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THE PRINCIPLE AND PRICE OF A LIVING LAW*

JOSEPH C. HUTCHESON, JR.†

When in 1872, more than eighty years ago, Rudolph von JHering, in opposition to what he called the Savigny-Puchta theory of the origin of the law, that law is a growth as painless as the formation and growth of a language, set down in Chapter I of "The Struggle for Law," his dynamic theory of its origin, he enunciated a principle, the truth of which is nowhere now questioned.

This is not the time nor the place to trace its struggle for acceptance. It is sufficient for my purpose to quote these stirring passages from his statement of his case:

"The end of the law is peace. The means to that end is war. The life of the Law is a struggle, a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife. Every principle of the law which obtains had first to be wrung by force from those who denied it, and every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert it and defend it.

"The law is not mere theory but living force, and hence it is that justice which in one hand holds the scales in which she weighs the right, carries in the other the sword with which she executes it . . ."

Admitting that the opposite theory was the idea of the origin of law which he himself had had when he left the University and that he had lived under the influence of it for a good many years, indeed giving it its due weight, he went on:

"All the great achievements which the history of the law

*The final lecture of the fifth annual John Randolph Tucker Lectures delivered by Judge Hutcheson before the School of Law of Washington and Lee University on April 28 and 29, 1952. The complete Lectures will be published in book form at a later date.

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has to record, the abolition of slavery, of serfdom, the freedom of landed property, of industry, of conscience, all have had to be won...by the most violent struggles...for the law is Saturn devouring his own children. The law can renew its youth only by breaking with its own past. A concrete legal right or principle of law simply because it has come into existence is a child lifting its arm against its own mother; it despises the idea of the law when it appeals to that idea; for the idea of the law is an eternal becoming; but that it has become must yield to the new beginning.

"And thus the historical development of law presents us with the picture of research, struggle, fight, in short, of toilsome wearying endeavor...cast into the chaotic whirl of human aims, endeavors, interests. The law has forever to feel and seek in order to find the right way, and when it has found it, to overthrow the obstacles which would impede its course."

Because these things are true, everywhere the struggle of groups or of whole peoples to seize the government and the power of the state, in order to make the laws by which those in the state must live, is forever going on.

For a long time to come it will remain true. As soon as man began to congregate he became, and ever since has been, a subject for and of tabus, customs and laws. These have determined and will continue to determine for him when and how he shall be born and die, and what he shall do on his graveward journey. Therefore, though there has always been a quality of majestic inevitableness in the name of law, there has always been in it too the quality of changeableness, so that men who have thought long on it, believing that "principles are eternal, laws are born and die," think of particular laws as but a becoming, which hardly are, before they cease to be.

Deriving from government and religion, speaking in terms of power, based on the yearning men have for known and predictable sequences, for order and the peace that order brings, law has always had, it will always have, a great name among men. For wherever the unending struggle between rule and discretion, the absolute and the relative, the fixed and the changing, the predictable and the unpredictable goes on, it does so in the name of law. Sometimes, and particularly in some periods, specific law in the concrete has falsely taken on the character of, and been defended as, an end. In the main, however, it has appeared as it really is, as means to ends, its content ever changing under the steady pressure of the changing life it serves and rules.

Regarded at first as only the concern of rulers, as communities have become more closely drawn together, states more definitely or-
ganized, peoples more closely congregated, men more intelligent and free, it has become more and more the concern of common men. Especially as men became more concerned with mending injustices in this world than in merely contemplating the blessings of the next, who should make men's laws and what laws they should make, who should interpret and who enforce them, have tended increasingly to become for man in general no longer matters for his rulers to dispose of at their will, but matters of his own deepest personal concern. All civilized progress, certainly all progress under republican principles, has been from caprice to law, and from law as the will of the governor to law as the will of the governed. This was so in some lands, notably in England, even in times when the masses of men were being sedulously taught by their rulers that their chief end here was to obey them in humbleness, looking for their happiness not in this world, but in the next; and to their eternal glory be it said it was churchmen, both Catholic and Protestant, who sounded this note of protest.

It is more than ever so now when, speaking roughly and generally, it may be said of the pursuit of happiness that the accent now is almost entirely upon this world. Indeed, it is the case now that laws and who shall make them, and how they shall be made, and most important, the spirit of the laws, the principle on which the state is organized and conducted, transcend in importance for mankind every other matter of human concern.

At first blush and on first examination, this may appear to be an overstatement. So smoothly do most of our lives go, so little contact aside from traffic regulations do most of us make consciously with laws, that we are hardly aware of the fact that in a fundamental sense laws underlie the whole of our social life. Nevertheless, it may be safely generalized that, except in countries like ours where freedom areas are withdrawn from the control of law, for social man laws condition and determine everything he may, and everything he may not do. More, far more than that, in accordance with the genius and principle of the government, and the spirit of the laws of any given society, what its laws are and are to be will in time largely determine for that society not only the circumstances and conditions under which life will go on, but the kind of people who will live there. For within their constitutional forms and the limitations of their set-up it is the business of governments to make and enforce the laws by and under which men live. Who has the government has the making of the laws; who has the making of the laws, if he can enforce them, has in ac-
cordance with the principles of the government the making or unmaking of the people.

All governments, in short, are instituted, organized and maintained for action, either on republican principles and in behalf of the justice of the common good or in the interest of particular groups or persons. No government acts or can act upon its citizens except in two ways, directly by force, or indirectly through laws. Governments de jure as we understand the term, especially republican governments like ours, act only through laws. Therefore, Locke, Montesquieu, Rousseau, Priestley, and all the rest mean to tell us that to have a great and good people, the government must be so constituted that the laws will assure and secure the maximum of liberty; to have the maximum of liberty, laws must be liberator as well as ruler, and at once the will and consent of the whole people whose lives they direct and control. It is true now, it has always been, it always will be true, that whatever the form of government, all societies and all states have been and will be governed by their strongest and most vigorous members—that is, their strongest and most vigorous in seizing and using state power.

It is, therefore, absolutely true that there is always going on a struggle for state power, and that unless those who have the power of government are effectively limited and controlled—that is, obliged to control themselves—the laws they enact will serve not the people as a whole, but a partial, an unjust will.

Whatever the form of government, whether like ours under a limited constitution, with state power checked by bills of rights and other reservations marking off as civil rights areas of conduct into which governments may not enter, or unlimited, as in totalitarian states where state power knows no areas withdrawn, there will always be going on a struggle for, an effort to obtain, state power—an effort to obtain it in order to make and enforce laws giving effect to the will of those who have the power. Said Locke:

"Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good."

Always, to some extent, and latterly almost entirely so, the means by which societies are consolidated, states organized, governments established, conducted, and maintained, is law. Therefore, there has always been going on, there always will be going on, perhaps until the
millenium, when the interests of each will be the interest of all, a struggle for laws. Ever since these struggles for laws began, the battle ground has been known, and the same general objective, the conquest of state power, understood. It has never varied; only the particular objectives, the particular ends to be attained, through state power, have varied, and until quite recently the means have sometimes varied. The weapons, the means to attain their ends, of societies, states, and governments, founded on privilege and class and of their members, have been usurpation and force. The weapons of those founded on a more democratic, a more libertarian base, have been laws.

Because this is so, the history of a country, at least in modern times, has been the history of its struggle for laws.

Back of all philosophy and the making of all history has been the truth that (except as limited by the principle of the government) as the will and the ability to grasp the power of making laws was in one group of hands or another, the nature and condition of the society and of the people in particular states and periods have been determined.

Eighty years before JHering wrote, our forefathers, seeing with great clarity that "the law is not mere theory but living force, that the life of the law is a struggle, for the idea of law is an eternal becoming," founded their nation and formed their government upon an avowed adherence to these ideas. Indeed, born of and in the struggle for just laws, which evoked the Declaration of Independence, brought on the revolution and culminated in its creation and the adoption of its constitution, the new nation came into being and has continued to be the embodiment of these ideas.

