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Conflict Of Laws-Full Faith And Credit Not Accorded To Confessed Judgment On Note Paid Before Judgment Was Rendered. [-Vest Virginia]

RECENT CASES

CONFLICT OF LAWS—FULL FAITH AND CREDIT NOT ACCORDED TO CONFESSED JUDGMENT ON NOTE PAID BEFORE JUDGMENT WAS RENDERED. [West Virginia]

There is no international law which compels the court of one nation to enforce a judgment rendered in the tribunals of another nation. The validity of such a judgment outside the jurisdiction in which it was rendered depends on the diplomatic relationship and agreements between the country in which the judgment was rendered and the country in which it is to be enforced. This would be the situation among the sovereign states of the United States were it not provided in the Federal Constitution that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state."[1] However, this mandatory provision of the Constitution does not require that every judgment which a court may render be enforced in every other state. Rather, this clause must be interpreted in connection with other provisions of the Constitution which require due process of law in the judical proceedings of every state.[2]

It is well recognized that lack of jurisdiction of a court rendering a judgment is a defense to the enforcement of the judgment under the full faith and credit clause in the tribunals of another state.[3] First, the court must have had jurisdiction of the subject matter in the controversy.[4] Second, the court must have obtained jurisdiction over the

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[1]U. S. Const., Art. IV, § 1.

[2]Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. ed. 345 (1906).

[3]Thompson v. Whitman, 85 U. S. (18 Wall.) 457, 21 L. ed. 897 (1873); Irose v. Balla, 181 Ind. 491, 104 N. E. 851 (1914); 1 Beale, Conflict of Laws (1935) § 743; Stumberg, Conflict of Laws (1937) 108.

[4]"It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that the judgment of a State court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered. " Roche v. McDonald, 275 U. S. 449, 451, 48 S. Ct. 142, 143, 72 L. ed. 395, 53 A. L. R. 1141, 1144 (1928). Even though the parties were before it, a court has been held to have had no jurisdiction to render a judgment affecting out-of-state land, so as to require recognition of the judgment by the state in which the land was situated. Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl.

parties to the controversy.[5] The most usual method securing this authority over the parties is personal service of process on the defendant within the jurisdictional boundaries of the state.[6] However, personal jurisdiction may also be obtained by a party's consent to the power of the court given in advance of the ligitation, as is commonly done by the execution of a warrant of attorney in a confession of judgment note.

A warrant of attorney is a written instrument addressed to an attorney of record or prothonotary, authorizing him generally to appear in any court or in a specified court on behalf of the person giving the warrant and to confess judgment in favor of some person named therein. This power is customarily given in promissory notes as part of the security for the loan. Consent jurisdiction based on a warranty of attorney differs from the ordinary method of service of process in that the party *contractually* consents to the power of the court by authorizing an attorney to appear and confess judgment against him.

Warranty of attorney was recognized at common law[7] but has been abolished or restricted by legislation or court decision in many states, because it deprives the debtor, who bargains at a disadvantage, of his

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676, 27 L. R. A. 213, 46 Am. St. Rep. 528 (1894). See Scott, Fundamentals of Procedure in Actions at Law (1922) Ch. II, for full discussion of jurisdiction; also 2 Cooley, Constitutional Limitations (8th ed.) 845.

[5]National Exchange Bank of Tiffin, Ohio v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. ed. 184 (1904); Raymor v. Michigan Trust Co., 165 Mich. 259, 130 N. W. 594 (1911); Jardine v. Reichert, 39 N. J. L. 165 (1877); Goldstein v. Siniscalco, 5 N. J. Misc. 382, 136 Atl. 593 (1927).

[6]See Jardine v. Reichert, 39 N. J. L. 165 (1877). However, there are several substitute and alternative methods. Jurisdiction over the person of a resident defendant temporarily absent from the state may be acquired by giving him reasonable notice of the proceedings against him. In Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140 (1917), publication of service was held sufficient basis of jurisdiction for the court to grant a personal judgment against a resident defendant who could not be located in the state. (However, in McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 343, 61 L. ed. 608, L. R. A. 1917F, 458 (1917), publication of process was held not to be reasonable notice to a resident defendant who had quit the state in search of a new domicile.) Further, a defendant may consent to the jurisdiction of the court over him. He may do this by making a general appearance at the trial, thereby waiving any right he has to object to the jurisdiction of the court over him. Corbet v. Physicians Casualty Ass'n, 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177 (1908). It may be provided by statute that a special appearance will give the court jurisdiction. York v. Texas, 135 U. S. 15, 11 S. Ct. 9, 35 L. ed. 604 (1890). Or the defendant may give written consent to the service of process out of the state. Jones v. Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475 (1897).

[7]Bonnett-Brown Corp. v. Coble, 195 N. C. 491, 142 S. E. 772 (1928).

day in court.[8] However, the policy of a state against confession of judgments is no defense to the enforcement of such a judgment rendered by the court of a sister state wherein warranty of attorney is recognized as a valid basis of jurisdiction. The law of the state where the original judgment is rendered governs, and if the judgment is valid there, it must be given full faith and credit in other states.[9]

By looking beyond the judgment to the contract itself, a different but not inconsistent result may be obtained. Since the power of the court over the defendant is founded on the contract, defenses which are directed at the validity of the agreement may be raised in attacking jurisdiction of the court. If the warranty of attorney is invalid, the court which has exercised no other method of obtaining control over the defendant would be without jurisdiction. Where the warranty of attorney is invalid by the law of the jurisdiction where the note is payable, and the note is sued on in another state which recognizes the warrant as a valid basis of jurisdiction, the judgment rendered by such state may be subject to the defense of lack of jurisdiction. The warranty of attorney being invalid by the law of the place where the contract was to be performed, it may not be used as the basis of jurisdiction in the court of another state.[10] The Michigan court, using a different conflict of laws approach, held that a confession of judgment note executed in Michigan, but not in conformity with the Michigan law, was invalid even though it was payable and sued on in a sister state where the warranty was good.[11] This decision may be explained by applying the conflict of laws rule that the validity of a contract is governed by the law of the place where it is made.[12] The warranty being invalid under the Michigan law where it was made, would be invalid everywhere.

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[8]Carroll v. Gore, 106 Fla. 582, 143 So. 633, 89 A. L. R. 1495 (1932). See 15 R. C. L. 651, and cases cited therein.

[9]Egley v. T. B. Bennett & Co., 196 Ind. 50, 145 N. E. 830, 40 A. L. R. 436 (1924); Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576 (1886); 31 Am. Jur. 329; Goodrich, Conflict of Laws (2d ed. 1938) 163. Cf. Hamilton v. Schoenberger, 47 Iowa 385 (1877). See Carroll v. Gore, 106 Fla. 582, 143 So. 633, 89 A. L. R. 1495 (1932).

[10]Irose v. Balla, 181 Ind. 491, 104 N. E. 851 (1914). The note here was also executed in Indiana, but the decision does not seem to turn upon that fact. Rather, the court indicated that where the note was payable, there the warranty was intended to be exercised, and the law of that place should govern the validity of the warranty.

[11]Acme Food Co. v. Kirsch, 166 Mich. 433, 131 N. W 1123, 38 L. R. A. (N. S.) 814 (1911). See also Squire v. Eubank, 295 Mich. 230, 294 N. W. 166 (1940).

[12]Scudder v. Union National Bank of Chicago, 91 U. S. 406, 23 L. ed. 245 (1875). This leaves undecided what the rule would be if the court followed the

That the invalidity of the warranty of attorney in the state whose court has rendered a confession judgment is of vital importance in full faith and credit questions is well demonstrated in the recent West Virginia case of *Perkins v. Hall*.[13] Perkins, in order to make a down payment on a restaurant he had purchased, obtained a loan from the Marion Savings Bank of Ohio, to which Perkins and his brother-in-law and sister, Joseph Hall and Lista Hall, executed a promissory note. Though Joseph and Lista Hall were joint makers of the note, they signed for the accommodation of Perkins, who, as between these parties, was the principal debtor. The note contained the customary warranty of attorney authorizing any attorney of record, after the note had become due and payable, to appear in a court of record in the State of Ohio and confess judgment against the makers. After two months Perkins gave up the restaurant and returned to West Virginia. Joseph and Lista Hall paid the note before maturity, and the note was thereupon indorsed to them by the bank. Several years after the note had become due, the Halls sued Perkins on the note in a court of record of Ohio. Pursuant to the warranty of attorney, an attorney of record appeared and confessed judgment against Perkins. An action of debt on the judgment was then brought in the West Virginia court. Thereupon, Perkins instituted the present suit to enjoin further prosecution of the action at law.

West Virginia is among the states which do not recognize the validity of a warrant of attorney so far as actions to exercise such a warrant in its own courts are concerned. But, as already indicated, this local policy affords no defense to the enforcement in West Virginia courts of a judgment of an Ohio court based on a confession of judgment valid under the local law of Ohio. It was admitted by the West Virginia court that full faith and credit must be given to the Ohio judgment "unless the same may be invalidated by lack of jurisdiction in the court rendering such judgment, or fraud in its procurement."[14]

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minority conflicts rule that the law of state of performance governs. The Texas court reached a similar result but held that warranty of attorney is a right and not a remedy, and therefore that its validity is governed by the law of the place where it is made rather than the law of the forum in which it is sought to be enforced as the basis of jurisdiction. Bernard Gloeckler Co. v. Baker Co., 52 S. W. (2d) 912 (Tex. Civ. App. 1932).

[13] 17 S. E. (2d) 795 (W. Va. 1941).

[14] Perkins v. Hall, 17 S. E. (2d) 795, 799 (W. Va. 1941).

Some cases allow the defense of fraud to foreign judgments when it would materially affect the jurisdiction of the court to render a judgment. But where

The court found that there had been no fraud involved in the procurement of the judgment,[15] but went on to find that the Ohio court had had no jurisdiction over the defendant in the suit on the note and therefore could not render a valid personal judgment against him. After a careful examination of authorities, it was concluded that under the local law of Ohio where the note was paid, payment by one or more of the makers of a note constitutes a discharge of the note and destroys the warranty of attorney to confess judgment.[16] The jurisdiction of the Ohio court thus failed because it was predicated on the confession of judgment clause of a note which had already been discharged by payment.

The West Virginia court recognized that Perkins was primarily obligated to the Halls for the full amount of the note paid by them. The means of enforcement of this obligation was said to lie either in the right of a surety to be indemnified on the basis of the implied promise of the principal debtor, or to be subrogated to the position of the creditor who has been paid. Viewing these as the only rights of the Halls, the conclusion is readily accepted that they could not rely on the warranty of attorney in the note. Obviously, no such action is available to a surety proceeding on the indemnity theory, as the obligation to reimburse exists solely between the surety and principal debtor, while the warranty of attorney runs only to the creditor. On the subrogation theory, the surety assumes the rights of the creditor, but the warranty is limited to confessing judgment against the joint makers of the note. To permit the warranty to be used in a suit by those joint

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the fraud is not jurisdictional, the judgment must be given the same effect that would be given in the state where it is rendered, and the question of whether it is impeachable for fraud ought to depend on whether such attack could be made where it was rendered. 3 Freeman on Judgments (5th ed. 1925) 2890.

It is generally held that only fraud in the procurement of the judgment is available as a defense to the enforcement of the judgment in a sister state. Crim v. Crim, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521 (1901); Smith v. Swart, 103 N. J. L. 150, 134 Atl. 755 (1926); 3 Freeman on Judgments (5th ed. 1925) 2895-2896. However, in Brone v. Golde, 267 N. Y. 284, 196 N. E. 58 (1935), the court held that the defendant was entitled to a trial of the issue raised by the defense that the contract had been rescinded because of fraud practiced by the plaintiff.

[15]Perkins v. Hall, 17 S. E. (2d) 795, 800 (W Va. 1941). Perkins contended that the Halls had agreed to take the ownership of the restaurant and to assume and pay the debt evidenced by the note, but had instead repudiated their obligation and sued him for the amount they had paid the payee in discharge of the note.

[16]There is evidently no Ohio decision on this question, and the West Virginia court merely examined the law of other jurisdictions and concluded that the law of Ohio should not be presumed to be different from the general view.

makers who were subrogated to the payee's rights would be to extend its scope and application to the enforcement of the primary obligor's obligation to reimburse the joint makers in full. The same may be said in answer to any contention that the paying makers obtained the right to rely on the confession of judgment clause by having become assignees of the note by indorsement from the payee.[17]

The rule is well settled that the authorization to confess judgment must be strictly construed.[18] As stated by the California court: "The noose a debtor places about his neck by such an instrument is loosened whenever there is a failure to abide strictly by the terms of the authority given."[19] Exemplifying this rule of narrow construction is a holding by the United States Supreme Court that the authorization to "any attorney of record" to confess judgment did not include the clerk or prothonotary who had been given power by statute to confess judgment.[20] It has also been held that a confessed judgment on a note authorizing confession of judgment "in favor of the holder" is not protected by the full faith and credit clause when sued on in another state, when it appeared that the party in whose behalf the judgment was rendered was not in fact the holder, because not the real owner of the note.[21]

Standing in contrast with the principal case, both as regards the approach to the problem and the result reached, is a New Jersey decision which held that full faith and credit must be accorded to a Delaware judgment given on the basis of a warranty of attorney, even though the defendant had, prior to the judgment, paid the note which contained the warranty.[22] The New Jersey court merely noted that

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[17]In the case at bar, however, the plaintiffs occupy the position of co-makers of the promissory note, and were equally liable to the bank for payment thereof, and, immediately upon making payment, the promissory note was discharged and is no longer a living obligation on the part of the makers thereof. Whatever right of action there may exist between the parties themselves, either as to reimbursement or contribution, no such action can be had on the promissory note." Harris v. King, 113 Cal. App. 357, 298 Pac. 100, 102 (1931). Cf. O'Neal v. Stuart, 281 Fed. 715 (C. C. A. 6th, 1922).

[18]Raymor v. Michigan Trust Co., 165 Mich. 259, 130 N. W. 594 (1911); Carlin v. Taylor, 7 Lea 666 (Tenn. 1881); Miller v. Miller, 90 Wash. 333, 156 Pac. 8 (1916); 1 Beale, Conflict of Laws (1935) 355; 31 Am. Jur. 116.

[19]Carlton v. Miller, 114 Cal. App. 272, 299 Pac. 738, 740 (1931).

[20]Grover and Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670 (1890).

[21]National Exchange Bank of Tiffin, Ohio v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. ed. 184 (1904).

[22]Hazel v. Jacobs, 78 N. J. L. 459, 75 Atl. 903, 27 L. R. A. (N. S.) 1066, 20 Ann. Cas. 260 (1910). Judgment was secured on a confession of judgment note in Dela-

confession of judgment agreements were valid in Delaware and that the Delaware judgment was regular on its face, and therefore found it entitled to enforcement. Ignored entirely was the problem of whether the payment of the note had destroyed the warranty so as to leave no basis for the Delaware court's jurisdiction over the defendant, who had not been served with process. Thus, the New Jersey tribunal appears to have missed the vital issue of the case, and in consequence rendered a very questionable decision. It seems most probable that the Delaware court, even by Delaware local law, was without jurisdiction to render the personal judgment against the maker of the note. If so, the judgment could have been set aside in Delaware at the instance of the maker, and the New Jersey court was in the doubtful position of having given a foreign judgment more effect than it was entitled to in the state where rendered.[23]

The view demonstrated by the West Virginia case makes for a more logical solution of the problem in conformity with the full faith and credit requirement as interpreted by the Supreme Court. The legal significance of the act of payment by a maker was determined by the law of the jurisdiction in which the payment was made. By the law of Ohio the note was discharged and the warranty of attorney was destroyed. In Ohio this would have been a defense to the enforcement of the judgment, or a reason for having it set aside. The West Virginia court has carried out its proper function by giving the judgment the same force as it would have been given in the state where it was rendered.

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ware. The judgment was then brought to New Jersey where it was sued on. In this action the defendant pleaded payment of the note, claiming that this would destroy the warranty of attorney which would leave the Delaware court without jurisdiction to render the judgment on the note.

[23]Further, there is at least a possibility that if the basis of jurisdiction of the Delaware court was founded on the warranty of attorney given in a note which had been discharged by payment, the judgment rendered may have been subject to a constitutional objection of lack of due process of law. This possibility is suggested by statements of the United States Supreme Court, admittedly made in discussing a different issue, in Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8 at 15, 27 S. Ct. 236 at 238, 51 L. ed. 345 (1906).

CONFLICT OF LAWS—JUDGMENT ASSESSING UNSERVED NON-RESIDENT POLICYHOLDERS AS MEMBERS OF INSOLVENT INSURANCE ASSOCIATION NOT ENTITLED TO FULL FAITH AND CREDIT. [United States Supreme Court]

The protection of the interests of creditors in insolvent business organizations is a matter of constant concern to the courts. In order to make possible the fullest realization on such claims, the strict principles of jurisdiction laid down in *Pennoyer v. Neff*[1] have been relaxed to some extent, and personal judgment against non-resident stockholders of insolvent corporations have been allowed in representative suits by the creditors, even though the stockholders were not served within the state so rendering the judgment.[2] Thus, where such a judgment is rendered levying assessments on non-resident stockholders, that judgment becomes the basis for an action in the courts of the states where the stockholders reside, to collect the assessments ordered; and there can be no defense maintained in these courts that the judgment is not entitled to full faith and credit because rendered by a court not having jurisdiction over the parties.

The Supreme Court of the United States, although recognizing that the courts of the state of incorporation may determine that stockholders should be assessed, has recently blocked an attempt to extend this principle to the point of allowing the courts of that state to decide also that certain non-resident and unserved persons are stockholders and subject to assessment.[3] The Auto Indemnity Company, organized under the laws of New York, was placed in liquidation by

[1] 95 U. S. 714, 24 L. ed. 565 (1877).

[2] See Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. ed. 22 (1940); Notes (1942) 42 Col. L. Rev. 283; (1927) 48 A. L. R. 669. The basis for this position is well set out in the Hansberry case, 311 U. S. 32, 41, 61 S. Ct. 115, 118: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of precedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

[3] Pink, Superintendent of Insurance of New York v. A. A. A. Highway Express, Inc., 62 S. Ct. 241, 86 L. ed. 200 (1941), rehearing denied, 62 S. Ct. 477 (1942). (hereinafter referred to as the Indemnity Company case).

order of the New York Supreme Court, on the petition of Pink, the Superintendent of Insurance for that state.[4] The court ordered further that each member of the Indemnity Company pay assessments, and directed that members show cause why they should not be held liable to pay. Pursuant to this order and a New York Statute,[5] the Superintendent mailed notice of the order to each of the policyholders of the Indemnity Company, including the respondents in the instant case, residents of Georgia. None of them appeared. The respondents were then sued on the assessment order in the courts of Georgia,[6] but the Georgia Supreme Court examined the contract of insurance between the respondents and the Indemnity Company, and found that there was nothing in the contract purporting to make the policyholders members of the Company so as to subject them to assessment.

The New York Superintendent of Insurance contended that the Georgia decision was in violation of the full faith and credit clause of the Federal Constitution, and the Supreme Court of the United States granted certiorari.[7] The unanimous decision of that Court, however, upheld the Georgia court's judgment.[8] It was recognized that persons becoming stockholders of a corporation are subject to assessment provided by the laws of the state of incorporation regardless of whether they are made parties to the proceeding levying the assessment. But the question of whether certain persons are in fact stockholders is not one on which a court can validly pass without having served the persons concerned with process. Therefore, the New York court had had no jurisdiction over the respondents to try the issue of their membership in the Indemnity Company, and on that issue the Georgia court had the right to reach its own conclusion, in accord with the law of Georgia.

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[4]The liquidation proceedings were entitled, In the Matter of Liquidation of the Auto Mutual Indemnity Company. The Indemnity Company, being held insolvent, was placed in liquidation by order entered and filed in the office of the Clerk of the New York Supreme Court on November 24, 1937.

[5]New York Insurance Law § 422, Consolidated Laws of New York (Cahill, 1931-35 Supp.) c. 30, § 422. The statute provides that after an order of liquidation of a domestic mutual insurer has been filed, the Superintendent shall make a report to the court setting forth the reasonable value of the assets and probable necessary assessment. On the basis of this report, the court may levy assessments against all members of such insurer, and the court may thereupon issue an order directing each member to show cause why he should not pay the assessment. The Superintendent must mail a notice of the order to each member and cause a notice to be published in the manner directed by the court.

[6]Pink v. A. A. A. Highway Express, Inc., 191 Ga. 502, 13 S. E. (2d) 337 (1941).

[7]Pink v. A. A. A. Highway Express, Inc., 313 U. S. 555, 61 S. Ct. 1096 (1941).

[8]Pink v. A. A. A. Highway Express, Inc., 62 S. Ct. 241, 86 L. ed. 200 (1941).

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[9] However, this clause requires only that a judgment rendered in one state be given that amount of conclusiveness in another state to which it would be entitled in the state where rendered.[10] An *in personam* judgment by a court lacking jurisdiction over the parties or subject matter is void where rendered and open to collateral attack in that state.[11] Consequently, such a judgment is not entitled to enforcement when sued on in another state.[12] Thus, it is the accepted rule that where the judgment of one state is sought to be enforced in a sister state, the courts of the sister state may make an inquiry into the jurisdiction of the court which rendered the judgment.[13]

In the principal case there had been no personal service on the respondents within the state and no appearance was made by these parties; nor was there any other basis on which the New York court could derive personal jurisdiction in the usual sense. The court instead relied on the New York statute[14] as providing a basis for jurisdiction over the respondents. That statute allowed assessment to be made against members of an insolvent corporation. Printed on the back of the insurance policies issued by the Indemnity Company was a "notice to Policyholders" that "the insured is hereby notified that by virtue of this policy he is a member of the Auto Mutual Indemnity Company." A reading of the insurance contract together with the statute thus

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[9]U. S. Const., Art. IV, § 1

[10]Board of Public Works v. Columbia College, 84 U. S. (17 Wall.) 521, 21 L. ed. 687 (1873); Robertson v. Pickrell, 109 U. S. 608, 3 S. Ct. 407, 27 L. ed. 1049 (1883); Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562 (1846); Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254 (1858); Note (1911) 32 L. R. A. (N. S.) 917.

[11]Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355 (1848); Pursley v. Hayes, 22 Iowa 11, 92 Am. Dec. 350 (1867); Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589 (1877).

[12]Knowles v. Gaslight & Coke Co., 86 U. S. (19 Wall.) 58, 22 L. ed. 90 (1873); Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271 (1875); Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670 (1890); Flexner v. Farson, 268 Ill. 435, 109 N. E. 327 (1915), affirmed 248 U. S. 289, 39 S. Ct. 97, 63 L. ed. 250 (1918).

[13]Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 648 (1938), rehearing denied, 303 U. S. 666, 58 S. Ct. 640, 82 L. ed. 1123; Laing v. Rigney, 160 U. S. 531, 16 S. Ct. 366, 40 L. ed. 525 (1896); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Louisville & Nashville R. Co. v. Nash, 118 Ala. 477, 23 So. 825, 41 L. R. A. 331 (1898). Notes (1911) 32 L. R. A. (N. S.) 913; (1905) 103 Am. St. Rep. 309; (1911) 20 Ann. Cas. 262.

