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Federal Procedure-Obligation Of Federal Courts Under Erie Railroad V. Tompkins To Follow Decisions Of Lower State Courts

CASE COMMENTS

BASTARDS—ILLEGITIMATE CHILD'S RIGHT TO PENSION PAYABLE TO "CHILD" OF DECEASED MEMBER OF BENEFICIAL ASSOCIATION. [Minnesota]

Although the early civil and canon law allowed legitimation of an illegitimate child by the subsequent intermarriage of its parents,[1] the common law showed no such leniency, branding the child as *filius nullius,* the child of no one. He could not inherit from his mother or father, nor could he have heirs other than those of his own body.[2] The basic reason for the rule was probably the pressure against illicit sex relations,[3] but the doctrine whereby the child born out of wedlock was treated as *filius nullius*[4] was also greatly influenced by the fact that marriage was an event which could be proved, whereas fatherhood of an illegitimate child could not; and thus, in a day when land was essentially inalienable, the all-important determination of who was an heir was rendered more accurate.[5]

Blackstone strenuously argued the superiority of the common law rule over that of the civil law, but he confined this incapacity of the bastard principally to the right to become an heir and to hold church office.[6] Accordingly, Kent, speaking of the English common law, states

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[1] 1 Bl. Comm. (New ed. 1825) 487: "The civil and cannon laws do not allow a child to remain a bastard if the parents afterwards intermarry; (i) and herein they differ most materially from our law."

Three classes of children were recognized by the civil law: legitimate, natural, and bastards. Natural children were those born of parents both of whom had capacity to marry and were legitimized by subsequent intermarriage of their parents. Bastard were the children born of parents one of whom was incapacitated to marry. There was no legitimization for this latter class. Thus, Blackstone in the comment above must have referred to "natural" children, as under the common law these were also termed bastards.

For the law of Louisiana, see Minor v. Young, 149 La. 583, 89 So. 757 (1920).

[2] 1 Bl. Comm. (New ed. 1825) 491, 492.

[3] Clarke v. Carfin Coal Co., [1891] A. C. 412, 427, where the Earl of Selbourne states that the rule was aimed at "the encouragement of marriage and the discouragement of illicit intercourse."

[4] 1 Bl. Comm. (New ed. 1825) 479: "A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards." It was not necessary, even at common law, that the child be conceived in wedlock.

[5] See Ayer, Legitimacy and Marriage (1902) 16 Harv. L. Rev. 22, 23. The author states that the common law policy was founded on the necessity "... that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied on as determining the heir."

[6] 1 Bl. Comm. (New ed. 1825) 492: "The incapacity of a bastard consists prin-

positively that the rule that a bastard is *filius nullius* applied only to the case of inheritance and succession.[7] It was unlawful for him to marry within the Levitical degrees of relationship, and a bastard was considered to be within the Marriage Act of 26 Geo. II which required consent of the father, guardian, or mother in order that the marriage of a minor be valid.[8]

The English law applicable to illegitimate children was brought to America by the founding fathers, and adopted in the colonies;[9] but the further development of American law has to a considerable extent given to children born prior to valid marriage the same rights enjoyed by other children. This advance has been brought about primarily by express statute, but also to some extent by the construction given by the courts to other statutes affecting the rights of the illegitimate child.[10] In all fifty-one American jurisdictions statutes have provided a means of mitigating the harsh rule of the common law, and in all jurisdictions the child may become legitimate by acts of both parents. In forty-eight jurisdictions the child is legitimized if the parents subsequently marry.[11]

The state of Arizona has an outstanding liberal statute which provides that "every child is the legitimate child of its natural parents,"[12]

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cipally in this, that he cannot be an heir to any one, neither can he have heirs, but of his own body; ... A bastard was also, in strictness, incapable of Holy orders; and though that were dispensed with yet he was utterly disqualified from holding any dignity in the church; but that doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man."

[7]2 Kent, Commentaries on American Law ((11th ed. 1866) 230: "With the exception of the right of inheritance and succession, bastards, by the English law, as well as the law of France, Spain, and Italy, are put upon an equal footing with their fellow subjects."

[8]2 Kent, Commentaries on American Law (11th ed. 1866) 299.

[9]See Madden, Persons and Domestic Relations (1931) Sec. 105 and the cases there cited, in general, on the application of the modern common law rule in America.

[10]Middleton v. Luckenbach S. S. Co., 70 F. (2d) 326 (C. C. A. 2d, 1934); Ciarlo et al v. New York City Employee's Retirement System, 270 App. Div. 594, 61 N. Y. S. (2d) 751 (1946).

[11]For a very complete analysis of these statutes in the various jurisdictions, see 4 Vernier, American Family Laws (1936) 154, Table CXVII at page 158.

[12]Ariz. Code Ann. (1939 § 27-401, Laws (1921) Ch. 114, § 1. For a recent construction of this statute, see In Re Cook's Estate, 63 Ariz. 78, 159 P. (2d) 797 (1945) holding that a child born out of wedlock subsequent to the 1921 statute was thereunder "for all purposes the legitimate child of her father with full right of inheritance" and, thus, could contest his will. However, see also In re Silva's Estate, 32 Ariz. 573, 261 Pac. 40 (1927) where it was held that this statute did not apply to illegitimate children born prior to its enactment.

North Dakota has a very similar statute, but there is some question as to

and it appears that this statute in substance goes as far as the celebrated Children's Rights Laws of Norway which accord illegitimate children full legal rights with legitimate children.[13] The illegitimate child has been given many rights under wartime protective measures for members of the armed forces and their dependents,[14] and the Uniform Illegitimacy Act imposes a duty of support on both parents.[15]

Most American courts have, however, proceeded cautiously in their construction of this legislation. Illustrating this tendency is the recent Minnesota case of *Jung v. St. Paul Fire Dept. Relief Ass'n*,[16] in which a statute according the illegitimate child a right of inheritance from the father under certain conditions was given a restrictive application on the reasoning that it merely created a specific exception to the common law rule, rather than working an abrogation of it. In this case, the plaintiff's illegitimate father was killed in line of duty as a fireman while a member of the Relief Association. By his mother as *guardian ad litem,* plaintiff brought this action to recover pension benefits which he alleges are due him under the Minnesota statute authorizing the establishment of the defendant organization, which provides that "when an active member of a relief association dies, leaving ... a child or children ... [such] child or children shall be entitled to a pension ...."

The Minnesota court followed the weight of authority in this country as well as in England in ruling that the term "child" when used in such a statute, without express intention to the contrary, means only a legitimate child.[17] The plaintiff did not contest this point, but referred to a Minnesota statute which provides:

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whether or not its general legitimization section has been repealed. N. D. Comp. L. (1913) § § 4421, 4450, 5745, (Supp. 1913-25) § 10500b1.

California and Michigan also have liberal statutes. In Michigan, if the child is acknowledged and the acknowledgment is recorded like a deed, but with the probate judge, the child is legitimate for all purposes. Mich. Comp. Laws (1929) § 13443. Cal. Code (Lake, 1933) § § 215, 230; Probate Code (Lake, 1933) § § 255, 256.

[13]Norway Children's Rights Laws (1915). A favorable comment on these statutes appears in Note (1916) 16 Col. L. Rev. 698, 700.

[14]National Service Life Insurance Act, 54 Stat. 1009 (1941), as amended 56 Stat. 657-659 (1942), 38 U. S. C. A. § 802 (g) (Supp. 1945); Serviceman's Dependents Allowance Act. 56 Stat. 385, (1942), as amended 57 Stat. 581, 582 (1943), 37 U. S. C. A. § 220 (c) (Supp. 1945); World War Veterans' Relief Act. 43 Stat. 607 (1924), as amended 48 Stat. (1934), 38 U. S. C. A. § 505 (c) (1942).

[15]Uniform Illegitimacy Act, § 1, 9 U. L. A. (1932) 187. The act was approved by the National Conference of Commissioners on Uniform State Laws in 1922, and by 1932 it was adopted, either in its original or a somewhat modified form, in seven states: Iowa, Nevada, New Mexico, New York, North Dakota, and Wyoming.

[16]27 N. W. (2d) 151 (Minn. 1947).

[17]7 W. & Ph. (1940) 42; 1 Bouvier, Law Dictionary (8th ed. 1914) 479.

> "An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by the right of representation."[18]

Prior to the birth of the child, the father had made a statement in writing before competent attesting witnesses declaring himself to be the father of the plaintiff. He had also made a settlement with the mother by which he was released from all duty to support the child, but the instant case was disposed of without considering whether this instrument conformed to the statutory requirements. The court held that the statute conferred on the illegitimate child only a specific right—that of inheritance—and then only to a limited degree, and while it did to this extent raise an exception to the common law disabilities of illegitimacy, it did not abrogate that body of law.

Though it is true that the legislature did not express the purpose of annulling the general common law rule, yet when this specific exception is created, what remains of the rule? According to outstanding authorities as to what the common law embodied, the lack of any right of inheritance was the fundamental and original disability inflicted upon the bastard child.[19] Other disabilities such as the denial of rights under workmen's compensation and wrongful death statutes have grown up in the law merely as incidents to the child's incapacity to inherit.[20] When the right of inheritance is bestowed upon the child by

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[18]Minn. Stat. (1945) § 525.172.

[19]2 Bl. Comm. (New ed. 1825) 490; 2 Kent, Commentaries on American Law (11th ed. 1866) 230.

[20]See Ayer, Legitimacy and Marriage (1902) 16 Harv. L. Rev. 22, 23.

(Wrongful Death Act) Robinson v. Georgia R. and Banking Co., 117 Ga. 168, 43 S. E. 452 (1903), where the court denied the mother of an illegitimate child the right of recovery under a statute which provided that "a mother... may recover for the homicide of a child minor or sui juris upon whom she... is dependent, or who contributes to... her support," on the argument that under the common law the mother had no right of inheritance from the child. One judge stated that he concurred because of previous rulings of the court which were binding, but expressed rulings of the court which were binding, but expressed the view that if it were an original question, he would never agree to the judgment. Accord, 3 R. C. L., Children § 49, and cases there cited.

(Workmen's Compensation Acts) Staker v. Industrial Comm. of Ohio, 127 Ohio St. 13, 186 N. E. 616 (1933), where the court held that the Ohio Workmen's Compensation Statute applied only "to children of an employee who are legitimate and to children who have been legally adopted prior to the injury." Also, Bell v. Terry & Trench Co., 177 App. Div. 123, 163 N. Y. Supp. 733 (1917); In Re Daigoni, 53 Wyo. 143, 79 P. (2d) 465 (1938).

(Beneficial Associations) Lavigne v. Ligue Des Patriotes, 178 Mass. 25, 59 N. E.

statute, the basic disability is removed, and it could logically be reasoned that the incidental disabilities must fall of their own weight. Most American courts, however, while expressing a deep desire to alleviate the plight of the child afflicted with the brand of bastardy[21] are continuing to cast incidental burdens upon him even after the legislature has eliminated the foundations on which the fiction of *filius nullius* was constructed. Occasional decisions show some modern judicial inclination to recognize that a construction of legislative acts strictly in accord with the English common law on this subject is not consistent with humanitarian progress in the law. As far back as 1894 the Supreme Court of Missouri held[22] that since the mother could, by statute, inherit generally from her illegitimate child, she could also sue for its death under the Missouri wrongful death statute providing for recovery by the "mother" or "father" of the deceased child.[23] This same reasoning could be applied to a recovery by the illegitimate child for the death of its parent, and the decision makes it apparent that this court clearly recognized that the removal of the illegitimate child's basic disability also did away with any disability under the wrongful death statute. A later outstandingly liberal case is *Middleton v. Luckenbach S. S. Co.*,[24] in which the Circuit Court of Appeals for the Second Circuit, recognizing that the rule that a bastard is *filius nullius*

674 (1901), where an illegitimate child was held not to be a "child" or "relative" within the statute stating who may be a beneficiary.

[21]Reilly v. Shapiro, 196 Minn. 376, 379, 265 N. W. 284, 286 (1936): "Nor can it be denied that a child born out of wedlock is as much in need of parental aid and the natural rights that go with the relationship of parent and child as those pertaining to a child born in wedlock. Every human instinct is moved extending a helping hand to such child, already laboring under a handicap impossible of removal.... No matter what the individual judgment of a judge may be, his desire to aid in extending human rights cannot be employed to the extent of making law." Jung v. St. Paul Fire Dept. Relief Ass'n, 27 N. W. (2d) 151, 155 (Minn. 1947): "In a society which has barbarically handicapped and burdened children of illegitimate parents for sins in the commission of which they had no part, much remains to be done to humanize existing rules of law. As a court, however, we must take legislative enactments as we find them...." Robinson v. Georgia R. and Banking Co., 117 Ga. 168, 43 S. E. 452, 456 (1903): "If it were an original question, I would never agree to a judgment which holds that the doubly unfortunate mother of a child whose sole parent she is and upon whom she is dependent,—this dependence probably due to the fact of its miserable birth,—cannot recover for its homicide...."

[22]Marshall v. Wabash R. Co., 120 Mo. 275, 25 S. W. 178 (1894).

[23]Cf. State, for the use of Smith v. Hagerstown & Frederick Ry. Co., 139 Md. 78, 114 Atl. 729 (1921), where a mother was denied recovery for the wrongful killing of her illegitimate child even though the legislature had by statute provided a general right of inheritance between the mother and child.

[24]70 F. (2d) 326 (C. C. A. 2d, 1934).

applies only in cases of inheritance, held (1) that an illegitimate child could recover damages for the death of its mother, (2) that the mother of an illegitimate child could recover damages for its death, and (3) that an illegitimate child could recover damages for the death of its father under the Federal Death Act[25] which provides for recovery by a "parent, child, or dependent relative."[26] Also in *Ciarlo et al. v. New York City Employee's Retirement System*[27] an acknowledged illegitimate child was allowed to recover pension benefits from the retirement system in which his father was a member, under the provision that the pension was to be paid to the "widow" or "child" of the deceased "... upon application by or on behalf of the dependents of such deceased member." Here the court reasoned that the legislature intended the word "child" to be used in a broad and natural sense. This case can be distinguished from the *Jung* case only on the technical phrasing of the statute involved. It appears that the intent of the legislature in each state was the same—to provide a pension for those whom an individual is under a duty to support, in case his ability to support is cut off by death. There is little ground on which to reconcile the two decisions. The New York court chose a liberal construction in accord with the progressive view, and the Minnesota court followed the orthodox pattern.

The reason for construction in accord with the early common law fiction has substantially disappeared today.[28] There are adequate

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[25]41 Stat. 537 (1920), 46 U. S. C. A. § 761 (1944).

[26]Judge Manton, speaking for the court, says: "There is no right of inheritance here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view.... To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent." 70 F. (2d) 326, 329 (C. C. A. 2d, 1934).

[27]270 App. Div. 594, 61 N. Y. S. (2d) 751 (1946).

[28]Mansfield wrote in Morris v. Pugh, 3 Burr. 1241, 97 Eng. Rep. 811 (K. B. 1761) that "... fictions of law hold only in respect of the ends and purposes for which they were invented." See also, McKellar v. Harkins, 183 Iowa 1030, 1043, 166 N. W. 1061, 1066 (1918) where the court makes a slashing attack on the fiction of *filius nullius:* "The only justification ever offered fo the common-law fiction was that bastardy should be rendered odious. But bastardy is the sin of the parent; not of the child. The illegitimate child is as innocent as the babe of Bethlehem. Yet the common law held its fiction as a shield over the guilty parent and frowned upon the guiltless child with the disdain of a Pharisee. Our early territorial legislation struck at

means of recording acknowledgements to put the public on notice as to who is an heir. It is certainly questionable as to whether the common law rule has ever promoted morality, and it would seem that the posibility of fraud is less if complete legitimization after birth out of wedlock is allowed.[29] Also, statutes in most states, as in Minnesota, have given the illegitimate child the right of inheritance from the mother and, under certain conditions, from the father.[30] Inheritance being the very essence of the common law rule, those statutes are inconsistent with the rule. The liberal courts, rather than turning to the early common law construction of the word "child," have looked to the intention of the legislatures; and where the law-making bodies have shown some desire that pension, wrongful death, and like statutes give a means of providing support for those who morally and legally have a right to such support, the courts construe them to include the illegitimate child. As brought out in the *Middleton* case, such legislation does not involve inheritance but rather support, and in all states but two, a legal duty has been imposed on both parents to support a child they have brought into the world, whether in wedlock or not.[31] If statutes such as the one authorizing the pension in the *Jung* case are construed with this purpose in mind, the future of these unfortunate children who have no control over their status would be more secure, and the welfare of the general community would be enhanced.[32]

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the cruel injustice of this fiction. From territorial days until now there has never been a time in this state when it has not been contradicted by existing legislation."

[29]Under the common law rule the putative father, in a desperate effort to avoid the possibility of his child going through life branded by law a bastard might be induced to marry a woman conceived of another man's child with no means of verification. However, after the child is born, comparing physical characteristics, blood typing, RH factor tests, etc., afford the accused a better chance of ascertaining whether he was actually the father before taking steps to legitimize the child.

[30]For a summary of the illegitimate child's right of inheritance under these statutes see: Vernier and Churchill, Inheritance by and from Bastards (1934) 20 Iowa L. Rev. 216; Robbins and Deak, The Familial Property Rights of Illegitimate Children: A Comparative Study (1930) 30 Col. L. Rev. 308; Notes (1923) 24 A. L. R. 570; (1929) 64 A. L. R. 1124; (1933) 83 A. L. R. 1330; (1942) 140 A. L. R. 1323.

[31]Texas and Virginia are the exceptions. 4 Vernier, American Family Laws (1936) 207.

[32]This seems to be the underlying consideration in such decisions as the Middleton and Ciarlo cases. Even though it might not have given the plaintiff in the Jung case the remedy asked for because of the prior settlement made by the father relieving him from the duty of further support, it would seem that the court by construing the inheritance statute in the light of the origin of the illegitimate child's disability, and by construing the pension statute according to its general purpose, to

CONFLICT OF LAWS—EFFECT OF FOREIGN DIVORCE DECREE ON HUSBAND'S DUTY OF SUPPORT IN MARITAL DOMICILE. [New York]

Since the United States Supreme Court has now determined that full faith and credit[1] must be given to a divorce rendered at the domicil of the plaintiff in proceedings where the non-resident party has constructive notice only,[2] there may be a need for re-examination of the effect of a divorce decree given subsequent to a support order of another jurisdiction, and of the effect of a foreign divorce decree on a subsequent suit for alimony in the forum.

The first of these two problems was before the Supreme Court nearly a century ago in *Barber v. Barber*.[3] There the wife sought to enforce her New York support order on the theory that it was not terminated by a divorce subsequently obtained by her husband in Wisconsin, and the Court upheld her contention, declaring that determination of the validity of the Wisconsin divorce was not necessary to this conclusion. With the decision of the first *Williams* case[4] in 1942, placing greater obligation on the courts to respect divorce decrees granted in another state, it was arguable that the Supreme Court had indicated a change in attitude.

In the recent case of *Estin v. Estin*[5] the New York Court of Appeals was required to determine whether such a change had been wrought. The wife had obtained an alimony decree in separation proceedings in New York. The husband moved to Nevada and two years later ob-

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provide support for the decedent's dependents, could have carried the opinion in the plaintiff's favor to the point where the question arose as to whether of not the plaintiff's right to support had been terminated by settlement.

[1]Const. U. S. Art. 4 § 1. For the interesting historical background of this clause see Radin, The Authenticated Full Faith and Credit Clause: Its History (1944) 39 Ill. L. Rev. 1.

[2]Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279, 143 A. L. R. 1273 (1942). This case was tried in North Carolina on the basis of Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. ed. 867 (1906) according to which North Carolina need not recognize the Nevada divorce unless there was personal jurisdiction over the parties. The Supreme Court overruled the Haddock case and said that if the domicil of petitioners in Nevada is conceded, then the Nevada decrees are entitled to full faith and credit.

[3]21 How. 582, 16 L. ed. 226 (U. S. 1859).

[4]Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. 279, 143 A. L. R. 1273 (1942).

[5]296 N. Y. 308, 73 N. E. (2d) 113 (1947). Petition for certiorari filed, June 18, 1947. 16 L. W. 3010. Noted (1947) 47 Col. L. Rev. 1069.

Kreiger v. Kreiger, 16 L. W. 3098 (1947) involved the same factual situation as the Estin case, and the New York Court of Appeals affirmed a judgment for the wife on authority of the Estin case. Petition for certiorari filed, September 24, 1947.

tained a divorce without any award of alimony. The wife was served by constructive process and did not personally appear. Thereafter, the husband moved to New York, recorded this divorce, and discontinued payment of alimony. In a suit by the wife for arrears of alimony the New York court conceded the necessity of according the Nevada divorce full faith and credit, in so far as it dissolved the marriage; but since Nevada lacked personal jurisdiction over the wife, its courts were held to be without power to terminate the liability for her support which the New York courts had imposed upon the husband.

Under the theory of this decision marriage is not to be treated as a unit, but as a divisible concept which can be split into the incidents of status and support. The status of the parties can be determined by an in rem[6] proceeding based on constructive service on one of the parties, but an existing support order can be terminated only when the action is in personam. By application of this device, the New York court has found itself able to affirm its compliance with the Federal Supreme Court's new mandate for full faith and credit to foreign divorces, while at the same time preserving the effect of the same tribunal's century-old doctrine of the *Barber* case.

Some support for this reconciliation of principles can be drawn from the Supreme Court, itself, in the concurring opinion of Justice Douglas in *Esenwein v. Commonwealth of Pennsylvania.*[7] There Mr. Douglas, who had spoken for the majority of the Court in the first *Williams* case opinion, after pointing out that the divorce in that decision

[6]In the first Williams case the Supreme Court pointed out that labeling divorce proceedings as "in rem" does not promote analysis of the problem. 317 U. S. 287, 297, 63 S. Ct. 207, 212, 87 L. ed. 279, 285, 143 A. L. R. 1273, 1279 (1942). Madden, Persons and Domestic Relations (1931) 314-316 says the general doctrine is that divorce proceedings are in rem, the status being the res upon which the courts act. Courts departing from the general doctrine treat the action as quasi in rem under the theory that the proceedings are in part in personam. Van Orsdal v. Van Orsdal, 67 Iowa 35, 24 N. W. 579. (1885); Smith v. Smith, 43 La. Ann. 1140, 10 So. 248 (1891); Magowan v. Magowan, 57 N. J. Eq. 195, 39 Atl. 364 (1898) (changed by adoption of the Uniform Divorce Act). New York followed the rule that the divorce action is in personam. People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274 (1879). Madden indicates that Massachusetts, North Carolina and Wisconsin approve this rule.

[7]325 U. S. 279, 65 S. Ct. 1118, 89 L. ed. 1608, 157 A. L. R. 1396 (1945). Petitioner's wife obtained a separation and support decree in Pennsylvania where both parties were domiciled. Petitioner went to Nevada, got a divorce and returned to Ohio to live. He sought to have the support order terminated under the Pennsylvania law that such order does not survive divorce. The court in Pennsylvania held that his divorce was invalid because he failed to establish domicil in Nevada. The Supreme Court affirmed and saw no necessity for deciding the question of the support order being terminated.

had been rendered by a court which obtained jurisdiction over the wife by constructive process, declared:

> "But I am not convinced that *in absence of an appearance or personal service* the decree need be given full faith and credit when it comes to the maintenance or support of the other spouse or the children."[8]

Whether the Court will see fit to follow this personal dictum of one of its members remains to be proved. But such a view, as employed in the *Estin* case, affords an admirable basis for the promotion of both of two partially conflicting public policies—national uniformity in the field of divorce and protection by the state of the welfare of its citizens. The New York court has partially achieved its wishes in the latter respect by finding a way to continue its support order given to the wife prior to the divorce by the husband in another jurisdiction; but yet the policy of the first *Williams* case rule, to secure a nationwide recognition of the dissolution of the marriage status as regards such questions as bigamy and illegitimacy of offspring, has not been infringed.

It appears, however, that the state of the wife's domicil is not able to extend its policy of securing her support by the former husband if the wife has made a personal appearance in the foreign divorce proceedings. As Justice Douglas indicated in his opinion in the *Esenwein* case, the decree given under such circumstances is entitled to full faith and credit (assuming the husband has established a bona fide domicil in the foreign state). Neither the concern for the welfare of its citizens nor the desire to maintain its own judicial prestige can justify the court of the wife's domicil in enforcing her prior alimony decree under those conditions. This conclusion was reached by a New York Appellate Division Court in *Helman v. Helman*,[9] decided after the *Estin* case and involving the same fact situation with one important exception—the wife entered a personal appearance in the Nevada court and contested the divorce. By this action she was held to have given the Nevada court power to terminate her support order. Though legal theory justifies the divergent results of the *Estin* and *Helman* cases, the practical effect of the decisions is to promote uncontested divorces, since a wife who has an existing support order runs the risk of losing that benefit if she dares to contest a divorce sought by her husband in another jurisdiction.

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[8]Esenwein v. Commonwealth of Pennsylvania, 325 U. S. 279, 282, 65 S. Ct. 1118, 1120, 89 L. ed. 1608, 157 A. L. R. 1396, 1398 (1945) (italics supplied.)

[9]73 N. Y. S. (2d) 32 (1947).

The obvious ease with which a Nevada divorce can be acquired brings to focus a problem more urgent than the one presented in the *Estin* case: What relief can be accorded the resident wife who has obtained no support order and whose husband is outside of the court's jurisdiction in the process of acquiring a Nevada divorce? Inasmuch as the awarding of the divorce, whether contested or not, is almost a foregone conclusion, it seems that the wife would be in a better financial position if she remained at home and thereby preserved the chance of later upsetting the decree under the rule of the second *Williams* case.[10] A support action instituted upon her "husband's" probable[11] return to New York, confronts the court with a serious problem of which of the *Williams* cases rules to apply. Before the decision of the first *Williams* case, when courts were not required to give full faith and credit to divorce decrees if the non-resident party was served with constructive notice and did not appear,[12] such foreign decrees were freely disregarded by the New York courts,[13] and by this method they avoided the obstacle of the rule that a husband has no legal or moral obligation to support his divorced wife.[14] Courts in some other states recognized the foreign divorce as valid to dissolve the marriage, but for purposes of alimony the parties were still treated as husband and wife.[15] Such rules were founded on statute[16] or were the product of

[10]325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1557, 157 A. L. R. 1366 (1945).

[11]This thought has been given judicial recognition in a rather cryptic summary by a New York judge in Standish v. Standish, 179 N. Y. Misc. 564, 570, 40 N. Y. S. (2d) 538 (1943), who said New York will continue to reject foreign divorces where "it is apparent that the tourist plaintiff cocked one eye askance at the examining justice while solemnly swearing intention to remain permanently in the divorce forum State and with the other eye anxiously watched the courtroom clock in nervous concern about catching the afternoon train 'back home'."

[12]This was subject to the exception that the divorce given the plaintiff at the matrimonial domicil was entitled to full faith and credit. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. ed. 794. (1901).

[13]As was stated in Standish v. Standish, 179 N. Y. Misc. 564, 571, 40 N. Y. S. (2d) 538 (1943). "Prior to Williams v. North Carolina this court was bound by the settled New York rule that,... no recognition would be accorded to the judgment of a sister State which purported to dissolve against a resident of New York a marriage between spouses whose matrimonial domicile had been in this State and which judgment was not based on voluntary appearance or personal service within the other State where it was rendered."

[14]In New York a wife cannot sue for alimony except as an incident to an action for annulment, separation or divorce. Cohen v. Cohen, 289 N. Y. 145, 44 N. E. (2d) 404 (1942); Robinson v. Robinson, 271 App. Div. 98, 62 N. Y. S. (2d) 785 (1946); Ainsworth v. Ainsworth, 239 App. Div. 258, 267 N. Y. Supp. 587 (1933).

[15]Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Tonvray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N.S.) 1106 (1910).

[16]Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415 (1869); Toncray v. Toncray, 123

judicial legislation[17] to the effect that there is no absolute connection between divorce and alimony. The wife in such cases lost her support suit only if she was plaintiff in the prior divorce action.[18]

Those states which denied the unitary concept of marriage find their support rules unaffected by the *Williams* decisions. However, the New York courts can no longer continue the husband's support duty by merely disregarding a foreign divorce rendered at the domicile of the plaintiff. Thus, the wife in New York must, in order to be successful in her suit for support, upset the foreign divorce by maintaining a collateral attack on the jurisdictional fact of domicil.[19] This situation is undesirable because it tends to create pressure on a court to uphold the attack as a means of protecting a local citizen, and such a successful attack brings about the very evils which the rule of the first *Williams* case was designed to abolish. A real necessity for support plus the realization that few husbands intend to reside in Nevada any longer than necessary may be parlayed into a successful suit for alimony with the consequence that the foreign divorce is declared void for the husband's failure to establish a bona fide domicil in Nevada.

It has been suggested that an amendment to the Federal Constitution would provide the uniformity which is much to be desired in this field.[20] Such an amendment, recently put before Congress,[21] would give that body the power to legislate in regard to divorce and support. However, since it seems very unlikely that enough states will consent

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Tenn. 476, 131 S. W. 977, 34 L. R. A. (N.S.) 1106 (1910). Here the husband obtained a divorce in Virginia, the wife being served by constructive notice. Four years later she sued him in Tennessee for divorce and alimony. The Virginia divorce was held valid but the wife was allowed alimony. The court relied on a Tennessee statute to the effect that there is no necessary connection between divorce and alimony.

[17]Turner v. Turner, 44 Ala. 437 (1870). In Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921) the wife brought suit against the husband for divorce and alimony. He pleaded a prior divorce obtained in Idaho in which action the wife was served by constructive notice. The Colorado court said that ordinarily they recognized foreign divorces as a matter of comity, but declared that even if the husband's foreign divorce was considered valid the wife could still maintain a suit for alimony. Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017 (1894).

[18]McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921). Here the rule applies that alimony is in incident to divorce proceedings. If the wife is the plaintiff and cannot acquire personal service over her husband she will be unable ever to obtain alimony. If she sues for alimony in a later action she will be barred from recovering on the basis that she has split her cause of action.

