh v. United States, 56 F. Supp. 452 (S. D. N. Y. 1944). See also, Defense Supplies Corp. v. U. S. Lines Co., 148 F. (2d) 311 (C. C. A. 2d, 1945), and Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 744 (C. C. A. 2d, 1921), cert. denied 257 U. S. 643, 42 S. Ct. 54, 66 L. ed. 413 (1921), wherein it was admitted that the claim of a subrogee is within the scope of the Suits in Admiralty Act.

[12]Insurance Co. of North America v. United States, 76 F. Supp. 951 (E. D. Va. 1948).

[13] Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948), reversed since this comment was written, by 170 F. (2d) 469 (C. C. A. 2d, 1948).

[14]76 F. Supp. 850, 856 (S. D. N. Y. 1948).

[15]42 Stat. 1066 (1922), 31 U. S. C. A. § 215 (1927), repealed by 60 Stat. 846 (1946).

[16]36 Ops. Att'y Gen. 553 (1932).

[17]The administrative construction of a statute must be deemed to have received legislative approval when re-enacted without material change. Guaranty Trust Co. v. Commissioner of Internal Revenue, 76 F. (2d) 245 (C. C. A. 2d, 1935); Allen v. Morsman, 46 F. (2d) 891 (C. C. A. 8th, 1931).

[18]171 F. (2d) 404 (C. C. A. 5th, 1948). See also Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947). In applying the Anti-Assignment Act this court pointed out: "Assignment is not permitted, and subrogation is of the same nature."

[19]35 Stat. 411 (1908), 31 U. S. C. A. § 203 (1947).

is in the nature of an assignment and that Congress had already asserted an absolute policy against allowing assignees of claims against the government to bring suit to enforce the claims. This argument was refuted in the principal case,[20] however, on the grounds that the Anti-Assignment Act only concerns voluntary assignments, whereas the doctrine of subrogation involves an assignment by operation of law. In the case of *Grace, to Use of Grangers Mut. Ins. Co. v. United States,*[21] a district court rejected the application of the Anti-Assignment Act, on the theory that the purpose of the Act was to protect the United States against the loss of possible set-offs or counterclaims which might not be applicable against an assignee, a purpose not relevant in Tort Claims Act cases.[22]

In the case of *Old Colony Ins. Co. v. United States,*[23] the holding against the insurance company was based on the proposition that the Tort Claims Act did not include derivative claims. The court apparently felt that the subrogee should have joined the subrogor or at least sued in his name. This line of reasoning is suggested again in the *Grace* decision where the court attempted to distinguish the cases following the view that the subrogee's right is not recognized under the Tort Claims Act, basing the distinction on the absence of the words "for use of" in the titles of those suits. After admitting that the only effect of placing this phrase in the title was to constitute notice that the plaintiff would hold the recovery, in whole or in part, in trust for the equitable plaintiff, the subrogee, the court concluded: "We may assume (without the necessity of deciding in this case) that derivative claims as such are not authorized by the Act; that is to say, the proper plaintiff in suits under the Act is the person who has been damaged...."[24] However, in support of the subrogee's rights, the court proceeded to rely on the decision in *Hill v. United States,*[25] in which case the words "for use of" were not employed. Moreover, the late decision in *Insurance Co. of North America v. United States,*[26] wherein the insurance company prevailed in a suit brought in its own name, indicates that the lack of joinder of parties is not a conclusive factor.

[20]Employers' Fire Ins. Co. v. United States, 167 F. (2d) 655 (C. C. A. 9th, 1948).

[21]76 F. Supp. 174 (D. C. Md. 1948).

[22]In Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948), the court adopted this view of the inapplicability of the Anti-Assignment Act but denied the subrogee's suit on another ground. See text at note 37, infra.

[23]74 F. Supp. 723 (S. D. Ohio 1947).

[24]Grace, to Use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174, 176 (D. C. Md. 1948).

[25]74 F. Supp. 129 (N. D. Tex. 1947), reversed since this comment was written, by 171 F. (2d) 404 (C. C. A. 5th, 1948).

[26]76 F. Supp. 951 (E. D. Va. 1948).

Thus, the attempted distinction in regard to derivative claims seems invalid, since the cases refuse to fall into their proper niches upon an application of the rule. It appears to be immaterial whether the subrogee sues in his own name or in that of the subrogor. If the subrogee pays the full claim of the insured, then the majority of courts hold he is the real party in interest and may sue in his own name.[27] Likewise, if he pays only a part of the claim he is still a real party in interest, but here the defendant may request a joinder of the subrogor if he so desires, although if such request is not timely, the defendant is taken to have waived his right to join the subrogor and must be satisfied with the subrogee.[28] The Federal Rules of Civil Procedure[29] provide easy means by which a party can be added by amendment in order to allow the action to be prosecuted in the name of the real party in interest, thus obviating the possibility of two claims being presented to the government in satisfaction of the same injury.[30]

Two of the courts denying the right of the subrogee have emphasized the doctrine that a waiver-of-immunity statute must be strictly construed, because any such statute is an exception to the policy-created rule that the sovereign is immune from suit.[31] This line of reasoning was adequaely rebutted in the *North America* case, where the court, after admitting the efficacy of the general doctrine of strict construction and the duty of the court to follow it, declared: "But just as impelling is the duty of the Court to follow the intent of the Congress to make the United States fully liable to suit, and to accord every citizen, whether person, firm or corporation, such right of action, when an enactment of the Congress is clear and unequivocal in its purpose to waive the sovereign immunity. A clearer or more sweeping waiver of immunity than that contained in . . . [The Tort Claims Act] is not easily phrased."[32]

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[27]2 Moore, Federal Practice 2056, n. 26 (1938).

[28]2 Moore, Federal Practice 2057 (1938).

[29]Rule 21 declares that: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

[30]In Insurance Co. of North America v. United States, 76 F. Supp. 951, 954 (E. D. Va. 1948), the court stated: ". . . the pleadings should be made to reveal and assert the actual interest of the claimant. The insured and insurer can be compelled to join . . . . If such procedure is deemed advisable, then here or in any other case the plaintiff may amend by adding the insured . . . ."

[31]Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948); Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947).

[32]Insurance Co. of North America v. United States, 76 F. Supp. 951, 952 (E. D. Va. 1948). See also Aetna Casualty & Surety Co. v. United States, 170 F. (2d) 469 (C. C. A. 2d, 1948), reversing district court decision cited in note 31, supra.

A practical consideration apparently overlooked by courts denying the claims of subrogees is that the liability of the tort-feasor should not depend on whether the injured party has been diligent enough to procure insurance. As was pointed out in the *Grace* decision: "It is not apparent why the prudent foresight of a property owner in protecting his property by insurance should result in a benefit to the Government or a detriment to the property owner or his insurance carrier."[33] The carriage of insurance by the injured party could hardly be made a reasonable criterion by which the liability of the government is determined.

From a standpoint of rules of construction applicable to a statute waiving the immunity of the sovereign, the interpretation of prior acts of a similar nature, the fact that subrogees are not expressly excepted from the operation of the statute as has been true in other acts,[34] and the generally applied rule allowing the insurance company subrogation where it has satisfied a claim in favor of the insured, it would seem that the interpretation placed on the Act by the courts allowing the subrogee to sue is preferable. Since the main purpose of the legislation was to remove the burden of tort claims from congressional deliberation, any other interpretation would appear so to limit the effect of the Act that the intent of Congress would be in a large measure defeated.[35] In none of the cases denying the liability of the government to the subrogee was there a convincing reason given to substantiate the result. Two of the cases were published with hardly any opinion,[36] and in the third published case[37] the court's "reason-

[33]Grace, to Use of Grangers Mut. Ins. Co. v. United States, 76 F. Supp. 174, 177 (D. C. Md. 1948).

[34]The Foreign Tort Claims Act, 61 Stat. 501 (1947), 31 U. S. C. A. § 224d (Supp. 1947) provides: "...including the claims of insured but excluding the claims of subrogees...."

[35]As an example of congressional intent as to the scope of the Act, it is interesting to note an amendment made thereto and the revisors' comment concerning the amendment. After the passage of the Tort Claims Act, it was found that the wrongful death statutes in two states made the damages recoverable for wrongful death purely punitive, and in the Act it is stated that the United States will not be liable for punitive damages. As a result, the legal successors of the deceased were being deprived of a remedy. After the Act was amended to cover these claims, the revisors noted: "It seems clear that it was never intended by the Congress that any such inequity should be caused by the operation of the act...." H. R. Rep. No. 748, 80th Cong., 1st Sess. 1548, 1549 (1947). This incident tends to show that the intention of Congress is that the Act should provide the remedy generally applicable in tort cases, unless expressly negated.