[14]New York Insurance Law § 422, Consolidated Laws of New York (Cahill, 1931-35 Supp.) c. 30 § 422. See note 5, supra.

furnished the New York court with jurisdiction to order an assessment against the respondent policyholders. But there was nothing embodied in the contract agreement itself which would make the policyholders members of the Company, and the Georgia court held that the contract between the respondents and the Indemnity Company was limited to the provisions on the face of the policy. Under this interpretation, policyholders as such would not be members subject to assessment, notwithstanding the fact that the by-laws and charter of the Company stated that policyholders were members of the Company.[15]

Worthy of comment is the fact that, while the fundamental disagreement between the Georgia and New York courts lay in the question of whether the terms of the policies made the policyholders members within the New York statute, the New York court did not make a *positive decision* that the respondent policyholders were members of the company—the court merely *assumed* that to be true and thereby assumed the fact of its own jurisdiction instead of inquiring into and passing on that issue. Had the New York court, upon proper appearance of the parties, made an affirmative determination in regard to its jurisdiction and the Georgia court had then re-examined the question and decided to the contrary, the decision of the United States Supreme Court upholding the Georgia decision would have been more significant, for such a holding would have cleared up speculation regarding the doctrine of the case of *Baldwin v. Iowa State Traveling Men's Ass'n.*[16] In the *Baldwin* case the Supreme Court held that a litigation of a jurisdictional factor in the courts of a state was entitled to full faith and credit when a judgment thereby rendered was sued on in a *federal court;* but the Court left open and undecided the question of whether an adjudication of such a jurisdictional issue in the courts of one state must be given full faith and credit in the courts of a *sister state.* Consequently, if the New York court in the instant case had adjudicated the question of whether the policies were such as to make the holders members of the Company and the Georgia court had decided that such was not true, a very controversial legal question would have been determined.[17]

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[15]Pink v. A. A. A. Highway Express, Inc., 191 Ga. 502, 13 S. E. (2d) 337, 345 (1941).

[16]283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244 (1931); see Note (1928) 52 A. L. R. 740.

[17]See Farrier, Full Faith and Credit of Adjudication of Jurisdictional Facts (1935) 2 U. of Chi. L. Rev. 552, 570. See also (1939) 6 U. of Chi. L. Rev. 293, commenting on Stroll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. ed. 104 (1938).

The rule seems to be settled that a decree assessing stockholders of an insolvent corporation or mutual association is conclusive against the non-resident stockholders or members, although they are not served with process within the state where it was rendered, insofar as the necessity of the decree and the amount of the assessment is concerned.[18] However, the rule is equally well settled that such a stockholder, who has been so assessed, is not precluded from litigating any personal defenses he may have which involve an attack on the jurisdiction of the court.[19] The cases hold that a stockholder who has been so assessed may show in an action on the decree of assessment the extent of his holdings,[20] the fact of payment,[21] or the running of the Statute of Limitations.[22] Certainly it follows from these cases that he can put in issue the question of whether he is a stockholder at all, to ascertain whether or not he is within the class against whom the decree was rendered in the first instance.[23] In the instant case, the Georgia court did not contest the jurisdiction of the New York court to make the

[18]Stockholders of insolvent corporations: Hawkins v. Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184 (1889); Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 989 (1896); Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163 (1907); Selig v. Hamilton, 234 U. S. 652, 34 S. Ct. 926, 58 L. ed. 1518 (1914); Maril v. Augedahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. ed. 1038 (1918); Howard v. Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156 (1890); Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634 (1913); Cox v. Updegraff, 140 Ore. 401, 12 P. (2d) 1025, 14 P. (2d) 280 (1932); Hallam v. Taylor, 60 S. D. 45, 242 N. W. 920 (1932). See Notes: (1927) 48 A. L. R. 669; (1935) 97 A. L. R. 690.

Policy holders of insolvent mutual associations: Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514 (1909); Stone v. Old Colony Street R. Co., 212 Mass. 459, 99 N. E. 218 (1912); Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442 (1908); Swing v. Mooney, 139 App. Div. 821, 124 N. Y. Supp. 545 (1910); Swing v. Engle, 143 App. Div. 181, 127 N. Y. Supp. 322 (1911).

[19]Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 989 (1896); Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163 (1907); Selig v. Hamilton, 234 U. S. 652, 34 S. Ct. 926, 58 L. ed. 1518 (1914); Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514 (1909); Stone v. Old Colony Street R. Co., 212 Mass. 459, 99 N. E. 218 (1912); Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442 (1908); Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634 (1913); Cox v. Updegraff, 140 Ore. 401, 12 P. (2d) 1025, 14 P. (2d) 280 (1932); Swing v. Rose, 75 Ohio St. 355, 79 N. E. 757 (1906).

[20]Selig v. Hamilton, 234 U. S. 652, 34 S. Ct. 926, 58 L. ed. 1518 (1914).

[21]See Cox v. Updegraff, 140 Ore. 401, 12 P (2d) 1025, 14 P. (2d) 280 (1930).

[22]Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 989 (1896).

[23]See Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227 (1902) (party sued on assessment contending that his contract with insolvent company was not such as to make him liable for assessment); Stone v. Old Colony Street R. Co., 212 Mass. 459, 99 N. E. 218 (1912) (party sued on assessment asserting that he was not liable because policies were unlawfully issued).

assessment against the members of the insolvent corporation, nor did it question the amount of the assessment. What it did do was to decide that the respondents were not rendered members of the Indemnity Company merely by the force of their policies and contracts with it, and thus were not within the class against whom the New York statute was directed. Such a holding is in perfect accord with the established principles and decided cases concerning the effect of the full faith and credit clause, and the Supreme Court very properly upheld the Georgia court's decision.

It is to be noted that the holding in the case under consideration is not opposed to the decisions in which full faith and credit was required to be given to a personal judgment rendered by the courts of one state where jurisdiction was acquired by virtue of legislation making acts done within the states a basis of personal jurisdiction.[24] Consider the state of facts in the leading case of *Hess v. Pawloski*,[25] where jurisdictiton over the defendant was based on a Massachusetts statute which conferred jurisdiction on the courts of that state when a person driving through the state in an automobile caused injury. Manifestly, the defendant in such an action could prove in a collateral attack on a judgment so rendered without further basis for jurisdiction, that the injury occurred in a place outside of Massachusetts, and thereby could strip the judgment of its efficacy. Similarly, where jurisdiction for a personal judgment rests on the fact of doing business within a state,[26] the defendant who has not been served within the state and has not appeared can, when sued upon the judgment in another state, attack it on the grounds that he was not in fact doing business within the boundaries of that state. The Supreme Court in the instant case merely extends this list of examples by allowing persons, sued on a judgment rendered under a statute granting jurisdiction to state courts over "policyholders," to prove that they were not in fact policyholders.

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[24]Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927); Goodman v. Henry L. Doherty & Co., 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935). See discussion, Goodrich, Conflict of Laws (2d ed. 1938) 165.

[25]274 U. S. 352, 47 S. Ct. 632, 71 L. ed. 1091 (1927).

[26]Goodman v. Henry L. Doherty & Co., 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097 (1935).

CONTEMPT—STATE COURT'S EXERCISE OF SUMMARY CONTEMPT POWER FOR PUBLICATIONS HELD TO BE VIOLATION OF FREEDOM OF SPEECH. [United States Supreme Court]

At a period in United States history when many American liberties are being curbed to enhance the efficiency of the war effort, the recent case of *Bridges v. California*[1] represents what would appear to be a courageous position on the part of the Supreme Court. By the complete return in constructive contempt cases to a more limited and restrictive "clear and present danger" test as a standard for determining the scope of constitutional protections of freedom of speech,[2] it appears that the Supreme Court is evidencing an intention to extend its policy of according full protection to freedom of expression as provided for in the Bill of Rights and implied in the due process clause of the Fourteenth Amendment.[3] In view of the present crisis, however, the *Bridges* case, broadening freedom of speech to the extent it does, may be extremely ill-timed and not in accord with restrictions which other civil liberties are undergoing. The decision will prove most unfortunate if used as a precedent for continuing such an expansive freedom of expression during war time.[4]

The main issue in this case turned on the argument that constitutionally guaranteed freedom of speech and the press were violated by a state court's action in dealing out summary punishment for alleged constructive contempts arising from newspaper publications.[5] The Supreme Court of California affirmed the action of the lower courts in imposing four separate fines for contempt of court on the Los Angeles Times for a like number of infamous publications appearing

[1] 62 S. Ct. 190, 86 L. ed. 149 (1941).

[2] This formula was first used by Justice Holmes writing for the majority in Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470 (1919). This "clear and present danger" test was replaced by the less restrictive "dangerous tendency" standard of Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1923). The Supreme Court has shown some disposition to return to the earlier test in recent cases where either the majority or minority of the Court has employed it: Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 1213 (1940); Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940); Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732, 81 L. ed. 1066 (1937) Bridges v. California seems to strengthen the Court's inclination to readopt this standard.

[3] Schneider v. State, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. ed. 155 (1939).

[4] The Court's intention of rendering decisions which will be in full accord with the necessary temper of the times is manifested in one of its recent cases. Goldman v. United States, 10 U. S. L. Week 4357, 62 S. Ct. 993 (April 27, 1942).

[5] The terms "publication" and "editorial" are used in this article to refer only to written comments concerning a case still pending litigation.

in its pages.[6] The majority of the United States Supreme Court reversed the Supreme Court of California in each case,[7] holding that all four convictions violated freedom of speech as protected under the due process clause of the Fourteenth Amendment. The prevailing opinion regarded the use of summary punishment as invalid unless the allegedly contemptuous acts raised a "clear and present danger" that justice would be obstructed; and the publications under consideration were held not to create such an urgent threat. Although applying a different test, the four dissenting justices of the Federal Supreme Court concurred with the majority opinion as regards two of the publications but voted to affirm the decision of the California court as applied to the other two.

The fundamental issue presented in each of the four individual cases is ultimately the same. It is a delicate question, the solution of which requires the most careful judicial deliberation, for it is necessary

[6]Bridges v. Superior Court in and for Los Angles County, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); Times-Mirror Co. v. Superior Court in and for Los Angeles County, 15 Cal (2d) 99, 98 P (2d) 1029 (1940).

[7]The four publications reaching the Supreme Court of the United States are set out in full in the main case: Bridges v. California, 62 S. Ct. 190, 198 (1940).

Originally the Los Angeles Bar Association instituted proceedings by affidavit against the Los Angeles Times for eight separate publications. The Superior Court of Los Angeles County sustained defendant's demurrer as to two articles vindicating their appearance in print. The Supreme Court of California reversed the Superior Court as regards two, "A Black Committee Here?" and "Curious Reasoning" saying, "The editorials were temperate and considerate and free of any abusive or immoderate language." Times-Mirror v. Superior Court in and for Los Angeles County, 15 Cal. (2d) 464, 98 P (2d) 1029, 1040 (1940). Two of the remaining four publications which reached the United States Supreme Court seem to be exceedingly malicious in their language. Furthermore, they are personal in their tenor, indicating a desire to bring specific pressure to bear and so bring about a result in accord with the interests of the publisher. (1) "The Bridges Telegram": Bridges, an officer in the C. I. O., sent a telegram to the Secretary of Labor but also allowed it to be published by the Los Angeles Times at a time when a motion for a new trial was still pending. In this telegram Bridges stated that the judge's decision was "outrageous" and that any attempt to enforce it would tie up the ports of the entire Pacific coast in a strike. (2) "Probation for Gorillas": Two labor union men had been convicted for assaulting two non-union truck drivers. They were now seeking probation. After representing the two culprits to be the blackest and most desperate criminals imaginable, the editorial went on to advise, "Judge A. A. Scott will make a serious mistake if he grants probation. "

The entire United States Supreme Court was of the opinion that the other two articles were entirely too temperate and unabusive to warrant an exercise of contempt power in those cases. (3) "Fall of an Ex-Queen": Merely a moralization of conviction of a woman, once a powerful state politician, who, seeing her power begin to wane, resorted to unlawful means in an attempt to maintain her influence. (4) "Sit-Strikers Convicted": An article lauding the jury for finding guilty twenty-two sit-strikers who had led an attack on a Douglas plant.

to determine which of the two civil liberties must be curtailed while the other is expanded. Our American heritage has given to us both the right to express our opinions freely and the right to have a fair and impartial trial of all judicial controversies. They are both protected under the Constitution.[8] Moreover, they must operate side by side without one encroaching on the other so as to menace its existence. The duty of maintaining this balance rests in the hands of the judiciary. Since the conflicts between the two rights can only be resolved by a weighing of the degrees of the threatened violations of either form of personal liberty, the best approach for the courts in each case is an application of common sense and sound judgment to the particular circumstances involved.[9] However, the majority opinion in the *Bridges* case, although not specifically saying so, in effect seems to have completely abolished summary punishment for constructive contempt in publication cases, thus bluntly refusing to attach any importance to the threatened obstruction of justice as a factor for consideration in these cases.

To explain why the opinion of the four dissenting members of the Court seems at present to be more in accord with the principles of justice, there are several problems which must be discussed and clarified: (1) Does the majority opinion achieve the effect of abolishing constructive contempt for out-of-court publications? (2) If so, is the power to punish for this type of constructive contempt necessary to our courts if they are to render impartial justice? (3) Assuming that this power is essential to the preservation of our constitutional right to a dispassionate judiciary, is it necessary that it be abandoned in favor of freedom of speech?

(1) The recent case of *Nye v. United States,*[10] involving federal courts, and the present case of *Bridges v. California,* involving state courts, effectuate completely the Supreme Court's apparent desire to limit the power of all courts to impose summary punishment for con-

[8]That the Fourteenth Amendment guarantees to each individual the fullest opportunity for expression was recently reiterated by the Supreme Court. Near v. Minnesota ex rel., 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931); Palko v. Connecticut, 302 U. S. 319, 326, 58 S. Ct. 149, 152, 82 L. ed. 288 (1937). An equally imposing line of cases have held the same protection of fair and impartial trial to be covered by the Fourteenth Amendment. See Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. ed. 543 (1923).

[9]Schaefer v. United States, 251 U. S. 446, 482, 483, 40 S. Ct. 259, 264, 265, 64 L. ed. 360 (1920).

[10]Nye v. United States, 313 U. S. 33, 61 S. Ct. 810, 85 L. ed. 1172 (1941).

tempts. Although the results of these two cases appear to be parallel in this respect, there are noteworthy differences in approach. The decision in the *Nye* case necessitated a judicial construction of Section 268 of the Judicial Code.[11] The Supreme Court expressly reversed its previous position[12] and held that the clause of the 1831 statute allowing federal courts to punish summarily for contempts occurring in the courts "or so near thereto" as to obstruct justice, is of geographical rather than causal connotation. The objectionable conduct of the defendant was an interference with a litigant, but the narrow geographical limit imposed on the courts by this literal interpretation of the contempt statute obviously excludes altogether the federal courts' exercise of contempt powers to punish any out-of-court publications for attempts to interfere with the administration of justice.[13]

In deciding the *Bridges* case the Supreme Court was confronted with a constitutional rather than a statutory construction problem. The Court had to determine whether or not the state practice in California of allowing tribunals to punish publications for contempt of court was a violation of the right to speak freely as guaranteed by the due process clause of the Fourteenth Amendment. This was the first time the Supreme Court had been called upon to pass on the validity

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[11]Jud. Code § 268, 4 Stat. 487 (1831), 28 U. S. C. A. § 385 (1928). This was Section I of the March 2, 1831 Act passed to combat the evils made manifest by the infamous trial of James H. Peck. Stansbury, Report of the Trial of James H. Peck (1833).

For historical background governing legislative intent see, Thomas, Problems of Contempt of Court (1934) 53; Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401, 423, dealing with Peck case itself 423–431.

[12]Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. ed. 1186 (1918). This case was the final link in a long chain of federal cases, beginning around 1900, which made the Act of 1831 in reality a non-limiting statute on a court's power to punish publications for contempt. The Nye case expressly reversed the Court's position taken in the Toledo Newspaper case and returned to the intended, literal and geographical interpretation of the 1831 Act. Ex parte Poulson, 19 Fed. Cas. No. 11,350, at 1205 (E. D. Pa. 1835); Ex Parte Robinson, 86 U. S. (19 Wall.) 505, 22 L. ed. 205 (1873).

Excellent discussions of the individual federal cases and their contributions to the interesting variations in judicial interpretation of § 268 of the Judicial Code will be found in, Thomas, Problems of Contempt of Court (1934) 53; Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Courts (1924) 37 Harv. L. Rev. 1010, 1026; Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 525, 539; Notes (1941) 7 Geo. Wash. L. Rev. 234; (1941) 3 Wash. and Lee L. Rev. 109.

[13]Wimberly v. United States, 119 F. (2d) 713 (C. C. A. 5th, 1941) (followed the strict construction of the Nye case).

of a state court's exercise of its constructive contempt powers.[14] The practice of summary punishment for constructive contempt has been utilized in appropriate cases by the state courts of forty-two states.[15] Although there has been heated controversy over the propriety of allowing courts to exercise this authority,[16] such widespread indulgence in the practice would tend to indicate that cases do arise in which the use of the contempt power is proper.[17] Thus, the Supreme Court appeared to be on the right track in applying a formula suited to determining questions of degree. However, the majority's application of the "clear and present danger" formula to the factual situations of this case would seem to be so narrow and stringent as to exclude wholly a state court's exercise of publication contempt power in all but possibly a very limited group of intensely flagrant cases.[18]

The dissenting opinion makes a more justifiable application of its "reasonable tendency" test[19] and would seem to be right in distinguishing between the various publications involved, some of which were merely comment and some of which were manifestly intended to work

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[14]The question was raised but left undecided in Patterson v. Colorado, 205 U. S. 454, 462, 27 S. Ct. 556, 558, 51 L. ed. 879 (1907).

[15]For a partial list of state cases punishing for contempt out-of-court publications where they have a tendency to interfere with administration of justice see, Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 525, 554; Note (1941) 19 N. C. L. Rev. 219, 220.

[16]Complete and classic protrayals of this controversy are to be found in, Thomas, Problems of Contempt of Court (1934) chs. IV, VI and VII; Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Courts (1924) 37 Harv. L. Rev. 1010; Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 401, 525.

[17]Mr. Justice Black, delivering the majority opinion in the Bridges case flatly rejected this deduction: ". . .we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press." 62 S. Ct. 190, 196 (1941).

[18]Of course, it must be admitted that by the very act of adopting a test based on degree, the majority of the Court has left open a door through which it may, in a future case, return to a more liberal interpretation of the scope of the contempt power. In another case, in which the facts might seem to present even less danger to justice than in the Bridges case, the Court will be perfectly free to decide that the application of summary punishment is necessary.

[19]Mr. Justice Frankfurter, writing the dissent, seems to think that entirely too much stress was laid on the adoption of the "clear and present danger" doctrine when the "reasonable tendency" test had long been adequate for weighing questions of degree. "The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension." Bridges v. California 62 S. Ct. 190, 210 (1941).

specific coercion.[20] Undoubtedly the "Sit-Strikers Convicted" and the "Fall of an Ex-Queen" would occupy the realm of commentative editorials only. On the other hand, if the "Bridges Telegram"[21] and "Probation for Gorillas"[22] are not such publications as involve a dangerous attempt to coerce the judiciary, one wonders what is necessary to constitute such an attempt.

(2) Is this power to punish publications for contempt necessary to the courts to insure the competent handling of justiciable questions? Both history and reason seem to indicate that it is. Historically, the broadest kind of powers were given to the federal courts by the Judicial Act of 1789.[23] The infamous *Peck* case[24] aroused Congress to pass the statute of 1831 which was designed to limit the broad contempt powers conferred on the courts in 1789.[25] The intended effect of the 1831 Statute was gradually construed away by the courts during the

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[20]See note 7, supra.

[21]Mr. Justice Frankfurter speaking for the dissent concerning the "Bridges Telegram" said, "A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter." Bridges v. California, 62 S. Ct. 190, 213 (1941).

[22]As regards "Probation for Gorillas," Mr. Justice Frankfurter said, "A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be 'a serious mistake.' Clearly, the state court was justified in treating this as a threat to impartial adjudication." Bridges v. California, 62 S. Ct. 190, 211.

Since state judges are usually selected by popular election for terms of years, while federal judges are appointed with life tenure, perhaps a different standard of danger should be applied as between the two. However, Mr. Justice Black, speaking for the majority, took a position directly opposite to that of the dissent: "To regard it [The editorial "Probation for Gorillas"], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise." 62 S. Ct. 190, 199. In this respect, it is interesting to note a contradiction of contentions often presented as arguments against the summary contempt power. As here, it is said that judges are not so easily influenced as is popularly thought, and yet the further point is made that it is dangerous to give such summary punishment power to judges because they may be swayed by a spirit of vindictiveness against their critics and use the contempt power to sooth injuries to personal pride. Thus, in one breath the bench is considered as being elevated above the common weaknesses of human nature while in the next it is regarded as submissive to such traits.

[23]The Act of 1789 provided that the federal courts should have the power at their discretion to punish "all contempts of authority in any cause or hearing before the same." 1 Stat. 73, 83 (1789).

[24]Stansbury, Report of the Trial of James H. Peck (1833). Federal Judge Peck dealt out summary punishment of disbarrment and imprisonment to a lawyer who published a bitter attack against one of Peck's decisions while an appeal in the case was pending. Peck was promptly impeached, but was acquitted.

[25]Thomas, Problems of Contempt of Court (1934) 55.

past century,[26] and the Supreme Court in the case of *Toledo Newspaper Co. v. United States*[27] handed down a decision directly opposed to the purpose behind the 1831 enactment. Many states passed statutes similar to the federal statute, but most of them have been declared unconstitutional[28] by their state courts on the theory that the court's right so to punish is "inherent" and the legislature is powerless to affect this judicial practice. And at present forty-two states adhere to the practice of allowing courts to punish summarily contempts arising from newspaper articles.

On the side of reason, it is to be remembered that the Constitution guarantees to the people of the United States a fair and unbiased trial of their differences. The courts were intrusted with the burden of settling these controversies in the most consistently equitable manner possible. The efficiency of a tribunal in performing this grave task depends largely upon the dispassionate mind with which it renders its decisions; and the more dispassionate the mind the more nearly perfect will be the court's application of the principles of justice to the case being tried before it. If force and coercion are allowed to distort the opinion of a judge, the administration of justice, as it is thought of today, will be impossible. The most effective and accepted means of punishing this interference with the normal course of justice has been summary punishment for contempt of court.[29] In so far as this contempt power is limited, the courts are to that extent rendered helpless to combat directly the subjection of judicial decisions to the primitive element of force. In the formulative stages of the scope of contempt power, the newspaper publications of the day may not have been of sufficient consequence to warrant the courts using their contempt power in this

[26]Thomas, Problems of Contempt of Court (1934) 59.

[27]247 U. S. 402, 38 S. Ct. 560, 62 L. ed. 1186 (1918), see note 12, supra.

[28]Nelles and King, Contempt by Publication in the United States (1928) 28 Col. L. Rev. 525, 554-562, presents a complete tabulation of the statutes of the various states and the decisions pertaining thereto. The Supreme Court in the Bridges case took note of the fact that California had no statute expressly making out-of-court publications of comments on pending cases summarily punishable. It was said that such a legislative declaration of a state's policy would "weigh heavily in any challenge of the law as infringing constitutional limitations." 62 S. Ct. 190, 192. But the Court did not pretend that the mere existence of a statute would have changed the decision; and since the courts regard the contempt power as inherent in the judiciary, it is not readily apparent how the presence or absence of a statute confirming this power could be of any substantial significance.