Interesting, therefore, as the study of the struggle for laws and the consequent "glorious uncertainty" of the law, of which Priestley

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1To Burke's charge that the majority of the members of the French National assembly "are of the inferior, UNLEARNED, MECHANICAL, MERE INSTRUMENTAL MEMBERS OF THE PROFESSION OF THE LAW" and his question, "Is it to be expected then that they would attend to the stability of property, whose existence had always depended upon whatever rendered property questionable, ambiguous and obscure?", Priestley made this spirited reply:

"But if your reasoning be good, that lawyers whose existence depends upon rendering property questionable, ambiguous and obscure, will not attend to the stability of property, where is our policy in raising such men to the rank of judges? We do not think our property less safe in their hands because they have always lived by what has been called 'the glorious uncertainty of the law.' The first American Colonists, I very well remember, were said to consist chiefly of lawyers.... If the lawyers of France do as well as the lawyers of America, they would soon wipe away the reproach they now lie under, and become the object of respect, perhaps of dread, to those who at present despise them."
spoke in his reply to Burke, will be found to be in other countries, it
will be found far more interesting here where the framework of the
government is set in a written constitution, carefully designed and
drawn to give a little here and stretch a little there but not too much,
so that, always, however, within the framework and in accordance with
the principles of the government, the people could freely and safely
exercise their right to struggle for laws consented to and willed by
them.

This right was, if they could obtain a majority, to propose through
their representatives and have adopted any just laws which, within the
framework and limits of the fundamental law and consistent with its
principle, advanced and promoted the ends of government as the
founders had determined them.

The founders knew, as all men of their time knew, that this struggle
for laws was, and would be, always going on, and that the struggle had
too often resulted in the governors making laws to extend their powers
far beyond what was necessary or proper to control the governed in
order to extend the privileges of the groups or interests which had put
them there. They knew that this would be the result again unless the
government and governors were effectively limited and directed by the
principle and spirit that state power exists not for arbitrary and per-
sonal use but for the ends of justice and for the general weal, and by
laws designed to make and keep that principle free from corruption.

It is not to be wondered at, then, that with their experience with
and attitude toward governments, they should have made provision
against their own government's arbitrarily depriving them or their
posterity of either life, liberty, or property. It is not to be wondered
at, law-minded as they were, that they should have directed their
whole energies to making adequate and firm provision in the funda-
mental law against arbitrary government, and to writing these pro-
visions down for all to read, couched in language all could under-
stand. Thus they provided that each person should hold his life, his
liberty, and his property under the sanctions of due process and the
equal protection of the laws, and that only by due process could he be
deprieved of them. Practical, reasonable, level-headed, these men knew
that society must be so ordered as to promote industry, thrift, and en-
terprise, and to secure to the industrious, the thrifty, and the enterpris-
ing the just fruits of their enterprise.

It is true that many of the first founders thought of the government
they had formed as designed to function within rather narrow limits,
and they were content, for the present, to have a government which kept itself within these lines. It was their idea that for a small and simple people, especially one predominantly agricultural, that that government was best which governed least, and that within lawful limits free individual enterprise and individual activities were to be promoted and encouraged.

With Priestley they believed that "a government should not interfere with the most valuable of a man's private rights," and that certain areas of conduct should be completely reserved from governmental control. They believed with him that "the boundaries of very great power can never be so exactly defined but that when it becomes the interest of men to extend them, and when so flattering an object is kept a long time in view, opportunities will be found for the purpose." Knowing that:

"...there is in the nature of sovereign power an impatience of control that disposes those who are invested with the exercise of it to look with an evil eye upon all attempts to restrain or direct its operations.... It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged," they favored every kind of reasonable check and balance on power which could be devised. Particularly did they believe and provide that the national government should be of limited scope, thus avoiding the danger to democracy of seating great power in uncontrollable majorities, of giving special self-seeking groups and selfish majorities too big a fulcrum, too long a lever.

Jefferson and the other earlier founders knew, as well as any of the later founders, that all struggle for laws has been conscious, that very little of it has been blind or instinctive. They knew: that there must be laws to adapt the customs and institutions of the country to the life evolving there; and that the struggle for laws had always been, it would always be, a conscious, a dynamic one, and they looked to the government under the limitations the Constitution had laid down to enact, interpret and enforce such laws. For it may not be forgotten that with the first founders the chief end of man was the right to enjoy life and liberty and to pursue happiness. In their Declaration of Independence they had boldly asserted, and by their revolution maintained, that to secure these rights governments, deriving their just powers from the consent of the governed, are instituted among men; nor may the dynamic and purposeful words of the Preamble ever be forgotten.

2The Federalist, c. XV. p. 102.
They knew that the institution and establishment of governments was but the beginning; that their flesh and blood institutions and practices must be formed by, and life must be breathed into them through, laws. Especially did they know that this must be so with the federal government they had formed, a government of purely delegated powers. Contacts of state with state and state with nation, of the people with each other and with the state, and of the people with the nation, must have their legitimate boundaries determined and marked, the regulable actions of all must be regulated and controlled by a body of laws.

Not, indeed, a body of laws new made out of the whole cloth, but an existing body, the common law of England, modified and to be modified by legislative acts, executive practices, and judicial decisions. It cannot be too often stated and restated, here and elsewhere, that the principles and laws which the new governments were to make, to administer and to construe, were to be drawn from and by the processes of the common law of England, as found and held to be adapted and suited to the genius of the American people.

It cannot be too often declared that this common law was not one which had come down to the people from the prince, as a command they must obey, but one which had come up from the people as their consent and will. Customary law has, of course, always existed everywhere, and it would be wholly incorrect to minimize its influence and importance in shaping the laws and customs of other peoples than the English. But it may be safely generalized that only in England and America was the supremacy of the common law so established as that its processes, its sources, and particularly its spirit, became part of the genius of the people, accustoming them to the idea of law as means. The notions that the people were the source of laws, and that laws should be framed and enforced in conformity with their customs, their ideals, and their aims, were traditions with Englishmen long before their factual bases had become firmly established.

Greatly important in its provisions and in its guaranties, Magna Charta is more important to us in what it represents. This is the spirit of the people, that laws were made for and by them, and that springing from their customs, they are at once the measure and guarantee of their ever-expanding rights. A spirit which demands that all matters should go by laws, giving to each his own by settled definite rules known in advance, the determination and application of which should not be controlled by or subject to any man's caprice or whim. This spirit,
ever thrusting upward from the sod, as changes in seated power, changes in dynasties and particularly changes in economic conditions enabled the bottom to come to the top, supported the people in their assertion that they are the sources of the laws. This spirit supported them in their long struggle for freedom from every law and rule of church and state imposed upon them by any other right than their own consent and will.

What is of importance in all of this is not so much the particular laws that have emerged from the struggle for laws, as it is the seeing and understanding that it is the right of the people by full participation in government to be continuously changing old and framing new laws under which they are to live—the right, in short, to laws not merely as guarantees of particular old measures, but as the means of exercising their old, their fundamental rights, under new measures and in new ways, as changing conceptions of justice, under changing conditions, require new laws.

Now it is not of course meant to say that law changes with the mood, and that each whim and caprice of a people must or may find itself translated into law. On the contrary, it is meant to say that, speaking most generally, law should be in its nature stable, and that it must, as the basis for obedience and order, have a reasonable predictability, a reasonable certainty. But it is meant to say, too, that if it is to be a living law, it must have the capacity and be free to grow, and, growing, live.

Many years ago the opinion in the Clerk's case, *Brotherhood of Ry. & S. Clerks, etc. v. Texas & N. O. R. Co.*, thus undertook to point this out:

> "For the purposes of this opinion it may be roughly stated that all justiciable matters are made so by law derived from two sources, that ascertained and declared by the judges as founded in and springing from the customs of the people, and that enacted by the Legislatures; or, again roughly, common law and statutory law. Statutory law may be either declaratory or in derogation of the common law. In the former case, it makes more clear or gives more sanction to established customs. In the latter, while it may in rare cases run counter to established custom, it usually is declaratory of customs which, though existent as such, have not yet become established as law, so as to make actions in defiance of them justiciable.

> "Customs then, being the basis and spring of the law, and changing as it must with changed conditions, judges and legislatures from time to time, in declaring the law, will make innovations upon it, and new adaptations of it to conform to these
changes; and so, slowly through judicial decisions, and often with great rapidity through legislative action, the law modifies and grows, and, growing, lives."