[19]Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1557, 157 A. L. R. 1366 (1945).

[20]See Note (1947) 32 Corn. L. Q. 417.

[21]Joint Resolution, S. J. Res. 28, 80th Congress, introduced by Senator Capper of Kansas on January 15th, 1947.

to the relinquishment of this authority to the Federal Government, individual states, such as New York, which find the present rules of law highly unsatisfactory must seek a more realistic solution. An answer could be found in a state statute requiring the ex-husband to support his ex-wife for a period of time until she could become financially able to fend for herself. There seems to be no constitutional objection to this action:

> "The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized."[22]

A support statute would involve financial problems for the ex-husband, but on the other hand it would minimize the chances that his divorce will be declared void. Thus, it seems that in the final analysis such legislation would sustain the purpose underlying the rule of the first *Williams* case.

JOSEPH E. BLACKBURN

CONSTITUTIONAL LAW—PROPRIETARY RIGHTS OF STATE AND FEDERAL GOVERNMENTS IN LAND UNDER THE SEA WITHIN THE THREE-MILE LIMIT. [United States Supreme Court]

The recent decision of the Supreme Court in the case of *United States v. California*[1] represents an effort of the Judiciary Department to settle a controversy which for a decade has been harassing both the legislative and executive branches of the Federal Government. Since

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[22]Esenwein v. Commonwealth of Pennsylvania, 325 U. S. 279, 282, 65 S. Ct. 1118, 1120, 89 L. ed. 1608, 157 A. L. R. 1396, 1399 (1945) (concurring opinion by Justice Douglas). See Yarborough v. Yarborough, 290 U. S. 202, 213, 54 S. Ct. 181, 185, 78 L. ed. 269, 276, 90 A. L. R. 924, 931 (1933) (dissenting opinion by Justice Stone with whom Justice Cardozo concurred).

[1]332 U. S. 19, 67 S. Ct. 1658 (1947). The Court authorized the parties to submit by Sept. 15, 1947, the form of decree to carry its opinion into effect. Subsequently, one stipulation was filed by the United States Attorney General and Secretary of the Interior and one by the California Attorney General, purporting "to renounce and disclaim for the United States Government paramount governmental power over certain particularly described submerged lands in the California coastal area." The Court, however, ordered that the stipulations "be stricken as irrelevant to any issues now before us," and thereupon issued its own decree "for the purpose of carrying into effect the conclusions of this Court as stated in its [original] opinion...." 68 S. Ct. 20, 21 (1947).

1921, California had been leasing to oil operators some of the lands underlying the Pacific Ocean within three miles of the coast of California and outside all bays and other inland waters. At the instigation of the Navy Department, various Congressional bills which aimed at reserving the oil lands under the sea to the United States were introduced during the period 1937-1939, but were not acted upon because of the overwhelming opposition of the state governments and of the private oil interests.[2] In 1945, the President claimed title to all the resources under the continental shelf, including the oil in dispute, for the United States;[3] but he subsequently ordered that his claim was to be of no legal effect in any litigation between the United States and a state.[4] In 1946, Congress attempted to quitclaim to the states the title to these lands under the marginal sea, but the President vetoed this legislation and his veto was sustained.[5] The United States then brought suit, asking for a decree declaring the paramount rights of the Federal Government in the disputed area as against those of California and enjoining the state and all persons claiming under it from continuing

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[2]Ireland, Marginal Seas Around the States (1940) 2 La. L. Rev. 252, 254-262.

[3]"Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Executive Proclamation No. 2667, Sept. 28, 1945, 10 Fed. Reg. 12303, 1 C. F. R. (1945 Supp.) 39, 40.

[4]"Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." Executive Order No. 9633, Sept. 28, 1945, 10 Fed. Reg. 12305, 1 C. F. R. (1945 Supp.) 123. It is interesting to speculate on the President's motives in issuing this order, which in effect seems to nullify the proclamation cited in note 3, supra. That proclamation would be of little effect against any foreign government since it could only be upheld by force, which remedy would be available even without the proclamation if any foreign power should ever assert an adverse claim. Further, the continental shelf at certain places extends about 600 miles into the sea; such an extravagant claim has no support under international law. It would seem that the proclamation may have been issued to indicate the Executive Department's view as to the correct solution, while the later executive order was designed to relieve the President of the political disadvantages which would fall upon him for making such a decision. This supposition is strengthened by the President's subsequent veto of the Congressional determination to quitclaim title to the states, evidencing his desire that the submarginal land in question should belong to the United States. In the light of note 34, infra, it seems clear that the proclamation without the overriding effect of the executive order would have been decisive of the issue as between the state and Federal governments, subject to the Congressional power to dispose of such public lands.

[5]Note (1947) 56 Yale L. J. 356.

to trespass in violation of the rights of the United States. The Supreme Court granted the decree as requested, holding that the Federal Government's paramount rights in the three-mile marginal belt included full dominion over the resources of the subsoil.

California contended that the ownership of land under adjacent waters to the three-mile limit is one of the attributes of state sovereignty, that such ownership was vested in the King when England owned the American colonies, that all the Crown's interests passed to the people of the several colonies at the time of the Declaration of Independence, and that California acquired title to lands under her territorial waters on being admitted to the Union "on an equal footing with the original States...."[6]

It may be conceded that California possesses the same rights of sovereignty as those which passed from the English Crown to the original American colonies at the time of the American Revolution;[7] but it appears that any such rights concerning soil under the marginal sea were not *proprietary*, as the state government here claimed.

Early publicists in the field of international law, who first developed the concept that the littoral nation has certain rights in the marginal sea, were not agreed on its geographical extent nor on the nature of the rights possessed therein by the bordering nation.[8] Much of this

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[6]9 Stat. 452 (1850).

[7]"...upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." Shively v. Bowlby, 152 U. S. 1, 14-15, 14 S. Ct. 548, 553, 38 L. ed. 331, 337 (1894). Martin v. Waddell's Lessee, 16 Pet. 367, 10 L. ed. 997 (U. S. 1842); Stevens v. The Paterson & Newark Railroad Company, 34 N. J. Law 532 (1870); People v. New York and Staten Island Ferry Company, 68 N. Y. 71 (1877); Armour & Co. v. City of Newport, 43 R. I. 211, 110 Atl. 645 (1920).

The Court in the Shively case continued: "The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands below the high water mark, within their respective jurisdictions." 152 U. S. 1, 26, 14 S. Ct. 548, 557, 38 L. ed. 331, 341 (1894). Weber v. The Board of State Harbor Commissioners, 18 Wall. 57, 21 L. ed. 798 (U. S. 1874); Mumford v. Wardwell, 6 Wall, 423, 18 L. ed. 756 (U. S. 1867); Pollard's Lessee v. Hagan, 3 How. 212, 11 L. ed. 565 (U. S. 1845).

[8]For discussions of the development of the three-mile concept of territorial waters from the unlimited freedom of the seas doctrine of Grotius to the cannon shot rule of Bynkershoek to the three-mile limit first propounded by Galiani, see: 1 Hyde, International Law (2d rev. ed. 1947) 451-453; Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) 3-9; Note (1900) 46 L. R. A. 267-268.

Of those early writings favoring the property concept, most often cited is the following: "The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belong-

uncertainty has persisted to modern times.[9] Some authorities accept the three-mile limit as an established rule of international law, but apparently assert it as a jurisdictional rather than a proprietary limit.[10] The United States has been one of the champions of this rule in the international arena,[11] but has never asserted it as a rule of property ownership.[12]

If these theories conceived and developed by writers in the field of international law are too controversial to sustain any claim of property ownership in either state or nation, even less do treaties and codifications, which are really the substance of international law,[13] support such claims. European and United States treaties of the Colonial and Revolutionary periods refer to various distances in the territorial seas as limits of neutrality zones,[14] or relate to fishing rights and sanitation control near the coasts.[15] Such treaties apparently give no support to

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ing to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore, along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Wheaton, Internation Law (Wilson, 1936) § 177. See Vattel, The Law of Nations (Chitty's new ed. 1883) 129. Absolutely denying the property concept was Ortolan, Diplomatic De La Mer [cited in 1 Halleck, International Law (3d ed. 1893) 158].

[9]"... neither the nature nor the extent of the territorial zone in the marginal seas has ever been exactly settled by international usage or agreement." Dickinson, Jurisdiction at the Maritime Frontier (1926) 40 Harv. L. Rev. 1.

[10]See 1 Hyde, International Law (2d rev. ed. 1947) 455; Baty, The Three-Mile Limit (1928) 22 A. J. I. L. 503.

Apparently in favor of the doctrine that the bordering nation has a property right in the bed of the sea is Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) 118-119; 33 C. J. 407 (but most of the cases cited to support the latter conclusion deal with questions of jurisdiction only).

[11]Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) 46; Ireland, Marginal Seas Around the States (1940) 2 La. L. Rev. 252, 436, 476.

[12]"The subsoil appurtenant to the coast of a State is doubtless susceptible to acquisition by the State.... It is not understood, however, that the United States has found occasion to endeavor to exercise such a privilege." 1 Hyde, International Law (2d rev. ed. 1947) 467-468.

[13]"... writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it." The Queen v. Keyn, 2 Ex. D. 63, 202 (1876).

[14]Meyer, The Extent of Jurisdiction in Coastal Waters (1937) 51, 63, 78; Riesenfeld, Protection of Coastal Fisheries Under International Law (1942) 134, 135. United States Treaties: Articles VI and VII of the Treaty of 1778 with France (8 Stat. 12, 16); Article V of the Treaty of 1782 with the Netherlands (8 Stat. 32, 34); Article VII of the Treaties of 1785 and 1799 with Prussia (8 Stat. 84, 86-88; 8 Stat. 162, 164); Article XXV of the Treaty of 1794 with Great Britain (8 Stat. 116, 128).

[15]Riesenfeld, Protection of Coastal Fisheries Under International Law (1942) 132-133; Jessup, Law of Territorial Waters and Maritime Jurisdiction (1927) 32, 39.

the property concept. Clearly militating against California's claim of a property interest in the marginal sea at the time of the Revolution is the Treaty of Peace between the United States and Great Britain,[16] Article II of which described the boundaries of the United States as running "to" the Atlantic Ocean. Nor can the United States point to any international law to maintain its claim to ownership of the soil under the marginal sea. The Conference for the Codification of International Law at The Hague in 1930 tentatively agreed that there was such ownership, but no final code resulted because the signatories could not agree on the width of the zone to be included.[17]

There is very little support by way of judicial precedent for the proprietary claims of either the state or Federal Governments to the subsoil of the marginal sea. Several nineteenth century English decisions contain dicta reaffirming extravagant claims of the King's ownership of the subsoil of the sea,[18] but such claims were denounced by the Lord Chief Justice as "an assertion of sovereignty which, for all practical purposes is, and always has been, idle and unfounded."[19] Although the English courts finally accepted the three-mile limit as a property boundary in 1916,[20] American judicial interpretations of the three-mile limit since the Declaration of Independence are too confusing to sustain any such proprietary rights.

California's claim of ownership is, of course, generally favored by those decisions of state courts in which this type of question has arisen.[21] But federal cases, which should control this determination as

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[16]Treaty of 1783 (8 Stat. 80, 81-82.)

[17]Riesenfeld, Protection of Coastal Fisheries Under International Law (1942) 124; 1 Hyde, International Law (2d rev. ed. 1947) 453, 454. For a summary of the proposed draft and the replies of the nations thereto, see Masterson, Jurisdiction in Marginal Seas (1929) 385-400.

[18]Benest v. Pipon, 1 Knapp 60, 67, 12 Eng. Rep. 243, 246 (1829); Blundell v. Catterall, 5 B. & Ald. 268, 293, 294, 106 Eng. Rep. 1190, 1199 (1821).

[19]The Queen v. Keyn, 2 Ex. D. 63, 175 (1876). And see also at page 67.

[20]Secretary of State for India v. Chelikani Rama Rao, [1916] 43 Ind. App. 192. The three-mile limit had been first adopted by an English court in 1800, and then only as a belt of neutrality. The Twee Gebroeders, 3 C. Rob. 162, 165 Eng. Rep. 422 (Adm. 1800); The Anna, 5 C. Rob. 373, 165 Eng. Rep. 809 (Adm. 1805). As late as 1913, the Judicial Committee of the Privy Council emphasized the difference between territorial jurisdiction and proprietary rights in the marginal sea, but carefully avoided determination of the extent of the Crown's interest. Attorney-General for the Province of British Columbia v. Attorney-General for the Dominion of Canada, [1914] A. C. 153, 174-175. Cf. Utah Power & Light Co. v. United States, 243 U. S. 389, 404, 37 S. Ct. 387, 389, 61 L. ed. 791, 816 (1917).

[21]"The minerals contained in the soil covered by tidal and submerged lands belong to the state in its sovereign right." Boone v. Kingsbury, 206 Cal. 148, 273

between nation and state,[22] do not adequately support the claims of either litigant in the present suit. Numerous lower court holdings for and against the proprietary view of the three-mile limit can be found.[23] These decisions were based largely on broad Supreme Court language to the effect that the several states or the people thereof own "their navigable waters, and the soils under them."[24] However, the cited cases, on which lower court misconceptions as to the nature of the three-mile limit were based, dealt only with inland waters and the soil thereunder.[25] None of them involved any claim of the Federal Government as against a state, and hence none of them should control in *United States v. California,* as the Court properly held.

The Supreme Court of the United States has never heretofore expressly determined proprietary rights in the bed of the marginal sea.[26]

Pac. 797 (1928), cert. denied sub nom. Workman v. Boone, 280 U. S. 517, 50 S. Ct. 66, 74 L. ed. 587 (1929) (for want of a substantial federal question). See People v. Stralla, 14 Cal. (2d) 617, 96 P. (2d) 941, 945, (1939); Lipscomb v. Gialourakis, 101 Fla. 1130, 1134, 133 So. 104, 106-107 (1931); Commonwealth v. Boston Terminal Co., 185 Mass. 281, 282, 70 N. E. 125 (1904); State ex rel. Luketa v. Pollock, 136 Wash. 25, 29, 239 Pac. 8, 10 (1925). These latter cases speak of the state's territory as extending to the three-mile limit, but deal only with jurisdictional questions. Other state courts hold only that the state's jurisdiction in the exercise of its police power runs to the three-mile limit or farther. Ex Parte Marincovich, 48 Cal. App. 474, 192 Pac. 156 (1920); Culcullu v. Louisiana Insurance Company, 5 Martin (N.S.) 464 (La. 1827); State v. Ruvido, 15 A. (2d) 293 (Me. 1940).

[22]U. S. Const. Art. III, § 2, Cl. 2; United States v. Alabama, 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327 (1941).

[23]"Every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores.... Indeed such waters are considered as a part of the territory of the sovereign." Justice Story in The Ann, 1 Fed. Cas. No. 397 at 926-927 (C. C. D. Mass. 1812). See United States v. Newark Meadows Imp. Co., 173 Fed. 426, 429 (C. C. S. D. N. Y. 1909). These cases involved the enforcement of laws of the littoral nation within the three-mile limit; and not any question of property rights in the subsoil. Another decision holds that the United States has jurisdiction to the three-mile limit, but makes no statement as to proprietary rights in the subsoil. United States v. Smiley, 27 Fed. Cas. 1132, No. 16,317 (C. C. N. D. Cal. 1864).

[24]Martin v. Waddell's Lessee, 16 Pet. 367, 410, 10 L. ed. 997, 1013 (U. S. 1842).

[25]United States v. Oregon, 295 U. S. 1, 14, 55 S. Ct. 610, 615, 79 L. ed. 1267, 1274 (1935) (inland lake, Wash.); United States v. Holt State Bank, 270 U. S. 49, 54, 46 S. Ct. 197, 198, 70 L. ed. 466, 468 (1926) (Mud Lake, Minn.); Port of Seattle v. Oregon & W. R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 239, 65 L. ed. 500, 506 (1921) (Seattle harbor); McCready v. Virginia, 94 U. S. 391, 394, 24 L. ed. 248 (1876) (Ware River, Va.); Weber v. Board of State Harbor Commissioners, 18 Wall. 57, 65-66, 21 L. ed. 798, 802 (U. S. 1874) (San Francisco Bay); Pollard's Lessee v. Hagan, 3 How. 212, 229-230, 11 L. ed. 565, 573- 574 (U. S. 1845) (Mobile Bay).

[26]Riesenfeld, Protection of Coastal Fisheries Under International Law (1942) 257; Ireland, Marginal Seas Around the States (1940) 2 La. L. Rev. 252, 436, 476-477.

In three cases the Court has spoken directly with respect to the relationship between the states and the marginal sea, but these decisions have little significance to the controversy at hand.[27]

Although California has shown no good title to the soil under the sea to the three-mile limit, the United States cannot depend on the weakness of that title to maintain this action of trespass.[28]

As Justice Frankfurter ably points out in his dissent,[29] the majority decision in *United States v. California* allows the Federal Government's action of trespass against California on the basis of national "dominion," without deciding that the United States does own the subsoil of the marginal sea.[30] Although the Court attaches much weight to the theory that the Federal Government's control over surface waters within the three-mile limit must be unfettered in order to insure adequate control of commerce and navigation in peace and adequate defense in war, it is difficult to see that ownership of the bed of the sea has anything to do with effective maintenance of external sovereignty

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[27]Manchester v. Massachusetts, 139 U. S. 240, 264, 11 S. Ct. 559, 564, 35 L. ed. 159, 166 (1891): "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation.... Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea...." To the extent that the Court expressed any opinion with respect to the three-mile belt, it was to the effect that the state has legislative jurisdiction within the marginal sea. This may be conceded without thereby concluding that the state has any proprietary interest in the soil of the sea. Skiriotes v. Florida, 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1193 (1941), aff'g 144 Fla. 220,197 So. 736 (1940); Humboldt Lumber Manufacturers' Ass'n. v. Christopherson, 73 Fed. 239 (C. C. A. 9th, 1896), aff'g In re Humboldt Lumber Manufacturers' Ass'n, 60 Fed. 428 (N. D. Cal. 1894); United States v. Carrillo, 13 F. Supp. 121 (S. D. Cal. 1935). And see note 20, supra.

Louisiana v. Mississippi, 202 U. S. 1, 52, 26 S. Ct. 408, 422, 50 L. ed. 913, 932 (1906): "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States...." This was pure dictum, inasmuch as the boundary dispute involved inland navigable waters and arms of the sea only.

A third of this group of cases on which California (and lower federal courts) placed much reliance is The Abbey Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. ed. 390 (1912). The controversy here involved waters in the Gulf of Mexico adjacent to Florida, and no issue as to the possible claims of the United States to ownership of the bed of the marginal sea was either raised or decided.

[28]52 Am. Jur., Trespass § 25.

[29]332 U. S. 19, 43, 67 S. Ct. 1658, 1669 (1947).

[30]332 U. S. 19, 38-39, 67 S. Ct. 1658, 1668 (1947): "...we decide... that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

over the surface waters.[31] Neither is it necessary to insure an adequate flow of oil in situations of national emergency. If any mining in the subsoil were to interfere with the Government's external control in peace, such interference could be readily stricken down by Congress in the exercise of its powers of condemnation and of control over interstate and foreign commerce. Under its war powers, Congress could control the mining and disposition of the oil itself during periods of national emergency. The treaty-making power is also available if needed.

If by national "dominion" the Court means "ownership," it has found such ownership, where none previously existed, by judicial fiat. In so doing, it has decided a political question.[32] Absent this decision, the land in question is still unappropriated. California has no title, but the United States can show no better title as a basis for trespass.

Although the Supreme Court has indicated that determination of the extent of the national domain and appropriation of new territory are matters for the executive and legislative branches jointly,[33] it would seem that the President alone might exercise these powers in the marginal sea, where the Government's relations with foreign governments are so intimately concerned.[34] The Court's opinion, in barely men-

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[31]A state may prevent commission of dangerous acts outside the three-mile limit without thereby claiming territory. 1 Hyde, International Law (2d rev. ed. 1947) 460-462. The same reasoning would certainly be applicable to resisting dangerous acts of foreign governments inside the three-mile limit.

[32]"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer ... as appearing from the public acts of the legislature and executive...." Jones v. United States, 137 U. S. 202, 214, 11 S. Ct. 80, 84, 34 L. ed. 691, 696 (1890). This decision held that the President's determination of guano islands as appertaining to the United States is conclusive on the courts, thereby bringing the islands within the criminal jurisdiction of the United States. See 1 Hyde, International Law (2d rev. ed. 1947) 491.

[33]Wilson v. Shaw, Secretary of the Treasury, 204 U. S. 24, 27 S. Ct. 233, 51 L. ed. 351 (1907); United States v. Reynes, 9 How. 127, 13 L. ed. 74 (U. S. 1849); Garcia v. Lee, 12 Pet. 511, 9 L. ed. 1176 (U. S. 1838); Foster and Elam v. Neilson, 2 Pet. 253, 7 L. ed. 415 (U. S. 1829); The Kodiak, 53 Fed. 126 (D. C. Alaska 1892); The James G. Swan, 50 Fed. 108 (N. D. Wash. 1892); note 32, supra.

[34]United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936), rev'g 14 F. Supp. 230 (S. D. N. Y. 1936). And see 15 R. C. L. 127: "The courts will not inquire into the jurisdiction of the United States over that portion of the waters adjoining its territory which has been assumed by the executive department of the government, the question being merely a political and not a judicial one." Upholding the power of the President to determine the sovereignty of the Falkland Islands, such determination being binding on the courts, see Williams v. The Suffolk Ins. Co., 13 Pet. 415, 10 L. ed. 226 (U. S. 1839).

tioning the Presidential Proclamation and subsequent Executive Order,[35] apparently considered that the order denied legally binding effect to the proclamation. If this is the true legal effect of the presidential backtracking, a more rational decision on the part of the Supreme Court would have dismissed the Government's action of trespass against California without prejudice, leaving the door open for the Congress and the President acting together or the President acting alone to appropriate the land under the marginal sea as part of the public domain, giving rise to a trespass action against California and all those claiming under that state. Judging from the past actions of the President, he would no doubt reassert his claim, by revoking the Executive Order or otherwise, since it is doubtful that the present Congress would initiate such action. This presidential assertion of title should then be allowed to stand, subject to overriding by Congress under its powers to manage or dispose of United States property.[36] The legislative body, not the judicial, should, in the end, determine such a vital question of policy.[37]

LLOYD R. KUHN

CONSTITUTIONAL LAW—SCOPE OF REASONABLENESS OF SEARCH AND SEIZURE WITHOUT SEARCH WARRANT. [United States Supreme Court]

The case of *Harris v. United States*[1] has once again focused the attention of the Supreme Court of the United States on the question of what constitutes an illegal search and seizure under the Fourth Amendment to the Constitution, and whether if such search and seizure is illegal, because unconstitutional,[2] the seized articles are admissible as evidence. Although the Court ostensibly adhered to the traditional federal rule that such illegally seized evidence is inadmissible, the effect of the decision seems to reduce further than ever before the citizen's protection against unwarranted interference of this nature.

Since at least as early as 1723, when in *Bishop Atterbury's Trial*[3] it was held that certain letters were admissible as evidence regardless of

[35]See notes 3 and 4, supra.

[36]U. S. Const. Art. IV, § 3, Cl. 2.

[37]In England, the minerals under the bed of the sea have been vested in the Crown by legislation. 21 & 22 Vic. (1858) c. 109.

[1]311 U.S. 145, 67 S. Ct. 1098 (1947).

[2]In this comment when a search and seizure is said to be "illegal," that term is being used as meaning "unconstitutional."

[3]16 How. St. Tr. 323 (1723).

whether they were obtained by unlawful means, England has followed the rule that the unlawful manner in which evidence is procured is not a valid objection to its being admitted as evidence.[4] In the United States, however, the Federal courts,[5] along with eighteen state courts,[6] follow the doctrine that evidence obtained in a manner not permitted by the Fourth Amendment or by similar state constitutional provisions is inadmissible in a criminal case.

The adoption of this position by the Federal courts is directly attributable to the Fourth[7] and the Fifth Amendments[8] to the Constitution of the United States, but it is to be noted that nearly every state has constitutional provisions similar to those two. Because of the oppression exercised by the British Government prior to the colonies' successful struggle for freedom, the people demanded that these amendments be passed in order to protect them from arbitrary action by their governments. Whether the two Federal Constitutional Amendments were intended to be read together and joined to produce a combined result is debatable, but such was the treatment accorded them by the Supreme Court in *Boyd v. United States*,[9] decided in 1886, which contained dictum to the effect that obtaining evidence by an unreasonable search and seizure is prohibited by the Fourth Amendment and that evidence so obtained is not admissible because such searches and seizures are almost always made for the purpose of compelling a man to give evidence against himself, this being condemned by the Fifth Amendment.

The Fourth Amendment simply states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." There is no mention that the use of evidence found during such an unreason-

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[4]Jordan v. Lewis, 14 East. 306, 104 Eng. Rep. 618 (1740); Legatt v. Tollervey, 14 East. 302, 104 Eng. Rep. 617 (1811); Lloyd v. Mostyn, 10 M. & W. 478, 152 Eng. Rep. 558 (1842); Calcraft v. Guest, [1898] 1 Q.B. 759.

[5]Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. ed. 746 (1914).

[6]Rosenzweig, The Law of Wire Tapping (1947) 32 Corn. L. Q. 514, 525, 526, lists the following states as in the minority: Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, Oregon, South Dakota, Texas, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. Rhode Island has not decided the question. All other states accept the English view.

[7]U. S. Const., Am. 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

[8]U. S. Const., Am. 5: "No person... shall be compelled to be a witness against himself."

[9]116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746 (1886).

able search should be prohibited. But the Supreme Court regarded the Fifth Amendment as a remedy, concluding that the introduction of such evidence would in effect be compelling a person to be a witness against himself. In 1914, in the case of *Weeks v. United States*,[10] the dictum of the *Boyd* case was established as the law of the Federal courts, with the condition that the illegality of the search and seizure should first have been directly litigated and established by a motion, made before trial, for the return of the things seized.[11] In a case decided six years later,[12] a corporation was the defendant in a criminal action by the federal government, and the question arose as to the admissibility as evidence of corporate books and papers which had been seized by government officers in violation of the Fourth Amendment. The Court held that the rights of corporations against unlawful search and seizure are to be protected by exclusion of the evidence so seized, *even though the corporation is not protected by the Fifth Amendment from compulsory production of incriminating documents.* Thus the Court has reached by judicial legislation the same method of enforcing the Fourth Amendment as had originally been reached by an application of the Fifth Amendment. The principle has been reaffirmed repeatedly by the Court in the third of a century following the *Weeks* case.[13]

With this background, the case of *Harris v. United States*[14] arose in 1947. Agents of the Federal Bureau of Investigation had gone to petitioner's apartment with two warrants for his arrest, charging him

[10]232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

[11]In People v. Defore, 242 N. Y. 13, 20, 150 N. E. 585, 587 (1926), the court said: "The procedural condition of a preliminary motion has been substantially abandoned, or, if now enforced at all, as an exceptional requirement." Fegan, The Necessity of Motion Before Trial To Suppress Evidence Obtained by Illegal Search and Seizure (1923) 1 U. of Chi. L. Rev. 120, 122, 123, states that the doctrine that a motion before trial must be made still stands, but that there are now two main exceptions to the rule. The first, as exemplified by Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647 (1921), is where the defendant is unaware until trial that the evidence has been procured and is to be used against him. The second, as shown by Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, L. ed. 654 (1921), is where the illegal nature of the seizure is not disputed at the time of the trial.

[12]Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319 (1920).

[13]Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319 (1920); Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647 (1921); Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925); Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927); Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. ed. 374 (1931); United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. ed. 877 (1932).

[14]331 U. S. 145, 67 S. Ct. 1098 (1947).

with the violation of two federal statutes by causing a forged check to be placed in the mails. Petitioner was placed under arrest in the living room of his apartment, and thereafter the agents systematically searched the entire apartment, without the benefit of a search warrant.[15] They were searching for two cancelled checks which were alleged to have been used in forging a $25,000 check. No check was found, but after five hours the agents discovered a sealed envelope marked "George Harris, personal papers." Over the protests of petitioner this was opened, and inside were found certain draft registration certificates.[16] Petitioner was then charged with the unlawful possession, concealment, and alteration of these certificates, and found guilty in the lower court. On appeal, the United States Supreme Court held, by a 5-4 majority, that the search and seizure was reasonable and therefore not condemned by the Fourth Amendment.[17] Chief Justice Vinson, for the majority, said:

> "The opinions of this Court have clearly recognized that the search incident to arrest may, under the appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control.... Petitioner was in exclusive possession of a four room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested."[18]

The question of what is or is not a "reasonable" act cannot, of course, be controlled by rigid rules, but previous Supreme Court decisions in this field seemed to point to a result in the *Harris* case contrary to that actually reached, on the ground that the search and seizure

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[15]If the government agents had searched for the checks pursuant to a search warrant, then they could not have legally seized the draft certificates. This prompted Mr. Justice Frankfurter, dissenting, to say: "The Court's decision achieves the novel and startling results of making the scope of search without warrant broader than an authorized search." 331 U. S. 145, 165, 67 S. Ct. 1098, 1108 (1947).

[16]The majority Court said: "This Court has frequently recognized the distinction between mere evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." 331 U. S. 145, 154, 67 S. Ct. 1098, 1103 (1947). The Court then said clearly these draft certificates fall into the latter category.

[17]The Court justified its holding by reasoning also that the possession of the draft certificates was a continuing criminal act, and was being committed in the presence of the agents at the time petitioner was arrested.