[29]2 Bishop, Criminal Law (9th ed. 1923) § 261. The alternative method of a regular criminal proceeding based on an indictment and attended with a jury trial is rendered unsatisfactory by the formality and delay necessarily involved in such actions. See Mr. Justice Stone's dissent in Nye v. United States, 313 U. S. 33, 53, 61 S. Ct. 810, 817, 85 L. ed. 1172 (1941), 3 Wash. and Lee L. Rev. 109, 115.

field. However, with the growth in circulation, size, and influence on public sentiment of modern newspapers, there has been a vast increase in the chances of coercive pressure being exerted through this indirect means of publications. The likelihood of obstruction of justice through this medium has become very real, and newspaper publishers are thus fitting subjects of contempt actions in appropriate circumstances. The right to punish for contempt should be available to the judges in those cases where newspaper publishers use their power to defeat impartial justice by a dispassionate judiciary just as much as where an individual creates a disturbance in the court room, for in both instances the normal functioning of justice has been jeopardized. Whether or not the contempt power should be used in individual cases will depend on the peculiar circumstances of each case. The facts of some cases will show the threat of an obstruction of justice to be so great that freedom of speech must give a little ground to insure a fair trial. In other cases this threat to justice will be so slight that the need for protection of the right of fair trial will not be urgent enough to justify any curtailment of free speech. But the Supreme Court's refusal to recognize and give due weight to the prudence of trusting the courts to deal summarily with publishers of newspaper articles such as the "Bridges Telegram" and "Probation for Gorillas" is not a result in accord with the principles of justice.

(3) Assuming that this contempt power is essential to the preservation of our constitutional right to a dispassionate judiciary, is it necessary that it be abandoned in favor of freedom of speech? In a democracy such as the United States the desirability of full freedom of expression by the people is undeniable. But even here inevitable destructive use by some unprincipled individuals of this right to speak freely necessitates certain limitations being placed on this power. Exemplifying this are the espionage acts, criminal syndicalism act, "Anti-insurrection" act, and punishment for seditious libel. All too often the excessive or unscrupulous use of a good thing by one individual will convert it into a detriment rather than the usual benefit to society as a whole. The danger of such a result following from this most recent extension of free expression by the *Bridges* case is sufficiently imminent to menace the very foundation of democratic government. No doubt criticism of our judiciary should be encouraged,[30] for this is the demo-

[30]Note (1938) 48 Yale L. J. 54, 61, n. 40. But the limitation can be reasonably imposed that the public withhold its criticism until the case in question is closed. The judge will still be fully apprised of the public's reaction to his decision, without any threat of the court's being influenced in its judgment in a pending matter.

cratic method of stimulating public interest in the work of our courts, and of impressing on the minds of the judges the reactions with which the people are receiving their decisions. Thus, through the exercise by the people of the right to speak opinions freely, the tribunals are forced to maintain the highest efficiency possible in carrying out their duties. However, it would be a deplorable situation if this right were expanded so that the court's efficiency in doing its duty was impaired rather than enhanced. Take from the courts their power to punish for contempts and this result has virtually been achieved. When the courts are divested of their contempt powers, the channels of justice become trammeled by the undemocratic element of force. As observed by Mr. Justice Frankfurter:

> "But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure."[31]

If the Supreme Court's decision in the *Bridges* case is given its apparent effect, it will be impossible for the courts to protect adequately the civil liberties guaranteed in the Bill of Rights—including freedom of speech—when the decisions may come to reflect merely the distorted opinion of courts subjected to the influence of force and coercion from the outside.

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CONTRIBUTION—RIGHT TO CONTRIBUTION BETWEEN JOINT TORT-FEASORS RECOGNIZED WHERE PARTIES WERE NOT ACTUAL PARTICIPATING INTENTIONAL WRONGDOERS. [Federal]

The right to contribution is defined as a remedial right of one of two or more joint obligors to demand from the other or others his or their proportionate share of the common burden which the first has satisfied by payment to the obligee.[1] The action for contribution arises whenever one disproportionately bears the burden of the common obli-

[31]Bridges v. California, 62 S. Ct. 190, 204 (1941).

[1] 4 Am. and Eng. Encyc. of Law 1; 9 Words and Phrases (Perm. ed. 1940) 371 ff.; Gregory, Contribution among Tortfeasors: A Uniform Practice [1938] Wis. L. Rev. 365, 369.

gation; and it may be based on an implied assumpsit in courts of law, or be founded in equity on principles of justice and fairness.[2]

However uniform the granting of contribution may be in cases of joint debtors, the result, in the absence of statute, is overwhelmingly to the contrary in cases of joint tort-feasors.[3] This distinction was arbitrarily established by the English decision in *Merryweather v. Nixan* in 1799, wherein Lord Kenyon refused, on the sole basis of lack of precedent, to allow contribution to one tort-feasor who had paid the whole judgment rendered against joint wrongdoers.[4]

Courts looking to this decision as a criterion have invented so-called reasons of policy to refute claims for contribution. One of the favorite devices is the employment of the maxim that the courts should not lend themselves to assist a wrongdoer to profit by his own conscious wrong.[5] Other courts have said that the denial of restitution tends to prevent the further misconduct of the parties; or that the burden to the public of the expense of litigation should be borne only for those who obey the law;[6] or that the right to contribution is based on an

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[2] 4 Am. and Eng. Ency. of Law 1, n. 5, noting the equitable origin and character of contribution and the later incorporation into the common law on the basis of an implied assumpsit.

[3] Harper, Torts (1933) 679; Prosser, Torts (1941) 1111; 1 Street, Foundations of Legal Liability (1906) 490; Bohlen, Contribution and Indemnity between Tortfeasors (1936) 21 Corn. L. Q. 552; Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130.

[4] 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799). It is interesting to note that the action in this case was predicated upon an implied assumpsit and therefore no *equitable* claim for contribution was involved. It was not necessary to infer from this decision at law that equity could not act in its independent capacity. Lord Kenyon said, "that he had never before heard of such an action [assumpsit] having been brought, where the former recovery was for a tort." Therefore, this procedural difficulty may have been the basis of denial of restitution, rather than some substantive objection.

Kenyon added that this decision should not affect cases of indemnity where one was engaged to do an act not intrinsically unlawful. Later English cases used this dictum as a basis for allowing contribution where there was no wilful or conscious wrongdoing. Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (1827); Betts v. Gibbins, 2 Ad. & El. 57, 111 Eng. Rep. 22 (1834). Today, in England contribution is allowed where the wrong is "mere negligence, accident, mistake, or other unintentional breaches of the law." Salmond, Torts (8th ed. 1934) 86; Burrows v. Rhodes [1899] 1 Q. B. 816, 828. Note also a recent English Act, 25 & 26 Geo. V, c. 30, Part II (1935).

[5] Bohlen, Contribution and Indemnity between Tortfeasors (1936) 21 Corn. L. Q. 552, 557, wherein Professor Bohlen sanctions the reason only if the wrongdoer is consciously blameworthy; Restatement of Restitution (1937) Ch. 3, Topic 3, Title C, Introductory note.

[6] Bohlen, (1936) 21 Corn. L. Q. 552, 557 (showing that before this effect can be had the tort-feasor must know his conduct is such as to subject him to damages,

implied contract which is void for illegality because in its inception the parties had an illegal purpose in mind.[7] The erroneous conception of the impossibility of apportioning fault, especially negligence, is also frequently employed to deny contribution.[8] To this imposing array of "policy" considerations must be added the pragmatic criticism of contribution prepared by Professor James wherein he points out that, in the practical application of the doctrine, the risk of loss is not spread over society by contribution, as theorists claim it should be.[9]

In the United States the early practice was to refuse contribution in cases of wilful misconduct,[10] but to permit it if the joint tort-feasors became such as the result of mere negligence, accident or mistake.[11] However, with the advent of statutes permitting the joinder of those responsible for the same damage in one action, the courts apparently ignored this previous distinction.[12] At the present time the great majority of American courts refuse to recognize a right to contribution even

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must realize he has a co-feasor, and must be aware of the rule of no contribution); Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130, 134; Restatement of Restitution (1937) Ch. 3, Topic 3, Title C, Introductory note.

[7]Salmond, Law of Torts (8th ed. 1934) 85.

[8]Bohlen, (1936) 21 Corn. L. Q. 552, 557. Experience has refuted this notion, however (see note 22, infra). Restatement of Restitution (1937) § 102 and caveat admitting that the rule against contribution in cases of negligent tort-feasors is explainable on historical grounds only. Unfortunately, the Restatement takes no definite stand on this active problem. Harper, Torts (1933) § 303 points out that there is some tendency to compare negligence. See Prosser, Torts (1914) 1114.

[9]James, Contribution among Joint Tortfeasors: a Pragmatic Criticism (1941) 54 Harv. L. Rev. 1156. Professor James' thesis is that contribution in practice is generally confined to two type of cases: "those in which an insurance company or a large self-insurer seeks it against an uninsured individual; and those in which a self-insurer or insurance company seeks it against another such company." In either case, the loss is not spread over society, for in the first instance it is cast onto the shoulders of individuals who cannot distribute it, and in the latter, the processes cancel themselves out.

[10]Hunt v. Lane, 9 Ind. 248 (1857); Peck v. Ellis, 2 Johns. Ch. 131 (N. Y. 1816); Miller v. Fenton, 11 Paige 18 (N. Y. 1844); Rhea v. White, 40 Tenn. (2 Head) 121 (1859); Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260 (1870); Prosser, Torts (1941) 1113. See 6 R. C. L. 1055, where it is shown that in early American practice the test was whether the act committeed was *malum in se* or *malum prohibitum*. If *malum in se*, contribution was denied; if *malum prohibitum*, the criterion was whether the tort-feasor thought he was doing a proper act.

[11]Nickerson v. Wheeler, 118 Mass. 295 (1875); Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663 (1853); Horbark's Adm'rs v. Elder, 18 Pa. 33 (1851); Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368 (1870); Thweatt's Adm'r v. Jones, Adm'r., 22 Va. (1 Rand.) 328, 10 Am. Dec. 538 (1823).

[12]Prosser, Torts (1941) 1113.

where the wrongdoing was occasioned by the independent negligence of the tort-feasors.[13]

It is not to be inferred that in all situations the unfortunate tort-feasor who pays or is compelled to pay the injured party is bound to suffer the entire loss. *Indemnity* may often be had as a matter of right where contribution is not an appropriate remedy.[14] Thus in situations in which there is vicarious liability on the master's part for the servant's tort,[15] or where an innocent partner is held for the misconduct of another partner in acting for the partnership,[16] or where the hirer is made responsible for the tortious act of the independent contractor,[17] or in any other similar situation in which one under a secondary duty has provided satisfaction for the wrong caused by one under a primary duty,[18] complete indemnification may be had from that primary tort-feasor. It is only when the joint wrongdoers are *in pari delicto,* meaning equal *plane* of fault and not equal *degree* of fault, that the problems of contribution arise.

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[13]Union Stockyards Co. v. Chicago, B. & Q. R. Co., 196 U. S. 217, 25 S. Ct. 226, 49 L. ed. 453 (1905); Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921); Ill. Cent. R. Co. v. Louisville Bridge Co., 171 Ky. 445, 188 S. W 476 (1916); Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N. E. 194 (1930); Prosser, Torts (1941) 1113.

[14]Salmond, Law of Torts (8th ed. 1934) 87. Contribution implies a sharing of the damages; indemnity a complete restitution of the tort-feasor who satisfied the injured party's claim.

[15]Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647 (1875); Georgia So. & F. R. Co. v. Jossey, 105 Ga. 271, 31 S. E. 179 (1898); Old Colony R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372 (1889); Hill v. Murphy, 212 Mass. 1, 98 N. E. 781 (1912).

[16]Farney v. Hauser, 109 Kan. 75, 198 Pac. 178 (1921); Smith v. Ayrault, 71 Mich. 475, 39 N. W 724 (1888).

[17]John Griffiths & Son Co. v. Nat. Fireproofing Co., 310 Ill. 331, 141 N. E. 739 (1923); Kampmann v. Rothwell, 101 Tex. 535, 109 S. W 1089, 17 L. R. A. (N. S.) 758 (1908).

[18]As in cases in which one is employed or commanded to do an act not in itself manifestly wrong, Russell v. Walker, 150 Mass. 531, 23 N. E. 383 (1890) (sheriff attaching wrong goods); or in which one is persuaded to act by the fraudulent representations of another, Philadelphia, B. & W R. Co. v. Roberts, 134 Md. 398, 106 Atl. 615 (1919); or in which the owner of goods has to pay for injuries to third persons caused by negligence of supplier of goods, Busch & Latta Paint Co. v. Woermann Const. Co., 310 Mo. 419, 276 S. W 614 (1925); John Wanamaker, N. Y., Inc. v. Otis Elevator Co., 228 N. Y. 192, 126 N. E. 718 (1920); or in which a municipal corporation has paid judgment against it for defective sidewalks in front of landowner's property, City of Des Moines v. Des Moines Water Co., 188 Iowa 24, 175 N. W 821 (1920); Board of City of Harrodsburg v. Vanardsdall, 148 Ky. 507, 147 S. W. 1 (1912); B. & O. R. Co. v. Howard County, 113 Md. 404, 77 Atl. 930 (1910); City of Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W 319 (1900); or where wrongdoer creates a hazard for which landowner is liable, Middleboro Home Co. v. Louisville &. N. R. Co., 214 Ky. 822, 284 S. W 104 (1926); Scott v. Curtis, 195 N. Y. 424, 88 N. E. 794 (1909).

In a distinct minority of American jurisdictions, contribution has been allowed as a common law right where the paying tort-feasor has himself been guilty of no willful or conscious wrongdoing.[19] It has been pointed out that there is no equity in a rule which imposes on one party a burden which should fall on two or more.[20] It is also apparent that the financially strong tort-feasor usually suffers the loss regardless of the degree of his culpability, while the impecunious wrongdoer escapes liability altogether.[21] Furthermore, the notion that negligence cannot be apportioned has been successfully repudiated.[22] Once this latter premise is accepted and the conception that liability in tort is penal in character is rejected, the attitude of the minority as summed up in the words of Prosser seems irrefutable:

> "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, acording to the accident of a successful levy of execution, the plaintiff's whim or malevolence, or his collusion with the other wrongdoer, while the latter goes scot free."[23]

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[19]This is a recognition of the equitable right of contribution to joint tort-feasors in the absence of statute. Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N. W. 13 (1926); Furbeck v. I. Gevurtz & Son, 72 Ore. 12, 143 Pac. 654 (1914); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928); Ellis v. Chicago & N. W. R. Co., 167 Wis. 392, 167 N. W. 1048 (1918). It is to be noted that Wisconsin has recently adopted a statute affirming its common law approach. The status of the law in Oregon is somewhat doubtful.

[20]Prosser, Torts (1941) 1114.

[21]Bohlen, (1936) 21 Corn. L. Q. 552, 553; Harper, Torts (1933) § 303.

[22]Bohlen, (1936) 31 Corn. L. Q. 552, 560. At 556-7 the author points out that, at the time of Merryweather v. Nixan, torts were considered more like crimes and therefore contribution was denied. Bohlen contends that but for this early rule there would have been a more intelligent development of the law of torts, especially in negligence cases, for there would have been no necessity for developing the contributory negligence or last clear chance doctrines. Harper, Torts, (1933) § 303 notes a tendency to compare negligence today, although Gregory, Contribution Among Tortfeasors: A Uniform Practice [1938] Wis. L. Rev. 365, 372-5, points out that it is not generally done in America but is universally done in Admiralty Jurisprudence, in England and Canada by statute, and would be done under proposed Uniform Contribution Among Tortfeasors Act.

[23]Prosser, Torts (1941) 1114, citing two such collusion cases, Pennsylvania Co. v. West Penn. Rys., 110 Ohio St. 516, 144 N. E. 51 (1924); Norfolk So. R. Co. v. Beskin, 140 Va. 744, 125 S. E. 678 (1924). In about one-fourth of the States general dissatisfaction with the existing rule of no contribution has led to passage of statutes permitting some measure of contribution or indemnity as the case may be—Md. Ann. Code (Bagley, Supp. 1929) Art. 50, § 12A; Mo. Rev. Stat. (1929) § 3268; N. M. Stat. Ann. (Courtright, 1929) § 76-101; N. Y. Laws 1928, c. 714, N. Y. Civ. Prac. Act. (1920)

With the recent decision in *George's Radio, Inc. v. Capital Transit Company*,[24] Chief Justice Groner, in delivering the opinion of the United States Court of Appeals for the District of Columbia, expressly committed that jurisdiction to the minority point of view. In that case it appeared that one Oisboid had been injured due to a collision of his automobile with a bus of the defendant and an automobile operated by an agent of the plaintiff. Oisboid had obtained a judgment against both the plaintiff and defendant, who were made joint tort-feasors by legal inference, inasmuch as the individual negligent acts of their several agents had combined to produce the injuries. But Oisboid had elected to pursue his remedy against the Radio Company alone and had refused even to attempt to collect anything from the Transit Company. Plaintiff Radio Company thereupon brought this suit in equity to restrain the issuance of execution and levy, requesting that the Transit Company be compelled to pay one-half of the judgment. The District Court dismissed the bill, and the Radio Company paid the judgment in full, then brought this appeal.

After delving into the historical background of the law of contribution, Justice Groner came to the conclusion that:

> "where the parties are not intentional and wilful wrongdoers, but are made such by legal inference or intendment, contribution may be enforced. .. Here, as we have seen, there was no personal participation in the wrong, and the liability of both

§211-a; N. C. Code Ann. (Michie, 1935) § 618; Tex. Stat. (Vernon, 1936) art. 2212; W. Va. Code (1931) c. 55, Art. 7, § 13; English Law Reform Act. (1935) 25 & 26 Geo. V, c. 30 § 6. This list of statutes is taken from [1938] Wis. L. Rev. 365, 366, n. 4. See also, Leflar, Contribution and Idemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130, 144, n. 66., adding five other statutes: Ky. Stat. (Carroll, 1930) § 484a; Va. Code Ann. (Michie, 1936) § 5779; Kan. Rev. Stat. Ann. (1923) § 60-3437; Mich. Comp. Laws (1929) § 14497 (in libel cases only); Ga. Code Ann. (Michie, 1926) § 4512-13 ("joint trespassers" only). See Note (1931) 45 Harv. L. Rev. 369, for a review of these contribution statutes. In at least three of the jurisdictions listed above, Maryland, New York, and West Virginia, contribution is confined to those subject to a joint and several judgment liability, presumably to avoid difficulty of apportioning damages. See: Note (1931) 16 Corn. L. Q. 246 and Gregory, Contribution among Tortfeasors: A Uniform Practice [1938] Wis. L. Rev. 365 at 370 for constructive criticism of such statutes; also see proposed Uniform Contribution Among Tortfeasors Act [1938] Wis. L. Rev. at 398 for suggested methods of apportioning damages according to varying degrees of fault. For excellent study of tort contribution in New York under Civil Practice Act § 211-a, see Gregory, Tort Contribution Practice in New York (1935) 20 Corn. L. Q. 269. Some of these statutes, Maryland and West Virginia, are so worded as not to require that the tort arise out of negligence or inadvertence to permit recovery, but by court interpretation contribution is not allowed where there was an intentional tort.

[24] 126 F. (2d) 219 (App. D. C. 1924).

> parties in the original damage suit existed only as the result of the relationship of principal and agent under the doctrine of respondeat superior or, in other words, by implication of law. In the circumstances, it would, we think, be contrary to the principles of natural justice, of reason, and of common sense, to impose unconditionally the whole loss on one of them."[25]

While the step thus taken by the court is a commendable one, it is unfortunate that the decision was predicated upon the narrow and somewhat indefinite ground that those made joint tort-feasors by operation of rules of law are entitled to contribution. The seemingly necessary implication of such an attitude is that the court would deny contribution between actual participating wrongdoers even where the wrong is unintentional and the parties stand in *equali jure*. Thus, a reasonable doubt arises as to whether this case represents a wholehearted adoption of the doctrine of contribution or merely creates a refinement applicable to the particular circumstances.

It may be argued with reason that, once it is admitted that contribution is a policy doctrine looking to a more equitable casting of loss and not an escapist means for wrongdoers, it must then logically follow that contribution should be allowed in all cases where the parties are *in pari delicto*, whether the wrong be accidental, mistaken, unintentional, negligent, wilful, conscious or even criminal.[26] If it is

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[25] 126 F. (2d) 219, 221-2 (App. D. C. 1942). Mr. Justice Edgerton dissented on the ground that Professor James' criticism of contribution among joint tortfeasors, based on social policy, is justified. James, Contribution among Joint Tortfeasors: A Pragmatic Criticism (1941) 54 Harv. L. Rev. 1156, see note 9, supra.

[26] See: Gregory, Contribution Among Tortfeasors: A Uniform Practice [1938] Wis. L. Rev. 365, 366-76; Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130, 144-51. However, the following cases, in which contribution was denied, show that there is no tendency in the courts to accept such a premise: Turner v. Kirkwood, 49 F. (2d) 590 (C. C. A. 10th, 1931) (fraud); Sparrow v. Bromage, 83 Conn. 27, 74 Atl. 1070 (1910) (false imprisonment); Horrabin v. City of Des Moines, 198 Iowa 549, 199 N. W 988, 989 (1924) (wrongs involving moral turpitude); Alexander v. Alexander, 154 Ky. 324, 157 S. W. 377 (1913) (embezzlement); Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127 (1889) (misappropriation); Palmer v. Showalter, 126 Va. 306, 101 S. E. 136 (1919) (fraud); Zurn v. Whatley, 213 Wis. 365, 251 N. W. 435 (1933). In Note [1938] Wis. L. Rev. 580 it is suggested, that since courts are prone to act according to well established precedent, the proper place for remedy is in the legislature.

Bohlen, (1936) 21 Corn. L. Rev. 552, 559 suggests that in the cases of torts of a criminal nature, the character of the crime should govern the right to contribution, with no such right in cases of heinous wrongdoing. For an interesting case in this regard see Everet v. Williams (The Highwayman's Case), (1893) 9 L. Q. Rev. 197, wherein both plaintiff and defendant were hanged as a consequence of an attempt to obtain contribution to divide the spoils of a robbery.

granted that society benefits by the spreading of loss, it would seem to make little difference if this risk is spread in favor of unintentional wrongdoers or of the anti-social, for in either case society would presumably profit. As yet, however, no cases have been found admitting of such a proposition.[27]

Perhaps the most advanced viewpoint which would be acceptable to the courts is that represented by the proposed Uniform Contribution Among Tortfeasors Act.[28] Manifestly the primary intent of this statute is affirmatively to establish by legislative enactment the right of contribution among joint wrongdoers. The act undertakes to define the term "joint tortfeasors," announce the right to contribution, and provide for alternative methods for the pro-rationing of damages—either equally or according to the relative degree of fault, at the option of the legislative body.[29] The proposed statute clearly and precisely sets forth the procedure by which contribution may be realized, sanctioning the third party practice of joining an alleged joint tort-feasor on motion of the defendant, as well as providing for separate and independent actions.[30] It boldly settles the much-controverted issue of release by proposing that a release given to one tort-feasor shall not discharge the other's liability unless it is so provided in the agreement;[31] and the release will not relieve the releasee tort-feasor from liability for contribution unless the release is granted prior to the accrual of the right to enforce contribution and expressly provides a pro rata reduction of damages recoverable by the injured party.[32]

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[27]See cases cited in note 26, supra.

[28][1938] Wis. L. Rev. at 398.