In *Village of Euclid v. Ambler Realty Co.*, Mr. Justice Sutherland, for the Court, declared:

"Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. ... And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are possibly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."*

Any student of law, if he studies not perfunctorily, but seriously and in the light of history, the struggles for laws always going on here, is bound to see not merely particular laws, but particular notions of justice from time to time emerging. He is bound to see how notions of justice of what is fair and right between man and man, of what is each man's due, have changed and humanized, and have in turn been changed and humanized by, changing economic and social conditions and the changing laws they bring about. To such a student it will appear that here law is, always has been, and always will be, in the forging between the hammer of majority opinion and demand, and the anvil of what is esteemed to be justice. Such a student will see the concept of justice ever humanizing, broadening, and advancing in merciful content, and the institutions made by the law ever expanding to meet that concept, and, seeing it, will openly range himself on JHering's side.

He will see, too, that with our forty-eight separate states and one federal jurisdiction, we have not only fully carried on the English tradition of the "glorious uncertainty" of the common law, but that, through the existence here of written constitutions and of our more liberal view of stare decisis, we have by developing a constitutional common law,* added to this "glorious uncertainty," by at once widening the field and increasing the dynamic stress of the struggle.

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*24 F. (2d) 426, 427 (S. D. Tex. 1928).
*For illustrations of the process in the period it deals with compare Charles Warren's "The Supreme Court in United States History." For later illustrations, the Supreme Court Reports, especially those issued in the past two decades when restless change has been the order of the day, may be profitably consulted.
Because of the thus intensified dynamics, a student of the constitutional common law of this country would see a stirring panorama of struggle on many fields. He would see, too, with the winning of each field, a fresh struggle beginning, a struggle in which, under the counter influences of legislative and judicial hammer on the constitutional anvil, the essential fabric of the common law of the Constitution continues to grow, expand, and broaden.

He would find, also, that within their powers, it has been the duty of the legislative to enact only laws which are just—that is, which express the will not of a partial group, but of all. This duty is imperative because, under the principle of this government that the law is liberator, majorities are trustees of power and their obligation as such trustees is to write legislation in accordance with the fundamental law, and to bring about and establish within that law the justice of the common good.

Such a student of the common law of the Constitution will not wonder, then, to find that a law-minded people like ours have been constantly pressing upon the legislative, the executive, and the judiciary of states and nation their questions of fundamental law.

For it is a prime characteristic of our constitutional common law that time and circumstance change it,6 and that any desired change through changed decision, or legislative act, or constitutional amendment, where that alone will serve, will in time be certainly forthcoming, if the whole movement is just and for the good of the people as a whole, and has behind it not only a sufficient passion for justice, but the steady, the reasonable, the persistent pressure of enlightened and informed public opinion.

Any student of our constitutional common law, who studies it with an open mind and a will not to find written there what he does or does not want to find, but merely to find what is written, will be bound to rise from his study with three outstanding reflections. One is that the right of the people to struggle for, and in the long run obtain, the enactment and interpretation of laws so as to keep them abreast of the people's needs, by a constitutional expression of the justice of the common good, has been never successfully, and rarely for long, seriously questioned. For the common law processes of differentiating and overruling have usually proven adequate, and if they have not,

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amendment has, to limit the confining effect of decisions which, whether just or unjust for their time, are found standing in the way of a just and constitutional expression of what is necessary for the common good. Each student will see how “every opinion tends to become a law.” He will see how “new policies are usually tentative in their beginning; advance in firmness as they advance in acceptance. They do not, at a particular moment of time, spring full perfect in extent or means, from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph, or from question to repeal.”

He will therefore be neither dismayed nor in despair when measures, in the justice of which he and many others believe, fail. For he will know with certainty that if they are really expressive of the justice of the common good, and not merely of some partial, some temporary, some group desire, they will in the end prevail, either through court decision or legislative action, or through amendment of the Constitution.

It is therefore not only the right but the duty of the legislative, from which all enacted laws proceed, to continue to consider appropriate forms and measures for the carrying out, within the constitutional framework, of the justice of the common good, informed, indeed, but undeterred by the fate of a particular case or law. As the primary instrument for making this justice effective, it is its right, nay its duty, under constitutional principles, the most fundamental of which is that the legislative will enact no law as to the constitutionality of which it has a reasonable doubt, to be instant in season and out of season, to devise constitutional and therefore just legal means to enact laws which will bring about an even wider and more perfect justice. It is its right and duty, in short, as the knowledge of our people grows, their horizon widens, their conditions change, and their experience informs, to be constantly alert to keep the law abreast of their opportunities and needs.

A decent respect for the opinion of mankind is still the determining factor with us. Generally, and as a people, we get what we want, but we get it under the banner and in the form of law. Generally, and as a people, we will accept as law any verdict which is rendered under the forms of law until we can reverse it by the lawful means provided. Generally, while we struggle as a people to obtain for ourselves the laws we want and need, we do it within the ways, in accord-
ance with the forms, and under the rules of the game fixed for us by law and by custom having the force of law. Generally, and as a people, we accept as binding law, for the case and issue joined, just as we do in our sports and games, the judgment and decision of the duly constituted umpire.

Now we are the more inclined, in fact, perhaps are only inclined to this course, and have taken it through this long period of years (for we are perhaps the oldest government in the world under the same principle, the same essential forms), because we know that it is not to any particular laws that we yield this unflagging loyalty and obedience. It is to law in general, law without specific content, law as the handmaiden of justice, law at once ruler and liberator. We respect and honor law as sovereign. We look to law as the source of order, and therefore of safety and security. But we know that because law is liberator too, it is our fundamental right as the governed to have a say not only in supporting and in maintaining but in changing the laws we live by.

Thus the principle of law as order, and the principle of law as progress, working together and in harmony, endow the law with power to give itself the capacity to grow, adapt and change. Thus, law, the liberator, at once preserves order and institutes progress.

If it were not for the courts; if with the courts it were not for the spirit of our laws, that law is liberator, and that therefore we must not only obey the just laws we have but must be ever struggling for the necessary changes to keep law just; if it were not for the spirit of fair-mindedness and fair play, which makes majorities as trustees of the common good accept the umpirage of the duly constituted authorities, we could not for so long have maintained this government with so little change in, or corruption of, its principle. For those who had the power would not have peacefully submitted to limitations on their power. Those who wanted status would not have peacefully submitted to majorities wanting change. Nor would those who wanted change have submitted any more peacefully to majorities wanting status. Instead, then, of a national history of peaceful growth, and progress in wisdom and in stature, and in favor with God and man, we should have had either a history of laggard progress, with a constant warring struggle, or a history of dizzying and unsettling change through revolution upon revolution over night.

Given our set-up of the right of those on the right of the board to press for laws holding to status, or, if they wish it, for those turn-
ing back to older ways, the right of those on the left of the board to press for those bringing about change, even to the point of complete revolution in our habits and views, with the right of the balancers, the liberals, Liberty's Remembrancers, to strive for a balanced course between, we need have no fear for our future. For protecting against self-seeking pressure groups, either minority or majority, there is the complete, the final control over all, of the restraints on power as set down in the Constitution.

Because these things are so, though over the long years factions have come and gone, diverse interests and desires have waxed and waned, none have wrecked the America the founders planned. Nor is it likely that any ever will. For, because of our judicial system and the respect in which the great majority of the people hold it, law, with us, remains as it began, at once liberator and ruler, and the American people remain, as they began, a just and sportsmanlike people. They play the game justly and fairly by the rules laid down by and for themselves. Though they may and do "cuss the umpire," they abide the umpirage.