[18]331 U. S. 145, 151, 152, 67 S. Ct. 1098, 1101, 1102 (1947).

was unreasonable. Two earlier cases closely in point[19] had made it appear that only items which are visible and accessible in the offender's immediate custody may reasonably be seized by the arresting officer. And in *United States v. Lefkowitz*,[20] a search by Government officers pursuant to an arrest warrant but no search warrant, of the desks, towel cabinet, and waste baskets of the offender, and the seizure of certain articles found in those places, was held to be in violation of the Fourth Amendment. The Supreme Court in that case pointed out that the search was *exploratory* and *general*. Even if it be conceded that the "immediate control" concept be extended to the lengths that it was in the principal case, still the facts that the seized articles were neither "visible" nor "accessible" and that the five hour search was "exploratory" and "general" make it difficult to justify the majority opinion. Of the four dissenting Justices,[21] three delivered opinions disparaging the conclusion of the majority of the Court, on the grounds that the action of the agents were unreasonable, and that history and governmental policy demand rigid enforcement of the Fourth Amendment.[22]

An evaluation of the *Harris* decision requires more than a choosing between the arguments for and against the federal and English

[19]In Angello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925), it was held that the arresting officer is free to look around and seize the evidences of crime which are in plain sight and in his immediate and discernible presence. Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927) obscured the issue slightly by holding that an arresting officer, pursuant to a search warrant for liquor, could rightfully seize ledgers found, not under the search warrant, but incident to the arrest. This was clarified by Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. ed. 374 (1931), which made it clear that only items which are visible and accessible in the offender's immediate custody may reasonably be seized incident to an arrest.

[20]285 U. S. 452, 52 S. Ct. 420, 76 L. ed. 877 (1932).

[21]Justices Frankfurer, Murphy, Jackson, and Rutledge.

[22]Justice Frankfurter, with Justices Murphy and Rutledge concurring, dissented vigorously. He argued that the search and seizure was unreasonable, but his main attack on the majority opinion was based on the historic reason for the Fourth Amendment, the necessity for maintaining freedom and the right of the people to be free from having their homes ransacked. He declared: " 'Unreasonable' is not to be determined with reference to a particular search and seizure considered in isolation. The 'reason' by which search and seizure is to be tested is the 'reason' that was written out of historic experience into the Fourth Amendment." 331 U. S. 145, 162, 67 S. Ct. 1098, 1107 (1947). Justice Murphy in a very persuasive dissent also attacked the decision, on the ground of reasonableness, during which he said. "The decision of the Court in this case ... effectively takes away the protection of the Fourth Amendment against unreasonable searches from those who are placed under lawful arrest in their homes." 331 U. S. 145, 190, 67 S. Ct. 1098, 1116 (1947).

rules. A logical case can be made out to support either view. In favor of the federal rule, it is said that in order to effectuate the Fourth Amendment protection of the citizenry from the invasion of its privacy by the federal government, the evidence seized in violation of the Amendment must be excluded.

> "In the exercise of their great powers, Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some Courts have said, that the injured party has his cause of action against the officer, and that this should be sufficient satisfaction."[23]

On the other side, Professor Wigmore ably presents the reasoning. He argues that the above line of thought is "misguided sentimentality," and that it places the courts in the position of aiding in undermining the foundations of the institutions they are supposed to protect, by regarding the officer of the law as a greater danger to the community than the unpunished criminal. He further comments:

> "... the mainstay of the special doctrine of Weeks v. United States is that the party whose documents were obtained by illegal search *has a right to obtain their return* by motion before trial. But no such consequence is implied in the Fourth Amendment. The object of the Amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials. It expressly forbids such misconduct, and it implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials. But it implies nothing at all as to the nature of the documents or chattels possessed by the citizen; and they may be treasonable, criminal, wicked, harmless, or meritorious, so far as the Amendment's tenor is concerned."[24]

The action of the Supreme Court in the *Harris* case seems unlikely to please the adherents of either rule. Because the Justices of both the majority and the dissent reaffirmed the rule that illegally seized evidence should be excluded, those agreeing with the Wigmore viewpoint will lament the Court's failure to break with its earlier precedents. But because the majority's interpretation of the scope of reasonable-

[23]Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860, 866 (1920).
[24]8 Wigmore, Evidence (3d ed. 1940) sec. 2184, p. 35.

ness in search and seizure goes to such an extreme, those who believe that such arbitrary action of police officers should be curbed will see the decision as creating new threats to personal liberty. If it be conceded that a faithful application of either rule according to its traditional interpretations will still provide the individual with a remedy for unwarranted police interference, yet the trend pointed to by the *Harris* case may dangerously reduce the citizen's protection against such oppression by federal law enforcement agencies. Under the federal doctrine he is protected by the holding that illegally seized evidence is inadmissible. Under the English rule he is protected by the threat of a civil and a criminal action against the offending officer. But under the *Harris* decision he has neither remedy. The scope of reasonableness has been extended to the point that all an arresting officer has to do is have a valid arrest warrant and wait until he can find the suspect at home, then he can search the entire premises.[25] The evidence found in that manner will be admissible, and the individual has no civil action because the action of the officer is called reasonable. Thus the Fourth Amendment has been rendered totally ineffective under those circumstances. It would seem that the Supreme Court should either refuse to relax its standards of reasonableness and thus enforce the Fourth Amendment, or repudiate the federal doctrine of refusing to admit illegally obtained evidence, and leave the party to his own remedy under the Fourth Amendment.

EDWIN P. PRESTON

CONSTITUTIONAL LAW—STANDARD OF DEFINITION OF STATUTORY PROHIBITION NECESSARY TO MEET THE REQUIREMENT OF DUE PROCESS OF LAW. [United States Supreme Court]

With the ever-increasing governmental control of commercial enterprise and the enactment of penal statutes to effectuate this control, the courts must become the forum in which the provisions of these statutes are subjected to close and critical scrutiny as to their precise meanings. This legislation is frequently attacked on the ground that it fails to meet the standards of due process by not sufficiently defining the acts prohibited. Due process of law requires that a statute be sufficiently definite to inform those subject to its penalties what conduct

[25]Justice Jackson, dissenting, in Harris v. United States, 331 U. S. 145, 196, 67 S. Ct. 1098, 1119 (1947).

is proscribed.[1] The Supreme Court has upheld, as being sufficiently explicit to satisfy the demands of due process, such provisions as liquor restrictions varying according to wholesale or retail;[2] contracts reasonably calculated to or which tend to fix prices;[3] unreasonable or undue restraints of trade;[4] any cattle range previously or usually occupied by any cattle grower;[5] meat represented to be kosher;[6] building of fires near any forest or inflammable material;[7] receiving contributions for any political purpose whatever;[8] reasonable variations in weight or measure;[9] ordinary fees for services rendered;[10] all the ordinary and necessary expenses paid during the year.[11] In upholding these provisions, the Court has often had to seek justification in such inconclusive observations as: "that there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense,"[12] and "the mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."[13]

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[1]Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417 (1909).

[2]State of Ohio ex rel Lloyd v. Dollison, 194 U. S. 445, 24 S. Ct. 703, 48 L. ed. 1062 (1904), involving a local option law prohibiting sale of liquor except by manufacturers in wholesale quantities.

[3]Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417 (1909), where defendant was indicted for violation of state anti-trust statutes prohibiting price-fixing combines.

[4]Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. ed. 1232 (1913), involving a conviction under the Sherman Anti-Trust laws.

[5]Omaechevarria v. Idaho, 246 U. S. 343, 38 S. Ct. 323, 62 L. ed. 763 (1918), involving a statute prohibiting sheep herders from grazing their sheep on cattle ranges, passed in an effort to prevent a war between the two competing interests.

[6]Hygrade Provision Co. v. Sherman, 266 U. S. 497, 45 S. Ct. 141, 69 L. ed. 402 (1925). A New York statute enjoined the false representation of meat as being kosher.

[7]United States v. Alford, 274 U. S. 264, 47 S. Ct. 597, 71 L. ed. 1040 (1927). A Federal Statute prohibited building fires near U. S. forest preserves.

[8]United States v. Wurzbach, 280 U. S. 396, 50 S. Ct. 167, 74 L. ed. 508 (1930), where an officer of the United States (Congressman) was indicted for receiving political contributions from another officer (also a Congressman) in violation of the Federal Corrupt Practices Act.

[9]United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42, 77 L. ed. 175 (1932). Defendant was charged with mislabeling the weight of grain sacks in violation of the Food and Drug Act.

[10]Kay v. United States, 303 U. S. 1, 58 S. Ct. 468, 82 L. ed. 607 (1938), involving a conviction under the Home Owner's Loan Act.

[11]United States v. Ragan, 314 U. S. 513, 62 S. Ct. 374, 86 L. ed. 383 (1942), involving deductions for expenses under income tax regulations.

[12]United States v. Petrillo, 332 U. S. 1, 7, 67 S. Ct. 1538, 1542 (1947).

[13]United States v. Ragan, 314 U. S. 513, 523, 62 S. Ct. 374, 378, 86 L. ed. 383, 390 (1942).

On the other hand, the Court has struck down, as being too vague to satisfy due process requirements, provisions such as: market value under fair competition and normal market conditions;[14] excessive prices for necessaries;[15] any symbol or emblem of opposition to organized government;[16] such provisions regulating common carriers as could constitutionally be applied to private carriers;[17] distribution of pamphlets intended at any time in the future to lead to forcible resistance to law.[18] In striking down such legislation, the Court has repeatedly invoked the doctrine that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties .... And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[19] Although the Court strives to distinguish the various cases, upon examination it is difficult to discover any thread of consistency in the conflicting decisions.

The Supreme Court has upheld another seemingly vague statute in the recent case of *United States v. Petrillo*.[20] James Petrillo president of the American Federation of Musicians, was charged by information with violating a federal statute[21] making it unlawful to coerce or attempt to coerce a radio broadcasting licensee to employ in connection with his business "any person or persons in excess of the number of employees needed by such licensee to perform actual services." Petrillo withdrew three musicians from employment by a licensee, and refused to allow others to work because the station had

[14]International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. ed. 1284 (1914); Collins v. Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 L. ed. 1510 (1914). Defendants were prosecuted under Kentucky anti-trust statutes.

[15]United States v. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298, 65 L. ed. 516 (1921) (see text at note 25); Weeds, Inc. v. United States, 255 U. S. 109, 41 S. Ct. 306, 65 L. ed. 537 (1921).

[16]Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532, 75 L. ed. 1117 (1931). Defendant was prosecuted for hanging a red banner out of his window in violation of a statute forbidding the display of any symbol of opposition to organized government.

[17]Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582, 75 L. ed. 1264 (1931), involving a statute providing for licensing of all except certain specified common carriers.

[18]Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732, 81 L. ed. 1066 (1937) where defendant was indicted for inciting others to join the Communist Party.

[19]Connally v. General Construction Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. ed. 322, 328 (1926), and see cases cited in notes 17 and 18, supra.

[20]322 U. S. 1, 67 S. Ct. 1538 (1947).

[21]60 Stat. 89, 47 U. S. C. A. sec. 506 (1946).

refused to employ three additional musicians as he had decreed. Petrillo attacked the validity of the statute, contending that it: (a) abridges freedom of speech by making peaceful picketing a crime in contravention of the First Amendment; (b) imposes involuntary servitude in violation of the Thirteenth Amendment; (c) is repugnant to the Fifth Amendment because it denies equal protection of the laws to radio broadcasting employees as a class in that it prohibits employees from attempting to force employers to hire more men than needed, but does not forbid employers to hire voluntarily more employees than needed; and (d) is repugnant to the Fifth Amendment because it defines a crime in terms that are excessively vague. The District Court of the Northern District of Illinois upheld these contentions, and dismissed the information. On appeal by the United States, the Supreme Court, in regard to the first basis of attack, decided that Petrillo's motion to dismiss, made only on the ground that the statute *as written* contravened the First Amendment, was not sustainable since the statute did not, on its face, forbid picketing in violation of the First Amendment—its proposed application to picketing came from the information's charge that Petrillo attempted to coerce a licensee by placing a picket in front of the licensee's place of business—and refused to decide, in advance of the necessity for its doing so, the question of the validity of the application of the statute. The Thirteenth Amendment argument was disposed of in the same manner and for the same reasons. The third contention was readily rejected, since the Fifth Amendment contains no equal protection clause. Finally, the Court rejected the most seriously contended point by holding that the statute was not too vague for due process purposes in defining the crime.[22] Justices Reed, Murphy, and Rutledge dissented from this conclusion.

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[22] The case was remanded for further trial, and on 13 Nov. 1947 action against Petrillo was renewed by the United States.

On retrial, the Federal District Court for the Northern District of Illinois dismissed the action because of failure of proof of the government's case. Though the information charged that Petrillo, "knowing that the licensee had no need for the services of additional employees," demanded that the station hire three extra staff musicians, and though the evidence proved that the three extra musicians were not needed by the station, yet there was said to be "no evidence whatever in the record to show that [the union president] had knowledge of or was informed of the lack of need for additional employees prior to the trial of this case." United States v. Petrillo, 16 U. S. L. Week 2334-5, January 14, 1948.

The United States Law Week concludes that "most of [the] teeth seem to have been drawn" from the statute by this decision, because "prosecution thereunder will not lie unless it is shown that the person demanding that a radio station employ additional personnel knew that such personnel were not needed and that it

The majority of the Court felt that "the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress."[23] However, Justice Reed, in his dissenting opinion, pointed out that this was a statute creating a new crime, and that since common experience had not created a general understanding of the criminality of the prohibited acts, a more precise definition of the crime was necessary to meet constitutional requirements.[24]

The leading case in this field, cited in many of the Supreme Court's decisions, is *United States v. Cohen Grocery Co.*[25] There a federal statute[26] making it unlawful to "make any unjust or unreasonable rate or charge . . . to exact excessive prices for any necessaries" was held not to specify the crime with reasonable exactitude. The Court invoked the doctrine, previously referred to, that a statute which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the due process clause."

When compared, the statutes involved in the *Cohen Grocery* and *Petrillo* cases seem equally difficult of interpretation. Overhead, possible losses, capital expenditures, necessary reserves, and reasonable profits, each a variable item, must be considered by a vendor in fixing the selling price of his commodity. The buying public, on the other hand, wants cheaply priced goods. In a like manner, the broadcaster, in an attempt to minimize expenses, will hire the minimum number of employees at reduced wages while the labor leader desires the optimum working conditions for his members. No means of ascertaining the "needs" of an employer are provided for by the statute. As Justice Reed indicated in his dissent, "How can a man or a jury possibly know how many men are 'needed' 'to perform actual services' in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?"[27]

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was intended that such additional personnel were not to perform actual services." 16 U. S. L. Week 1110.

[23]United States v. Petrillo, 332 U. S. 1, 7, 67 S. Ct. 1538, 1542 (1947).

[24]United States v. Petrillo, 332 U. S. 1, 16, 67 S. Ct. 1538, 1546 (1947).

[25]255 U. S. 81, 41 S. Ct. 298, 64 L. ed. 316 (1921).

[26]41 Stat. 297 (1919).

[27]67 S. Ct. 1938, 1546 (1947).

Justice Black, writing for the majority, acknowledged that the employer's determination of his needs was not an acceptable criterion, but stated that the needs must be determined in the light of all the evidence.[28] The labor leader, at his peril, must guess these needs in the light of what a jury will later determine them to be when he is prosecuted.

In previous cases in which the Court has upheld seemingly vague language in a statute, it has frequently seen fit to reflect on the good faith of the efforts made to understand the law, declaring that "Men . . . desirous of observing the law will have little difficulty in determining what is prohibited by it,"[29] and "[the statute] lays down a plain enough rule of conduct for anyone who seeks to obey the law."[30] However, it is doubtful whether such a criterion can validly be applied to labor statutes, in view of the bitter disputes over questions of labor policy and labor legislation that are raging in this country between conflicting interests, each of which seeks to sustain its contentions with appeals to both reason and sympathy.

It is perhaps unfortunate for all concerned that the *Petrillo* case is so inextricably involved in the present swing of the pendulum away from the liberal advances accorded labor unions under the New Deal. The questioned statute, aimed specifically at "featherbedding," a practice in which the American Federation of Musicians has consistently engaged, was enacted at a time when the need for labor regulation was keenly felt. Although there was little likelihood of Petrillo's being unaware of the nature of the acts that Congress sought to prohibit in the actual situation leading to the principal case, there obviously is a lack of any semblance of dividing line between acts permitted and acts prohibited by the statute. Assuming that the statute succeeds in preventing "featherbedding." there seems to be nothing in its terms to keep the radio licensees from utilizing it to force musicians to revent to overly long and underpaid hours.[31]

Perhaps a more satisfactory disposition of the matter from a standpoint of safeguarding personal liberties would have resulted had the Supreme Court invalidated the present statute, thereby requiring

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[28]332 U. S. 1, 6, 67 S. Ct. 1538, 1541 (1947).

[29]Omaechevarria v. Idaho, 246 U. S. 343, 348, 38 S. Ct. 323, 325, 62 L. ed. 762, 768 (1918).

[30]United States v. Alford, 274 U. S. 264, 267, 47 S. Ct. 597, 598, 71 L. ed. 1040, 1041 (1927).

[31]It is doubtful whether the Fair Labor Standards Act would be applicable to a situation of this type.

Congress to enact new legislation setting up a definite standard or providing for a fact-finding board to determine the "needs" to the employer.[32] It must be noted that the attack on the statute has not abated, but has been renewed on those grounds that were improperly presented in the first action.[33] It is quite possible that Petrillo will secure a different result in the pending action. While the statute probably caused no hardship in this particular case, such phrases as "employees needed" should be avoided by Congress in the drafting of future penal legislation, in view of their obvious vagueness.

JOHN E. SCHEIFLY

CONSTITUTIONAL LAW—STATES' OBLIGATIONS UNDER THE EQUAL PROTECTION CLAUSE TO FURNISH EDUCATIONAL FACILITIES TO NEGROES. [United States Supreme Court]

The increase in recent years of the number of Negroes applying for study in law and other graduate and professional courses is reflected in a series of cases in which it has been contended that the states, in violation of the requisites of equal protection of the laws,[1] are denying to Negroes equal educational opportunities within their jurisdictions. The Supreme Court of the United States in 1938 propounded, in *Missouri ex rel. Gaines v. Canada*,[2] the test of the extent to which the policy of a state may validly require segregation of races in public institutions of higher learning. Since that time the "Gaines test" has become with increasing frequency a subject of nice application, with the result that the Supreme Court has now found it necessary to issue a more positive restatement of that doctrine in the recent case of *Sipuel v. Board of Regents of University of Oklahoma*.[3]

In April, 1947, the Supreme Court of Oklahoma had unanimously affirmed a judgment for the defendants in an action in mandamus against the Board of Regents and other college officials to compel the Negro petitioner's admittance to the law school of the University of Oklahoma. The petitioner had sought enrollment in that law school,

[32]Justice Reed suggested that the determination of needs might have been left to the Federal Communications Commission or other regulatory body. 332 U. S. 1, 18, 67 S. Ct. 1538, 1547 (1947).

[33]See not 22, supra.

[1]U. S. Const. Amend. XIV, § 1.

[2]305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938).

[3]16 U. S. L. Week 4090, Jan. 12, 1948, reversing 180 p. (2d) 135 (Okla. 1947).

and even though she met all other requirements, she was denied admittance in accordance with the settled state policy of separate schools, laid down by both Constitution[4] and statute.[5] Although Oklahoma maintained Langston University for separate higher education for Negroes, it had made no such provision for the study of law within the state. The State Regents for Higher Education had statutory authority to establish a law school at Langston,[6] but, in the absence of any previous request for the school, had instead provided a fund for the payment of tuition in any law school outside Oklahoma at which a Negro should matriculate. Though petitioner had sought entrance to the state law school which is under the control of the *University Board of Regents,* she had never requested the *State Regents for Higher Education* to provide a separate law school for Negroes in Oklahoma.

The importance of the Oklahoma court's decision lies in its extension of the "Gaines test" laid down by the Supreme Court of the United States.[7] In the *Gaines* case, the Court squarely upheld the policy of a state in its separation of the races for higher education,[8] but not without imposing limitations that would assure equality of rights. Accordingly, a state is obligated "... to provide Negroes with advantages for higher education substantially equal to the advantages afforded to white students," and "... within its own jurisdiction."[9] Further, it must be the mandatory duty of the governing board to provide such facilities upon the application of even one student.[10] The Court, in reply to the

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[4]Okla. Const. (1907) Art. 13, § 3: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained."

[5]Okla. Stat. (1941) Tit. 70, § § 451, 455, 456, make any person, corporation, or association of persons guilty of a misdemeanor who maintain or operate a state college where both white and colored persons receive instruction; instructors in such colleges are also made guilty of a misdemeanor.

[6]Okla. Stat. (1941) Tit. 70, § 1451; Okla. Stat. (Supp. 1947) Tit. 70, § 1451 b.

[7]305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938).

[8]Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896); McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U. S. 151, 35 S. Ct. 69, 59 L. ed. 169 (1914); Gong Lum v. Rice, 275 U. S. 78, 49 S. Ct. 91, 72 L. ed. 172 (1927); cf. Cumming v. Board of Education, 175 U. S. 528, 544, 545, 20 S. Ct. 197, 200, 44 L. ed. 262, 266 (1899).

[9]305 U. S. 337, 344, 350, 59 S. Ct. 232, 234, 236, 83 L. ed. 208, 211, 213 (1938).

[10]305 U. S. 337, 351, 59 S. Ct. 232, 237, 83 L. ed. 208, 214 (1938). The Court, in holding that the Negro's constitutional right was denied, declared that "... the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

argument that the provision for tuition to schools outside the state was only temporary pending actual establishment of a law school for Negroes within the state, took the view that discrimination could continue indefinitely by virtue of the statutory discretion of the curators, coupled with their alternative out-of-state scholarship provision. "In that view, we cannot regard the discrimination as excused by what is called its temporary character."[11] Later decisions have interpreted this language to signify that so long as the governing body was under a mandatory duty to establish a Negro law school upon proper application, requiring the first applicant to wait the reasonable interval necessary for its establishment would not be considered a denial of equal protection of the laws.[12]

Following closely these various stipulations, the Supreme Court of Oklahoma expressly found that the "Gaines test" had been met in every particular. It expressly recognized the obligation of the state to provide equal educational facilities within the state for any one Negro who made known his desire for such.[13] It interpreted the state law,[14] which merely "authorized" the State Regents to act, as meaning that the board was under a mandatory duty to provide a separate school for Negroes under those circumstances.[15] And following the inference of the *Gaines* case, as well as later supporting authority in states with similar statutes,[16] it concluded that until *substantial notice* was given to the State Regents, to create the duty, the failure to establish a school would not constitute discrimination. Thus, the court pointed out that the Negro in Oklahoma had at his discretion and upon his application the alternative of education within the state by right, or without at

[11]305 U. S. 337, 352, 59 S. Ct. 232, 237, 83 L. ed. 208, 214 (1938).

[12]Bluford v. Canada, 32 F. Supp. 707 (W. D. Mo. 1940); State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941); State ex rel. Michael v. Witham, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

[13]180 P. (2d) 135, 138 (1947): "...it would be the duty of the state, without any formal demand, to provide equal educational facilities for the races, to the fullest extent indicated by any desired patronage, whether by formal demand or otherwise."

[14]Okla. Stat. (Supp. 1947) Tit. 70, § 1451 b: "Said Board of Regents is hereby authorized to...employ necessary instructors, professors and other personnel, and fix the salaries thereof, and to do any and all things necessary to make the University effective as an educational institution for the Negroes of this State."

[15]180 P. (2d) 135, 144 (1947): "That board has full power, and as we construe the law, the mandatory duty to provide a separate law school for negroes upon demand or substantial notice as to patronage therefor."

[16]Bluford v. Canada, 32 F. Supp. 707 (W. D. Mo. 1940); State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941); State ex rel. Michael v. Witham, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

state expense, and intimated that if discrimination existed it would be in the Negro's favor.[17]

The determination that the State Regents for Higher Education had not under the facts of this case been given substantial notice is the point on which the result of the case hinges.[18] The Supreme Court in the *Gaines* case did not expressly decide that application by the Negro to the authorities who would be responsible for setting up a Negro law school was necessary to provide the state with notice to set up that school,[19] whereas the Oklahoma court decided that was necessary.[20] It excused the fact that the State Regents for Higher Education actually had known of petitioner's application and had met to consider the "questions involved" without doing anything to establish a Negro law school, by saying the board had no notice of her desire to attend a Negro law school because no application was ever made to it.

The Supreme Court of the United States reversed the Oklahoma decision, and in a concise opinion citing the *Gaines* case, declared:

> "The petitioner is entitled to secure legal education afforded by a state institution .... The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."[21]

It seems clear, accordingly, that this opinion does not alter in any respect the previous "Gaines test," but merely points a warning to the

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[17]Sipuel v. Board of Regents of University of Oklahoma, 180 P. (2d) 135, 140 (Okla. 1947).

[18]Sipuel v. Board of Regents of University of Oklahoma, 180 P. (2d) 135, 139 (Okla. 1947). "It would be the duty of that board to so act, not only upon formal demand, but on any definite information that a member of that race was available for such instruction and desired the same. The fact that petitioner has made no demand or complaint to that board, and has not even informed that board as to her desires, so far as this record shows, may lend some weight to the suggestion that petitioner is not available for and does not desire such instruction in a separate school."

[19]305 U. S. 337, 352, 59 S. Ct. 232, 237, 83 L. ed. 208, 215 (1938).

[20]Sipuel v. Board of Regents of University of Oklahoma, 180 P. (2d) 135, 138 (Okla. 1947). "As we view the matter the state itself could place complete reliance upon the lack of a formal demand by petitioner .... But it does seem that before the state could be accused of discrimination for failure to institute a certain course of study for negroes, it should be shown there was some ready patronage therefor, or some one of the race desirous of such instruction. This might be shown by a formal demand, or by some character of notice, or by a condition so prevalent as to charge the proper officials with notice thereof without any demand. Nothing of such kind is here shown."

[21]Sipuel v. Board of Regents of University of Oklahoma, 16 U. S. L. Week 4090, Jan. 12, 1948.

states to refrain from straining the spirit of that rule by legal hair-splitting as to the requisites for substantial notice of the Negro petitioner's desire for education. Thus, the cases following the *Gaines* case are still in force in holding that temporary discrimination after application will be excused for a "reasonable time" necessary for the state to provide separate facilities.[22] In recent months when Negroes have given notice of a desire for study in those fields already offered by the state to white students, states which have a segregation policy have followed the inference of the *Gaines* case, and have hastened to make some type of provision for the same instruction in separate institutions.[23]

If the foregoing interpretation is accepted, the question logically arises as to what length of time is then reasonable. Although the courts astutely avoid establishing a rigid rule, in the more recent *Wrighten* case the court condoned the delay "... if the State [Negro] College Law School is opened and adequate for the September 1947 [next] term as represented...."[24] The Supreme Court of Missouri had twice spoken in similar terms.[25] These decisions seem clearly to point

[22]Wrighten v. Board of Trustees of University of South Carolina, 72 F. Supp. 948 (E. D. S. C. 1947); Bluford v. Canada, 32 F. Supp. 707 (W. D. 1940); State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941); State ex rel. Michael v. Witham, 179 Tenn. 250, 165 S. W. (2d) 378 (1942).

[23]When a Negro was denied admission to the University of Texas Law School in 1946, he went to a state district court at Austin, and filed a petition to enforce his legal rights, whereupon the court allowed the state six months in which to provide a separate law school or admit him to the University of Texas. Texas opened a separate law school early in 1947. Life (Sept. 22, 1947) p. 69, 70.

Prior to the decision of Wrighten v. Board of Trustees of University of South Carolina, 72 F. Supp. 948 (E. D. S. C. 1947), but after the action seeking admittance to the Law School of the University of South Carolina had been brought, the legislature authorized the Board of Trustees to operate a law school for Negroes for the next fiscal year and appropriated funds therefor.

[24]72 F. Supp. 948, 953 (E. D. S. C. 1947).

[25]State ex rel. Gaines v. Canada, 344 Mo. 1238, 131 S. W. (2d) 217, 220 (1939) The United States Supreme Court remanded the cause to the Missouri Supreme Court for proceedings consistent with its opinion in State ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938). Prior to the latter opinion the Missouri Legislature had changed a former statute to make the duty of the Board of Curators mandatory, and also had made an appropriation for the establishment of a colored law school. The Missouri Supreme Court held the period between June 26, 1939, when the resolution to provide a school was first adopted, and September 1, 1939, reasonable.

See also State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S. W. (2d) 12, 18 (1941). In another recent case, Sweatt v. Painter, District Court of Travis County, Texas (1947), the court allowed the state of Texas six months within which to make provision for a Negro law school. An appeal was taken from the decision of the lower court: No. 9684 in the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, and is now pending.

toward a "by next-term" deadline.[26] This standard would appear to accord reasonable privileges to the colored applicant, especially in consideration of the fact that most colleges operate on a term-to-term basis, and under few circumstances would a white student be allowed to enter college other than at the beginning of a term. And if the interval between the decision and the next term is a substantial period of time, the state's job of making the essential arrangements for the school becomes physically possible. However, assuming even somewhat greater leeway in time, compliance is certain to be more costly to the state than if made over a long period.

Moreover, the length of time allowed presents a correlative problem in that it will affect in large part the type of facilities that can be acquired in an effort to meet the test of equal treatment in respect to every facility.[27] The decisions in this particular, numerous in recent years regarding situations arising in secondary and grade schools, would appear equally applicable under the same circumstances in higher state-supported schools.

There is substantial agreement that a state may not constitutionally, either by statute or administrative discretion, differentiate in salaries paid colored and white teachers where qualifications attained and services performed are substantially equal.[28] Further, courts consistent-

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[26]Because of the peculiar timing of this case, the State of Oklahoma was faced with the necessity of establishing a law school for Negroes within the very few weeks before the second term of the normal school year began. In the future this difficulty can be avoided by the advance adoption of an administrative rule that *all* students must apply for admission a set time in advance of the beginning of the term.

[27]Pearson v. Murray, 169 Md. 478, 182 Atl. 590, 592 (1936). "The requirement of equal treatment would seem to be clearly enough one of equal treatment in respect to any one facility or opportunity furnished to citizens...."

