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Suretyship-Right of Surety Paying Creditor's Claim against Insolvent Bank to Be Subrogated to Position of Creditor [American Surety Co. v. Bethlehem National Bank, C. C. A. 3rd, 1940].

RECENT CASES

AGENCY—RIGHT OF PRINCIPAL GIVING PROPERTY TO AGENT FOR ILLEGAL PURPOSE TO RECOVER FROM THIRD PARTY FOR CONVERSION OF THAT PROPERTY. [New York]

Public policy, a phrase that seems inherently indefinable, is employed continually in courts of law and equity in a multitude of instances. It is so flexible and so all-inclusive that a decision based upon one or more phases of it rarely escapes scrutiny directed toward the propriety of the particular application. Individual conceptions of sound public policy vary to such an extent that agreement, even among members of the same court, is difficult.

Flegenheimer v. Brogan[1] presents an example of the confusion that too frequently results from decisions based upon public policy. The plaintiff's intestate[2] organized a corporation, of which he was virtually the sole owner, for the purpose of operating a brewery. Unable to obtain a permit from either the New York or the United States liquor authorities, he transferred the capital stock to one Vogel as his agent and dummy.[3] By this manipulation the identity of the intestate was concealed and the permits were secured. After the death of the intestate, Vogel transferred the stock to the defendant, who gave no consideration and took with notice of the fact that the stock was the property of the intestate. The plaintiff, as administratrix, sued the defendant for conversion.

The Court of Appeals of New York, assuming the allegations of the plaintiff to be true, held for the defendant. It was said that the transaction between the intestate and Vogel was for the purpose of circumventing the state and federal liquor control statutes and was "so far against the public good as to disable the plaintiff from invoking the

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[1]284 N. Y. 268, 30 N. E. (2d) 591 (1940). Noted in (1941) 10 Brooklyn L. Rev. 307.

[2]The intestate, Mr. Flegenheimer, is doubtless better known as "Dutch Schultz" of "bootlegging" fame. This fact may well be considered as partially explaining the decision of the court.

[3]The fact that this agent had legal title to the stock may lead one to inquire whether the true relationship was not that of trustee and cestui que use. But it appears that it is not unusual for an agent to hold general title to lands or chattels. 1 Bogert, Law of Trusts and Trustees (1935) § 15. The court here did not question the allegation that Vogel was an agent, and indeed, it is believed that the distinction is immaterial in this case.

aid of the court in her endeavor to disengage herself (as administratrix) from the unlawfulness of the conduct of her intestate."[4]

The first objection to the holding is that the court was apparently so impressed by the weakness of the position of the plaintiff that it either completely overlooked or completely ignored the real nature of the cause of action. This was not a suit upon a contract. There was never at any time any contractual relationship between the plaintiff's intestate and the defendant. Therefore, the ordinary rule, barring actions upon illegal contracts, had no application as between them. Yet the majority of the court implicitly, and the minority of the court explicitly,[5] relied upon this rule. Such errors in the application of legal principles do not necessarily lead to incorrect results. Nevertheless, even though the correct result be achieved, the commission of the error is unfortunate in that there is introduced into the law an element of needless confusion. The commission of the error is especially unfortunate in cases involving public policy, a doctrine inevitably confusing in many respects.

The second objection to the holding is that the result of the decision, when examined in the light of what is believed to be the correct principle, is neither logical nor warranted as an expression of the most desirable public policy. The true relationship among the parties here seems to be that of principal and agent and transferee with notice from the agent. Therefore, the right of the defendant to retain the stock depends upon the right of the agent to dispose of the stock. In turn, the right of the agent to dispose of the stock depends upon the legal effect of his contract with his principal.

It is elementary that an agent is liable to account to his principal for property coming into the former's hands by virtue of the agency. And anyone taking the property from the agent with notice of the fact of the agency and of the limitations upon the powers of the agent can stand in no better position than did the agent himself. On the other hand, if the agent has a defence to an action by the principal to recover

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[4]Flegenheimer v. Brogan, 284 N. Y. 268, 273, 30 N. E. (2d) 591, 593 (1940).

[5]Judge Finch, dissenting, considered the case from the standpoint of illegal contract, and concluded that the plaintiff should be allowed to recover since she relied only on her ownership of the property which was the subject of the contract. He made no distinction between cases in which the suit was between the parties to the contract and cases in which the suit was between one party to the contract and a stranger. Judge Conway, dissenting, considered the case solely from the standpoint of public policy. He was of the opinion that public policy would bar recovery in an action by the principal against the agent, but should not bar a recovery against the defendant.

the property, such a defence should be available to the transferee from the agent.[6] Thus the immediate, and what is believed to be the controlling question in the case: Did Vogel, the agent, have a valid defence to an action by the intestate, the principal, to recover the stock? There is no defence by virtue of anything expressed or implied in the contract of agency. There is only the possible defence that the contract was executed for an illegal purpose.

By the general rule an agent who has received property from his principal cannot defeat an action brought to recover it by contending that the purpose to which it was devoted was illegal.[7] *Kearney v. Webb*,[8] somewhat analagous on its facts to the principal case, illustrates this rule. The plaintiff had given money to his agents to be used in a gambling house which he conducted in violation of a state statute. The money was seized by the district attorney following a raid by the police. In an action to recover the money from the district attorney, the latter contended that by the delivery of the money to the agents, the plaintiff had parted with all right and title to it and could not have recovered it from them. The court held for the plaintiff, saying that the rule denying recovery on an illegal contract did not apply in cases where the plaintiff did not found his cause of action on such a contract, and that if he was able to prove his title without relying on the contract, the defendant could not introduce and rely on it.

> "In determining the equities in such a case, the respective rights of the parties ... are only to be considered. If the money is found to belong to the plaintiff, and the defendant shows no right thereto whatever, courts will not go back to inquire by what unconscionable or illegal methods the plaintiff obtained it, or to what illegal purposes he had in other transactions employed the use of it."[9]

Although the rule of the *Kearney* case is supported overwhelmingly in both prior and subsequent decisions by many courts,[10] it has been

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[6]Harper, Law of Torts (1933) § 29. The author states the rule to the effect that the plaintiff's right to recover in an action for conversion is conditioned upon his showing himself either to have been in possession or entitled to immediate possession of the goods at the time the defendant interfered with them.

[7]1 Mechem, Law of Agency (2d ed. 1914) § 1332; 6 Williston, Law of Contracts (1938) § 1785. Accord: 1 Halsbury, Laws of England (2d ed. 1931) § 421; Salmond and Winfield, Law of Contracts (1927) § 54–4.

[8]278 Ill. 17, 115 N. E. 844, 3 A. L. R. 1631 (1917).

[9]Kearney v. Webb, 278 Ill. 17, 115 N. E. 844, 847, 3 A. L. R. 1631, 1634 (1917).

[10]Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732 (U. S. 1863) (recovery of profits from the illegal purchase and sale of soldiers' warrants); Clarke v. Brown, 77 Ga. 606

criticized by legal writers,[11] and not without cause. Today, when legal problems are approached with much less emphasis upon their strictly formal aspects, it is evident that the earlier reason for the rule—that the illegality of the contract is irrelevant since the action is based upon the agent's receipt of property belonging to the principal—will no longer suffice. Consequently, the whole problem is resolved into a conflict betweent two phases of public policy. On the one hand is that policy which requires the strictest fidelity on the part of the agent.[12] On the other is that policy which requires that courts be free from the burden of enforcing honor among thieves.

Recognizing this conflict, the Restatement of the Law of Agency[13] qualifies the rule as follows: An agent who has received property from his principal is under no duty to return it (1) if to do so would aid in the commission of a crime (2) if it was given to the agent for the purpose of accomplishing a very serious crime (3) if a crime involving more than a minor offense has been accomplished by the delivery to the agent.

Applying the third qualification of the rule of the Restatement to the principal case, has a crime involving more than a minor offense

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(1886) (recovery of money given to be used in speculation in grain futures in spite of a statute providing that no rights could arise in either party out of an agency created for an illegal purpose); Ware v. Spinney, 76 Kan. 289, 91 Pac. 787 (1907) (recovery of money given to procure an agent's violation of his duty to his principal); Decell v. Hazlehurst Co., 83 Miss. 346, 35 So. 761 (1904) (recovery on contracts declared void by statute when made by a firm which had failed to pay the privilege tax); Murray v. Vanderbilt, 39 Barb. 140 (N. Y. Sup. Ct. 1863) (recovery of money received by an agent on an illegal contract between the principal and a third person); Morgan v. Groff, 4 Barb. 524 (N. Y. Sup Ct. 1848) (recovery of money bet with and lost to the wrong person by the agent); Kohler v. Rosenthal, 135 App. Div. 438, 120 N. Y. Supp. 325 (1909) (recovery of money given for betting); Monongahela Nat. Bank v. First Nat. Bank of California, Pa., 226 Pa. 270, 75 Atl. 359, 26 L. R. A. (N. S.) 1098 (1910) (recovery of the proceeds of a check which the principal had obtained by fraud); Hutzler v. Geigley, 196 Pa. 419, 46 Atl. 366 (1900) (recovery of profits made in the illegal sale of liquor); Keen v. Price, [1914] 2 Ch. 98 (recovery of money given to a bookmaker to be used in betting). In the following more recent cases the rule has been affirmed: Kyne v. Kyne, 98 P. (2d) 738 (Cal. App. 1940), rev'd, 106 P. (2d) 620 (Cal. 1940); Stephenson v. Golden, 279 Mich. 710, 276 N. W. 849 (1937); Ocean Forest Co. v. Woodside, 184 S. C. 428, 192 S. E. 413 (1937); Cuffman v. Blunkall, 124 S. W. (2d) 289 (Tenn. App. 1938).

[11]6 Williston, Law of Contracts (1938) §§ 1785, 1786; Woodward, The Law of Quasi Contracts (1913) § 148.

[12]That there has always been a limit beyond which courts will not go in enforcing this fidelity is evident from Everet v. Williams, 9 Law Quar. Rev. 197 (Exch. 1725). In that case a bill for an accounting between two persons engaged in highway robbery was abruptly dismissed.

[13]Restatement, Agency (1933) § 412. See also Restatement, Contracts (1932) §§ 598–609; Restatement, Restitution (1937) § 140; Restatement, Trusts (1935) § 422.

been accomplished? The New York statute[14] provides that persons making false statements in applications for a license or permit shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or both. The federal statute[15] provides for a fine of not more than one thousand dollars, and further provides that the administrator of the statute, with the consent of the Attorney-General, may compromise the liability. It cannot be fairly implied from these statutes that either the Legislature of New York or the Congress of the United States intended to make one guilty of such a misconduct an outlaw, to be barred from legal relief which in no way enforces or upholds the violation of the statute. To refuse relief here is to enforce a punishment other than that prescribed by law and to violate the public policy against forfeiture of property for crime,[16] as well as to enable the defendant to escape all responsibility for the tortious conversion of a small fortune.[17]

In such a decision as was reached in the principal case there is unquestionably an unjust deprivation and an unjust enrichment as between the parties. Logic demands a recovery. The refusal to heed that demand can only be justified on the ground of public policy. But there is " more than one phase to sound public policy. One of these that ought to be paramount is that courts should close their ears when dishonest men attempt to wrest and quote rules of law in an effort to shield them from their misdeeds."[18]

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[14]Laws of 1934, c. 478 § 130.

[15]49 Stat. 985 (1935), 27 U. S. C. A. 207 (Supp. 1940).

[16]See 6 Williston, Law of Contracts (1938) § 1750 on the similar problem arising in suits by beneficiaries in life insurance policies. The author notes an increasing tendency to allow recovery in cases where the insured died while committing a felony.

[17]The loss alleged to have been suffered exceeded $200,000.

[18]Memphis & Arkansas City Packet Co. v. Agnew, 132 Tenn. 265, 177 S. W. 949, 951, L. R. A. 1916A 641, 645 (1915) (corporation doing business in Tennessee without a license allowed to recover profits from its agent). Accord, Franzer v. Zimmer, 90 Hun 103, 35 N. Y. Supp. 612 (N. Y. Sup. Ct. 1895). Contra: Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989 (1907).

CONSTITUTIONAL LAW—"NAVIGABLE WATERS OF THE UNITED STATES" HELD TO INCLUDE STREAMS CAPABLE OF BEING MADE NAVIGABLE BY IMPROVEMENTS. [United States Supreme Court]

The tendency of the Supreme Court of the United States in the past ten years toward a liberalized constitutional interpretation as a means of centralizing power in the federal government has resulted in a continual widening of the scope of federal authority under the commerce clause. One important phase of this trend has been the extension of federal control over water power development in navigable streams. The recent case of *United States v. Appalachian Electric Power Co.*[1] presents what appears to be the most radical step yet taken by the Court in this field of the law. It is a step which may well bring despair to the advocates of states rights, as its effect is to curtail the right of the states to develop water power in their streams, and to extend greatly federal control over hydro-electric power development.

In 1926, the Appalachian Electric Power Co., proceeding under the provisions of the Federal Water Power Act of 1920,[2] petitioned the Federal Water Power Commission for a license to construct a dam on the New river above Radford, Virginia. The commission made a finding that the New river was not a navigable water of the United States but that interests of interstate commerce would be affected by the dam. After some further controversy,[3] the commission adopted another resolution stating that the New river was a navigable water of the United States under the Federal Water Power Act.[4] Notwithstanding this, the Appalachian Co. began construction work, which caused the federal government in 1935 to file a complaint seeking to enjoin the construction of the dam on the ground that it constituted an obstruction to navigation in violation of the Rivers and Harbors Act of 1890[5] and the Federal Water Power Act of 1920.[6] The Federal District Court

[1] 61 S. Ct. 291, 85 L. ed. 201 (1940).

[2] 41 Stat. 1077 (1920), as amended by the Federal Power Act of 1935, 49 Stat. 847 (1935), 16 U. S. C. A. §§ 791-825 (1941).

[3] A suit was begun by the Appalachian Co. to enjoin the commission from interfering with the construction, but the action was dismissed because of lack of personal jurisdiction over the defendants. Appalachian Electric Power Co. v. Smith, 4 F. Supp. 3, 6 (W. D. Va. 1931), aff'd, 67 F. (2d) 451 (C. C. A. 4th, 1933).

[4] 41 Stat. 1063 (1920), as amended by the Federal Power Act of 1935, 49 Stat. 838 (1935), 16 U. S. C. A. § 796 (1941).

[5] 26 Stat. 454 (1890), as amended by the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U. S. C. A. §§ 401-464 (1928).

[6] 41 Stat. 1077 (1920), as amended by the Federal Power Act of 1935, 49 Stat. 847 (1935), 16 U. S. C. A. §§ 791-825 (1941).

and the Circuit Court of Appeals held that the New river was not in fact a navigable water of the United States and that the construction of the dam would not impair the "navigable capacity" of any "navigable waters of the United States."[7] The Supreme Court in the instant decision reversed this finding and held that the New river was in fact navigable. Furthermore, the Court held constitutional certain license provisions of the Federal Power Act, the terms of which were not related to navigation.[8]

The courts in the United States have generally accepted the civil law test of navigability,[9] that all rivers which are navigable in fact are

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[7]United States v. Appalachian Electric Power Co., 23 F. Supp. 83 (W. D. Va. 1938), aff'd, 107 F. (2d) 769 (C. C. A. 4th, 1939).

[8]Federal Water Power Act of 1920, 41 Stat. 1068, as amended by the Federal Power Act of 1935, 49 Stat. 842, 16 U. S. C. A. § 803. The Supreme Court held that the power of the federal government over navigable waters of the United States is not limited to the purposes of navigation, and in effect overruled the dicta in the cases sustaining this restrictive principle. See James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 318 (1937); Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655, 51 L. ed. 956 (1907); Port of Seattle v. Oregon and Washington Ry., 255 U. S. 56, 41 S. Ct. 237, 65 L. ed. 500 (1921); United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 78 L. ed. 1267 (1935); United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. ed. 339 (1926); Wisconsin v. Illinois, 278 U. S. 367, 49 S. Ct. 163, 73 L. ed. 426 (1929). The Court would seem to have taken the correct approach in holding these license provisions constitutional on this basis. For since the federal government does have a plenary power to license obstructions in navigable streams, and since in regulating navigation other objectives may be incidentally accomplished, it would seem to follow logically that the government could impose license provisions not related to navigation if they were secondary to the principal consideration of keeping the stream open for navigation.

However, suppose the stream was not navigable but a dam thereon would effect the navigable capacity of navigable waters of the United States; can the Federal Power Commission under § 202 of the Federal Power Act, 49 Stat. 839 (1935), 16 U. S. C. A. § 797 (1941), require a license containing provisions not related to navigation? It is doubtful whether the federal power over non-navigable streams would extend this far.

[9]It has generally been stated that at common law navigable streams were only those in which the tide ebbed and flowed. Grand Rapids & Indiana R. R. v. Butler, 159 U. S. 87, 15 S. Ct. 991, 40 L. ed. 85 (1895); Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439 (1859); St. Louis I. M. & S. Ry. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559 (1890); See also 45 C. J. 404; 27 R. C. L. 1299, § 211; Note (1899) 42 L. R. A. 305. This doctrine was adopted in England because all of the streams were short and few were navigable in fact above the ebb and flow of the tide. But some cases have refused to accept this definition on the ground that the ebb and flow test was not the only measure of navigability at common law, and that the prevailing test was actual usability for navigation. Schurmeier v. St. Paul & P. R. R., 10 Minn. 82, 88 Am. Dec. 59 (1865); McManus v. Carmichael, 3 Iowa 1 (1856); See also 27 R. C. L. 1300, § 212. The confusion of navigable with tidal water prevailed in the United States for some time notwithstanding the differences existing between the topography of England and America. Barney v. Koekuk, 94 U. S. 324, 24 L. ed 224 (1876).

navigable in law.[10] The classic definition in The *Daniel Ball* has been the basis of the federal rule in this respect:

> "... Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water...."[11]

This rule has been frequently repeated and approved,[12] and had never been overruled or essentially modified until the decision in the principal case. Rather, later cases had affirmed and clarified it. In *The Montello*[13] it was made clear that the true criterion of a stream's navigability is its capacity for use in its natural state by the public for purposes of transportation and commerce, rather than the extent and manner of that use. In *Leovy v. United States*[14] it was stated that "navigable waters of the United States" has reference to commerce of a substantial and permanent character.[15] Only occasional or exceptional use under abnormal conditions is not sufficient,[16] nor is a theo-

[10]The Daniel Ball, 10 Wall. 557, 19 L. ed. 999 (U. S. 1870); United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465 (1926); Little Rock M. R. & T. R. R. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277 (1882); Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209 (1853); See also 45 C. J. 406; 27 R. C. L. 1300, § 212. Some of the early cases interpreted this rule. The streams must be valuable for commerce, Neaderhauser v. State, 28 Ind. 257 (1867); must have a public terminus at both ends, Chisolm v. Caines, 67 Fed. 285 (C. C. D. S. C. 1894); must be more than a periodical stream, Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98 (1870); and mere obstructions will not render the stream non-navigable, Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633 (1886).

[11]10 Wall. 557, 563, 19 L. ed. 999 (U. S. 1870)..

[12]Arizona v. California, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed. 1154 (1931); Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77, 43 S. Ct. 60, 67 L. ed. 140 (1922); Donnelly v. United States, 228 U. S. 243, 33 S. Ct. 449, 57 L. ed. 820, Ann. Cas. 1913E, 710 (1913); Economy Light and Power Co. v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. ed. 847 (1921); Leovy v. United States, 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 (1900); Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. ed. 771 (1922); United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465 (1926); United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. ed. 1267 (1935); United States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 (1899); United States v. Utah, 283 U. S. 64, 51 S. Ct. 438, 75 L. ed. 844 (1931).

[13]20 Wall. 430, 22 L. ed. 391 (U. S. 1874).

[14]177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 (1900).

[15]Other decisions of the Supreme Court have interpreted the rule to mean that the stream must be capable of valuable public use in its natural conditions, United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746 (1917); must have a capacity for general and common usefulness for purposes of trade and commerce, United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 79 L. ed. 1267 (1935).

[16]Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. ed. 771 (1922); United

retical or potential navigability, or one that is temporary, precarious or unprofitable.[17] But it is not necessary that a boat be able to pass over all portions of the stream, and occasional interruptions or retardations of navigation by falls or rapids do not render the stream non-navigable where in fact it is used or susceptible of use for navigation.[18]

It was early decided by Chief Justice Marshall in *Gibbons v. Ogden*[19] that the power to regulate commerce given to the federal government under the commerce clause[20] included the power to regulate navigation[21] in the "navigable waters of the United States." Thus, the question has frequently arisen as to what streams are navigable in the sense that the federal government has a power to regulate them. The first case on this point was *The Daniel Ball,* where it was stated:

> "... And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[22]

Even though a body of water lies wholly within a state it may be a navigable water of the United States,[23] provided it is utilized under common control in connection with other means of transportation for purposes of interstate commerce.[24] But if the stream is wholly intrastate and does not form a continuous highway for commerce, it is not a

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States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 (1899).