I am one of those who believe that if this nation had been founded on any other principle than the reconciliation of liberty with law, the authority of just and impartial laws—that is, laws consented to by the governed—or had been organized except upon the basis of judicial, and, therefore, just umpirage, the Constitution could not have adapted, expanded, and adjusted as it has done, the nation could not have grown into the great nation it has become. I believe any less general, any more partial, view would have wrecked us. I believe we have remained a united and a just, and have become a great and powerful people because law as liberator has been the keyword of our constitutional common law, and the guarantor of our liberties, and because, consented to and prescribed by ourselves for ourselves, we obey laws when they do, and reject them when they do not conform to our fundamental ideas of justice and liberty, as the Constitution enshrines them. I am, therefore, persuaded that if, as time goes on, justice, broadening and deepening with the stream of our national life, continues to be with us, an aspiration and not a mere policy, those who in the long march of the years come after us will be bound to declare: "Though these planted and those watered, surely it is God that hath given the increase.
A PROCEDURAL REVIEW
OF THE FEDERAL EMPLOYER'S LIABILITY ACT

Clyde H. Bloemker

The 1908 original version\(^1\) of the present Federal Employer's Liability Act contained no special venue provisions; venue was regulated by the general venue provisions of the Judicial Code, which required the plaintiff to bring his action in the place of residence of the defendant.\(^2\) By amendment in 1910 and 1911, the plaintiff was given the choice of three federal districts in which to sue: "...the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."\(^3\) In the same section it was further provided: "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States...." This expansion of the number of forums in which the action could be brought relieved the plaintiff of the necessity of going to the residence of the defendant railroad to sue, but it frequently placed a corresponding hardship on the defendant, as the plaintiff was often able to sue the railroad at a considerable distance from the point at which the cause of action arose, thus making it necessary for the railroad to transport employee-witnesses great distances to the scene of the trial. To alleviate the hardship placed on defendant railroads by their normal amenability to suit in the many states in which they were doing business, the state courts began enjoining plaintiffs from prosecuting their actions in distant state forums.\(^4\)

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\(^1\)April 22, 1908, c. 149, 35 Stat. 65, 66.
\(^2\)Judicial Code § 51, 36 Stat. 1101 (1911), 28 U. S. C. A. § 112 (1927): "...no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant...."
\(^4\)Kern v. Cleveland, C., C. & St. L. Ry. Co., 204 Ind. 595, 185 N. E. 446 (1933); Reed's Adm'r v. Illinois Cent. R. Co., 182 Ky. 455, 206 S. W. 794, 798 (1918): "The federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience."

For an example of the confusing results of having a state court enjoin further prosecution of an F. E. L. A. suit in a distant federal court, see Bryant v. Atlantic
Following the Supreme Court decision of *Miles v. Illinois Central Railroad Co.* in 1942, in which it was held that a state court could not enjoin a person under its jurisdiction from prosecuting an F.E.L.A. action in another state court which also had jurisdiction of the cause of action, it appeared that: (1) A state court could refuse to entertain an F.E.L.A. suit under a “valid excuse.” 6 (2) A federal district court could not decline jurisdiction of an F.E.L.A. action. 7 (3) A federal district court would not enjoin a plaintiff from suing on an F.E.L.A. cause of action in another federal district court. 8 (4) A federal district court could not enjoin a plaintiff from suing in a state court. 9 (5) A state court could not enjoin a plaintiff from prosecuting an F.E.L.A. action in another state court. 10 (6) A state court could not enjoin a person from prosecuting an F.E.L.A. action in a distant federal district court, under the rule of *Baltimore & Ohio Rd. Co. v. Kepner.* 11

As of 1942, therefore, it is evident that by federal court decisions the 1910 amended version of the Federal Employer's Liability Act had given plaintiffs, excepting in one situation, an absolute choice as to forum of suit, venue requirements being met. The exception had been created by the decision in *Douglas v. New York, New Haven &
Hartford Railroad Company, which allowed a state "by judicial decision or legislative enactment to regulate the use of its courts generally..." and accordingly to accept or refuse jurisdiction of the case by means of a nondiscriminatory forum non conveniens doctrine.

Plaintiff's Choice of Forum construed To Be Absolute

In Union Pac. R. Co. v. Utterback, the Supreme Court of Oregon, on the basis of the Miles case, properly refused to enjoin plaintiffs from prosecuting an F.E.L.A. action in a California state court for damages for an accident which occurred in Oregon. The railroad then resumed its fight in California by requesting the California court in Leet v. Union Pac. R. Co. to refuse jurisdiction because of forum non conveniens. The California court refused to do so saying: "Whatever may have been the rule on the subject from time to time it is now settled that the state court having jurisdiction may not refuse to exercise it." The decision ignored the Douglas case, and also expressions in the Miles case that the F.E.L.A. did not impose any absolute duty on a state court to accept an F.E.L.A. case. The reasoning of the California court was that since the injunction could no longer be used to thwart a plaintiff from suing in a distant federal or state court on an F.E.L.A. cause of action and because forum non conveniens was not applied to an F.E.L.A. action brought in a federal court, therefore, the state court where the same cause of action was being prosecuted could not refuse jurisdiction because of forum non conveniens.

By denying certiorari, the United States Supreme Court refused

14For a more complete and exhaustive coverage of the problems discussed in the foregoing section, see Note (1942) 3 Wash. & Lee L. Rev. 247.
15173 Ore. 572, 146 P. (2d) 76 (1944).
1625 Cal. (2d) 605, 155 P. (2d) 42 (1944).
18For cases holding a state court had to accept jurisdiction of an imported F. E. L. A. cause of action, but which were decided before the Supreme Court decision in the Douglas case, see Holmberg v. Lake Shore & M. S. Ry. Co., 188 Mich. 605, 155 N. W. 604 (1915); State ex rel. Schendel v. District Court of Lyon County, 156 Minn. 580, 194 N. W. 780 (1923); Davis v. Minneapolis St. P. & S. S. M. Ry. Co., 134 Minn. 455, 159 N. W. 1084 (1916).
to overthrow the decision. The one remnant of restraint was thereby removed, and a plaintiff now appeared to have an unqualified right to bring his F.E.L.A. action and to have it tried in any court, state or federal, where the venue provisions were complied with.

**Forum Non Conveniens Made Applicable to F.E.L.A. Actions**

Section 1404 (a) of Title 28, United States Code which became effective on September 1, 1948, codified the doctrine of forum non conveniens for the federal courts. While no statute was necessary to give federal courts power to apply the doctrine, because it is a common law doctrine and may always be used in a proper case unless explicitly denied a court by statute or decision, Section 1404 (a) specifically gave the federal courts the authority to use forum non conveniens. One significant difference exists between the common law version of forum non conveniens and this codified version; the common law would require dismissal of the case, whereas the federal act authorized transfer “to any other district or division where it might have been brought.”

A split developed in the federal courts as to whether 1404 (a) could be applied to F.E.L.A. actions. While most of those courts faced with the problem held that it was applicable, at least one court decided that the special venue provision of the F.E.L.A. was superior to 1404 (a), and plaintiff’s choice of forum would not be subordinated to a forum non conveniens doctrine. The United States Supreme Court settled the issue in regard to the federal courts by its decision in

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24 "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 62 Stat. 937 (1948), 28 U. S. C. A. § 1404 (a) (1950).
25 Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law (1929) 29 Col. L. Rev. 1: "...new legislation is not needed...for the doctrine in question involves nothing more than an appeal to the inherent powers possessed by every court of justice—powers, that is to say, which are incontestably necessary to the effective performance of judicial functions."
26 This has generally been held to mean that in a diversity suit the transfer has to be to a district where jurisdiction could originally have been obtained over defendant. Rogers v. Halford, 107 F. Supp. 295 (E. D. Wis. 1952).
Ex Parte Collett, which held that an F.E.L.A. action was subject to 1404 (a) in spite of the special venue provision contained in the Act. Under this decision, forum non conveniens could now be used in a federal court, but under the Leet case, forum non conveniens could not be used in an F.E.L.A. action brought in a state court. Thus, by 1949 the situation had become just the reverse of what it had been in 1942.