[28]Where differentiation was the custom or policy of the school board, Morris v. Williams, 149 F. (2d) 703 (C. C. A. 8th, 1945); where it appeared in a salary schedule, Alston v. School Board of City of Norfolk, 112 F. (2d) 992 (C. C. A. 4th, 1940); Davis .v Cook, 55 F. Supp. 1004 (N. D. Ga. 1944); Thomas v. Hibbitts, 46 F. Supp. 368 (M. D. Tenn. 1942); McDaniel v. Board of Public Instruction for Escambia County, Fla., 39 F. Supp. 638 (N. D. Fla. 1941); where it appeared in a state minimum wage law, Mill v. Lowndes, 26 F. Supp. 792 (D. C. Md. 1939). But where the differentiation was not based on race, the fact that Negro teachers received lower salaries is not violative of the equal protection of the laws; where Negro teachers lacked education, background, and experience, Reynolds v. Board of Instruction for Dade County, Fla., 148 F. (2d) 754 (C. C. A. 5th, 1945); where Negro teachers made lower grades on a state teacher's examination, Thompson v. Gibbes, 60 F. Supp. 872 (E. D. S. C. 1945); where the board was allowed discretion on the basis of professional attainments, Mills v. Board of Education of Anne Arundel County, 30 F. Supp. 245 (D. C. Md. 1939).

ly take the position that the ratios of teachers to pupils and the relative competence of teachers are essential factors in the determination of whether school facilities are equal.[29] Equality of facilities has been held to mean generally that they must be the same type, sufficient and commodious, although not necessarily identical in size or number; value proportionate to enrollment has been emphasized.[30] Uniformly it is insisted that there be no substantial difference because of race in the length of the school terms,[31] or in instruction offered in the separate schools;[32] and a few cases hold that the school revenues must be prorated per capita among white and colored schools.[33] Another yard-

[29]Claybrook v. City of Owensboro, 16 Fed. 297 (D. C. Ky. 1883); Graham v. Board of Education of City of Topeka, 153 Kan. 840, 114 P. (2d) 313 (1941); Board of Education of Berea v. Ballard, 299 Ky. 370, 185 S. W. (2d) 538 (1945); Lowery v. Board of Graded School Trustees in Town of Kernersville, 140 N. C. 33, 52, S. E. 267 (1905); Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400 (1923).

[30]Discrimination was found: Where the number of white schoolhouses were disproportionate to colored schoolhouses according to enrollment, and superior in other respects, Claybrook v. City of Owensboro, 16 Fed. 297 (D. C. Ky. 1883); where colored school had mixed classes in schoolrooms and was without auditorium, music facilities, and athletic facilities, Graham v. Board of Education of City of Topeka, 153 Kan. 840, 114 P. (2d) 313 (1941); where value of colored school buildings was vastly disproportionate to value of white school buildings, and so crowded that some classes met only half-time, Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400 (1923). Discrimination was not found: Where building for a large white school was larger than a commodious building for a small colored school, Reynolds v. Board of Education of City of Topeka, 66 Kan. 672, 72 Pac. 274 (1903); Lowery v. Board of Graded School Trustees in Town of Kernersville, 140 N. C. 33, 52 S. E. 267 (1905).

[31]Claybrook v. City of Owensboro, 16 Fed. 297 (D. C. Ky. 1883); Lowery v. Board of Graded School Trustees in Town of Kernersville, 140 N. C. 33, 52 S. E. 267 (1905); Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400 (1923); Williams v. Board of Education of Fairfax District, 45 W. Va. 199, 31 S. E. 985 (1898); accord, Clarence C. Walker Civic League v. Board of Public Instruction for Broward County, Fla., 154 F. (2d) 726 (C. C. A. 5th, 1946).

[32]Courts found discrimination where Negroes were not given similar instruction: In library training course, Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. (2d) 212 (C. C. A. 4th, 1945); by means of departmentalized teaching system, alphabetical grading system, and in athletics and music, Graham v. Board of Education of City of Topeka, 153 Kan. 840, 114 P. (2d) 313 (1941); in law and other professional courses, Pearson v. Murray, 169 Md. 478, 182 Atl. 590 (1936); in mechanical, commercial, art, and music courses, Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400 (1923); but not where only one of many phases of physical instruction was offered later in school program for Negroes, State ex rel. Cheeks v. Wirt, 203 Ind. 121, 177 N. E. 441 (1931).

[33]Reynolds v. Board of Education of City of Topeka, 66 Kan. 672, 72 Pac. 274 (1903); Jones v. Board of Education of City of Muskogee, 90 Oklo. 238, 217 Pac. 400 (1923); cf. Lowery v. Board of Graded School Trustees in Town of Kernersville, 140 N. C. 33, 52 S. E. 267 (1905).

stick by which equality in Negro higher education may be measured is the statutory requirement in some states that its schools already provided for whites be maintained so as to meet the qualifications required by certain accrediting groups.[34] Even absent such a statutory requirement, it would seem that the mere fact that the white schools meet such qualifications provides a sufficient standard upon which equality may be predicated. If this be true, in such groups may rest a noteworthy opportunity to raise standards of Negro education.

With these judicial criteria of equal protection of the laws in education, and in view of the costly nature of graduate and professional facilities already provided by states which uphold a policy of segregation, it is apparent that if separate facilities are to be duplicated in each field of higher education the cost will exceed the limits of practicability. Further, it seems likely that in some instances the motive of the applicants will be merely to harass the state into providing *identity* (not equality) of facilities. If this cannot be done directly by persuading the states in the first instance to resort to the revenue-saving expedient of admitting a colored student to a white professional school, further pressure may be employed by having successive applicants withdraw from the colored professional school after the state has made a large expenditure to provide the separate but equal facilities.[35] This burden

[34]For example, Arkansas statute creating a medical department in the state university which only whites may attend provides, in part: "...said medical department [is] to be operated in a first-class manner, and with course of study, methods of instruction and equipment of a standard equal to that required of medical colleges by the American Association of Medical Colleges..." Ark. Dig. Stats. (Pope, 1937) § 13248. To the same effect, a Texas statute provides in creating a state dental college that it "...shall meet requirements of the Council on Dental Education, the American Association of Dental Schools and other such educational associations of like standard concerned with dental education." Tex. Stat. (Vernon, 1943) Art. 2623b-2.

[35]In State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S. W. (2d) 12 (1941), evidence that the action to admit a Negress as a journalism student in the University of Missouri was partly financed by the National Association for the Advancement of Colored People, that it was one of a series of suits in southern states to break down segregation in schools, and that the relator intended to pave the way for other Negroes by attending classes for a few days, was held insufficient to convict her of bad faith in trying to destroy state racial segregation policy.

See Wrighten v. Board of Trustees of University of South Carolina, 72 F. Supp. 948, 950 (E. D. S. C. 1947): "In the presentation and arguments in this case many factors not strictly within the purview of the case were discussed. The justice or injustice...of racial segregation...was referred to...."

"Plans for law suits against school authorities in every county in Virginia, setting the stage for a full-scale legal attack on the State's segregation laws by the National Association for the Advancement of Colored people, was disclosed...by two of its officials today. Suits, they said, will be filed against the University of Virginia...." Richmond Times-Dispatch, Nov. 3, 1947, p. 9, col. 2.

becomes more regrettable when it is considered that in some states the very few Negro students who require the state to furnish graduate training will necessitate an expenditure by which many times that number could be educated.[36]

A consideration of the action taken by states since the *Gaines* case makes manifest the conclusion that they are not willing to sacrifice their social policy for economy reasons.[37] One possible and practical solution, not to be founded on a mere technicality,[38] toward achieving greater economy in providing equal facilities within the state while yet upholding state policy, is the sharing of facilities insofar as statutes will permit. Although the plan may not prove feasible as to all graduate and professional training, it may yet be a workable scheme in a few institutions such as law schools. It requires, of course, that separate schools be located in the same vicinity. One law library, located conveniently between both separate schools but actually on neither campus, with separate reading rooms but the same library materials furnished by the same library employees, would eliminate probably the costliest factor that duplication would present in such a school. Another saving almost as great would be the use of the same faculty, hired by the separate colleges, with class schedules harmonized. This plan would, as a corollary to its cost-saving feature, contribute to some extent toward equality as to salaries paid teachers, as to the length of school terms, as to curricula, as to facilities, and as to qualifications of teachers.

ENOS ROGERS PLEASANTS, JR.

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[36]The necessary initial cost in law, medical, dental, and other such schools for buildings, libraries, equipment, and facilities to satisfy substantial equality would scarcely be affected by the number of initial students. Such a situation occurred when a District Court in Texas "gave the state of Texas six months in which to establish a separate law school for Negroes or admit Sweatt to the University [of Texas]. It opened this spring... Sweatt did not show up to register. Neither did anyone else." Life (Sept. 22, 1947) pp. 69, 70.

[37]Wrighten v. Board of Trustees of University of South Carolina, 72 F. Supp. 948, 950 (E. D. S. C. 1947). "Each community will have to decide whether it can or desires to sustain the financial burdens of segregation...."

[38]It has been suggested that, theoretically, equal protection of the laws within the state might be satisfied by creation by interstate compact with the approval of Congress, of multiple-state corporations operating Negro graduate and professional schools at the point of convergence of the various states. They would be similar in nature to the New York Port Authority established in 1921 by compact between New Jersey and New York, with the approval of Congress, to operate and improve the Port of New York Area lying partially in both states. Assuming the plan would meet with the approval of Congress and that other constitutional objections did not arise, it would seem that education within the state would, theoretically at least, be satisfied, at a lower cost to the states concerned.

DOMESTIC RELATIONS—APPLICATION OF ESTOPPEL TO PREVENT PARTY OBTAINING A FOREIGN DIVORCE FROM SUBSEQUENTLY ATTACKING ITS VALIDITY. [New York]

In the recent case of *Senor v. Senor*,[1] a New York Appellate Division Court found itself confronted with a problem constituting one phase of that great legal enigma—the validity of foreign divorce decrees[2]—which still lacks a uniform solution over the nation or even a certain answer within the individual states. The question is whether one who has invoked the jurisdiction of a court outside the matrimonial domicile and obtained a divorce upon plaintiff's oath of residence in the territory of the forum and the personal appearance of the defendant, may later impeach that decree and assert its invalidity in the courts of another state on the ground that the divorce court lacked jurisdiction to enter the decree because plaintiff was not a bona fide domiciliary of that state.

In the *Senor* case, the plaintiff claimed that she was never a resident of Nevada, but that she was persuaded to institute the divorce action there and to accept the terms of the separation agreement by the false representations of defendant as to his financial condition. On the premise that the prior divorce was therefore void, she now asked the court to give her a separation from defendant, with an increase in alimony. The trial court granted defendant's motion to dismiss the complaint, ruling that the Nevada divorce was a final determination of the marital status of the parties. On appeal from this dismissal, the Appellate Division affirmed the judgment by a 3-2 vote, refusing to permit the plaintiff to attack the jurisdiction of the Nevada court, which she had previously invoked.

The majority of the divided court reasoned that since neither party was a domiciliary of Nevada, the Nevada court was without jurisdiction of the subject matter and therefore the divorce rendered was void,[3] and subject to collateral attack.[4] The court then added:

> "This does not mean, however, that a collateral attack must be entertained and may freely be made by the parties whenever it

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[1]70 N. Y. S. (2d) 909 (App. Div., 1st Dept. 1947).

[2]See Jacobs, Attack Upon Divorce Decrees (1936) 34 Mich. L. Rev. 749, for a detailed discussion of all the possible attacks upon divorces, both foreign and domestic, in the original rendering court and also the courts of sister states.

[3]Williams v. State of North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1577, 157 A. L. R. 1366 (1945) was cited as giving the New York court the *right* to invalidate such a decree, so far as full faith and credit requirements are concerned.

[4]Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. ed. 366 (1903).

suits their convenience. Rather, the law is that whether or not the attack may be made depends upon the public policy of the home state in which attack is sought to be made...."[5]

"... The authority of the state remains to adjudicate upon the marital status whenever its social interest is aroused.... The infirmity in the decree remains constant and its vulnerability to the attack of third parties is sufficient protection of society's interest."[6]

Certainly, the New York courts have readily allowed third parties to question the validity of foreign divorce decrees. This practice is illustrated by *Matter of Lindgren's Estate,*[7] in which a child was allowed to make a collateral attack on an invalid foreign divorce decree, though the child's parents were estopped to assert that invalidity.

Consistent with the instant decision, also, are numerous cases in which a party to the prior decree has been denied the right to repudiate its legality. Thus, in *Starbuck v. Starbuck,*[8] decided in 1903, the wife had gone to another state and obtained an invalid divorce decree, and after the death of the husband, she sought dower in his estate, on the ground that the foreign divorce decree was a nullity. On the theory

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[5]Senor v. Senor, 70 N. Y. S. (2d) 909, 913 (1947).

[6]Senor v. Senor, 70 N. Y. S. (2d) 909, 915 (1947).

[7]293 N. Y. 18, 55 N. E. (2d) 849, 153 A. L. R. 936 (1944). Against the protests of the surviving wife under a second marriage, a child of the first marriage contested the validity of the husband-father's divorce from the first wife, in order to establish the child's rights as sole distributee of the deceased husband-father's estate. In Urquhart v. Urquhart, 272 App. Div. 60, 69 N. Y. S. (2d) 57 (1947) the same department of the Appellate Division which decided the Senor case held, on the authority of the Lindgren case, that a child conceived several years subsequent to an award of an Arkansas divorce to the mother was not estopped to attack the divorce for lack of jurisdiction of the Arkansas court, in order to establish his legitimacy as the son of the divorced husband.

When the second husband of a woman who had obtained an invalid foreign divorce from her first husband has attempted to assert the invalidity of that decree, the lower New York courts have generally taken the position that he is not estopped unless he was a party to the arrangement by which the divorce was procured. Lotz v. Lotz, 49 N. Y. S. (2d) 319 (1944); Oldman v. Oldman, 174 Misc. 22, 19 N. Y. S. (2d) 667 (1940). Contra: Heusner v. Heusner, 181 Misc. 1015, 1017, 42 N. Y. S. (2d) 850 (1943), ruling that the second husband's action of aiding the wife to obtain her void divorce cannot be regarded as equivalent to his being a legal party to that proceeding, and that the present action for separation by the wife with counterclaim for annulment by the second husband is "an action *directly* involving the marital *status between* the parties...."

[8]173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631 (1903). The court did not actually employ the word "estoppel" in stating the basis of the wife's disability. Neither did the court expressly draw the "private rights" and "marital status" action distinction, but the New York courts, in numerous cases during the last fifteen years, have interpreted the decision as employing that test.

that the rights of the parties involved had been submitted to a court, which though admittedly without jurisdiction, had settled them as between the parties, the Court of Appeals held that the wife was precluded from attacking the jurisdiction of the court which she had invoked. On such reasoning the doctrine of estoppel to assert the invalidity of a foreign divorce decree has been applied by the New York courts in a number of cases to prevent wives from repudiating their divorces in an attempt to obtain some benefit dependent on the continuing validity of the marriage.[9] Similarly, in several decisions, a husband has been estopped to contest the validity of a divorce from his first wife, where his motive was to evade his duty of support to a second wife.[10]

However, the same tribunals, contrary to the import of the instant decision, have repeatedly declared that the award of a foreign divorce decree "will have no effect upon the right of either spouse to a full adjudication in our courts upon the question of the existing marital status,"[11] and in such questions the estoppel doctrine invoked in the "private rights" cases is not applicable. In *Stevens v. Stevens*,[12] a husband who had obtained an invalid Nevada divorce was sued by his wife for separation in New York. Because the state had an interest in the determination of the marital status, which interest outweighed any equitable consideration between the parties, the court allowed the husband to impeach his Nevada decree by permitting him to counterclaim

[9]In re Robottom, 248 App. Div. 637, 288 N. Y. Supp. 397 (1936); Matter of Swales' Estate, 60 App. Div. 599, 70 N. Y. Supp. 220 (1901), aff'd without opinion 172 N. Y. 651, 65 N. E. 1122 (1902). See also Cohen v. Randall, 137 F. (2d) 441 (C. C. A. 2d., 1943) where the federal court, in applying its interpretation of New York law, invoked an estoppel against a wife who had obtained a foreign divorce and now sought to impeach it so as to share in the deceased husband's estate. She argued that she had been induced to procure the divorce by the husband's misrepresentation as to his wealth, but the court decided that these facts did not involve such fraud as would justify a challenge of the decree within the rule of the New York decisions.

[10]Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); Frost v. Frost, 260 App. Div. 694, 23 N. Y. S. (2d) 754 (1940); Stevely v. Stevely, 254 App. Div. 743, 4 N. Y. S. (2d) 69 (1938); Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (1934). See Haynes v. Title Guarantee & Trust Co., 273 N. Y. 612, 614, 7 N. E. (2d) 719, 721 (1937).

[11]Querze v. Querze, 290 N. Y. 13, 18, 47 N. E. (2d) 423, 424 (1943). Also Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940); Stevens v. Stevens, 273 N. Y. 157, 7 N. E. (2d) 26, 109 A. L. R. 1016 (1937); Steinbugler v. Steinbugler, 9 N. Y. S. (2d) 939 (1939).

[12]273 N. Y. 157, 158, 7 N. E. (2d) 26, 109 A. L. R. 1016, 1017 (1937): "This is not a case in which one spouse, after having secured a foreign divorce decree not binding in this State on the other, attempts thereafter to assert in our courts a private claim or demand arising out of their marriage."

for divorce on grounds of adultery. And in *Querze v. Querze*,[13] although the parties had previously obtained a Mexican mail-order divorce, the wife was allowed to deny the effectiveness of those proceedings and to seek a divorce from the New York courts. It was reasoned that since the wife was only trying to have her present marital status determined by the courts, and was not trying to secure some additional advantage over her husband or to avoid some obligation which she had assumed, the estoppel doctrine would not be applicable.

Classification of any specific situation as involving private rights or marital status is rendered difficult and tenuous because the decisions do not furnish consistent tests or definitions for guidance.[14] Obviously, the Court of Appeals has on several occasions gone beyond the "third-party attack" exception to the application of estoppel, regarded by the majority of the Appellate Division court in the principal case as sufficient to safeguard the state's interests. As far as it is possible to

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[13]290 N. Y. 13, 47 N. E. (2d) 423 (1943). Also Vose v. Vose, 280 N. Y. 799, 21 N. E. (2d) 616 (1939).

[14]The Supreme Court of Washington has recently adopted the same terminology in determining whether estoppel should apply, Wampler v. Wampler, 25 Wash. (2d) 258, 170 P. (2d) 316, 322 (1946): "The doctrine of estoppel to assert the invalidity of a foreign judgment or decree does not apply where, as in the case at bar, the subsequent action in which the doctrine is sought to be applied is one for adjudication as to the marital status...." Here the wife was asking for a Washington divorce, but no alimony, after having previously obtained an invalid Idaho divorce at the demand of her husband who wished to marry another woman.

Several jurisdictions have avoided involvment in the distinction between private and marital actions by adopting a more severe hostility to foreign divorces generally. In Massachusetts, a statute provided that if an inhabitant of that state went to another state to obtain a divorce on grounds not recognized as valid grounds in Massachusetts, the divorce should have *no force or effect* in Massachusetts. In Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. ed. 366 (1903), the Supreme Court held this statute valid as it applied to a resident of that state who obtained a divorce in South Dakota without acquiring a bona fide domicil there. Under a similar statute in New Jersey, it was held that a wife who had obtained an invalid Nevada decree was not estopped to deny its invalidity in a suit for separate maintenance, even though the wife had accepted a lump sum as alimony settlement and the husband had subsequently remarried. The foreign divorce was said to be not merely voidable but entirely void under the New Jersey statute. "...in this case the answer to the claim of estoppel is not that the estoppel does *not exist*, but that it *cannot* exist." Hollingshead v. Hollingshead, 91 N. J. Eq. 261, 110 Atl. 19, 22 (1920).

In Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. (2d) 207, 209 (1942), the court ruled that while a wife obtaining a foreign divorce would ordinarily be estopped to deny its validity, yet "if she was under the duress, domination, and compulsion of her husband, and he was present at all times, planning and guiding each step, employing and paying the attorneys and witnesses, then there arises an estoppel against an estoppel which sets the matter at large." See dictum to the same effect in the Hollingshead case, 110 Atl. 19, 21.

generalize, it seems that actions are regarded as involving marital status and therefore not controversies in which estoppel may be invoked when the attempt to invalidate the prior divorce is merely in furtherance of a desire of the plaintiff to have the New York courts grant a divorce from the same spouse. If the motive for trying to repudiate the previous decree is some ulterior purpose such as getting a share of the deceased ex-spouse's estate or avoiding responsibilities of a second marriage, the case is said to concern private matters only, and the estoppel will be effected.

Applying this test to the *Senor* case, it would appear that the dissent was more strongly supported by precedent, inasmuch as the wife was seeking to have the Nevada decree nullified in order that the New York court might now grant her a divorce from the same husband.[15] *Stevens v. Stevens*[16] seems directly in point, unless the present case is distinguishable because the wife is asking for a higher alimony award than was given by the Nevada decree. The majority of the Appellate Division court may have regarded this as a sufficient distinction, for its opinion points out that the wife, in making her attack on the Nevada decree, "seeks reestablishment of the marriage relationship only for the purpose of obtaining a separation with larger alimony payments."[17] However, the Court of Appeals allowed just such an action in *Vose v. Vose*[18] and *Querze v. Querze*.[19] In the latter case, the court specifically stated that the estoppel issue is not "affected by the fact that plaintiff is asking for alimony... herein."[20] The *Senor* case opinion

[15]Justice Dore, dissenting, classified "matrimonial cases" as those in which "the issue concerns not a private right of one of the parties but a public right, in this case the existing marital status of the parties, a relationship involving public policy in which the state has a vital interest as it concerns the stability of the family, the basic unit of society." 70 N. Y. S. (2d) 909, 917 (1947).

[16]273 N. Y. 157, 7 N. E. (2d) 26, 109 A. L. R. 1016 (1937).

[17] Senor v. Senor, 70 N. Y. S. (2d) 909, 914 (1947). The majority's disapproval of plaintiff's conduct was further expressed: "But the state has no interest in serving the vagaries of those who would play fast and loose with the marriage relationship, swearing to a residence in one state for the purpose of obtaining a divorce, and at some later time willing and anxious to impeach their oath for some further private purpose. They do not come chastened in spirit, seeking restoration of the relationship so favored by the state. They come for relief from their obligations or for other personal gain." Compare the language of the Stevens case, quoted in Note 12, supra.

[18]280 N. Y. 779, 21 N. E. (2d) 616 (1939). The previous separation agreements were set aside and alimony of $6000 per year was awarded to the wife.

[19]290 N. Y. 13, 47 N. E. (2d) 423 (1943).

[20]"That was the claim made by the defendant in Vose v. Vose, supra, and we held that the claim was without merit. The wife's right to alimony is not 'a private claim or demand' arising out of the marriage of the parties. That right comes from the

sought to distinguish these decisions on the tenuous ground that in obtaining Mexican divorces the parties had not even made colorable compliance with residence requirements to give the court jurisdiction.[21] The dissent viewed this as a difference merely in degree rather than in kind; and it is to be noted that the majority's reasoning results in estopping a party who made some gesture at establishing the necessary residence, while relieving from estoppel the party who indulged in a total sham by securing the divorce by mail.

A further factor which may have been of some influence in determining whether a particular plaintiff should be estopped is the matter of a husband's duty of support. It is generally true that the classification of an action as "marital" or "private" by the New York Court of Appeals has been such as to sustain the responsibility of a living husband to support a wife, wherever such an element was present in the case. Thus, the action was "private" and the estoppel applied when a husband attempted to be relieved from supporting his second wife by claiming his divorce from his first wife was void.[22] But when a wife sought to impeach her Mexican divorce so as to gain greater support from her husband, the action was regarded as "marital" and no estoppel was invoked.[23] On this basis, also, the view of the dissent in the *Senor* case seems more in accord with the policy manifested in the previous New York decisions.

In view of the fact that the majority of the Appellate Division court proceeded on the premise that the Court of Appeals had never passed on the precise issue presented in the *Senor* case, while the dissent concluded that several earlier decisions were sufficiently in point to be con-

statute and not from the common law .... Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident of the judgment in a matrimonial action." 290 N. Y. 13, 17, 47 N. E. (2d) 423, 425 (1939).

[21]"Here at least is a presumption of validity as against the obvious invalidity of the mail order decree. Here the defect, if it exists, is latent and may be uncovered only by a trial at which the suitor is permitted to impeach his equally solemn act in another forum and take advantage of his confessed fraud upon another court." 70 N. Y. S. (2d) 909, 914 (1947). The language of the Court of Appeals in Querze v. Querze, 290 N. Y. 13, 17, 47 N. E. (2d) 423, 425 (1943) in regard to the total invalidity of a Mexican divorce does not seem directed toward such a distinction as the Appellate Division has drawn here.

[22]Krause v. Krause, 282 N. Y. 355, 26 N. E. (2d) 290 (1940). Also Frost v. Frost, 260 App. Div. 694, 23 N. Y. S. (2d) 754 (App. Div., 1st Dept. 1940). In both cases the husband was trying to prove that he was still the legal husband of the first wife rather than the second, thus raising what might commonly be thought to be an issue as to his "marital status."

[23]Querze v. Querze, 290 N. Y. 13, 47 N. E. (2d) 423 (1943); Vose v. Vose, 280 N. Y. 779, 21 N. E. (2d) 616 (1939).

trolling,[24] it seems that the higher tribunal should take cognizance of the sharp split of opinion and make a positive ruling on the question. If a clear and inclusive declaration on the scope of the terms "marital status" and "private rights" were to be made by that court, considerable light could be thrown on such important practical and policy matters as the husband's duty of support, the avoidance of bigamous remarriages and the distinctive status of mail-order divorces in New York.

CLARK W. TOOLE, JR.

DOMESTIC RELATIONS—DIVORCED WIFE'S RIGHT TO ENFORCE ANTENUPTIAL CONTRACT PROVIDING FOR PAYMENT FROM HUSBAND'S ESTATE. [Ohio]

In *Southern Ohio Savings Bank & Trust Co. v. Burkhart*,[1] the Supreme Court of Ohio, deciding a case of first impression in that state, has recently aligned itself with what it terms a modern trend[2] in regard to antenuptial agreements: that a former wife may not enforce the performance of an antenuptial contract which she herself has failed and refused to perform by violating her marital obligations. While there is no objection to the rule when applied to proper situations, it is believed that the court may have been overzealous in invoking it under the circumstances of this case.

One Burkhart and the defendant, Leonora Burkhart, were married to each other twice and divorced twice. Previous to each marriage the parties entered into an antenuptial contract. The second of these contracts contained a statement that the husband had made a will providing for a payment of $300 per month to the wife as long as she should live. The contract provided also that she should be paid from

[24] Justice Peck, who wrote the majority opinion in the principal case, wrote a special concurring opinion in Urquhart v. Urquhart, 272 App. Div. 60, 69 N. Y. S. (2d) 57, 61 (1947), where a child was allowed to attack the validity of an Arkansas divorce obtained by his mother. Justice Peck agreed that the case was controlled by Matter of Lindgren's Estate, 293 N. Y. 18, 55 N. E. (2d) 849 (1944), but refused to acquiesce in the discussion in the opinion regarding the right of parties to the decree to challenge its validity. Under the Querze case, he regarded "the question as at least an open one in this state, if indeed it is not settled against the existence of such estoppel."

[1] 74 N. E. (2d) 67 (Ohio 1947).

[2] "... the trend fortunately is definitely away from the inflexibility of the old rule and in the direction of sound reason and good conscience...." 74 N. E. (2d) 67, 68 (Ohio 1947).

his estate the further sum of $1,000 per year for five years. These provisions were in consideration of the remarriage.

Thirteen years later he was granted a divorce in Ohio by reason of her aggression, and two years thereafter he died. She then filed claim with the plaintiff, Burkhart's executor, under the terms of the antenuptial contract. Thereupon the executor sought a declaratory judgment holding the antenuptial contract void on the ground of failure of consideration in that the defendant had refused to perform the obligations of her marriage, as evidenced by the divorce granted her husband upon her aggression.

The court recognized that the weight of authority was to the effect that desertion, separation, or even divorce does not make such contracts unenforceable.[3]The decisions following this general rule employ the reasoning that marriage, as a consideration, cannot be reduced to a dollars and cents measurement, that once the marriage is entered into the status quo of the parties cannot be restored by canceling or rescinding the agreement, and that sound policy requires the enforcement of these agreements.[4]

Notwithstanding these precedents, the Ohio court determined that the agreement here involved was void for failure of consideration. Though three other cases were cited,[5] the primary authority relied upon seemed to be the Iowa decision of *York v. Ferner*,[6] which was quoted as follows:

> "The contract of marriage between a man and a woman always contemplates that the parties shall live together as husband and wife as long as the marriage relation shall exist, subject, of course, to such absence from one another or separation as may be agreed upon, or may be justified by the law. But while the marriage relation exists each has a right to the society and service of the other, and if these be refused the marriage rights and duties are thereby disregarded and violated .... Upon the facts shown in this case plaintiff was not justified in leaving her

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[3]Cryar v. Cryar, 243 Ala. 318, 10 S. (2d) 11 (1942); Jackson v. Jackson, 222 Ill. 46, 78 N. E. 19, 6 L. R. A. (N.S.) 785 (1906); Sparrow v. Sparrow, 172 Minn. 91, 214 N. W. 791 (1927); 13 R. C. L. 1033; 26 Am. Jur. 903, 904; 41 C. J. S. 584, § 110; Notes (1910) 26 L. R. A. (N.S.) 858; (1924) 29 A. L. R. 198-202.

[4]Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904 (1895); Jackson v. Jackson, 222 Ill. 46, 78 N. E. 19, 6 L. R. A. (N.S.) 785 (1906); Lloyd v. Lloyd, 2 Myl. & C. 192; Note (1910) 26 L. R. A. (N.S.) 858.

[5]Becker v. Becker, 241 Ill. 423, 89 N. E. 737, 26 L. R. A. (N.S.) 858 (1909); Veeder v. Veeder, 195 Iowa 587, 192 N. W. 409, 29 A. L. R. 191 (1923); New Jersey Title Guarantee & Trust Co. v. Parker, Exr., 85 N. J. Eq. 557, 96 Atl. 574 (1916).

[6]59 Iowa 487, 13 N. W. 630, 631-632 (1882).