[17]United States v. Doughton, 62 F. (2d) 936 (C. C. A. 4th, 1933).

[18]The Montello, 20 Wall. 430, 22 L. ed. 391 (U. S. 1874); Economy Light and Power Co. v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. ed. 847 (1921); St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 18 S. Ct. 157, 42 L. ed. 497 (1897).

[19]9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).

[20]U. S. Const. Art. 1, § 8, cl. 3, "The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

[21]This is distinct from the admiralty power of the federal government, U. S. Const. Art. 3, § 2, cl. 1.

[22]10 Wall. 557, 563, 19 L. ed. 999 (U. S. 1870). See also Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96 (U. S. 1865); Miller v. Mayor of New York, 109 U. S. 385, 3 S. Ct. 228, 27 L. ed. 971 (1883).

[23]The Montello, 11 Wall. 411, 20 L. ed. 191 (U. S. 1870).

[24]The Katie, 40 Fed. 480, 7 L. R. A. 55 (S. D. Ga. 1889).

navigable water of the United States.[25] From these decisions and those defining navigability, it is apparant that a navigable water of the United States is one that meets certain conditions as a highway for commerce between the states. These would fall into two categories: interstate streams, and intrastate streams that form a highway for interstate commerce.

On the basis of this comprehensive body of precedent, an examination of the physical characteristics of the New river strongly confirms the correctness of the lower courts' determination that the river is not in fact a navigable water of the United States. The river has its source in two creeks in northwestern North Carolina, several miles from the Virginia border. The stream flows in a general northwesterly direction through Virginia for 160 miles after which it reaches the West Virginia border. About 90 miles into West Virginia it meets the Gauley river, and just below this point, at Kanawha Falls, the stream becomes the Kanawha river which flows 95 miles to Point Pleasant, where it joins the Ohio. Defendant's proposed dam was to be situated about 60 miles toward the head of the New from the West Virginia state line and several miles above Radford, Virginia.

The river is generally rocky and turbulent, and drops rapidly from its head to its mouth. For a good portion of its length it passes through steep cliffs and unusual geological rock formations. Its course is marked by numerous rapids and shoals, and here and there by pools of deeper water. From its mouth at Kanawha Falls up to near Hinton, West Virginia, about 50 miles, the river is the most precipitous of its entire length, and forms a barrier between the navigable Kanawha and any possible navigable waters of the New.

The evidence showed there were only two sections of the river which were in fact navigated by any appreciable amount of commerce at anytime. From Hinton up the river for about 25 miles and from Radford up the river for about 30 miles, the river was navigated in about 1850 by some 18 or 20 keel boats drawing two feet of water. These boats were used to ship grain and tobacco down stream to railheads at these two points. Even this small local commerce was abandoned by 1890; and there is no appreciable commerce on the river today.[26]

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[25]The Montello, 11 Wall. 411, 20 L. ed. 191 (U. S. 1870); The Katie, 40 Fed. 480, 7 L. R. A. 55 (S. D. Ga. 1889); Veazie and Young v. Moor, 14 How. 568, 14 L. ed. 545 (U. S. 1852).

[26]See the lower courts' decisions for an excellent analysis of the physical characteristics of the New, 23 F. Supp. 83 (W. D. Va. 1938), and 107 F. (2d) 769 (C. C. A. 4th, 1939).

The strip of river from Radford downstream, across the Virginia-West Virginia border, to 25 miles above Hinton, is one of the most impassible of the entire stream. This stretch of about 60 miles is rocky and drops rapidly. Any trips made on this part of the river were irregular and attended with great difficulty. There is no evidence that any trips in keel boats were made between Radford and Hinton, nor that appreciable commerce of any kind was ever conducted between these points.[27]

Thus, the character of the commerce on the New was purely intrastate. It occurred in two widely separated stretches of the river with little traffic of any sort between them. The improvements made by the federal government between 1876 and 1885 on the stretches above Hinton and Radford in no way altered the local character of the navigation, and no attempt was made to create a continuous channel between these two sections.

In spite of this evidence, the Supreme Court reversed the decisions of the lower courts, and decided that the New river was a navigable water of the United States in contemplation of law, since it was capable of being made navigable in fact by improvements.[28] This conclusion rested on findings of fact made *de novo*. The Court held, contrary to all that had theretofore been said on the subject, that the natural and ordinary condition of the stream, however impassible it may be, is not the proper test. Rather, if by reasonable improvements the stream may be rendered navigable, then it is navigable in law without such improvements.[29] Nor is it necessary for Congress to have appropriated

[27]The section of the river from 30 miles above Radford to the head of the New at Wilson Creek, just short of the North Carolina border, was not given much consideration by any of the courts as it was too shallow to carry anything but small boats.

[28]The opinion of the Supreme Court shows the meagre evidence upon which the court based its conclusions of navigability. The Court assumed that the stretches of river above Hinton and Radford were navigable in contemplation of law without considering that the commerce was purely local in character. The section of the river from Kanawha Falls to Hinton was mentioned only in a general summary of the physical characteristics. The most important stretch covering the Virginia-West Virginia border from Radford to 25 miles above Hinton received most of the Court's attention. The only evidence cited as to navigability of this section of the stream was trips by government survey parties, attended with great difficulty and requiring considerable portage, and certain vague statements as to isolated bits of boating. No valuable commerce of any type was shown to have been carried in interstate traffic. Clearly, this is not enough to make the river a navigable water of the United States, under the usual tests. United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746 (1917); Leovy v. United States, 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914. (1900).

[29]It will be noticed that the Supreme Court made a statement that when once a stream becomes a navigable water, it always remains so. 61 S. Ct. 291, 299. The only

money to improve the stream or even contemplated doing so. The only limitation is that there must be a balance between cost and need at a time when the improvement would be useful. No authority is cited to uphold this position and none could be found.[30] But, even applying this test, it is inconceivable that the New river could be made navigable by anything approaching a reasonable expenditure of money.[31]

In considering *de novo* the facts of navigability, the Supreme Court violated its well established practice of accepting the concurrent findings of fact by two lower courts, if supported by substantial evidence. This was an express basis of the decision in *Brewer-Elliott Oil and Gas Co. v. United States,*[32] where the Supreme Court refused to review a judment based on concurrent findings by the lower courts that a stream was not navigable. Until the instant decision, the Supreme Court had consistently refused to consider the evidence as to navigability anew, and had merely examined the opinion to see if the lower courts had applied the correct principles of law to the facts.[33]

Despite the surprising nature of the Court's reasoning, the obvious explanation for this decision lies in the fact that the policy of

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authority cited for this holding is Economy Light and Power Co. v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. ed. 847 (1921). An examination of this case fails to uphold that premise. The Court there said: "...a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions." 256 U. S. 113, 123, 41 S. Ct. 409, 413, 65 L. ed. 847 (1921). This would indicate that mere disuse because of cheaper transportation by rail, or the existence of dams or other man made obstructions, would not make a stream non-navigable in contemplation of law if it were in fact navigable. But if a once-navigable stream becomes a small creek, or if natural obstacles appear in it so that it becomes non-navigable in fact, then it should become non-navigable in law. If a non-navigable stream can become navigable through changed conditions, it would equally appear that a navigable stream could become non-navigable.

[30]In fact, all authority is exactly contrary. In United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. ed. 746 (1917) the Court said the stream must be capable of valuable public use in its natural condition. Only occasional or exceptional use under abnormal conditions is not sufficient. United States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 (1899). A theoretical or potential navigability will not make a stream a navigable water of the United States. United States v. Doughton, 62 F. (2d) 936 (C. C. A. 4th, 1933).

[31]See 23 F. Supp. 83, 97 (W. D. Va. 1938) for a report of the chief of engineers on the impossibility of making the river navigable by improvements.

[32]260 U. S. 77, 43 S. Ct. 60, 67 L. ed. 140 (1922).

[33]Economy Light and Power Co. v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. ed. 847 (1921); Leovy v. United States, 177 U. S. 621, 20 S. Ct. 797, 44 L. ed. 914 (1900); United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. ed. 465 (1926); United States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136 (1899).

the federal government to extend its control over the development of hydro-electric power was blocked by the conventional tests of navigability, and thus the Supreme Court was obliged to seek a new test to effectuate this policy. But if a departure from established principles of law has become a practical necessity, it would seem better that the Court should make a direct and express break with precedent by simply stating that because of changed conditions the old views are no longer adequate. Instead, the Court has stated new rules of law, unsupported by previous decisions, and yet has failed to acknowledge that any new principles are being adopted. Perhaps the most satisfactory means for relieving the Court from making further strained interpretations in this field lies in the adoption of a constitutional amendment giving the federal government plenary power over all streams, whether navigable or not, for the regulation of navigation, power development, flood control, and irrigation.

CARTER GLASS, III

CONSTITUTIONAL LAW—POWER OF FEDERAL GOVERNMENT TO PROHIBIT CHILD LABOR IN INDUSTRY. [United States Supreme Court]

By its decision in *United States v. F. W. Darby Lumber Co.*,[1] the Supreme Court of the United States has again acknowledged the urgency of present-day demands for social reform; on this occasion it has overruled its earlier adjudication which had denied that Congress' power to regulate interstate commerce embraced the right to prohibit child labor in industry. This move has in its general effect further broadened the scope of the commerce clause, and has given to the federal government a regulatory function previously thought to rest exclusively with the states. Thus the query is raised whether, in the light of this decision, there is now any necessity for the passage of the long-proposed Child Labor Amendment to the Federal Constitution. But in spite of the apparent new departure of the Court, it may be questioned whether the overruling of *Hammer v. Dagenhart*[2] is actually an innovation in the law, or whether it comes merely as a confirmation of principles already established.

The *Darby Lumber Co.* case arose as a test of the validity of the Fair Labor Standards Act of 1938,[3] which embodies a comprehensive scheme for preventing the shipment in interstate commerce of goods

[1] 61 S. Ct. 451 (1941).

[2] 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918), 3 A. L. R. 649 (1919).

[3] 52 Stat. 1060 (1938), 29 U. S. C. A. §§ 201-219 (Supp. 1940). The real purpose behind the act was probably the protection of New England industry against

manufactured under labor conditions which fail to conform to the requirements set up by the act. The act fixes both minimum wages and maximum hours of work for employees coming within its provisions. The defendant was engaged in the business of acquiring raw materials which he manufactured into finished lumber with the intent to ship in interstate commerce when manufactured; and he did in fact so ship a large part of the lumber produced. He was charged with violating the act by having employed workmen at less than the prescribed minimum wage or for more than the prescribed maximum hours, without payment of wages for overtime.[4]

The Court in upholding the act was faced with two questions. First, could Congress prohibit the carrying of goods in interstate commerce if the goods were manufactured under conditions other than those imposed by the act; and second, could it prohibit the employment of workmen in the production of goods for commerce at other than the prescribed wages and hours? In answering the first question, the Court found that the prohibition of shipment of the proscribed goods in interstate commerce was a valid exercise of congressional control over commerce between the states. It was declared that the power to control embraced the power to prohibit. In connection with this holding, the Court specifically overruled the case of *Hammer v. Dagenhart*.[5] To the second issue, also, an affirmative answer was given. The Court found that the defendant's activities came within the phrase "production for commerce" and were within the meaning of the statute. The power of Congress to regulate interstate commerce was de-

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competition with the low wage standards of the deep South. But in the words of the Court, "The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." 61 S. Ct. 451, 457 (1941).

[4]Specifically, the appellee was charged with violating § 15 (a) (1), (2) and (5) of the Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938), 29 U. S. C. A. §§ 201-219 (Supp. 1940). Section 15 (a) (1) prohibits the shipment in interstate commerce of any goods in the production of which any employee was employed in violation of § 6 or § 7 of the act. Section 6 fixes minimum wages to be paid to employees engaged in commerce or in the production of goods for commerce, while § 7 sets maximum hour of work for such employees. Section 15 (a) (5) makes it unlawful to violate § 11 (c) which requires the employer to keep such records of the persons employed by him and of their hours of work and wages as shall be prescribed by the administrator of the act.

[5]247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918), 3 A. L. R. 649 (1919). The Court need not have even considered the child labor question in the principal case,

clared not to be confined to commerce among the states alone, but to extend to intrastate activities which are so connected with interstate activities as to make their control necessary in order to accomplish the desired end.[6] As a consequence, labor conditions in the manufactory may be controlled by Congress, and Congress may prohibit the employment of workers for the production of goods for interstate commerce at other than the prescribed wages and hours.

Since 1918, the decision of *Hammer v. Dagenhart*[7] has stood as an obstacle to the extension of the federal government's power to control working conditions in industry by the use of its authority to regulate interstate commerce. Prior to that case, the congressional power over commerce between the states had in several important instances been successfully invoked to prohibit the shipment of certain objectionable commodities, and thus to prevent the use of those commodities. *Champion v. Ames (The Lottery Case)*,[8] decided in 1903, represents the earliest successful attempt by Congress to prohibit the shipment of particular goods in interstate commerce. In that case the Supreme Court upheld an act of Congress suppressing traffic in lottery tickets in interstate commerce.[9] However, the decision did not define the extent of this prohibitory power, and the Court expressly decided only the case before it.[10] Eight years later, in *Hipolite Egg Co. v. United States*,[11] the Court upheld the power of Congress to prohibit the introduction of impure foods and drugs into states by means of inter-

but it nevertheless seized upon the opportunity to settle once and for all this old controversy.

[6]Accord: Southern Railway Co. v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. ed. 72 (1911); United States v. Ferger, 250 U. S. 199, 39 S. Ct. 445, 63 L. ed. 936 (1919); Railroad Commission of Wisconsin v. Chicago, B. and Q. R. R., 257 U. S. 563, 42 S. Ct. 232, 66 L. ed. 371 (1922).

[7]247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918), 3 A. L. R. 649 (1919).

[8]188 U. S. 321, 23 S. Ct. 321, 47 L. ed. 492 (1903).

[9]The act was entitled, "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States," 28 Stat. 963. The present form of this statute is found at 35 Stat. 1136 (1909), 18 U. S. C. A. § 387 (1927).

[10]In the words of the Court: "The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states." 188 U. S. 321, 362, 23 S. Ct. 321, 329, 47 L. ed. 492 (1903); and again: "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause." 188 U. S. 321, 363, 23 S. Ct. 321, 330, 47 L. ed. 492 (1903).

[11]220 U. S. 45, 31 S. Ct. 364, 55 L. ed. 364 (1911).

state commerce.[12] In 1913, Congress was sustained in prohibiting the transportation in interstate commerce of women for immoral purposes.[13] And subsequently, Congress was allowed to prohibit the shipment of whiskey in interstate commerce into any state or territory in contravention of the laws of that state or territory.[14] In all of these cases the prohibitions dealt with goods which could become harmful in their use, and interstate commerce was necessary to bring about the harmful consequences of such usage.

In 1918, the decision of the Court in *Hammer v. Dagenhart* closed the door, at least temporarily, on federal power to prohibit the shipment of innocent and harmless goods in interstate commerce. In that case the Court declared unconstitutional an act of Congress[15] prohibiting the interstate transportation of the products of any mine or quarry in which within 30 days prior to their removal therefrom, children under the age of 16 had been permitted to work, or any article or commodity, the product of any mill in which children had so worked. The majority of the Court took the view that the act was aimed at a standardization of working conditions within the state and that that was a matter solely for state control. The attempt of the federal government was therefore branded as an interference with the exercise by the states of their reserved police powers. The situation was distinguished from those of the earlier cases, in the following language:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results.... This element is wanting in the present case."[16]

Thus it was decided that where the undesirable feature of the goods lay in the manner in which they were produced, rather than in the effects of their use, the passage of the goods in interstate commerce

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[12]The act concerned here was the "Pure Food and Drug Act." 34 Stat. 768 (1906), 21 U. S. C. A. § 1 (1927). The act was declared constitutional, the Court taking the view that Congress in its power to regulate interstate commerce could prohibit entirely illicit or adulterated articles.

[13]Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905 (1913). The act upheld was "The White Slave Traffic Act of June 25, 1910," 36 Stat. 825 (1910), 18 U. S. C. A. §§ 397-399 (1927). This prohibition was later upheld when the purpose of transportation was unaccompanied by any expectation of financial gain, but when the sole purpose was debauchery of the women. Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442 (1917).

[14]Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1917), upholding the "Webb-Kenyon Act," 37 Stat. 699 (1913).

[15]39 Stat. 675 (1916).

[16]247 U. S. 251, 271, 38 S. Ct. 529, 531, 62 L. ed. 1101 (1918), 3 A. L. R. 649, 653 (1919).

was not sufficiently related to the harms sought to be avoided to enable the federal government to prohibit their shipment among the states. However, even at this time four justices joined in a dissent, contending that this act was a valid exercise of the power of Congress over interstate commerce.

While the Court in the instant case could probably have distinguished *Hammer v. Dangenhart,* in such a way as to avoid its application to the present situation, yet it chose rather to overrule the decision directly, and so to destroy the distinction between the shipment of goods harmful in their use and of goods innocent in themselves but produced in an undesirable manner.[17] The Court may be commended for its forthright action in overruling its own precedent, but Mr. Justice Stone, in writing the opinion in the instant case, was unnecessarily harsh in his condemnation of the decision of *Hammer v. Dagenhart.* He declared:

> "The conclusion is inescapable that Hammer v. Dagenhart, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision. . . ."[18]

It is true that *Hammer v. Dagenhart* has not been accorded the esteem of being followed as a precedent in recent cases; but when decided, it was no more novel than any other case of first impression. Irrespective of the correctness of the decision as judged by standards of social consciousness a quarter of a century after the case arose, there was clearly an understandable basis for the Court's distinguishing between the facts of that case and the facts of the other cases decided prior to it. All of the earlier cases, except for *United States v. Delaware and Hudson Co.,*[19] readily distinguishable on other grounds,[20] dealt with prohibitions of things which when transported in interstate com-

[17]The instant case and Hammer v. Dagenhart may be thought to be distinguishable since there seems to be a difference between the two cases in what goods are prohibited. In the instant case it is apparent that the only goods prohibited were those manufactured under conditions prohibited by the act; whereas in Hammer v. Dagenhart *all* of the products of the mill or mine were prohibited if children had worked within 30 days prior to their removal. This, of course, included not only the goods actually made by child labor, but also all of the products made in the mill whether by child labor or otherwise.

[18]61 S. Ct. 451, 458 (1941).

[19]213 U. S. 366, 29 S. Ct. 527, 53 L. ed. 836 (1909), upholding the Hepburn Act, 34 Stat. 584 (1906), 49 U. S. C. A. §§ 1-9 (1929).

[20]This case is easily distinguished from the other cases mentioned in note 21, infra. The Hepburn Act, 34 Stat. 584 (1906), 49 U. S. C. A. §§ 1-9 (1929), made it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined or produced by it or under its authority or which it may

merce became harmful in their use.[21] In reality, then, *Hammer v. Dagenhart* for the first time presented a case of prohibition of goods in themselves harmless; and even though the decision of the Court may have been wrong, it cannot be said that the Court failed to follow the then prevailing interpretation of the commerce clause.

In any event, *Hammer v. Dagenhart* has not been well received and it is best that it be overruled.[22] It can be said that even before the instant case, *Hammer v. Dagenhart* had in effect been overruled. The shift away from its rule began in 1937, with the case of *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*[23] This case upheld the Ashurst-Summers Act,[24] which made it unlawful for one knowingly to transport in interstate or foreign commerce goods made by convict

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own in whole or in part or in which it may have any interest, direct or indirect." The purpose of the act was obviously not to prohibit the transportation of any particular goods, but to disassociate the carrier from the goods hauled. Its purpose was to prohibit a relationship, not to prohibit the transportation of goods.

[21]Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321, 47 L. ed. 492 (1903) (lottery tickets); Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 364, 55 L. ed. 364 (1911) (impure foods and drugs); Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905 (1913) (prostitutes); Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442 (1917) (same); Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1917) (whiskey).

[22]Professor Willis says, "This decision was another five to four decision, and it is believed that it was an incorrect decision, that it is a stumbling-block in the way of necessary social control, and that the constitutional law on the subject of interstate commerce will never be in a satisfactory state until this decision has been overruled." Willis, Constitutional Law (1936) 341.