[29][1938] Wis. L. Rev. at 398. Where contribution has been allowed by common law or by statute it has been on a basis of equal shares, for courts are reluctant to accept the task of comparing negligence. Parker, to Use of Bunting v. Rodgers, 125 Pa. Super. 48, 189 Atl. 693 (1937); Martindale v. Griffin, 259 N. Y. 530, 182 N. E. 167 (1932). Note [1938] Wis. L. Rev. 580 points out that this is obviously inequitable where tort-feasors are guilty of varying degrees of negligence and suggests that the question be left for the jury. The optional section in the statute is doubtlessly to appease those who steadfastly adhere to the theory that fault cannot be apportioned. A tendency to compare negligence is found in Nashua Iron Co. v. Worchester & M. R. Co., 62 N. H. 159 (1882) where one negligent wrongdoer was allowed contribution against another who had the last clear chance to avoid injury; also in Fidelity & Casualty Co. v. Christenson, 183 Minn. 182, 236 N. W. 618 (1931) where contribution was denied the intentional wrongdoer against the negligent one.

[30][1938] Wis. L. Rev. at 398-400.

[31][1938] Wis. L. Rev. 400; also see generally (1941) 3 Wash. & Lee L. Rev. 151 for an analysis of the effect of a release given to one of the tort-feasors.

[32][1938] Wis. L. Rev. 400. See Note [1938] Wis. L. Rev. 580, 581 for the proposition that the right to contribution "should not be defeated by the inability of the

Since the statute has not been put into actual usage, any attempt to define its remedial effect would only be conjecture; but from a cursory examination of its contents one result is manifest—it will at least affirmatively establish the right of contribution among joint tort-feasors and provide proper latitude for the granting of contribution to all wrongdoers according to the degree of culpability, regardless of the nature of the fault. It will thus allow those courts which have tenaciously clung to precedent for precedent's sake to act as conscience has long dictated.

MARION G. HEATWOLE

DAMAGES—LIQUIDATED DAMAGES PROVISION IN CONVEYANCE RESERVING MINERAL RIGHTS HELD TO BE EXCLUSIVE REMEDY OF SURFACE OWNER AGAINST OWNER OF MINERALS. [Iowa]

The problem of the exclusory nature of a liquidated damages remedy was presented in an uncommon situation in the recent case of *Jensen v. Sheker*,[1] where the assignee of a coal lease was granted an injunction restraining the defendant, owner of the surface land, from interfering with the plaintiff's right to prospect, mine, and set up a right of way for removal of coal and other minerals named in the lease. The original grantor had conveyed the land to defendant Sheker's predecessor in title, reserving certain mineral rights to himself, his heirs and assigns, as provided in the following clause:

> "... with the full and sole right to prospect for, mine, obtain and remove the same by such means as he may deem proper, without hereby incurring in any event whatever any liability for injury caused or damage done to the surface of said land except that the said Edward H. Litchfield his heirs or assigns shall pay the owners of said premises at the rate of $25.00 per acre for any surface land necessary to be used aside from said right of way in working such coal, coal mines, minerals, mineral products, oil and gypsum and removing the same."[2]

Plaintiff Jensen held the coal lease by assignments from one who had succeeded by mesne conveyances to the interests of the original grantor.

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injured person to recover from one of those responsible for the damage." This Note predicts that the proposed statute would do away with the exceptions of assumption of risk, convenants not to sue, and workman's compensation payable to the injured party.

[1] 231 Iowa 240, 1 N. W. (2d) 262 (1941).
[2] 231 Iowa 240, 1 N. W. (2d) 262, 264 (1941).

The Supreme Court of Iowa ruled that an injunction had been properly granted to the plaintiff by the lower court, and affirmed another portion of the decree recognizing the defendant's right to damages at such time as acts of the plaintiff should injure defendant's fee in the surface.[3] No damages were awarded as the plaintiff had been unable to enter the defendant's land, but the court pointed out that: "The deed expressly provided for liquidated damages for any injuries to the surface estate."

This decision is of such a nature as to evoke comment in two respects: First, the court has found a liquidated damages provision in a situation in which such agreements seem to be of rare occurrence. Second, assuming that the case was properly regarded as involving a liquidated damages problem, the court has made a questionable application of the rules of law in that field.

It is an established general principle that where the title to underlying minerals is severed from the title to the surface estate, the owner of the latter interest has an absolute right to necessary support.[4] But this right is one which can be modified by agreement of the parties concerned,[5] and in the principal case it was conceded that the defendant's right to surface support was affected by the terms of the conveyance reserving the mineral rights in plaintiff's predecessor. Though the court regarded the particular clause in question as giving a right to liquidated damages, an easier and more logical solution of the case might have been possible by viewing the clause as the granting of a waiver by the surface owner of his right to support—or at least a granting of an option to purchase such a waiver. Had the court not spe-

[3]The court also held: That the plaintiff had the same rights his lessor would have had if there had been no lease, because the plaintiff took a property interest including the easement to prospect, etc. on the defendant's land. That the defendant had no title to the minerals by adverse possession because they and the surface had been severed in the original grantor's deed and defendant had exercised no acts of dominion over them. That there was no right to subjacent support, because a construction of the deed of severance showed the intention of the parties to take that right from the surface. That defendant might not plead estoppel or laches on the basis of valuable improvements made over a period of time because he had actual and constructive notice of the plaintiff's fee simple in the minerals and that defendant's surface fee might be taken and used for mining purposes upon payment of the stipulated damages. That there was only a technical distinction in the original grantor's use of "reserving" rather than "excepting" part of the land, and this distinction must give way to the clear intention of the parties.

[4]Collins v. Coal Co., 140 Iowa 114, 115 N. W. 497 (1908); 1 Tiffany, Real Property (2d ed. 1920) § 346.

[5]Collins v. Coal Co., 140 Iowa 114, 118, 115 N. W 497, 498 (1908); 1 Tiffany, Real Property (2d ed. 1920) § 354.

cifically stated that the provision was one for liquidated damages, the decision for the plaintiff would have appeared to have been based merely upon a recognition of the term of the conveyance whereby the grantee, purchasing the surface rights with the grantor reserving the minerals, waived his right to support. In fact, the court expressly observed at one point that such a waiver had occurred, quoting American Jurisprudence to the effect that: "The waiver of surface support may be inferred from the terms of the grant or reservation of the minerals, as where it contains an agreement to pay for damages to the surface."[6] But though this seems to have been stated as a rule of Real Property law, it followed immediately after the court's assertion that the deed provided for *liquidated damages* for injuries to the surface.

Upon further examination of the situation involved, however, there seems to be no reason why the liquidated damages concept can not be appropriately fitted into the case. It is true that such damages provisions are more typically found in the type of contract in which services are to be rendered in return for payment of money, and that the rules of law concerning these damages have largely been evolved from cases arising out of such contracts. But in a land sale such as led to the principal case, a contract may be involved which is capable of including a liquidated damages agreement: A conveys surface land to B for consideration. As an implied term of this contract, A has the duty to give support to B's surface estate, and for the breach of this duty, A would be liable to B for damages. To pre-estimate the extent of this liability, the parties may agree upon liquidated damages.[7]

If this was the manner in which the court viewed the case, the result reached is open to question. The immediate import of the decision is that defendant's only right in regard to surface support is to recover the liquidated damages agreed upon. This is to say that the promisee in a liquidated damages agreement is precluded from any form of remedy or relief against the promisor for breach of the contract containing the agreement, except the recovery of the amount specified in the contract. No such general rule of damages law is authorized by the decided cases. Rather, the promisee has often been granted the alternative relief of (1) recovery of actual damages, (2) a

[6] 231 Iowa 240, 1 N. W. (2d) 262, 266 (1941) citing 36 Am. Jur. 408.

[7] Of course, in the principal case the surface estate was *reserved* in a conveyance of the mineral rights, but the principle is the same, the plaintiff Jensen being in the position of A, owner of the mineral estate, and the defendant Sheker being in the position of B, owner of the surface estate.

decree of specific performance, (3) an injunction against the promisor's threatened breach.

In regard to the recovery of actual damages, it is familiar law that the *promisor* may avoid paying the specified "liquidated damages" if the sum set is so unreasonably in excess of the actual damages that the provision is branded a "penalty" intended to secure performance. Such a penalty will not be enforced by the courts, and the parties are left with the usual remedy of actual damages.[8] The converse of this situation also sometimes occurs (though by no means as frequently), and where the liquidated damages set are unreasonably low, the courts may allow the *promisee* to repudiate the agreement and sue to recover the actual damages. Thus a New Jersey court declared:

> The " . . liquidated damages would be unconscionable. The plaintiff not only paid the full consideration of $2,000 for the conveyance, but also search fees, taxes and assessments upon the property. He also lost the profits of the sale of the property. Seven hundred dollars for these damages would be inadequate and inequitable. The real damages were readily ascertainable. With the law favoring indemnity we feel that the trial court ruled properly . " in granting actual damages.[9]

Of course, this possibility is only presented in "disproportion" cases, for otherwise the liquidated damages effect substantial justice. Actual damages may be given on a somewhat different basis, however—where in an equity suit for some other form of relief, damages may be given instead of or in addition to the relief sought.[10]

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[8]McCormick, Damages (1935) 613-4; Electrical Products Consolidated v. Sweet, 83 F. (2d) 6 (C. C. A. 10th, 1936); May v. Young, 125 Conn. 1, 2 A (2d) 385 (1938); Jeffries v. Lesh, 195 Ind. 503, 144 N. E. 881 (1924); Collier v. Betterton, 87 Tex. 440, 29 S. W. 467 (1895); 25 C. J. S. 704, and many cases there cited.

[9]Bonhard v. Gindin, 104 N. J. L. 599, 142 Atl. 52, 54-5 (1928). Notice that this case allows actual damages on a disproportion ratio of about 3 to 1. An English court held that, while called a "penalty" in the contract, the sum was liquidated damages and the promisees were not allowed to claim their actual damages—ten times the amount agreed upon. Widnes Foundry Ltd. v. Cellulose Acetate Silk Co. Ltd. [1931] 2 K. B. 393, aff'd, [1933] A. C. 20.

Also recognizing the promisee's right to recover actual damages where the liquidated sum has been set too low: Brown-Crummer Co. v. W M. Rice Construction Co., 285 Fed. 673 (C. C. A. 5th, 1923); Pengra v. Wheeler, 24 Ore. 532, 34 Pac. 354 (1893); McCelvy v. Bell, 6 S. W. (2d) 390 (Tex. Civ. App. 1928). See 17 C. J. 945-6; 25 C. J. S. 673; 15 Am. Jur. 683, and cases cited therein. McCormick, Damages (1935) 613 states that the promisee cannot recover more than the liquidated amount even though the actual damages are greater; but the case cited as authority is not a holding in point, and the dictum contained in the cited case is in no way upheld by the decision which was supposed to support it.

[10](1924) 31 A. L. R. 1174. See notes 17 and 18, infra.

A general prerequisite to obtaining relief by enforcing specific performance of the contract obligation, is, of course, a showing that the remedy at law is inadequate. Thus, if a recovery either of the liquidated damages or of the actual damages will compensate the promisee fully for the promisor's breach of contract, equity will not grant its extraordinary form of relief.[11] But if the case is otherwise one which calls for this relief, the presence of a liquidated damages provision does not affect the power or inclination of equity to grant specific performance.[12] The typical case in which this question is presented involves a contract for the sale of land with a provision for the forfeiture of the part of the price paid and a termination of the contract, if the vendee defaults in the payment of installments of the purchase price; the vendor is allowed to elect to enforce specific performance rather than to rely on the liquidated damages forfeiture agreement.[13] Where the provision for stipulated damages is termed a "penalty," it is clear that equity's specific performance power is not affected,[14] inasmuch as the

[11]McCormick, Damages (1935) 613-4.

[12]Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. (N. S.) 210 (1905); Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282 (1885); Tobacco Growers' Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174 (1923); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808, 32 A. L. R. 578 (1922). And other cases cited note 13, infra.

The opposite result is sometimes reached on the basis of an interpretation of the contract as giving the promisor an option either to perform the principal obligation of the contract or to default and pay liquidated damages. Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913); Gilman v. Murphy, 21 A. (2d) 272 (R. I. 1941); Moss & Raley v. Wren, 102 Tex. 567, 120 S. W. 847 (1909). Where the parties have actually intended to provide such an option, such decisions are of course entirely sound. But the serious danger arises here, as in other situations in which alternative performance contracts are found (see discussion in this comment, infra), that the courts will find an option from the mere existence of a liquidated damages provision. The opinions seldom give any convincing indication of the basis for finding an option to exist but merely declare that such is a fact (see Moss & Raley v. Wren, supra), and one leading authority has flatly declared that the inclusion of a true liquidated damages provision (as distinguished from a penalty) makes the contract one for alternative performances. 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 447. This is such an unfortunate mistatement that the editor of the later edition of this work has thought it necessary to make a footnote qualification of the proposition stated in the text. This qualification makes the very proper observance that some liquidated damages provisions do not give options of performance, but merely stipulate the amount of damages recoverable for a breach of the contract; and in these situations, the damages agreement does not affect the specific performance remedy. Pomeroy, § 447, (a), pp. 851-3. For clearer thought in this respect, see Koch v. Streuter and Asia Inv. Co. v. Levin, supra.

[13]Stewart v. Griffith, 217 U. S. 323, 30 S. Ct. 528, 5 L. ed. 782, 19 Ann. Cas. 689 (1910); Dana v. St. Paul Inv. Co., 42 Minn. 194, 44 N. W. 55 (1889); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808, 32 A. L. R. 578 (1922).

[14]See 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 446.

penalty is null and void, and the contract stands as if that clause had never been included.

Injunctive relief may also be allowed in spite of the existence of a liquidated damages clause in the contract, where the legal remedy is inadequate.[15] The usual case in which the promisee seeks an injunction arises where the promisor has sold his business, with a convenant that he will not re-enter the same kind of business in the locality, this promise being accompanied by a liquidated damages agreement; if the recovery of damages at law would not give the promisee a sufficient remedy, equity will restrain the vendor from entering into competition with his vendee.[16] In view of the negative character of an injunction, damages may be granted by the equity court which, once it acquires jurisdiction through a prayer for equitable relief, can provide for a complete remedy.[17] The damages given are for injuries occurring before the injunction is given, and are the actual ones.[18] But the promisee is not entitled to both an injunction and the enforcement of the liquidated damages provision, as that would give him a double remedy.[19]

Three different types of relief have been granted in the same case under Co-operative Marketing Acts, wherein equity has granted

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[15]Atlantic Refining Co. v. Kelly, 107 N. J. Eq. 27, 151 Atl. 600 (1930), (1931) 4 So. Calif. L. Rev. 322; McCormick, Damages (1935) 613; Note (1930) 4 U. of Cin. L. Rev. 482, 484; and cases cited in note 16, infra.

[16]McCurry v. Gibson, 108 Ala. 451, 18 So. 806 (1895); Busk v. F. Wolf & Co., 143 Ga. 18, 84 S. E. 63 (1915); Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 Atl. 845 (1904); Wills v. Forester, 140 Mo. App. 321, 124 S. W 1090 (1910); Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N. Y. 214, 192 N. E. 297 (1914); Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161 (1917); General Accident Assur. Corp. v. Noel [1902] 1 K. B. 377, 86 L. T. 555, 18 T. L. R. 164.

Here, again, no injunction will be granted if the contract is held to provide for an alternative of performance by the promisor—to perform the principal obligation or to default and pay liquidated damages. However, the courts seem to be less inclined to find such options in this type of contract including a negative convenant and liquidated damages agreement. See cases cited above. Also, here as in the cases of specific performances, if the stipulated damages are held to be a penalty, the right to injunctive relief is not affected. 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 446.

[17]Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N. Y. 214, 192 N. E. 297 (1934); (1924) 31 A. L. R. 1174.

[18]Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N. Y. 214, 192 N. E. 297 (1934); Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161 (1917); Note (1930) 4 U. of Cin. L. Rev. 482, 486.

[19]Solomon v. Diefenthal, 46 La. Ann. 897, 15 So. 183 (1894); Wirth & Hamid Fair Booking, Inc. v. Wirth, 265 N. Y. 214, 192 N. E. 297 (1934); General Accident Assur. Corp. v. Noel [1902] 1 K. B. 377, 86 L. T. 555, 18 T. L. R. 164.

liquidated damages for cotton already sold contrary to the agreement, an injunction to prevent further breaches, and specific performance for delivery of remaining cotton in fulfillment of the co-operative contract agreement.[20] The threat of irreparable injury to the co-operative, if its bargaining power should be lost through having no control over sales by members, was the basis for the latter two remedies.

Qualifying the right to any of the remedies discussed above however, is the reservation that if the liquidated damages provision is construed as setting up an "alternative to performance" of the principal obligation of the contract, then the promisor has an option to perform or pay damages—that being the intention of the parties as found by the court in construing the contract.[21] Obviously, if the promisee has agreed that the promisor may either perform the principal obligation contracted for *or* refuse to perform and pay the stipulated damages, the promisor, after breach, is merely relying on a contract right in insisting that the promisee can have only liquidated damages.[22] Once the contract is found to contain an alternative to performance, the result follows easily; but a very real difficulty arises in identifying alternative performance agreements.

As a general proposition, a person does not have a *right* to breach a contract—i.e. to pay damages instead of performing—although he may have the *power* to do so.[23] A liquidated damages provision merely has the effect of a pre-estimation by the parties of damages which are likely to flow from the promisor's breach of contract and an agreement that these shall be the damages collectible by the promisee if there is a breach of contract.[24] This must not be a penalty to force the

[20]Brown v. Staple Cotton Co-operative Ass'n, 132 Miss. 859, 96 So. 849 (1923). See also Tobacco Growers' Co-operative Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231 (1923). Since the liquidated damages were measured according to the pounds of cotton illegally sold, the damages provision could be enforced as to the cotton already sold, not extending to threatened future sales which were prohibited by the injunction. Thus, the case is like those which allowed the recovery of actual damages occurring up to the time of the injunction. There is no element of double recovery, as would be true if a liquidated damages term providing for a single sum for a complete breach were enforced.

[21]Gilman v. Murphy, 21 A. (2d) 272 (R. I. 1941), and other cases cited in notes 12 and 16, supra; 15 Am. Jur. 688; 25 C. J. S. 694-5.

[22]Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913); Moss & Raley v. Wren, 102 Tex. 567, 120 S. W. 847 (1909).

[23] 1 Williston, Contracts (rev. ed. 1936) § 130A.

[24]Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161, 163 (1917); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808, 810 (1922); McCormick, Damages (1935) § 146.

promisor to perform, for penalties are invalid.[25] Evidently it is not supposed to be for the purpose of limiting absolutely the promisor's liability for a breach, for if it were, courts could never give a plaintiff actual damages in excess of liquidated damages. The purpose and effect of such a provision is merely to help the parties settle the extent of liability for a possible future breach without resort to litigation to try the issue of the extent of the damages. This being the purpose and theory of a liquidated damages provision, it seems entirely unreasonable to say that a *right* is created in the promisor to breach the principal obligation of the contract, no such *right* existing in the absence of a damages agreement. It is conceded that parties *can* contract for a right or option in the promisor not to perform his contract and to pay damages instead, but cases finding this extraordinary force in the mere presence of a liquidated damage provision are of very questionable validity. Something more than a simple pre-estimation of damages is necessary to show that the parties intended to provide for an alternative to performance.[26]

Though the Iowa court in the principal case did not expressly consider the agreement as one for alternative performance, the decision may be explained on that theory. If the clause in question was a true liquidated damages provision, as the court asserted it was, and if the promisee was restricted to the sole remedy of collecting the specified damages, then the court must have regarded the promisor's duty of performance to be either to give surface support or to pay the specified damages for failure to give support. Yet there is no expression or implication in the words of the contract by which the parties indicated any intention to contract on such a basis. The deed shows merely a pre-estimation of damages for the grantee's possible future failure to give surface support.

If the courts insist upon attaching to the mere act of inserting a liquidated damages provision in a contract, the fundamentally impertinent intention of limiting the promisee to the remedy of recovering the stipulated amount,[27] the ultimate result can only be to destroy

[25]McCormick, Damages (1935) § 146; 25 C. J. S. 651, 654-5; 15 Am. Jur. 672.

[26]Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049 at 1051 (1905); Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 160 at 163 (1917); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808 at 810 (1922); 25 C. J. S. 695.

[27]No worse example of this lamentable practice can be found than that appearing in 1 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 447, where the very inclusion of a liquidated damages provision is accepted as a stipulation for alternatives of performance.

the use of such provisions by contracting parties. For the advantages to be gained by the promisee from an advance agreement of the amount of damages are not sufficient to balance his loss of possible future rights to seek specific performance, injunctive relief, or actual damages. Thus, the commendable procedure of entering agreements to avoid the future litigation of claims for damages for breach of contract will be doomed by the action of the very courts which are benefitted by such agreements.

PAUL D. BROWN*

DOMESTIC RELATIONS—POWER OF EQUITY TO GRANT ALIMONY WITHOUT DIVORCE. [Virginia]

By its decision in the recent case of *Heflin v. Heflin*[1] the Supreme Court of Appeals of Virginia reaffirmed the inherent jurisdiction of equity in Virginia to entertain a suit for alimony independent of any action for divorce[2], and declared that the divorce statutes have not impaired or abridged such jurisdiction. In this case the wife, after being deserted and abandoned by her husband, filed a bill in equity praying that she be granted alimony and counsel fees, but not asking for a divorce. The court entered an order on her behalf compelling the husband to pay her counsel fees and $250 per month alimony. The husband paid the counsel fees but after several years became in arrears in payment of the alimony. The wife then filed a petition asking that her husband be adjudged in contempt of court for failure to comply with the order. The husband made a motion that both the original and the present petition be dismissed on the ground that equity has no jurisdiction to entertain a bill for alimony without a prayer for divorce.[3] The lower court sustained the motion of the husband but its decision was reversed on appeal.

*Written in collaboration with the editors.

[1]177 Va. 384, 14 S. E. (2d) 317 (1941).

[2]"Alimony in its strict sense is confined to an allowance made to a wife who is legally separated or divorced from her husband but in many jurisdictions courts have authority to make an allowance to a wife who is living separate and apart from her husband, without being legally separated or divorced; and this allowance has come to be known as alimony, although it is often called separate maintenance." Dyer v. Dyer, 213 N. C. 620, 194 S. E. 278, 280 (1937), quoting 19 C. J. 203. See 3 Words and Phrases (Perm. Ed. 1940) 130.

[3]The motion contended that the exclusive original jurisdiction was in the juvenile and domestic relations court. See note 21, infra.

The doctrine of the principal case is of purely American origin.[4] In England, the weight of opinion was that neither the ecclesiastical courts nor the courts of equity had the power to award alimony in an independent action for that purpose.[5] In this country the majority of early decisions followed the English view in relation to equity and denied its jurisdiction in these cases.[6] This view is well demonstrated in an Indiana decision of 1825 in which it was held that the granting of alimony is incidental to the divorce and that the court which decrees the divorce must also make provision for the alimony.[7] The Indiana court went on to declare that if the court granting the divorce failed to provide for the wife's alimony, there was no authority either in the acts of assembly or in the English books which empowered any other court to remedy the omission. The few early decisions[8] holding that equity should have jurisdiction, were criticized by Bishop,[9] who understood these courts to assume jurisdiction merely because of the absence of ecclesiastical tribunals in this country. He regarded this as an unsound basis for the power, because the ecclesiastical courts in England did not in fact have such jurisdiction.[10] But thorough analysis of these cases indicates that Bishop was arguing on a false premise, because the reason given by the courts for their assumption of jurisdiction was not that they were substituting for the ecclesiastical courts but rather that there was no adequate remedy at law.[11]

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[4]See Note (1901) 77 Am. St. Rep. 228; 27 Am. Jur. 10.