[36]Old Colony Ins. Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947); Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947).

[37]Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948).

ing" seems to have amounted to no more than holding that the Act did not include the claims of subrogees because subrogees' claims were not within the scope of the Act! The court assumed the answer by restating the problem.

The opinion of Justice Cardozo in *Anderson v. John L. Hayes Construction Co.* properly states the general rule to be applied to those cases involving the construction of a waiver-of-immunity statute: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."[38]

W. H. JOLLY

TAXATION—TAXABILITY OF PAYMENTS RECEIVED BY NON-RESIDENT ALIEN AUTHOR FROM DOMESTIC PUBLISHER FOR LITERARY PROPERTY. [Federal]

The power of the federal government to tax incomes in any particular instance is predicated upon the relationship of the taxpayer to the United States in at least one of the following senses: (1) citizenship,[1] (2) residence,[2] (3) source of incime.[3] Thus, the jurisdiction to tax the income of a non-resident alien must, from the inherent nature of the taxpayer's situation, always rest upon the last named basis—that is, an *in rem* authority to tax incomes which have their source in this country.[4]

From the effective date of the Sixteenth Amendment and the Revenue Act of 1913 until 1936, a tax was levied against the non-resident alien's gross income derived from *all* sources in this country.[5] By the terms of the Act prior to the 1936 revision, only part of this gross in-

[38]243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926).

[1]Cook v. Tait, 265 U. S. 47, 44 S. Ct. 444, 68 L. ed 895 (1924). Note (1925) 23 Mich. L. Rev. 396. See also Harding, Double Taxation of Property and Income (1933) 229; Levitt, Income Tax Predicated Upon Citizenship: Cook v. Tait (1925) 11 Va. L. Rev. 607; Keesling, The Importance of Citizenship, Residence and Domicile in Federal Income Taxation (1943) 31 Calif. L. Rev. 283.

[2]Bowring v. Bowers, 24 F. (2d) 918 (C. C. A. 2d, 1928), Cert. denied, 277 U. S. 608, 48 S. Ct. 603, 72 L. ed. 1013 (1928). See also Keesling, The Importance of Citizenship, Residence and Domicile in Federal Income Taxation (1943) 31 Calif. L. Rev. 283, 286.

[3]Sabatini v. Commissioner, 98 F. (2d) 753 (C. C. A. 2d, 1938); Lord Forres (Archibald Williamson) v. Commissioner, 25 B. T. A. 154 (1932), Note 32 Col. L. Rev. 549. Cf. Commissioner v. Piedras Negras Broadcasting Co., 127 F. (2d) 260 (C. C. A. 5th, 1942), 55 Harv. L. Rev. 1388.

[4]Note 3, supra.

[5]Revenue Act of 1913, § II A (1), 38 Stat. 166 (1913).

come was subject to a withholding tax,[6] and considerable administrative difficulty was encountered in collecting the tax on the remainder of the income not subject to the withholding provisions.[7] To remedy this administrative difficulty, the Internal Revenue Code was amended in 1936, The amended Act excluded from taxable income all gains realized by such aliens from the sale or exchange of real and personal property located in the United States, these gains having been theretofore treated as taxable income, and subjected dividends to withholding provisions.[8] The amendment, which is still in force, *limited* the taxable income of the non-resident alien to "... fixed or determinable annual or periodical gains, profits and income...."[9] This phrase has been construed to include royalties received from the use of literary property,[10] as well as interest, dividends, rents, salaries, wages, premiums and others.[11]

The perplexity of the courts in determining whether, under these amended provisions, the income realized in any specific instance is taxable or not is indicated by the recent case of *Wodehouse v. Commissioner*.[12] Here the non-resident alien taxpayer, a British subject and a French resident, sold two novels to a publisher. Each novel was sold under a contract which provided that the publisher purchases *all* rights in the literary property, and would obtain a copyright thereon, and, after publication as a serial in its magazine, would reassign on demand of the author all rights in the property except the American (including Canadian and South American) serial rights. The consideration for each novel was made in a lump sum payment to the agents of the author. The Commissioner contended that the payments so received were taxable as ordinary income within the purview of Section 211 (a) (1) (A) of the Internal Revenue Code in that they were "... other fixed or determinable annual or periodical ... income...." The taxpayer contended that the payments did not fall within the above section, first, because they represented gains from the sale of personal property and, second, because they were not annual or periodical

[6]That income which was subject to withholding included wages, rents, interest, salaries and other fixed and determined income, but excepted dividends. 38 Stat. 166 (1913).

[7]Sen. Report No. 2156, 74th Cong., 2d Sess. 21 (1936); H. R. Report No. 2475, 74th Cong., 2d Sess. 9 (1936).

[8]Revenue Act of 1936, §§ 211-19, 49 Stat. 1648, 1714-16 (1936).

[9]Internal Revenue Code § 211 (a) (1) (A), 26 U. S. C. A. § 211 (a) (1) (A) (1945).

[10]Sabatini v. Commissioner, 98 F. (2d) 753 (C. C. A. 2d, 1938). See also Treas. Reg. § 29.211-7 (a).

[11]Treas. Reg. § 29.211-7 (a).

[12]166 F. (2d) 986 (C. C. A. 4th, 1948) cert. granted, 5 Tax Barometer par. 528, 17 U. S. L. Week 3098.

amounts, inasmuch as they were made in lump sums. The Tax Court sustained the contention of the Commissioner,[13] but the Circuit Court of Appeals for the Fourth Circuit, with Judge Dobie dissenting, reversed the decision and held, first, that the copyright was susceptible of division into separate components,[14] and the transfers thereof constituted individual sales of these separate parts of the whole which were not taxable because they were sales of personal property;[15] and, second, that the lump sum payments did not come within the purview of Section 211 (a) (1) (A) because they were not "annual or periodical gains."

Though this decision seems to be based on sound reasoning, some doubt is cast on its finality by the dissent of Judge Dobie and by direct conflict of the majority opinion with several earlier decisions of the Circuit Court of Appeals for the Second Circuit. That court, in the most important of these cases, *Rohmer v. Commissioner*,[16] which involved a factual situation similar to the principal case and in which like contentions were made by both the taxpayer and the Commissioner, held that where "... a copyright owner transfers ... substantially less than the entire 'bundle of rights' conferred by the copyright, then payment therefor, whether in one sum or in several payments, constitutes royalties ..."[17] within the provisions of the taxing statute. This decision rested upon the supposedly settled law that a copyright was indivisible as to a *sale* of its separate component parts,[18] and that a transferee of a separate component part acquired no legal rights of ownership but became a mere *licensee*.[19] The court reasoned that once a transfer is found to be a license, the compensation paid to the li-

[13]Wodehouse v. Commissioner, 8 T. C. 637 (1947).

[14]Examples of the separate parts into which a copyright may be broken are: Book rights, serial rights, moving picture rights, radio rights, and play rights.

[15]Upon this basis the court seemed content to rest its decision, even though a second ground was also adopted. "Our decision ... rests on the inherent nature of the transfer, and on the further fact that the only ground for the indivisible theory ...has been swept away by [a] decision of the Supreme Court...." Wodehouse v. Commissioner, 166 F. (2d) 986, 990 (C. C. A. 4th, 1948).

[16]153 F. (2d) 61 (C. C. A. 2d, 1946), cert. denied, 328 U. S. 862, 66 S. Ct. 1367, 90 L. ed. 1633 (1946).

[17]153 F. (2d) 61, 63 (C. C. A. 2d, 1946).

[18]Goldwyn Pictures Corp. v. Howell Sales Co., 282 Fed. 9 (C. C. A. 2d, 1922), cert, denied 262 U. S. 755, 43 S. Ct. 703, 67 L. ed. 1217 (1923); M. Witmark and Sons v. Pastime Amusement Co., 298 Fed. 470 (E. D. S. C. 1924) aff'd, 2 F. (2d) 1020 (C. C. A. 4th, 1924); Cunningham v. Douglas, 72 F. (2d) 536 (C. C. A. 1st, 1934). See also Ball, Law of Copyright and Literary Property (1944) 545.