[23]299 U. S. 334, 57 S. Ct. 277, 81 L. ed. 270 (1937). Several cases were decided prior to this case and after Hammer v. Dagenhart, but they did not indicate as definitely as did this case, the trend away from the former holding. Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817 (1922), held that an excise tax was unconstitutional if its purpose was the regulation of child labor, and Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. ed. 699 (1925) dealing with the National Motor Vehicle Theft Act, 41 Stat. 324 (1919), 18 U. S. C. A. § 408 (1927) went much on the same basis as did Hammer v. Dagenhart. The statute provided a criminal punishment for anyone who transported a stolen motor vehicle in interstate or foreign commerce, concealed, stored or disposed of one moving as a part of interstate commerce. The Court in its decision took the position that stolen goods came within the category of harmful commodities and that therefore the prohibition was valid. Even though this case was based on Hammer v. Dagenhart, it would seem that stolen automobiles do not come in the same class as lottery tickets, whiskey and impure foods, since automobiles are harmless in their use; and that actually a trend away from Hammer v. Dagenhart was begun. However, it remained for Kentucky Whip and Collar Co. v. Illinois Central R. R. Co., 299 U. S. 334, 57 S. Ct. 277, 81 L. ed. 270 (1937), to give impetus to this attitude.

[24]49 Stat. 494 (1935), 49 U. S. C. A. §§ 61-64 (Supp. 1940).

labor, into any state where the goods were intended to be received, possessed, sold or used in violation of the state's laws. The plaintiff had tendered to the defendant shipments of prison-made goods, some of which were consigned to states prohibiting the sale of such goods. The defendant refused to accept the shipment and the plaintiff sued to force him to do so. The Court, in holding the act valid, ruled that Congress had the power to exercise prohibitions designed to prevent interstate commerce from being used to impede the carrying out of a state's policy.[25]

Any remaining doubt as to Congress' power to prohibit specific goods, harmless in their use, from being carried in interstate commerce was removed in 1939, by *Mulford v. Smith.*[26] The Court upheld the provisions of the A.A.A.[27] which established and appointed marketing quotas for tobacco and penalized the marketing of tobacco in excess of those quotas. In other words the act prohibited the marketing of tobacco in interstate commerce if the tobacco concerned had been produced in excess of the quota allowed. This was held to be a valid exercise of the power vested in Congress to control and regulate interstate commerce. Obviously this case conflicts directly with *Hammer v. Dagenhart,* and its effect was to overrule the case, although the Court did not there express itself as intending to overrule that precedent. Thus, even without the instant decision, *Hammer v. Dagenhart* had already lost its force, and *United States v. F. W. Darby Lumber Co.* is in no wise revolutionary, but rather sets forth the law as it had come to be established.

In view of the principal decision, a serious question is presented as to whether there is now any necessity for the passage of the proposed

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[25]It has been said in an effort to distinguish Kentucky Whip and Collar Co. v. Illinois Central R. R. Co. from Hammer v. Dagenhart, that in the latter case the effect of the statute was to bring about a control by the federal government in the state of *origin* of the goods, whereas in the former case the effect was to exercise control in the state of *destination.* For other discussions of Kentucky Whip and Collar Co. v. Illinois Central R. R. Co., see Notes (1937) 11 U. of Cin. L. Rev. 357. and (1937) 15 Tex. L. Rev. 371. One must remember in reading these comments, however, that they were written before the deciding of Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092 (1939).

[26]307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092 (1939).

[27]52 Stat. 31 as amended March 26, 1938, 52 Stat. 120, April 7, 1938, 52 Stat. 202, May 31, 1938, 52 Stat. 586, and June 20, 1938, 52 Stat. 775, 7 U. S. C. A. § 1281 et seq. (1939). The portions of the act under which the appellants were charged are 7 U. S. C. A. §§ 1311-1314 (1939).

Child Labor Amendment.[28] Since Congress by virtue of the present state of the law can regulate child labor by means of prohibiting the shipment in interstate commerce of the products of child labor, it is apparent that no amendment is necessary to enable Congress to control child labor effectively in industries sending their products into other states. Further, because it has long been accepted that Congress can control intrastate commerce if it is so connected with the interstate commerce as to make its control necessary in order to regulate interstate commerce,[29] Congress can to a large extent prohibit child labor in intrastate commere also. Due to the increasing complexity of modern industry and commerce, almost every business to some extent affects interstate commerce, and hence wide powers of regulation are permissible. Thus, without extending the basis of its powers, Congress can readily regulate child labor in almost any industry in which such regulation seems advisable, and such powers are almost as broad in scope as any that would be granted by amendment.[30]

EDMUND SCHAEFER, III

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[28]This amendment was proposed by Congress to the legislatures of the several states in 1924. By 1932, only seven states had ratified, and thirty-two had rejected it. In 1933, an attempt was made to resurrect the amendment, and since then twenty-eight states have ratified and eleven have rejected. According to reports at the time of the instant decision, the officials of the Children's Bureau intend to continue to press for the passage of the amendment. However, some have taken the view that it cannot now be ratified because of an unreasonable lapse of time and because of its previous rejection by many states; they insist that a new proposal by Congress is necessary. Committee Report—Child Labor Amendment (1935) 21 A. B. A. J. 11. But see Dowling, Clarifying the Amending Process (1940) 1 Wash. and Lee L. Rev. 215.

[29]In Southern Railway Co. v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. ed. 72 (1911), the Supreme Court allowed Congress to require railroads doing an interstate business to comply with safety requirements in their equipment which was used solely in intrastate transportation. This was done upon the theory that in order to regulate interstate commerce effectively, it was necessary to regulate the interdependent intrastate commerce also. In United States v. Ferger, 250 U. S. 199, 39 S. Ct. 445, 63 L. ed. 936 (1919), the Court allowed Congress to regulate bills of lading because of their effect upon interstate commerce. See also, Railroad Commission of Wisconsin v. Chicago, B. and Q. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. ed. 371 (1922), and National Labor Relations Board v. Jones and Laughlin Steel Co., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937). This rule is expressed in the instant case in this way: "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." 61 S. Ct. 451, 459 (1941).

[30]Law review writers have taken the view that such an amendment is unnecessary. Notes (1937) 13 Notre Dame Lawyer 59, and (1937) 22 Wash. U. L. Q. 401. It

CONTRACTS—LIMITS OF PROMISSORY ESTOPPEL AS BASIS OF ENFORCING GRATUITOUS PROMISES. [Pennsylvania]

The doctrine of equitable estoppel has long been employed to prevent injustice where the defendant has made a representation as to *past* or *present* conduct[1] calculated to induce reliance thereon, and which the plaintiff has reasonably relied upon to his injury.[2] Because consideration has become so firmly embodied in the roots of our common law, the courts are reluctant to waive the requirement of this necessary safeguard and extend the principle of equitable estoppel to the enforcement of promises as to *future* conduct.[3] In enforcing such gratuitous promises relied on by the promisee, some courts have sought desperately for a consideration in order to prevent an injustice to the promisee.[4] For example, in *Alleghany College v. National Chautauqua*

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has been suggested that legislation patterned after the Ashurst-Summers Act, 49 Stat. 494 (1935), 49 U. S. C. A. §§ 61-62 (Supp. 1940), upheld in Kentucky Whip and Collar Co. v. Illinois Central R. R. Co., 299 U. S. 334, 57 S. Ct. 277, 81 L. ed. 270 (1937), would be a good substitute for the proposed amendment. Note (1937) 13 Notre Dame Lawyer 59.

This would also avoid a constitutional problem as to whether or not the proposed amendment is now susceptible of ratification.

[1]Bank of America of California v. Pacific Ready-Cut Homes, Inc., 122 Cal. App. 554, 10 P. (2d) 478, 482 (1932): "It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future." Butler Bros. Co. v. Levin, 166 Minn. 158, 207 N. W. 315 (1926); Exchange National Bank of Tulsa v. Essley, 173 Okla. 2, 46 P. (2d) 462 (1935); 10 R C. L. 690.

[2]The doctrine finds frequent application where the promisor announces his intention of abandoning an existing right and thereby misleads another relying on this representation by some action or forbearance. Faxton v. Faxton, 28 Mich. 159 (1873), where the plaintiff promised the son of the deceased mortgagor that if he would remain on the land and cultivate it, the mortgage would never be enforced. Thom v. Thom, 294 N. W. 461, 464 (Minn. 1940): "A promise relating to the intended abandonment of an existing right which influences the promisee to act to his prejudice may be the basis of an estoppel, where substantial injustice will result unless the promise is enforced, although there is no consideration for the promise." Stevens v. Turlington, 186 N. C. 191, 119 S. E. 210 (1923).

This particular enforcement of promises unsupported by consideration has been regarded as an extension of the doctrine of equitable estoppel beyond its usual application as to representations concerning past or present conduct. Exchange National Bank of Tulsa v. Essley, 173 Okla. 2, 46 P. (2d) 462 (1935).

[3]In denying the application of the doctrine, the courts reason that promises as to future conduct, if binding at all, must be binding as contracts and must be supported by consideration. Rottman v. Hevener, 54 Cal. App. 474, 202 Pac. 329 (1921); Langdon v. Doud, 10 Allen 433 (Mass. 1865); 21 C. J. 1142, and cases cited therein.

[4]See (1938) 16 Tex. L. Rev. 569.

County Bank of Jamestown,[5] Judge Cardozo ruled that the setting up of an endowment fund in the promisor's name was consideration for the promise to contribute the money for the fund. Upon closer analysis, however, it seems clear that no consideration in the orthodox sense was present and that the decision in effect rests upon the principles now generally termed promissory estoppel.

Because of the public interest involved, promissory estoppel has developed rapidly in the enforcement of charitable subscriptions. In such cases several courts have taken the realistic stand of admitting the futility of trying to find consideration,[6] instead granting recovery by application of the doctrine of promissory estoppel.[7] It is thus coming to be accepted that though a charitable subscription is a promise to make a gift in the future,[8] and is not enforcible as a true contract because of lack of consideration,[9] yet it may be enforced where money has been expended or liabilities incurred in reliance upon the promise and such liabilities and expenditures would cause loss or injury to the promisee unless the promise is performed.[10]

In only a comparatively few cases has a promise between two individuals been enforced by promissory estoppel. One of the earliest

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[5]246 N. Y. 369, 159 N. E. 173 (1927), 57 A. L. R. 980 (1928), noted, (1928) 13 Corn. L. Q. 270.

[6]The courts of some jurisdictions in enforcing charitable subscriptions have held that the several promises of the subscribers constituted a sufficient consideration for each other. Lagrange Female College v. Carey, 168 Ga. 291, 147 S. E. 390 (1929); Cotner College v. Hyland, 133 Kan. 322, 299 Pac. 607 (1931); Greenville Supply Co. v. Whitehurst, 202 N. C. 413, 163 S. E. 446 (1932). In the same kind of situation some courts have relied on the performance of the enterprise for which the subscription was given as the consideration. Board of Home Missions v. Manly, 129 Cal. App. 541, 19 P. (2d) 21 (1933); Alleghany College v. National Chautauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927), 57 A. L. R. 980 (1928).

[7]Board of Trustees of Upper Iowa Conference of Methodist Episcopal Church v. Noyes, 165 Iowa 601, 146 N. W. 848 (1914); In re Stock's Estate, 164 Minn. 57, 204 N. W. 546 (1925); School District of the City of Kansas v. Stocking, 138 Mo. 672, 40 S. W. 656 (1897).

[8]South v. First National Bank of Fayette, 17 Ala. App. 569, 88 So. 219 (1920).

[9]Missouri Wesleyan College v. Shulte, 142 S. W. (2d) 644 (Mo. 1940). A promise to make a gift in the future is not actionable because of lack of consideration; but where the promisee in reliance on the subscription has assumed the performance of some duty, or has performed services, done work or expended money, the gratuitous promise is converted into a valid and enforcible contract. See 60 C. J. 956.

[10]A defense of lack of consideration can not be made to a promissory note given as a gift, if money has been expended or liabilities incurred which cause injury or loss to the person so expending money. Trustees of Baker University v. Clelland, 86 F. (2d) 14 (C. C. A. 8th, 1936); South v. First National Bank of Fayette, 17 Ala. App. 569, 88 Co. 219 (1928); Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432 (1898). For complete discussion, see Eastern State Agricultural and Industrial League v. Vail's Estate, 97 Vt. 495, 124 Atl. 568 (1924).

clear applications of the doctrine was made by the Nebraska court in 1898.[11] It appeared that deceased had given his granddaughter a promissory note for $2,000, saying that none of his granddaughters worked and he did not like for her to do so. Though the deceased did not actually request her to stop working, the granddaughter gave up her job in reliance on the note. She later sued to collect on the note, and was met by the defence of lack of consideration. The court conceded that heretofore equitable estoppel had been applied only to representations of past or present facts, but in this case it was deemed necessary, as a means of preventing injustice, to extend the estoppel principle to enforce representations as to future conduct, or promises which were calculated to induce reliance on the part of the promisee and upon which the promisee did reasonably rely so as to suffer a detriment.

The Restatment of the Law of Contracts, published in 1932, recognized the doctrine of promissory estoppel as follows:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[12]

The sanction thus accorded by the American Law Institute has given new energy and prestige to the doctrine,[13] and the Restatement definition has been followed by nearly all the recent cases invoking a promissory estoppel. Thus, where a wife gave a note for the debt of her husband to her father so that she would not be disinherited, the court estopped her from pleading a lack of consideration as a defence to payment of the note;[14] and a promise by a company to give a retired employee $100 a month was enforced by estoppel.[15] The same result was reached in a case involving a promise to pay the debt of an estate, made by the widow to induce creditors to delay in asserting claims against the estate.[16] In a 1938 Pennsylvania case, a promise by the lessor to release one of the partners of the lessee firm from the payment of rent

[11]Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. St. Rep. 491 (1898).

[12]Restatement, Contracts (1932) § 90.

[13]This adoption gave rise to considerable disapproval and adverse criticism from those who relied on the American Law Institute merely to restate the law as it was already established. Even at this late date, the adoption of promissory estoppel was branded as a radical attempt to change the law.

[14]Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41 (1937).

[15]Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 571 (1932), rev'd. on other grounds, 318 Pa. 490, 178 Atl. 490 (1935).

[16]W. B. Saunders Co. v. Galbraith et al, 40 Ohio App. 155, 178 N. E. 34 (1931).

was enforced by estoppel, because the promisee in reliance on the promise had gone into another business.[17]

In spite of the increased employment of promissory estoppel as an accepted legal principle, the true purpose and nature of the doctrine are often misunderstood. An instance of this situation is afforded by the recent Pennsylvania case of *Stelmack v. Glen Alden Coal Co.*[18] The plaintiff in purchasing the title to surface land had expressly waived all rights he might have or acquire against the owner of the minerals for damages to the surface caused by subsidence of the land resulting from mining operations. At a later time defendant's agent promised the plaintiff that the defendant would prevent threatened damage to the buildings and would repair damage already caused by subsidence of the soil. This action was brought by the plaintiff to recover for losses resulting from the defendant's failure to perform. The plaintiff contended that the defendant should be estopped from denying consideration for the promise. However, the court very properly ruled that this was not an appropriate situation for the operation of promissory estoppel because the plaintiff suffered no injury by reliance on the defendant's promise, inasmuch as the damages to his land would have been incurred irrespective of the promise to repair and restore. Plaintiff failed to show any action on his part in reliance on defendant's promise, and no injustice would result from a refusal to enforce the promise.

Unless there were facts in the case which were not revealed in the court's opinion, it seems that the plaintiff's concept of the doctrine of promissory estoppel would involve a rule for enforcing any promise made under any circumstances, if the failure to perform the promise would cause a loss to the promisee. Such a broad principle has not been adopted by any court and is certainly not within the word or spirit of the Restatement rule. The protection of that rule may be invoked only where plaintiff shows (1) a promise reasonably expected to induce action or forbearance, (2) actual action or forbearance in reliance on the promise, and (3) injustice resulting from a refusal to enforce the promise. Under the facts as stated in the *Stelmack* case, the first requisite may be found, but nothing appears of the actual reliance and threatened injustice. If the plaintiff had made preparations, prior to defendant's promise, to prevent the damage to his land, and then on the promise of defendant to undertake this task, abandoned his efforts,

[17]Fried v. Fisher, 328 Pa. 497, 196 Atl. 39, 115 A. L. R. 147 (1938). Though this is a leading Pennsylvania case on promissory estoppel, actually the case is very near to the scope of operation of equitable estoppel, as it might be said to have involved a representation relating to the future abandonment of an existing right.

[18]14 A. (2d) 127 (Pa. 1940).

relying on defendant to preserve the land, then if defendant failed to perform and the land was damaged, it would seem that plaintiff would be entitled to invoke the promissory estoppel doctrine.

One explanation of the observable lack of an exact understanding of the proper sphere of operation of promissory estoppel undoubtedly lies in the fact that in the use of this rule, as of any "justice-making" rule, considerable flexibility of application must be preserved. Once the scope of the estoppel becomes rigidly set, its intended use to prevent injustice in the individual case may be seriously hampered.

Another reason for the uncertainties surrounding the use of the principle springs from the long acceptance of the doctrine of consideration as a fundamental precept of law, and the courts' distrust of any proposition which tends to question the necessity of consideration. In these two factors lies the significance of the controversy over the nature of promissory estoppel as it bears on consideration concepts. Judge Hand said that promissory estoppel is "a recognized specie of consideration."[19] However, estoppel is not to be confused with consideration, because it is not a relaxation of the accepted definition that consideration is a swap, bargain, or trade.[20] The injury to the promisee in reliance on the promise is not regarded as consideration that binds the promisor. The reliance by the promisee gives rise to an estoppel which is independent of any consideration. It is clearly stated by the Pennsylvania court that "... the basis of the doctrine is not so much one of contract, with a substitute for consideration, as the application of the general principle of estoppel to certain situations."[21]

The objection that promissory estoppel destroys the fundamental concepts of consideration[22] is minimized by the fact that in many cases in which the doctrine could have been applied, the courts have enforced the promise by finding a consideration of doubtful existence. Inasmuch as the trend of the law seems to be to enforce gratuitous promises relied on by the promisee,[23] the outright adoption of the promissory

[19]Porter v. Comm. of Internal Revenue, 60 F. (2d) 673, 675 (C. C. A. 2d, 1932).

[20]Restatement, Contracts (1932) § 75.

[21]Fried v. Fisher, 328 Pa. 497, 196 Atl. 39, 41, 115 A. L. R. 147, 150 (1938). Also, Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N. W. 74, 75 (1887): "This [enforcement of the promise] is based on the equitable principle that after allowing the donee to incur obligations on the faith that the note would be paid, the donor must be estopped from pleading want of consideration."

[22]Ashley, Must the Rejection of an Offer Be Communicated to the Offeror? (1903) 12 Yale L. J. 419; See 1 Williston, Contracts (rev. ed. 1936) § 139.

[23]Shattuck, Gratuitous Promises—A New Writ? (1937) 35 Mich. L. Rev. 908. After making an exhaustive survey of cases enforcing gratuitous promises, it was con-

estoppel principle is the practical answer to a problem made increasingly difficult when a solution is sought in the orthodox rules of consideration.

HOMER A. JONES, JR.

DOMESTIC RELATIONS—CONSTITUTIONALITY OF STATUTE AUTHORIZING RETROSPECTIVE MODIFICATION OF PRIOR AWARD OF PERMANENT ALIMONY. [Virginia]

In 1938, the Supreme Court of Appeals of Virginia in considering an amended statute of 1934[1] which gave the courts power to "increase, decrease, or cause to cease, any alimony" as the circumstances of the case might make proper, held that the act was one of prospective operation only.[2] By a subsequent amendment that same year the legislature extended this power to "... any alimony that may thereafter accrue whether the same has been heretofore or hereafter awarded. ..."[3] The constitutionality of the retroactive portion of this statute was upheld in the recent case of *Eaton v. Davis*.[4]

The present defendant had been granted an absolute divorce from the present plaintiff in 1929, and at that time the court had overruled the plaintiff's motion to retain the cause upon the docket and to reserve in the decree the right to modify the alimony award of $50 per month. Proceeding under the 1938 amendment, in the present case the plaintiff sought to have the former award reduced because of his now destitute circumstances. The defendant demurred to the bill, alleging that the legislature was without power to enact the retroactive portion of the 1938 statute; that vested rights had accrued by virtue of the 1929 decree which the legislature was powerless to invade. After affirming the right to legislate retroactively, the court held that the act in question invaded no constitutional guarantee of the defendant; unaccrued

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cluded that the courts are creating a new writ which is neither in the category of contracts or torts. It was argued that damages awarded to the promisee should be determined by the extent of his injury suffered in reliance on the promise.

[1]Acts 1934, c. 329, Va. Code Ann. (Michie, 1936) § 5111. Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804 (1920) held that a decree allowing alimony was not a final and irrevocable settlement of the right to support for the wife *and infant children*. Cf. Gloth v. Gloth, 154 Va. 511, 532, 153 S. E. 879, 885 (1930), 71 A. L. R. 700, 711 (1931).

[2]Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938).

[3]Acts 1938, c. 418, Va. Code Ann. (Michie, Supp. 1938) § 5111.