[5]The English rule was well summed up by Lord Loughborough in Ball v. Montgomery, 2 Ves. Jun. 191, 195, 30 Eng. Rep. 588 (1793) as follows: I "take it to be now the established law, that no court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter, that she becomes entitled to a separate provision." For further discussion of the English rule see Note (1901) 77 Am. St. Rep. 228; 2 Story, Equity Jurisprudence (12th ed. 1877) § 1422.

[6]See McGee v. McGee, 10 Ga. 477 (1851); Chapman v. Chapman, 13 Ind. 296 (1859); Yule v. Yule, 10 N. J. Eq. 138 (1854); Griffin v. Griffin, 47 N. Y. 134, 141 (1872). For a compiled list of cases holding that equity has no such inherent power, see Note (1912) 38 L. R. A. (N. S.) 963, n. IV

[7]Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251 (Ind. 1825).

[8]See Gloner v. Gloner, 16 Ala. 440 (1849); Galland v. Galland, 38 Cal. 265 (1869); Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525 (1873); Butler v. Butler, 4 Litt. 201 (Ky. 1823); Garland v. Garland, 50 Miss. 694 (1874); Purcell v. Purcell, 4 Hen. & M. 507 (Va. 1810); Almond v. Almond, 4 Rand. 662, 15 Am. Dec. 781 (Va. 1826).

[9] 1 Bishop, Marriage, Divorce and Separation (1891) §§ 1393-4.

[10]See note 5, supra.

[11]See note 8, supra, for cases; for a discussion see Robinson, Alimony without Divorce (1914) 2 Va. L. Rev. 134.

The Virginia case of *Purcell v. Purcell*[12] was one of the earliest decisions in America holding that a court of equity could grant alimony apart from divorce. In this case the wife had been deserted without misbehavior on her part and had been left to depend on charity for subsistence, while her husband enjoyed a very considerable estate. The Chancellor reasoned, "... that in every well regulated government there must somewhere exist a power of affording a remedy where the law affords none; and this peculiarly belongs to a Court of Equity; and as husband and wife are considered as one person in law, it is evident, that in this case the law can afford no remedy; which is universally admitted to be a sufficient ground to give this court jurisdiction."[13] It was concluded, therefore, that equity should have jurisdiction as a matter of policy, since there was no adequate remedy at law.[14]

In circumstances in which a wife has been deserted by her husband and yet does not want to institute divorce proceedings, the law recognizes her rights to the extent of giving her the remedy of obtaining necessaries on his liability.[15] But this remedy is inadequate,[16] not only because the wife should not be limited to bare necessities, but also because it will often give rise to a multiplicity of law suits, since each person furnishing the wife with supplies must, if the husband refuses to pay, bring separate actions to recover therefor. Few business men are willing to enter voluntarily into transactions in which the probability of having to sue for payment is strong, and if the wife's sole remedy is her right to get necessaries on the credit of

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[12]4 Hen. & M. 507 (Va. 1810).

[13]4 Hen. & M. 507, 511 (Va. 1810).

[14]Following this case was Almond v. Almond, 4 Rand. 662, 15 Am. Dec. 781, 782-5 (Va. 1826) which discussed this issue at great length in its dictum. This case also asserted that the wife's remedy at law was inadequate and that unquestionably the arm of chancery should be stretched out to protect her.

[15]See Graves v. Graves, 36 Iowa 310, 313, 14 Am. Rep. 525 (1873); Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 967, 16 L. R. A. 94, 96, 33 Am. St. Rep. 557, 558 (1892); Bueter v. Bueter, 1 S. D. 94, 45 N. W. 208, 210, 8 L. R. A. 562, 564 (1890); Lang v. Lang, 70 W. Va. 206, 207, 73 S. E. 716, 717, 38 L. R. A. (N. S.) 950, 953 (1912); 27 Am. Jur. 10.

[16]See In Re Popejoy, 26 Colo. 32, 55 Pac. 1083, 1084, 77 Am. St. Rep. 222, 225 (1899); Baier v. Baier, 91 Minn. 165, 97 N. W. 671, 673 (1903); Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 968, 16 L. R. A. 94, 97, 33 Am. St. Rep. 557, 559 (1892); Milliron v. Milliron, 9 S. D. 181, 68 N. W. 286, 287, 62 Am. St. Rep. 863, 864 (1896); Bueter v. Bueter, 1 S. D. 94, 45 N. W. 208, 210, 8 L. R. A. 563, 564 (1890); Lang v. Lang, 70 W. Va. 205, 208, 73 S. E. 716, 717, 38 L. R. A. (N. S.) 950, 953 (1912). For a further discussion see Note, Separate Maintenance in Iowa (1938) 24 Iowa L. Rev. 137.

her husband, it is indeed a very inadequate, uncertain, and humiliating one. In view of the deficiencies of legal relief, if equity is not allowed to give alimony without an accompanying divorce the resulting situation will stand in conflict with a strong social policy which demands that divorce not be encouraged—for a wife who has respected the marriage vows may be driven by privation in some cases to release the husband from the bonds of matrimony by applying for a divorce in order to obtain relief from penury and want.[17]

In the *Heflin* case it was argued for the husband that the Virginia divorce statutes and desertion and non-support legislation had superseded any jurisdiction which equity may ever have had in these cases.[18] But the wife's right to sue for alimony without asking for a divorce was recognized before the divorce statutes were passed, and those statutes contain no provisions purporting to abrogate such right. Rather, they make it possible for the wife to obtain a divorce, something entirely different from obtaining independent alimony. The mere granting of this different form of relief should not be held to exclude the right already established, and the Virginia courts have not in earlier cases found that the divorce statutes were intended to deprive equity of the power to grant alimony without divorce.[19] Such

[17]"In abandoning the wife without good cause, and refusing to support her, the husband violates a legal duty and commits a breach of contract, which entitles the wife to redress, either by divorce, or to the enforcement of the marriage contract by compelling restitution of conjugal rights to the extent of maintenance, at her option. If she chooses the latter she ought not to be starved into the former, for that would force her to abandon the marriage contract against her will." Garland v. Garland, 50 Miss. 694, 716 (1874). See Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557 (1892).

[18]Counsel relied on the dictum of Kiser v. Kiser, 108 Va. 730, 734, 62 S. E. 936, 938 (1908) for their argument. In dictum the court said that as courts had been authorized to grant divorces, statute law is to be looked on as the sole foundation of jurisdiction of alimony to be exercised in proceedings for divorce. In other words the court construed the statute as only allowing alimony as an incident to a divorce. The dictum in this case has been greatly weakened by the subsequent Virginia cases of Bray v. Landergren, 161 Va. 699, 172 S. E. 252 (1934) and Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930).

For reference to divorce statutes see Va. Code Ann. (Michie, 1936) § 5100 et seq.

[19]The following Virginia cases decided since the passage of the divorce statutes in 1827, held that equity had jurisdiction. Gray v. Landergren, 161 Va. 699, 172 S. E. 252 (1934); Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930); Francis v. Francis, 31 Grat. 283 (Va. 1879); Latham v. Latham, 30 Grat. 307 (Va. 1878). See also Va. Code Ann. (Michie, 1936) § 5111, II B 2. For cases from other jurisdictions see Galland v. Galland, 38 Cal. 265 (1869); Sauvageau v. Sauvageau, 59 Idaho 190, 81 P (2d) 731 (1938); Johnston v. Johnston, 182 Miss. 1, 179 So. 853 (1938); Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. (N. S.) 94 (1892). For a compiled list of cases, see Note (1912) 38 L. R. A. (N. S.) 954, n. III.

a construction of the legislative intent would compel an abandoned wife, who is without fault, to seek a divorce before she could get relief. An early South Dakota case in discussing why a wife should not be compelled to seek a divorce reasoned that "There may be abundant reasons, controlling with her, and which the law ought to respect, why she does not want a divorce. There may be objections in conscience,—a vital and unyielding principle and rule of her religion. She may unselfishly desire to avoid a public notoriety and scandal that would involve her children, or she may still have such affection for, and faith in, her husband as will feed the hope of his reformation and their reconciliation,—reasons, all of them, which the law ought not to ignore or disrespect. The husband owing this duty of maintenance to the wife, we perceive no good reason why she may not, independent of any other ground, maintain an action against him for its enforcement."[20]

The desertion and non-support statutes give the juvenile and domestic relations court jurisdiction to fine the derelict husband for a misdemeanor.[21] While this legislation furnishes an additional remedy by providing criminal punishment for the husband, no civil relief is afforded the wife and thus no adequate remedy at law is given to her. The need for the equitable relief of alimony without divorce remains.

Even assuming that the divorce or non-support statutes do give the wife an adequate remedy outside the usual processes of equity, they should not deprive courts of equity of authority which comes within the scope of their elementary jurisdiction. As a general proposition, where courts of equity have a certain jurisdiction before the enactment of a statute, they still retain their jurisdiction although the statute may furnish a complete and adequate remedy at law, unless the statute giving such legal remedy expressly abrogates or restricts the pre-existing jurisdiction of equity.[22]

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[20]Bueter v. Bueter, 1 S. D. 94, 45 N. W. 208, 211, 8 L. R. A. 562, 566 (1890). See also 27 Am. Jur. 11.

[21]Va. Code Ann. (Michie, 1936) § 1936 provides that "Any husband who shall without just cause, desert . or fail to .. support .. his wife . shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not exceeding five hundred dollars." Section 1937 provides that all cases arising under this act shall be tried in the juvenile and domestic relations court. ("Shall have original exclusive jurisdiction"). But compare Va. Code Ann. (Michie, 1936) § 5111, II B 2.

[22]See Labodie v. Hewitt, 85 Ill. 341 (1877); Dysart v. Crow, 170 Mo. 275, 70 S. W. 689, 690 (1902); Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040, 1045 (1891); Filler v. Tyler, 91 Va. 458, 22 S. E. 235 (1895). See also Lile, Notes on Equity Jurisprudence (1922) 10-11; McClintock, Equity (1936) § 47.

Referring to the holding of the *Purcell* decision,[23] Mr. Justice Story remarked that " . . there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted."[24] It appears that this wish has become largely fulfilled, despite the lack of historical basis for the rule and the various criticisms directed against it. The reasoning which was in a great part originated and developed by the Virginia courts and which sustained the decision in the principal case, has been the basis for the recognition in many states of this socially important power of equity. Today, equity's jurisdiction to award alimony without a divorce is recognized in almost all of the American jurisdictions, either by statute or by modern decisions.[25]

LESTER L. DILLARD*

MORTGAGES—RIGHT OF ONE OF MORTGAGOR'S HEIRS TO REDEEM ENTIRE MORTGAGED PREMISES AFTER FORECLOSURE IN WHICH HE WAS NOT JOINED. [Arkansas]

Although the law of mortgages differs widely among the various jurisdictions, one point of common agreement lies in the rule regarding joinder of parties in an action to foreclose. As a general statement of law, the rights of a person having an interest in the mortgaged land are not affected by foreclosure proceedings in which that person is not made a party.[1] The basis for this rule is that the mortgagor and all claiming under him have an equitable right to redeem the mortgaged premises at any time prior to foreclosure. Since the foreclosure proceeding in equity is designed to cut off this equity of redemption, the courts will not permit an interested party to be divested of his rights without being given an opportunity to contest the claim of the mortgagee.

With the exception of few rather specific limitations,[2] the effect of

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[23] 4 Hen. & M. 507 (Va. 1810).

[24] 2 Story, Equity Jurisprudence (12th ed. 1877) § 1423A.

[25] There appear to be only three states, Arkansas, Louisiana, and Texas, which have unimpeached decisions holding that equity does not have such jurisdiction, while in Delaware no decision has been found either for or against this doctrine. See 2 Vernier, American Family Laws (1932) § 139, p. 472.

* Written in collaboration with the Editors.

[1] 2 Jones, Mortgages (8th ed. 1928) § 1342; Walsh, Mortgages (1934) § 68.

[2] Prior mortgagee has no right to redeem a subsequent mortgage, Goodman v. White, 26 Conn. 317 (1857); one who has obtained an interest in land pending foreclosure has no right to redeem, Cook v. Manicios, 5 Johns. Ch. 89 (N. Y. 1821);

this rule is fairly well established in all jurisdictions, but occasionally an unusual situation arises which requires a new adjudication in regard to the operation of the principle. Such is the recent Arkansas case of *Parker et al. v. Dendy et al.*[3] The mortgagor of the premises in question died without having redeemed his land, and the mortgagee proceeded to foreclose, but in so doing failed to provide an infant heir of the mortgagor with proper notice as required by law. Four years after the completion of this foreclosure proceeding, the unjoined heir brought suit to redeem the land. That he had an equity of redemption was not in dispute, inasmuch as the mortgagee admitted that the foreclosure was invalid as to the heir. The sole problem involved was the determination of the amount of land subject to this outstanding equity of redemption. The heir claimed the right to redeem the entire premises for the benefit of himself and the other heirs as co-tenants, in spite of the fact that all of the other heirs had lost all right to redeem.[4] The mortgagee insisted that the heir could redeem only his proportionate part of the land inheritance, which amounted to only one-sixty-fourth of the 95 acres covered by the mortgage.

Four previous Arkansas decisions were cited as authority, two by each of the litigants.[5] The majority of the court reached the conclusion

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junior mortgagee may be estopped by promising not to redeem, Fay v. Valentine, 12 Pick. 40, 22 Am. Dec. 397 (Mass. 1831); junior mortgagee who after being made a party permits first mortgagee to foreclose without asserting his rights, cannot redeem, Mansfield v. Kilgore, 86 Neb. 452, 125 N. W. 1078 (1910); mortgagor may consent in writing that sale may be free from restrictions, King v. King, 215 Ill. 100, 74 N. E. 89 (1905).

[3] 157 S. W. (2d) 48 (Ark. 1941).

[4] In view of the fact that the heir's case rested entirely on his ability to show that his equity of redemption had not been affected by the foreclosure proceedings against the other heirs, it would seem that the heir chose an inapt way of stating his prayer for relief. There was no necessity of joining the other heirs in this action, and by so doing he immediately invited consideration of his personal rights in conjunction with the fact that a decision for the plaintiff would necessarily enable these other heirs to share in the disposition of the property. Had the heir sued in his name alone, he might have had a better chance of convincing the court of the merits of his contentions.

[5] Baker v. Boyd, 196 Ark. 563, 119 S. W. (2d) 524 (1938) (Part of the land was misdescribed in foreclosure proceedings at which the heir was not properly represented. A suit to reform the former decree was contested by the heir. The court held that the heir could redeem by paying the whole indebtedness, including the land correctly described in the first decree. Moreover, the fact that other heirs were estopped from redeeming had no effect on this heir's equity of redemption.); Norris v. Scroggins, 175 Ark. 50, 297 S. W. 1022 (1927) (Trustee violated the terms of the agreement in selling the land. Court held the proceeding ineffectual against the minor heirs who could redeem for themselves and the other

that only those cases cited by the mortgagee were applicable.[6] Therefore, the court ruled that the heir could redeem only his proportionate part of the property. Three judges, however, dissented vigorously on the ground that the cases cited by the heir were such precedent as to require a decision in his favor.[7]

In reaching its decision, the majority placed considerable emphasis on the fact that all of the other heirs were barred from redeeming the land, due to the foreclosure, which was valid as to them, and due to the operation of an Arkansas statute regulating redemption after foreclosure.[8] This seems to indicate that the court permitted its aversion to helping the other heirs blind it to the real issues involved. The court stated at the very beginning of the decision: "As to such infant not served with summons, his equity remains undisturbed; and, when ascertained, all of the rights originally inhering to the estate stand as though no action had been taken by the mortgagee."[9] Following such

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heirs as co-tenants, even though the other heirs were estopped from redeeming.); Rowland v. Griffin, 179 Ark. 421, 16 S. W. (2d) 457 (1929) (Plaintiff, who acquired one-eighth interest in the minerals of an 80 acre tract after the mortgage was given, was not joined in foreclosure proceedings. Court held that the plaintiff had no interest in the seven-eighths as to which the foreclosure was valid. Therefore, the plaintiff could only redeem his one-eighth unless the defendant refused to apportion his debt.); Pine Bluff, M. & N. O. Ry. Co. v. James, 54 Ark. 81, 15 S. W. 15 (1891) (The railroad purchased a strip of land which was part of a tract subject to the vendor's lien. At foreclosure proceedings all the land except that owned by the railroad was sold, the lienholder being the purchaser. The holder of the lien then proceeded against the railroad, and the railroad by cross-bill asserted the right to redeem the entire tract. It was held that the railroad only succeeded to the original vendee's interest and equity of redemption in the parcel purchased, not in the whole.).

[6]Rowland v. Griffin, 179 Ark. 421, 16 S. W. (2d) 457 (1929); Pine Bluff, M. & N. O. Ry. Co. v. James, 54 Ark. 81, 15 S. W 15 (1891).

[7]Baker v. Boyd, 196 Ark. 563, 119 S. W. (2d) 524 (1938); Norris v. Scroggins, 175 Ark. 50, 297 S. W 1022 (1927).

[8]Digest of Stats. of Ark. (1937) c. 114, § 9473.

The whole attitude of the court in this decision is illustrated by the following quotation: "The rule contended for, if sustained, would establish the precedent that sui juris defendants inheriting from a common source subject to debt, also infants similarly situated, and a widow who joined in her husband's mortgage or deed of trust, may stand by in respect of a decree to which they are parties without a defence, and after years have elapsed may join with a minor of whose existence neither they nor the mortgagee was aware, and supply the unserved minor with financial means for redemption in a proceeding against which any innocent purchaser is helpless.

"A rule so drastic would have the effect of making insecure property holdings acquired in the utmost good faith, and would render uncertain many titles based upon foreclosure and confirmation decrees." Parker et al. v. Dendy et al., 157 S. W. (2d) 48, 49 (1941).

[9]Parker et al. v. Dendy et al., 157 S. W (2d) 48, 49 (1941).

a declaration, it was to be expected that the court would undertake an examination of the heir's rights prior to the foreclosure. But it did not do so. The whole opinion is directed to the argument that the other heirs must not be given an unwarranted advantage. Though it must be admitted that to allow a redemption of the entire premises would in effect enable the other heirs to evade the consequences of foreclosure and the operation of the statute, it seems that this fact should have had no bearing on the question of the extent of the single unserved heir's equity of redemption.

In adopting the authority cited by the defendant as controlling, the majority neglected one distinction which was pointed out by the dissenting opinion—the rule of those cases was adopted in a situation in which the individual seeking to redeem had not had an equity of redemption *as to the whole mortgaged premises* prior to foreclosure. Rather, he was in the position of a purchaser of a divided part of the mortgaged premises, subject to the mortgage.[10] Even if it be assumed that it is proper to refuse redemption of the entire mortgaged premises under such circumstances, yet the same rule should not apply in the principal case, where the heir was in the position of a tenant-in-common, having an undivided interest in the whole. The heir was seeking to redeem the entire tract by exercising his equity of redemption in the whole. Such a distinction seems of sufficient importance to substantiate the contention of the dissenting judges that the cases adopted as controlling were actually not in point.

Having become fully convinced that the heir should not redeem all, the court attempted to discover some grounds on which to distinguish those cases cited on behalf of the plaintiff. In the process of discussing one of the cases, it was observed:

> "The Baker case, it will be seen, goes no further than to say that the mortgagee, prior to foreclosure, is only entitled to have his debt paid; and if a foreclosure, either under the power or by resort to chancery, is void, the minor stands in the position he occupied before the sale. He may pay the entire debt and redeem for all because, in legal contemplation, there has been no sale."[11]

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[10]Rowland v. Griffin, 179 Ark. 421, 16 S. W. (2d) 457 (1929); Pine Bluff, M. & N. O. Ry Co. v. James, 54 Ark. 81, 15 S. W. 15 (1891). In the Rowland case, the distinction is not so clearly acceptable because the person seeking to redeem was actually the owner of an undivided interest, as in the principal case. But as the dissent indicated, the Rowland decision was based on the precedent of the James case, and thus turned on a rule which did not fit the facts involved.

[11]Parker et al. v. Dendy et al., 157 S. W. (2d) 48, 50 (1941).

This very declaration would seem to point to the necessity of a decision opposite from the one reached. It is a frank admission that the heir has the right to redeem the entire premises under the facts of the *Baker* case. Upon examination, the only discoverable distinction between that case and the principal case lies in the fact that the foreclosure sale in the former was void as to all parties, while in the latter, it was void only as to the heir not joined.[12] The majority of the court seized upon this distinction as a valid reason for casting aside precedent.

Clearly, a foreclosure proceeding which is void even as to the parties joined can have no effect on an individual who should have been, but in fact was not joined. But two leading writers[13] make no distinction between the effect of such a totally void foreclosure and one which is valid as to all except the party not joined, and there is authority to support their statements to the effect that once an invalid sale has been repudiated, the status existing prior to the sale is restored.[14]

If these eminent authors are admitted to be authoritative, the problem resolves itself into the solution of one question: what were the rights of the heir prior to foreclosure?[15] Obviously, he had an equity of redemption. But this heir was not in the position of a sole owner. Instead he was one of many co-owners, a tenant-in-common. Authority is, for all practical purposes, nonexistent concerning redemption by an heir apart from his relationship as co-tenant, but the courts

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[12]In the Baker case, in addition to the failure to join one of the heirs, part of the land was misdescribed in the foreclosure proceedings, thereby rendering the decree void as to all parties involved. In the principal case, the only error lay in the failure to join one heir. However, the Baker case permitted the heir to redeem the land correctly described, on the theory that the heir's interest was in all the land—not merely the part misdescribed.

In the light of the facts as reported, there does not seem to be sufficient justification for the distinction drawn by the court in this case. However, it is quite conceivable that facts not appearing in the opinion may have made the claim for full redemption seem so essentially unfair that the court felt forced to take this stand. For example, had oil been discovered on this property during the time the mortgagee was in possession, it would seem most unfair to permit the heirs to reap the benefit.

[13] 2 Jones, Mortgages (8th ed. 1928) § 1342; Walsh, Mortgages (1934) § 68.

[14]Pitts v. American Freehold Land Mortgage Co., 157 Ala. 56, 47 So. 242 (1908); McCall v. Mash, 89 Ala. 487, 7 So. 770, 18 Am. St. Rep. 145 (1890).

[15]The court admitted that the case rested basically on the solution of this problem. However, it never got around to a discussion of this issue. Instead, it concentrated its attention on the fact that granting the heir the relief sought would necessitate aiding the other heirs to recover their shares.

have frequently faced the problem of redemption by a co-tenant. In these cases it is unequivocally declared that the mortgagee has the right to insist that the co-tenant seeking to redeem must pay the entire debt as a condition to his right to redeem.[16] The usual case arises when the co-tenant wishes to lift the encumbrance from part of the land by merely paying his share.[17] The courts, however, have not made it clear whether this right to insist on full payment is a mere option on the part of the mortgagee or an absolute condition to redemption by a co-tenant—a right which can be invoked by either party. By the implication of this case, the Arkansas court has decided that it is an option. However, the leading text writers are so emphatic in their insistence that the redeeming co-tenant must redeem all or none,[18] and their statements are so well substantiated[19] that, even though the normal case involves an attempt on the part of the co-tenant to avoid full payment, there is no indication that a different rule was intended to cover the present case. In fact, such a possibility seems clearly negated by the statement that the rule is that one co-tenant cannot redeem his share only of the estate because this would violate the principle that a mortgage must be redeemed as a whole or not at all.[20]

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[16]McQueen v. Whetstone, 127 Ala. 417, 30 So. 548 (1900); Lyon v. Robbins, 45 Conn. 513, 524 (1878); Calkins v. Munsel, 2 Root 333 (Conn. 1796); Taylor v. Porter, 7 Mass. 354 (1811); Harding v. Gillett, 25 Okla. 199, 107 Pac. 665 (1909).