Although plaintiffs who sued in a federal forum at a very inconvenient location could be remitted under 1404 (a) to a more convenient federal forum to prosecute the suit, inasmuch as state courts were now powerless to apply forum non conveniens and an F.E.L.A. action brought in a state court could not be removed to a federal court, plaintiffs could still not be disputed in their choice of forum as long as they sued in a distant state court. By this obvious discrepancy the bulk of F.E.L.A. litigation was thrown upon state courts of large cities where the benefits of larger verdicts were thought to accrue. In State ex rel. Southern Ry. Co. v. Mayfield, a Missouri court in 1949 felt bound to accept jurisdiction of an F.E.L.A. action even though the cause of action had arisen in Tennessee. On review of this case the United States Supreme Court held that a state court could also apply its local doctrine of forum non conveniens to F.E.L.A. actions, thereby reestablishing the holding of Douglas v. New York, New Haven & Hartford Railroad Company, which was cited in the case. However, in subsequent proceedings, the Missouri Supreme Court held that the courts of that state must try the case, because Missouri had no forum non conveniens doctrine. As a result of the Mayfield decision, the only place where plaintiff could not have his case subjected to the forum non conveniens doctrine was in a state court not using the doctrine. Such a situation was presented in Ex Parte State ex rel. Southern Ry. Co., in which the defendant railroad asked for a writ

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26Leet v. Union Pac. R. Co., 25 Cal. (2d) 605, 155 P. (2d) 42 (1944).
28359 Mo. 827, 224 S. W. (2d) 105 (1949).
32254 Ala. 10, 47 S. (2d) 249 (1950).
of mandamus requiring the Judge of the Tenth Judicial Circuit in Alabama to decline jurisdiction and dismiss, on the grounds of forum non conveniens, an F. E. L. A. action there pending against it. The plaintiff in the Alabama suit was a resident of Georgia and the cause of action arose in Georgia. The Alabama Supreme Court refused to issue the writ, deeming all Alabama courts to be bound by a state statute to take jurisdiction of all transitory actions brought in the state courts. The statute was regarded as allowing no room for discretion to refuse to accept jurisdiction of the cause of action, because "The wording [of the statute] is that the 'cause of action shall be enforceable in the courts of this state,' and to read into the statute the vesting of judicial discretion to accept or decline jurisdiction would do violence to the language employed."34

The Injunction Applied to F.E.L.A. Actions

There is very little difference between the effect of the application of the forum non conveniens doctrine, and the issuance of the injunction against prosecuting the action—both devices are used to deter the plaintiff from suing in locations which are inequitably inconvenient to the defendant. In the injunction case, the court having jurisdiction of the plaintiff will enjoin him, on defendant's petition, from prosecuting his action in another court. Under forum non conveniens, the court where the cause of action is brought, if a state court, will dismiss the suit, and if a federal court, will transfer to another federal court. Although the two devices have similar deterrent effects, the problem remains whether they are interchangeable, so that a court, not the court of the forum and hence without jurisdiction

33"Whenever, either by common law or the statutes of another state, a cause of action, either upon contract, or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforceable in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." Ala. Code (1940) Tit. 7, § 97.

In First National Bank of Chicago v. United Air Lines, Inc., 342 U. S. 396, 72 S. Ct. 421, 96 L. ed. 360 (1952), a statutory version of forum non conveniens applicable to out-of-state wrongful death actions, prosecuted in Illinois, was held invalid under the Full Faith and Credit Clause. Except for the fact that an out-of-state statute was in issue, it would seem to follow from this decision that the Alabama statute would be the ultimate requirement needed and probably preferred by the United States Supreme Court to fulfill the requirements of the Full Faith and Credit Clause of the Federal Constitution.

to apply forum non conveniens, may nevertheless reach the same result by use of the injunction.

In the case of *Atlantic Coast Line R. Co. v. Pope*, the Georgia court was recently asked by petitioner railroad to enjoin Pope from prosecuting his F.E.L.A. action in an Alabama state court. From even a cursory examination of the facts of the case, it would seem that the whole issue was foreclosed by *Miles v. Illinois Central Railroad Co.*, which prohibited the courts of a state having jurisdiction of the plaintiff in an F.E.L.A. action from issuing an injunction against prosecution of the action in a state court of another state. Yet the Georgia court issued the injunction. On an identical set of facts, however, the Florida Supreme Court, in *Atlantic Coast Line R. Co. v. Wood* has recently held that it could not issue the injunction.

The confusion existing is aptly illustrated by the fact that in the Florida case both appellant and appellee relied on 1404 (a), *Ex Parte Collett*, and *Missouri ex rel. Southern Railway Co. v. Mayfield*. Moreover, in both the Florida and Georgia cases the two courts considered exactly the same cases together with 1404 (a), and arrived at differing conclusions. The critical point of difference between them is whether 1404 (a) has or has not diminished plaintiff's initial choice of venue given to him by 45 U.S.C. Section 56, and made absolute in him by the *Kepner, Miles, and Leet* cases.

After discussing 1404 (a), and its applicability to F.E.L.A. actions by reason of *Ex Parte Collett*, the Georgia court relied for its authority to enjoin the plaintiff, on a statement in the concurring opinion of Justice Jackson in the *Mayfield* case:

"The Missouri Court appears to have acted under the supposed compulsion of *Miles v. Illinois Central R. Co.*, 315 U. S. 698, among other of this Court's decisions. The deciding vote in that case rested, in turn, only on what seemed to be compulsion of statutory provisions as to venue. By amendment, 28 U. S. C. Section 1404 (a), as interpreted in *Ex Parte Collett*, 337 U. S. 55, etc..."
Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling."^40

An almost identical statement is made by Justice Frankfurter in the opinion of the Court: "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion."^41 In both instances the sentences following the quoted ones resurrect the view of the *Douglas* case by stating that Missouri should now be free to apply its own local law on forum non conveniens to an F.E.L.A. action brought by a non resident in its courts. Two questions are thereby raised by the *Mayfield* case: (1) What was the compulsion that existed under the *Miles* case? (2) Was that compulsion removed for all purposes, or only in relation to the forum court being able to apply forum non conveniens to an F.E.L.A. action?

Mayfield Case Clarified Miles Case

The compulsion referred to in the *Mayfield* case as existing under the *Miles* case was that plaintiff, by special statute given his choice of forum in which to commence his action, could not be denied that choice by an *injunction* issued against him by a state court having jurisdiction over him. As the cause of action in an F.E.L.A. suit is predicated on a federal statute, and concurrent jurisdiction is given to state and federal courts to determine the issue, the United States Supreme Court reasoned in the *Miles* case that because a plaintiff, when bringing his F.E.L.A. action in a federal court, could not under the *Kepner* case^42 be enjoined from prosecuting it there, neither could a plaintiff when bringing the same cause of action in a foreign state court, be enjoined by the state court having jurisdiction over him. In other words, the injunction could not be used to keep plaintiff in an F.E.L.A. suit from initially bring his cause of action where he chose to do so, venue provisions being met.

Taken out of its context, one sentence from the *Miles* case, which was a suit for an injunction, might be taken to mean that a state court also could not apply forum non conveniens to an F.E.L.A. action.

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That sentence is: "The Missouri court here involved [where the suit was brought] must permit this litigation." Taken to mean that the court having jurisdiction of the cause of action could not apply forum non conveniens to the case, this assertion would be pure dicta. But this sentence is qualified by a succeeding observation that Missouri, if it were "To deny citizens from other states, suitors under F.E.L.A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause." It seems evident, therefore, that the first-quoted sentence was meant to refer to a violation of the Privileges and Immunities Clause, and not to forum non conveniens. This interpretation is further substantiated by a direct denial in the opinion of the Court that forum non conveniens was being considered. Therefore, the removal by the Mayfield case of the compulsion of the Miles case merely made it clear that the forum court was now able to apply forum non conveniens to an F.E.L.A. action, but did not withdraw from plaintiff the initial right to bring his action where he could and where he chose to bring it.

**Distinction Between Forum Non Conveniens and Injunction Overlooked**

In evaluating the decisions in this field, the courts have failed to keep in mind whether the issues dealt with forum non conveniens or with the injunctive remedy. From Justice Jackson's assertion in the Mayfield case that "By amendment, 28 U. S. C. Section 1404 (a), as interpreted in Ex Parte Collett... Congress has removed the compulsion which determined the Miles case..." the Georgia court in Atlantic Coast Line R. Co. v. Pope infers that a state court may now again enjoin a person within its jurisdiction from prosecuting an F.E.L.A. action in a state court of another state. This seems to be an unwarranted assumption. It disregards the concluding portion of the sentence which states: "...and the Missouri Court should no longer

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45"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U. S. Const. Art. IV, § 2.
regard it as controlling." The Georgia court overlooks the fact that the Missouri court was not regarding the Miles case as controlling on the use of the injunction, but was erroneously regarding it as controlling on the use of forum non conveniens. To have been explicit Justice Jackson should simply have said: "The Missouri Court should not regard the Miles case as controlling." The Miles case, a suit concerning an injunction, never was controlling on the Missouri court where forum non conveniens was the issue, but is still controlling on the Georgia court where the injunction is again in issue.