[4]10 S. E. (2d) 893 (Va. 1940), noted (1941) 19 N. C. L. Rev. 388; (1941) 27 Va. L. Rev. 415. Holt, J., dissented.

alimony, though fixed by a final decree, was not a vested property right.[5] By this decision the Virginia court refused to follow the New York decision in *Livingston v. Livingston*[6] which had established the prevailing rule that the retrospective portions of statutes authorizing a subsequent alteration of the alimony provisions of an absolute divorce decree are unconstitutional interferences with the wife's vested right in unaccrued alimony.[7]

It is thought that the process of judicial groping by which it may be shown by analogy that a final award of alimony incident to a decree of divorce *a vinculo* may or may not possess certain of the characteristices of a property right[8] adds little to an intelligent understanding of

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[5]By the general rule accrued alimony payments are vested. Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. ed. 905, 28 L. R. A. (N. S.) 1068 (1910), 20 Ann. Cas. 1061 (1911); Epps v. Epps, 218 Ala. 667, 120 So. 150 (1929); Keck v. Keck, 219 Cal. 316, 26 P. (2d) 300 (1933); Boehmer v. Boehmer, 259 Ky. 69, 82 S. W. (2d) 199 (1935); Nelson v. Nelson, 282 Mo. 412, 221 S. W. 1066 (1920). Contra: Hartigan v. Hartigan, 142 Minn. 274, 171 N. W. 925 (1919). See (1936) 20 Minn. L. Rev. 314. On the power of the legislature to enact retroactive divorce legislation see Note (1936) 21 Corn. L. Q. 512.

[6]173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903). 3 of the 7 judges dissented.

[7]Fuller v. Fuller, 49 R. I. 45, 139 Atl. 662 (1927), noted (1928) 28 Col. L. Rev. 664; Blethen v. Blethen, 177 Wash. 431, 32 P. (2d) 543 (1934); Notes (1903) 3 Col. L. Rev. 356; (1903) 16 Harv. L. Rev. 521; (1903) 1 Mich. L. Rev. 675. See Note (1935) 97 A. L. R. 1188.

[8]Accrued alimony is assignable and may be recovered from the husband by the assignee. Cederberg v. Gunstrom, 193 Minn. 421, 258 N. W. 574, 97 A. L. R. 207 (1935), noted (1935) 3 U. of Chi. L. Rev. 146. Unaccrued alimony has been held to be a personal right and incapable of being assigned. Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694 (1902), 58 L. R. A. 471 (1903), 97 Am. St. Rep. 692 (1904). Such an assignment has also been held to be contrary to public policy. Wells v. Brown, 226 Mich. 657, 198 N. W. 180 (1924); Restatement, Contracts (1932) § 547. See Note (1935) 97 A. L. R. 208.

A husband may not offset a debt owed by divorced wife against his obligation for accrued alimony. Keck v. Keck, 219 Cal. 316, 26 P. (2d) 300 (1933), noted (1934) 22 Calif. L. Rev. 697.

The divorced wife's creditors may not subject the alimony payments to the satisfaction of a debt contracted prior to the divorce decree. Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14. L. R. A. 712, 26 Am. St. Rep. 544 (1892). The contrary rule apparently obtains for debts contracted subsequent to the decree. The Romaine case would imply that alimony is not property in the general sense of the term, but is an allowance for the wife's maintenance. A debt contracted after the decree is presumably for her support; the creditor relies upon the award as the means of payment.

Alimony is not such a debt as to be subject to garnishment in the hands of the husband for debts of the wife. Malone v. Moore, 204 Iowa 625, 215 N. W. 625 (1927), 55 A. L. R. 356 (1928). It is not a debt provable in bankruptcy, nor is it affected by a discharge granted the husband. Audubon v. Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009 (1901).

Alimony, accrued but unpaid at the time of the wife's death, may be collected

either *Eaton v. Davis*[9] or *Livingston v. Livingston*.[10] Upon analysis it would seem that the sound and socially desirable position was taken by the Virginia court.

Although today the power of the courts in respect to divorce matters is regulated by statute in fifty of the fifty-one American jurisdictions,[11] the rules of the Ecclesiastical Courts[12] continue to be the dominant influence upon our case and statutory law.[13] Permanent alimony, originated as an incident to the divorce *a mensa*,[14] had as its basis the

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by her personal representative, even against the divorced husband's estate. Van Ness v. Ransom, 215 N. Y. 557, 109 N. E. 593 (1915).

The alimony decree constitutes a lien on the real estate of the defendant. Isaacs v. Isaacs, 117 Va. 730, 86 S. E. 105 (1915), L. R. A. 1916B, 648. However, the divorced wife has no right to specific property of the husband. Almond v. Almond, 4 Rand. 662 (Va. 1826); Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804 (1920). See Note (1905) 102 Am. St. Rep. 700.

A judgment for alimony is a final judgment within the full faith and credit clause of the Constitution as regards accrued and unpaid installments where no modification of the award has been made, and no power has been retained to modify the accrued installments. Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. ed. 905, 28 L. R. A. (N. S.) 1068 (1910), 20 Ann. Cas. 1061 (1911); Armstrong v. Armstrong, 117 Ohio St. 558, 160 N. E. 34 (1927), 57 A. L. R. 1108 (1928).

The type of the alimony award may influence a court's analysis of its nature. In Smith v. Rogers, 215 Ala. 581, 112 So. 190 (1927) the court held that an award in gross made without a reservation of the power to modify was a vested right. But in Epps v. Epps, 218 Ala. 667, 120 So. 150 (1929) a monthly allowance was held to be in the nature of maintenance and subject to modification. Cases collected, Notes (1931) 71 A. L. R. 723, 730; (1940) 127 A. L. R. 741, 743.

For a limited discussion of the problems raised, see (1941) 27 Va. L. Rev. 415.

[9]10 S. E. (2d) 893 (Va. 1940).

[10]173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903).

[11]South Carolina prohibits absolute divorce. Jurisdictions included are Alaska, District of Columbia, and Hawaii and the forty-eight states. 2 Vernier, American Family Laws (1932) § 62.

[12]Prior to the Divorce Act of 1857, 20 and 21 Vict. c. 85, the Ecclesiastical courts granted the divorce *a mensa et thoro* for adultery and cruelty, and a nullity sentence, divorce *a vinculo matrimonii*, which declared the marriage to be void ab initio because of an impediment existing at the time of the marriage. Dissolution of a valid marriage was had by a private act of Parliment. Vernier and Hurlbut, The Historical Background of Alimony Law and Its Present Statutory Structure (1939) 6 Law and Contemp. Prob. 197. See also the historical analysis by Epes, J., in Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930), 71 A. L. R. 700 (1931).

[13]2 Vernier, American Family Laws (1932) § 104. See Francis v. Francis, 192 Mo. App. 710, 179 S. W. 975 (1915).

[14]Vernier and Hurlbut, The Historical Background of Alimony and Its Present Statutory Structure (1939) 6 Law and Contemp. Prob. 197. Twenty-seven American jurisdictions, including Virginia, Va. Code Ann. (Michie, 1936) § 5104, recognize the divorce *a mensa* (temporary divorce). In Colorado this divorce from bed and board is called "separate maintenance." Apparently Florida is the only state which forbids the limited divorce. 2 Vernier, American Family Laws (1932) § 114; id. (1938 Supp.) § 114.

duty of the husband to support his wife.[15] As the primary object of the award was to provide a continuing maintenance for the wife, the basic factors determining its amount were the needs of the wife and the ability of the husband to pay.[16] Changed circumstances of the parties were considered sufficient to justify a subsequent revision of the award.[17] The statutes and decisions which have established the divorce *a vinculo*[18] for the most part are reflective of these ecclesiastical practices.[19] In 1938, Professor Vernier found statutes authorizing the revision of alimony awarded by a final decree of absolute divorce in thirty-four American jurisdictions.[20] A few states recognize that the power to revise inheres in the courts without such authority and absent a reservation of the right to modify.[21]

Before the enactment of its statute empowering courts to alter alimony awards, Virginia had, by judicial decision,[22] adopted the general rule that permanent alimony in a final decree of absolute divorce cannot be altered in the absence of fraud, legislative authority, or a power of modification reserved in the divorce decree.[23] This rule proceeds

[15]Harris v. Harris, 31 Grat. 13 (Va. 1878); Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381 (1910), Ann. Cas. 1912A, 889; Otway v. Otway, 2 Phill. Ecc. 109, 161 Eng. Rep. 1092 (1813). See Ritzer v. Ritzer, 243 Mich, 406, 220 N. W. 812 (1928).

[16]Vernier and Hurlbut, The Historical Background of Alimony and Its Present Statutory Structure (1939) 6 Law and Contemp. Prob. 197. See Cooey, The Exercise of Judicial Discretion in the Award of Alimony (1939) 6 Law and Contemp. Prob. 213. Cf. Cralle v. Cralle, 84 Va. 198, 202, 6 S. E. 12, 14 (1887).

[17]De Blaquiere v. De Blaquiere, 3 Hagg. Ecc. 322, 162 Eng. Rep. 1173 (1830). See Saunders v. Saunders, 1 Sw. and Tr. 72, 164 Eng. Rep. 634 (1858). The overwhelming rule in the American jurisdictions is that permanent alimony incident to a divorce *a mensa* may be modified as the changed circumstances of the parties require. Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930), 71 A. L. R. 700 (1931). Cases collected, Note (1931) 71 A. L. R. 723, 724.

[18]There is statutory authority for absolute divorce in all American jurisdictions save South Carolina. 2 Vernier, American Family Laws (1932) § 62. The power of the legislature in respect to divorce matters is generally recognized by the cases. Alexander v. Alexander, 13 App. D. C. 334 (1898), 45 L. R. A. 806 (1899); Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903); Fuller v. Fuller, 49 R. I. 45, 139 Atl. 662 (1927); Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938); Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721. Cases collected, Note (1931) 71 A. L. R. 723, 728.

[19]2 Vernier, American Family Laws (1932) § 104.

[20]2 Vernier, American Family Laws (1932) §106; id. (1938 Supp.) § 106.

[21]Alexander v. Alexander, 13 App. D. C. 334 (1898), 45 L. R. A. 806 (1899); Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (1913); Simpson v. Simpson, 154 Ore. 396, 60 P. (2d) 936 (1936). Cases collected, Notes (1917) L. R. A. 1917F, 729; (1931) 71 A. L. R. 723, 726, 738; (1940) 127 A. L. R. 741, 742, 745. See Note (1913) 26 Harv. L. Rev. 441.

[22]Brin v. Brin, 147 Va. 277, 137 S. E. 503 (1927).

[23]Smith v. Smith, 45 Ala. 264 (1871); Kennard v. Kennard, 131 Fla. 473, 179 So. 660 (1938); Hardy v. Pennington, 187 Ga. 523, 1 S. E. (2d) 667 (1939); Gilcrease v.

upon the general theory that an adjudication by a court having jurisdiction over the subject matter and the parties is conclusive as to the matters controverted and those which should have been litigated as an incident thereto. The divorce decree not only dissolves the marriage relation, but is also a final determination of the right to alimony.[24] Since the parties are no longer married, the court's jurisdiction over the marital status is exhausted save as to the enforcement of the alimony provision.[25] Moreover, the plea of res judicata would preclude future modification of its terms.[26] When a power to modify is reserved in the decree, the court does not thereby confer jurisdiction upon itself to alter the alimony award subsequently; it merely retains the right to exercise the unexhausted portion of the jurisdiction which it already had, to subject the unaccrued payments to revision based on the parties' changed conditions.[27]

As has been stated, the statutes now in force in most states abandon this once-general view and allow courts to modify alimony awards. Yet when the constitutionality[28] and construction[29] of the *retroactive* portions of such statutes have been questioned, the old concept of finality of the decree of permanent alimony has led most courts considering the problem to spell out a vested property interest in the unaccrued payments. A leading example is the *Livingston* case, which arose under

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Gilcrease, 186 Okla. 451, 98 P. (2d) 906 (1939), 127 A. L. R. 735 (1940), noted (1940) 88 U. of Pa. L. Rev. 880; Sampson v. Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349 (1889); Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938); Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721 (1917). Cases collected, Notes (1917) L. R. A. 1917F, 729; (1931) 71 A. L. R. 723, 726, 734; (1940) 127 A. L. R. 741, 742, 744. Generally, when alimony is omitted from the divorce decree, it cannot thereafter be inserted, even though statutory authority empowers the courts to modify the award. Duvall v. Duvall, 215 Iowa 24, 244 N. W. 718 (1932), 83 A. L. R. 1242 (1933). Cases collected, Note (1933) 83 A. L. R. 1248.

[24]Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721 (1917); Brin v. Brin, 147 Va. 277, 137 S. E. 503 (1927).

[25]Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938).

[26]Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721; Brin v. Brin, 147 Va. 277, 137 S. E. 503 (1927).

[27]Brin v. Brin, 147 Va. 277, 137 S. E. 503 (1927). See Gloth v. Gloth 154 Va. 511, 153 S. E. 879 (1930), 71 A. L. R. 700 (1931); Capell v. Capell, 164 Va. 45, 178 S. E. 894 (1935); Casilear v. Casilear, 168 Va. 46, 190 S. E. 314 (1937).

[28]Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903); Fuller v. Fuller, 49 R. I. 45, 139 Atl. 662 (1927); Blethen v. Blethen, 177 Wash. 431, 32 P. (2d) 543 (1934).

[29]Van Loon v. Van Loon, 132 Fla. 535, 182 So. 205 (1938); Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898); Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938). Cases collected, Note (1935) 97 A. L. R. 1188. Cf. Edmunds v. Edmunds, [1926] Prob. 202.

circumstances similar to those involved in the *Eaton* case. In deciding that the retroactive portion of the New York statute was an unconstitutional interference with the wife's property in the unaccrued alimony, the court adopted the theory that the final divorce decree changed the husband's obligation to support. The new obligation created by the judgment was in the nature of a vested right which the legislature was powerless to invade. A later New York court has explained that the *Livingston* case did not decide that alimony was a mere debt. It recognized that the foundation of the award rested on the husband's marital duty to support, but held that this previously indefinite obligation was liquidated by the divorce decree.[30]

Thus the New York decisions would seem to imply that, in a divorce *a mensa,* the award of alimony is co-extensive with and dependent upon the husband-wife relation and the appertaining duty to support. When that relation is terminated by an *absolute* divorce the duty to support ceases. Any alimony which may be awarded in the decree is based on the obligation created by law or the court at the time of the marriage dissolution. It becomes a right fixed by judgment.[31]

The courts which have taken this majority position, that the legislature cannot give retroactive operation to statutes allowing changes in permanent alimony, point to the severance of the matrimonial bonds as the reason for differentiating between alimony decreed in a divorce *a vinculo* and alimony in a divorce *a mensa.*[32] To the minority, which regards the right to alimony as inchoate until the time for payment has arrived even in the absence of a reservation and statutory authority, such a distinction is unimportant.[33] That the parties by a divorce *a vinculo* have become strangers at law does not alter the fundamental premise. The purpose of the alimony provision is to afford a continuing maintenance for the wife in the form of a judicial substitute for her lost right of support.[34] It should be revised as the circumstances of the

[30]Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236 (1905).

[31]See Munson, Some Aspects of the Nature of Permanent Alimony (1916) 16 Col. L. Rev. 217.

[32]Brin v. Brin, 147 Va. 277, 137 S. E. 503 (1927); Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721 (1917); and see Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903).

[33]Alexander v. Alexander, 13 App. D. C. 334 (1898), 45 L. R. A. 806 (1899).

[34]Cf. the dissent of O'Brien, J., in Livingston v. Livingston, 173 N. Y. 377, 389, 66 N. E. 123, 127, 61 L. R. A. 800, 805, 93 Am. St. Rep. 600, 606 (1903) in which it was contended that an alimony award was a mere creation of equity and had "... no more of the attributes of property than the common law right to marital support for which it is an imperfect substitute."

parties and the other conditions affecting its award change.[35] By this holding no violence is done the principle of res judicata; the divorce decree is "final" in that it operates res judicata as to *the facts existing at the time of its award.*[36] There would appear to be nothing unusual for an equity decree to be absolute in some respects yet variable in others.[37]

From the standpoint of judicial history the position of the majority is understandable, but its doctrine is not compelling. Lacking Ecclesiastical Courts, the American states executed the English concepts of divorce by the regular processes of equity and the common law.[38] Although the divorce *a vinculo* was, with modifications, a statutory declaration of ecclesiastical principles,[39] a final decree of divorce was given the same binding effect as any other final decree.[40] It would seem, however, that by every dictate of reason the right to unaccrued alimony should be subject to the changed circumstances of the parties.[41] To deny inflexibility is to recognize that the duty to support extends further than the scope of the marital bonds. The primary function of a court decreeing permanent alimony should be to provide an adequate maintenance for the divorced spouse and the family, independent of financial aid from the state.[42] Any theory by which the administration of this function is rendered inflexible is contrary to the purpose of the alimony award. The Virginia court is to be commended for refusing to follow the *Livingston* case, and for impliedly abandoning the majority doctrine to which it had heretofore subscribed.

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[35]Alexander v. Alexander, 13 App. D. C. 334 (1898), 45 L. R. A. 806 (1899); Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (1913); Simpson v. Simpson, 154 Ore. 396, 60 P. (2d) 936 (1936). Cases collected, Notes (1917) L. R. A. 1917F, 729; (1931) 71 A. L. R. 723, 726, 738; (1940) 127 A. L. R. 741, 742, 745.

[36]See Bates v. Bodie, 245 U. S. 520, 38 S. Ct. 182, 62 L. ed. 444, L. R. A. 1918C, 355 (1918).

[37]Alexander v. Alexander, 13 App. D. C. 334 (1898), 45 L. R. A. 806 (1899); Francis v. Francis, 192 Mo. App. 710, 179 S. W. 975 (1915).

[38]Bradway, Why Pay Alimony? (1937) 32 Ill. L. Rev. 295.

[39]2 Vernier, American Family Laws (1932) § 104.

[40]Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903); Sampson v. Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349 (1889).

[41]Cf. dissenting opinion of Chadwick, J., in Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, 1070, L. R. A. 1917F, 721, 729 (1917) "...every reason, the dictates of common sense, the interest of society, and the logic of our statutes defining the status of married persons, save the law, call for a different rule."

[42]Kelso, The Changing Social Setting of Alimony Law (1939) 6 Law and Contemp. Prob. 186, 196. Cf. West v. West, 126 Va. 696, 699, 101 S. E. 876, 877 (1920) Alimony "...is an order compelling a husband to support his wife, and this is a public as well as a marital duty—a moral as well as a legal obligation."

LABOR LAW—MAJORITY VOTE OF EMPLOYEES OF COLLECTIVE BARGAINING UNIT AS PRE-REQUISITE TO PEACEFUL PICKETING. [Wisconsin]

The case of *The Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*[1] for the first time brings into purview an important provision of the Wisconsin Employment Peace Act.[2] The statute provides that "It shall be an unfair labor practice for an employee individually or in concert with others: To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike. . . ."[3]

The action giving rise to the instant case was a strike by employees of two hotels, no vote having been taken, and an attempt by the strikers to picket the employer's business. The Wisconsin Employment Relations Board found: first, that the contractual relationship between the unions and the employer was terminated by the calling of the strike; second, that the unions were guilty of an unfair labor practice by engaging in picketing and boycotting without first obtaining the approval of the majority of the employees by secret ballot; third, that all of the former employees who went out on strike and who remained out on strike were guilty of an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employees; fourth, that certain named persons by reasons of threats and assaults or by misdemeanors committed by them during the strike were guilty of unfair labor practices. The board on the basis of these findings ordered the unions immediately to cease and desist from: one, engaging in promoting or inducing picketing at or near the hotels; two, attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by the employees of the hotel company; three, boycotting in any way

[1]294 N. W. 632 (Wis. 1940), rehearing denied, 236 Wis. 329, 295 N. W. 634 (1941).
[2]Wis. Laws (1939) c. 57.
[3]Wis. Laws (1939) c. 57, § 111.06 (2) (e).
"The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2d) so to do." Wis. Laws. (1939) c. 57, § 111.02 (6).

the hotel company. The unions in appealing from the order of the board relied upon two recent cases, *Thornhill v. Alabama*[4] and *Carlson v. California*,[5] to uphold the contention that the Wisconsin statute in requiring the approval of a majority of the employees before there could be an authorized strike was in violation of that freedom of speech which is guaranteed by the Fourteenth Amendment of the Federal Constitution and by the Wisconsin Constitution. The Wisconsin Supreme Court affirmed the order of the board by holding that the legislature can provide that only a majority of a collective bargaining unit has the power to authorize a strike, and that picketing is an unfair labor practice unless a strike has been called with proper authorization.