[17]Similar questions frequently arise concerning junior lienholders. In many cases the first mortgage covers an entire tract of land and the second mortgage covers only a sub-division of the larger tract. In such cases it would be advantageous to the second mortgagee to redeem as to that share of land covered by his mortgage. This would raise his lien to a first mortgage without the necessity of paying off the entire first mortgage debt which in most cases involves a much greater amount than the second mortgage. In nearly all cases the courts have held that the junior lienholder must redeem all or none: Moor v. Dawson, 13 Del. Ch. 98, 115 Atl. 589 (1921); Quinn Plumbing Co. v. New Miami Shores Corp., 100 Fla. 413, 129 So. 690 (1930); Fortune v. Barnhart, 199 Iowa 329, 200 N. W. 610 (1924). But it has been held in one jurisdiction that a junior mortgagee who was not made a party to the foreclosure proceedings by the first mortgagee could redeem his portion alone: Green v. Dixon, 9 Wis. 485 (1859). See also (1931) 25 Ill. L. Rev. 720.

Similarly, a widow of a deceased mortgagor often seeks to redeem her dower interest without paying the entire indebtedness. She may do so from one who, claiming under her husband, has redeemed the whole. But where she redeems directly, she must redeem the whole: Johns v. Anchors, 153 Ala. 498, 45 So. 218 (1907); Hiller v. Nelson, 118 S. W. 292 (Ky. App. 1909); McCabe v. Bellows, 7 Gray 46 (Mass. 1855); Chiswell v. Morris, 14 N. J. Eq. 101 (1861); Ross v. Boardman, 22 Hun 527 (N. Y. 1880).

[18]2 Jones, Mortgages (8th ed. 1928) § 1362; Walsh, Mortgages (1934) § 46.

[19]See cases cited, note 16, supra, and analagous cases discussed, note 17, supra.

[20]2 Jones, Mortgages (8th ed. 1928) § 1362, citing Powell on Mortgages.

Since the usual case involves an attempt to avoid redemption of the entire mortgaged property, the rule requiring full redemption might appear to be designed primarily for the protection of the mortgagee. Then why not permit him to require full payment or partial payment as he sees fit? The answer to this difficult question lies in the nature of the mortgage transaction. Because his interest is merely security, the mortgagee, prior to foreclosure, is entitled to receive repayment of the debt and no more. If he receives payment, it is no concern of his who pays him, except that he can prevent the intermeddling of a mere volunteer. Anyone with any interest in the land (even a one-sixty-fourth undivided share) would not be a volunteer, because he has his own interest to protect. Therefore, the mortgagee should not be regarded as having an option to refuse full payment and full redemption from a part owner, because to allow him so to refuse would prevent one of the debtors from protecting his interest in the land. Thus, in spite of the lack of authority directly in point, the Arkansas court seems to have rendered a decision which is not only in conflict with the best authority in Arkansas, but of the United States as a whole.

For considerations of policy alone, a court might reasonably hesitate to permit full redemption by an individual in the position of this heir. This clearly seems to have been the force which motivated the majority of the Arkansas court in the principal case. There is the obvious objection that such a decision would permit the other heirs to circumvent the statute and enable them to acquire a windfall.[21] It is true that by their failure to act within the prescribed time they would have lost all chance of recovering their property except for the discovery of a procedural error. Yet they will not be in such a position as to acquire something for nothing. The redeeming co-tenant is subrogated to the position of the mortgagee and can hold the land for his own use unless the other co-tenants reimburse him for their proportionate part of the debt.[22] Nor does the mortgagee stand to lose any benefit to which he is entitled under his mortgage contract. He receives full payment of the debt with interest, and thereby the sole purpose of the mortgage is achieved. The position of a possible third-party purchaser at the foreclosure sale seems more difficult at first. But it is to be remembered that such a purchaser acquires the land with full realization that his title can be defeated at any time during the

[21]See note 8, supra.
[22]See cases cited, note 16, supra.

period allowed by the statute for redemption, and with the further realization that he bears the risk of a possible defect in the foreclosure proceedings. Therefore, he cannot be placed in the same category as an innocent purchaser without knowledge of possible defects in his title. And in the principal case, as will very often be true, the mortgagee himself was the purchaser. The heir stands to gain nothing more than protection of his interest. While his actual interest in this case amounted to only one-sixty-fourth, quite conceivable such a small plot of land amounting to less than one and one-half acres might be practically worthless, whereas an undivided interest in the whole might prove of much greater proportionate value.

With one exception, policy considerations do not demand that the heir be limited to a redemption of his share. The exception lies in the fact that if complete redemption is allowed, the spirit of the foreclosure remedy is violated—i.e., the desire to achieve stability of land titles. [23] However, the trend of the courts has been away from the idea of strict foreclosure, a fact evidenced by the passage of statutes permitting redemption after foreclosure and sale. Moreover, the law is not always consistent, and where two irreconcilable rights are in competition, it would seem to be in keeping with the best judicial procedure to follow the apparent logical operation of established rules of law, unless policy considerations stronger than those appearing here are involved.

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PARDON—EFFECT OF A PARDON FOR INNOCENCE ON THE OPERATION OF SECOND OFFENDER STATUTES. [New York]

The troublesome question of the legal effect of a pardon has continually arisen before the courts and has produced extended comment by many leading writers.[1] It is generally agreed that, while a pardon does not erase the fact of conviction from the judicial record, it does remove the legal consequences of conviction. Accordingly, it is recognized that a full pardon frees the convicted person from all further punishment for the pardoned offense, and ordinarily it is held

[23] See note 8, supra.

[1] Two of the most comprehensive articles in this field are: Williston, Does a Pardon Blot Out Guilt? (1915) 28 Harv. L. Rev. 647, and Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177.

to restore his right to vote,[2] to serve on a jury,[3] to testify as a witness,[4] and to hold office.[5] In short, a full pardon generally restores those civil rights which, in the absence of statute, are lost as a legal consequence of conviction for a felony. But the courts are in irreconcilable conflict in regard to the effect of a pardon on the operation of habitual criminal statutes which provide for increased penalties for second and third offenses. The issue is whether a full pardon blots out the defendant's guilt, thereby destroying any basis for the increased punishment provided for later offenses, or whether the fact of the former conviction remains, thus providing the basis for the more severe punishment for a later offense.

A limited number of the courts have held that such liability for additional punishment is merely a legal consequence of the former conviction, and hence is removed by a complete and unconditional pardon. The Supreme Court of Appeals of Virginia, in *Edwards v. Commonwealth*,[6] was the first to adopt this position. Yet the actual basis for the decision was nothing more than an ancient English case,[7] the statements of two English jurists,[8] and an extravagant dictum of the

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[2]In the Matter of the Executive Communication, 14 Fla. 318 (1872); Cowan v. Prowse, 93 Ky. 156, 19 S. W. 407 (1892); Jones v. Board of Registrars, 56 Miss. 766 (1879); Wood v. Fitzgerald, 3 Ore. 568 (1870).

[3]State ex rel. Collins v. Lewis, 111 La. 693, 35 So. 816 (1940); Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294 (1895); Puryear v. Commonwealth, 83 Va. 51, 1 S. E. 512 (1887).

[4]Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077 (1892); Werner v. State, 44 Ark. 122 (1884); People v. Bowen, 43 Cal. 439 (1872); Robertson v. Woodfork, 155 Ky. 206, 159 S. W. 793 (1913); State v. Kirchner, 23 Mo. App. 349 (1886); People v. Pease, 3 Johns. 333 (N. Y. 1803); Deihl v. Rodgers, 169 Pa. 316, 32 Atl. 424 (1895); Watson v. State, 90 Tex. Cr. R. 575, 237 S. W. 298 (1922).

[5]Admittedly, there is little authority on this question, but that which exists seems to agree that a pardon restores the right to hold office. Donham v. Gross, 210 Cal. 190, 290 Pac. 884 (1930); Hildreth v. Heath, 1 Ill. App. 82, 87 (1878); State v. Hazzard, 139 Wash. 487, 492, 247 Pac. 957, 959 (1926) (but pardon does not restore convicted person to office forfeited by conviction).

[6]78 Va. 39, 49 Am. Rep. 377 (1883).

[7]Cuddington v. Wilkins, Hob. 67, 81, 80 Eng. Rep. 216, 231 (1615). "Cuddington brought an action of the case against Wilkins, for calling him thief." The defendant pleaded truth to which the plaintiff replied by showing a pardon. The court held for the plaintiff on demurrer by the defendant to the replication, and stated that, though the plaintiff was a thief in the past, he at present was not, as the pardon "took away not only, poenam, but reatum, for felony is contra coronam dignitatem regis."

[8]See, 4 Blackstone's Commentaries (1825) 400: The effect of a "pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity." Also, 4 Haw-

United States Supreme Court in *Ex Parte Garland.*[9] The decision, therefore, finds practically no basis in the American precedent of that time.[10] Actually the court ignored what seems to have been the only American decision on this point, a Kentucky case which reached exactly the opposite result. Nevertheless, the courts of Ohio,[11] Texas,[12] Louisiana,[13] and Indiana[14] have since expressly adopted and followed the Virginia rule.[15]

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kins, Pleas of the Crown (7th ed. 1795) 354-5: " . . the pardon of a treason or felony even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him as it were a new man, and gives him a new capacity and credit." Reference was made to both of these authorities in Edwards v. Commonwealth, 78 Va. 39, 42, 49 Am. Rep. 377, 379 (1883).

[9] 71 U. S. (4 Wall.) 333, 380 (1866). "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. . . It releases the punishment and blots out of existence the guilt. . . It makes him, as it were, a new man, and gives him a new credit and capacity." The extreme breadth of the rule as stated made a federal circuit court bold enough to doubt that the Supreme Court actually meant what it seemed to say: In Re Spenser, 5 Sawy. 195, 199 (1878). Here, after quoting from Ex Parte Garland, the court observed: "And yet I do not suppose the opinion is to be understood as going to the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. . . . It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."

[10] After disposing of the dictum of Ex Parte Garland, this becomes apparent, for the only remaining authority is both ancient and English and is hardly applicable in America. This is true because a felony in England was *contra coronam dignitatum regis,* and this would furnish some ground for saying that the king's pardon removed both the consequences of conviction and the guilt itself. In the United States, however, felonies are committed against the state—not against the king—while pardons are issued by the executive. Hence, due to our difference in governmental structure, the reasoning of these English authorities is not analogous or applicable. In fact, Blackstone declared that the power of pardon, in the English sense of the word, cannot exist in a democracy. 4 Blackstone's Commentaries (1825) 395.

[11] State v. Martin, 59 Ohio St. 212, 52 N. E. 188, 43 L. R. A. 94, 69 Am. St. Rep. 762 (1898).

[12] Scrivnor v. State, 113 Tex. Cr. R. 194, 20 S. W. (2d) 416 (1928).

[13] State v. Lee, 171 La. 744, 132 So. 219 (1931).

[14] Kelley v. State, 204 Ind. 612, 185 N. E. 453 (1933).

[15] The reasoning in these cases is largely confined to statements that the added punishment is in strict legal consequence of the prior conviction, and to the citation of like cases and the rejection of contrary decisions. For example, see Scrivnor v. State, 113 Tex. Cr. R. 194, 20 S. W. (2d) 416 (1928) were the court quotes and follows State v. Martin, 59 Ohio St. 212, 52 N. E. 188, 43 L. R. A. 94, 69 Am. St. Rep. 762 (1899) and Edwards v. Commonwealth, 78 Va. 39, 49 Am. Rep. 377 (1883) and

A slightly larger number of the courts passing on this question have adopted the opposite view, reasoning that an executive pardon does not remove the judical fact of conviction, and that, therefore, upon the commission of another offense, the defendant must receive the additional punishment provided by statute for repeating offenders. This position was well stated by the Court of Appeals of Kentucky, in *Mount v. Commonwealth,* the first American case in which the present problem arose:

> " . the pardon relieved the convict of the entire penalty incurred by the offense pardoned... It neither did nor could relieve any penal consequences resulting from a different offense. The increased punishment prescribed by statute was no part of the penal consequences of the first offense, but applied exclusively to the last as aggravated by its repetition of the same crime."[16]

Kentucky reaffirmed this position in 1899,[17] and since that time the courts of New York,[18] North Dakota,[19] Washington,[20] and Pennsylvania,[21] and California[22] have expressly approved and followed this view.[23]

It is to be carefully noted, however, that in none of the cases following this latter view had the pardon been granted on the basis of an executive determination of the *innocence* of the convicted person. Precisely this question confronted the New York Court of Appeals in

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expressly rejects the Kentucky holdings of Mount v. Commonwealth, 63 Ky. (2 Duv.) 93 (1865) and Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989 (1899); furthermore, Carlesi v. New York, 233 U. S. 51, 34 S. Ct. 576, 58 L. ed. 843 (1914) is distinguished as merely saying that the statute making a former pardon usable, in the case of a second conviction, to enhance the punishment, did not violate the rights of the accused.

[16] 63 Ky. (2 Duv.) 93, 95 (1865).

[17] Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989 (1899). Judge Hobson speaking for the court said: "The increased punishment for a second or third conviction is simply the punishment for that offense, and the legislature may well increase the punishment in such cases to prevent a repetition of offenses."

[18] People v. Carlesi, 154 App. Div. 481, 139 N. Y. Supp. 309 (1913), which was affirmed in 208 N. Y. 547, 101 N. E. 1114 (1913) in a memorandum opinion, which was affirmed in 233 U. S. 51, 34 S. Ct. 576, 58 L. ed. 843 (1914).

[19] State v. Webb, 36 N. D. 235, 162 N. W 358 (1917).

[20] State v. Edelstein, 146 Wash. 221, 262 Pac. 622 (1927).

[21] Com. ex rel. v. Smith, 324 Pa. 73, 187 Atl. 387 (1936).

[22] People v. Briggs, 9 Cal. (2d) 508, 71 P (2d) 214 (1937). Also, People v. Dutton, 9 Cal. (2d) 505, 71 P (2d) 218 (1937). The opinion in the former case contains an especially effective refutation of the view that a pardoned convict cannot be sentenced as a second offender after a subsequent conviction.

[23] Supporting this position is Williston, Does a Pardon Blot Out Guilt? (1915) 28 Harv. L. Rev. 647.

the recent case of *People ex rel. Prisament v. Brophy*.[24] The relator, Prisament, was convicted of attempted robbery in the third degree. An information was then filed alleging that he had been formerly convicted in the federal district court for bank robbery. Thereupon he was sentenced as a second offender under the New York statute. The relator then brought habeas corpus proceedings to challenge the imposition of this additional punishment upon him, as he had received a full pardon for the bank robbery from the President of the United States. The presidental pardon, furthermore, contained a preamble or recital indicating that it had been granted because Prisament appeared to be "innocent of the offense for which he was then being held."

The Appellate Division sustained the relator's contention that a pardon for innocence prevented additional punishment in this case, and directed that the relator be resentenced as a first offender. The Court of Appeals, however, held that the relator had been properly sentenced as a second offender. Judge Lehman, in an able opinion, gave considered attention to the conflict of the courts on this point, but asserted that New York had consistently held that the recipient of a full pardon, upon the commission of another offense, may receive the increased punishment provided therefor by statute. The court denied that this rule was altered by the fact that the pardon had been granted because of the President's conclusion that the relator was innocent. "The judgment of guilt is, as matter of law, conclusive upon the executive as well as upon all others except where a statute provides otherwise."

This decision is unique. It appears that no other court of last resort has ever before expressly ruled that a pardon granted because of innocence fails to remove the judicial fact of conviction which furnishes the basis for the increased punishment provided for second offenders. Previously, the Supreme Court of California had expressly refused to decide this question, although its existence was recognized by the court in passing on a related question.[25] Professor Weihofen has recently written a vigorous article urging a distinction between pardons granted for innocence and those granted for other reasons. It is his contention that if a pardon for innocence is to serve its purpose, it "must be given the same effect as a judicial acquittal."[26] Weihofen consistently con-

[24]287 N. Y. 132, 38 N. E. (2d) 468 (1941).

[25]People v. Briggs, 9 Cal. (2d) 508, 71 P (2d) 214, 218 (1937), and People v. Dutton, 9 Cal. (2d) 505, 71 P. (2d) 218, 219 (1937).

[26]Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177, 179.

tends for this distinction. For example, the general rule is that a former conviction, though pardoned, may be shown to impeach the credibility of a witness. In applying his thesis to this situation, he asserts that a pardon granted to the convicted person because of innocence "is a legal determination that he was not actually guilty of crime, and so is not in fact a convicted criminal."[27] Again, in his concluding summary, he maintains that if the executive is conceded to be able to grant pardons for innocence, they "should be as legally binding as a judicial decision to the same effect," and the pardoned person "should be held to be innocent for all purposes, in whatever connection the question may arise."[28]

In considering Weihofen's position, the distinction between judicial acquittals and executive pardons, though for innocence, should be remembered. A judicial acquittal is a "vindication of a right, the award of justice," granted by the courts themselves. A pardon, even for innocence, is an extraordinary act of the executive which releases a person from the penalty of his conviction in spite of the judicial determination of guilt; it is an "act of mercy."[29] But even admitting that pardons, though granted for innocence in the eyes of the executive, and judicial acquittals are fundamentally different concepts, the question remains as to whether or not both should be given the same effect as regards the second offender statutes.

In answering this question, an inquiry into the purpose of these statutes is enlightening. It is accepted that the object sought to be gained by providing increased punishments for second offenses is the prevention of repetitions of crimes.[30] This end is reached by two processes. First, as a psychological matter, it is supposed to be easier for persons having once committed a crime to bring themselves to further violations of the law, and the threatened heavier penalty is set up to overcome this mental condition. Second, when one becomes such an habitual criminal as to appear incorrigible, the "repeater" statutes enable the courts to remove him permanently from contact with society by imposing life imprisonment. It is the actual existence of the former guilt of the convicted, therefore, that is important to the aims of the statutes. This being true, the question becomes whether the courts or

[27]Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177, 184.

[28]Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177, 193.

[29]Williston, Does a Pardon Blot Out Guilt? (1915) 28 Harv. L. Rev. 647, 661, quoting from Sanders v. State, 85 Ind. 318, 322 (1882).

[30]See Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989 (1899).

the executives shall have the final word concerning the actual guilt or innocence of one duly convicted of crime. If the final word ought to be with the executive, then Weihofen's contention that a pardon for innocence should be given the same effect as a judicial acquittal is correct. On the other hand, if the court's determination of guilt ought to be conclusive, then a pardon for innocence should not be given the same effect as a judicial acquittal.

The New York Court of Appeals in the principal case expressly rejected the assumption that merely because the innocence was established "to the satisfaction of the executive, the judgment of the conviction, which would otherwise be conclusive, no longer establishes guilt." It was admitted that the executive "has power to pardon because he is convinced that the conviction is unjust," but it was added that "he has no power to set aside the judgment."[31] In short, the court being the authority constituted to adjudge guilt, its legal determination that an accused is guilty is conclusive for all purposes and on all officials, unless some constitutional or legislative provision makes an exception. Since the grant of the pardoning power to the executive does not expressly state that the pardon shall have the full effect of a judicial acquittal, the New York court believed that a court's authority as the final judge of guilt stands unrestricted in this respect.

It will be noted that the New York court failed to mention any specific reasons for asserting that the executive, without the aid of statute, is conclusively bound by the judicial determination of guilt. It is submitted that the true reason is that the courts feel that executives are not in as good a situation as are judicial tribunals to pass accruately upon the innocence of accused persons. There is much to support this position. Generally, executives are not trained or experienced in determining the guilt or innocence of those accused of crime. Again, the executive may not have equal opportunity to hear both sides as the courts do; and he may base his opinion upon general rumors, hearsay, or other prejudiced or unreliable evidence which would not be properly admissible in a court of law. Furthermore, our President and state governors, already overburdened with the affairs of government, seldom have sufficient time to investigate carefully and review all the circumstances of each case before granting pardons for innocence. Finally, it may well be thought that to allow one man to pass upon the innocence or guilt of accused persons lodges too much power in the

[31] 287 N. Y. 132, 139, 38 N. E. (2d) 468, 471 (1941).

hands of a single individual who, by virtue of his position alone, would constantly be beset by those seeking to gain favoritism or to exert undue influence. These very real practical considerations argue strongly for the view that the judicial determination of guilt should be conclusively binding on the executive, except as this situation is expressly covered by statutory or constitutional powers of the latter.

Admittedly, because of our inflexible procedural rules, hardship may be worked in extreme cases. Later evidence may be discovered which definitely shows the conviction to be erroneous—evidence which if available sooner would have acquitted the accused.[32] In such a case the only recourse of the convicted would lie in an executive pardon which might contain a recital that it was granted for innocence. Upon a subsequent conviction, the accused would then be sentenced as a second offender in those courts following the New York rule. Here again, the only recourse for the accused would lie in a pardon suspending the additional punishment provided by the statute. This is unfortunate, yet it is believed that such cases do not occur with sufficient frequency to justify giving a pardon for innocence the effect of a judicial acquittal in view of the difficulties that, in most cases, would surround an accurate executive determination of guilt.[33]

Thus, it becomes apparent that the whole question of pardons for innocence as related to the problem of second offenders is but a part of the larger problem of the inflexibility of existing procedural rules. Our legal system should provide an innocent man with a legal remedy. Liberalizing procedural rules to adopt something of the more progressive Continental Law form of allowing judicial redetermination

[32]"Perhaps the real perpetrator of the crime has later confessed, and his confession proved true." Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177, 179. The general rule is that no criminal case may be reopened because of new evidence after the close of that term of court at which the case was first tried. Williston, Does a Pardon Blot Out Guilt? (1915) 28 Harv. L. Rev. 647, 659; Note (1941) 39 Mich. L. Rev. 963.

[33]The legislature of Iowa in 1935 passed a statute dealing with the problem of those about to be sentenced as second offenders. It provided that no additional punishment should attach, if "the person so convicted shall show to the satisfaction of the court before whom such conviction was had" that he was pardoned "for the reason that he was innocent." Iowa Code (1935) § 13402. As no case has yet arisen under this statute, its construction is not settled, but its most apparent meaning would seem to be that the convicted should satisfy the court, not that his innocence was a fact, but merely that the executive, in good faith, thought him to be innocent. Assuming this to be the meaning of the statute, most of those same reasons which forced the conclusion that a pardon for innocence ought not to have the same effect as a judicial acquittal, are applicable to this statute and compel the conclusion that its passage was ill-advised.

where one wrongfully convicted is later found to be innocent, would give the most satisfactory solution to the problem under discussion.[84] Until such steps have been effected, however, the position taken by the New York Court of Appeals, in refusing to give a pardon for innocence the effect of a judicial acquittal, deserves commendation for adherence to sound legal doctrine and practical policy.