> husband .... The antenuptial contract was based upon the contemplated marriage, whereby plaintiff became bound to discharge the duties of a wife. Surely such a contract cannot be enforced by the wife, who, after the marriage, abandons her husband without lawful cause. The consideration of the instrument is the marriage contract. If it be broken and violated, the antenuptial contract can not be enforced. It would be monstrous to hold that a woman could collect an annuity settled upon her by a contract in contemplation of marriage, when after the marriage, without cause, she utterly refused to live with her husband longer than seven weeks and three days. This is the precise case before us. Our conclusions, we think, are supported by legal principles and sound reason."

In a single paragraph the court thereafter applied that reasoning to the case at bar. It declared that since the parties had been divorced, the defendant was not the deceased's widow and hence had no rights as surviving spouse to relinquish in consideration for the sums now claimed.[7] Further, the contract was regarded as contemplating that the parties would live together and perform the marital obligations as long as they lived; and this the wife has failed to do, as evidenced by the Ohio decree. The fact that the wife had procured a Florida decree in her favor was said not to affect the validity of the unreversed and unmodified Ohio decree.

In the face of the acknowledged majority of decisions taking the opposite view on such agreements, further examination of the four cases offered by the Ohio court to support its resolution of the controversy leaves considerable doubt as to their validity and pertinence as precedents for the instant decision.

The particular situations in the Iowa cases of *York v. Ferner*[8] and *Veeder v. Veeder*[9] seem to call for the setting aside of the contract because in each case the wife left the husband within such a short time

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[7]Although by Ohio law, divorce will bar dower, the court has discretion to award the wife such part of husband's estate as it deems proper. Ohio Code Ann. (Baldwin's Throckmorton, 1940) § § 10502-1 and 11993. It is quite possible that the antenuptial agreement had been considered by the Ohio court in deciding that issue in the divorce action.

[8]59 Iowa 487, 13 N. W. 630 (1882).

Jacobs v. Jacobs, 42 Iowa 600 (1876), which was cited by York v. Ferner, seems not in point. The court upheld the antenuptial agreement there, and moreover, there was a specific provision in the agreement covering separation. See 26 Am. Jur., Husband & Wife, Sec. 304: "A marriage settlement by its terms limiting itself to exist only so long as the marriage relationship exists ... is, of course, controlled by such terms ...."

[9]195 Iowa 587, 192 N. W. 409, 29 A. L. R. 191 (1923).

after the ceremony as to indicate bad faith or fraud,[10] or at least to amount to virtually a total repudiation of the marital obligations.[11] *Becker v. Becker*[12] did not turn on failure of marital obligations, but rather upon failure of a monetary consideration. Here the husband had the duty to keep up an insurance policy on his life in favor of his wife, in return for certain right in his property at death. He allowed the policy to lapse, and for this reason the Illinois court refused to enforce the wife's promise. Non-performance of such a pecuniary condition is quite different from failure of marital obligations, and the same reasons of policy are not present. The strongest case in point is *New Jersey Title Guaranty & Trust Co. v. Parker*.[13] Here the wife lived with the husband some six years before she left him, but the New Jersey court refused to enforce the antenuptial contract because of her failure to live up to her marital obligations.

Thus, it is apparent that most of the cases relied upon as authority contained some influencing factor which was not present in the Ohio case. Moreover, the presence of any public policy strong enough to call for the principal decision is doubtful, at best.

The primary purpose behind these agreements would seem to be to promote marriage, particularly among those who are of mature years and who have families by previous marriages. Under modern statutes of descent and distribution, a surviving consort, regardless of how late in life the parties married, gets a considerably portion of the deceased partner's estate.[14] Quite obviously this situation may not be looked upon with much favor by children and descendants of a

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[10]See Judd v. Judd, 192 Mich. 198, 158 N. W. 948 (1916); 13 R. C. L., Husband & Wife, Sec. 54.

[11]See Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904, 905 (1895): "The case ... of a woman merely going through the marriage ceremony, and then refusing to act as a wife, has no pertinency to the case at bar. Insuch a case it might be held, perhaps, that the contract to marry was not actually performed ...."

[12]241 Ill. 423, 89 N. E. 737, 26 L. R. A. (N.S.) 858 (1909).

[13]85 N. J. Eq. 557, 96 Atl. 574 (1916). Even here, there is a factor to be considered, which was not present in the principal case. The parties lived together six years with only an oral agreement. The wife did not attempt to have it put in writing and made binding until after she had left her husband and presumably intended to divorce him. Since once the agreement was in writing it related back to the original oral agreement where no fraud was evident, that ground for setting it aside was eliminated, but the wife's conduct in seeking a written agreement even while contemplating divorce could easily have influenced the New Jersey court in its decision.

[14]In Ohio when a man dies intestate a widow gets one half of all property if there be only one child, and one third if there be more. Ohio Code Ann. (Baldwin's Throckmorton, 1940) § 10503-4.

previous marriage. Therefore, in practical result, a person with such a family is often constrained from marrying again until his present family is assured that the prospective spouse, who has shared none of the early struggles of the family life and who perhaps will live with the head of such family only a relatively few years, will not be able to claim a major portion of his estate at his death.

The easiest solution to the difficulty is an agreement between the parties before marriage as to each one's prospective share in the other's property. People have shown themselves quite willing to enter into such agreements to give up valuable statutory rights—but *only* if they have a fair and binding agreement which will assure a measure of security to the survivor. These agreements are seldom entered into with any idea of a separation or divorce occurring; they are made in good faith and the parties intend living together "till death do part." But people will not feel that they can enter into such contracts with confidence when it becomes obvious that if a separation or divorce should occur, they will be set aside on points of technical fault, which though determined by a court in a divorce action quite often bear no relation to the actual trouble involved.[15] Such a rule of law dissipates the security intended to be achieved in exchange for making such an irrevocable change in status quo as marriage and in addition giving up valuable rights.

It is admitted that the agreements can equitably be set aside when there is such a total failure of marital obligations that the marriage ceremony becomes a farce. However, where persons entered marriage in good faith and have lived together such a length of time as proves that good faith, it is doubted that their contract should be set aside without more careful investigation of fault than was indicated by the Ohio court's opinion. Virtually to ignore the decree procured by the wife in Florida, and to rely without question on the Ohio decree as definitely controlling in the question of fault does not give due consideration to the public policy behind these agreements. There should be strong reason for any decision which, years after the parties have contracted and irreparably changed position in good faith, turns expected security into nothingness.

PAUL M. SHUFORD

[15]It is well known, if not acknowledged by the courts, that in today's complex society many divorces are obtained by agreement of the parties. For many reasons—convenience, chivalry, etc.—one party simply does not contest a divorce, preferring the divorce to a long, publicity-ridden airing of the family life.

EQUITY—CERTAINTY AND COMPLETENESS OF TERMS AS PREREQUISITES TO SPECIFIC ENFORCEMENT OF A CONTRACT TO SELL LAND. [Massachusetts]

Since their inception, courts of equity have required that a contract, in order to be the subject of specific performance, must be complete and certain in all of its terms,[1] and the rule is still subscribed to by the courts today.[2] Though the rule may have originated in the desire of the then novel courts of equity to avoid clashes with the stronger law tribunals,[3] the reason generally recited is that the courts can not and will not make a contract for the parties.[4] In contracts concerning land, the price, description of land, terms of payment, specifications as to acceptance and notice, type of deed, and encumbrances are the usual terms requiring certainty.[5]

However, the basic rule is subject to the qualification that if a contract is complete and certain in all of its essential terms, it will be enforced, although its subsidiary terms are not on the face of the contract.[6] The courts do not admit that they are making the minor terms, but state that the contract implies objective standards of "usual," "fair," or "reasonable" for all unmentioned or incidental terms.[7] Thus, when only the terms of payment are missing or have been left to future agreement, specific performance by the vendor will be required, conditioned on the vendee's tendering the whole price in cash.[8] If the

[1]Fry, Specific Performance (3d ed. 1884) § 335.

[2]Naughton v. Clubb, 52 A. (2d) 739 (Md. 1947); Ginsburg v. White, 139 N. J. Eq. 271, 50 A. (2d) 644 (1947); 4 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1405.

[3]"When the chancellor was struggling to establish his jurisdiction with the courts of law eying him narrowly, the dignity of the court had to be maintained and it was jeopardized by any order that the chancellor could not be sure of enforcing .... since the court ought not to make a contract for the parties but only enforce it as they made it, it led to a doctrine that every detail of performance ought to be fixed by the agreement so that the court could supervise and exact each detail without departing from or adding to the agreement." Pound, The Progress of The Law—Equity (1920) 33 Harv. L. Rev. 420, 434.

[4]Livingston Waterworks v. City of Livingston, 53 Mont. 1, 162 Pac. 381 (1916); Parsons v. Hall, 199 S. W. (2d) 99 (Tenn. 1947); Beidler v. Davis, 72 Ohio Opp 27, 50 N. E. (2d) 613 (1943); Pound, The Progress of The Law:Equity (1920) 33 Harv. L. Rev. 420, 434.

[5]Florida Bank and Trust Co. v. Field, 25 S. (2d) 663 (Fla. 1946); Fry, Specific Performance (3d ed. 1884) § § 324, 349; 4 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 1405; Merwin, The Principles of Equity and Equity Pleading (1896) § 736.

[6]Cisco v. Van Lew, 141 P. (2d) 433 (Cal. App. 1943); Foltz v. Evans, 49 N. E. (2d) 358 (Ind. App. 1943); Kleinschmidt v. Central Trust Co., 103 Ore. 124, 203 ac. 598 (1922).

[7]Morris v. Ballard, 16 F. (2d) 175 (App. D. C. 1926); Boekelheide v. Snyder, 26 N. W. (2d) 74 (S. D. 1947).

[8]Morris v. Ballard, 16 F. (2d) 175 (App. D. C. 1926); Trotter v. Lewis, 45 A. (2d) 329 (Md. 1946).

time for exercising an option is not specified, specific performance will be granted if the optionee has acted reasonably under the circumstances.[9] So too, if the description is not complete, but the vendor owned but one piece of land in the area specified, he will be forced to convey that land, for the courts reason that he must have so intended, else he would be contracting to convey unowned land.[10] And a contract need not have all of its terms reduced to certainty on its face, if it contains provisions whereby uncertain terms may be rendered certain by the time for performance.[11]

The modern trend is to ease the requirements of certainty in order that specific performance may be granted.[12] Though the courts continue to aver that they are applying the basic doctrine, nevertheless, the principle is being gradually qualified to avoid the former harsh results to plaintiffs caused by the rigidity and technicality of application of the rule in some of the older cases. Thus, formerly, equity held that an option to buy wherein the price was to be ascertained by what another purchaser would give was too uncertain for enforcement.[13] But such options are now enforced when an offer has been made by a third person.[14] In the past, where terms were to be ascertained by arbitration upon failure of the parties to agree, or were to be determined initially by appraisal, the courts would not require specific performance of the agreement to arbitrate or appoint appraisers.[15] But by statute in England[16] and in forty six states[17] procedures are set out whereby if a contract provides for arbitration, but the party refuses to appoint arbitrators, or the arbitrators previously appointed refuse

[9]Pearson v. Horne, 139 Ga. 453, 77 S. E. 387 (1913); Trotter v. Lewis, 45 A. (2d) 329 (Md. 1946); Restatement, Contracts (1932) § 370.

[10]Hurley v. Brown, 98 Mass. 545 (1868); Suchan v. Swope, 53 A. (2d) 116 (Pa. 1947).

[11]Parker v. Murphy, 152 Va. 173, 146 S. E. 254 (1929); Fry, Specific Performance (3d ed. 1884) § 336.

[12]Edward v. Tobin, 132 Ore. 38, 284 Pac. 562 (1930); Young v. Nelson, 121 Wash, 285, 209 Pac. 515 (1922); Thompson, Real Property (1st ed.) § 1230.

[13]Bromley v. Jefferies, 2 Vern. 415, 23 Eng. Rep. 867 (1700). The court here used the technical reasoning that if the land was not in fact to be sold to any other than the named vendee, there could be no other purchaser and hence no way of determining the price.

[14]Moreno v. Blinn, 185 P. (2d) 332 (Cal. 1947); Tinkler v. Devine, 159 Kan. 308, 154 P. (2d) 119 (1944); Peerless Department Stores, Inc. v. George M. Snook Co., 123 W. Va. 77, 15 S. E. (2d) 169 (1941). Today the reasoning is that if there is a bona fide offer the price has been ascertained. Goerke Motor Co. v. Lonergan, 236 Wis. 544, 295 N. W. 671 (1941).

[15]Milnes v. Gery, 14 Ves. 400, 33 Eng. Rep. 574 (1807).

[16]Arbitration Act (1889) 52 Vict., c. 49.

[17]6 Williston, Contracts (rev. ed. 1938) § 1920.

to act, or cannot agree, the court will appoint arbitrators. However, when the price is to be determined by appraisers to be appointed, courts will not require specific performance of the agreement to appoint,[18] and hence cannot require specific performance of the contract to convey in which the price remains unascertained, for it is recognized that the arbitration statutes do not apply to appraisal agreements[19]. Of course, it was long ago determined that if the appraisers had been appointed and had determined the price, specific performance on that price would lie, since the price had been ascertained prior to the time for performance.[20] And yet, while the price is an essential element of a contract,[21] it has been held that if the agreement to submit the price to appraisers is an incidental or subordinate or unessential part of the contract, the court will determine the value before a master, if the appraisal agreement is not consummated.[22] It is called incidental if the price to be ascertained concerns but a segment of greater and principal properties involved in the contract for which its price is ascertained,[23] or if all the other terms are ascertained and carried out,[24] or, in other words, if part performance has taken place.[25]

The relaxing of the certainty doctrine has been carried to a new extreme by the Supreme Judicial Court of Massachusetts in the recent case of *Shayeb v. Holland.*[26] The plaintiff, assignee of a lease, asked specific performance of an option to buy contained in the lease contract. The option provided that "the lessee shall at his option be entitled to the privilege of purchasing the aforesaid land and buildings." The lease granted the lessee the right to make improvements thereon, and the bill alleged that the plaintiff had expended large sums in so doing. The contract had no terms as to price or means of ascertaining it, manner of payment, type of deed, encumbrances that might exist, time and manner of acceptance of the option, nor any

[18]Simmons Co. v. Crew, 84 F. (2d) 82 (C. C. A. 4th, 1936); Equitable Trust Co. v. Delaware Trust Co., 54 A. (2d) 733 (Del. 1947); Davila v. United Fruit Co., 88 N. J. Eq. 602, 103 Atl. 519 (1918).

[19]In Re Thurston, 48 F. (2d) 578 (C. C. A. 2d, 1931); In Re Fletcher, 237 N. Y. 440, 143 N. E. 248 (1924); Fry, Specific Performance (3d ed. 1884) § 341.

[20]Maury v. Post, 55 Hun. 454, 8 N. Y. Supp. 714 (1890); Fry, Specific Performance (3d ed. 1884) § 339.

[21]See note 5, supra.

[22]Wichita Water Co. v. City of Wichita, 280 Fed. 770 (C. C. A. 8th, 1922).

[23]Davila v. United Fruit Co., 88 N. J. Eq. 602, 103 Atl. 519 (1918).

[24]Castle Creek Water Co. v. City of Aspen, 146 Fed. 8 (C. C. A. 8th, 1906).

[25]Cooke v. Miller, 25 R. I. 92, 54 Atl. 927 (1903).

[26]73 N. E. (2d) 731 (Mass. 1947).

other terms except the bare option set out above. The lessor had not attempted to sell the property to anyone else.

The court stated the rule that "a contract must be complete and definite to support a decree for specific performance," adding the qualification that "a contract embodying all the material factors for the accomplishment of the transaction undertaken by the parties is not incomplete or indefinite because it fails to express in terms some matters concerning the performance of the contract and reasonably necessary for the attainment of its object."[27] Without explaining its course of deduction by showing what material factors were in the contract and what subsidiary terms would thereby be implied, the court held that the option must be interpreted as meaning that the lessor would tender a deed free from encumbrances upon payment of cash by the plaintiff a reasonable time after acceptance of the option by the plaintiff. The cases which were cited in support of this determination of terms were in no sense precedents for the decision.[28] Though all were cases in which the rule allowing the court to supply subsidiary terms was invoked, in the contracts there involved the basic terms were present, and the courts implied mere subsidiary ones. In every case at least the price was clearly ascertained in the contract.

The court then glossed over the uncertainty—rather, the complete absence of the most basic term— by stating that, while the price is undoubtedly an essential element, "the offer to sell in the present case should be reasonably understood to be an offer to sell for a fair and reasonable price. Otherwise, the offer would have no practical value but would be a mere illusion or perhaps a snare to the unwary."[29] Here, also, the cases cited for support are of questionable authority because in all of them some controlling factors appeared which were not involved in the present case.[30]

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[27]Shayeb v. Holland, 73 N. E. (2d) 731, 732 (Mass. 1947).

[28]Church v. Lawyers Mortgage Investment Corp of Boston, 315 Mass. 1, 51 N. E. (2d) 450 (1943) was a case in which *price,* terms of payment, mortgage, and taxes were specified in the contract. In Laidlaw v. Vose, 265 Mass. 500, 164 N. E. 388 (1929) the *price* had been agreed upon, while in Grant v. Pizzano, 264 Mass. 475, 163 N. E. 162 (1928) both *price* and terms of payment had been determined by the parties. In Pearlstein v. Novitch, 239 Mass. 228, 131 N. E. 853 (1921) *price* and date of performance had been agreed upon by the parties, and in Nickerson v. Bridges, 216 Mass. 416, 103 N. E. 939 (1914) the *price* and terms of payment were certain without aid of court. In Smith v. McMahon, 197 Mass. 16, 83 N. E. 9 (1907) the *price,* time and performance and terms of payment were set out in the contract.

[29]Shayeb v. Holland, 73 N. E. (2d) 731, 733 (Mass. 1947).

[30]Several cases involved "refusal" type options, and the lessor had offered to sell to another without giving the lessee a chance to buy: Wilson v. Brown, 5 Cal. (2d) 425, 55 P. (2d) 485 (1936); R. F. Robinson Co. v. Drew, 83 N. H. 459, 144 Atl. 67

The justification for supplying a "reasonable price" solution to fill the gaping void in the contract on the grounds of preventing an illusion or snare, would, in logical application, obviate the need for all certainty requirements; and to say that the parties must have meant the option to have some effect is not sufficient basis for assuming that they intended a court's standard of reasonableness to control their dealings. Surely, judges are not so naive as to believe that prices and profits are set by such objective standards of reasonableness. The result reached in the principal case obviously springs from the court's feeling that the defendant had laid a "snare for the unwary" plaintiff, and that the plaintiff through his improvement of the property had been trapped. Under certain circumstances part performance has vitiated uncertainty that would have otherwise deprived a vendee of specific performance.[31] The circumstances in the *Shayeb* case, however, do not offer support for applying that rule.

Hardship on the plaintiff, due to what the court apparently feels is sharp practice on the part of defendant, and not fulfillment of the certainty requirements, being the real reason for relief here, the remedy of specific performance is not needed. Specific performance implies a contract. There was none here. Since the court felt that the plaintiff had been entrapped by the defendant, it has at its disposal a remedy more appropriate than the one employed here by sledge-hammering square pegs into round holes.

(1928); Cummings v. Neilson, 42 Utah 157, 129 Pac. 619 (1913). In others, the option to purchase or renew the lease had already been exercised, but the lessor was attempting to have the agreement set aside: Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 282 (1927); Slade v. City of Lexington, 141 Ky. 214, 132 S. W. 404 (1910). Special circumstances in several others excepted the contracts from general completeness requirements.

The cases which were the nearest approach to precedents for the principal decision are those in which the option provided that the price should be agreed upon by the parties, and the courts held that this agreement bound the lessor to accept objectively reasonable terms: Edward v. Tobin, 132 Ore. 38, 284 Pac. 562 (1930); Young v. Nelson, 121 Wash. 285, 209 Pac. 515 (1922). However, the Massachusetts court in the principal case declared: "A contract leaving the price of the land to a future agreement between the parties would be indefinite and incomplete and could not be enforced." 73 N. E. (2d) 731, 733. And, as is pointed out in Livingston Waterworks v. City of Livingston, 53 Mont. 1, 162 Pac. 381, 385 (1916) even in such cases the parties may not have intended objective standards to apply but rather probably intended to reserve the right to negotiate and come to terms or not—"terms which a court might or might not consider entirely 'fair and equitable.' Any other conclusion vests the courts with power to make contracts for the parties in every instance."

[31]Coles v. Peck, 96 Ind. 333 (1884) where the inability of equity to decree specific performance was due to wilful refusal of the vendor to appoint an appraiser. Cf. Cooke v. Miller, 25 R. I. 92, 54 Atl. 927 (1903).

When an owner of real property knowingly sits by while another person builds thereon under mistake as to boundary, equity will give relief by a decree in the alternative ordering that the owner pay the intruder the value of the improvements or else convey the land upon payment by the intruder of the value of the land prior to such improvement.[32] The parallel between such cases and the principal one is obvious. Such relief has been given when the court has refused to enforce a contract providing for the price to be set by appraisal, the lessee having already made improvements in reliance on the contract.[33] On the same theory, relief could be given in situations like that of the *Shayeb* case if it is shown that the lessor sat by while the lessee made improvements obviously incommensurate with a lease that contained neither an enforceable renewal nor option-to-buy clause.

McRAE WERTH

EVIDENCE—PROPER AGENCY FOR DETERMINING THE VOLUNTARY CHARACTER OF A CONFESSION IN A CRIMINAL TRIAL. [Maryland]

It is universally accepted in the United States that the judge must determine the admissibility of the evidence if either the relevancy or competency or lack thereof is apparent from the offer itself.[1] Difficulties arise, however, in cases in which the admissibility depends upon a prior determination of fact. If the problem is one of relevancy, it is held that the court merely determines whether there is sufficient prima facie evidence of relevancy to submit to the jury, and if so, the court leaves the determination of the actual fact for the jury.[2] This practice is considered appropriate because the preliminary question coincides with one of the ultimate questions of fact to be decided by the jury. On the other hand, if a question of competency depends upon a preliminary question of fact, there are several views which have been taken by the courts.

These divergent practices are perhaps best illustrated by the de-

[32]Burrow v. Carley, 210 Cal. 95, 290 Pac. 577 (1930); Olin v. Reinecke, 336 Ill. 530, 168 N. E. 676 (1929); Wilie v. Brooke, 45 Miss. 542 (1871).

[33]La Mar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939); Shabot v. Winter Park Co., 34 Fla. 258, 15 So. 756 (1894); Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273 (N. Y. 1814); Duke v. Griffith, 13 Utah 361, 45 Pac. 276 (1896).

[1]Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929) 43 Harv. L. Rev. 165.

[2]Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of fact (1929) 43 Harv. L. Rev. 165.

cisions on the question of who should determine the voluntariness of a confession made by a person accused of crime. It is agreed that confessions made because of threats or promises shall not be admitted as evidence to be considered by the jury,[3] but there is no agreement as to how voluntariness should be determined.[4] It has been fairly stated that "No subject of the law is in more inextricable confusion than that relating to the admission in evidence of confessions made by one accused of crime."[5]

Two recent decisions demonstrated the force of this statement. In *State v. Scott*,[6] the defendant was arrested and charged with the murder of a policeman. After being held in jail for two or three weeks and being questioned repeatedly by the sheriff, he made a full confession, describing the commission of the crime in details. The judge submitted the confession to the jury with instructions for the jury to determine from the evidence whether it was given voluntarily, and if they so found to give it such weight as they thought it worth; but if they determined it was involuntarily given, they should reject it from further consideration. The defendant appealed the conviction to the Supreme Court of South Carolina, which sustained the trial court's ruling on this point, holding that "if there be any reasonable doubt in the mind of the trial judge as to the character of the confession or if the evidence is conflicting the jury must be the final arbiter of such fact."[7]

In the more recent Maryland case of *Jones v. State*,[8] defendant and his brother were arrested at midnight for the murder of a fisherman, and were taken to the police station in a small town 40 miles away. After about 30 minutes the two prisoners were taken to another police station 100 miles away, in order to prevent any possible disorder, so the

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[3]Bram v. United States, 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568 (1897); State v. Bostich, 4 Harr. 563 (Del. 1847); Garrard v. State, 50 Miss. 147 (1874); Commonwealth v. Taylor, 5 Cush. 605 (Mass. 1850); State v. Sherman, 25 Mont. 512, 90 Pac. 981 (1907); State v. Armijo, 18 N. M. 262, 135 Pac. 555 (1913); People v. Ward, 15 Wend. 231 (N. Y. 1836); State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943); 1 Elliot, Evidence (1st ed. 1904) § § 271, 273; Underhill, Criminal Evidence (1st ed. 1898) § 160; 1 Wigmore, Evidence (3d ed. 1940) § 815.

[4]The question of burden of proof of the voluntariness has been the subject of conflicting views, with some states holding that the burden must be borne by the defendant, while others put the burden upon the state. Lyons v. State, 77 Okla. Cr. 197, 138 P. (2d) 142 (1943); Note (1909) 18 L. R. A. (N.S.) 768; 12 Cyc. 464 et seq.

[5]State v. Sherman, 35 Mont. 512, 90 Pac. 981, 982 (1907). See also State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943).

[6]209 S. C. 61, 38 S. E. (2d) 902 (1946).

[7]State v. Scott 209 S. C. 61, 38 S. E. (2d) 902, 903 (1946).

[8]52 A. (2d) 484 (Md. 1947).

ifficers stated. Here the prisoners were separately quizzed and the defendant confessed. At the trial the defendant claimed that he confessed because of fear of mob violence. After hearing testimony from both the state and the defendant, the judged ruled that the state had shown affirmatively that the confession was freely and voluntarily made, and therefore it was admitted as evidence, to be weighed by the jury. In rendering the opinion it was recognized that "In most States the question whether a confession was voluntarily made is primarily for the trial judge, but where the testimony is conflicting, the judge may admit the confession and instruct the jury that they must find it to be voluntary before considering it as evidence.... But in Maryland the preliminary question whether a confession is admissible must be decided by the judge in every case before it is permitted to go to the jury."[9] In both decisions, the courts merely recited an established rule of law for the state, without considering the merits of the practices applied.

The ruling of the Maryland court accords with the orthodox view that questions of the admissibility of evidence are decided by the court.[10] On this basis it is supported by many courts of high repute and of leading writers on the law of Evidence.[11] Under this view, if the judge admits the evidence, it can not be disregarded by the jury as being incompetent, although they may disregard it as having no weight.[12] If the judge decides the confession was involuntarily made,

[9]Jones v. State, 52 A. (2d) 484, 487 (Md. 1947).

[10]Brister v. State, 26 Ala. 107 (1855); Wallace v. State, 28 Ark. 531 (1873); People v. Columbus, 49 Cal. App. 761, 194 Pac. (1920); Osborn v. People, 83 Colo. 4, 262 Pac. 892 (1927) Hauk v. State, 148 Ind. 238, 46 N. E. 127 (1897); Hudson v. Commonwealth, 63 Ky. 531 (1866); Biscoe v. State, 67 Md. 6, 8 Atl. 571 (1887); State v. Armijo, 18 N. M. 262, 135 Pac. 555 (1913); State v. Yarrow, 104 N. J. L. 512, 141 Atl. 85 (1928); State v. Whitener, 191 N. C. 659, 132 S. E. 603 (1926); Carter v. State, 37 Tex. 362 (1872); 1 Greenleaf, Evidence (16th ed. 1898) § 219; 1 Thompson, Trials (2d ed. 1918) § 328; 3 Wigmore, Evidence (3d ed. 1940) § 861; 10 R. C. L., Evidence § 122.

[11]Brister v. State, 26 Ala. 107 (1855); Osborn v. People, 83 Colo. 4, 262 Pac. 892 (1927); Hauk v. State, 148 Ind. 238, 46 N. E. 127 (1897); McCleary v. State, 122 Md. 394, 89 Atl. 1100 (1914); Synn v. State, 181 Tenn. 325, 181 S. W. (2d) 332 (1944); 3 Wigmore, Evidence (3d ed. 1940) § § 861, 2550; Notes (1933) 85 A. L. R. 870; (1909) 18 L. R. A. (N.S.) 768, 777.

[12]"The Court does not vouch for the confession, but admits it to the jury to be considered and weighed like other evidence. Its weight, its value and its sufficiency is a question for the jury." Upshur v. Commonwealth, 170 Va. 649, 655, 197 S. E. 435, 437 (1938). Also, Wallace v. State, 28 Ark. 531 (1873); Osborn v. People, 83 Colo. 4, 262 Pac. (1927); Hauk v. State, 148 Ind. 238, 46 N. E. 127 (1897); State v. Overton, 75 N. C. 200 (1876); Fry v. State, 78 Okla. Cr. 299, 147 P. (2d) 803 (1944); State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943); 1 Greenleaf, Evidence (16th ed.

it is not admitted for the jury's consideration in any respect.[13] Dean Wigmore, after stating the rule is "one of the foundation-stones of our law," argues that to hand disputable "evidence to them [jury], to be rejected or accepted according to some legal definition, and not according to its intrinsic value to their minds, is to commit a grave blunder. It is an error of policy (as well as a deviation from orthodox principle) for several reasons; in the first place, it is a needless abdication of the judicial function—of which humility we have already too much; furthermore, it adds another to the exceptions to the general rules; and finally, it cumbers the jury with legal definitions and offers an additional opportunity for quibbling over the tenor of the instructions."[14] Although a substantial minority of the jurisdictions

1899) 355; 3 Wigmore, Evidence (3d ed. 1940) 349. The question may be asked whether in final anaylsis it makes any difference which view is followed, because under the orthodox rule, although a judge-accepted confession must be considered as evidence, the jury is free to refuse to give it any weight. However, in cases in which the judge would find the confession involuntary and therefore refuse to admit it, the importance of the rule followed is obvious. Under the orthodox view, the jury would never be allowed to consider the confession for any purpose, while under the majority rule, it would still be submitted to the jury, which might see fit to accept it as voluntary.