The court took the position that a fundamental principle of Congress in regulating labor relations was to allow a majority of a collective bargaining unit to coerce the minority in the matter of bargaining; therefore, the state legislature could follow the same policy by putting it within the power of a collective bargaining unit to determine whether conditions in the employment did or did not merit the calling of a strike.[6] The congressional action referred to is found in the National Labor Relations Act and the Railway Labor Peace Act, which appear to have received varying interpretations by different authorities. Dicta in two decisions of the Supreme Court of the United States would seem to indicate that the only coercion provided for in those statutes is that which requires the employer *to enter into negotiations* with the representatives of the majority of a collective bargaining unit.[7] He is not compelled to reach an agreement with them, but only to make a reasonable effort to do so.[8] And whether he makes such agreement or not, he is still free to make contracts with individual employees as he wishes.[9] Thus, it is said that no coercion applies to either the majority or minority of any collective bargaining unit or to any employees.

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[4]310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).

[5]310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940).

[6]294 N. W. 632, 640 (Wis. 1940).

[7]49 Stat. 453 (1935), 29 U. S. C. A. § 159 (a) (Supp. 1940), N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44, 57 S. Ct. 615, 627, 81 L. ed. 893 (1937); 48 Stat. 1186 (1934), 45 U. S. C. A. § 152 (9) (Supp. 1940), Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 548, 57 S. Ct. 592, 600, 81 L. ed. 789 (1937).

[8]N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44, 57 S. Ct. 615, 628, 81 L. ed. 893 (1937); Virginian Ry Co. v. System Federation No. 40, 300 U. S. 515, 548, 57 S. Ct. 592, 599, 81 L. ed. 789 (1937).

[9]N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45, 57 S. Ct. 615, 628, 81 L. ed. 893 (1937); Virginian Ry Co. v. System Federation No. 40, 300 U. S. 515, 548, 57 S. Ct. 592, 600 (n. 6), 81 L. ed. 789 (1937).

However, the language of the statutes does not seem to sustain this view,[10] and the debates on the Labor Relations Act in both houses of Congress show a contrary legislative intent.[11] Further, the Labor Relations Board has taken a position opposing the Court's dicta, in ruling that the employer violates the act by negotiating with any group other than that representing the majority of the employees,[12] or by entering into agreements with the employees individually.[13] It has been very pertinently observed that the view denying the majority the right to negotiate for the whole body conflicts with the fundamental precepts of democratic institutions and undermines the essential purposes of the act.[14] Therefore, while no ultimately compelling authority is available, the position of the Wisconsin court seems justified on this point.

In passing on the effect of the provision prohibiting picketing unless the strike has been authorized by a majority vote, the court had to deal with a serious charge that the statute threatens fundamental civil liberties. In the *Thornhill* case, the Supreme Court of the United States held that an Alabama statute which prohibited loitering or picketing of even a peaceful nature was unconstitutional because it contravened the guarantees of free speech afforded by the due process clause of the Fourteenth Amendment. The same court in the *Carlson* case held a county ordinance similarly unconstitutional. Mr. Justice Murphy speaking for the Court in the *Thornhill* case stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.... Abridgement of the liberty of such discussion can be justified only where the clear danger of substan-

[10] 49 Stat. 453 (1935), 29 U. S. C. A. § 159 (a) (Supp. 1940): "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer." See also 48 Stat. 1186 (1934), 45 U. S. C. A. § 152 (9) (Supp. 1940).

[11] See Sen. Rep. 573, 74th Cong., 1st. sess., and House Rep. 1147, 74th Cong., 1st sess. See Rosenfarb, The National Labor Policy (1940) 224-32.

[12] Elbe File & Binder Co., 2 N. L. R. B. 906. And see National Motor Bearing Co., 5 N. L. R. B. 409.

[13] Sands Mfg. Co., 1 N. L. R. B. 546, 558; Columbian Enameling & Stamping Co., 1 N. L. R. B. 181; Atlas Bag and Burlap Co., 1 N. L. R. B. 292.

[14] See Rosenfarb, The National Labor Policy (1940) 224 ff.

tive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[15]

The Court went even further in declaring that:

"... the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion.... But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."[16]

Thus, peaceful picketing is *per se* a means of lawful exercise of one's freedom of speech. It may therefore seem difficult to understand how a state can make a majority vote of all the employees a pre-requisite to the enjoyment of that right which is given to the individual by the Federal Constitution. In *American Federation of Labor v. Bain*[17] an Oregon statute prohibited all picketing or patrolling unless there was a bona fide "labor dispute," and a "labor dispute" was defined as an "actual bona fide controversy in which the disputants stand in proximate relation of employer and the majority of his or its employees...."[18] The Oregon court held the statute unconstitutional, saying:

"The fundamental constitutional right...was declared to be secured to 'every person.' We see no escape from the conclusion that the denial of such a right to the members of a minority is no less an unconstitutional abridgement of the right simply because it is saved to the majority."[19]

The Wisconsin court in the principal case considered the decision of the Oregon court, but distinguished it on the ground that the word "picketing" in the Oregon statute meant that kind of peaceful picketing which the *Thornhill* and *Carlson* cases held to be protected by the Fourteenth Amendment.[20] The Wisconsin statute, on the other hand,

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[15]310 U. S. 88, 102, 104-5, 60 S. Ct. 736, 744-5, 84 L. ed. 1093 (1940).

[16]310 U. S. 88, 105, 60 S. Ct. 736, 745-6, 84 L. ed. 1093 (1940).

[17]106 P. (2d) 544 (Ore. 1940).

[18]Oregon Laws (1939) c. 2, § 1. See 106 P. (2d) 544, 547 (Ore. 1940).

[19]106 P. (2d) 544, 555 (Ore. 1940).

[20]The Oregon Court expressly recognized this aspect of the statute with which it was concerned. The broad coverage of the term picketing was said "to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities which the Supreme Court holds the state may not lawfully suppress." American Federation of Labor v. Bain, 106 P. (2d) 544, 554 (Ore. 1940).

was viewed as referring only to the kind of picketing which the Supreme Court had expressly recognized as subject to state regulation aimed at preservation of peace and protection of life and property.[21] This interpretation of the statute was based on the clause by which the legislature declared that the act should not "be so construed as to invade unlawfully the right to freedom of speech."[22] Thus, while the prohibitory provision itself is unrestricted as regards the kind of picketing covered, the courts are saddled with the duty of applying it only within the limits allowed by constitutional guarantees of free speech.

That there is a permissible area of state regulation is recognized in the *Thornhill* case in these words:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. . . ."[23]

And in the principal case the Wisconsin court found it possible to bring the majority vote pre-requisite within the pale of valid regulation by the state. First it was pointed out that the Employment Peace Act does not attempt to prohibit picketing but merely seeks to regulate the exercise of this right. The "regulation" takes the form of a prohibition, however, in any strike which is "unauthorized" under the provisions of the statute. In terms, this prohibition includes all kinds of picketing—peaceful or violent—and the cease and desist order of the Employment Relations Board was as all-inclusive as the statute in this regard. The Wisconsin court affirmed this order on the intrepretation of the order as being "coextensive with the statute as construed."[24] It is difficult to determine exactly what the court meant by this phrase, in spite of the fact that two opinions were written presenting the court's conclusions. In view of the rehearing opinion's emphasis on

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[21]Thornhill v. Alabama, 310 U. S. 88 at 105, 60 S. Ct. 736 at 745, 84 L. ed. 1093 (1940).

[22]Wis. Laws (1939) c. 57, § 111.15. See 294 N. W. 632, 638, 639 (Wis. 1940). Further distinction was found between the Oregon and Wisconsin statutes in the fact that the prohibited picketing was in the former termed to be unlawful and a misdemeanor, whereas in the latter statute only an unfair labor practice is declared. As a consequence of the commission of unfair practices, the miscreants lose their status as employees, and by virtue of that fact forfeit the rights which the act gives employees conducting an authorized strike.

[23]310 U. S. 88, 103-4, 60 S. Ct. 736, 745, 84 L. ed. 1093 (1940).

[24]294 N. W. 632, 642 (Wis. 1940).

the significant fact that violence occurred during the picketing, and in view of the court's repeated mention of the clause in the statute to the effect that the act shall not be applied to infringe on freedom of speech, it seems probable that the order of the board was sustained as a prohibition of further picketing in this unauthorized strike, such prohibition being justified by the fact that there had been *violence and disorder* in the previous activities of the pickets. The recent Supreme Court decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies*[25] sanctions the enjoining of all future picketing where in past picketing there has been violence of such nature as to have a coercive influence in future activities. Thus, the statute as applied to the situation before the board and court does not appear to invade any constitutionally guaranteed civil liberties.

It may then be argued that, under the clear language of the *Thornhill* case, a court must consider the general provisions of the statute itself rather than merely the evidence under it, where regulation of the exercise of freedom of speech is concerned.[26] Pursuing this policy, the Wisconsin court would have to examine the validity of the statute as it might operate in a case in which there was no violence or disorder in the picketing done. What the result of such an inquiry would be is conjectural, but it is believed that the statute would still be upheld but its scope of operation limited. In case of an *authorized* strike without violence in picketing, of course, by its specific terms the prohibitions of the act do not apply. Where an *unauthorized* strike is accompanied by only peaceful and orderly picketing, the specific terms seem to apply, but here the saving clause forbidding any construction violating freedom of speech would be invoked. If, as seems probable, the doctrine of the *Thornhill* and *Carlson* cases precludes the prohibiting of peaceful picketing even in unauthorized strikes, then the court must find that the statute does not apply—for to apply it would be to invade the right of freedom of speech, whereas the legislature has declared that

[25] 51 S. Ct. 552 (1941), noted 41 Col. L. Rev. 727, 54 Harv. L. Rev. 1064.

[26] "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.... It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.... Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." 310 U. S. 88, 97, 98, 60 S. Ct. 736, 741, 742, 84 L. ed. 1093 (1940); but cf. opinion of Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 341, 56 S. Ct. 466, 480, 80 L. ed. 688 (1936).

no such application shall be made. If, on the other hand, the Supreme Court rulings are regarded as not covering the issue presented in this situation, the regulation of the Wisconsin statute would probably be extended to all types of picketing in the promotion of an "unauthorized" strike. Such is the legislative mandate.

It may well be thought that the statute here in question shows a lamentable regression from that leadership in state labor policy which has heretofore been typical of Wisconsin.[27] If a state is to be allowed to require a majority vote of a collective bargaining unit before even peaceful picketing is permitted, the holdings of the *Thornhill* and *Carlson* cases will be reduced in many situations to a useless doctrine, and the bargaining power of labor will have received a serious blow.[28] However, the Wisconsin court in carrying out its function of applying and interpreting the statute seems to have followed the only reasonable course open to it. As the court itself observed, it is not the judge of legislative wisdom, but only of constitutional validity.[29]

LYNELL G. SKARDA

SURETYSHIP—RIGHT OF SURETY PAYING CREDITOR'S CLAIM AGAINST INSOLVENT BANK TO BE SUBROGATED TO POSITION OF CREDITOR. [Federal]

The recent case of *American Surety Co. v. Bethlehem National Bank*[1] poses the question of the extent to which a surety on a bond of an insolvent bank may prove and receive dividends by subrogation to the depositor's claim. The Commonwealth of Pennsylvania had deposited $135,000 in the Bank, and this deposit was secured by collateral in the form of stocks and bonds worth $12,000 and the Bank's bond of $125,000, the plaintiff being surety on the bond. On the insolvency of the Bank, the Commonwealth sold the collateral which had been pledged, and later received the first dividend in the course of the Bank's liquidation. The plaintiff then paid the remainder of the amount of the Commonwealth's deposit—approximately $68,500. Conceiving itself

[27]See, Rice, The Wisconsin Relations Act in 1937, [1938] Wis. L. Rev. 229.

[28]It is not unusual for the members of a union to constitute a minority of the employees of a collective bargaining unit. See American Federation of Labor v. Bain, 106 P. (2d) 544, 554 (Ore. 1940).

[29]Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 294 N. W. 632 at 642, and 236 Wis. 329, 295 N. W. 634 at 635. (1941).

[1]116 F. (2d) 75 (C. C. A. 3rd, 1940).

to be subrogated to the exact position of the creditor-Commonwealth of Pennsylvania, the Surety Company claimed the right to receive the same percentage dividends of the assets in future liquidation payments as the Commonwealth would have received. The Federal District Court upheld this contention.[2] However, the Circuit Court of Appeals for the Third Circuit reversed this decision, holding that the share of the Surety Company in the distribution of the Bank's assets should be based on the amount which the Surety Company actually had paid in satisfying the Commonwealth's claim. This is to say that as the Bank pays further liquidation dividends, the Surety Company will receive its payments on the basis of a total claim of $68,500, instead of on the basis of a $135,000 total claim which would have applied had the Commonwealth been receiving the dividend as a depositor.

Since the case of *Merrill v. National Bank of Jacksonville,* the federal courts have permitted creditors of an insolvent national bank to prove their claims on the basis of the full amount owing to them, without deductions for collateral they hold or for collections made from its sale.[3] This so-called "chancery rule," which was in a large measure the basis for the decision of the lower court,[4] was adopted by the federal courts in preference to the "bankruptcy rule." By the latter rule a creditor may prove only the amount of his original claim against the bank less the collections he has made and the value of the security which he holds. The statute concerning insolvent national banks merely provides that the distribution be "ratable,"[5] and the Supreme Court has decided this to mean the "chancery" rather than the "bankruptcy" rule.[6]

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[2]33 F. Supp. 722 (E. D. Pa. 1940). The comments in (1940) 54 Harv. L. Rev. 349 and in (1940) 40 Col. L. Rev. 1448 approve the holding of the District Court. It is to be understood, of course, that the *total* recovery of the surety would not be allowed to exceed the sum it had actually paid.

[3]Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640 (1899). Many state courts favor the rule.

The "chancery rule" has been much criticized as bringing about inequality to the unsecured creditors. The courts upholding the rule state that the secured creditor has the absolute right to recover his debt from the general assets of his debtor, without recourse to any collateral he may have taken; and that this contract right of recourse is vested so that the accident of insolvency cannot take it away from the secured creditor. For full discussion and case classification see, Notes, L. R. A. 1918B, 1024, and (1935) 94 A. L. R. 468.

[4]33 F. Supp. 722 (E. D. Pa. 1940).

[5]Rev. Stat. § 5236 (1864), 12 U. S. C. A. § 194 (1936).

[6]A third class of cases has followed a rule varying slightly from the bankruptcy rule. They hold that *when the collateral has been sold,* the claim on which dividends are to be paid is reduced by the amount of the realization on the col-

In the principal case the court recognized that if this had been a case of a creditor trying to prove his claim, it would have been bound to follow the Supreme Court rule announced in the *Merrill* case. But here the surety of the debtor was seeking subrogation to the rights of the creditor. Therefore, it was declared that the precedent was not directly in point. The court held itself free to apply a different rule to a surety, unless it should be true, as the plaintiff contended, that a surety by subrogation steps into the exact position of the creditor. Thus, the ultimate issue for the court's decision was whether the surety in this case was entitled to be so subrogated.

In order to protect the creditor in his rights against the debtor, it is the agreed principle of subrogation that the surety cannot be subrogated to the creditor's rights until the latter's claim has been fully satisfied.[7] However, this does not mean that the surety must pay the entire claim. If the surety pays a part of the obligation and the remainder is paid from another source or sources, as through the sale of collateral or through part payment by the debtor, the creditor's need for protection is obviated, and the surety's demand for subrogation may be heard.

It is stated as a general principle that "when a surety pays his principal's debt he has a right to be substituted *to the position of the creditor* when he pays.... It [right of subrogation] entitles the surety to use *any remedy against the principal which the creditor could have used,* and in general *to enjoy the benefit of any advantage that the creditor had....*"[8] However, subrogation is a doctrine of an equitable nature.[9] When its operation will be contrary to the established principles of equity, it will not be enforced.[10] In instances where the surety may not be subrogated, it can resort to a direct remedy against the principal debtor based on the right of indemnity or reimbursement, in which case the position of the surety is that of a general creditor.[11] The remedy of subrogation is patently to be preferred, for through

lateral. This has been called the preferable rule. Jamison v. Adler-Goldman Co., 59 Ark. 548, 28 S. W. 35 (1894); Erle v. Lane, 22 Colo. 273, 44 Pac. 591 (1896); Wheat v. Dingle, 32 S. C. 473, 11 S. E. 394 (1890); Note (1924) 8 Minn. L. Rev. 232, 239.

[7]See 60 C. J. 721 and the cases cited therein. Also see Arant, Suretyship (1931) 359.

[8]Arant, Suretyship (1931) 357. (Italics supplied)

[9]Arnold, Suretyship and Guaranty (1927) § 131. Also 60 C. J. 696 and cases cited.

[10]The surety's right may be lost by laches. See Note (1899) 13 Harv. L. Rev. 509. Also the surety must present his claim with clean hands. If the consideration between surety and principal is illegal, the surety will not be subrogated, even if forced to pay for the default of the principal.

[11]Arant, Suretyship (1931) § 73.

its use the surety can have the advantage of any sort of preference which the creditor might have enjoyed.[12]

The surety is entitled to be subrogated to the creditor's rights as they existed before the payment of the creditor's claim, which in the principal case was at the moment of the Bank's insolvency.[13] At that time, under the "chancery rule" which bound the federal court, the creditor was entitled to prove for the full amount of his deposit. But the Circuit Court of Appeals was of the opinion that to allow this regular operation of the doctrine of subrogation in this case would give rise to inequitable consequences, and that therefore the court should invoke its discretionary power to refuse to the plaintiff his remedy of subrogation. It was pointed out that the Surety Company had deliberately undertaken the risk of the Bank's becoming insolvent and had been paid for doing so. Also that to give the surety dividends on the basis of the Commonwealth's total deposit would necessarily result in the other general creditors of the Bank receiving less money in a distribution of assets. Thus, "the surety and the depositors shared the same risk. It seems fair that they should share, in partial compensation for their loss, on the same basis"[14]—that is, in proportion to the amounts of their actual losses.

A similar decision in another circuit[15] is apparently the only authority in support of the principal case. While no decisions to the contrary have been discovered,[16] the conclusion does not seem proper. It is true that the other creditors will be able to recover more of their claim

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[12]American Bonding Co. v. Reynolds, 203 Fed. 356 (D. Mont. 1913); U. S. Fidelity Co. v. McFerson, 78 Colo. 338, 241 Pac. 728 (1925); Maryland Casualty Co. v. McConnell, 148 Tenn. 656, 257 S. W. 410 (1924); Central Trust Co. v. Bank of Mullens, 107 W. Va. 679, 150 S. E. 221 (1929). See other cases cited in Arant, Suretyship (1931) 363. But see the Pennsylvania rule to the effect that the surety is not allowed subrogation to the Commonwealth's preference, Note (1929) 78 U. of Pa. L. Rev. 120 discussing the case of In Re S. Philadelphia State Bank's Insolvency, 295 Pa. 433, 145 Atl. 520 (1929). The overwhelming weight of authority on this point seems against the Pennsylvania case. The Federal rule favors subrogation to the government's preference, and this has been made statutory. 1 Stat. 676 (1799), 31 U. S. C. A. § 193 (1926); Hunter v. U. S., 5 Pet. 173 (U. S. 1831); American Surety Co. v. Carbon Timber Co., 263 Fed. 295, 298 (C. C. A. 8th, 1919); U. S. Fidelity Co. v. Union Bank and Trust Co., 228 Fed. 448 (C. C. A. 6th, 1915).

[13]Lumpkin v. Mills, 4 Ga. 343, 349 (1848). This early opinion states: "The substitution of the surety is not for the creditor as he stands related to the principal *after* the payment, but as he *stood* related to him *before* the payment. He is subrogated to such rights as the creditor *then* had against the principal."

[14]116 F. (2d) 75, 77 (C. C. A. 3rd, 1940).

[15]Maryland Casualty Co. v. Cox, 104 F. (2d) 354 (C. C. A. 6th, 1939).

[16]The case of In Re Thompson, 300 Fed. 215, 217 (W. D. Pa. 1924) supports the opposing rule, but it concerns the problem of rights of a surety against co-sureties.

from the insolvent Bank if the plaintiff can only claim for the amount he has paid. But this additional recovery is purely a windfall which the creditors would not have enjoyed had the Commonwealth sought its full share of the liquidated assets, in the absence of a surety. The issue is clear enough: Whether to grant the general creditors a windfall, or to let the subrogation be complete and enable the Surety Company to approach nearer to a full recovery.[17] The other creditors had no part in obtaining the surety, and it would seem that as to their claims all the dictates of equity and fairness would be met by treating those claims exactly as they would have been handled if there had been no surety.