CHARLES LEE HOBSON

TORTS—APPLICATION OF RES IPSA LOQUITUR DOCTRINE IN BOTTLE EXPLOSION CASES. [Georgia and Louisiana]

Of frequent recurrence in personal injury actions is the fact situation in which a prospective user of a "soft drink" beverage is injured by an explosion of the bottle in which the drink is contained. The bottling company, which is the defendant in the action for damages, has given up control of the bottled goods some time before the accident, and transportation agencies and retailers have handled them in the interim. Then, either the retailer, his employee, or a customer is injured when the bottle explodes while the drink is about to be served. The troublesome aspect of such familiar litigation arises from the fact that the cause of the explosion is ordinarily unknown and undiscoverable, and both parties to the suit are faced with great difficulties in presenting proof for their respective contentions. About all than can be shown is that the defendant bottled this beverage in the regularly accepted manner, and that a bottle exploded, injuring the plaintiff.

Inasmuch as the doctrine of res ipsa loquitur has been developed to resolve such an impasse in some comparable situations, it is to be expected that plaintiffs will often urge this doctrine on the courts in bottle explosion cases. However, the majority of the courts have rejected the doctrine completely in these cases,[1] and in those jurisdic-

[84]This reform is suggested by Weihofen, The Effect of a Pardon (1939) 88 U. of Pa. L. Rev. 177, 192, and the need is recognized by the New York court in the principal case, 287 N. Y. 132, 139, 38 N. E. (2d) 468, 471 (1941).

[1]Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N. D. Tex. 1939) (explosion of a gingerale bottle); Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P. (2d) 952 (1937) (explosion of a Coca-Cola bottle); Slack v. Premier-Pabst Corp., 40 Del. (1 Terry) 97, 5 A. (2d) 516 (1939) (explosion of a beer bottle); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916) (explosion of a Coca-Cola bottle); Dunn et al. v. Hoffman Beverage Co., 126 N. J. L. 556, 20 A. (2d) 352 (1941) (explosion of a bottle of sarsaparilla); Bruckel v. Milhau's Son, 116 App. Div. 832, 102

tions directed verdicts for the defendant have been uniformly upheld. The reasons given for the refusal to apply the res ipsa loquitur principle are: that the cause of the explosion may lie in one of several events, some under the control of the bottling company and some not,[2] and is therefore a matter of speculation and conjecture:[3] that there must be knowledge of the danger on the part of the seller before he can be held liable;[4] and finally, it may be argued that if the doctrine were held to be applicable, the courts would be swamped with law suits, many on fictitious claims.[5] By refusing to apply the doctrine to bottle explosion cases, the courts have avoided meeting in their charges to the jury such problems as how much negligence is to be presumed, how much negligence the plaintiff is required to show, and how much proof, if any, the defendant is required to offer to rebut the presumption.

A respectable minority of the courts, however, do find in the bottle explosion situations the general conditions necessary for the application of the res ipsa loquitur doctrine: an accident that ordinarily does not occur unless someone is negligent; the cause of the accident being something within the exclusive control of the defendant;[6] the plaintiff not having contributed to any part of the accident; and the defend-

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N. Y. Supp. 395 (1901) (explosion of siphon of seltzer water); Note (1919) 4 A. L. R. 1094. See, Cashwell v. Fayetteville Pepsi-Cola Bottling Co., 174 N. C. 324, 93 S. E. 901 (1917) (explosion of a bottle of Pepsi-Cola, and nothing except fact of explosion being offered by the plaintiff, the doctrine of res ipsa loquitur was not applicable); Coralnick v. Abbotts Dairies, Inc., 337 Pa. 344, 11 A. (2d) 143 (1940) (explosion of a milk bottle).

[2]Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P (2d) 952 (1937); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916).

[3]Leobig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124, 81 S. W (2d) 910 (1935). See, Dail v. Taylor, 151 N. C. 284, 66 S. E. 135, 137 (1909); Note (1920) 8 A. L. R. 500.

[4]O'Neill v. James, 138 Mich. 567, 101 N. W. 828 (1904). See, Stone v. Van Noy Ry. News Co., 153 Ky. 240, 154 S. W. 1092 (1913).

[5]If plaintiffs are to be relieved of the necessity of furnishing the usual preponderance of the evidence to support their cases, the temptation will be great to file suits at the slightest pretext and take a chance on obtaining sympathetic juries, to whom "the thing speaks for itself" too loudly. See Dail v. Taylor, 151 N. C. 284, 66 S. E. 135, 137 (1909): " the facts present a case where it would be entirely unsafe to permit the application of the principle contended for, or to hold that the explosion of one single bottle of such an article under such circumstances should of itself rise to the dignity of legal evidence sufficient, without more, to carry a case to the jury."

[6]This means that bottle inspection and user must have been in the exclusive control of the defendant, or that all the factors operating to cause the injury be under the defendant's control. Prosser, Torts (1941) 298; Prosser, The Procedural Effects of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 242.

ant being in a better position to explain the accident than the plaintiff.[7] But even these courts are not uniform in their holdings as to the legal effect of the doctrine. This diversity in holding is not peculiar to bottle explosion cases, for there are three definitely recognized views as to the effect of res ipsa loquitur in general: (1) the permissible inference view; (2) the presumption view; (3) the burden of proof view.[8]

The permissible inference version merely assures the plaintiff of the right to get his case to the jury but nothing more. Cases following that view are submitted to the jury for its findings as to negligence, even though the plaintiff has introduced no positive evidence of negligence; and such cases do not require defendant to give evidence of due care on his part in order to take the case to the jury. The presumption version, which regards the doctrine of res ipsa loquitur as creating a presumption of negligence, goes a step further than the inference view. Its affect is said to be to shift the burden of going forward with the evidence, thus requiring that the defendant introduce affirmative evidence of due care. In the event of failure, a verdict is directed for the plaintiff. If, however, that duty is discharged, the question of negligence is submitted to the jury as one of fact. Under neither the inference nor presumption view does the doctrine of res ipsa loquitur affect the instructions which are given to the jury as to burden of proof as this term refers to the risk of non-persuasion. Under these two views the doctrine is one which may aid the court in determining whether or not a verdict should be directed. If the case be submitted to the jury, it may be instructed that the fact of the accident's occurrence may be considered in determining whether the defendant was negligent, but that the plaintiff has the burden of persuading them that such negligence did occur.[9]

There is, however, a third theory as to res ipsa loquitur, mentioned above as the burden of proof view. That version of the doctrine is substantially the same as the presumption view, except that, in cases

[7]Prosser, Torts (1941) 295; Prosser, The Procedural Effects of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 242. The fourth requisite is not applied by all the courts. It is a broad statement that includes the first two conditions.

[8]Harper, Torts (1933) § 77, p. 184; Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724, 730; Prosser, Torts (1941) 302; Prosser, The Procedural Effect of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 243-5.

[9]See, Prosser, Torts (1941) 308, 309; Heckel and Harper, Effect of The Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724, 729; Kay v. Metropolitan St. Ry. Co., 163 N. Y. 447, 452, 57 N. E. 751, 752 (1900); Salomone v. Yellow Taxi Corp., 242 N. Y. 251, 259, 151 N. E. 442, 445 (1926).

in which some evidence of due care is introduced by the defendant, thus necessitating the submission of the case to the jury, it is proper to instruct that the burden has been shifted to the defendant to persuade the jury that due care was exercised.[10]

In applying the doctrine of res ipsa loquitur under different fact situations, most of the courts follow the permissible inference interpretation,[11] and this is also true in those courts that apply the doctrine to bottle explosion cases.[12] However, since the defendants in these cases will usually come forward with some evidence of due care, there is very little difference between the inference and the presumption views, and they seem to merge together. An example of this situation is to be found in a recent Georgia case, *Cole v. Pepsi-Cola Bottling Co.*,[13] where the plaintiff was injured in the usual manner. The court instructed the jury that in Georgia the manufacturers of drinks are not insurers of their products though they must "exercise ordinary care and diligence." Thus, the jury was charged that if it found that the defendant used that care in bottling the beverage, plaintiff could not recover. The jury returned a verdict for the defendant, and the plaintiff appealed. The Court of Appeals in affirming the judgment of the trial court observed, quoting from an earlier Georgia case, "practically, the doctrine is simply a rule of circumstantial evidence which permits an inference to be drawn from proved facts. . "[14] Therefore, the trial court, though it instructed the jury upon the effect of the doctrine of res ipsa loquitur, did not err in charging also that the bur-

[10]Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur (1928) 22 Ill. L. Rev. 724, 738.

[11]Prosser, Torts (1941) 303; Prosser, The Procedural Effects of Res Ipsa Loquitur (1936) 20 Minn. L. Rev. 241, 245.

[12]Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S. E. 1087 (1912); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P (2d) 601 (1941); Coca-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S. W 778 (1926) (explosion of 27 bottles held to authorize inference of negligence); Riecke v. Anheuser-Busch Brewing Ass'n, 206 Mo. App. 246, 227 S. W. 631 (1921) (bottle exploded while the plaintiff was in the defendant's plant); Taylor v. Berner, 7 N. J. Misc. 597, 146 Atl. 674 (1929). See, Atlanta Coca-Cola Bottling Co. v. Donneman, 25 Ga. App. 43, 102 S. E. 542 (1920).

[13] 15 S. E. (2d) 543 (Ga. App., 1941). The court spoke of the doctrine as applying to create an "inference of negligence," which would entitle plaintiff to a verdict if the defendant offered no evidence of due care on its part. But it stated that the jury could find that the defendant had offered such evidence as to exculpate itself from the inference, though it appears that the defendant's evidence was limited to very general matters such as the purchase of bottles for its beverage from a reputable manufacturer and the use of modern machinery and efficient equipment in preparing and bottling the product.

[14] 15 S. E. (2d) 543, 546 (Ga. App. 1941).

den was upon the plaintiff to prove the defendant's negligence by a preponderance of the evidence, and that the plaintiff could not recover unless the jury affirmatively found that the defendant had failed to exercise ordinary care.

The third interpretation of the doctrine of res ipsa loquitur, that which shifts the burden of proof to the defendant, is followed in a recent Louisiana case, *Lanza v. De Ridder Coca-Cola Bottling Co.*[15] The trial judge in finding that the defendant had failed to discharge the burden of proving that the bottle had no defects and was properly bottled, laid down the following rule: "Under our law, . . . when the plaintiff has thus proved that the bottle of Coca-Cola had not been opened or tampered with or improperly handled from the time it left the possession of the defendant until the time it exploded in the hand of the plaintiff while she was in the act of lifting the bottle from the ice box to hand to a customer, through no negligence on her part, then a prima facie case has been established and the burden is then on the defendant company, under the doctrine of res ipsa loquitur, to rebut the presumption that the explosion arose from some defect or some negligence in its manufacture or preparation."[16] The Court of Appeals in sustaining this application of the doctrine said: "The plaintiff having proved that the bottle was not improperly handled after it left the possession of the defendant company, the presumption arises, that, if there were any defects in the bottle or if there was an overcharge of gas in the bottle, this fact would be more within the knowledge of the defendant than that of the plaintiff. With this proof, plaintiff made out a prima facie case of negligence against the defendant. . . "[17]

A decision as to whether the majority view, denying the applicability of the doctrine of res ipsa loquitur, or the minority view, applying

[15] 3 So. (2d) 217 (La. App. 1941). Other cases that follow this view are Auzenne v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Vargus v. Blue Seal Bottling Works, 12 La. App. 652, 126 So. 707 (1930); Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S. W. 497 (1925).

[16] 3 So. (2d) 217, 219 (La. App. 1941).

[17] 3 So. (2d) 217, 218 (La. App. 1941). The defendant on appeal also insisted that the doctrine should not be applied to its fullest extent in this case because the plaintiff had failed to produce the broken bottle so that the defendant could examine it. The Court of Appeals in rejecting this argument said, in substance, that while there might be cases where this would work a hardship on the defendant manufacturer, it would not do so here, because the bottle exploded into fragments which would make any examination entirely worthless. The court also observed that there was no evidence that the plaintiff purposely failed to preserve the fragments.

the doctrine in some form, is preferable in these cases must depend more upon a choice of social policy than upon the validity of legal rules. A loss has been sustained and must be borne by one of the parties. The plaintiff is innocent of wrongdoing, but the culpability of the defendant cannot be proved by the usual processes. Therefore, if the policy of the law should be to let the loss remain where it has first fallen, then the best legal rule is the one followed by the majority of the courts. These cases usually result in a directed verdict for the defendant, because it is almost impossible for the plaintiff to prove that the defendant was negligent. If however, the policy of the law should be to relieve the injured party of the loss and shift it to one better able to bear it and perhaps better able to prevent future losses from being sustained, then the best rule is to apply the doctrine of res ipsa loquitur in some form. Since in these situations juries are ordinarily inclined to prefer the plaintiffs—usually impecunious persons—over the defendants—usually corporations—it may not be highly material whether the doctrine be applied as creating an inference or a presumption, or to shift the burden of proof. In any form it may readily enable the jury to grant recovery. Acknowledging this factor in the cases, the courts would be more realistic by stating the law as shifting the burden of proof to the defendant.

F. THORNTON STRANG

TORTS—DUTY OF DOCTOR TO OBTAIN CONSENT OF PARENTS TO SURGICAL OPERATION ON MINOR PATIENT. [Federal]

The recent case of *Bonner v. Moran*[1] presents in unusual factual circumstances the question of the duty of a doctor to obtain a patient's consent to a surgical operation. A doctor was sued by a fifteen year old colored boy for damages for an assault and battery, alleged to have been involved in the following situation. Plaintiff's cousin, who had been severely burned, was examined by defendant, a doctor specializing in plastic surgery, and advised to have a skin graft if a donor could be secured whose blood would match. The cousin's mother, plaintiff's aunt, persuaded plaintiff to have a blood test, and when it was found that his blood was suitable, a series of operations were performed in order to transfer skin from the plaintiff to his cousin. The operations were unsatisfactory and caused plaintiff to lose much blood and to be hospitalized for a period of two months.

[1] 126 F. (2d) 121 (App. D. C. 1941).

Plaintiff's mother was not cognizant of the arrangement until after the first operation had been performed. For this reason, at the close of the evidence plaintiff's counsel asked for an instruction to the effect that defendant was liable unless he had obtained the consent of plaintiff and plaintiff's parents before performing the operation. The court refused so to instruct, and instead "told the jury that if they believed that plaintiff himself was capable of appreciating and did appreciate the nature and consequences of the operation and actually consented, or by his conduct impliedly consented, their verdict must be for defendant." There was a judgment upon the verdict for the defendant. That this charge was erroneous was the ground of appeal by plaintiff, and the United States Court of Appeals for the District of Columbia reversed the trial court, holding that there was error in the refusal to instruct that the consent of the parent was necessary for non-liability.

While this case dealt solely with the aspect of consent by a minor to an assault and battery, it suggests a review of the broader field of consent by any patient to a surgical operation.[2] There is hardly an act that is more definitely an invasion of one's interest in bodily security than the performance of an operation by a surgeon without the consent of his patient or of another legally capable of consenting for him. When unauthorized, the operation constitutes an actionable tort for which the surgeon may be liable.[3] Proper authorization is founded on consent, which may be express, implied in fact, or implied in law (i.e., in emergency situations), and it is a good defense only where the operation is performed with due care and skill, not being an excuse for recklessness or the want of ordinary skill.[4]

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[2]Foley, Consent as a Prerequisite to a Surgical Operation (1940) 14 U. of Cin. L. Rev. 161, wherein the many aspects of the problem at hand are excellently classified and discussed. Also, Comments (1912) 26 Harv. L. Rev. 91, (1905) 4 Mich. L. Rev. 49, (1906) 5 Mich. L. Rev. 40, (1913) 12 Mich. L. Rev. 77, (1928) 26 Mich. L. Rev. 561, (1930) 8 Neb. L. Bull. 313, (1931) 10 Tex. L. Rev. 99.

[3]Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924); Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609 (1906); Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113 (1924); Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40 (1912); State v. Housekeeper, 70 Md. 162, 16 Atl. 382 (1889); Franklyn v. Peabody, 249 Mich. 363, 228 N. W. 681 (1930); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 26 A. L. R. 1036 (1905), 4 Mich. L. Rev. 49; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505 (1914); Rolater v. Strain, 39 Okla. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880 (1913); Hively v. Higgs, 120 Ore. 588, 253 Pac. 363 (1927); Harper, Law of Torts (1933) § 44; Restatement, Torts (1934) § 18, Ill. (1); cases collected in 48 C. J. 1130.

[4]Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924); Pratt v. Davis, 224

Where the operation is of an emergency nature and immediate action by the surgeon is necessary if a life is to be saved or impairment of health prevented, and it is impracticable to obtain either the patient's consent or the consent of anyone legally capable of consenting for him, the surgeon will not be held liable on the charge that his act was unauthorized.[5] This emergency rule of non-liability is applied either to the operation which is from the beginning an emergency[6] or to the situation of an authorized operation in the course of which conditions arise requiring acts different from those authorized.[7] The surgeon is given this latitude in emergencies regardless of the age or legal status of the patient.

The problem of consent to a surgical operation most often arises in the situation where, though there was no emergency, the surgeon

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Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609 (1906); "The fundamental distinction between assault and battery, on the one hand, and negligence such as would constitute malpractice, on the other, is that the former is intentional and the latter is unintentional." Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113, 1114 (1924); Van Meter v. Crews, 149 Ky. 335, 148 S. W 40 (1912); State v. Housekeeper, 70 Md. 162, 16 Atl. 382 (1889); Mohr v. Williams, 95 Minn. 261, 104 N. W 12, 26 A. L. R. 1036 (1905), 4 Mich. L. Rev. 49; State v. Gile, 8 Wash. 12, 35 Pac. 417, 422 (1894). The difficulty of proving want of due skill against a doctor is well recognized. Most courts, because of the very nature of the circumstances, require expert medical testimony, and the *esprit de corps* of the medical profession will tend to hamper the fulfillment of the requirement.

[5] "... if a surgeon is confronted with an emergency which endangers the life or health of the patient, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same or similar localities, without the consent of the patient." Jackovach v. Yokum, 212 Iowa 914, 237 N. W 444, 449 (1931); see (1931) 10 Tex. L. Rev. 99. Cotnam v. Wisdom, 83 Ark. 601, 104 S. W 164 (1907) (surgeon permitted to recover fee for services rendered defendant in emergency, defendant being unconscious, on a quasi-contractual basis); Delahunt v. Finton, 244 Mich. 226, 221 N. W 168 (1928); King v. Carney, 85 Okla. 62, 204 Pac. 270, 26 A. L. R. 1032 (1922), and cases collected in note at last citation.

[6] Cotnam v. Wisdom, 83 Ark. 601, 104 S. W 164 (1907); Jackovach v. Yokum, 212 Iowa 914, 237 N. W. 44 (1931); Luka v. Lowrie, 171 Mich. 122, 136 N. W 1106 (1912).

[7] Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948 (1912), where it was reasoned that the surgeon becomes the legal representative of the unconscious patient and is duty bound to exercise his professional skill and wisdom in the patient's behalf. "If in the course of an operation to which the patient consented the physician should discover conditions not anticipated before the operation was commenced and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them." King v. Carney, 85 Okla. 62, 204 Pac. 270, 272 (1922).

acted beyond the scope of the original consent.[8] Courts which have faced this sort of case have handed down decisions which cannot be reconciled on the facts that are involved. The divergence is best explained by simply recognizing that certain courts have taken a "strict" point of view, and will hold the surgeon liable,[9] while others have taken a more "liberal" attitude towards a surgeon who has acted in good faith.[10]

In the situations set forth above, the main issue has been: when is the consent of the *patient* to the operation necessary? A further

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[8]Hobbs v. Kiser, 236 Fed. 681 (C. C. A. 8th, 1916); Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924); Pratt v. Davis, 224 Ill. 300, 79 N. E. 562 (1906); Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40 (1912); McClees v. Cohen, 158 Md. 60, 148 Atl. 124 (1930); Franklyn v. Peabody, 249 Mich. 363, 228 N. W. 681 (1930); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12 (1905); Schloendorff v. New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1924); Wells v. Van Nort, 100 Ohio St. 101, 125 N. E. 910 (1919); Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913); Thorne v. Wandell, 176 Wis. 97, 186 N. W. 146 (1922). With the above compare: McGuire v. Rix, 118 Neb. 434, 225 N. W. 120 (1929); Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948 (1912); King v. Carney, 85 Okla. 62, 204 Pac. 270 (1922); Marshall v. Curry, 6 M. P. R. 157, 3 D. L. R. 260, 60 Canada C. C. 136 (1933).

[9]Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439 (1905), 4 Mich. L. Rev. 49; Wells v. Van Nort, 100 Ohio St. 101, 125 N. E. 910 (1919); Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913).

[10]McGuire v. Rix, 118 Neb. 434, 225 N. W. 120 (1929); Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948 (1912); King v. Carney, 85 Okla. 62, 204 Pac. 270 (1922); Marshall v. Curry, 6 M. P R. 157, 3 D. L. R. 260, 60 Canada C. C. 136 (1933). In the Marshall case, the facts were practically the same as those in Markart v. Zeimer, note 9, supra, but the defendant surgeon was held not liable. Note here, however, that the defendant had performed other operations on the patient subsequent to the one complained of. This fact was considered sufficient to support the holding of non-liability on the basis of implied consent. Courts which have turned from the strict application of the general rule of liability base their decisions for the most part on a theory of implied consent—e.g., McGuire v. Rix, supra (patient employed defendant to reduce fracture, and the allegedly unauthorized operation was the only reasonable method of doing so; consent to the particular operation therefore implied). However, authority given for a single operation is not a carte blanche for the performance of subsequent operation that may become necessary. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 565 (1906).

That a justification based upon public policy is more nearly accurate than implied consent, which is in reality a fiction, has been suggested: (1912) 26 Harv. L. Rev. 91. "The question, however, is one to be settled, not by authority, but by reason, and its importance is such that it touches at a vital point the interests of the entire public, any member of which may at any time suffer in life or health by the establishment of a rule that will paralyze the judgment of the surgeon and require him to withhold his skill and wisdom at the very juncture when they are most needed and when, could the patient have been consulted, he would manifestly have insisted upon their being exercised in his behalf." Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948, 951 (1912).

refinement of the problem appears where the patient's particular legal status may make it necessary for the surgeon to obtain consent from some other person instead of, or in addition to, consent from the patient.

A situation somewhat similar to that of the principal case is presented when an operation is performed upon one spouse without the consent of the other. The courts are consistent in holding that if the patient is conscious and mentally capable of giving consent, the patient's consent is sufficient authorization to the surgeon, and he will not be liable to the spouse for not having sought and gained the latter's consent.[11] If the patient was legally incapable of giving consent, however, the surgeon would, in the absence of an emergency, be liable for an operation without the consent of the spouse.[12]

In the whole field of consent to surgical operations, the circumstances of the principal case raise the problem which presents the highest degree of difficulty and results in the most striking lack of uniformity among the adjudicated cases. The courts draw fine distinctions. Generally, an infant is under a legal disability and cannot consent to an operation on his own account. Rather, the basis for authorization to the operation upon an infant patient is the consent of the infant's legal or natural guardian, without which the surgeon would be liable.[13] By their *language* the courts accept this rule, but from the decisions the conclusion is inevitable that they do not always feel compelled to adhere to the rule, except in one situation—where the infant is of "tender years," the consent of the person stand-

[11]Burroughs v. Crichton, 48 App. D. C. 596, 4 A. L. R. 1529 (1919), note; McClallen v. Adams, 19 Pick. 333, 31 Am. Dec. 140 (Mass. 1837) (plaintiff was the surgeon suing for his fee and met the argument of the husband that the operation upon the spouse was without his consent; husband had no defense); State v. Housekeeper, 70 Md. 162, 16 Atl. 382 (1889); Rytkonen v. Lojacono, 269 Mich. 270, 257 N. W. 703 (1934) (wife sued for death of husband from operation to which she had not consented; her consent unnecessary since husband was capable of consenting for himself); Barker v. Heaney, 82 S. W. (2d) 417, 420 (Tex. Civ. App. 1935) (" . the wife is not the guardian of the husband and her consent is not necessary before a physician is authorized to perform an operation upon him.")