[19]M. Witmark and Sons v. Pastime Amusement Co., 298 Fed. 470 (E. D. S. C. 1924) aff'd, 2 F. (2d) 1020 (C. C. A. 4th, 1924). See also Ball, Law of Copyright and Literary Property (1944) 539.

censor of a copyright must be termed a royalty, and such transfer is no less a license simply because payment therefor is made in a lump sum.[20] Worthy of note, however, is the fact that there exists among the judges of the Circuit Court of Appeals for the Second Circuit a difference of opinion as to whether a component part of a copyright may be sold, Judge Learned Hand having declared that such a transfer might constitute a sale rather than a license.[21]

The conflict between the decision of the *Wodehouse* case and that of the *Rohmer* case is also apparent on the problem of whether a lump sum payment constitutes "annual or periodical" income so as to come within the scope of the Act. Both courts used the committee reports and the legislative history of the taxing statute to support their contrary results. The *Rohmer* case seems to go far into the field of judicial legislation by unequivocally declaring that "... Congress intended the words 'other fixed or determinable annual or periodical gains, profits, and income' to be interpreted to mean 'other fixed and determinable income,' and to include therein a lump sum ...."[22] This traverse upon legislative authority was recognized by the court of the Fourth Circuit in the *Wodehouse* decision.[23] That court was careful to point out that in the *Rohmer* case the court of the Second Circuit seemed to have taken the position that the lump sum payment should be taxed, on the reasoning (in reference to the congressional motive for amending the act) that such a tax would not be at all impossible to collect and would produce substantial amounts of revenue.[24] The court in the instant case was quite critical of this reasoning; it pointed out that capital transactions as a class were specifically excluded from the applicability of the 1936 amendment. The reason for this exclusion, as indicated in the congressional reports, was the difficulty encountered in administration and collection.[25] Thus, it was not for the *courts* to subject to taxation a *particular transaction* which fell within the *generally excepted class* simply because of the facility of collection in that particular instance. Furthermore, the court felt that the congressional committee's

[20]Rohmer v. Commissioner, 153 F. (2d) 61 C. C. A. 2d, 1946). Cf. Hazeltine Corp. v. Zenith Radio Corp., 100 F. (2d) 10 (C. C. A. 7th, 1938).

[21]Judge Learned Hand concurring in Goldsmith v. Commissioner, 143 F. (2d) 466, 467 (C. C. A. 2d, 1944) admitted the possibility of the sale of a separate component of a copyright. He did not take part in the decision of Rohmer v. Commissioner.

[22]153 F. (2d) 61, 64 (C. C. A. 2d, 1946).

[23]The court said: "It seems to us that this amounts to an amendment of the Act which the court is powerless to make." 166 F. (2d) 986, 992 (C. C. A. 4th, 1948).

[24]153 F. (2d) 61, 64, (C. C. A. 2d, 1946).

[25]See note 7, supra, and text at note 7.

reference to the additional revenue obtainable under the 1936 amendment did not pertain to this class of excepted transactions, as the *Rohmer* case argued, but rather was a reference to the increased receipts to be derived from the subjection of dividends, which had theretofore been excepted, to the withholding provisions of the Act. The *Wodehouse* opinion emphasizes that no general rule concerning lump sum payments could be formulated, but that the result would turn on whether, on the facts of each case, the transaction was within the annual or periodical classification or was in a single unitary form.[26]

Though the nature of the payment was discussed at length, the court in the principal case seemed to rest its decision primarily on the fact that the copyright was divisible and that each separate part was susceptible of sale and, when sold, was not within the provisions of the taxing statute. The *Rohmer* case, as previously indicated, had embraced the contrary view that a copyright is indivisible.[27] Here, then, is a conflict in the basic reasoning underlying the decisions in the two cases. In support of the divisible copyright theory, it is argued that the concept of indivisibility was established because the assignee of a part of a copyright was unable to sue for infringement.[28] But this basis for indivisibility made the rule only a procedural barrier that has been abrogated by court decision,[29] and by the rules of federal procedure.[30] For this reason and, also, due to the inherent nature of the transfer in question as a conveyance of *all* serial rights, the decision that the transaction constituted a sale and not an assignment has considerable merit. The position that part of the rights accruing under copyrights and patents are susceptible of sale has been taken by an eminent jurist[31] and by the Internal Revenue Bureau itself.[32]

The conflict discussed above could have been avoided in the prin-

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[26]The court here was careful to distinguish Commissioner v. Raphael, 133 F. (2d) (C. C. A. 9th, 1943) where a lump sum payment of interest was held to be taxable since by its inherent nature it was periodical income.

[27]See notes 15 and 16, supra.

[28]Wodehouse v. Commissioner, 166 F. (2d) 986, 990 (C. C. A. 4th, 1948).

[29]In Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U. S. 459, 46 S. Ct. 166, 70 L. ed. 357 (1926) it was held that an assignee of a patent could sue for infringement making the owner a codefendant if he is within the jurisdiction of the court or a co-plaintiff if without. The rule has been applied in copyright law. L. C. Page & Co. v. Fox Film Corp., 83 F. (2d) 196 (C. C. A. 2d, 1936).

[30]Rule 19(a), 28 U. S. C. A. § 723 (c) (1941), and notes of the Advisory Committee thereon.

[31]Judge Learned Hand, concurring in Goldsmith v. Commissioner, 143 F. (2d) 466, 467 (C. C. A. 2d, 1944) cert. denied 323 U. S. 774, 65 S. Ct. 135, 89 L. ed. 619 (1944), where he said of an exclusive license, "I think ... that its grant is a 'sale' ...."

[32]Note (1945) 54 Yale L. J. 879, 884 and materials cited.

cipal case if the court had based its decision upon the existence of a factual difference between the various contracts and the legal effect thereof. The transfer involved here could have been found to constitute a *complete sale* under the contract and an assignment back by the publisher to the author of certain of the rights. This interpretation of the contract was recognized by the court but was expressly eliminated as a basis for its decision.[33] However, such a position could be authoritatively supported by a case involving a similar contract of the same publisher.[34] The facts in the instant case would support this argument if due emphasis was given to the comparative amounts received from the transfer of the serial rights in relation to the amount received at a later date from the transfer of the book rights.[35] If this argument in the *Wodehouse* case is accepted, there is the additional problem of whether the decision would violate the rule of *Dobson v. Commissioner*,[36] which limits the scope of review that a circuit court of appeals may exercise over a Tax Court decision. Under the narrow doctrine set out in the *Dobson* case, itself, that finality must be given to the Tax Court's findings of fact only, the reversal of the Tax Court and the interpretation of the contract as constituting a sale and an assignment back would not breach the rule. Under the broad and much criticized application of the *Dobson* rule, where the right of determining the governing principle also is withdrawn from the realm of appellate review,[37] the complete sale argument of the circuit court of appeals in the *Wodehouse* case would be precluded.[38] However, it appears that this dilem-

[33]Wodehouse v. Commissioner, 166 F. (2d) 989, 990 (C. C. A. 4th, 1948).

[34]In Eliot v. Gears-Marston, Inc., 30 F. Supp. 301 (E. D. Pa., 1939), a case involving a similar contract of the same publisher (The Curtiss Publishing Co.) as was involved in the principal case, it was held that the transferee publisher became owner of the copyright with the book, dramatic and scenario rights being reassigned to the author rather than reserved by him, and he was thus constituted a licensee for the reassigned rights.

[35]In the findings of fact of the Tax Court, 8 T. C. 637, 652 (1947), it is shown that Curtiss paid $40,000 under its contract of transfer for the serial rights of each work involved whereas the book rights for one work were later sold for only $5,000. Due to the relative amounts paid, it would seem plausible to argue that the major worth of these works was in the use as serials, and that the property passed to the publisher with a reassignment of other rights back to the author.

[36]320 U. S. 489, 64 S. Ct. 239, 88 L. ed. 248 (1943), rehearing denied 321 U. S. 231, 64 S. Ct. 495, 88 L. ed. 691 (1944).

[37]For an exhaustive discussion of the Dobson Rule and the views indicated see Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact (1944) 57 Harv. L. Rev. 753. See also Commissioner v. Estate of Bedford, 325 U. S. 283, 65 S. Ct. 1157, 89 L. ed. 1611 (1945); Trust of Bingham v. Commissioner, 325 U. S. 365, 65 S. Ct. 1232, 89 L. ed. 1670 (1945); Raffold Process Corp. v. Commissioner, 153 F. (2d) 168 (C. C. A. 1st, 1946).