Policy favors the protection of sureties in order to insure the desirable freedom of credit. While it is true that the surety undertook the risk of the Bank's failure and was paid therefor, yet it is only reasonable to assume that in contracting this obligation, the Surety Company proceeded on the premise that in case it had to pay the Commonwealth's claim, it would enjoy the advantage of being subrogated to the Commonwealth's position. This premise seemed justified in the light of the general application of the subrogation doctrine, and the surety's undertaking should be measured in view of it. The compensation of which the court spoke was presumably calculated to reimburse the company for assuming the risk of having to pay a creditor to whose favorable position the surety could be subrogated. If that right is not accorded, the compensation has failed to give the reimbursement intended.

The holding in the lower court, favoring a larger recovery for the surety, would seem better than that rendered in the Circuit Court of Appeals. That this must be true is forcibly demonstrated by the fact that under the principal case holding, the extent of the loss which will result to the surety depends on the caprice of the creditor as to whether it shall go first against the debtor and accept dividends, or apply at once to the surety for payment[18]. Or at least the extent of loss depends

[17]In Lumpkin v. Mills, 4 Ga. 343, 355 (1848), the court observed: "If anybody is entitled to complain, it is the creditor, who holding a lower grade of claim, is excluded by the substitution of the surety. But, really, no injustice is done to him. The surety by paying the debt to the cretitor, abstracts from the assets of the principal debtor, just that amount which the creditor himself would have abstracted, if he had not paid it." To the same effect, see Arant, Suretyship (1931) 359.

[18]The case of Pace v. Pace's Adm'r., 95 Va. 792, 30 S. E. 361 (1898), favors the rule which allows proof of the full amount in the interest of greater certainty and uniformity to the surety's position. See also, In Re Thompson, 300 Fed. 215, 217 (W. D. Pa. 1924) which supports the opposite rule to that of the principal case as applied to the analogous problem of the right of a surety against the co-sureties.

on whether the surety pays the creditor before any dividends are paid to the creditor or after some liquidation payments have been made. For the court concedes that the windfall which it proposes to give the other creditors would not be available if the surety paid its creditor's claim immediately and entered its own claim for the full amount of deposit. In the case of *In Re Thompson,* where a closely similar problem was decided, it was pointed out that "Equity would seem to require that the rights of the parties should be definitely fixed by law rather than made dependent on the uncertain procedure of the creditor."[19] Surely if this benefit can validly be swept away from the general creditors by so simple an action as paying earlier in the proceedings, the loss of benefit does not give such unfair and inequitable results as to necessitate the abrogation of the general suretyship doctrine of subrogation. In other instances the surety's right of subrogation has been guarded jealously by the courts, as where the surety is declared to be released because it has been deprived of its right of subrogation by the creditor's extension of time to the principal debtor.[20]

It seems probable that the unexpressed reason for the holding in the principal case is that the court desired to avoid the operation of the "chancery rule," which was thought to be too favorable even to secured creditors themselves. However, in shying away from one inequitable result, the court has apparently produced another inequity. In trying to prevent over-compensation it has decreed under-compensation. Perhaps as a preferable compromise position, the surety should have been given the right to prove on the basis of a claim of $123,000, which was the amount of the creditor's deposit minus the sum received from the sale of collateral security. Inasmuch as subrogation is a creature of equity, surely the courts can apply it with such flexibility as to give the proper settlement in each individual case.

JOHN E. PERRY

TAXATION—POWER OF STATE TO IMPOSE TAX MEASURED BY INTRASTATE EARNINGS ON DECLARATION OF DIVIDENDS BY FOREIGN CORPORATION. [United States Supreme Court]

With the recent case of *Wisconsin v. J. C. Penney Co.*,[1] the Supreme Court of the United States has taken the third step in a development begun in 1873. During this seventy year period, the Court's concepts

[19]300 Fed. 215, 218 (W. D. Pa. 1924).
[20]Arant, Suretyship (1931) § 68.

[1]61 S. Ct. 246, 85 L. ed. 222 (1940), rehearing denied, 61 S. Ct. 444 (1941).

regarding the significance of the "subject" and "measure" of state taxes[2] have undergone a process of revision which has now seemingly reached the furthest extreme in removing judicial restraints on state taxing power.

The beginning of this development appears in *The Delaware Rail-Road Tax Case*,[3] in which the Court upheld a Delaware tax requiring railroads to pay the state one-fourth of one per-cent on the cash value of their shares. If a railroad did business in more than one state, the proportion of business taxable in Delaware was based on the ratio that the number of miles of track in that state bore to the entire line. The Court, speaking through Mr. Justice Field, said:

> "It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."[4]

This statement lays down the principle of the first group of decisions—i. e., that the Court judges a tax only by whether it involves a valid *subject* of taxation; it has no concern with the nature of the *measure* of the tax.

This view was reiterated almost twenty years later in two cases with opinions again written by Mr. Justice Field. The Court upheld in *Maine v. Grand Trunk Ry. Co.*[5] a tax on the privilege of exercising franchises within the state, measured by the gross receipts per mile, and in *Horn Silver Mining Co. v. New York*[6] a tax on franchises measured either by a per cent of capital stock according to dividends paid, or by the actual cash value of the stock. A short time later the Court, with Mr. Chief Justice Fuller writing the opinion, sustained a tax on the right of commission merchants to do business, measured by the amount of business, regardless of whether it was local or interstate.[7]

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[2]Isaacs, The Subject and Measure of Taxation (1926) 26 Col.. L. Rev. 939, 940. "Subject" is defined as "... that on which the statute says the tax is imposed." The "measure" of a tax is explained as "... that element whose magnitude in each particular case, given the rate of the tax, determines the amount which the taxpayer must pay."

[3]18 Wall. 206, 21 L. ed. 888 (U. S. 1873).

[4]18 Wall 206, 231, 21 L. ed. 888 (U. S. 1873).

[5]142 U. S. 217, 12 S. Ct. 121 (dissent, 12 S. Ct. 163), 35 L. ed. 994 (1891).

[6]143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164 (1892).

[7]Ficklen v. Shelby County Taxing District, 145 U. S. 1, 12 S. Ct. 810, 36 L. ed. 601 (1892). See Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 15 S. Ct. 268, 39 L. ed. 311 (1895).

In all these cases the Court concerned itself only with the subject of the tax and did not give attention to the measure. It must also be noticed that the Court at this time attached no significance to the fact that the tax might fall on interstate as well as local commerce.

In 1908, with Mr. Justice Holmes speaking, the Court in *Galveston, Harrisburg, and San Antonio Ry. v. Texas*[8] started the second line of decisions. There it was held that even though the *subject* matter of the tax was good, the tax still failed because its *measure* was bad. The tax was levied on the gross receipts of railroads from all sources of income. The plaintiff railway was located entirely within the state of Texas, but a large portion of its gross receipts came from interstate business with connecting lines. In holding the tax invalid, the Court distinguished *Maine v. Grand Trunk Ry. Co.*[9] on the ground that the levy in that case was an excise tax imposed on the privilege of exercising a franchise, and was in lieu of other property taxes; on the other hand, the Texas tax was on the gross receipts themselves, not being in the nature of a privilege tax. It was further held that since the measure took in business done outside the state, this tax amounted to an attempt to regulate interstate commerce. It seems clear that the Court here made a definite break from its former opinions in which no attention was given to the measure and the sole inquiry concerned the subject of the tax.

Under the impetus provided by the *Texas* case, the Court during the next few years invalidated several statutes on similar reasoning. A Kansas statute[10] which imposed a tax on the right of foreign corporations to do business, the levy being measured by the amount of the corporation's capital stock, was held unconstitutional as a burden on interstate commerce.[11] An Oklahoma statute[12] which levied a gross income tax on public service corporations in addition to the taxes already imposed, the tax being apportioned according to the ratio that the gross receipts of business in the state bore to total receipts, was declared void[13] as being of the same nature as the tax in the *Texas* case,[14] in that

[8]210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031 (1908).

[9]142 U. S. 217, 12 S. Ct. 121 (dissent, 12 S. Ct. 163), 35 L. ed. 994 (1891).

[10]Kansas Gen. Stat. (1901) p. 280; Gen. Stat. (1905) p. 284.

[11]Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910).

[12]Okla. Sess. Laws (1910) c. 44, p. 65, § 2.

[13]Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445 (1912). In 1920, however, a Connecticut statute (Conn. Laws of 1915, c. 292, Part IV, §§ 19-29) taxing income attributed to business done in the state was upheld, inasmuch as it was not shown that income earned outside that state was included.

the measure of the tax by gross receipts was invalid. A few years later a Texas franchise tax[15] was declared void, because though its subject was one over which the state had control, it imposed too great a burden on interstate commerce.[16] In 1925, the Court considered a Massachusetts statute[17] which imposed an excise for the privilege of carrying on or doing business within the Commonwealth, the tax being levied on shares of stock attributed to such business and on the proportion of the income attributed to such business. The tax was held invalid because its subject (interstate commerce) was not a taxable subject, though on this occasion the Court seemed to think that the measure was a valid one.[18]

As late as 1938, in the case of *Connecticut General Life Insurance Co. v. Johnson*,[19] the reasoning of the foregoing group of decisions was employed to strike down a California tax.[20] The subject was good inasmuch as the tax was on the doing of a local business; but the measure was bad because there was an attempt to touch business done entirely outside the control of California. The next year a Texas statute[21] was upheld which imposed a franchise tax on the outstanding capital stock, surplus, and undivided profits of the corporation, plus its long term obligations. This tax was measured by the ratio of the gross receipts of its Texas business to the total gross receipts.[22] Both of these taxes were franchise taxes, but the former was rejected because of its extra-territoriality, while the latter was upheld because it was measured by local

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Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. ed. 165 (1920).

[14]Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031 (1908). But during this same period a Minnesota statute [Rev. Laws of Minn. (1905) c. 11.], which imposed a tax on gross receipts in lieu of all other taxes, was upheld. The Court said this was allowed because it was done in the exercise in good faith of a legitimate taxing power, and though the measure covered some elements not taxable, the tax was not an attempt to burden the conduct of interstate business as it was in lieu of all other taxes. U. S. Express Co. v. Minnesota, 223 U. S. 355, 32 S. Ct. 211, 56 L. ed. 459 (1912).

[15]Texas Acts of 1893, p. 158; Acts of 1897, p. 168; Acts of 1907, p. 503; Rev. Stat. (1911) Art. 7394.

[16]Looney v. Crane Co., 245 U. S. 178, 38 S. Ct. 85, 62 L. ed. 230 (1917).

[17]Mass. Gen. Laws (1932) c. 63 § 30.

[18]Alpha-Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916 (1925).

[19]303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673 (1938).

[20]Cal Const., Art XIII, § 14; Cal. Stat. (1921) c. 22, pp. 20, 21; Political Code, § 3664b.

[21]Texas Rev. Civ. Stat. (Vernon, 1936) Art. 7084.

[22]Ford Motor Co. v. Beauchamp, 308 U. S. 331, 60 S. Ct. 273, 84 L. ed. 304 (1939).

capital in Texas, the amount of which was determined by an approved formula.[23]

From a review of the above cases it appears that during the period 1908-1939 the Court not only looked to the subject of the tax but also to the measure of it. If either of these was improper, the tax was invalidated.

At the present term, the Supreme Court in *Wisconsin v. J. C. Penney Co.*[24] took the final step in the progression when it held valid a Wisconsin statute[25] which levied a tax on the privilege of declaring dividends from profits earned in Wisconsin, which dividends were paid out by the company in New York.[26] Mr. Justice Frankfurter, speaking for the majority in sustaining the statute, observed that in reality it involved merely an additional income tax on a corporation doing business in the state, in spite of the fact that the legislature had specifically said that the tax was on the privilege of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin. The Court held that if Wisconsin had provided such a tax as the price of the privileges offered corporations within its borders, it would clearly be upheld.[27] The proper test was stated to be whether the property was taken without due process of law, and it was concluded that the privilege of doing business in Wisconsin was ample basis for this levy.

Looking at the tax from the viewpoint of the Wisconsin legislature, it is plain that the subject was bad, because the tax attempted to cover activities that were done entirely outside of Wisconsin. All money received by the defendant in Wisconsin was sent to New York, and all dividends of the company were declared and paid in New York. On the other hand, the measure of the tax was a proper one. It was based on a formula that had already been accorded the approval of the Supreme Court[28]—i. e., the income to be attributed to Wisconsin bears the same relation to the total income of the company as the gross busi-

[23]For a general discussion, see Isaacs, The Unit Rule (1926) 35 Yale L. J. 838.

[24]61 S. Ct. 246, 85 L. ed. 222 (1940), rehearing denied, 61 S. Ct. 444 (1941).

[25]Wis. Stat. (1937) § 71.60.

[26]The Wisconsin Supreme Court had previously held the tax invalid [J. C. Penney Co. v. Wisconsin Tax Commission, 233 Wis. 286, 289 N. W. 677, 126 A. L. R. 1333 (1940)], on the authority of Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 58 S. Ct. 436, 82 L. ed. 673 (1938), see note 19, supra.

[27]Compare Continental Assurance Co. v. Tennessee, 311 U. S. 5, 61 S. Ct. 1, 85 L. ed. 42 (1940).

[28]United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748 (1918).

ness and property in Wisconsin bears to the total gross business and property of the company. In substance, it appears that the Court has said that even though the *subject* is bad, the *measure* used to ascertain the tax is a good one and is fair; therefore, the tax will be sustained. Of course, Mr. Justice Frankfurter did not say directly that the subject is bad, but he seems tacitly to admit as much by abandoning the legislative declaration of the nature of the levy and saying that the tax is nothing more than an additional income tax. By applying this title to the levy, the majority then had no trouble distinguishing this case from *Connecticut General Life Insurance Co. v. Johnson,* for there the tax had been called an excise tax; and, further, there it was the *measure,* and not the *subject,* that was invalid.[29]

Thus, after once having considered that only the subject of a state tax was of significance, then having regarded a valid subject and measure both essential, the Court now seems to require only an acceptable measure. This is apparently a radical departure from previous concepts of taxing power, but the change in legal rules may be necessitated, as the Court observed, by practical considerations in the form of the great need of the states for additional revenue. It is not believed that Mr. Justice Robert's fears that Wisconsin could now levy an ad valorem tax on property outside of Wisconsin because it returned income in Wisconsin[30] will come true. But this case has every indication of allowing states to tax as personal income, dividends to out-of-state stockholders of foreign corporations doing business in the state. It is to be supposed, however, that the Supreme Court will not approve any tax that is not essentially fair. The tax in the principal case seems to meet the test of fairness in that it is a tax on profits that were earned in Wisconsin, even though the subject of the tax was said by the legislature to be something entirely out of the jurisdiction of the state.

G. MURRAY SMITH, JR.

[29]The four dissenting Justices contended that the tax must be declared invalid on the authority of Connecticut General Life Insurance Co. v. Johnson, therein concurring with the decision of the Wisconsin Supreme Court. See note 26, supra.

[30]Dissenting opinion, Wisconsin v. J. C. Penney Co., 61 S. Ct. 246, 251, 85 L. ed. 222 (1940).

TORTS—LEGAL BASIS FOR THE OPERATION OF THE FAMILY PURPOSE DOCTRINE. [Texas]

By its recent decision in *Ener v. Gandy*,[1] the Texas Court of Civil Appeals has reaffirmed and perhaps extended its earlier repudiation of the "family purpose doctrine." In this case it appeared that the defendants' seventeen year old son had obtained permission to drive his parents' car to a football game in which he was to participate. During the trip the car collided with plaintiff's car, and in the accident plaintiff received personal injuries, her husband and child were killed, and her car damaged. In a suit to recover for her losses, plaintiff contended that the defendant father[2] should be liable for damages caused by his son's negligence, because the father was the owner of the car and had given the son permission to drive it. The trial court's judgment for the defendants, based upon an instructed verdict, was affirmed on appeal.

Since the decision of *Trice v. Bridgewater*[3] in 1935, the Texas courts have consistently maintained the rule that the family purpose doctrine has no application in that jurisdiction.[4] When urged to adopt the doctrine in the *Trice* case, the Court of Civil Appeals, in a well considered opinion, asserted that neither law nor reason supported the operation of such a principle.[5] In the instant case a situation more favorable to the family purpose rule was presented. As the son was on his way to play in a game for which he would receive credit in school, the father had a more direct interest in his activity than in the usual cases in which the child is merely bent on personal pleasure through use of the family car. Nevertheless, the court refused to place liability

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[1]141 S. W. (2d) 772 (Tex. Civ. App. 1940).

[2]The alleged liability of the mother was based upon her presence in the car and her failure to exercise proper control over the son's driving. This phase of the case is not relevant to the discussion of the family purpose doctrine, and will not be considered here.

[3]Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63 (1935).

[4]Bluth v. Nelson, 127 Tex. Rep. 462, 94 S. W. (2d) 407 (1936); Sturtevant v. Pogel, 109 S. W. (2d) 556 (Tex. Civ. App. 1937); Witt v. Universal Automobile Ins. Co. 116 S. W. (2d) 1095 (Tex. Civ. App. 1938); Seinsheires v. Burkhart, 132 Tex. 336, 122 S. W. (2d) 1063 (1939); See also Fernandez v. Lewis, 92 S. W. (2d) 305 (Tex. Civ. App. 1936).

[5]Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 64 (1935): "A consideration of these cases [previously cited] leads to the inescapable conclusion that there is no sound or logical basis in law or reason on which liability of the father for the negligent acts of his son, while in the pursuance of his own personal ends and pleasure, can be grounded."

on the father, and so seemingly made its former rejection of the family purpose doctrine complete and all-inclusive.[6]

A fair statement of what the doctrine entails was announced in the case of *Norton v. Hall*[7] in the following language:

> "The substance of the doctrine is that when the father or other head of a family supplies an automobile for the use and pleasure of the family, permitting the members thereof to use it at will, those members thus using the automobile become the agents of the head of the family, and that each one using it, even for his own sole personal pleasure, is carrying out the purpose for which the automobile is furnished, and is the agent or servant of the head of the family, so that the latter is liable for injuries resulting from negligence, under the doctrine of respondeat superior."

This doctrine is a comparatively new legal rule which did not make its appearance until the advent of the automobile.[8] The fact that it was developed to cope with the problems arising from ever-increasing automobile accidents has led some writers to title it the "family car doctrine."[9] There has been a sharp variance of opinion in the different jurisdictions as to the propriety of the doctrine, with many courts refusing its acceptance. And except in situations in which an orthodox agency relation can be shown, it is only in the states which have incorporated the family purpose doctrine into their law that recovery may be had from the parent for injuries caused by a member of the family driving the family automobile.[10]

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[6]In Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 63, 67 (1935), the court limited its decision in these words: "The question of liability of a father, if any, for negligent acts of his child while driving the family car in furtherance of some particular mission of the father or some business mission which may involve the moral, intellectual, and material welfare of the child or other members of the family, and in which matter the father has a direct interest, is in no manner to be affected by this decision." In the principal case the court decided that the son in playing football was in pursuit of his own personal pleasure, and that it was wholly immaterial that he was driving the car with permission of his father or that the son received credit in school for playing football.

[7]149 Ark. 428, 232 S. W. 934, 935 (1921), 19 A. L. R. 384, 385 (1922).

[8]5 Am. Jur., Automobiles § 365.

[9]Harper, Torts (1933) § 283, p. 620.

[10]Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Stickney v. Epstein, 100 Conn. 170, 123 Atl. 1 (1923); Smith v. Callahan, 34 Del. 129, 144 Atl. 46 (1928); Gordon v. Rose, 54 Idaho 502, 33 P. (2d) 351, 93 A. L. R. 984 (1934); White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1930); Landry v. Oversen, 187 Iowa 284, 174 N. W. 255 (1919); Grier v. Woodside, 200 N. C. 759, 158 S. E. 491 (1931); Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487 (1914). See also (1936) 100 A. L. R. 1021; 5 Am. Jur., Automobiles § 365; Harper, Torts (1933) § 283.

The whole gist of the argument advanced by the courts to justify the doctrine is based on the agency principle of respondeat superior. When the father, as head of the family, places an automobile at the disposal of his family, the courts assume an agency to exist. This reasoning proceeds on the premise that furnishing the use of a car is a means of providing pleasure for the family,[11] and is a part of the ordinary duties of the father. Thus, a member of the family driving the car is an agent engaged in a mission for the parent. The true reason for the doctrine, however, is that the courts feel that by holding the father liable, they are carrying out the dictates of justice.[12] Such a view, intimated in many decisions, is frankly adopted by at least one court, which observed that "... the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent."[13] In the usual case the actual driver of the automobile is judgment-proof, and the only person financially able to respond in damages is the family head who has placed the car in the hands of the negligent driver. The courts are therefore faced with the alternative of finding a legal basis for imposing liability on the parent or leaving the injured party without means of recovering for his losses and injuries.