Apparently not yet completely convinced that it may again use the injunction, the Georgia court also reasoned along another line: That because the plaintiff no longer has an unqualified right to have his case tried where he brings it, he no longer has an inviolable right to bring it where he chooses. The injunction and forum non conveniens issues are again not distinguished, but are made component and necessary parts of the special venue privilege. If Justice Jackson meant, as the Georgia court here concluded he did, that the plaintiff in an F.E.L.A. action no longer has an inviolate initial right to bring his action in any court where venue requirements are met, merely because once he has brought it he may have it dismissed or transferred by virtue of forum non conveniens, then Justice Jackson should not have limited the effect of 1404 (a) by saying "Section 1404 (a), as interpreted in Ex Parte Collett..." He should rather have said that because 1404 (a) punctured plaintiff's special choice of venue privilege by denying him an absolute right to have his case tried where he brought it, the special venue privilege is entirely deflated and he no longer has an initial right to bring it where he chooses, venue provisions being complied with. This is exactly what Ex Parte Collett interprets 1404 (a) as not having done. Either inadvertently or pur-

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"See note 47, Supra.

Atlantic Coast Line R. Co. v. Pope, 209 Ga. 187, 71 S. E. (2d) 243, 247 (1952): "It being clear from the decisions in the Collett and Mayfield cases...that the courts in the State where transitory causes of action are pending have a right to apply the doctrine of forum non conveniens, no sound reason exists why a court of equity, where the employee resides and where the cause of action arose, having jurisdiction of the parties, cannot, in a proper case, on equitable principles, restrain the employee from prosecuting his action under the Federal Employers' Liability Act in a court of a foreign State."

It is interesting to note that the California court in the Leet case had reasoned that because the injunction could not be used, it could not use forum non conveniens.

"See concurring opinion, Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U. S. 1, 5, 71 S. Ct. 1, 3, 95 L. ed. 3, 9 (1950)."
poksen, the Georgia court did not recognize the distinction made in the Miles and Collett cases.

In Ex Parte Collett it was held that 28 U. S. C. Section 1404 (a) applied to F.E.L.A. actions even though they were brought under a special venue statute. But it is specifically stated that plaintiff's initial right to bring his action where he can and chooses to do so is not affected thereby.52 When Justice Jackson gave 1404 (a) the effect it was interpreted to have under Ex Parte Collett, he recognized the distinction made that the plaintiff in an F.E.L.A. action may still bring his case where he chooses, venue requirements being fulfilled, but has no inviolable right to have it tried there. The effect seems clearly stated by Justice Rutledge in the concurring opinion, where he observed that "the changes made in them [special venue causes of action] by 1404 (a) were in the nature of repeals to the extent that the plaintiffs were deprived of their rights under the pre-existing statutes to have their causes of action tried in the forums where they were properly brought."53 The Georgia court unjustifiably interpreted Justice Jackson as saying much more.

Even though to the Georgia court no sound reason exists for not being able to use an injunction where forum non conveniens can be used, some reason for distinguishing the two situations must have been apparent to the United States Supreme Court. The Georgia court apparently forgot that a federally created cause of action was in issue, and that the state court is bound to follow interpretations already made by the United States Supreme Court, and not to make its own. Perhaps the soundest reason why plaintiff in an F.E.L.A. action has an inviolable right to bring his action wherever he chooses, venue requirements being complied with, is that given by Justice Jackson when he called the F.E.L.A. a medieval system of reccompense for in-

52 Ex parte Collett, 337 U. S. 55, 69, 69 S. Ct. 944, 947, 93 L. ed. 1207, 1211 (1949): "Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously. The Code, therefore, does not repeal § 6 of the Federal Employers' Liability Act.... We cannot agree that the order before us [to transfer an F. E. L. A. case to another federal court because of forum non conveniens] effectuates an implied repeal.... Discussion of the law of implied repeals is, therefore, irrelevant."

juries received, allowing a lawsuit instead of a remedy, burdening interstate commerce with two dollars of judgment for every dollar the injured person receives, and concluded:

"I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in the favor of the workman in the matter of venue. It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he could be allowed to try his principal lawsuit elsewhere." 5

**Forum Non Conveniens a Prerogative of the Forum Court**

The doctrine of forum non conveniens involves determinations which can only be made by the court of the forum. 55 And it is immaterial in this connection whether the forum empowers its courts to employ the doctrine. It does not follow as the Georgia court in the Pope case supposed that because the Alabama courts do not apply forum non conveniens, a Georgia court may enjoin a plaintiff subject to its jurisdiction from prosecuting the action in an Alabama court. This point is even more significant where a federally created right is in issue as in the Pope case, than where a state created right is being litigated.

In *Miles v. Illinois Central Railroad Co.* it was stated:

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5Tivoli Realty, Inc. v. Interstate Circuit, Inc., 167 F. (2d) 155, 156 (C.A.A. 5th, 1948): "Under the doctrine of forum non conveniens a court having jurisdiction may decline to exercise it in a suit that in justice should be tried elsewhere. This doctrine involves the use of discretion on the part of the court in which the suit is brought." Note (1945) 158 A. L. R. 1022, 1031: "The doctrine of forum non conveniens deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever, because of the foreign elements involved in the cause of action before the court, it appears that the controversy may be more suitably tried elsewhere."

The Georgia court also draws attention to the fact that counsel for plaintiff had instituted ten suits against defendant railroad in twenty-four months in Alabama, nine of which arose outside that state. However, this is a matter for correction by the Alabama legislature or courts. In *Atchison, T. & S. F. Ry. Co. v. Andrews*, 398 Ill. App. 552, 88 N. E. (2d) 364 (1949), defendant attorney was enjoined from further prosecuting F. E. L. A. cases in the Superior Court of Cook County, Illinois. He secured these cases by means of a regular agency, and the cause of action often occurred far distant from Illinois.
“Even if Missouri, by reason of its control of its own courts might refuse to open them to such a case [F.E.L.A. action, cause of action occurring outside the state], it does not follow that another state may close Missouri’s courts to one with a federal cause of action. If Missouri elects to entertain the case, the courts of no other state can obstruct or prevent its exercise of jurisdiction as conferred by the federal statute...”

The Georgia court is in effect making all F.E.L.A. actions arising in Georgia and sued on where it is deemed to be inconvenient to the defendant, local Georgia actions. This result is in conflict with the reasoning of Tennessee Coal, Iron & Railroad Company v. George. In that case a suit based on an Alabama statute was instituted in Georgia. The defense was that Alabama had by another statute decreed that all actions based on the statute had to be tried in Alabama, and litigating the action in Georgia would violate the Full Faith and Credit Clause of the Constitution. The United States Supreme Court held:

“...a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court’s creation and cannot be defeated by the extra-territorial operation of a statute of another State, even though it created the right of action.”

If a state may not make its own statutory cause of action a local action it would seem impossible for a state court to make a federally created cause of action a local action, and the Georgia court could not by the use of the injunction keep plaintiff from prosecuting his action in Alabama.

*Power To Use, Plus a Proper Case, a Necessity for the Use of the Injunction*

The Georgia court in the Pope case based the power of the outside state court to enjoin the plaintiff in an F.E.L.A. action from proceeding in the inconvenient state forum largely upon the power of a forum court to decline jurisdiction on the basis of forum non conveniens. This would seem to be erroneous reasoning, yet the Georgia court

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58"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U. S. Const. Art. IV, § 1.
assumed it has the power, and concluded: "At least for the present, the views of the minority in the Miles and Kepner cases are the views of the majority in Ex Parte Collett and Southern Railway Co. v. Mayfield... We are bound by controlling decisions of the United States Supreme Court as of today. Sufficient unto the day is the decision thereof." It is submitted that by allowing forum non conveniens to be applied to F.E.L.A. cases, the United States Supreme Court did not overrule the Miles and Kepner cases pertaining to injunctions, and that all four cases in their own proper spheres are still authoritative. The Georgia court is bound by the decisions of the United States Supreme Court on this federally created cause of action, and the Miles case is authority for an opposite conclusion than that at which the Georgia court arrived.