[38]Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact (1944) 57

ma has been removed by recent congressional action in passing a statute which subjects Tax Court decisions to the same appellate review by the circuit courts of appeal as is given appeals from decisions of the district courts sitting without a jury.[39]

As a compromise between a taxpayer and the Commissioner, Congress might amend the statute in order to tax only a *certain portion* of the payments received by the non-resident alien. This idea is based upon the assumption that the contract of transfer makes the publisher a mere licensee, and thus the payments received by the non-resident alien are royalties within the taxing statute. However, the jurisdiction to tax the income of a non-resident alien is of constitutional necessity based upon the determination that such income has its source in the United States.[40] In the *Wodehouse* case the Tax Court made a finding of fact that the publication carrying the serials had a considerable circulation outside of the limits of the United States.[41] Thus, since part of the income had its source outside of the United States—that is, if the source of the income is thought of as the receipts from the sales of the publication rather than the sale of the literary rights—there was no jurisdiction to levy a tax upon that amount.[42] Of course, such a middle position would involve practical difficulties in the necessity of

Harv. L. Rev. 753, 849, where the author points out that under the broad interpretation of the Dobson rule a number of Supreme Court decisions could easily fall if the Tax Court chose to disregard them.

[39]26 .U S. C. A. Sec. 1141 (a) (1940) as amended by Title 28 U. S. C. § 2680, subsec. 36 which became effective Sept. 1, 1948. This section now reads: "The circuit courts of appeal and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; . . ."

[40]See note 3, supra.

[41]Wodehouse v. Commissioner, 8 T. C. 637, 649 (1947).

[42]In Commissioner v. Piedras Negras Broadcasting Co., 127 F. (2d) 260 (C. C. A. 5th, 1942) it was held that income not having its source within the United States was not taxable. See Note (1942) 55 Harv. L. Rev. 1388.

The Rohmer case has been criticized for not having granted the taxpayer such an allowance. In Molnar v. Commissioner, 156 F. (2d) 924 (C. C. A. 2d, 1946), it was held that evidence showing that 40 per cent of an American motion picture producer's income was from sources without the United States was not sufficient evidence to exclude from tax liability such portion of the income received from the sale of motion picture rights to a play. The court based its decision upon the authority of Rohmer v. Commissioner, 153 F. (2d) 61 (C. C. A. 2d, 1946). Judge Learned Hand, dissenting, said: "Moreover, Rohmer v. Commissioner, supra, so far as I can see, is directly contrary to Helvering v. Taylor, 293 U. S. 507, 513, 515, 55 S. Ct. 287, 79 L. ed. 623, which I had supposed decided that, when it appeared that a taxpayer was entitled to something, it was error for even the Tax Court to deny him any allowance whatever, although of course we should be bound to accept whatever that allowance might be." See also Note (1947) 47 Col. L. Rev. 160.

ascertaining the total amounts of incomes having their sources inside and outside of the country, and of working out apportionment formulas. However, such a compromise, though involved, would be gratefully accepted by non-resident aliens of literary inclinations as a tax relief measure, and it would resolve irrevocably conflicting court decisions.

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TORTS—CONSENT OF MINOR PARTICIPANT INJURED IN ILLEGALLY PROMOTED FIGHT AS DEFENSE FOR PROMOTOR AGAINST CIVIL LIABILITY. [California]

The issue of the right of one injured in a fight, into which he has entered voluntarily, to recover damages from his opponent has plagued English and American courts for several centuries without an entirely satisfactory solution having been reached. While respectable authority has concluded that the plaintiff's consent to enter the fight deprives him of any remedy in damages, a majority of the courts, as well as several writers, maintain that the consent involved in voluntarily engaging in the fight is no defense if the fight resulted in a breach of the peace, for which each participant is criminally liable.[1]

All of the cases and authorities supporting the majority rule rely directly upon the eighteenth century English case of *Boulter v. Clark*,[2] or upon cases which in turn cite this case with approval.[3] *Boulter v. Clark* was founded upon a dictum[4] in an earlier case, *Matthew v. Ollerton*, which declared: "but license to beat me is void, because 'tis against the peace."[5]

It is impossible to ascertain whether this dictum was premised upon a civil or criminal concept of the action of trespass, because the de-

[1]Lund v. Tyler, 115 Iowa 236, 88 N. W. 333 (1901); McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168 (1905); Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008 (1892); Morris v. Miller, 83 Neb. 218, 119 N. W. 458 (1909); Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185 (1887); Colby v. McClendon, 85 Okla. 293, 206 Pac. 207 (1922); Teolis v. Moscatelli, 44 R. I. 494, 119 Atl. 161 (1923); Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630 (1892); Strawn v. Ingram, 118 W. Va. 603, 191 S. E. 401 (1937); Shay v. Thompson, 59 Wis. 540, 18 N. W. 473 (1884); Pollock, Torts (14th ed. 1939) 124; Prosser, Torts (1941) 123-4.

[2]Bull. N. P. 16 (1747).

[3]Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008 (1892); Morris v. Miller, 83 Neb. 218, 119 N. W. 458 (1909); Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185 (1887); Colby v. McClendon, 85 Okla, 293, 206 Pac. 207 (1922); Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630 (1892); Prosser, Torts (1941) 123-4.

[4]Bohlen, Consent As Affecting Civil Liability For Breaches Of The Peace (1924) 24 Col. L. Rev. 819, 825-6; Prosser, Torts (1941) 124.

[5]Comb. 218, 90 Eng. Rep. 438 (1693).

cision was rendered at a time when assaults were punishable both civilly and criminally in a single action, the writ of trespass having been invented so that the King's courts could obtain jurisdiction over offenses less than felonies, with the hope of further enriching the Treasury by the collection of fines, However, the initiation of the proceeding was left to the individual plaintiff in a civil action for damages. The fine payable to the Crown was small compared to the damages usually recoverable, and when, as time passed, more and more of these fines found their way into the pockets of the court officers instead of the Royal Treasury, the King's interest gradually receded.[6] When the fine was abolished by statute in 1694,[7] the action became a purely civil one, and the "value of the dictum in *Matthew v. Ollerton,* if, indeed, the court which pronounced it had in mind anything other than a criminal prosecution at the suit of the Crown, was completely destroyed...."[8] Therefore, such authority is of no value as support for the majority rule.

The other reason given by those following the majority rule is based on public policy.[9] "If men fight, the state will punish them. If one in injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace."[10] But those who oppose this view contend that these authorities fail to distinguish between the civil and the criminal liabilities of the parties, and that the state's interest, being fully protected by criminal statutes, should play no part in a civil suit by one contestant against the other. It is also argued that the policy of discouraging breaches of the peace is defeated rather than promoted by the majority rule because it enables the participants to enter a fight secure in the right to obtain compensation for injuries that may be suffered.

A minority of jurisdictions declare that unless the force used exceeds the consent, consent deprives the act of its tortious character, although the parties are subject to criminal prosecution.[11] This rule

[6]Bohlen, Consent As Affecting Civil Liability For Breaches Of The Peace (1924) 24 Col. L. Rev. 819, 827-8.

[7]Statute of 5 & 6 Wm. and Mary, c. 12.

[8]Bohlen, Consent As Affecting Civil Liability For Breaches Of The Peace (1924) 24 Col. L. Rev. 819, 829.

[9]Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185 (1887); Shay v. Thompson, 59 Wis. 540, 18 N. W. 473 (1884).

[10]Cooley, Torts (Students ed. 1907) 152.

[11]Lykins v. Hamrick, 144 Ky. 80, 137 S. W. 852 (1911); Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581 (1886); Wright v. Starr, 42 Nev. 441, 179. Pac. 877 (1919);

follows the view that the interests of society are best served by leaving the parties where they have placed themselves; and since each is a wrong-doer, a court of law should give succor to neither. A contrary holding, it is argued, would only serve to put a premium on law-breaking for the loser of the battle.[12] Thus, in a majority jurisdiction the law says in effect: "If you fight, you are a wrong-doer and will be held criminally liable for your acts; however, if you fight and lose, you will be protected by law to the extent of your damages." The minority rule allows no room for such inconsistency.