These arguments supporting the rule have been well rebutted in cases rejecting it.[14] A thorough statement is found in *Smith v. Callahan*,[15] where the Delaware court refused to apply the family purpose doctrine. The court very pertinently pointed out that agency is based

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[11]Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224 (1912); McNeal v. McKain, 33 Okla. 449, 126 Pac. 742 (1912), 41 L. R. A. (N. S.) 775 (1913); Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913), 50 L. R. A. (N. S.) 59 (1914). Of course, once the doctrine has been adopted in a jurisdiction, later cases follow the precedent without inquiring into its legal merit. Boyd v. Close, 82 Colo. 150, 257 Pac. 1079 (1927); Grier v. Woodside, 200 N. C. 759, 158 S. E. 491 (1931).

[12]Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 1024 (1913), 50 L. R. A. (N. S.) 59, 67 (1914) "... Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of the family, even if he knew that they were grossly incompetent to operate it themselves. The adoption of a doctrine so callously technical would be little short of calamitous." Gordon v. Rose, 54 Idaho 502, 33 P. (2d) 351 at 353, 93 A. L. R. 984 at 988 (1934).

[13]King v. Smythe, 140 Tenn. 217, 204 S. W. 296, 298, L. R. A. 1918F, 293, 296 (1918).

[14]Smith v. Callahan, 34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929); Gordon v. Rose, 54 Idaho 502, 33 P. (2d) 351, 93 A. L. R. 984 (1934); White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1931); Harrington v. Gough, 164 Miss. 802, 145 So. 621 (1933); Lafond v. Richardson, 84 N. H. 288, 149 Atl. 600 (1930); Piquet v. Wazelle, 288 Pa. 463, 136 Atl. 787 (1927); Jones v. Knapp, 104 Vt. 5, 156 Atl. 399 (1931).

[15] 34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929).

upon the agent's doing something for the principal's benefit or in the principal's stead. Factual agency is hard to find when a member of the family is using the family automobile for his own personal pleasure which is in no way connected with the family relationship.[16] To the argument that the doctrine satisfies the dictates of justice, this court answered that the head of the family is guilty of no negligence in allowing members of his family certain pleasures, and should not be held an insurer against any injury resulting from the negligence of the permitee.

In the light of the mounting toll of automobile accidents, the social expediency of the family purpose doctrine seems generally admitted today, even among those who fail to see a legal basis for its application.[17] Further proof of the desirability of the doctrine can be found in the fact that courts have strained to give recovery on other bases. One court allowed recovery on the ground that an automobile is a dangerous instrumentality,[18] while in other jurisdictions the legislatures have passed statutes incorporating the family purpose doctrine into their law or adopting rules of liability even broader than that of the doctrine.[19]

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[16]Smith v. Callahan, 34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929). The court pointed out that since an automobile is not a dangerous instrumentality, its use by a son can be compared with his use of a baseball bat or any other instrument furnished by his father. There should be no more liability for one than for the other.

[17]"It is to be observed that the agency explanation of the 'family car' principle is not very convincing. This, however, in no sense militates against the desirability of the doctrine as a matter of social engineering." Harper, Torts (1933) § 283, p. 621. See also Notes (1914) 28 Harv. L. Rev. 91; (1921) 19 Mich. L. Rev. 543; (1932) 81 U. of Pa. L. Rev. 60; (1926) 25 Mich. L. Rev. 187, where the writers agree to the desirability of the doctrine from a social standpoint but find no legal basis for it in our common law. They suggest that the family purpose doctrine is a good subject for legislative action.

[18]Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). The court's position was that any vehicle requiring as much legislative regulation as an automobile should be classed as a dangerous instrumentality. But that an automobile is not a dangerous instrumentality, see Smith v. Callahan, 34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929); Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Hartley v. Miller, 165 Mich. 115, 130 N. W. 336 (1911); Note (1932) 81 U. of Pa. L. Rev. 60. The Florida court later reversed its stand and now appears to be in line with the almost unanimous holding that an automobile is not a dangerous instrumentality. Herr v. Butler, 101 Fla. 1125, 132 So. 815 (1931); Engleman v. Traeger 102 Fla. 756, 136 So. 527 (1931); Green v. Miller, 102 Fla. 767, 136 So. 532 (1931).

[19]Public Acts of Michigan (1927) N. 56, § 29, p. 69; Laws of New York (1930) c. 64-a, § 59. For a good discussion of the legislative approach see, Lattin, Vicarious Liability and The Family Automobile (1928) 26 Mich. L. Rev. 846, 869.

If it be admitted that the doctrine is socially desirable, the problem remains to find a more logical basis for its application. Since past experience indicates that few legislatures are inclined to come to the aid of the courts in this regard, judical action is the only means of supporting the imposition of liability. Professor Harper advocates the recognition of a new rule of vicarious liability, thereby avoiding the controversy over factual agency.[20] Such a solution carries the merit of being a direct and undisguised move to the attainment of the desired policy, and should be favorably received by those courts which commend the aims of the family purpose doctrine but refuse to adopt it because of the faulty agency concepts which support it.[21]

A further suggestion grows out of an examination of the evolution of respondeat superior. The historical origin of this principle has been the subject of much controversy which has resulted in two conflicting views. On the one hand some authorities have contended that the doctrine is the result of judicial legislation by Holt in the seventeenth century when he made the master liable for acts of the agent when the agent acted with implied consent.[22] Justice Holmes, an exponent of the other view, traced the principle from the ancient Roman law in which the father was held responsible for the acts of the members of his family.[23]

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[20]"It seems better, in the absence of legislation, to frankly recognize a new rule of vicarious liability, and to predicate the departure from 'established principles' upon the real reason therefor, the demands of the welfare and safe organization of modern society. By recognizing such a basis for the doctrine, the difficulties of the agency theory are avoided." Harper, Torts (1933) § 283, p. 621.

[21]An attempt at such a compromise may be found in the inauguration in Illinois of a doctrine called the "Family Errand Doctrine." This state had formerly repudiated the family purpose doctrine in White v. Seitz, 342 Ill. 266, 174 N. E. 371 (1931). In O'Haran v. Leiner, 306 Ill. App. 230, 28 N. E. (2d) 315 (1940), a husband was held liable for his wife's negligence when she was driving the car to purchase a dress for the daughter. The court seems to adopt a modified form of the family purpose doctrine, holding the head of the family liable when the car is being used for family *business*. See Note (1940) 39 Mich. L. Rev. 309.

[22]In about 1688, Judge Holt used the implied consent theory as a basis of the master's liability for acts of the servant. See Jones v. Hart, Holt 642, 90 Eng. Rep. 1255; Boulton v. Arlsden, Holt 641, 90 Eng. Rep. 1255. Also see: Wigmore, Responsibility for Tortious Act: Its History-II (1894) 7 Harv. L. Rev. 383, 394, for a full collection of these cases. It is admitted that many centuries before, the master had been responsible for acts of his servant, but it is contended that these earlier holdings bear no relation to any present doctrine of respondeat superior. See Wigmore, Responsibility for Tortious Acts: Its History (1894) 7 Harv. L. Rev. 315 and 383; 2 Polloch and Maitland, History of English Law (1895) 526.

[23]According to Justice Holmes' view, the whole law of agency is based on the theory that the father as head of the family should be liable for acts of the members of the family, since the acts of the family were considered acts of the father. See

Either theory which may be accepted may be thought to give a foundation for the present application of the family purpose doctrine. If the very origin of respondeat superior lies in judicial legislation, then the extension of the concept by further judicial legislation to embrace the policy of the family purpose doctrine does not seem a surprising development.[24] Changes in the conditions of man's existence continually result in modifications of legal rules to fit the new circumstances. On the other hand, under the Holmes view, the family purpose doctrine seems not to be a new principle at all. Rather, it appears as a return to a simple and fundamental precept which was thought necessary under the family system of ancient times, and may at present have become again as necessary under different conditions.

FORREST WALL

TORTS—LIABILITY IN CONVERSION OF LANDLORD DISPOSING OF CHATTELS LEFT ON PREMISES BY FORMER TENANT. [Massachusetts]

It is a common occurrence for a landlord or new tenant taking possession of a building to find there belongings which were left by a former occupant. Very often these effects left behind are apparently worthless articles, such as old books, papers, pictures and all kinds of odds and ends, and in many cases they have been abandoned by their owner. When such goods are in fact not abandoned, a troublesome problem arises as to the nature of the new occupant's duty in respect to these chattels.

This question is exemplified by the recent case of *Row v. Home Savings Bank*.[1] The defendant held a mortgage on a building which was occupied by a Campfire Girls Council. Plaintiff had hired a room from the Council until June, 1932, after which she removed most of

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Holmes, Agency (1891) 4 Harv. L. Rev. 345: "I then shall give some general reasons for believing that the series of anomalies or departures from the general rule which are seen whenever agency makes its appearance must be explained by some cause not manifest to common sense alone; that this cause is, in fact, the survival from ancient times of doctrines which in their earlier form embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since. . . ."

[24]". . . ethical standards have changed in the past; no doubt they will continue to change in the future. It is not inconceivable that *respondeat superior* is but the forerunner of a different way, perhaps a more intelligent way of dealing with a social problem." Smith, Frolic and Detour (1923) 23 Col. L. Rev. 444, 454.

[1]29 N. E. (2d) 552 (Mass. 1940).

her belongings, but continued, with the consent of the Council, to use the room during that summer. When she terminated her tenancy and left the community at the end of the summer, she intended to return and get the rest of her property. In May, 1933, plaintiff was notified by the Council that it was vacating the building and that everything was to be moved out. By June, 1933, the Council had removed all its property, but in the room formerly occupied by her, the plaintiff had left a suitcase and two old trunks, one of which was unlocked. These were filled with manuscripts, letters and documents, family photographs, and other personalty of varying intrinsic and sentimental value.[2] Plaintiff returned to the room in July, 1933, and at that time left the property unchanged. She came back to the premises on August 1, but could not enter the building because a new lock had been put on it. And later she learned that in the meantime, on July 13, 1933, defendant by his agent had entered, foreclosed the mortgage, and caused the "debris," including plaintiff's property, to be removed.

The Supreme Judicial Court of Massachusetts, in holding that the defendant had not committed a conversion, declared that the plaintiff had no right to keep her property on the premises of the defendant, whose duty to such property did not extend beyond reasonable conduct. The apparent worthlessness of the property excused the defendant from looking for the real owner, and made the disposal of the property fall within the term "reasonable conduct." In the words of Justice Lummus, speaking for the court: "His [defendant's] duty depends upon its [the property's] value to the eyes of a reasonable man in his position, not upon the value that it may later be shown to have. He is entitled to act upon appearances." And the fact that the property was removed or thrown away "... was no wrong to the plaintiff. Her own conduct led the defendant naturally to the course taken."[3]

Thus it appears that the two factors of the property's apparent worthlessness and the plaintiff's apparent abandonment of it gave defendant full right to dispose of the goods left on his premises. In view of the frequency of the occasions in which buildings owners find themselves confronted with situations like that in the principal case and of the difficulties which beset such owners in trying to determine how such property should be handled, the result reached in this decision

[2]The trunks also contained photographic plates and films, a 17th century Japanese lacquered escritoire, two antique sewing boxes, some linen and embroidery, a carved ivory tusk, some books and china, some silver spoons and silver plated ware, a crayon portrait, and some curiosities from New Zealand.

[3]29 N. E. (2d) 552, 554 (Mass. 1940).

seems the best practical solution to the problem. However, legal principles to support the result are not easily discovered.

According to the usual standards, the Home Savings Bank converted the plaintiff's property by assuming the right to throw it away.[4] The property, though apparently abandoned by plaintiff, was not actually or legally abandoned,[5] but still belonged to plaintiff;[6] and generally, any unlawful exercise of dominion over another's property is a conversion. It is ordinarily no defense to an action for conversion that the defendant acted in good faith, did not know who owned the property,[7] or thought the property was abandoned,[8] or that he himself owned it.[9] In addition, it has been held in at least one case that mistaken belief as to value is not defense,[10] and other cases have established the law that it is not necessary that the property be of commercial value in order that its taking be the basis for an action in trover.[11] Neither can the contributory negligence of the owner of the property be a defense to an action for conversion.[12] The foregoing cases seem to demonstrate that the reasonableness of defendant's action is not even a material factor in deciding whether he is a converter.

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[4]Beasley v. Central of Georgia Ry., 29 Ga. App. 584, 116 S. E. 227 (1923); Hall v. Merchants' State Bank, 199 Iowa 483, 202 N. W. 256 (1925); Eisenberg v. Nelson, 247 S. W. 244 (Mo. App. 1923); McClintock v. Parish, 72 Okla. 260, 180 Pac. 689 (1919); Pittman-Harrison Co. v. Fox Bros. 228 S. W. 597 (Tex. Civ. App. 1921). See also 26 R. C. L. 1098, §§ 2, 3; Restatement, Torts (1934) § 226.

[5]"The question whether there is an abandonment or not, thus turns on the fact of intent to be determined by the jury in the light of all circumstances. Without the intent there can be no abandonment." Brown, Personal Property (1936) 9.

[6]There must be actual intent to abandon. International Finance Corp. v. Jawish, 63 App. D. C. 262, 71 F. (2d) 985 (1934); Hediger v. Zastrow, 174 Minn. 11, 218 N. W. 172 (1928); Pearson v. Black, 120 S. W. (2d) 1075 (Tex. Civ. App. 1938). Delay in removing property is not abandonment. Bickham v. Bussa Oil & Gas Co., 152 So. 393 (La. App. 1934). Non-user is not abandonment. Riedman v. Barkwill, 139 Cal. App. 564, 34 P. (2d) 744 (1934).

[7]National Atlas Elevator Co. v. U. S., 97 F. (2d) 940 (C. C. A. 8th, 1938); Poggi v. Scott, 167 Cal. 372, 139 Pac. 815 (1914); Prudential Insurance Co. of America v. Thatcher, 104 Ind. App. 14, 4 N. E. (2d) 574 (1936); Nesvold v. Gerding, 49 N. D. 207, 190 N. W. 815 (1922).

[8]Poggi v. Scott, 167 Cal. 387, 139 Pac. 815 (1914).

[9]Carver v. Ketchum, 53 Idaho 595, 26 P. (2d) 139 (1933); Moore v. Andrews, 203 Mich. 219, 168 N. W. 1037 (1918); Pine & Cypress Mfg. Co. v. American Engineering & Construction Co., 97 W. Va. 471, 125 S. E. 375 (1924).

[10]Poggi v. Scott, 167 Cal. 372, 139 Pac. 815 (1914). See Teal v. Felton, 12 How. 284, 13 L. ed. 980 (U. S. 1851) (unlawful detention of a mere newspaper by a postmaster held to be a conversion).

[11]Vaughn v. Wright, 139 Ga. 736, 78 S. E. 123, 45 L. R. A. (N. S.) 785 (1913); Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. 356 (1892).

[12]Varney v. Curtis, 213 Mass. 309, 100 N. E. 650, L. R. A. 1915A, 629 (1913).

However, when the enforcement of even such a well-established principle of law[13] conflicts with the rights of another property owner to use his own premises as he reasonably desires, it is natural for the courts to qualify the concepts of conversion in deserving cases. It was this conflict in rights between two property owners which led the Massachusetts court in the principal decision to declare that the ordinary rules of conversion did not govern here. Other courts have taken similar positions in recognizing the validity of acts done by building owners in handling chattels of another left on the premises. For example, in *Geisler v. Stevenson Brewing Co.*[14] the defendant, on taking possession of a building as assignee of a lease, removed plaintiff's furniture, which had been left on the premises, to a warehouse. Though this action was taken without plaintiff's knowledge or consent, the court held that no conversion had resulted from the removal of the property, because there had been no demand and refusal to deliver, but rather defendant had stored the goods subject to plaintiff's order and requested that she retake them.[15] It is now established that the owner of premises on which another's personal property has been left may, after reasonable notice to such person to remove, himself remove the goods in order to make a normal use of the premises.[16] Some cases have gone so far as to hold that the landlord may destroy the tenant's effects when such an act is necessary to enable him to obtain the use of his property, provided proper notice to remove was given to the tenant at the expiration of the lease.[17]

In all the cases mentioned above there has been wrongful intermeddling, asportation, or detention of another's property. Nevertheless, the courts relax the rule of conversion in accordance with the circumstances, and justify the defendants in such conduct as can be said to be reasonable in each case. But even the cases discussed do not go

[13]Velzian v. Lewis, 15 Ore 539, 16 Pac. 631 (1888). See Carver v. Ketchum, 53 Idaho 595, 26 P. (2d) 139 (1933); Lee Tung v. Burkhart, 59 Ore. 194, 116 Pac. 1066 (1911); 26 R. C. L. 1098, §§ 2, 3; Restatement, Torts (1934) § 226.

[14]126 App. Div. 715, 111 N. Y. Supp. 56 (1908).

[15]The principal case referred to this right of the building owners to remove goods to a warehouse. 29 N. E. (2d) 552, 554 (Mass. 1940).

[16]Stearns v. Sampson, 59 Maine 568, 8 Am. Rep. 442 (1871); Smith v. Detroit Loan & Building Ass'n., 115 Mich. 340, 73 N. W. 395 (1897); Whitney v. Sweet, 22 N. H. 10, 53 Am. Dec. 228 (1850); Herrman v. Huntington, 111 App. Div. 875, 98 N. Y. Supp. 48 (1906), aff'd, 188 N. Y. 622, 81 N. E. 1166 (1907); Rush v. Aiken Mfg. Co., 58 S. C. 145, 36 S. E. 497 (1900); Alsbury v. Linville, 214 S. W. 492 (Tex. Civ. App. 1919).

[17]Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77 (1911); Lyons v. Philadelphia & R. Ry., 209 Pa. 550, 58 Atl. 924 (1904).

quite as far as the principal case, in that here no notice was given by the defendant to plaintiff to remove her property.

The plaintiff in *Row v. Home Savings Bank,*[18] by her negligent delay in removing her goods and failure to notify defendant of her ownership, set up appearances that to a reasonable person occupying the premises would indicate that the property had been abandoned. It is true that Row did not actually abandon the property and the ownership did remain in her, because to constitute abandonment there must be a clear and unequivocal intent to abandon on the part of the owner.[19] However, the plaintiff left goods which were to the ordinary eye worthless junk. Seemingly the things had not been taken by their owner because she no longer wanted them. In this connection, it must be remembered that the premises had not been used actively for several months prior to the defendant's taking possession. The fact that the defendant had no dealings with the plaintiff and no knowledge that she ever occupied the premises makes defendant's conduct all the more reasonable. The case appears to fit exactly into the sensible rule, announced by the Massachusetts court in an early decision:

> "The unauthorized appropriation of personal chattels will generally be sufficient of itself to enable the true owner to maintain an action for their conversion.... But this severe rule of law will not be applied when the action of appropriation can be justified as having been authorized in any manner by the owner of the property."[20]

HOWARD WESLEY DOBBINS

TORTS—RIGHT OF CHILD TO RECOVER FROM DOCTOR FOR INJURIES RECEIVED BEFORE BIRTH AS RESULT OF NEGLIGENT TREATMENT OF MOTHER. [New Jersey]

By its recent decision in *Stemmer v. Kline,*[1] the Circuit Court of New Jersey has extended the scope of common law liability for negli-

[18]29 N. E. (2d) 552 (Mass. 1940).

[19]See Notes 5 and 6, supra.

[20]Hills v. Snell, 104 Mass. 173, 177, 6 Am. Rep. 216, 218-9 (1870). In this case the defendant, a baker, ordered flour from a merchant, C, who had to buy flour from B to fill the order. B gave C an order on a warehouse for the flour. The flour delivered to the defendant was not the flour which had been bought from C, but was of a higher quality than ordered, mistakenly sent, and belonging to A. Defendant consumed it, not knowing the difference. Other cases have acknowledged the existence of the doctrine set out in Hills v. Snell: Robinson v. Bird, 158 Mass. 357, 33 N. E. 391 (1893); Somerville National Bank v. Hornblower, 293 Mass. 363, 199 N. E. 918, 104 A. L. R. 1107 (1936).

[1]17 A. (2d) 58 (C. C. N. J. 1940).

gence by upholding the right of an infant child to recover damages for personal injuries sustained while the child was *en ventre sa mere*[2] and caused by the negligence of a doctor. The complaint in the case alleged that the defendant had negligently diagnosed the condition of the mother of the child and applied X-ray treatments to her; that she was in fact pregnant; and that the result of the treatments was the birth of the infant child as a microcephalic idiot without skeletal structure or powers of sight, hearing, or locomotion. Defendant's motion to dismiss the complaint was denied.

Some rights of a child *en ventre sa mere* have been so often recognized and so well protected that there is no doubt concerning their existence. At common law, under what is termed the "civil rule," a child when conceived is considered as born if such a fiction will operate for the benefit of the child.[3] This rule will not operate to the child's disadvantage,[4] and the right is conditioned upon the live birth of the child.[5] Thus, a child *en ventre sa mere* has been held to be born for the purpose of being vouched in a recovery, taking under the Statute of Distribution, having a guardian appointed for it, taking by devise, being entitled under a charge for raising portions, having an injunction issued, suing for the death of its father under Lord Campbell's Act,[6] and receiving other benefits.[7]

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[2]A child is said to be *en ventre sa mere* before it is born; while it is a fetus. Bouvier's Law Dictionary (1934); 20 C. J. 1297.