[13]Some of the courts which hold that the question is for the judge alone have also held that the preliminary matter should be admitted and heard before the court not in the presence of the jury. Biscoe v. State, 67 Md. 6, 8 Atl. 571 (1887); Ellis v. State, 65 Miss. 44, 3 So. 188 (1887); State v. Andrews, 61 N. C. 207 (1867); Fry v. State, 78 Okla. Cr. 299, 147 P. (2d) 803 (1944); Carter v. State, 37 362 (1872); State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943). Others hold that if the confession is admitted in evidence, the hearing of the preliminary matter in the presence of the jury is not prejudicial. People v. Kamaunu, 110 Cal. 609, 42 Pac. 1090 (1895); Kirk v. Territory, 10 Okla. 56, 60 Pac. 797 (1900). Many, if not all, courts allow the evidence touching the confession to be presented to the jury once the confession is determined to be voluntary, in order for them to give it such weight and effect as it should receive. People v. Gongales, 24 Cal. (2d) 870, 151 P. (2d) 251 ,1944); State v. Sherman, 35 Mont. 512, 90 Pac. 981 (1907); State v. Yarrow, 104 N. J. L. 512, 141 Atl. 85 (1928); State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943). It was held in State v. Sherman that the evidence touching the making of a confession, although it is addressed primarily to the court, must be given in the presence of the jury in order for the appellate court to consider it on appeal.

[14]3 Wigmore, Evidence (3d ed. 1940) 861. Maguire and Epstein recommended the orthodox rule in that it has greater simplicity, because the jury is not cumbered with legal definitions; it has greater predictability, since it prevents the jury from making unreasonable decisions because of their lack of legal training and experience; it has a protective tendency, in that collateral matters of a prejudicial nature will not be present to confuse the jury; it more generally possesses the merit of precision, as the holding of the jury can more easily be ascertained by the appellant, and of prompt vindication, in that it keeps involuntary confessions from the jury. Telling the jury to disregard evidence once they have heard it is like locking the door after the horse is stolen. Preliminary Questions of Fact in Determining the Admissibility of Evidence (1927) 40 Harv. L. Rev. 392.

adopt this view,[15] the cases add little to the reasoning supporting the rule.[16]

On the other hand, a majority of the jurisdictions declare that the question of voluntariness of a confession is for the jury.[17] However, there are many variations of the rule in different jurisdictions, and in some instances no uniform practice is followed even within the state.[18] The Massachusetts practice is something of a compromise between the orthodox and the extreme jury determination rules. There the judge rules on the character of the confession in the first instance, as under the orthodox rule. If he rules it to be involuntary, it will not be admitted for the jury's consideration. If he rules the confession to be voluntary, it goes to the jury, but with full instructions that if from the evidence the confession is found to have been obtained by threats or inducements, it is to be disregarded as evidence. The Massachusetts court has characterized this as "the humane practice,"[19]

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[15]Note (1933) 85 A. L. R. 870, lists the following states as taking this view: Alabama, Colorado, Illinois, Florida, Maryland, Indiana, Noth Carolina, North Dakota, Minnesota, Mississippi, Montana, New Jersey. See State v. Crank, 105 Utah 332, 142 P. (2d) 178, 185 (1943).

[16]However, a few courts have made additional comments on the point. A North Carolina court recognized that the duty of finding the facts preliminary to the admissibility of evidence is often very embarrassing, but held it to be the duty of the judge nevertheless, and stated the evil of allowing the jury to pass on it also to be this: "If he decides for the prisoner and rejects the evidence, that is the end of it, whereas, if he decides for the State, and can leave it the jury to review his decision, it is an inducement for him to decide proforma for the state, and so the evidence goes to the jury without having the preliminary facts decided according to law." State v. Whitener, 191 N. C. 659, 132 S. E. 603, 604 (1926), quoting State v. Andrews, 61 N. C. 205 (1867). In People v. Columbus, 49 Cal. App. 761, 194 Pac. 288, 289 (1920), this reasoning was used: "The jurors are sworn and impaneled to try the issues joined between the people and the prisoner, and are not sworn or impaneled to try collateral matters preliminary to the admissibility of evidence."

[17]Note (1933) 85 A. L. R. 870 lists the following jurisdictions as taking this view: Arizona, Arkansas, California, Georgia, Iowa, Kentucky, Massachusetts, Michigan, Nebraska, New Mexico, New York, Pennsylvania, South Carolina, South Dakota, Texas, Utah. See State v. Crank, 105 Utah 332, 142 P. (2d) 178, 185 (1943).

[18]The jurisdictions listed in Note (1933) 85 A. L. R. 870 as doubtful as to just what view is followed: Federal courts, Kansas, Maine, Missouri, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, Washington, West Virginia, Wisconsin and Wyoming. See State v. Crank, 105 Utah 332, 142 (2d) 178, 185 (1943).

The Missouri court has conceded that the jurisdiction was justly listed as doubtful as to whether the voluntariness of a confession was for the court or the jury, but held in State v. Pillow, 169 S. W. (2d) 414 (Mo. 1943) that it had adopted the view that the question was one for the jury.

[19]Commonwealth v. Knapp, 10 Pick. 477, 20 Am. Dec. 534 (Mass. 1830); Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885); Commonwealth v. Burrough, 162 Mass. 513, 39 N. E. 184 (1895). California seems to have taken the same

apparently because it allows the accused two opportunities to get the confession excluded.

The New York practice represents the farthest departure from the orthodox competency rule in that whenever there is a conflict of evidence as to the voluntary nature of the confession the court submits the issue to the jury without itself first determining the fact. It is reasoned that "For the judge himself to have determined this question of fact and to have excluded the confession altogether would have been going very far indeed toward usurping the functions of the jury, bordering almost upon arbitrary action."[20] An Ohio court seems to have adopted virtually the same position, in ruling that where there is any conflicting evidence as to the voluntariness of the confession, the question is for the jury. In support of this view, the court observed: "The first law of nature is that of self-preservation. One charged with a crime involving liberty and possibly his life, may resort to any claim that may relieve him from suffering such a penalty. Prisoners, against whom no questionable practice has been indulged, may concoct stories tending to establish that they are victims of the third degree. Out of this common experience has grown the legal principle that, upon conflicting evidence, the jury should be accorded the right to make decisions as to where the truth [of voluntariness] is to be found."[21] Other courts

view. People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925); People v. Gonzales, 24 Cal. (2d) 870, 151 P. (2d) 251 (1944). See also Wilson v. United States, 162 U. S. 613, 16 S. Ct. 895, 40 L. ed.10 90 (1896); State v. Armijo, 18 N. M. 262, 135 Pac. 555 (1913); State v. Hymas, 102 Utah 371, 131 (2d) 791 (1942).

[20]People v. Moran, 246 N. Y. 409, 418, 159 N. E. 379, 382 (1927). In Bass v. Commonwealth, 296 Ky. 426, 177 S. W. (2d) 386, 388 (1944) the Kentucky court rebutted the argument that for the judge to decide takes away the accused's right to trial by jury: "It is argued ... that [the] statute [is] unconstitutional in that it deprives the accused of the ancient mode of trial by jury guaranteed by Sec. 7 of our Constitution. This argument is based on an erroneous conception of the ancient mode of trial by jury. Courts existed long before juries and there was no such thing in the ancient mode of trial by jury as an allotment of all questions of fact to the jury. The jury simply decided some questions of fact and the judges always decided a multitude of questions of fact forming a part of the issue....

"For many years, both prior and subsequent to the adoption of the present Constitution, the orthodox practice in our jurisdiction was for the judge to determine the voluntary nature of the confession and its admissibility in evidence.... In the later cases, the heterodox rule was announced that where there was an issue as to the voluntariness of a confession the question of fact should be submitted to the jury, leaving to their consideration the conflicting evidence and its effect in case of belief or disbelief.

"It was to abolish the rule thus established that the Act of 1942 was enacted. Clearly, the Act does not violate Sec. 7 of the Constitution since it provides for a return to, and not a departure from the ancient mode of trial by jury."

[21]State v. Collett, 58 N. E. (2d) 417, 425 (Ohio App. 1944).

seem to have varied the statement of the New York and the Ohio rules, holding that if the evidence given before the judge is conflicting, or/and if he is left in doubt, it is a matter for the jury without a preliminary determination by the court.[22] Another procedure which has been used in several states is for the court in the absence of the jury to hear the witnesses for the state, allowing defendant to cross examine them but not to present evidence in his behalf. If the testimony is prima facie sufficient to authorize a finding of voluntariness, all the testimony, including that of the defendant, is then given before the jury for their own determination of the issue.[23] It has also been held that where the defendant did not object to the confession being presented in evidence, but later there was some evidence that the confession was not voluntary, it was a question for the jury, although it would have been for the court if the question had been raised at the proper time.[24] However, it seems that the judge may even at the later stage withdraw the confession from the jury if he finds it was involuntarily given.

The argument of the text writers and the reasoning of the courts which hold the question for the court give a fairly accurate basis for that view, but the rather non-persuasive references to "self-preservation," "usurpation of the jury functions," and "human practice" do little to formulate a reasonable basis for the unorthodox view.[25] Some courts may follow the unorthodox rule because they fail to distinguish between relevancy and competency, applying the rules relating to relevancy to both situations, which leaves the question, in most cases, to the jury.[26] Professor Morgan, after giving his views of the basis for the de-

[22]State v. Scott, 209 S. C. 61, 38 S. E. (2d) 902 (1946).

[23]Dawson v. State, 59 Ga. 333 (1877); Commonwealth v. Aston, 227 Pa. 112, 75 Atl. 1019 (1910); State v. Wells, 35 Utah 400, 100 Pac. 681 (1909). It has been held error not to allow the defendant to give evidence before the court. People v. Gonzales, 24 Cal. (2d) 870, 151 P. (2d) 251 (1944); Nicholson v. State, 38 Md. 156 (1873; State v. Sherman, 35 Mont. 512, 90 Pac. 981 (1907); State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943).

[24]Metzer v. State, 18 Fla. 481 (1881); Biscoe v. State, 67 Md. 6, 8 Atl. 571 (1887); Ellis v. State, 65 Miss. 44, 3 So. 188 (1887); State v. Armijo, 18 N. M. 262, 135 Pac. 555 (1913); Commonwealth v. Epps, 193 Pa. 512, 44 Atl. 570 (1899).

[25]It has been said of the Massachusetts view that, "The practice in fact results in nothing more than the usual course of submitting the credibility of the testimony to the jury. Its so-called 'humane quality' consists only in furnishing the defendant an opportunity to entrap an unwary trial judge. It serves as another example of the inexplicable faith of the Massachusetts court in the magic power of a formula." Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929) 43 Harv. L. Rev. 165, 171.

[26]Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929) 43 Harv. L. Rev. 165, 174.

parture, states that if the validity of the exclusionary rules of evidence is admitted, "there is no argument for departure from the orthodox practice which does not strike at the validity of the exclusionary rules themselves."[27] He points out:

> "These serious departures from the orthodox rule may have resulted from a combination of loose thinking manifested in loose phraseology,[28] of the indisposition of modern trial judges to assume the responsibility, of a vague acquiescence in a supposed popularity of the jury, and of the prevailing irrational notion that a jury must not be contaminated by any knowledge of the judge's opinion upon the merits. But a more respectable rationalization has not been wanting. It has been urged that to adhere to the accepted doctrine will produce a judge-made decision rather than a jury-made decision of the lawsuit .... [But] there is nothing inherently objectionable in a judge-made decision."[29]

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[27]Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929) 43 Harv. L. Rev. 165, 189.

[28]It has also been suggested that in the jurisdictions holding the question one for the jury, the practice has developed as follows: "In numerous appeals from convictions in criminal cases, defendants have contended that the trial court erred in admitting confessions in evidence which were involuntary. It also appears that the trial court, at the instance of the defendant or on its own initiative, instructed the jury to disregard the confession if they found it not voluntary. The appellate court, examining the evidence, concludes that there was no error, since the confession was made voluntarily; but adds that, besides, the rights of the defendant were safeguarded by the favorable instruction. Thereafter, the trial courts, to be on the safe side when there is any doubt in their minds as to voluntariness, make a practice of giving the instruction; and since the defendant cannot complain of such error favorable to him, the appellate courts have given apparent acquiescence to the practice by treating it not as error, but merely as another reason why the defendant cannot complain. This constant practice, favorable to the defendant, has lent color of authority; so that when a case has arisen necessitating a choice between the two views many courts have leaned toward the one in practice." Note (1933) 85 A. L. R. 870, 872.

[29]Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact (1929) 43 Harv. L. Rev. 165, 184- 186.

A Utah court, in a very thorough opinion, comes to the conclusion that there is no conflict between the functions of the judge and jury in regard to determining the voluntariness of a confession, that the difference in the decisions are often more apparent than real. The court points out that all courts agree that the court first passes on the question of voluntariness in determining the competency of the evidence:that all courts agree that if the confession is admitted, both the state and the defendant may give to the jury all the facts and circumstances under which the confession was made in order that they may pass upon the credibility and weight to be given it. This court thinks the only difference is as to the extent of the court's investigation as to the confession being voluntary and as to the nature of the instructions to be given the jury regarding the confession if received in evidence.

FEDERAL PROCEDURE—OBLIGATION OF FEDERAL COURTS UNDER ERIE RAILROAD V. TOMPKINS TO FOLLOW DECISIONS OF LOWER STATE COURTS. [Federal]

A recurring question in federal diversity litigation is the extent to which federal courts are bound by decision of intermediate appellate state courts in the absence of a decision on the question involved by th highest court of the state. *Erie R. Co. v. Tompkins*,[1] holding that the federal courts are to follow decisions of the highest state court, did not solve the problem, and considerable difference of opinion was manifested in the federal courts.[2]

In an apparent attempt to settle the question permanently, the Supreme Court, on December 9, 1940, handed down four decisions simultaneously, establishing the principle that the federal courts are to follow the decisions of the appellate state courts in the absence of decisions by the highest state court. (1) In *Fidelity Trust Co. v. Field*,[3]

Some courts hold that the court should make a complete investigation of all the evidence and circumstances and then rule upon it. Those jurisdictions which hold the question one for the jury, if certain conditions are present, instruct them that if they find the confession was not freely and voluntarily given, they should disregard it. This instruction is the same thing as saying that as a matter of law it is entitled to no weight. Thus, there is then no conflict between the functions of the judge and jury. State v. Crank, 105 Utah 332, 142 P. (2d) 178 (1943). This court seems to lose sight of the evils of allowing the jury to hear the confession when it was obtained by improper methods and is therefore inadmissible, or of having the jury decide questions which are governed by technical rules of law. By the same reasoning as used by this court, all matters could be given to the jury, and the exclusionary rules cease to have any meaning.

[1]304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487 (1938).

[2]1 Moore, Federal Practice (1946 Supp.) 59: "... The Supreme Court had reached the conclusion, before the Tompkins case had been decided and when federal courts were only applying state statutory and local law, that the decisions of intermediate state courts on those matters must be followed in the absence of a decision of the question by the highest state court. And, ... the Supreme Court had indicated that it would continue the policy of going to the decisions of intermediate state courts in order to ascertain the general law of the state to be applied in federal courts under the doctrine of the Tompkins case. Confusion had arisen, however, because of decisions by four Circuit Courts of Appeals refusing to apply state law as declared by lower state courts, and independently adopting a contrary rule, in the absence of a ruling by the highest state court." These four Circuit Court of Appeals decisions are discussed in notes 3, 5, 7, 9, infra.

[3]311 U.S. 169, 61 S. Ct. 176, 85 L. ed. 109 (1940), rehearing denied 311 U.S. 730, 61 S. Ct. 438, 85 L. ed. 475 (1940), second petition for rehearing granted 313 U.S. 550, 61 S. Ct. 1106, 85 L. ed. 1515 (1941), petition denied 314 U.S. 709, 62 S. Ct. 118, 86 L. ed. 565 (1941). This decision reversed 108 F. (2d) 521 (C.C.A. 3d, 1939). The Circuit Court had refused to be bound by two decisions of the New Jersey Chancery Court: "This statute [the constitutionality of which was in question] was considered

the Supreme Court declared: "An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.... Whether... [the state's highest court] will disapprove the rulings..., is merely a matter of conjecture... and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."[4] (2) In *West v. American Telephone & Telegraph Co.*,[5] the Court observed: "A state is not without law save as its highest court has declared it. There are many rules of decisions commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced

twice in 1936 by the Court of Chancery of New Jersey, a court of original jurisdiction.... The facts in these two cases cannot be distinguished from those here in question." (p. 522). "We hold, therefore, that the law of New Jersey is the law expressed in the statute which seems to us clearly constitutional and unambiguous, and that we are not bound to follow contrary decisions of the Chancery Court of New Jersey." (p. 527). The dissenting judge thought that the Circuit Court of Appeals was bound by the decisions in as much as the Chancery Court's judgment had state-wide effect. (p. 529). But see New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65 (W.D. Pa. 1938) aff'd 106 F. (2d) 921 (C.C.A. 3d, 1939); Charmley Drug Store v. Guerlain, 113 F. (2d) 247 (C.C.A. 3d, 1940): "...we see no reason for holding that it [a decision of the New Jersey Chancery Court] was not a correct expression of the law of that state."

[4]311 U.S. 169, 177-179, 61 S. Ct. 176, 178, 179, 85 L. ed. 109, 113, 114 (1940).

[5]311 U.S. 223, 61 S. Ct. 179, 85 L. ed. 139, 132 A.L.R. 956 (1940), rev'g 108 F. (2d) 347 (C.C.A. 6th, 1939) which had refused to follow the decision of an Ohio Court of Appeals. The Circuit Court of Appeals had stated: "The only Ohio case squarely on this subject is West v. American Telephone & Telegraph Co.,... which is the decision of the Court of Appeals reversing the judgment of the trial court...." "[That decision] relied upon and misconstrued American Steel Foundries v. Hunt [79 F. (2d) 558]." "The judgment in the state case... is not binding on the courts of appeals for the other 87 counties of Ohio. A motion to certify was made in the Supreme Court of Ohio and overruled." "If the judgment of the state court of appeals is binding here, we have the anomalous situation of an intermediate appellate court in Ohio misconstruing a decision of this court... and a District Court upon authority of the inferior appellate court's misconstruction, making the same error, and this court following the same erroneous holding. This conclusion hardly seems logical, and we hold that West v. American Telephone & Telegraph Co. is not controlling here." (p. 350)

The same court subsequently ruled in Hochevar v. Maryland Co., 114 F. (2d) 948 (C.C.A. 6th, 1940), that it would be bound only by decisions of the highest state court.

by other persuasive data that the highest court of the state would decide otherwise."[6] (3) In *Six Companies v. Highway District,*[7] the Supreme Court noted that the Ninth Circuit court had thought the decision of the California District Court of Appeals was wrong, but the Supreme Court's decision was, nevertheless, that: "The Circuit Court of Appeals should have followed the decision of the state court...."[8] (4) In *Stoner v. New York Life Ins. Co.,*[9] the Court ruled: "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of Erie Railroad v. Tompkins, 304 U.S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently.... In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."[10]

Although the Supreme Court saw fit to reverse the four Circuit Courts of Appeals[11] for their refusal to follow decisions by courts of

[6]311 U.S. 223, 236, 237, 61 S. Ct. 179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940).

[7]311 U.S. 180, 61 S. Ct. 186, 85 L. ed. 114 (1940) rehearing denied, 311 U. S. 730, 61 S. Ct. 438, 85 L. ed. 475 (1940), rev'g 110 F. (2d) 620 (C.C.A. 9th, 1940). The lower court had held: "While there is a conflict in these Courts [District Courts of Appeals] whether the decisions of one is binding on another... the most recent case holds that one District Court of Appeal is not bound by the decision of another.... However this may be, a decision of the intermediate court is not binding on the Supreme Court of the state even where the latter denies a petition for hearing.... We may regard the decision of an intermediate appellate court as persuasive, but it is not controlling...." (p. 626).

The same court also had refused to be so bound in Woods v. Deck, 112 F. (2d) 739 (C.C.A. 9th, 1940). However, it had held itself bound in In re Wiegand, 27 F. Supp. 725 (S.D. Cal. 1939) and in In re Shyvers, 33 F. Supp. 643 (S. D. Cal. 1940), aff'd 108 F. (2d) 611.

[8]311 U.S. 180, 188, 61 S. Ct. 186, 188, 85 L. ed. 114, 118 (1940).

[9]311 U.S. 464, 61 S. Ct. 336, 85 L. ed. 284 (1940), rehearing denied, 312 U.S. 713, 61 S. Ct. 609, 85 L. ed. 1144 (1941), rev'g 109 F. (2d) 874 (C.C.A. 8th, 1940). The lower court had held, one judge dissenting: "We are not bound to follow the decisions and reasoning of the intermediate appellate courts of Missouri." (p. 878). The courts in the Eighth Circuit had handed down similar decisions in Summers v. Travelers Ins. Co., 109 F. (2d) 845 (C.C.A. 8th, 1940), and in State of Missouri v. A. B. Collins & Co., 34 F. Supp. 550 (W. D. Mo. 1940).

[10]311 U.S. 464, 467, 61 S. Ct. 336, 338, 85 L. ed. 284, 287 (1940).

[11]See also Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 n. 21, 61 S. Ct. 347, 350 n. 21, 85 L. ed. 327, 330 n. 21 (1941), rev'g 110 F. (2d) 310 (C.C.A. 6th, 1940): "We have applied the rule enunciated in the case of Erie R. Co. v. Tompkins, 304 U. S. 64, that state law as determined by the state's highest court is to be followed as a rule of decision in the federal courts, to determinations by state intermediate appellate courts."

less standing than the highest court in the state, it gave no guides for the interpretation of what it meant by "considered judgment," or "other persuasive data that the highest court of the state would decide otherwise," or "more convincing evidence," or "other convincing evidence." However, the Supreme Court was positive in declaring that a federal court was not to reject a state court's decision because "it thinks the rule is unsound in principle or that another is preferable,"[12] and that a federal court can not refuse to follow decisions because it "did not agree with their reasoning."[13] Nevertheless, the stated principles have not been uniformly followed in the lower courts and diverse decisions have thereby been reached in their interpretations of the principles.[14] Likewise, the principles stated by the Supreme Court

[12]West v. American Telephone & Telegraph Co., 311 U.S. 223, 236-7, 61 S. Ct. 179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940).

[13]Fidelity Trust Co. v. Field, 311 U.S. 169, 179, 61 S. Ct. 176, 179, 85 L. ed. 109, 114 (1940).

[14]A survey, though not exhaustive, of lower federal court cases subsequent to the four Supreme Court decisions reveals the lack of uniformity in the several federal courts as to the absolute necessity to follow decisions of less than the highest state court. *1st Circuit:* United Automatic Rifles Corporation v. Johnson, 41 F. Supp. 86 (1941). *2d Circuit:* Droste v. Harry Atlas Sons, 145 F. (2d) 899, 900 (1945) (2-1 decision). The Circuit Court felt itself "bound" by the state Court of Appeals' interpretation of a state statute. Clark, J., dissenting: "This case well illustrates the rigidity of decision forced upon us by a quite literal application of Erie R. Co. v. Tompkins...." But see, Cooper v. American Airlines, 149 F. (2d) 355, 359 (1945), rev'g. 47 F. Supp. 329 (1944) where the court refused to follow a decision of the N. Y. Appellate Division: "Perhaps the guessing-guide is this: What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court...." Miller v. National City Bank of N. Y., 69 F. Supp. 187 (1946). *3d Circuit:* Intermediate state courts' decisions were followed in: Barret v. Denver Tramway Corporation, 53 F. Supp. 198 (1944), aff'd. 146 F. (2d) 701 (1944); Stinson v. Edgemoor Iron Works, 53 F. Supp. 864 (1944), 55 F. Supp. 861 (1944); In re Rosen, 66 F. Supp. 174 (1946) aff'd. 157 F. (2d) 997 (1946) cert. denied (under title Fisch v. Standard Factors Corporation) 330 U.S. 835, 67 S. Ct. 972, 91 L. ed. 287 (1947); and Lambert v. Doyle, 70 F. Supp. 990 (1947). Contra: Dunn v. Wilson, 51 F. Supp. 655 (1943) modified 53 F. Supp. 205; In re Berlin, 54 F. Supp. 416 (1944) rev'd. 147 F. (2d) 491 (1945). *4the Circuit:* Order of United Commercial Travelers v. King, 161 F. (2d) 108 (1947) rev'g. 65 F. Supp. 740 (1946) cert. granted 68 S. Ct. 70 (1947). *5th Circuit:* Titus v. Wells Fargo Bank & Union Trust Co., 134 F. (2d) 223 (1943) rev'g. 41 F. Supp. 171 (1941). But see, Ake v. Chancey, 43 F. Supp. 581 (1942), 55 F. Supp. 660 (1943) aff'd. 149 F. (2d) 310 (1945). Wyatt v. City of Miami Beach, 67 F. Supp. 271, 272 (1945): There had been a ruling by the "Circuit Court of Dade County... upon the precise question involved in this case..." and the defendant contended the federal court was bound by that decision. But the court ruled: "I cannot follow this reasoning, and the motion of the defendant is denied." The decision is explained in Bratley v. Nelson, 67 F. Supp. 272, 276 (1945): "...in Wyatt v. City of

have been subjected to much comment in the law reviews.[15]

A recent case wherein the Fourth Circuit Court of Appeals refused to follow what it believed was an erroneous decision of a state appellate court is *Order of United Commercial Travelers v. King.*[16]

Miami Beach ... Judge Holland recently held that the District Court should retain the case on its docket until an authoritative interpretation of the laws by the State courts could first be obtained." *6th Circuit:* Intermediate state courts' decisions were followed: Schram v. Safety Inv. Co., 39 F. Supp. 517 (1941); Leihauser v. Hartford Fire Ins. Co., 29 F. Supp. 401 (1939) rev'd 124 F. (2d) 117 (1941) (the Circuit Court of Appeals followed the later of two inconsistent decisions by intermediate courts); Continental Casualty Co. v. Ohio Edison Co., 126 F. (2d) 423 (1942); McCrate v. Morgan Packing Co., 117 F. (2d) 702 (1941), aff'd 135 F. (2d) 742 (1943); Gustin v. Sun Life Assur. Co., 152 F. (2d) 447 (1945) aff'd 154 F. (2d) 961 (1946) (unreported case was followed). But see, Ammond v. Pennsylvania R. Co., 125 F. (2d) 747 (1942). *7th Circuit:* Intermediate state courts' decisions followed: Addressograph-Multigraph Corp v. American Expansion Bolt Co., 124 F. (2d) 706 (1942), cert. denied 316 U.S. 682, 62 S. Ct. 1270, 86 L. ed. 1755 (1942); Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 152 F. (2d) 493 (1945) (2-1 decision). But see, Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (1946), rev'd. 161 F. (2d) 852 (1947) (see especially, dissenting opinion at 858). *8th Circuit:* Intermediate state court decisions were followed: New York Life Ins. Co. v. Griesdieck, 116 F. (2d) 559 (1941); Yoder v. Nu-Enamel Corporation, 117 F. (2d) 488 (1941); Kansas City Life Ins. Co. v. Wells, 46 F. Supp. 754 (1942) aff'd. 133 F. (2d) 224 (1943). *9th Circuit:* Intermediate state courts' decisions followed: Sears Roebuck & Co. v. Marhenke, 121 F. (2d) 598 (1941); Alameda County v. United States, 124 F. (2d) 611 (1941); American Employer's Ins. Co. v. Lindquist, 43 F. Supp. 610 (1942); Mallatt v. Ostranger Ry. & Timber Co., 46 F. Supp. 250 (1940). See, National Campaign Committee v. Rogan, 69 F. Supp. 679 (1945) (the federal district court refused to be bound by the interpretation of a federal statute by an intermediate state court). *10th Circuit:* Preferred Accident Ins. Co. v. Clark, 144 F. (2d) 165 (1944).

[15]Corbin, The Laws of the Several States (1941) 50 Yale L. J. 762, 768: "Thus, it appears that in determining the law of a state the federal judiciary, including the Justices of the Supreme Court themselves, are forbidden to use their own 'reasoning.' They are restricted to no more than a good clear reading glass—one, of course, that can distinguish between a ratio decidendi and an obiter dictum." Note (1945) 59 Harv. L. Rev. 1299, 1301: "... not only are federal judges prevented from judging and made mere 'ventriloquist dummies,' but the precise evil of forum shopping which led to the demise of Swift v. Tyson is resurrected, and the broad policy of uniformity which Erie exists primarily to subserve is hopelessly thwarted."; Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins (1946) 55 Yale L. J. 267, 290: "But the current view ... is that we must act as a hollow sounding board, wooden indeed, for any state judge who cares to express himself ...."; Cook, The Federal Courts and the Conflict of Laws (1942) 36 Ill. L. Rev. 493, 526; Notes (1941) 29 Calif. L. Rev. 380, 385; (1941) 9 Geo. Wash. L. Rev. 458, 463; (1941) 3 La. L. Rev. 644, 646; (1941) 89 U. of Pa. L. Rev. 520; (1941) 15 So. Calif. L. Rev. 71; [1941] Wis. L. Rev. 528, 533; (1946) 24 Tex. L. Rev. 361, 364; (1946) 94 U. of Pa. L. Rev. 293, 308.

[16]161 F. (2d) 108 (C.C.A. 4th, 1947) rev'g. 65 F. Supp. 740 (W.D.S.C. 1946), cert. granted 68 S. Ct. 70 (1947). The opinion does not state whether or not the South Carolina Court of Common Pleas, which has both original and appellate jurisdiction, had acted as an appellate or trial court. Although the discussion in this

The *King* case is founded on the interpretation of a life insurance policy disclaiming liability where the insured suffered "death resulting from participation, as a passenger or otherwise, in aviation or aeronautics."[17] The insured, while flying a routine Civil Air Patrol over the Atlantic Ocean, was forced down about thirty miles from shore when the airplane's engine failed. He was uninjured in the forced landing and a few minutes later was seen floating in the water wearing an inflated life jacket. He was known to have been alive two and a half hours thereafter, but when his body was rescued about four and a half hours after the forced landing, the insured was dead. His death was listed as having been caused by "drowning as a result of exposure in the water after failure of airplane motor."[18]

The beneficiary's suit on the policy was tried in the Federal District Court for the Western District of South Carolina. There being no South Carolina decisions in point, the district judge allowed recovery, basing his opinion on what he thought the South Carolina courts would have held had they been deciding the case.[19] While this federal decision was being appealed, the Court of Common Pleas for the County of Spartanburg, an appellate court without state-wide jurisdiction,[20] allowed this same plaintiff recovery on a similar policy of another insurance company on the same state of facts. The Court of Common Pleas based its decision on the interpretation of the policy by the federal district judge.