The courts adhering to the minority rule consider the state's interest fully protected by resort to criminal proceedings. If the public officials feel that the state must punish the parties, that end can be accomplished in a criminal action. But if no prosecution is forthcoming, the breach must be so insignificant as not to merit punishment, or else the authorities are lackadaisical and unmindful of their duties, in which case a civil recovery will be "a prop to the inefficient administration of the criminal law . . . ."[13]

Whichever of these rules may be favored, neither seems to be applicable to the novel question presented in the recent California case of *Hudson v. Craft*.[14] The defendant, owner of a carnival, as one of the show's attractions sponsored boxing bouts between spectators who agreed to enter the ring for five dollars each—"win, lose, or draw." These bouts were promoted in violation of the Penal Code, the Business and Professions Code, and the rules and regulations of the State Boxing Commission. The plaintiffs in the suit were an eighteen-year-old participant who had been seriously injured by his opponent in one such match and the boy's father who had paid his son's medical and surgical expenses. The court denied recovery to either, the majority opinion approving the minority rule that consent bars recovery. The court reasoned that, since plaintiff had no cause of action against his opponent, it necessarily follows that the promoter is not liable. One judge dissented, favoring recovery under the majority rule that consent does not prevent liability where a breach of the peace was in-

Hart v. Geysel, 159 Wash. 632, 294 Pac. 570 (1930); Salmond, Torts (10th ed. 1945) 35; Restatement, Torts (1934) § 60.

[12]Lykins v. Hamrick, 144 Ky. 80, 137 S. W. 852, 854 (1911); Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581, 583 (1886); Wright v. Starr, 42 Nev. 441, 179 Pac. 877, 878 (1919); Hart v. Geysel, 159 Wash. 632, 294 Pac. 570, 572 (1930); Prosser, Torts (1941) 124.

[13]Bohlen, Consent As Affecting Civil Liability For Breaches Of The Peace (1924) 24 Col. L. Rev. 819, 830. The author persuasively argues that there is neither logic nor social justification in preserving civil liability in order that the state's interest also may be protected in an action which, today, is solely a private remedy.

[14]195 P. (2d) 857 (Cal. App. 1948).

volved. The California court did not question the applicability of these rules to a case against a promoter;[15] and in *Teeters v. Frost*,[16] the only direct precedent discovered, though the decision was contrary to the principal case in that it allowed recovery, the Oklahoma Supreme Court was content to rely on the same rules that have been developed in suits against the other participant in the fight.

A more thorough consideration of the new factors involved suggests that a different approach should be made to the question of the promoter's liability to an injured participant. Although the contestants are, as between themselves, in pari delicto, there is not the same relationship between a contestant and the promoter. The latter has failed to comply with the regulations of the State Boxing Commission which, in part, are promulgated for the protection of the contestants in a bout, in that they control such matters as the weight of the gloves used, the physical conditions of the fighters, the rules of boxing, and the selection of qualified officials to referee the match. Failure on the part of the promoter to comply with any one of these may result in serious injury to a participant. Although failure to procure a license is in itself punishable criminally (and, of course, consent by the fighters can have no affect on that liability), the addition of a threat of civil liability will be a further effective deterrent to the illegal conduct of the promoter. The danger of a criminal penalty will often be so remote and so small in relation to the enormity of the offense in terms of damage to the contestant, and in relation to the box office receipts, that it may have little effect in preventing the promoter's violations of the Commission's regulations.

In addition to its deterrent effect, a rule placing liability on the promoter may serve the "public interest" in another respect. As the dissent in the principal case indicates, where the victims of the fights are without family support, they may become public charges during the

[15]"It is axiomatic that 'He who consents to an act is not wronged by it.' Civ. Code, sec. 3515. Whether this principle bars a recovery when the contest so assented to is conducted in violation of law, is the real question presented for decision." Hudson v. Craft, 195 P. (2d) 857, 858 (Cal. App. 1948). However, the dissent, while willing to base his conclusion on the strength of the majority rule, did take passing note of the fact that the promoter's liability is not necessarily dependent on the same considerations as control the cases between participants. "Even if we accept the minority rule it does not follow that the promoter must escape liability for injury to the contestants. His is the duty to procure the license, not theirs. The law is for their protection, not his. Particularly in view of the strong public policy involved it seems clear that the gullible or youthful contestants who could be induced to run the risk of serious physical injury for five dollars apiece are not in pari delicto with the promoter." Hudson v. Craft, 195 P. (2d) 857, 861 (Cal. App. 1948).

[16]145 Okla. 273, 292 Pac. 356 (1930).

time of their disability to work.[17] To place the burden of the promoter's wrongdoing upon the shoulders of the public in the form of taxes for the upkeep of asylums for indigents runs contrary to the interests of the people. To allow an individual, seeking personal aggrandizement, to flout public policy simply because the rule of consent forbids recovery by one contestant from the other is an imposition on society.

An additional feature of the California and Oklahoma promoter cases, which was virtually ignored by those courts, is that both injured participants were infants. In denying a recovery, the California court adopted the view expressed in the Restatement of Torts, that an infant's consent to an invasion of his rights is binding whenever he is capable of understanding or appreciating the nature and consequences of his act.[18] When the suit is between two contestants, there may be no reason for courts to sympathize with one who in anger participates in brutal and bloody conduct; therefore, as between the contestants, courts may be justified in holding the infant to the consent manifested by his acts, if it is proved that he did appreciate their consequences. However, herein lies a third reason for imposing liability upon the promoter. The participants in a promoted contest are not presumed to have entered into the fight in hot blood, but were induced by one seeking personal gain. Although each realizes that he will be hit and possibly knocked unconscious by his opponent, he may be unable to exercise whatever good judgment he possesses, when the self-seeking promoter offers him a sum which, to one of his years, seems like "big money." Another factor which may play upon his immature judgment is the social pressure upon him to participate, or run the risk of being called "coward" by a crowd which is usually of local origin. Further, his discretion may be clouded by the prospects of what may seem to be the beginning of the highway to the glory which surrounds some professional fighter whom he may idolize.

No profound legal theory seems necessary to justify the award of compensation to under-aged participants, or to support the imposition of liability on a "promoter who knowingly flouts the law for selfish gain and wilfully induces minors and others, who may be physically unprepared, to engage in unlawful violent combat, which he must know may result in their physical injury . . . ."[19]

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[17]Hudson v. Craft, 195 P. (2d) 857, 861 (Cal. App. 1948).

[18]Hudson v. Craft, 195 P. (2d) 857, 860 (Cal. App. 1948); Restatement, Torts (1934) § 59.

[19]Judge Dooling, dissenting, in Hudson v. Craft, 195 P. (2d) 857, 861 (Cal. App. 1948).

TORTS—EFFECT OF "ONE PUBLICATION RULE" ON RUNNING OF STATUTE OF LIMITATIONS IN LIBEL ACTIONS. [New York]

In a cause of action for libel, it is a basic requirement that the defamed person prove that the libelous matter was communicated to a third person.[1] Such communication is technically known as "publication" of the libel,[2] and at early common law a new publication occurred each time the defamatory words were brought to a third person's attention. Thus, it has been said that "each time a libelous book or paper or magazine is sold, a new publication has taken place which... will support a separate action for damages...."[3]

The problem of what constitutes publication in newspapers, magaiznes, and books is complicated by the fact that they must be composed, printed, and then distributed to thousands of readers—a process much more complex than the mere writing and mailing of a single communication. The questions arise as to whether each *copy* of the libelous article constitutes a republication giving rise to its own cause of action, or whether the distribution of numerous copies is only *one* wrong. It must also be decided whether a rule of convenience should be adopted to avoid multiplicity of suits.[4]

Many cases arising from libels printed in newspapers and magazines have judicially disposed of these questions by the adoption of the "one publication rule," which effects an alteration of early common law doctrine. The rule was first announced in an effort to give a reasonable construction to venue statutes which provide, typically, that the person injured by a tort may sue in the county where the injury occurred.[5] Hence, it was decided that the composing, printing, and distributing of newspapers and magazines constituted "one publication," at the place where the operation took place.[6] The libel action accrues only in that

[1]Prosser, Torts (1941) § 93; Harper, Torts (1933) § 236; Throckmorton's Cooley, Torts (1930) § 157.

[2]Prosser, Torts (1941) § 93.

[3]Restatement, Torts (1938) § 578, comment (b). See Note (1948) 48 Col. L. Rev. 475.

[4]Winrod v. McFadden Publications, Inc., 62 F. Supp. 249, 250, 251 (N. D. Ill. 1945).

[5]For a compilation of modern statutes involving jurisdiction in libel actions specifically, see Angoff, Handbook of Libel (1946) 62, 66-67, 106, 115, 126-127, 135, 147, 181, 188.