[12]See Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609 (1906).

[13]Zoski v. Gaines, 271 Mich. 1, 260 N. W 99 (1935); Moss. v. Rishworth, 222 S. W. 225 (Tex. Com. App. 1920) (consent of an adult sister having temporary custody, to an operation on infant patient held not sufficient.); 48 C. J. 1131; 21 R. C. L. 393. But cf. Jackovach v. Yokum, 212 Iowa 914, 237 N. W. 444 (1931); Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106 (1912) (emergency situation); Bakker v. Welch, 144 Mich. 632, 108 N. W. 94 (1906); Bishop v. Shurly, 237 Mich. 76, 211 N. W. 75 (1926); Sullivan v. Montgomery, 155 Misc. 448, 279 N. Y. Supp. 575 (1935); In Re Vasko, 238 App. Div. 128, 263 N. Y. Supp. 552 (1933).

ing in *loco parentis* to the child is absolutely essential. In final analysis, the court, having decided on the facts of the particular case that the general rule is not to be strictly applied, must find in the facts a basis for non-liability of the surgeon when he has performed an operation which by usual standards was unauthorized. The courts give weight to such factors as the age of the infant patient,[14] his proximity in years to majority status, his mental capacities,[15] the seriousness of the operation,[16] and in some cases, the presence of relatives.[17] If an infant, by an interplay of these factors, is considered as being incapable of appreciating the benefits and dangers that may come from the operation, he is of "tender years," and the consent of the parents or guardian is essential.[18] The consent of the child alone is unavailing and the surgeon will be held liable.[19] On the other hand, if it is found that under all the circumstances the infant appreciated and understood the consequences relative to the operation, and consented to the operation, the surgeon may be held not liable although he did not have the consent of the parents or guardian.[20] In any case, if emergency conditions prevail, the surgeon may perform the necessary operation without liability even if he has obtained no consent from anyone.[21]

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[14]E.g., Bakker v. Welch, 144 Mich. 632, 108 N. W. 94 (1906) (patient was 17 years old and while there was no evidence showing the parent's consent, neither was there evidence to show that the parent would not have consented if requested); Bishop v. Shurly, 237 Mich. 76, 211 N. W. 75 (1926) (P made a contract with D for a tonsillectomy on her 19 year old son, a general anaesthetic to be used, but before the operation the son requested a local anaesthetic. D not liable for the son's death from the local anaesthetic, for, though P made the contract, it was for a statutory "necessary," and subject to binding change or modification by the son); Sullivan v. Montgomery, 155 Misc. 448, 279 N. Y. Supp. 575 (1935).

[15] 126 F. (2d) 121 (App. D. C. 1941).

[16] 126 F. (2d) 121 (App. D. C. 1941).

[17]Bakker v. Welch, 144 Mich. 632, 108 N. W. 94 (1906).

[18]Zoski v. Gaines, 271 Mich. 1, 260 N. W. 99 (1935); Moss v. Rishworth, 222 S. W. 225 (Tex. Com. App. 1920).

[19]Zoski v. Gaines, 271 Mich. 1, 260 N. W. 99 (1935); Moss v. Rishworth, 222 S. W. 225 (Tex. Com. App. 1920).

[20]Cases cited, supra, note 14.

[21]Jackovach v. Yokum, 212 Iowa 914, 237 N. W. 444 (1931); "Many small children are injured upon the streets in large cities. To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved. It is not to be presumed that competent surgeons will wantonly operate, nor that they will fail to obtain the consent of the parents to operations where such consent may be reasonably obtained in view of the exigency. Their work, however,

In the light of the decisions in which an infant is involved, there is little room for argument with the result of the principal case on its facts. The Court of Appeals merely stated the general rule requiring consent by the parents or guardian of the child and then devoted itself to a fact-by-fact analysis. Added to the fact that the infant here was only fifteen years of age[22] was the unusual factor that the operation he submitted to was not for his own welfare, but for the benefit of another. Also, it was an operation which was most complex. It was an "experiment," and therefore called for the application of better than ordinary skill by the physician and entailed more than ordinary risk to the donor-patient. Under the circumstances, a mature mind would be required to understand exactly what the donor was offering to undertake. Consideration of these factors apparently induced the court to give little weight to the fact that plaintiff's aunt was present at the time of the first operation. The court felt "constrained" to hold that the jury should have been instructed that the parent's consent was necessary.

The court did, however, conclude its opinion with an observation which may forebode disaster for the plaintiff on the retrial of this case. There was evidence showing that in the course of the skin grafting experiment in which plaintiff took such an important part, his mother learned of her son's courage and gloried in the publicity that was given him in the press. The court strongly suggested, without reaching a definite conclusion, that the subsequent attitude of the parent might be a basis for the jury finding, under appropriate instruction, that there was consent by ratification tantamount to consent by implication.[23] Consent by ratification is a novel theory in this field and no cases have been found which resorted to it as a basis of non-liability.[24] If used at all, such a theory must arise from an analysis

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is highly humane and very largely charitable in character, and no rule should be announced which would tend in the slightest degree to deprive sufferers of the benefit of their services." Brooke, J., Luka v. Lowrie, 171 Mich. 122, 136 N. W 1106, 1110-11 (1912).

[22]Other factors being equal, 15 years seems to be the age below which an infant is regarded as of "tender years," and above which he is regarded as not of "tender years." Of course, this is not in any sense an absolute rule.

[23] 126 F. (2d) 121, 123 (App. D. C. 1941).

[24]The only decision found which even suggests such an approach is Marshall v. Curry, 6 M. P. R. 157, 3 D. L. R. 260, 60 Canada C. C. 136 (1933) where the patient consented to other operations by the same surgeon subsequent to the unauthorized operation for which damages were sought. The patient's submission to the later operations was regarded as furnishing implied consent to the first act of the surg-

of the facts, as do the other theories that are most often used. It is submitted that the theory of consent by ratification should be applied only when reason and justice indicate strongly that the surgeon should not be held liable in the particular case and there is no other way of reaching non-liability. It is difficult to imagine a situation where this result could not be reached by an application of the ordinary rules, or justified as a demand of public policy.

If the courts in the instant litigation ultimately reach a decision against liability of the surgeon on the consent by ratification theory, an injustice will be done to this immature patient. The very conclusion of the court on the facts, as stated above, coupled with the fact that there was no prevailing emergency and that the surgeon-defendant could have contacted the parent for the purpose of getting her consent with little trouble, should serve to defeat any straining by the court to find a basis for non-liability on the ground it suggests.

PAUL E. GOURDON, JR.

TORTS—EMPLOYEE HELD TO BE INDEPENDENT CONTRACTOR AS TO USE OF AUTOMOBILE IN SERVICE OF EMPLOYER. [Delaware]

The problem of the liability of manufacturers and wholesalers for the torts of their traveling salesmen has long been a subject of controversy in American courts. One view regards such salesmen as employees, and holds that their employers are responsible under the respondeat superior theory.[1] In reaching this conclusion, the courts must decide that the salesmen are not independent contractors. Ordinarily the question of the relationship is for the jury,[2] and turns on such

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eon. Mr. Foley speaks of this decision as being based on the theory of "implied consent or ratification." (1940) 14 U. of Cin. L. Rev. 161, 166. No explanation of the latter term is made, but this use of the words "implied consent" and "ratification" together without comment as to their meaning, seems to indicate that they are synonymous. With this assumption the writer of the present comment fully agrees.

[1]Singer Manufacturing Co. v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440 (1889); Dillion v. Prudential Insurance Co., 75 Cal. App. 266, 242 Pac. 736 (1925); Heintz v. Iowa Packing Co., 222 Iowa 517, 268 N. W 607 (1936); Borah v. Zoellner Motor Car Co., 257 S. W. 145 (Mo. App. 1923); Auer v. Sinclair Refining Co., 103 N. J. L. 372, 137 Atl. 555, 54 A. L. R. 623 (1927); Brown v. Kremer, 124 N. J. L. 242, 11 A. (2d) 248 (1940); Knapp v. Standard Oil Co., 156 Ore. 564, 68 P. (2d) 1052 (1937); Fidelity Union Life Insurance Co. v. McGinnis, 62 S. W. (2d) 186 (Tex. Civ. App. 1933); 5 Am. Jur. 727.

[2]Miller-Brent Lumber Co. v. Stewart, 166 Ala. 657, 51 So. 943, 21 Ann. Cas.

factors as the extent of the employer's power to control the salesmen,[3] whether stated wages are paid,[4] and whether non-expert services are rendered.[5] Once it is decided that the salesman is an employee, then if the tort was committed while he was within the scope of his employment, the employer is declared liable. The other view is to regard such salesmen as independent contractors, and therefore to hold the manufacturers and wholesalers not liable. Generally, the same test of power to control has been the most popular in the cases taking this position.[6]

In regard to the general aspect of the problem of determining whether an agent is an employee or an independent contractor, the Restatement of Agency mentions several additional factors for consideration: the location of the work, which party supplies the tools or instrumentalities of the work, the length of time of the contract, and the intention of the parties.[7] Some courts have attempted to reconcile their apparent inconsistencies with other decisions concerning traveling salesmen, by deciding that a salesman on a straight commission is more apt to be an independent contractor than is one on a straight salary.[8] Other courts, however, have stated flatly that this is not alone a sufficient basis of differentiation.[9] And in fact, there have been almost identical circumstances surrounding salesmen who have been called independent contractors by courts emphasizing some factors, and who have been called employees by courts emphasizing other factors.[10]

The recent case of *McCrady v. National Starch Products, Inc.*[11] presents an unusual concept in this question, in that the court regarded a salesman as an employee in some parts of his activities and as an in-

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1149 (1909); Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768 (1888).

[3]See note 1, supra.

[4]Schular v. Hudson River Railroad Co., 38 Barb. 653 (N. Y. Sup. Ct. 1862).

[5]Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W 52 (1893); Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492 (1900); Dickson v. Hollister, 123 Pa. 421, 16 Atl. 484, (1889); Mecham, Outlines of Agency (1923) 335-7.

[6]Aldrich v. Tyler Grocery Co., 206 Ala. 138, 89 So. 289, 17 A. L. R. 617 (1921); Barton v. Studebaker Corp., 46 Cal. App. 707, 189 Pac. 1025 (1920); Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645 (1916).

[7]Restatement, Agency (1933) § 220.

[8]Barton v. Studebaker Corp., 46 Cal. App. 707, 189 Pac. 1025 (1920); McCraner v. Nunn, 129 Kan. 802, 284 Pac. 603 (1930); Ashley v. Safeway Stores, Inc., 100 Mont. 312, 47 P (2d) 53 (1935); Modern Motors, Inc. v. Elkins, 113 P (2d) 969 (Okla. 1941); Nettleship v. Shipman, 161 Wash. 292, 296 Pac. 1056 (1931); Mitchell v. Maytag-Pacific Intermountain Co., 184 Wash. 342, 51 P (2d) 393 (1935).

[9]Terry Dairy Co. v. Parker, 144 Ark. 401, 223 S. W. 6 (1920).

[10]See cases cited in Note (1922) 17 A. L. R. 621.

[11]23 A. (2d) 108 (Del. Super. 1941).

dependent contractor in others. In this case, the defendant-manufacturer entered into a contract whereby one Smith would represent him as a salesman in seven designated states. Smith was given entire control as to when, how, and at what time he would call on the customers of the defendant, and was to be paid a salary of $50 a week in addition to his normal expenses away from his headquarters when working for the defendant. By a later agreement, the defendant agreed to pay Smith four cents a mile for the car that he used while he was engaged in furthering the business of the defendant. While using his own car in this capacity, Smith negligently ran into and caused injuries to the plaintiff. The plaintiff sued the defendant-manufacturer for the damages sustained. At the conclusion of the plaintiff's testimony, the defendant moved for a non-suit, on the ground that the agent was an independent contractor. The court overruled this motion without prejudice, and later in the trial defendant requested that a verdict be directed in its favor, on the grounds that (1) Smith was an independent contractor, not an employee; (2) Even though he was an employee, yet as to the use of the car he was an independent contractor.

The court rejected the first ground, stating unequivocally that Smith must be considered an employee and not an independent contractor. This conclusion was obviously reached on the view that as to the entire contract of employment, the defendant had sufficient power of control over the salesman so that the relationship was not that of independent contractor. However, the court viewed as a distinct consideration the actual control and right of control that the defendant had over Smith *with regard to the use and operation of the car.* It was concluded that although the defendant had knowledge that Smith was using the car in the course of the business, yet as defendant had no right to control the use and operation of the car, the salesman was an independent contractor in respect to this activity. Therefore, the jury was directed to find a verdict for the defendant.

In reaching this conclusion, the court followed a number of decisions which have recognized the control over the particular instrumentality which caused the alleged liability as being the determining factor.[12] Some of these decisions considered the nature of the services

[12]Pyyny v. Loose-Wiles Biscuit Co., 253 Mass. 574, 149 N. E. 541 (1925); Wescott v. Young, 275 Mass. 82, 175 N. E. 153 (1931); Manus v. Kansas City Distributing Corp., 228 Mo. App. 905, 74 S. W. (2d) 506 (1934); McCarthy v. Souther, 83 N. H. 29, 137 Atl. 445 (1927); Hutchins v. John Hancock Mutual Life Insurance Co., 89 N. H. 79, 192 Atl. 498 (1937); Wesolowski v. John Hancock Mutual Life

to be rendered by the employee, and required as a basis of imposing liability on the employer that it be shown that the employer expressly or impliedly authorized the use of the liability-causing instrumentality.[13] Such cases usually arose from situations wherein the agent, upon being assigned a job to do, used an instrumentality without the consent of the employer, which the employer could not have reasonably expected him to use. When the problem arose as to the responsibility of the employer for the torts of the agent due to the use of these unexpected and unauthorized instrumentalities, the courts refused to hold the employer liable, contending that to do so would be to make him liable for acts that were beyond his control. This, it was claimed, would go beyond the intention underlying the doctrine of respondeat superior.

Though these cases, being readily distinguishable, need not have been thought to control the instant case, yet their deviation from the general rules of the responsibility of the employer for the torts of his servant made it only a short step to the reasoning so ably presented in the case of *McCarthy v. Souther*[14]

> "There is substantial authority for the proposition that the employer is liable for all torts of his agent or servant committed in the course of the employment, and under such authority the distinction between service in the course of the employment that is, and that is not, under the employer's control and direction is not observed. But the doctrine of respondeat superior underlying the employer's liability, and through which the liability has been established, is either disregarded or fallaciously applied when the distinction is not made. The doctrine rests on the employer's right of control and direction, and in reason applies only to the extent of control and direction. . Where no control may be implied from the situation and none has been expressly reserved, the mere fact that the relationship is of agency or service should not be enough to subject the employer to liability. And if, under the contract of employment,

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Insurance Co., 308 Pa. 117, 162 Atl. 166, 87 A. L. R. 783 (1932); Barr v. Anchorage Inn, Inc., 328 Pa. 378, 196 Atl. 21 (1938); Holdsworth v. Pennsylvania Power and Light Corp., 337 Pa. 235, 10 A. (2d) 412 (1940); Gittleman v. Hoover Co., 337 Pa. 242, 10 A. (2d) 411 (1940).

[13]St. Louis-San Francisco R. Co. v. Robbins, 219 Ala. 627, 123 So. 12 (1929); Hughes v. Western Union Telegraph Corp., 211 Iowa 1391, 236 N. W 8 (1931); Reardon v. Coleman Bros., 277 Mass. 319, 178 N. E. 638 (1931); Riggs v. Higgins, 341 Mo. 1, 106 S. W. (2d) 1 (1937); Wilson v. Pennsylvania R. Co., 63 N. J. L. 385, 43 Atl. 894 (1899); O'Loughlin v. Mackey, 182 App. Div. 637, 169 N. Y. Supp. 835 (1918); 42 C. J. 1128; Restatement, Agency (1933) § 239.

[14]83 N. H. 29, 137 Atl. 445, 449 (1927).

> the employer has control over part only of the service to be rendered, liability for the manner in which the rest of the service is performed does not thereby follow.
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> "For service not subject to the employer's control and direction to its details, on principle, he is no more to be held for its faulty performance than for the liability of an independent contractor."

While several courts have confidently demanded that the employer's power to control the particular instrumentality which caused the alleged liability of the employer must be proved before any liability will attach to the employer, they have been unable to sustain this position with satisfactory reasons. One court[15] reasoned that since, as a general proposition a person cannot be charged with liability for injury caused by negligent driving of a car unless he was either the operator or owner of the car or had control of it, an employer cannot be held responsible for injuries resulting from negligence of a salesman driving his own car when not under the employer's control in regard to the car's use. In the *McCrady* case[16] the court decided that the respondeat superior doctrine which led to employer-liability was based solely upon the fact of the control and direction of the employer. It then ruled that unless such control can be proven, there are no grounds upon which the employer can be held responsible for the torts of his employee. The thought seems to be that the employer is liable only because the employee stands as his alter ego, so that the acts of the employee are, in legal contemplation, the acts of the employer. No consideration is given to the fact that the employee's services are being rendered for the profit of the employer, who might for that reason alone well be held to responsibility for wrongs committed.

At one time the master bore full responsibility for the harmful acts of his servant. Different theories of the basis for placing liability on the master have been expounded,[17] but the evidence is strong that the main reason for the rule lay in the fact that the master-servant relationship

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[15]Stockwell v. Morris, 46 Wyo. 1, 22 P. (2d) 189 at 195 (1933).

[16] 23 A. (2d) 108 (Del. Super. 1941).

[17]Douglas, Vicarious Liability and Administration of Risk (1929) 38 Yale L. J. 584 (public policy); Hachett, Why is a Master Liable for the Tort of His Servant? (1893) 7 Harv. L. Rev. 107 (the carrying over to the employer of the resentment against the person who caused the injury); Holmes, Agency (1891) 4 Harv. L. Rev. 345 (the identification of the master and the servant as one); Seavey, Speculations as to Respondeat Superior (1934) Harv. Legal Essays 433, 435 (the belief that the master was the moving cause behind the acts of the servant); Wigmore, Responsibility for Tortious Acts: Its History (1894) 7 Harv. L. Rev. 315 (forthcoming from primitive ideas of justice and reparation).

was created chiefly to benefit the master, and if the master used the servant for his own gain, he should naturally be responsible for the harm caused by the servant. Due to the severe responsibility placed upon the master, however, it early developed that he could exonerate himself from criminal penalty for acts of the servant by showing that the acts were not consented to or commanded.[18] This defense was later carried over into civil actions, and has become a recognized exception to the respondeat superior doctrine—the master is not liable for injury inflicted by a servant acting outside the scope of his employment.

The other broad qualification to respondeat superior liability developed from the reluctance of courts to hold a general contractor liable for the negligence of a sub-contractor, because of the independent nature of the latter's work.[19] The feeling was that a person of a particular independent calling, who was engaged to perform a certain task for another, was not in the same position as a servant who worked only for the profit of the master, and the hirer of such a person should not be responsible for his wrongful acts.[20] In time, the test of determining whether a person was an independent contractor came to be, not whether he was a person of an independent calling, but rather whether he rendered his service without the hirer having the power to control the manner of performance.[21]

It is perhaps as a result of this shift of emphasis to the element of control that there has arisen the third exception to respondeat superior which is demonstrated by the decision of the principal case. It is accepted as logical that if an alleged employer may escape liability by proving that he had no control over the acts of the person alleged to be in his employ, he should likewise be able to avoid liability by showing lack of control over an employee's use of the particular instrumentality which caused the injury. When courts take this position, an injured person, in order to recover from the alleged employer, must show (1) that the person inflicting the injury was in the general relationship of employee of the alleged employer; (2) that the employee was acting within the scope of his employment when the injury was inflicted; *and* (3) that the employer had the power to control the employee in the particular aspect of the work out of which the injury arose.

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[18]Wigmore, Responsibility for Tortious Acts: Its History (1894) 7 Harv. L. Rev. 315, 335.

[19]Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826).

[20]Stover Bedding Co. v. Industrial Commission, 99 Utah 423, 107 P (2d) 1027, 1041 (1940).

[21]See notes 1 and 13, supra.

The difficulty of putting limitations on the operation of this doctrine makes so much the stronger its threat to the social advantages which originally dictated the creation of a respondeat superior theory. There is no reason to think that the requirement of control over the particular instrumentality causing liability will be confined to cases in which an automobile has wrought the injury. Such a rule makes it possible for any employer to place the control of all instrumentalities to be used in the performance of services in the hands of various employees, and thus to immunize himself from liability for their negligent use.

In 1938, the Nebraska Supreme Court[22] in considering a problem of the liability of a wholesaler for injuries inflicted by the negligent operation of a car by a salesman, conceded that the defendant had cited several decisions[23] which were "... based on the proposition that, unless the employer had the right to direct the manner in which the car was to be operated, there is no liability." But it continued thus:

> "We cannot accept this theory of the law.... We believe the proper law to be as follows: Where an employer expressly or impliedly authorizes the use of an automobile owned by an employee in the pursuit of his duties, the employer is liable to innocent third persons for injuries resulting from its negligent use by the employee in the business of his employer."[24]

Assuming that the respondeat superior doctrine is one to be preserved, it appears that the Nebraska Court's view embodies the better policy of demanding that the "power to control" test be made to the entire relationship between the master and servant, rather than to some particular aspect of the relationship. If the courts are searching for a means of saving manufacturers or wholesalers from liability for the negligent acts of their salesmen, it is better that they should simply demand proof of a more positive ability to control the salesman rather than apply a new test which may not be subject to reasonable limitation.

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[22]Peterson v. Brinn & Jensen Co., 134 Neb. 909, 280 N. W. 171 (1938). An earlier decision in the same case appears at 133 Neb. 796, 277 N. W. 82 (1938).

[23]Curcic v. Nelson Display Co., 19 Cal. App. (2d) 46, 64 P (2d) 1153 (1937); Heintz v. Iowa Packing Co., 222 Iowa 517, 268 N. W 607 (1936); Regal Laundry Co. v. Abell Co., 163 Md. 525, 163 Atl. 845 (1933); Borgstede v. Waldbauer, 337 Mo. 1205, 88 S. W. (2d) 373 (1935); Riggs v. Higgins, 341 Mo. 1, 106 S. W (2d) 1 (1937); La-Fleur v. Poesch, 126 Neb. 263, 252 N. W. 902 (1934); Tucker v. Home Stores, Inc., 170 Tenn. 23, 91 S. W. (2d) 296 (1936); Kennedy v. American Nat. Ins. Co., 130 Tex. 155, 107 S. W. (2d) 364, 112 A. L. R. 916 (1937); Restatement, Agency (1933) § 239.

[24]Peterson v. Brinn & Jensen Co., 134 Neb. 909, 280 N. W. 171, 172 (1938).