The Circuit Court of Appeals, in reversing the district judge's decision, brushed aside the argument that "the South Carolina law would permit recovery in a case of this character,"[21] and refused to be bound by the decision of the Court of Common Pleas:

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comment assumes the former, the principle seems to be the same in either case. The decision of the Circuit Court of Appeals certainly did not turn on any such consideration and it is believed that the Supreme Court has not drawn this distinction in prior cases. The issue has been regarded to be whether the federal courts must follow a decision of tribunals *inferior* to the *highest* court of the state.

[17]161 F. (2d) 108, 109.

[18]161 F. (2d) 108 (C.C.A. 4th, 1947).

[19]King v. Order of United Commercial Travelers of America, 65 F. Supp. 740, 743 (W.D.S.C. 1946): "The South Carolina Supreme Court has also adopted the rule, as to exclusion clauses in accident insurance policies, that liability is to be determined by the cause of death, and not by circumstances or status of the insured."

[20]S. C. Const. (1895) Art. 5, sec. 15: "Jurisdiction of courts of common pleas... They shall have appellate jurisdiction...." Fidelity Fire Ins. Co. v. Windham, 134 S. C. 373, 133 S.E. 35, 38 (1926): "...the court of common pleas [is] equal and coordinate in all respects to any other like court of any other county, excepting as to what may be termed 'territorial jurisdiction'...." And see, note 26, infra.

[21]Order of United Commercial Travelers v. King, 161 F. (2d) 108, 110 (C.C.A. 4th, 1947).

"That opinion, not binding on other South Carolina courts, is not binding on us and we cannot treat it as a final expression of South Carolina law . . . ."[22]

". . . In any event, we believe that the highest court in South Carolina would not make specific application of such a generalized dictum, which, if applied to the facts here would fly in the face of reason and the very considerable authority that has expressed the view we now follow. It would certainly not conform with accepted theories of proximate cause."[23]

Without passing upon the merits regarding the desirability of the interpretation of the insurance policy, it is believed that the *King* case was not decided in conformity with the principles laid down in the *West, Fidelity, Stoner* and *Six Companies* cases. This conclusion is strengthened by the fact that none of the cases was either cited or commented upon. That the *King* case should be governed by the principles of the above four decisions seems apparent when one compares the facts of the *King* case with those other decisions. A comparison reveals the following similarities:

(1) In the *King* case the district court's decision was reversed with the statement that "we believe that the highest court in South Carolina would not make specific application of such generalized dictum . . . ."[24] The Circuit Court of Appeals did not refer to any "other persuasive data" or "other convincing evidence" to support that belief. And mere belief, without more, apparently is not enough. In the *Fidelity* case it was held that mere conjecture was not enough even though the federal court did not agree with the reasoning of the state court.[25] In the *West* case the lower federal court was not free to reject the rulings of the

[22]161 F. (2d) 108, 110-111.

[23]161 F. (2d) 108, 110. Judge Dobie was referring to a statement from Bolt v. Life & Casualty Ins., Co., 156 S. C. 117, 152, S. E. 766, 767 (1930): ". . . our court has made it the almost universal rule to construe any clause of an insurance policy against the insurer, when there existed the least doubt as to the meaning of the language employed." Reynolds v. Life & Casualty Ins. Co. of Tennessee, 166 S. C. 214, 164 S.E. 602, 603 (1932), is interesting to note, in the light of Judge Dobie's remarks: "In the recent case of Bolt v.Insurance Company . . . Mr. Justice Blease (now Chief Justice) discusses at some length the question here presented and under the authority of that decision the court in case at bar properly overruled defendant's motion for a directed verdict . . . ." See also, Parker v. Jefferson Standard Life Ins. Co., 158 S. C. 394, 155 S.E. 617, 618 (1930): ". . . in cases of doubt, uncertainty, manifest ambiguity, or susceptibility of two equally reasonable interpretations . . . such contracts must be liberally construed in favor of the insured." Bolt v. Insurance Company was cited as one of many South Carolina cases as authority for this statement.

[24]161 F. (2d) 108, 110 (C.C.A. 4th, 1947).

[25]311 U.S. 169, 179, 61 S. Ct. 176, 179, 85 L. ed. 109, 113 (1940).

state court "even though it thinks the rule is unsound in principle or that another rule is preferable."[26] Yet, the court in the *King* case sought to justify its decision by declaring that for South Carolina to follow the decision of the Court of Common Pleas would be contra to "very considerable authority . . . [and] would certainly not conform with accepted theories of proximate cause."[27]

(2) The *King* case may be distinguished from the *West* case in that in the *King* case the state court's decision was not appealed, much less was it refused to be heard by the South Carolina Supreme Court. But, that factor seems not to be controlling:

> "The circumstance that the highest court had refused to review the decision of the intermediate court in this instance was considered as a fortifying factor, *but one not essential to its binding force.*"[28]

(3) In the *King* case, as was true in the *West* case, the lower state court looked to a decision of the federal court for guidance. It mattered not to the Supreme Court in the *West* case that the Circuit Court of Appeals felt the lower state court had misconstrued the federal decision.[29] The subsequent adoption of the lower federal court's decision as reflective of South Carolina law should not permit the Circuit Court of Appeals to say that the District Court was wrong, therefore the South Carolina court was wrong also, and that the Circuit Court of Appeals had the duty to establish as correct state law a decision contrary to that announced by the state court.[30] In the *Six Companies* case, the Ninth Circuit court was reversed for its failure to follow the decision of the state court, even though the federal court "thought that decision was wrong . . . ."[31]

(4) The mere fact that the defendant in the federal *King* case was not also the defendant in the state *King* case should not be a distin-

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[26]311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940.)

[27]161 F. (2d) 108, 110 (C.C.A. 4th, 1947).

[28]1 Moore, Federal Practice (1946 Supp.) 61 (italics supplied).

[29]311 U.S. 223, 235, 61 S. Ct. 179, 182, 85 L. ed. 139, 143, 132 A.L.R. 956, 960 (1940): "The court below thought . . . the district court had erred in following the ruling of the state court of appeals and that both had misconstrued and misapplied an earlier decision of the court below . . . ." Nevertheless the Circuit Court of Appeals was reversed. See note 5, supra, for the language used by the court relative to this fact.

[30]West v. American Telephone & Telegraph Co., 311 U.S. 223, 238, 61 S. Ct. 179, 184, 85 L. ed. 139, 145, 132 A.L.R. 956, 962 (1940): ". . . the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation."

[31]311 U.S. 180, 185, 61 S. Ct. 186, 187, 85 L. ed. 114, 117 (1940).

guishing feature,[32] especially since the issues and facts in the federal and state cases were the same. The decision of the appellate state court, in the absence of a decision by the highest court, represented the "law" of South Carolina on the question: "A state is not without law save as its highest court has declared it."[33]

(5) The Fourth Circuit court in the *King* case refused to be bound by the decision in the state court because that court's decision was not binding on the other state courts. That has not heretofore been regarded as a controlling factor. In fact, it is clearly pointed out in the *West* case as being inapplicable: "True, some other court of appeals of Ohio may in some other case arrive at a different conclusion...."[34] And the Ninth Circuit court in the *Six Companies* case had stated: "... one District Court of Appeals is not bound by the decisions of another."[35] Yet, the Supreme Court reversed that court with the mandate that: "The Circuit Court of Appeals should have followed the decision of the state court...."[36]

It is to be noted as significant that certiorari has been granted in the *King* case.[37] Thus, the Supreme Court again has an excellent opportunity to reaffirm and to clarify its position on the absolute necessity of a federal court's following the decision of an intermediate state court in the absence of a decision by the highest state court, and to establish standards of guidance for the interpretation of "more convincing evidence," "considered judgment," "other persuasive data," and "other convincing evidence." If this is done, it should go a long way toward eliminating "the maintenance within a state of two divergent or conflicting systems of law, one to be applied to the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship."[38]

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[32]Fidelity Trust Co. v. Field, 311 U.S. 169, 178, 61 S. Ct. 176, 178, 85 L. ed. 109, 113 (1940), in discussing the West case: "It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, *but we set forth the broader principle as applicable to the decision of an intermediate court,* in the absence of a decision by the highest court, whether the question is one of statute or common law." (Italics supplied.)

[33]West v. American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940).

[34]311 U.S. 223 237, 61 S. Ct. 179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940).

[35]106 F. (2d) 620, 626, (C.C.A. 9th, 1940).

[36]311 U.S. 180, 188, 61 S. Ct. 186, 188, 85 L. ed. 114 118 (1940).

[37]68 S. Ct. 70 (1947).

[38]West v. American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct.

NEGLIGENCE—COURT INTERFERENCE WITH JURY VERDICTS APPLYING COMPARATIVE NEGLIGENCE DOCTRINE. [Wisconsin]

The injustice of the doctrine of contributory negligence,[1] which denies a plaintiff any recovery if he was negligent in any degree, has been pointed out many times,[2] but various judicial attempts to modify it with the doctrine of "last clear chance"[3] or categories of negligence such as slight, ordinary, and gross,[4] have merely further confused one of the most treacherous branches of the common law. Apportionment of damages according to the relative fault of the parties has been looked to by text writers and courts as one means of solving this situation.[5] Virginia,[6] Florida,[7] Georgia,[8] Arkansas,[9] and Massachusetts[10] have ap-

179, 183, 85 L. ed. 139, 144, 132 A.L.R. 956, 961 (1940); Goodrich, Mr. Tompkins Restates the Law (1941) 27 A.B.A.J. 547: "Federal courts are to follow state decisions even when the latter are from intermediate courts and not final authority. Lawyers and judges have their own notions about the desirability of all this. Some federal judges do not like it. It limits their scope of freedom of decision and it also, ad hoc, makes them subordinate to a state court. But surely it is a good general policy that a suitor's right and liabilities should not vary from court to court. Wholly fortuitous circumstances, although the question involved is purely one of state law, should not make a difference in substantive rights. The present trend in the decisions supports this general policy strongly."

[1]Generally held to have entered the common law with the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

[2]Haeg v. Sprague, 202 Minn. 425, 281 N. W. 261 (1938); Gregory, Legislative Loss Distribution in Negligence Actions (1936) 3; Salmond, Torts (10th ed. 1945) 465; 2 Blashfield, Cyc. Automobile Law (1927) 1008; Lowndes, Contributory Negligence (1934) 22 Geo. L. J. 674, 681-682; Mole and Wilson, A Study of Comparative Negligence (1932) 17 Corn. L. Q. 333, 604.

[3]Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); Prosser, Torts (1941) 408; Schofield, Davies v. Mann; Theory of Contributory Negligence (1890) 3 Harv. L. Rev. 263; Bohlen, Contributory Negligence (1908) 21 Harv. L. Rev. 233; Smith, Last Clear Chance (1916) 82 Cent. L. J. 425; MacIntyre, The Rationale of Last Clear Chance (1940) 53 Harv. L. Rev. 1225; Note (1937) 35 Mich. L. Rev. 816; Note (1922) 9 Va. L. Rev. 237.

[4]Wilson v. Brett, 11 M. & W. 113, 152 Eng. Rep. 737 (1843); Galena & Chicago U. R. Co. v. Jacobs, 20 Ill. 478 (1858); Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534 (1871); Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456 (1885); 1 Thompson, Negligence (2d ed. 1901) Sec. 18.

[5]Gregory, Legislative Loss Distribution in Negligence Actions (1936) 4; Ulman, A Judge Takes the Stand (1933); Mole and Wilson, A Study of Comparative Negligence (1932) 17 Corn L. Q. 333, 604; Whelan, Comparative Negligence [1938] Wis. L. Rev. 465; Gregory, Loss Distribution by Comparative Negligence (1936) 21 Minn. L. Rev. 1; Note (1927) 12 Corn. L. Q. 113.

[6]Va. Code Ann. (Michie, 1942) Sec. 3959.

[7]Fla. Stat. (1941) Sec. 768.06.

[8]Ga. Ann. Code (Parks, 1914) Sec. 4426.

[9]Ark. Digest of Stats. (Pope, 1937) Sec. 1213.

[10]Mass. Gen. Laws (1932) c. 160, Sec. 232.

plied comparative negligence to railroad crossing accidents only. Mississippi,[11] Wisconsin[12] and Nebraska[13] have made more extended use of the doctrine. Four provinces of Canada have also adopted comparative negligence systems by statutes.[14] The policy has been embraced further by the Federal Employers' Liability Act,[15] the Merchant Marine Act,[16] and state railway labor acts.[17] There has also been a movement to adopt, in the admiralty courts of the United States, the apportionment practice used in sea accidents involving negligence on the part of both parties. This practice has proven successful in operation and has been employed by every major shipping nation of the world with the exception of the United States.[18]

One objection to the comparative negligence doctrine arises from the feeling that juries are not competent to handle the complicated situations which would come up in litigation, and that its use would thus create more injustice than the familiar doctrine of contributory negligence.[19] A study of the application of the Wisconsin Comparative Negligence statute in the courts since its enactment in 1931 indicates that such fears are well grounded and that the judges have found it necessary to upset jury verdicts with increasing frequency. Under the Wisconsin Act,[20] the jury has the task of determining the degree in which the fault of both defendant and plaintiff caused the injury in question. If the plaintiff's negligence amounted to 50% or more, no recovery is allowed. If his fault is less than half the cause, the

[11]Miss. Code Ann. (1942) Sec. 1454.

[12]Wis. Stat. (1941) Sec. 331.045.

[13]Neb. Comp. Stat. (1929) Sec. 20-1151.

[14]Brit. Col. Stat. (1925) c. 8; New Bruns. Rev. Stat. (1927) c. 143, p. 1758; Nova Scot. Stat. (1926) c. 3; Ont. Stat. (1930) 20 Geo. V, c. 27, amended (1931) 21 Geo. V, c. 26.

[15]45 U. S. C. A. Sec. 51-59 (1943).

[16]46 U. S. C. A. Sec. 688 (1944).

[17]Minn. Stat. (Mason, 1927) Sec. 4935; Iowa Code (1939) Sec. 8158; Wis. Stat. (1941) Sec. 192.50.

[18]Franck, Collisions at Sea in Relation to International Maritime Law (1896) 12 L. Q. Rev. 260; Scott, Collisions at Sea (1897) 13 L. Q. Rev. 17; Mole and Wilson, A Study of Comparative Negligence (1932) 17 Corn. L. Q. 333, 339-359; Franck, A New Law for the Seas (1926) 42 L. Q. Rev. 25.

[19]Gregory, Legislative Loss Distribution in Negligence Actions (1936) 6; Mole and Wilson, A Study of Comparative Negligence (1932) 17 Corn. L. Q. 333, 645-655.

[20]Wis. Stat. (1941) Sec. 331.045: "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering."

jury calculates the full amount which plaintiff could recover if guilty of no contributing negligence, and then reduces the award of the verdict by the percentage in which the plaintiff's negligence did bring about the injury. Thus, if the plaintiff is found to have been 51% at fault, he recovers nothing, while if he is only 49% negligent, he is awarded 51% of his total damages.[21]

In the early decisions arising under the statute, the Wisconsin Supreme Court indicated that it would leave the matter of the degrees of negligence of the parties almost entirely up to the jury. In *McGuiggan v. Hiller Bros.*,[22] one of the first cases to be decided, it was declared: "Nor can we say that the plaintiff's negligence, as a matter of law, is greater than that of the defendant. The negligent acts differ in kind and quality, and we know of no legal yardstick by which we can classify, evaluate, and compare them." Four years later, the court still sought to maintain its hands-off attitude, observing: "Where the negligence of the parties differs in kind and quality this court will not attempt to classify, evaluate, and compare them."[23] During this early period several cases demonstrated clearly that the comparative negligence system, left to the capricious mercy of juries, could foster as much injustice as the contributory negligence doctrine.[24]

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[21]This feature is criticized in Gregory, Legislative Loss Distribution in Negligence Actions (1936) 64; Whelan, Comparative Negligence [1938] Wis. L. Rev. 465, 490; Campbell, 10 Years of Comparative Negligence [1941] Wis. L. Rev. 289, 304. The small difference in the degree of plaintiff's fault could produce a great difference in the amount of recovery. It has been suggested that of his total damage the plaintiff should recover only the percentage fixed by subtracting the percentage of his fault from the percentage of defendant's fault. It is further pointed out that the act is deficient in that it does not deal with a situation in which more than two parties are involved.

[22]209 Wis. 402, 245 N. W. 97, 99 (1932).

[23]Brennan v. Chicago, M., St. P. & P. R. Co., 220 Wis. 316, 265 N. W. 207 (1936).

[24]In Nelson v. Klemm, 210 Wis. 432, 245 N. W. 657 (1932), the defendant was proceeding down a paved, arterial, state highway. The plaintiff was proceeding along an intersecting gravel road. Plaintiff, when 80 feet from the intersection, saw the defendant approaching and thought he had time to get across the intersection since he under-estimated the speed at which the defendant was traveling. Plaintiff did not look again at the defendant until he was at the intersection when it was too late to stop. Plaintiff thought the best thing to do was step on the gas, which he did, and was hit by the defendant. The jury held that the plaintiff was not negligent. On appeal, the verdict was sustained, thereby allowing the plaintiff to recover 100 per cent damages under the comparative negligence law. In Schmidt v. Leary, 213 Wis. 587, 252 N. W. 151 (1934), the plaintiff and defendant had a collision at a highway intersection. Both parties were negligent as to speed, lookout, and control, but the plaintiff ran a red stop light to get into the intersection. When the jury returned a verdict for the plaintiff the Supreme Court sustained it on appeal. See also: Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N. W. 420

In the past decade, however, the policy in Wisconsin has undergone a definite change with the decisions showing a trend toward increasing control by judges over the jury. In spite of the earlier assertions that judges have no better devices than jurors possess for measuring different types of negligence, the state Supreme Court has set aside a number of verdicts in cases in which the negligent acts of plaintiffs and defendants differed in number and kind. In *Kasper v. Kocher*[25] the plaintiff sued for the death of his wife, who, while riding as his passenger, was killed in a collision between the defendant's truck which was approaching on the highway and the plaintiff's auto which was emerging from a private driveway. The truck driver was negligent as to lookout, speed, and failure to yield the right of way. The jury gave a verdict for the plaintiff to recover 65% of his damages since he was only 35% at fault and the defendant 65%. On appeal the court held that as a matter of law the husband's failure to stop was a more important factor in causing the collision than the truck driver's negligence, hence the plaintiff could not recover.[26]

(1933); Bent v. Jonet, 213 Wis. 635, 252 N. W. 290 (1934); Davies v. Oshkosh Airport, 214 Wis. 236, 252 N. W. 602 (1934); Hammer v. Minneapolis, St. P. & S. S. M. Ry. Co., 216 Wis. 7, 255 N. W. 124 (1934); Doepke v. Reimer et al., 217 Wis. 49, 258 N. W. 345 (1935); Brennan v. Chicago, M., St. P. & P. R. Co., 220 Wis. 316, 265 N. W. 207 (1936).

[25]240 Wis. 629, 4 N. W. (2d) 158 (1942).

[26]In Kilcoyne v. Trausch, 222 Wis. 528, 269 N. W. 276 (1936), the defendant's truck entered the intersection (neither road being arterial) and was negligent in not seeing the plaintiff approaching. The plaintiff was negligent in failing to yield the right of way to the defendant and also by driving at such speed that he was unable to stop his auto within one-half the clear distance ahead. The Supreme Court set aside the jury verdict and held that the plaintiff could not recover as a matter of law. In Grasser v. Anderson, 224 Wis. 654, 273 N. W. 63 (1937), the plaintiff sued for injuries to himself and his auto, and expenses due to the death of his wife, in an accident with the defendant. Plaintiff and defendant were coming toward each other on a three-lane highway at night. The plaintiff attempted to turn left across the path of the approaching defendant and the accident resulted. The jury found that the defendant was negligent as to speed, lookout, management, and control, and yielding the right of way. The plaintiff was found to be negligent as to lookout, yielding the right of way, and making the left turn. The jury held that plaintiff's negligence amounted to 5 per cent and the defendant's 95 per cent of the total negligence. On appeal to the Supreme Court this finding of the jury was set aside, and the court stated that the negligence of the plaintiff was at least as great as that of the defendant if not more. In Geyer v. Milwaukee Electric Ry. & Light Co., 230 Wis. 347, 284 N. W. 1 (1939), the defendant bus driver had the right of way on an arterial street which had a 30 m.p.h. speed limit. At the intersection he saw a car stopped on his left waiting for him to cross. He was going 20 m.p.h. and attempted to speed up a bit to pass the intersection. The plaintiff then suddenly appeared on the other side of the stopped car and was coming right on through the intersection. The plaintiff was negligent as to lookout. The jury granted the

On the other hand, it has been pointed out in several opinions that merely because the jury finds the two parties have been at fault in the same respect, it does not follow that their negligent actions are equal, since causal connection may vary as may the degrees of the same offense.[27] Further, the fact that one party was causally negligent in three respects and the other party in but two respects does not necessitate the conclusion that the former's negligence is of greater degree.[28] Though in those particular cases the Wisconsin Supreme Court did not overthrow the verdicts, the right to do so was reserved if the juries' findings as to degrees of fault in such situations appeared unwarranted.

Cases in which the verdicts have involved findings of very small differences in the negligence of the parties naturally give rise to the greatest suspicion. Nice balancing of fault seems very difficult in complex situations, but juries have often thought themselves able to assess the responsibility within a 60-40 percentage or less.[29] In *Poole v. Houck*,[30] a recent noteworthy Wisconsin case, the jury apportioned the negligent conduct at 47% attributable to plaintiff and 53% to the defendant. In that case the defendant, while intoxicated, ran into the rear end of an auto belonging to one Peckham, and as a result the bumpers hooked and the two cars stopped. A sheriff and his deputy appeared, took the defendant into custody, and began directing traffic around the hooked cars while other persons who had stopped attempted to disengage the bumpers. There were lights on all the vehicles, and the sheriff gave out flashlights with which to signal traffic. Poole came upon the accident traveling at a speed of 40 to 50 m.p.h. and did not see either the activity or warning lights. He collided with the cars, damaging his own car and injuring himself. On appeal the court held that the negligence of the plaintiff was at least as great as that of the defendant as a matter of law and that the "jury's verdict should be overruled."[31]

The Wisconsin court has by no means limited its interference with

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plaintiff a verdict for 75 per cent of his damages since they found him at fault 25 per cent and the defendant 75 per cent. On appeal this verdict was set aside, and it was held as a matter of law that the plaintiff's negligence was at least equal to the defendant's.

[27]Fronczek v. Sink et al., 235 Wis. 398, 291 N. W. 850 (1940).

[28]Rosenow et al. v. Schmidt, 232 Wis. 1, 285 N. W. 755 (1939).

[29]Hansberry v. Dunn, 230 Wis. 626, 284 N. W. 556 (1939) noted in [1939] Wis. L. Rev. 530; Menden v. Wisconsin Electric Power Co., 240 Wis. 87, 2 N. W. (2d) 856 (1942); Konow v. Gruenwald et al., 241 Wis. 453, 6 N. W. (2d) 208 (1942).

[30]250 Wis. 651, 27 N. W. (2d) 705 (1947).

[31]250 Wis. 651, 27 N. W. (2d) 705, 706 (1947).

verdicts to those finding a close balance of fault. In one case[32] in which a plaintiff's careless acts, including a left turn in the face of approaching traffic on the highway, were regarded by the jury as only 5% of the cause of the ensuing accident, the court set aside the verdict on its own determination that the negligence of the plaintiff was at least as great as that of the defendant, if not greater. A similar reversal was made in the recently decided case of *Wilfert v. Neilson.*[33] In that case the plaintiff parked his car on a paved road and freed his dog for a run. Parallel to the highway and about 120 yards away there was a fence row. A dirt road crossed both the fence row and the highway at right angles. The plaintiff started down this road toward the fence and noticed the defendant approaching the fence row toward him but below the point where the dirt road and fence intersected. Plaintiff called to the defendant and told him that there was game along the fence row. Plaintiff saw defendant reach the fence row and start working toward the intersection of the road he was following and the fence. Defendant killed one bird. At this time the defendant checked the plaintiff's position, and saw that plaintiff was standing near a tree out of danger. Defendant continued and flushed a second bird, and when he fired this time some of the shot struck the plaintiff in the legs. The plaintiff had continued walking toward the point where he knew the defendant was also going. The jury found that the plaintiff was 10% negligent and the defendant 90%. On appeal this was sent back for a new trial as being grossly disproportionate.

Even within the last few years, the Wisconsin Supreme Court has declared that "we have no right to substitute our judgment for the judgment of the jury" under the evidence of a close case,[34] and that every reasonable intendment must be given to a jury's findings.[35] Nevertheless, this review of the decisions seems to demonstrate that the necessity is being felt more frequently to set aside the jury's findings because the judges disagree with their accuracy. Out of a total of 52 cases checked, it was found that only one case out of 13 before the Wisconsin Supreme Court, in the period of 1932 through 1935, held as a matter of law that the plaintiff could not recover; 12 out of 19 cases found in the period from 1936 through 1941 reached this result; and 13 cases out of 20 in the period 1942 to June 1947 so held.[36]

[32]Grasser v. Anderson, 224 Wis. 654, 273 N. W. 63 (1937).
[33]250 Wis. 656, 27 N. W. (2d) 893 (1947).
[34]Webster v. Roth, 246 Wis. 535, 18 N. W. (2d) 1 (1945).
[35]Guinnell v. Bowen, 246 Wis. 16, 16 N. W. (2d) 415 (1944).
[36]Cases found, Am. Dig., Negligence, Secs. 98 and 135.

Perhaps this situation is not the direct result of any weakness in the comparative negligence doctrine. It may be merely a further development in the long history of the struggle of the courts to impose some sort of check upon arbitrary or erroneous determinations of juries. Originating in such crude but direct methods as attaint and fines levied against jurors for improper verdicts,[37] the courts' power has now become lodged in the more refined devices of directed verdicts, judgments notwithstanding the verdict, and reversal of the judgments based on verdicts which are against the evidence. Consistent with this policy is a strengthening consensus that the judges should be accorded even more freedom to accept or ignore the opinions of juries in determinations of fact. Mr. Justice Holmes made the following observation: "A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than the average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing."[38]

The adoption of the comparative negligence system, by burdening the jury with the unfamiliar task of apportioning fault, may well have contributed to the expansion of such power in the courts. The missteps which naturally followed have afforded judges another field for interference and closer supervision. This effect seems desirable, and there may be good reason to believe that the comparative negligence doctrine, in the hands of a strong court, can work better justice in negligence cases than any other means now in practice.

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PROCEDURE—NECESSITY OF EXHAUSTING PEREMPTORY CHALLENGES BEFORE PRESENTING EXCEPTIONS TO RULINGS ON CHALLENGES FOR CAUSE. [North Carolina]

Judicial reform movements in various states directed toward revision of criminal procedure have called attention to the nature of the right of peremptory challenge. The suggestions for improving the existing cumbersome systems have generally advocated a reduction in

[37]Scott, Fundamentals of Procedure (1922) 90; Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) 140.

[38]Holmes, The Common Law (1881) 124.

the number of peremptory challenges permitted, as a means of avoiding the wholesale depletion of jury panels and of decreasing delays in jury selection.[1]

Because nearly all problems relating to peremptory challenges also involve other types of challenges, and as it is believed that proper solutions may be derived from a study of distinctions between challenges for cause and peremptory challenges, it becomes pertinent to classify and briefly define the various types of challenges.[2] Challenges for cause fall into two groups: to the array, and to the polls. A challenge to the array is to the entire panel, usually for unlawful means employed by the sheriff or other officer in summoning or selecting the panel.[3]

Challenges to the polls, or to individual jurors, are divided into two classes: for principal cause, and to the favor. The grounds for principal cause are generally statutory, and usually include: (1) that the prospective juror has been convicted of a crime which by law disqualifies him for jury duty; (2) that the prospective juror served on the grand jury which indicted defendant; and (3) that a relationship within a specified degree exists between the juror and one of the parties.[4] Challenges to the favor are exercised when it is revealed upon voir dire examination that the prospective juror is prejudiced against one of the parties or that he retains a fixed and positive opinion as to the guilt or innocence of defendant.[5]

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[1]Evans, Recommendations for Reforms in Criminal Procedure (1929) 24 Ill. L. Rev. 112; Note (1930) 30 Col. L. Rev. 721. Illinois Rev. Stat. (1947) c. 38, § 742 allows a defendant twenty peremptory challenges if the crime charged is punishable by death or life imprisonment, ten if punishable by imprisonment for a term exceeding eighteen months, and six in all other criminal trials. The American Law Institute Code of Criminal Procedure (1930) § 282 provides: "The State and the defendant shall each be allowed the following number of peremptory challenges: (a) Ten, if the offense charged is punishable by death or imprisonment for life. (b) Six, if the offense charged is a felony not punishable by death or imprisonment for life. (c) Three, if the offense charged is a misdemeanor."

[2]Many of the analogies and citations used are to civil cases, for the nature of challenges is the same in civil as in criminal procedure, differing only in the number allowed.

[3]Moore v. Navassa Guano Co., 130 N. C. 229, 41 S. E. 293 (1902), where county commissioners rejected certain names drawn because they believed too many had been selected from one township; Woods v. Rowan & Coon, 5 John. 133 (N. Y. 1809), where the sheriff was the plaintiff in a civil action but nevertheless served the venire himself. See Thompson, Challenges to the Array (1881) 15 Am. L. Rev. 699; Note (1923) 21 Mich. L. Rev. 578.