[6]United States v. Smith, 173 Fed. 227 (D. C. Ind. 1909); Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1907). See Fried, Mendelson & Co. v. Halstead, 203 App. Div. 113, 196 N. Y. Supp. 285 (1922); Note (1923) 23 Col. L. Rev. 193. Contra: O'Reilly v. Curtis Pub. Co., 31 F. Supp. 364 (D. C. Mass. 1940); Holden v. American News Co., 52 F. Supp. 24 (E. D. Wash. 1943).

place, and the circulation of the periodicals elsewhere does not constitute a repetition of the libel so as to give a new cause of action.

The "one publication rule" has met with objections, but the reasons advanced by the courts which have refused to adopt it in magazine and newspaper cases have been largely discredited.

First, those courts contend that the early common law rule that each communication is a new libel is too well entrenched to allow invasion by the "one publication" modification.[7] But the rule had its origin "in relation to the single acts of individuals, in a primitive society, and cannot, either as a matter of principle or common sense, be applied without qualification to the publication of modern newspapers."[8] Thus, it would seem that public policy requires the "one publication rule" as a means of preventing multiplicity of suits, brought wherever the defamed person could show that the article was circulated. "Otherwise, a plaintiff may be left free to choose his own forum, subject to guidance by consideration of local prejudice for and against himself or the defendant."[9]

A second objection to the "one publication rule" stems from the maxim that publication occurs when the libel is *read,* and printing and distribution are clearly not proof of reading.[10] However, the maxim was formulated in an era which did not contemplate mass distribution of copies of the same libel. And it is reasonable that a court should assume without requiring proof that at least one of the thousands of copies was, in fact, read.

Thirdly, it is said to be a harsh rule which forces the defamed person to sue in the place of the original publication, because greater damage might have been sustained by him in a jurisdiction in which he cannot sue.[11] But the courts have realized the unfairness of such a result and have provided that evidence of the total circulation is ad-

[7]Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945); Holden v American News Co., 52 F. Supp. 24 (E. D. Wash. 1943); O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (D. C. Mass. 1940); Dick v. Northern Pacific Ry. Co., 86 Wash. 211, 150 Pac. 8 (1915). See dissenting opinions in Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Foreman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344 (1943); Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. (2d) 640 (1938), aff'd 279 N. Y. 716, 18 N. E. (2d) 676 (1939). See Restatement, Torts (1938) § 578, comment (b).

[8]Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193, 196 (1921).

[9]Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344, 246, (1943).

[10]Dissenting opinions in Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193, 198 (1921); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344, 349 (1943).

[11]Dissenting opinion in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344, 349 (1943).

missible, to prove the total damage arising from the "one publication."[12]

Fourthly, it has been argued that the "one publication rule" is an absurd construction of a venue statute, which permits a cause of action where the injury "occurred."[13] That is, it is absurd that the plaintiff's action in a place where he knows the libel was communicated should fail when the defendant proves that the libel was previously communicated elsewhere. It is unlikely, however, that the plaintiff could even reasonably mistake the place of original publication. The "one publication rule" definitely establishes the venue of the action for the plaintiff's benefit, and he cannot contend that he sues at his peril.

Besides its application in determining venue questions, the rule has in some recent cases been carried to the logical conclusion that, for purposes of the statute of limitations, the cause of action accrues at the time of the "one publication," and further, that the mailing out of back issues or replacement copies does not constitute a republication of the libel so as to start the statute of limitations running anew.[14] These cases usually involve libelous magazines[15] and all have arisen in much the same manner. The plaintiff brings suit just within the statutory limit from the date printed on the magazine. However, inasmuch as magazines are "published" several days before the cover date, the plaintiff discovers that he has brought the action a few days too late. Upon realizing the error, he contends that later distribution of miscellaneous copies of the libelous issue, sent out to replace those damaged in the original distribution or to bring late subscribers' issues up to date, constitute a new publication and a new cause of action.

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[12]Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344 (1943); Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144 (1886). See Note (1923) 23 Col. L. Rev. 193.

[13]Dissenting opinion in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344, 350 (1943).

[14]Polchlopek v. American News Co., Inc., 73 F. Supp. 309 (D. C. Mass. 1947); Hartmann v. Time, Inc., 64 F. Supp. 671 (E. D. Pa. 1946); McGlue v. Weekly Publications, Inc., 63 F. Supp. 744 (D. C. Mass. 1946); Backus v. Look, Inc., 39 F. Supp. 662 (S. D. N. Y. 1941); Cannon v. Time, Inc., 39 F. Supp. 660 (S. D. N. Y. 1939); Means v. McFadden Publications, Inc., 25 F. Supp. 993 (S. D. N. Y. 1939); Winrod v. Time, Inc., 334 Ill. App. 59, 78 N. E. (2d) 708 (1948); Hartmann v. Time, Inc., 60 N. Y. S. (2d) 209 (1945), aff'd 271 App. Div. 781 (1945); Campbell-Johnson v. Liberty Magazine Inc., 64 N. Y. S. (2d) 659 (1945), aff'd 270 App. Div. 894, 62 N. Y. S. (2d) 581 (1946). See Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. (2d) 640 (1938), aff'd 279 N. Y. 716, 18 N. E. (2d) 676 (1939). Contra: Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945). See Notes (1946) 94 U. of Pa. L. Rev. 335; (1941) 26 Minn. L. Rev. 131.

[15]All the cases in note 14, supra, involved magazines, except the Wolfson case, a leading newspaper case on which the others rely.

But the "one publication rule" may again be invoked by the court, and the late distributions held not to toll the running of the statute but to constitute a part of the original publication. Cases which hold that a new publication of the libel *does* occur when replacement and back issues are sent out have generally involved a *reprinting* of the same libel, rather than replacement from the original publication.[16]

The extension of the "one publication rule" to preclude replacement and back issues from tolling the statute of limitations has been met with the familiar objection that a libel is published each time it is communicated.[17] But, in view of the peculiar short-lived interest in magazines and newspapers, it would appear that replacements are reasonably associated as a part of the original publication. Any doubt may well be resolved in favor of giving effectiveness to statutes of limitations by sustaining the bar against stale claims as of a definite date.

On the other hand, it has been urged that the statute of limitations is not nullified by allowing a replacement copy to toll the statute, for the reason that the publisher has it within his control to *stop* reissuance of the libelous matter. Otherwise, it is contended, the publisher is allowed to escape the consequences of his wrongful act.[18] However, the argument has been answered in *Wolfson v. Syracuse Newspapers, Inc.*,[19] in which the defendant permitted the public to inspect libelous articles in a newspaper, the action on which was barred by limitations. The defendant's conduct was thought to be "passive" in character. "It was at most a gratuitous courtesy which . . . was extended only after a third party had made a request therefor."[20] It seems no less courteous that a

[16]Woodhouse v. N. Y. Evening Post, 201 App. Div. 9, 193 N. Y. Supp. 705 (1922); Cook v. Connors, 215 N. Y. 175, 109 N. E. 78 (1915); Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008 (1894). See Notes (1939) 16 N. Y. U. L. Q. Rev. 658; (1938) 52 Harv. L. Rev. 167. Cf. Mack, Miller Candle Co. v. Macmillan Co., 239 App. Div. 738, 269 N. Y. Supp. 33 (1934), aff'd 266 N. Y. 489, 195 N. E. 167 (1934). For a criticism of the distinction between reprinting and replacement from stock, see Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945); Note (1945) 59 Harv. L. Rev. 136.

[17]Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945); Holden v. American News Co., 52 F. Supp. 24 (E. D. Wash. 1943); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344 (1943) (dissent). See Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S. W. (2d) 246 (1942). Cf. Fried, Mendelson & Co. v. Halstead, 203 App. Div. 113, 196 N. Y. Supp. 285 (1922); Dick v. Northern Pacific Ry. Co., 86 Wash. 211, 150 Pac. 8 (1915). Note (1945) 59 Harv. L. Rev. 136.

[18]Winrod v. McFadden Publications, Inc., 62 F. Supp. 249 (N. D. Ill. 1945). See dissent in Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 S. (2d) 344, 349 (1943).

[19]254 App. Div. 211, 4 N. Y. S. (2d) 640 (1938), aff'd 279 N. Y. 716, 18 N. E. (2d) 676 (1939).

[20]254 App. Div. 211, 212, 4 N. Y. S. (2d) 640 (1938).

publisher should provide his subscribers with undamaged copies of the publication.