Having concluded that it had the power to use the injunction, the Georgia court then studied the facts and found from them that there was also a proper case for issuing the injunction. It was determined that plaintiff had secured an "inequitable and unconscionable" advantage over the defendant by bringing the suit 313 miles distant from where the cause of action accrued, thereby causing defendant great expense and inconvenience in transporting the necessary witnesses to the trial. Another reason given for why there was a proper case for invoking the injunction was that: "In selecting a State court of Alabama, the employee [plaintiff] has... denied to the employer [defendant railroad] the equitable right of invoking the doctrine of forum non conveniens, which it would have had if the action had been brought in a Federal court of that State." This reasoning could only be upheld if it were shown that Alabama, because of its statute which denied any Alabama court the right to reject jurisdiction of a transitory cause of action because of forum non conveniens, had forced defendant to defend in the Alabama courts, and had thereby given him an inadequate remedy at law. Such has not been shown, nor can it be assumed that any state will not give a citizen of another state a just and fair trial in its courts. Furthermore, if forum non conveniens is regarded as substantive law, and a denial of it is viewed as an inadequate remedy at law, then the Alabama statute would be substantive, and the injunction of the Georgia court would be invalid under the Full Faith and Credit Clause. If there was a proper case for issuing the injunction, it would have to rest on the distance of

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travel, expense, and inconvenience forced on defendant by having to defend in Alabama. No rules can be set as to when there is, or when there is not a just case for invoking the injunction. Each case must rest on its own facts and the trial court by the exercise of a sound discretion must determine if there is sufficient justification for the injunction.62

**Supreme Court Reaffirms the Miles Case**

The United States Supreme Court granted certiorari in the *Pope* case, because the Georgia court interpreted a federal statute, and did so in a manner seemingly repugnant to prior interpretation by the Supreme Court.63 In holding, in its decision announced on April 27, 1953,64 that the Georgia court could not issue the injunction, the Supreme Court reaffirmed the *Miles* case, which had previously held that a state court could not enjoin a person within its jurisdiction from prosecuting an F.E.L.A. action in a distant state court where venue requirements were also fulfilled. In the opinion of the majority, Chief Justice Vinson declared:

"Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, in a case indistinguishable from this one, that Section 6 displaced the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness...from suing...in the courts of another state...'. *Miles v. Illinois Central R. Co.*,...315 U. S. at 699."65

It was denied that there was any implied repeal of the *Miles* case in 28 U. S. C. A. Section 1404 (a), which gave federal courts permission to use forum non conveniens, and which by the *Collett* case was made

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62 Note (1953) 85 A. L. R. 1351: "No general rule can be laid down as to when the court ought to enjoin a party from prosecuting a suit in a foreign jurisdiction. Each case must be governed by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the injunction will issue; otherwise not."

63 62 Stat. 929 (1948), 28 U. S. C. A. § 1257 (1949): "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, ...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Some time was spent to determine whether the decision by the Georgia Supreme Court was such a final decision as 28 U. S. C. A. § 1257 requires before the United States Supreme Court has jurisdiction to review a state court decision. This was determined in the affirmative.


applicable to F.E.L.A. actions brought in federal courts. It is asserted that 1404 (a) applies only to federal courts, and then only to federal courts where the suit is being prosecuted; that 1404 (a) has no effect on any state court, and contains no provision concerning an injunction.68

Justice Frankfurter, dissenting, reasoned that by the passage of 1404 (a) "...Congress has cut the ground from under..."67 the Miles and Kepner cases. However, he apparently relied too heavily on the reviser's notes to Section 140468 as support for his view, and overlooked the portions of the Collett case which specifically stated that the Miles and Kepner cases were undisturbed by 1404 (a).69

The F.E.L.A. in Retrospect

Had the contention of Justice Frankfurter and the Georgia court prevailed, the injured railroad employee would have been in the most disadvantageous position since amendments to the F.E.L.A. in 1910 and 1911 gave him the choice of three forums in which to sue. Even though in the early years of the Act plaintiff could be enjoined by the state court of his residence, and though a distant state court could reject jurisdiction, a distant federal court could be made the forum court, and it would accept the case. The plaintiff's position gradually became stronger, and after the Kepner, Miles and Uitterback

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6873 S. Ct. 749 at 752, 97 L. ed. 719 at 722 (1953).
69In the reviser's note to 1404 this statement is made: "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner..." H. R. Rep. No. 308, 80th Cong. 1st Sess. A. 132 (1947).
In the opinion of the Court, this reviser's note was interpreted to mean that the inequity of the result of the ruling in the Kepner case would be alleviated by 1404 (a), but that the decision itself is undisturbed; that the power of the federal court to transfer was the reference, and not of a state court to enjoin. Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749 at 752, 97 L. ed. 719 at 723 (1953).
Justice Frankfurter, on the other hand, interpreted the note to mean that by 1404 (a) Congress has changed the ruling of the Kepner case, and that henceforth the plaintiff in an F. E. L. A. action could again be enjoined by a state court of his residence from prosecuting his F. E. L. A. action in a distant state court. See Pope v. Atlantic Coast Line Rd. Co., 73 S. Ct. 749 at 754, 755, 97 L. ed. 719 at 725 (1953).
The differences in interpretation seem to be academic, and after all it is the statute not the reviser's note that is in issue, and the statute concerns forum non conveniens, not the injunction. Justice Frankfurter, as others have done, has made forum non conveniens and the injunction correlatives, which they are not.
69See note 52, supra.
cases he enjoyed a temporary absolute right to bring his case and to have it tried in the forum of his choice, state or federal, wherever venue requirements were met.

A retrogression was made when, by the Collett case, 1404 (a) was made applicable to F.E.L.A. actions brought in a federal court. Plaintiff's choice of federal forum was no longer absolute. Another backward step was made by the Mayfield case. By it forum non conveniens could be applied by a state court when the state court was made the forum for an F.E.L.A. action. Plaintiff's choice of forum was then secure only when a state court that was not able to apply forum non conveniens to any cases by its local law, was made the forum court. If the injunction could now be used when the action was being prosecuted in the distant state court where forum non conveniens was not in practice, then plaintiff would have no courts other than the state or federal court in his immediate vicinity in which he could bring his action and not have to prove his right outside the statute to prosecute it there—this, in spite of the fact that the basic statute gave an injured railroad employee three places in which to sue, and never qualified his right to sue in any one of them.7

As the cases now stand, an injured railroad employee may bring his suit in a distant state or federal court, and the state court of his residence cannot enjoin him from doing so. Both the federal and state court may view the case in the light of forum non conveniens, and are not required to hear the case. But if the state court, which is the

At attempts and suggestions have been made to alter the effect of the venue provision of the F. E. L. A. Railroad employers have attempted by contractual arrangement with the employee to delimit the place of suing in case a suit should arise. While earlier decisions have varied, by Boyd v. Grand Trunk Western Rd. Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. ed. 55 (1949), the Supreme Court seems to have now determined that such contracts are invalid under 55 Stat. 65 (1908), 45 U. S. C. A. § 55 (1913) voiding any contract by which the carrier attempts to exempt itself from liability under the Act. In 1947 the Jennings Bill, H. R. 1639, 80 Cong., 1st Sess. (1947), was discussed in Congress, but was never enacted. By it venue would have been limited to plaintiff's place of residence or where the injury occurred, and only if defendant could not there be served, could suit be had in any other place where defendant railroad could be served. New legislation has been urged repeatedly. What has retarded it, and will continue to do so, is lack of any consensus as to what it should embody. It has been suggested that the suits be heard only in federal courts, or that transfer from the state court to the federal court be allowed generally, or at least when the case is an imposition on the defendant, and is brought in a distant state court. Note (1950) 3 Ala. L. Rev. 192 at 200. Another suggestion is to abolish the F. E. L. A. entirely, and to set up a workmen's compensation for injured railroad employees. Note (1952) 30 N. C. L. Rev. 168.
forum court, does not have the principle of forum non conveniens available for its use, then it must try the case.\textsuperscript{71}