[4]Jewell v. Jewell, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473 (1892), granting a new trial where the relationship within the fourth degree was not discovered until after trial. See Clark, Criminal Procedure (2d ed. 1918) § 163.

[5]Fitts v. Southern Pacific Co., 149 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130

In addition to challenges based on these variously classified causes, each party litigant may, at his discretion, exercise a specified number of peremptory challenges to jurors without assigning any reason. The right is purely statutory, and its exercise may be "based upon the whim or fancy of the challenger."[6] The origin of the right of peremptory challenge is in dispute, though it is certain that it did exist at an early period in the law in favor of both the Crown and the accused.[7] Abuse of the Crown's unlimited right to challenge peremptorily brought about abolishment by statute.[8] In civil litigation, only challenges for cause were allowed until statutes extended the peremptory right to include both criminal and civil cases.[9] The basis for granting such challenges in excessive numbers in criminal cases is said to be "probably due to the old Anglo-American feeling that a defendant in a criminal case should be given as many means as possible of protecting himself."[10]

The recent North Carolina case of *State v. Koritz et al.*[11] presents a controversy involving the exercise of challenges for cause as well as peremptory challenges, and offers an appropriate basis for inquiry into the meaning and application of the oft-quoted but seldom expounded maxim that defendant's "right is not to select but to reject jurors."[12] Four defendants charged with obstructing a police officer in the discharge of his duty were tried together, and as the statute granted a defendant six peremptory challenges, together they were provided with twenty-four such challenges. Twenty-three were exercised, leaving one unused when the composition of the jury was complete. Defendants'

(1906), wherein a prospective juror was excused because of prejudice against allowing recovery in grade crossing accidents after stating on voir dire that he believed "a great many cases of that kind are through the negligence of the parties injured."

[6]Note (1939) 14 St. John's L. Rev. 142, 143.

[7]Forsyth, History of Trial by Jury (1852) 231, 232 states that at common law the number of challenges to which the defendant was entitled in the case of an indictment or appeal of death was thirty-five. Note (1939) 14 St. John's L. Rev. 142, 145 agrees that the right existed only in cases punishable by death. 1 Thompson, Trials (2d ed. 1912) § 42 believes that the statements of early writers to the effect that peremptory challenges were allowed in capital felonies misled many American courts into concluding that they were allowed in capital felonies *only*. At early law nearly all felonies were punishable by death, but as non-capital felonies were created the right to challenge peremptorily was allowed as well.

[8](1305) 33 Edw. 1 c 4.

[9]Sackett v. Ruder, 152 Mass. 397, 25 N. E. 736 (1890).

[10]Note (1930) 30 Col. L. Rev. 721, 726.

[11]227 N. C. 552, 43 S. E. (2d) 77 (1947).

[12]State v. Koritz et al., 227 N. C. 552, 43 S. E. (2d) 77, 80 (1947); Tierney v. United States, 280 Fed. 322 (C. C. A. 4th, 1922), cert. den. 259 U. S. 588, 42 S. Ct. 590, 66 L. ed. 1077 (1922). See 1 Thompson, Trials (2d ed. 1912) § 43.

counsel had made objections to jurors for cause, and on being overruled by the trial court, took due exceptions to the competency of the jurors finally selected. On appeal the Supreme Court of North Carolina refused to consider the rulings of the trial court on challenges for cause made by defendants, holding that as they did not exhaust all their peremptory challenges and then attempt to challenge one more juror, "they were not required to take any juror over objection,"[13] and the jury that served must have been satisfactory to them. "Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury."[14]

This holding follows the overwhelmingly accepted rule that to present an exception to rulings on challenges for cause, appellant must have exhausted his peremptory challenges and have undertaken to challenge another juror.[15] The rule is said to be derived from the previously mentioned maxim that defendant's "right is not to select but to reject,"[16] though it may be doubted whether that observation can appropriately be applied to the situation here involved.[17] In support of the widely accepted rule, the Oregon court has given this reasoning: ". . . that the law has provided not only challenges for cause, but also those peremptory to enable the defendant to protect his right to a fair and impartial jury; that, unless he avails himself of all those privileges

[13]State v. Koritz et al., 227 N. C. 552, 43 S. E. (2d) 77, 79 (1947).

[14]State v. Koritz et al., 227 N. C. 552, 43 S. E. (2d) 77, 80 (1947).

[15]People v. Stevens, 335 Ill. 415, 167 N. E. 49 (1929); Bufford v. State, 26 N. W. (2d) 383 (Neb. 1947); State v. Costales, 37 N. M. 115, 19 P. (2d) 189 (1933). See 1 Thompson, Trials (2d ed. 1912) § 120.

[16]State v. Koritz et al., 227 N. C. 552, 43 S. E. (2d) 77, 80 (1947).

[17]The converse situation of the instant case, in which the trial court incorrectly sustains a challenge for cause by one party, seems rightly not to accord the other party any appeal, for it can be fairly assumed that a competent juror replaced the one set aside so that the trial must have been by an impartial jury, which is all that could be accomplished by the granting of a new trial. Southern Pacific Co. v. Rauh, 49 Fed. 696 (C. C. A. 9th, 1892); Ives v. Atlantic & N. C. R. Co., 142 N. C. 131, 55 S. E. 74 (1906). It is submitted that this situation presents the real meaning and a proper application of the statement that "defendant's right is to select and not to reject." Defendant has no right to insist that a certain juror be retained, and if the jury that serves is fully competent he has not been prejudiced. But see Searle v. Roman Catholic Bishop of Springfield, 203 Mass. 493, 89 N. E. 809, 25 L. R. A. (N.S.) 992 (1909), holding that erroneous exclusion by the trial court of Roman Catholics from the jury in an action to which one of the parties was a Roman Catholic bishop, amounted to an increase in value of the right of peremptory challenge of the other party while diminishing the value of the bishop's similar right, and in effect was an unlawful award of extra peremptory challenges to the other party and necessitated a new trial.

whenever the occasion arises, he is in a sense leading the court into error which he might have cured if he had been so disposed, and not having obviated the error when he could he is in no position to complain."[18] Though this position has been accepted in most jurisdictions, the same Oregon court expressed a very logical and persuasive comment in support of the minority view that to present exceptions on overrulings of challenges for cause, appellant need only object to the ruling and note exception thereto: "... that a defendant has a right to have his challenges for cause tried agreeable to the rules of law, and that it is an invasion of his right when he is called upon to obviate the error at the expense of one or more of his peremptory challenges, although it does not exhaust his quota."[19]

Defendant has no inherent right to challenge peremptorily, and limitations imposed on that right do not violate his constitutional right to trial by jury.[20] But the right has been given to the accused in criminal trials in every state,[21] and the exercise of this statutory right

[18]State v. Humphrey, 63 Ore. 540, 128 Pac. 824, 826 (1912).

[19]State v. Humphrey, 63 Ore. 540, 128 Pac. 824, 826 (1912). An early Mississippi case announced this logical approach: "But where the prisoner chooses not to exercise his right of peremptory challenge, and the incompetent juror, under an erroneous ruling of the judge, is actually sworn, and acts as a juror, the question presented is a very different one. In that case, the prisoner, notwithstanding his objections, has not had a trial by an impartial jury; nor is he obliged, in order to exclude an incompetent juror held competent by the court, to resort to his peremptory challenges. The right of peremptory challenge is a valuable one, and is allowed to the prisoner to exclude those whom he may suspect but cannot prove have a prejudice against him. It is to be exercised at his discretion, and without the assigning of any cause. He has the right to have the competency of a juror challenged by him rightly decided by the court, and to have him set aside, if he is incompetent. He may or may not, in his discretion, use his right of peremptory challenge as to such an one. If he declines to do so, and an incompetent and partial juror actually is sworn and tries the case, his legal rights have been invaded, and the verdict will be set aside." Brown v. State, 57 Miss. 424, 434 (1879). Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354 (1905) follows the minority rule, and State v. Humphrey, 63 Ore. 540, 128 Pac. 824, 826 (1912) cites these early cases supporting that view: People v. Bodine, 1 Denio 281 (N. Y. 1845), and Freeman v. People, 4 Denio 9 (N. Y. 1847).

[20]Stilson v. United States, 250 U. S. 583, 40 S. Ct. 28, 60 L. ed. 1154 (1919), upholding the constitutionality of an Act of Congress requiring the several defendants in a single trial to be treated as a single party for purposes of determining the number of peremptory challenges to be allowed.

[21]See 1 Thompson, Trials (2d ed. 1912) § 44 n. 71 for a comprehensive collection of state statutes regulating the number of peremptory challenges allowed. Alabama, Virginia and West Virginia employ a system of challenging peremptorily which precludes the occurrence of the problem in the principal case. Twenty prospective jurors are selected free from objection for cause by either party. The prosecution and defendant each strike off a certain number (varying in the different states), provision being made for selection by lot or elimination by the court in case

is purely within his discretion, providing for no inquiry by any court as to his motives for challenging or witholding challenge. On the other hand, it cannot be doubted that defendant does have a constitutional right to have the competency of a prospective juror correctly determined by the court as part of his right to be tried "by an impartial jury."[22] If he had no right of peremptory challenge at all, or if he merely exhausts his peremptory challenges, the appellate court will grant a new trial upon discovery of prejudicial error in the rulings of the trial court concerning defendant's challenges for cause.[23] If defendant chooses to exercise less than his quota, or even none of his peremptory challenges, but nevertheless objects to the competency of a juror, and that incompetent juror is allowed to sit in judgment of him over his objection, how can it be said he is "leading the court into error"[24] in any sense? Notwithstanding objections for cause made by defendants, application of the general rule by the North Carolina courts results in its making this paradoxical statement: "When all is said and done in respect of these exceptions, we are met with the paramount fact that the jury as finally selected was satisfactory to the defendants, and they were not required to take any juror over objection."[25] If the trial court incorrectly overruled any of defendant's challenges for cause, and an incompetent juror was allowed to remain on the jury, defendants did not have a trial by a legally constituted jury; yet because they exercised only twenty-three of their twenty-four peremptory challenges they were denied any further consideration of the competency question.

The practical effect of the general rule is to require defendants to run through the entire panel to exhaust all their peremptory challenges in order to obtain a review of challenges for cause, thereby often delaying the trial even more by necessitating the summoning of talesmen or a special array. By thus exhausting his peremptory challenges, defendant is forced to have the twelfth juror chosen without

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either party fails to excuse the allowed number. By this method the jury in every case is reduced to twelve persons free from exception. Ala. Code (1923) § § 8641, 8642, 8645; Va. Code Ann. (Michie, 1942) § § 4898, 4900; W. Va. Code Ann. (Michie, 1943) § 6192.

[22]E. g., U. S. Const., Amend. VI. State constitutions generally contain a guaranty in the same form.

[23]Francone v. Southern Pacific Co., 145 F. (2d) 732 (C. C. A. 5th, 1944); Denver City Tramway v. Kennedy, 50 Colo. 418, 117 Pac. 167 (1911); Preston v. Ohio Oil Co., 121 S. W. (2d) 1039 (Tex. Civ. App. 1938).

[24]State v. Humphrey, 63 Ore. 540, 128 Pac. 824, 826 (1912).

[25]State v. Koritz et al., 227 N. C. 552, 43 S. E. (2d) 77, 79 (1947).

benefit of peremptory challenge, which he might normally reserve. Considering that the right to challenge for cause involves protection of the basic guaranty of trial by an impartial jury, and that the right of peremptory challenge is purely discretionary at the will of the defendant, the more logical rule would seem to be: "If error appears in the ruling of the court on a challenge for cause, that question should be decided wholly independent of any consideration of whether the party litigant had or had not exhausted his peremptory challenges."[26] Though the majority view as applied in the principal case may often cause no more than a harmless error, yet blind application of this rule in every case may result in violations of fundamental individual rights, and will clearly add unnecessary procedural delays.

JAMES M. BALLENGEE

PROPERTY—RECOVERY OF DAMAGES IN ASSUMPSIT FOR USE AND OCCUPATION FOR NAKED TRESPASS TO REALTY. [Virginia]

In the recent case of *Raven Red Ash Coal Co., Inc. v. Ball*[1] the Supreme Court of Appeals of Virginia has adopted the unorthodox view that a landowner should be permitted to recover substantial damages in assumpsit for use and occupation for a mere naked trespass to realty, resulting from the misuse of an easement. The plaintiff, Ball, is the present owner of approximately 100 acres of land which was a part of a 265 acre tract formerly owned by Sparks. In 1887, Sparks and his wife conveyed the coal and mineral rights in the 265 acre track to Doran and Dick. This deed granted an easement in the following language: "The right to pass through, over and upon said tract of land by railway or otherwise to reach any other lands belonging to the said Joseph I. Doran and Wm. A. Dick or those claiming such other lands by, through or under them, for the purpose of digging for, mining, or otherwise securing the coal and other things hereinbefore specified, and removing same from such other land."[2]

In 1887, Doran and Dick owned approximately 3,000 acres of land in this region, estimated to contain nine million tons of coal. By mesne conveyances the Raven Red Ash Coal Co. became the lessee of all the coal and mineral rights on and under this 3,000 acre tract. About 25 years ago the coal company, exercising its rights under the easement

[26]Theobald v. St. Louis Transit Co., 191 Mo. 385, 90 S. W. 354, 361 (1905).

[1]185 Va. 534, 39 S.E. (2d) 231 (1946).
[2]185 Va. 534, 537, 39 S.E. (2d) 231, 232 (1946).

purchased from Sparks, built a tramway over the 265 acres formerly owned by Sparks. This right of way extends for approximately 2800 feet across the 100 acres of land now owned by plaintiff, which was part of the 265 acre Sparks tract.

The coal company acquired coal and mineral rights on 5 small tracts not formerly owned by Doran and Dick but contiguous thereto, and during the past five years has transported 49,016 tons of coal mined from these 5 small tracts across the tramway built across plaintiff's land, and 950,000 tons from the land formerly owned by Doran and Dick. While conceding that the defendant was acting within its right in hauling the coal from the 3000 acre tract, plaintiff contends that defendant violated the property rights of the plaintiff in hauling coal from the five small contiguous tracts. He failed to prove any specific damage to the realty by the misuse of the easement, and admitted that he suffered no damage other than the exclusion from the property. For this reason the plaintiff based his sole ground of recovery on the right to maintain assumpsit for use and occupation.[3] The trial court awarded damages of $500 and the Supreme Court of Appeals upheld this judgment on appeal.

This decision, dealing only with rights of way on the surface, represents a consummation of Virginia's departure from generally accepted rules in this branch of mining law. The first step in this process was taken in 1920 in *Clayborn v. Camilla Red Ash Coal Co.*,[4] concerning underground passageways. On the authority of the English decision in *Phillips v Homfray*,[5] the universal rule has been that a passageway underground can be used for hauling coal from contiguous tracts of land not granted to the mining company for the grantor of the tract in litigation.[6] The theory is that the grantee of the coal rights

[3]Instead of bringing the common law form of action for use and occupation, the plaintiff brought his action by the simplified procedural method of Notice of Motion. Va. Code Ann. (Michie, 1942) § 6046. Expert testimony by the vice-president and general manager of the Coal Co. showed that the customary payment for the right to build a tramway over another's land and haul coal over it is one cent per ton (see Record No. 3066, p. 84), but where the right to haul certain coal already exists and a tramway has already been built and the coal company hauls additional coal over such tramway, the charge should be only a small fraction of a cent per ton. The witness had never heard of such a situation. Although this was the only evidence as to the damage suffered by the plaintiff, the jury still assessed damages at a little over one cent per ton. It is questionable whether there was enough evidence submitted on the question of damages that there could be a valid basis for its determination. See McCormick, Damages (1935) 99-101.

[4]128 Va. 383, 105 S.E. 117, 15 A.L.R. 946 (1920).

[5]24 Chan. Div. 439 (1883).

[6]Bagley v. Republic Iron and Steel Co., 193 Ala. 219, 69 So. 17 (1915); Moore

is the owner of a corporeal freehold estate in the coal, including the shell of the tunnel, and as such has a right to make any use of the tunnel he sees fit.[7] However, this right is qualified by the requirement that mining must be continued[8] in good faith[9] in the tunnel used as a passageway or in the tract granted, for upon cessation the tunnel reverts to the grantor.

In 1920, in a case of first impression, Virginia departed from this general rule in its decision in the *Clayborn* case.[10] There the grantor of the mineral rights sought an injunction against the use of the tunnel under his property to haul coal from adjacent tracts, not granted by the plaintiff. The court, although recognizing the universal rule outside Virginia was that no injunction would lie, granted the plaintiff an injunction but refused to allow him any damages, saying that none were shown. The action of the coal company in hauling coal from the contiguous tracts was ruled to be an additional burden upon the easement and a continuing trespass. A strong dissent in the case argued that the court should not depart from the long-established and universal rule to the contrary, on which coal companies had reasonably relied in making large investments in mining property.

Although the Virginia court in the *Ball* case relied heavily on the *Clayborn* decision, it is clear that the earlier case did not control the later one. First, the *Clayborn* case action was for an injunction, and damages were not granted. Further, it involved only the question of use of an underground way, while the recent decision passes on the rights of surface easements.[11]

In the absence of agreement, the owner of a surface easement has no right to use the way for the purpose of hauling minerals not mined from the dominant tract.[12] But while such misuse creates a cause of action, it is normally only for injunctive relief to protect the owner from prescriptive rights being acquired against him. As a general rule,

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v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N.E. 6 (1907); Webber v. Vogel, 189 Pa. St. 156, 42 Atl. 4 (1899); Note (1921) 15 A.L.R. 946, 957.

[7]Webber v. Vogel, 189 Pa. St. 156, 42 Atl. 4 (1899); Phillips v. Homfray, 24 Chan. Div. 439 (1883); Note (1921) 15 A.L.R. 957.

[8]Hopper v. Dora Coal Mining Co., 95 Ala. 235, 10 So. 652 (1892); Webber v. Vogel, 189 Pa. St. 156, 42 Atl. 4 (1899).

[9]Webber v. Vogel, 189 Pa. St. 156, 42 Atl. 4 (1899).

[10]Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 105 S.E. 117, 15 A.L.R. 946 (1920).

[11]Further, the Clayborn case was tried in equity by a bill for injunction and accounting and the Ball case was a law action for use and occupation.

[12]Brasfield v. Burnwell Coal Co., 180 Ala. 185, 60 So. 382 (1912); Moore v. Price, 125 Iowa 353, 101 N.W. 91 (1904); 36 Am. Jur. 403, 404; Note (1927) 48 A.L.R. 1406.

damages are not allowed because none can be shown.[13] Thus, the crucial question presented in the *Ball* case was whether an action for use and occupation would lie for a mere naked trespass, from which, however, the wrongdoer profited.[14] While the suit was started by the simplified procedure of notice of motion,[15] this procedure creates no new rights, and unless an action could be maintained under a common law form of action, it cannot be maintained under notice of motion. The court was therefore correct in inquiring into the common law form of assumpsit for use and occupation to determine the substantive rights of the plaintiff.

Although a tort may be waived and a suit maintained in assumpsit, it is a recognized rule that assumpsit will never lie for a naked trespass.[16] Assumpsit for use and occupation is generally allowed where the relationship of landlord and tenant exists, and is also frequently used where a trespasser has removed something from the property of the owner and converted it to his own use.[17] There was certainly noth-

[13]Chafin v. Gay Coal & Coke Co., 116 W. Va. 262, 169 S.E. 485 (1933); 28 C.J. 821.

[14]It seems unfortunate that the court used the word "trespasser" to describe the defendant, for the use of such terminology negatives the idea of an express or implied promise to pay which is necessary to support the action of assumpsit for use and occupation. It is felt that a more favorable and descriptive terminology would have been "user." See 66 C.J. 98. Also, note 16, infra.

[15]Va. Code Ann. (Michie, 1942) § 6046.

[16]Burks, Pleading and Practice (3rd ed. 1934) 175; 66 C.J. 98, for an exhaustive collection of cases supporting this point. Use and occupation does not lie against an adverse holder. Burdin v. Ordway, 88 Me. 375, 34 Atl. 175 (1896); Espy v. Fenton, 5 Ore. 423 (1875). Ames has pointed out that the reason for the origin of this rule is largely historical, and its continuation is the result of stare decisis. Ames, Assumpsit for Use and Occupation (1899) 2 Harv. L. Rev. 377. See also, Note (1932) 30 Mich. L. Rev. 1087, where it is said: "Though there is a wrong done by the trespass and substantial benefit accrues to the wrongdoer from his act, quasi contractual relief is generally denied the owner."

[17]Cavanaugh v. Cook, 38 R.I. 25, 94 Atl. 663 (1915); Taylor, Landlord and Tenant (5th ed. 1869) § 635; Cunningham v. Horton, 57 Me. 420, 421 (1869): "The general principle is that the action of assumpsit for use and occupation cannot be maintained unless the relation of landlord and tenant exists between the parties;" Hayes v. Fong Moon, 127 Minn. 404, 149 N.W. 659 (1914): "It is elementary that an action in the nature of assumpsit for use and occupation will not lie unless the relation of landlord and tenant subsists between the parties..." Carpenter v. U.S., 17 Wall. 489, 21 L. ed. 680 (U.S. 1873) points out that it is not necessary that a devise exist, only that from the situation of the parties the law will imply a contract to pay. Adsit v. Kaufman, 121 Fed. 355, 356 (C.C.A. 9th, 1903) (quoting dictum of United States Supreme Court): "An action in the nature of assumpsit, for the use and occupation of real estate, will never lie... where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes a defendant a trespasser." In this connection, see note 3, supra. See also 66 C.J. 83.

See National Oil Refining Co. v. Bush, 88 Pa. 335 (1879) in which language is

ing removed from the soil in the *Ball* case, for the plaintiff admits he has suffered no damage other than the exclusion from the property. Neither was there a relationship of landlord and tenant upon which an implied promise to pay the reasonable rental value of the property could be based.[18] There seems to be no grounds for the implication of such a promise on the part of the defendant to pay for the additional use of the easement unless it is that the use and occupation made of the tramway by the defendant to haul coal from the five adjacent tracts will support such a promise. A few jurisdictions have statutes extending the remedy of assumpsit for use and occupation to any wrongful occupancy,[19] and there are some cases holding that the mere fact of occupancy is enough to support the implied promise on the part of the occupier to pay the rental value of the property to the owner, absent any factors which negative such a promise.[20] However, it is prob-

used to the effect that assumpsit for use and occupation will lie against a mere trespasser. In this case, however, the user was a tenant at sufferance, so that the court could easily find an implied promise on which to base the action of assumpsit. In Virginia, it is settled that assumpsit for use and occupation will lie on an implied as well as an express promise to pay. Sutton v. Mandeville, 1 Munf. (15 Va.) 497 (1810); Eppes v. Cole, 4 H. & M. (14 Va.) 161 (1809). Elsewhere there is dispute as to whether use and occupation would lie on an implied contract. Long v. Vonner, 33 N.C. 27 (1850) held that it would lie only on an express promise since there were higher remedies, namely debt and distress. See also Preston v. Hawley, 139 N.Y. 296, 300, 34 N.E. 906, 908 (1893). But the United States Supreme Court in Carpenter v. U.S., 17 Wall. 489, 21 L. ed. 680 (U.S. 1873) inferred that at common law assumpsit for use and occupation could lie upon implied as well as express contracts.

[18]Cavanaugh v. Cook, 38 R.I. 25, 94 Atl. 663 (1915).

[19]See Cal. Civil Code (Deering, 1941) § 3334, Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454, 185 Pac. 184, 185 (1919); Samuels v. Singer, 1 Cal. App. (2d) 545, 36 P. (2d) 1098 (1934) seems to permit waiver of tort and suit in use and occupation without regard to the statute. See Rev. Code of South Dakota § 2313, Baldwin v. Bohl, 23 S. D. 395, 122 N.W. 247 (1909) which permits waiver of tort and suit for value of use where possession is wrongful. See Code of Alabama (1917) § 4753, and restrictive construction in Crabtree v. Street, 200 Ala. 442, 76 So. 374 (1917), 201 Ala. 630, 79 So. 192 (1918). See Ark. Stat. (Kirby Digest) § 4700, Watson v. Arthur, 142 Ark. 431, 218 S.W. 849 (1920).

[20]U. S. v. Whipple Hdw. Co., 191 Fed. 945, 946 (C.C.A. 3d, 1911): "the law implies a contract to pay rent from the mere fact of occupation unless the occupancy be such as to negative the existence of a tenancy." It is important to notice that this court was dealing with a tenant at sufferance, in which an implied promise is easily found, and for this reason the statement set out above should be taken with some reservation and not applied to a mere trespasser who has never been a tenant of the landowner. Von Padua v. American Type Founders' Co., 32 Idaho 710, 187 Pac. 793 (1920). Murphy v. Sampson, 342 Ill. 305, 174 N.E. 393, 397 (1931): "Where a party enters without authority upon the possession of another's premises and uses them, compensation may be awarded the owner upon the basis of the worth of the use of the property." In Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894), the court implied a promise to pay where the defendant was occupying the

able that the majority rule that occupancy alone is not enough to support the inference of such a promise[21] is the better view, especially where, as in the *Ball* case, the occupancy was by a trespasser. A promise to pay for the use of property is foreign to the very concept of trespass.

Notwithstanding that none of these factors necessary to support the action of assumpsit for use and occupation was present in the *Ball* case, the Virginia court permitted the plaintiff to recover damages on the basis of unjust enrichment, pointing out that to permit the defendant to escape with nothing more than paying nominal damages placed him in a more favorable position than one who had contracted

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property of the plaintiff with the *permission* of the plaintiff. In Vesey Street Corp. v. Strauss, 146 Misc. 666, 262 N. Y. Supp. 607 (1932) an assignee for benefit of creditors of the lessee was held liable for rent to the lessor. In Hearne v. De Genere, 144 So. 194 (La. App. 1932) defendant alleged to be using lot belonging to plaintiff to store wrecked cars. In Southern Pac. Co. v. Swanson, 73 Cal. App. 229, 238 Pac. 736 (1925), while the court said that a promise to pay rent would be implied from mere occupancy, this statement loses some of its force, and might even be regarded as dicta, since there was an express contract between the parties to pay rent.

Since in most of the cases in which the courts have talked about a promise being implied from the mere fact of occupancy there are additional factors from which such a promise can be implied, it is felt that all of the cases should be limited strictly to the facts decided, and that no general rule of law to the effect that a promise to pay rent will be implied from the mere fact of occupancy can be postulated. Also, most of these courts qualify their statements with a phrase to the effect that such will be implied, *absent any negativing factors*. It is submitted that if one is on property as a mere trespasser, such is a negativing factor.

[21]Harris v. Eagle Box Co., 110 Ark. 371, 162 S.W. 49 (1913) is very similar to the Ball case, and it was held the mere fact the defendant used the plaintiff's property for purposes of storing lumber, without anything being said by either party about the payment of rent, did not necessarily imply the relationship of landlord and tenant or a promise to pay rent; Herron v. Temple, 198 Iowa 1259, 200 N.W. 917 (1924); Preston v. Hawley, 101 N. Y. 586, 5 N.E. 770 (1886); Thackray v. Ritz, 130 Misc. 403, 223 N. Y. Supp. 668 (1927) (defendant was occupying property under void title due to defect in proceedings necessitating resale to defendant, and the court refused to permit plaintiff to recover for assumpsit for use and occupation for the interval between the first defective sale and the final, completed, valid sale); Peters v. Elkins, 14 Ohio 344, 346 (1846) (an action for use and occupation would not lie by the purchaser of mortgaged property sold under a decree in equity against a tenant in possession under the mortgagor: "If the occupant enter, and hold without permission or right, he is a trespasser; nor can the owner waive the trespass and make him his tenant without his consent. The assent to establish a tenancy may be applied from acts, as payment and acceptance of rent; but to support the action for use and occupation, there must be sufficient legal proof a tenancy subsists."); Cathcart v. Matthews, 150 S. C. 329, 89 S. E. 1021 (1916) (use and occupation cannot be maintained against one who entered tortiously); Hodgson v. Keppel, 214 Iowa 408, 238 N. W. 439 (1931) (court refused to imply a promise to pay where mother occupied property she had bought for her daughter); Roselle Park Bldg. & Loan Ass'n v. Friedlander, 116 N. J. L. 32, 181 Atl. 316 (1935) (defendant was in possession

for a right. The famous *Kentucky Cave* case[22] was cited and discussed with approval. There, the defendant had developed a cave, one-third of which was under the plaintiff's land, and charged admission for the right to go through and inspect the cave. Although the cave's mouth was on the defendant's land and thus the cave could be of no use to the plaintiff, the Kentucky court permitted the plaintiff to recover one-third of the profits the defendant had realized. While this decision has not generally received favorable comment from the writers,[23] Professor Seavey has hailed the case as a welcome departure from the common law rule.[24]

The decision in the *Ball* case, while setting up a rule in opposition to those of most of the states, appears to be more just than that reached under the general rule, because the easement holder is made to pay for benefits received. However, it is doubtful that this case, even if considered in conjunction with the *Kentucky Cave* decision of a decade ago, can be expected to initiate any new trend to cut down further the doctrine of *damnum absque injuria* in the field of property law.

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under a void contract to purchase); Young v. Home Telephone Co., 201 S. W. 635, 637 (Mo. App. 1918), is very similar to the Ball case in that the defendant had erected power lines across the Plaintiff's land without any express or implied permission. The court held that defendant could not be sued in assumpsit for use and occupation, even though the plaintiff had written the defendant he intended to hold him liable for rent, the court saying: "Under the circumstances of this case, to hold that a contract to pay is implied by law would be to allow the owner of land to change at will the remedy fixed by law for the wrong."

[22]Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S. W. (2d) 1028 (1936).

[23]Notes (1937) 31 Ill. L. Rev. 680; (1937) 2 Mo. L. Rev. 115, 117 ("Plaintiff has sustained at most nominal damages"); (1937) 37 Col. L. Rev. 503, 504 (called the decision an "astounding result"); (1937) 35 Mich. L. Rev. 1190 (a rather favorable comment).

[24]Seavey and Scott, Notes on Restatement of Restitution (1937) 194.

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