There have been few cases in which the "one publication rule" might be applied to libelous books.[21] Recently, however, a publisher sold copies of an allegedly libelous book from eight separate printings, and, after the statute had barred an action dating from the last printing, the defamed person brought suit alleging "publication" of the libel by the subsequent sale of books from stock within the statutory period. The New York trial court, in the novel case of *Gregoire v. P. G. Putnam's Sons, Inc.*,[22] held that the sales from stock did not constitute a republication so as to toll the running of the statutes of limitations. The judgment was reversed by the Appellate Division[23] but reinstated by the Court of Appeals in a 4 to 3 decision.[24] In order to give the statute of limitations[25] its intended effect as a statute of repose to outlaw stale claims, the court established the precedent that sales of books from stock do not constitute repetitions of the libel, but that the statute runs from the date of the original publication. The case was decided squarely on public policy, and an analogy to the numerous magazine and newspaper cases was closely drawn.

In considering the *Gregoire* case, the Appellate Division (all five judges concurring) held that the "underlying reason for holding that there is but one publication in the case of a newspaper or periodical, does not hold good where books are concerned."[26] The court based the distinction on the fact that periodicals have only an ephemeral reader-interest, to be read when the news is fresh and then discarded, whereas books are of lasting public interest. Thus, a magazine or newspaper must be distributed on a certain date to be seasonable, while a book may be distributed at the publisher's pleasure, without risk of its losing public interest during a period of withholding it from the public (a period as long, for instance, as the statute of limitations). After the original publication of a newspaper or magazine, "only nominal damage is likely to be done by the circulation or recirculation of num-

[21]Mack, Miller Candle Co. v. Macmillan Co., 239 App. Div. 738, 269 N. Y. Supp. 33 (1934), aff'd 266 N. Y. 489, 195 N. E. 167 (1934), held that an action for libel was not barred by limitations when it was brought within the statutory period from the last *reprinting*. The case clearly does not involve reissues from stock already printed. But see Restatement, Torts (1938) § 578, Comment (b).

[22]72 N. Y. S. (2d) 717 (1947).

[23]272 App. Div. 591, 74 N. Y. S. (2d) 238 (1947).

[24]298 N. Y. 119, 81 N. E. (2d) 45 (1948).

[25]New York Civil Practice Act § 51, subd. 3.

[26]Gregoire v. G. P. Putnam's Sons, Inc., 272 App. Div. 591, 74 N. Y. S. (2d) 238, 240 (1947).

bers that are out of date."[27] But it is possible that a book may gain popularity only after the statute has run, and real damage may occur which cannot be rectified. Therefore, the sale of a book from stock should be considered as a new publication of the libel, for the sale is a conspicuous independent act[28] not connected with the original publication as is the mailing out of replacements of a dated periodical.

The extent to which the "one publication rule" can logically be carried with regard to libelous books lies in public policy. In the *Gregoire* case, the Court of Appeals adopted the rule solely to require plaintiffs to proceed promptly with their suits. It is submitted that the distinction drawn by the Appellate Division between the nature of books and periodicals is valid. The public policy supporting statutes of limitations requires that they be given their intended effect, but not at the expense of allowing publishers to defame with impunity.[29] It would seem that the *Gregoire* case has virtually assured book publishers of immunity from libel suits once the statute has run from the date of the original printing and distribution.

LUTHER W. WHITE

TORTS—IMPOSITION OF CIVIL LIABILITY FOR CONDUCT CONSTITUTING VIOLATION OF CRIMINAL STATUTE. [Illinois]

A controversial decision involving tort liability based on the violation of a criminal statute was recently handed down by an Illinois appellate court in *Ostergard v. Frisch.*[1] The defendant was found liable for damage to the plaintiff's property sustained while the defendant's automobile was being operated by a thief, who took the car after the defendant had, in violation of a statute,[2] left the vehicle unattended without removing the ignition key.

The prevailing common law rule in like cases is that generally an owner is not liable for damages caused by a thief, either because the act of leaving the car unlocked is not regarded as negligent under the

[27]Gregoire v. G. P. Putnam's Sons, Inc., 272 App. Div. 591, 74 N. Y. S. (2d) 238, 240 (1947).

[28]Notes (1948) 48 Col. L. Rev. 475; (1945) 59 Harv. L. Rev. 136.

[29]Gregoire v. G. P. Putnam's Sons, Inc., 298 N. Y. 119, 81 N. E. (2d) 45, 51 (1948) (dissent).

[1]333 Ill. App. 359, 77 N. E. (2d) 537 (1948).

[2]Ill. Rev. Stat. (1947) c. 95½, § 189: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway."

circumstances[3] or because the legally unforeseeable criminal conduct of the thief[4] in stealing the vehicle breaks the chain of causation between the owner's negligence and the plaintiff's injury.[5] Therefore, the decisions of the courts in the principal case and in the District of Columbia case of *Ross v. Hartman*,[6] on which the Illinois court relied heavily for authority, rest upon the theory that the violation of a criminal statute prohibiting drivers from leaving parked cars unlocked gives rise to actionable negligence under circumstances in which no liability existed, absent statute.

Since the statute involved is expressly criminal in effect,[7] judicial construction is required to create civil liability for its breach. The Illinois court in the instant case, although recognizing the criminal nature of the statute,[8] chose to assume the conclusion on the point in issue—that the legislature intended the statute to carry with it civil liability. Although this seems to be the most prevalent view,[9] other courts have refused to allow civil liability where none existed at common law for conduct constituting a breach of a criminal statute, unless the legislature provided for civil liability in express terms or by clear implication.[10] Thus, it would appear that the question of civil liability under

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[3]Jackson v. Mills-Fox Baking Co., 221 Mich. 64, 190 N. W. 740 (1922); Kennedy v. Hedberg, 159 Minn. 76, 198 N. W. 302 (1924). Cf. Moran v. Borden Co., 309 Ill, App. 391, 33 N. E. (2d) 166 (1941); Connell v. Berland, 223 App. Div. 234, 228 N. Y. Supp. 20 (1928).

[4]"Had the truck, without the unlawful, voluntary act of a third person, started of itself and injured some one nearby, we would, of course, have held that the act of the driver in leaving the truck with the motor running was the proximate cause, because that result should have been within the contemplation of any reasonably intelligent person. But it cannot be said that it is to be expected that a thief, or any other third party, will steal such an automobile and do damage with it." Maggiore v. Laundry & Dry Cleaning Service, Inc., 150 So. 394, 397 (La. App. 1933); Chancey v. Norfolk & W. Ry. Co., 174 N. C. 351, 93 S. E. 834 (1917); Restatement, Torts (1934) § 448; Feezer and Favour, Intervening Crime and Liability for Negligence (1940) 24 Minn. L. Rev. 635.

[5]Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933); Galbraith v. Levin, 81 N. E. (2d) 560 (Mass. 1948), expressly overruling Malloy v. Newman, 310 Mass. 269, 37 N. E. (2d) 1001 (1941), and cited with approval in the principal case; Sullivan v. Griffin, 318 Mass. 359, 61 N. E. 2d) 330 (1945); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N. E. 778 (1927).

[6]78 App. D. C. 217, 139 F. (2d) 14 (1943), cert. denied 321 U. S. 790, 64 S. Ct. 790 (1944). The effect of this federal decision seems particularly strong, since it expressly overruled a previous decision of the same court on precisely the same set of facts, Squires v. Brooks, 44 App. D. C. 320 (1916).

[7]Ill. Rev. Stat. (1947) c. 95½, § 234.

[8]333 Ill. App. 359, 77 N. E. (2d) 537, 540 (1948).

[9]Johnson v. Harris, 187 Okla. 239, 102 P. (2d) 940 (1940); Ezell v. Ritholz, 188 S. C. 39, 198 S. E. 419 (1938); Prosser, Torts (1941) 265.

[10]Wynn v. Sullivan, 294 Mass. 562, 3 N. E. (2d) 236 (1936); Flanagan v. Sanders,

a criminal statute has been made one of statutory interpretation. However, it has recently been suggested by Professor Clarence Morris that the problem is not simply one of construing the language of legislation. Rather, "When criminals seek sanctuary under a common law no-duty rule, the time has come to reexamine the soundness of the rule.... The advance of criminal responsibility into areas of civil immunity raises the question...: Should tort liability follow the criminal law?"[11]

Once it is conceded that civil liability should follow some criminal statutes, it becomes necessary to consider the effect of the violation on the issue of negligence. If the statute sets a standard of care, the violation thereof is in most jurisdictions regarded as negligence per se.[12] Other jurisdictions refuse to follow the doctrine of negligence per se, and maintain that the breach of a statutory duty is only some evidence of negligence, to be considered by the jury along with other evidence offered.[13] The latter view seems to be based on the theory that not all violations of the criminal law are unreasonable, and that the defendant should be allowed to have a jury determine the question of reasonableness.