[3]Groce v. Rittenburg, 14 Ga. 232 (1853); Hall v. Hancock, 15 Pick. 255, 26 Am. Dec. 598 (Mass. 1834); McLain v. Howald, 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597 (1899); Marsellis v. Thalhimer, 2 Paige Ch. 35, 21 Am. Dec. 66 (N. Y. 1830); Deal v. Sexton, 144 N. C. 157, 56 S. E. 691, 119 Am. St. Rep. 943 (1907); Wallis v. Hodson, 2 Atk. 115, 26 Eng. Rep. 472 (1740).

[4]Re Haines' Will, 98 N. J. Eq. 628, 129 Atl. 867 (1925); Villar v. Gilbey, [1907] A. C. 139, 145.

[5]Gillespie v. Nabors, 59 Ala. 441, 31 Am. Rep. 20 (1877); Marsellis v. Thalhimer, 2 Paige Ch. 35, 21 Am. Dec. 66 (N. Y. 1830).

[6]Judical declarations, in holdings or in dicta, covering these points may be found in : Thellusson v. Woodford, 4 Ves. Jun. 227, 322, 31 Eng. Rep. 117, 163, 27 Am. & Eng. Enc. 421 note 1, 1 Eng. Rul Cas. 498 (1799); Millar v. Turner, 1 Ves. Sen. 85, 86, 27 Eng. Rep. 907, 908, Ves. Sen. Supp. 63, 64, 28 Eng. Rep. 457 (1747); Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. 1021, 1022, 11 L. R. A. 391, 392 (1890); Hill v. Moore, 5 N. C. 233 (1809); Pearson v. Carlton, 18 S. C. 47, 56-9 (1882); Detrick v. Migatt, 19 Ill. 146, 149, 68 Am. Dec. 584, 585 (1857); Marsellis v. Thalhimer, 2 Paige Ch. 35, 21 Am. Dec. 66 (N. Y. 1830); Scatterwood v. Edge, 1 Salk. 229, 230, 91 Eng. Rep. 203 (1424); Quinlen v. Welch, 69 Hun 584, 23 N. Y. Supp. 963 (1893); Galveston, H. & S. A. Ry. v. Contreras, 31 Tex. Civ. App. 489, 72 S. W. 1051 (1903); The George and Richard, L. R. 3 Adm. & Eccl. 466, 24 L. T. N. S. 717, 27 Am. & Eng. Enc. 421 note 1 (1871).

[7]Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480 (1872) (Child *en ventre sa mere* can take remainder in fee); Cooper v. Heatherton, 65 App. Div. 561, 73 N. Y. Supp.

In the so-called "criminal rule," the common law recognizes a distinction between a deliberate injury to an unborn child which prevents its birth alive, and a deliberate injury to an unborn child which results in its death subsequent to birth. The former is not punishable as murder,[8] but the latter is[9]—this, because according to legal concepts there can be no murder of a being which has never been "alive." And though there be no direct injury to the child, yet if a child is quick within the mother[10] at the time of an attempted abortion, and as a result is born prematurely and dies because it is too young to survive the changed environment, that, too, is murder.[11]

These two rules covering both civil and criminal rights and liabilities have been proffered as reasons for allowing a child to sue for prenatal injuries to itself,[12] but most courts have not recognized the validity of this argument. The court in *Stemmer v. Kline*[13] admitted that the majority of the cases on the question would seem, in the absence of close analysis, to deny the action; but it felt that many of these cases could be distinguished and that the weight of the better reasoning would allow the recovery.[14]

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14 (1901) ("youngest child" held to be child *en ventre sa mere*); Mason v. Jones, 2 Barb. 229 (N. Y. 1848) (child *en ventre sa mere* will take in trust in accumulation for children); Jenkins v. Freyer, 4 Paige Ch. 47 (N. Y. 1833) (child *en ventre sa mere* is considered as in esse, conditioned on his live birth, and will take as if born during life time of testator); Stedfast v. Nicoll, 3 John. Cas. 18 (N. Y. 1802) (child *en ventre sa mere* took a vested estate subject to ulterior contingent remainderman); Laird's Appeal, 85 Pa. 339 (1877) (child *en ventre sa mere* held to be "issue living"); Smart v. King, 1 Meigs 149, 33 Am. Dec. 137 (Tenn. 1838) (child *en ventre sa mere* included in "all my grandchildren"); Trower v. Butts, 1 Sim. & St. 181, 57 Eng. Rep. 72 (1823) (child *en ventre sa mere* held to be a child "born within testatrix's lifetime" so as to include it within terms of trust); Snow v. Tucker, 1 Sid. 153, 82 Eng. Rep. 1027 (1714) (devise to child *en ventre sa mere* is good); see 10 Am. & Eng Enc. 624 and note.

[8]Com. v. Parker, 9 Met. 263 43 Am. Dec. 396 (Mass. 1845); State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248 (1849); 1 Bl. Comm. 129.

[9]Clarke v. State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157 (1898); Regina v. West, 2 Car. & K. 784, 175 Eng. Rep. 329 (1848); Rex v. Senior, 1 Moody, C. C. 346, 168 Eng. Rep. 1298 (1832); See 1 Wharton, Criminal Law (12th ed. 1932) § 783; Notes (1904) 63 L. R. A. 902, 908; (1914) 49 L. R. A. (N. S.) 580, 582.

[10]Usually about the tenth to twenty-fifth week of pregnancy. Dates from time the embryo moves into abdomen; in eyes of law, life starts at this time, although the fetus is alive from moment of conception. Bouvier's Law Dictionary (1934) 1010.

[11]Regina v. West, 2 Car. & K. 784, 175 Eng. Rep. 329 (1848).

[12]It is argued that since for all beneficial civil rights the child *en ventre sa mere* is considered as alive, then it ought to be so considered in the analagous situation where the benefit is the right of a tort action; that since the child *en ventre sa mere* is a person such as to make its destroyer guilty of murder, then a mere damager ought to be liable in tort on the same reasoning.

[13]17 A. (2d) 58 (C. C. N. J. 1940).

[14]See Boggs, J. in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48

The thirteen cases[15] which militate against the child's right to maintain the action give six reasons for the denial. It is said that such an action has never been previously allowed and that there is no common law action for such injuries;[16] that a child *en ventre sa mere* has no existence apart from that of its mother until its birth, and thus no duty of care is owed it until that time;[17] that no right of action in the child is needed because the mother may recover damages for all the injuries to the unborn child, if they are not too remote;[18] that the death statutes sued upon do not include such a person within their meaning;[19] that to allow a recovery under these facts would result in great inconvenience and danger of fraudulent actions and uncertainty of proof;[20] and that the court has no power to legislate judicially.[21]

The first case which deals with the problem is *Dietrich v. City of*

L. R. A. 225, 228, 75 Am. St. Rep. 176, 179 (1900); Nugent v. Brooklyn Heights R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367 (1913); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, 917, L. R. A. 1917G, 334 (1916); Drobner v. Peters, 194 App. Div. 696, 186 N. Y. Supp. 278 (1921); Kine v. Zuckerman, 4 Pa. Dist. & Co. R. 227 (1924); Montreal Tramways v. Leveille, 4 Dom. L. R. 337, (1933) Can. L. R. 456; 1 Bevin on Negligence (4th ed.) 75; Frey, Injuries to Infants en Ventre sa Mere (1927) 12 St. Louis L. Rev. 85; Kerr, Action by Unborn Child (1905) 61 Cent. L. J. 364; Morris, Injuries to Infants en Ventre sa Mere (1904) 58 Cent. L. J. 143; Straub, Right of Action for Prenatal Injuries (1930) 33 Law Notes 205.

[15]See cases discussed in body following, and cited in notes 16 to 21, 30, 31, 33, 34, 37.

[16]Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Dietrich v. City of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Buel v. United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901); Magnolia Coca-Cola Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 97 A. L. R. 1513 (1935).

[17]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Magnolia Coca-Cola Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 97 A. L. R. 1513 (1935).

[18]Birmingham Baptist Hospital v. Branton, 218 Ala. 464, 118 So. 741 (1928); Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).

[19]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Dietrich v. City of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Buel v. United Rys. Co., 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901).

[20]Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca Cola Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944, 97 A. L. R. 1513 (1935).

[21]Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. (2d) 446 (1939); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. (2d) 28 (1940).

Northampton,[22] decided in Massachusetts in 1884. Recovery under a death statute was denied for the child's death resulting from its premature birth, which was allegedly due to the mother's having slipped on a defective highway. The child had lived only a few moments after its birth, and the action was brought by its administrator. In holding that the statute did not include such a person within its meaning, the court discussed the issue of whether a being like the plaintiff's intestate could sue at common law and decided that no such action would lie. Justice Holmes, in writing the opinion, denied that there was any analogy between the civil and criminal rules, and tort law applicable to a conceived but unborn child.[23] The court further observed that no precedent existed for such an action, and that there was no reason to allow the child a cause of action, since the mother could recover for all injuries to it which were not too remote.[24]

If the statute sued under in the *Dietrich* case was a wrongful death statute,[25] the case may not be in point with *Stemmer v. Kline*, as the action would by necessity have to be given by the statute itself, there being no action at common law for wrongful death.[26] If the statute sued under was a survival statute[27] the two cases may still be distinguished in that in the *Dietrich* case there was no direct injury to the child.[28] Further, the degree of care that a community owes to its citizens

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[22]138 Mass. 14, 52 Am. Rep. 242 (1884).

[23]Justice Holmes thought that any arguments for recovery based on analogies to the criminal law were destroyed by the fact that, though the Massachusetts statute made attempted abortion a crime and increased the punishment if the mother died, yet no distinction was made to turn on whether the child lived or died.

[24]Accord: Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926), approved by Birmingham Baptist Hospital v. Branton, 218 Ala. 464, 118 So. 741 (1928).

[25]A wrongful death action is an action given by statute to the surviving dependent relatives of the deceased person or to the administrator of the estate. It is an entirely new action, unknown at common law, and modeled after Lord Campbell's Act, 9 & 10 Vic. C. 93. It is independent of any action which deceased could have brought in his own right had he survived. Harper, Law of Torts (1933) § 279; McCormick, Damages (1935) § 93.

[26]Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808); Higgins v. Butcher, Yelv. 89, 80 Eng. Rep. 61 (1606).

[27]A survival statute permits the administrator of the deceased to sue upon a claim which deceased could have maintained during his life time, or to revive and follow to judgment any suit actually instituted by the deceased. At common law, the cause of action was wiped out by death; a survival statute prevents this, but gives no new ground of action, merely preserving the old. Harper, Law of Torts (1933) § 279; McCormick, Damages (1935) § 93.

[28]In Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901), the court held that where the mother, quick with child, was injured due to the negligent maintenance of a building and as a result the child died from

may not be the same as that owed by a doctor to one of his patients.[29]

The next case chronologically was *Walker v. Great Northern R. Co.*,[30] decided in Ireland in 1890. Here the mother was a paying passenger upon a train and was injured as a result of the negligence of the operator. The child was born subsequently, in a deformed condition; and when suit to recover for the injuries was brought in behalf of the child, the court sustained a demurrer to the complaint saying that it was insufficient in that it did not aver a contractual relationship between the defendant and the child *en ventre sa mere*. The issue of whether a child could recover for prenatal injuries was expressly left open by the Chief Justice, but three of the Justices expressed the opinion that there was no such action. Inasmuch as this case was decided on the seemingly irrelevant basis of an absence of a contractual relation,[31] it is not precisely in point with the issue in *Stemmer v Kline*.

Ten years later the Supreme Court of Illinois ruled on the question in *Allaire v. St. Luke's Hospital*.[32] The mother of the plaintiff alleged that she contracted with the defendant hospital for care during the approaching birth of her child and for the care of the child, and that both mother and child were injured directly through the negligent operation of an elevator in the hospital. A demurrer to the complaint was sustained, with one Justice strenuously dissenting. The court cited *Dietrich v. Northampton* and *Walker v. Great Northern R. Co.* as authority. However, the dissent pointed out that neither of these two cases was in point. In the *Dietrich* case the child was not capable of independent life at the time of its birth while here the child was still living. This factor affords grounds for a differentiation between the rights of a viable child and one incapable of life at the time its rights were injured.[33] In the *Walker* case there was no averment of knowledge

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a premature birth, living but three days, there was no action for the death of the child under the wrongful death statute. The fact that here the child suffered no direct injury distinguishes this case also from Stemmer v. Kline.

[29]See Cooley, Law of Torts (1880) 649; Luka v. Lowrie, 117 Mich. 122, 136 N. W. 1106, 1110 (1912), 41 L. R. A. (N. S.) 290, 295 (1913).

[30]L. R. 28 Ir. 69 (1890).

[31]The court in this as in other "contractual" cases fails to show why the absence of a contract prevents a tort recovery. Justice Clarke in his dissenting opinion in Drobner v. Peters, 194 App. Div. 696, 186 N. Y. Supp. 278 (1921), pointed out that the court was really denying a tort action for negligence and not a contract action.

[32]184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900).

[33]In Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334 (1916), the court limited its decision by holding that a child injured while *en ventre sa mere* could not recover if it was not viable at the time of the injury. It was admitted that there was cogent reasoning for allowing recovery

in the railroad of the existence of the child nor any contractual relationship between the defendant and the mother with respect to the unborn child, while here the mother contracted directly with the hospital with respect to the child as well as with respect to herself, and the hospital owed them a duty of care. Mention was also made by the dissent of the civil and criminal rules concerning a child *en ventre sa mere,* these rules being cited as supporting the view that the action should lie.

This decision was followed by *Nugent v. Brooklyn Heights R. Co.,*[34] which held that a child injured while yet unborn could not recover for injuries received through the negligent operation of a public carrier. Again, as in the *Walker* case, the court relied upon the incomprehensible argument that there was no contract to carry as between the defendant carrier and the child. But the language of the court was strongly in favor of allowing a recovery under more limited facts. Thus:

> "The indisputable fact is that one is answerable to the criminal law for killing an unborn child who to that end is regarded as *in esse,* and the further fact is that the unborn child, so far as the property interests are concerned, is regarded as an entity, a human being with the remedies usually accorded to an owner. But the argument then proceeds that one must respect the rights of ownership, and, so far as a civil remedy is concerned, disregard the safety of the owner. In such argument there is not true sense of proportion in the protection of rights. The greater is denied; the one lesser and dependent on the very existence of a person *in esse* and entitled to protection is respected. ... In my view, justice should not be turned aside and wrongs go without remedies because of apprehension of what may happen in jurisprudence if it be decided that an unborn child has some rights of the person."[35]

In *Drobner v. Peters*[36] a lower New York court, in a divided opinion, followed the above language of *Nugent v. Brooklyn Heights R. Co.* to hold that a child could recover for prenatal injuries. The court recognized the analogies of the civil and criminal rules in respect to the rights of a child *en ventre sa mere* and pointed out that the statements in the *Nugent* case were not dicta but essential to the holding. Upon appeal the decision of this inferior tribunal was reversed,[37] Judge

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if the child was injured while viable, but the court expressly refused to decide the question.

[34] 154 App. Div. 667, 139 N. Y. Supp 367 (1913).

[35] 154 App. Div. 667, 672, 139 N. Y. Supp. 367 (1913).

[36] 194 App. Div. 696, 186 N. Y. Supp. 278 (1921).

[37] 232 N. Y. 220, 133 N. E. 567 (1921).

Cardozo dissenting. In delivering the prevailing opinion, Judge Pound said:

> "Strong reasons of public policy may be urged both for and against following the new right of action. The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it as to call for judicial legislation on the question."[38]

Intermediate in time between the *Nugent* case and the *Drobner* case, *Buel v. United Rys. Co.*[39] was decided. There, the pregnant mother was negligently injured while boarding a street train of the defendants; the child was injured directly and died nine months after birth. The court denied recovery under a wrongful death statute for the death of the child. In a carefully worded opinion, the court stated that at the time of the passage of the state's statute, admittedly a copy of Lord Campbell's Act,[40] the common law *as of that time* gave no such cause of action. The court thus admitted that the common law at the time of the decision might be different from the common law as of the time of the passage of the statute; which means that the court refused to decided whether the growth of the common law had since included such an action.

Although no recovery was allowed in these cases, yet the dissenting opinions, the dicta, and the grounds of decision show that the courts were strongly swayed by the arguments in favor of recovery, but hesitated to take the final step, leaving that to *Stemmer v. Kline.*

To support its holding in the principal case, the court relied upon the dicta and dissenting opinions in the cases discussed, and upon the reasoning in an inferior court in Pennsylvania[41] and a Canadian case,[42] in which such a recovery was allowed. The Canadian court in answer to the proposition that there was no analogy between the criminal and the tort law, remarked that most crimes were torts as well, and that they were both really different aspects of the same facts. The court in the principal case held that the civil rule in respect to a child *en ventre sa mere* extended to a tort action by the child since it was for his benefit; that the law of negligence had so changed that it was now time to determine judicially that such was the law. However, it limited the holding to a situation in which the defendant was a doctor

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[38]232 N. Y. 220, 224, 133 N. E. 567, 568 (1921).
[39]248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913).
[40]9 & 10 Vict. c. 93.
[41]Kine v. Zukerman, 4 Pa. Dist. & Co. R. 227 (1924).
[42]Montreal Tramways v. Leveille, 4 Dom. L. R. 337, (1933) Can. L. R. 456.

who knew or should have known of the existence of the child, and his negligence resulted in injury to it.

The absence of a precedent does not mean that such an action is not to be allowed,[43] for there must be novel decisions or the law would soon become stagnant. Medical science has expanded and grown, and many facts known today were unknown a few years ago.[44] If the increase of medical skill and knowledge can now assure a more accurate determination of the actual cause-result sequence, there is no real reason to deny the action. The fear expressed by the courts that to allow such action would make damages too speculative could be allayed by procedural safeguards. That this fear is the main basis for the refusal seems to be clear when the various given reasons are considered. The confusion resulting from deciding almost similiar fact situations upon different grounds, and the failure to differentiate between wrongful death actions and ordinary tort actions seem to spring from this, rather than from purely legalistic reasons.

The issue would be almost entirely academic were it not for the fact that, in spite of judicial declarations to the contrary, a parent can not recover for all the damages done to the child before its birth. He may recover for all the pecuniary damage he has suffered,[45] such as the loss of services;[46] but he can not recover for injuries done to the child, such as its disfigurement,[47] impaired earning power past the child's majority,[48] or mental injury.[49] He can not recover for any injury for

[43]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156 (1896).

[44]See 17 A. (2d) 58, 62 (C. C. N. J. 1940).

[45]Birmingham R. Co. v. Baker, 161 Ala. 135, 49 So. 755, 135 Am. St. Rep. 118 (1909); Union Pacific Ry. Co., v. Jones, 21 Colo. 340, 40 Pac. 891 (1895); Travers v. Hartman, 28 Del. 302, 92 Atl. 885 (1914); McGreevey v. Boston Elev. Ry. Co., 232 Mass. 374, 122 N. E. (1919); Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 249 (1919).

[46]Finnerty v. Cummings, 132 Cal. App. 48, 22 P. (2d) 37 (1933); Jackiewicz v. United Illuminating Co., 106 Conn. 310, 138 Atl. 151 (1927); Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N. E. 440 (1931); Scanlon v. Kansas City, 325 Mo. 125, 28 S. W. (2d) 84 (1930).

[47]Durkee v. Central Pacific R. Co., 56 Cal. 388, 38 Am. Rep. 59 (1880); Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926); Pennsylvania R. Co. v. Kelly, 31 Pa. 372 (1858).

[48]Braswell v. Garfield Cotton Oil Mill Co. 7 Ga. App. 167, 66 S. E. 539 (1909); Bong v. Webster, 217 Ky. 781, 290 S. W. 662 (1927); Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104 (1891); Goldman v. Mitchell-Fletcher Co., 285 Pa. 116, 131 Atl. 665 (1926).

[49]Michigan Sanatarium & Benevolent Ass'n. v. Neal, 194 N. C. 401, 139 S. E. 841 (1927); St. Louis Southwestern Ry. v. Gregory, 73 S. W. 28 (Tex. Civ. App. 1903).

which the child, had it been a person in the eyes of the law, could have sued in his own right.[50]

It has been speculated that this holding might allow a child to sue his own mother for negligence,[51] but this is not true. The court expressly limited the decision, and did not lay down a broad rule. And the fact that a valid rule of law may possibly be distorted to apply to an inappropriate case should not dictate a refusal to recognize the rule in a proper case.

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[50]Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987 (1908).

[51]XXXVII Time 68 (Feb. 24, 1941).