Illinois, however, has adopted what would appear to be a dual course with regard to cases involving statutory violations. In general, violations have been held to be but prima facie evidence of negligence.[14] But where some public policy demands that more stringent effect be given to the statute, breaches thereof have been ruled to be negligence per se.[15]

In the principal case the opinions do not disclose which view was followed in regard to the negligent character of defendant's breach of the statute, because both sides of the court based their arguments mainly on the causation phase of the controversy. However, it is significant

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138 Mich. 253, 101 N. W. 581 (1904). The statute "does not pretend to deal with the liability for actionable negligence. It is a police regulation; and the sanction is the penalty provided by statute. It is not intended to attach civil liability." Volkert v. Diamond Truck Co., [1940] Can. Sup. Ct. Rep. 455, 461.

[11]Morris, The Role of Criminal Statutes in Negligence Actions (1949) 49 Col. L. Rev. 21, 22.

[12]Newell Contracting Co. v. Berry, 223 Ala. 109, 134 So. 870 (1931); Brixey v. Craig, 49 Idaho 319, 288 Pac. 152 (1930); Sherwood v. Southern Express Co., 206 N. C. 243, 173 S. E. 605 (1934); Restatement, Torts (1934) § 286.

[13]Baltimore & O. R. Co. v. Green, 136 F. (2d) 88 (C. C. A. 4th, 1943); Wainwright v. Jackson, 291 Mass. 100, 195 N. E. 896 (1935); Evers v. Davis, 86 N. J. L. 196, 90 Atl. 677 (1914).

[14]Rasmussen v. Wiley, 312 Ill. App. 404, 39 N. E. (2d) 57 (1941); Hill v. Hiles, 309 Ill. App. 321, 32 N. E. (2d) 933 (1941); Stine v. Union Electric Co. of Illinois, 305 Ill. App. 37, 26 N. E. (2d) 433 (1940).

[15]Beauchamp v. Sturges & Burns Mfg. Co., 250 Ill. 303, 95 N. E. 204 (1911).

that the majority quoted with approval from *Ross v. Hartman* an assertion that "Violation of an ordinance intended to promote safety is negligence;"[16] this unequivocal expression apparently refers to negligence per se. On the other hand, the dissenting justice at one point stated that the breach is "prima facie evidence of negligence,"[17] and thereby indicated the question of negligence was to be determined by a jury.

Assuming that the defendant's violation of the statute constituted negligence on one basis or the other, consideration should then be given to the issue of the risk which the legislature intended to cover. The plaintiff must establish that he is within the class of persons whom the statute was designed to protect[18] and that the harm was of the type the statute was designed to prevent.[19]

Statutes of the kind in question are undoubtedly drawn to protect those persons within the area of the automobile's operation. "The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets."[20]

It is not so evident that the statute was designed to protect the public from harm occasioned by thieves. The clause requiring breaks to be set and wheels turned toward the curb when the automobile is parked on an incline is obviously to guard against the possibility of automobiles starting to move merely by the force of gravity. The provision for locking the ignition and removing the key is doubtlessly calculated to prevent the automobile from moving under the power of its own motor when not properly attended. This contingency might arise through mechanical defects causing automatic starting, or, more likely, through the intermeddling of persons not authorized to operate the vehicle. These persons might be childish pranksters, negligent meddlers or, in the opinion of the majority of the Illinois court, wilful thieves.[21]

The dissenting judge was of the opinion that the statute requires no more precaution than that which common law rules demand of the ordinary prudent man in parking his vehicle. He reasoned the enact-

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[16]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 539 (1948).

[17]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 543 (1948).

[18]Prosser, Torts (1941) 266, 38 Am. Jur., Negligence § 165 and cases cited.

[19]Bischof v. Illinois So. Ry. Co., 232 Ill. 446, 83 N. E. 948 (1908); Volkert v. Diamond Truck Co., [1940] Can. Sup. Ct. Rep. 455; Gorris v. Scott, L. R. 9 Ex. 125 (1874); 38, Am. Jur., Negligence § 163 and cases cited.

[20]Ross v. Hartman, 78 App. D. C. 217, 139 F. (2d) 14, 15 (1943).

[21]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 541 (1948).

ment is "a traffic regulation not an anti-theft measure, and is designed to reduce the likelihood of parked cars being set in motion without the intervention of a human agency, or by children or other intermeddlers."[22]

A variant approach to the matter of the effect of the thief's intervention is often made through the "proximate cause" theory, under which the plaintiff must show, in addition to his being within the class of persons protected and his having suffered the type of harm the statute sought to prevent, that the harm was brought about in a *particular manner* contemplated by the legislature. In the principal case, the dissenting judge was of the opinion that the legislature was not to be presumed to have abrogated the general rule requiring a "proximate" causal relation between the violation of a statute and the subsequent injury.[23] Thus, the dissent, although willing to concede liability in some cases,[24] refused to impose it in the principal case because the "... criminal act of a third person is generally considered to be a new and independent force which breaks the causal connection between the original wrong and the injury...."[25] The distinction, of course, rests upon the well established common law rule that the defendant will be relieved of liability by the unforeseeable intervention of third parties.[26]

The majority of the court, relying upon the *Ross* case, declared: "Since it is a safety measure, its violation was negligence. This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or 'proximate' cause of the harm."[27] As read by the majority, the statute imposed a duty upon the defendant to foresee that someone might steal the car and do damage with it. Professor Prosser has given support to such a view by suggesting that the violation of a statute may be assumed to cover all risks that might reasonably be likely to follow from

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[22]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 542 (1948).

[23]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 543 (1948), citing Kelly v. Davis, 48 R. I. 84, 135 Atl. 602, 603 (1927).

[24]Moran v. Borden Co., 309 Ill. App. 391, 33 N. E. (2d) 166 (1941); Connell v. Berland, 223 App. Div. 234, 228 N. Y. Supp. 20 (1928).

[25]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 545 (1948).

[26]Curtis v. Jacobson, 54 A. (2d) 520 (Me. 1947); Lane v. Atlantic Works, 111 Mass. 136 (1872); Aune v. Oregon Trunk Ry., 151 Ore. 622, 51 P. (2d) 633 (1935).

[27]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 539 (1948). Cf. Lowndes, Civil Liability Created by Criminal Legislation (1932) 16 Minn. L. Rev. 361, 371: "It is evident that the violation of a statute has no causal connection with an injury in any case.... The violation of a statute goes not to causation but to culpability. That is, the breach of the statute does not contribute anything to the result, it merely colors the act or omission to act which produces the result."

its violation.[28] Even if this premise is accepted, however, there still remains the issue of whether the statute itself is intended to establish what risks are "reasonably" to be expected.

The decision in the principal case rejects the conclusive application of common law causation concepts and imposes a liability which Professor Morris has termed "novel," wherein "The test for criminal responsibility is calculated to require more care than the reasonably prudent man would exercise before the enactment of the ordinance in at least some circumstances."[29] Concurrence in this point of view is indicated by the majority of the Illinois court in the observation that "The courts must keep pace with scientific developments and recognize the increasing hazards to the safety of the public. When considering present hazardous conditions confronting the public, against which the Legislature aims to provide protection, courts should not rigidly adhere to a legal interpretation of proximate cause applied to conditions prevailing many years ago, if to do so would do violence to the intention of the Legislature."[30]

It appears that the presence of the statute has been accepted by this court as affording an opportunity to break away from the restrictive common law rule that the intervening criminal acts of a third party must necessarily break the chain of causation and save the defendant from liability, and to allow the imposition of liability where the negligent defendant's conduct has in fact contributed to the cause of the plaintiff's injury. It has been said that this novel liability, being "the creature of the court, . . . can be justified in the last analysis only in policy. [But] that the legislature has enacted a criminal proscription properly engenders an assumption that conformity is practical and that desetion of an old immunity will not result in undesirable sudden shock."[31]

JACK B. PORTERFIELD, JR.

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[28]Prosser, Torts (1941) 271.

[29]Morris, The Role of Criminal Statutes in Negligence Actions (1949) 49 Col. L. Rev. 21, 27.

[30]Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537, 541 (1948).

[31]Morris, The Role of Criminal Statutes in Negligence Actions (1949) 49 Col. L. Rev. 21, 47.