\textsuperscript{71}Justice Frankfurter points out what might seem to be an anomalous situation as the decisions now stand, in that the F. E. L. A. is a federal cause of action, yet federal courts are able to transfer by 1404 (a), but state courts cannot. The result is not as illogical as Justice Frankfurter seems to view it. A federal court only transfers to another federal court, while a state court can dismiss because of forum non conveniens. Of course, a state court not allowed to use forum non conveniens, is currently required to try the case. Yet a non-discriminatory forum non conveniens statute may be passed by those states not now using it. While Justice Frankfurter states that it is the exceptional state court which does not use forum non conveniens [See 73 S. Ct. 749, 756, 97 L. ed. 719, 727 (1953)], it seems that the exception is the other way. Few states have it. Barrett, The Doctrine of Forum non Conveniens (1947) 35 Calif. L. Rev. 380, 388; Goodrich, Conflict of Laws (3d ed. 1949) 22.
A distinct set of tax problems arise upon the dissolution of a corporation. First, the distribution of the corporate assets in the form of liquidating dividends presents the question whether, by nature, they are true dividends at all or merely a return of invested capital. To the extent that the distribution represents a return of capital, it is non-taxable, not being "income" within the meaning of the tax statutes. Since it rarely happens that a shareholder receives upon distribution the exact amount that he has invested, at nearly every corporate dissolution a second problem presents itself of how to treat his gain or loss—as an ordinary gain or loss, or as a capital gain or loss.

A capital gain or loss results from the sale or exchange of a capital asset, which is defined in general as any property held by the taxpayer, whether or not connected with his trade or business, with certain enumerated exceptions. The sale or exchange of a capital asset held for more than six months results in a long-term capital gain or loss; if held for six months or less there is a short-term capital gain or loss. Section 115 (c) of the Internal Revenue Code classifies a distribution in complete liquidation as a capital transaction, producing capital gain or loss.

The tax advantage or disadvantage of having a gain or loss classified as a capital one is apparent when the method of computing the amount to be included on the individual's return is observed. Several steps are required for such computation. All short-term capital gains and losses are taken together to determine net short-term capital gain or loss. All long-term capital gains and losses are taken together to determine net long-term capital gain or loss. Then the net of the long and short term transactions are taken together to determine net gain or loss from the sale or exchange of all capital assets.

Net gain so computed is included as gross income for the year it
is incurred. However, certain tax advantages are obtained under the Code. For tax years beginning before October 20, 1951, only 50 per cent of long-term capital gains and losses were taken into account in determining long-term gain or loss. A tax advantage resulted when dealing with long-term capital gains, because only 50 per cent of them were included. A disadvantage resulted when dealing with long-term capital losses, because only 50 per cent of them were deductible. Short-term transactions were taken into account 100 per cent.

By the Revenue Act of 1951, this law was changed so that for tax years beginning after October 20, 1951, all capital gains and losses are taken into account 100 per cent. However, relief is now granted by allowing a deduction from gross income equal to 50 per cent of the excess of net long-term capital gain over net short-term loss. In some cases the new is more advantageous to the taxpayer, in others less advantageous, and in still others the result is the same under both the old and new law.

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6Int. Rev. Code § 117 (b).
7Int. Rev. Code § 23 (ee), 117 (b).

*Under the old law, $1 of short-term capital loss offset $2 of long-term capital gain, as only 50 per cent of long-term gains were taken into account. Under the new law, a short-term capital loss will offset a long-term capital gain dollar for dollar, as 100 per cent of long-term capital gain is taken into account. Under the old law, $1 of short-term capital gain offset $2 of long-term capital loss, while under the new law, a short-term capital gain offsets a long-term capital loss dollar for dollar.

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**EXAMPLE ONE**

<table>
<thead>
<tr>
<th>OLD LAW</th>
<th>NEW LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Long-term gain</strong> .......$10,000</td>
<td><strong>NEW LAW</strong> $10,000 (100% recognized)</td>
</tr>
<tr>
<td>Short-term loss ....... 5,000</td>
<td><strong>5,000 (100% recognized)</strong></td>
</tr>
<tr>
<td>Net gain from capital transactions ............ $0</td>
<td>$5,000</td>
</tr>
<tr>
<td>Deduction from gross income—(50% of excess of net long-term gain over short-term loss) ............ 0</td>
<td>2,500</td>
</tr>
<tr>
<td>Capital gains subject to tax .................. $0</td>
<td>$2,500</td>
</tr>
</tbody>
</table>

**EXAMPLE TWO**

<table>
<thead>
<tr>
<th>OLD LAW</th>
<th>NEW LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Short-term gain</strong> ........$10,000</td>
<td><strong>NEW LAW</strong> $10,000 (100% recognized)</td>
</tr>
<tr>
<td><strong>Long-term loss</strong> ....... 10,000</td>
<td>$5,000 (50% recognized)</td>
</tr>
<tr>
<td>Net Gain from capital transactions .......... $5,000</td>
<td>$0</td>
</tr>
<tr>
<td>Deduction from gross income. 0</td>
<td>0</td>
</tr>
<tr>
<td>Capital gains subject to tax .................. $5,000</td>
<td>$0</td>
</tr>
</tbody>
</table>
When dealing with a net capital gain, other advantages are found in the alternative method of tax liability computation, which in effect places a maximum rate of 26 per cent on long-term capital gains, in contrast with individual rates up to 88 per cent of net income. From the above it can be seen that in many instances a capital gain is preferable to an ordinary gain.

Net loss from the sale or exchange of capital assets can be used to offset an individual's ordinary income, but only to the extent of $1,000 in the year of loss. However, under Code Section 117 (e) (1), an individual sustaining a net capital loss may carry over such loss to each of the five succeeding years as a short-term capital loss. Since the loss carry-over is treated as a short-term loss, it can be used only to offset capital gains, plus $1,000 of ordinary income in each of the later years.

For example, if T had sustained a net capital loss of $20,000 in 1952, only $1,000 could be used to offset his ordinary income for that year. If in 1953, T has a capital gain of $2,000, the $19,000 loss balance from the previous year can be used to offset this gain, and another $1,000 used to offset ordinary income for 1953. If during the next four succeeding years T has no capital gains against which to apply his loss carry-over, the maximum $1,000 deduction against ordinary income would be the only one to which he is entitled. The tax disadvantage of having a loss classified as a capital one is apparent from this example, where only $8,000 in deductions were allowed over a six year period ($1,000 in each year except 1953 when $3,000 was allowed), although the economic loss to the taxpayer was $20,000.

The tax treatment of other types of losses is too varied to discuss here. Suffice it to say that other losses can usually be used to offset ordinary income in the year of loss, with no $1,000 limitation. Special carry-over provisions apply in certain instances.

Subsequent Repayments by Distributee-Shareholders

The problem of classifying a transaction as an ordinary or capital one takes on added complications when in a year subsequent to what purports to be a final liquidation it is discovered that the corporation...
has hidden assets or liabilities. It is not unusual to discover at a later time that the corporation has hidden assets which require distribution, or hidden liabilities which must be satisfied. An obvious example is the situation in which after the apparently final distribution the corporation becomes entitled to a tax refund, or is obliged to pay an additional tax assessment. Under general corporation law doctrines, a distributee-shareholder is entitled to his pro rata share of any assets collected by the corporation after liquidation and in turn is liable for the debts of the corporation. While Section 115 (c) treats distributions in complete liquidation as capital transactions, no Code provision prescribes how the shareholder should treat his subsequent payments in discharge of his transferee liability for the corporation's debts. The Commissioner's position in regard to such payments is that they are capital losses, while the taxpayer's position has usually been that the later payments are ordinary losses, not subject to the limitations found in the case of capital losses.

At one time the difference in the two positions was less important than it is today, as the taxpayer could have had his returns for previous years reopened and adjusted, provided the statute of limitations had not run. Accordingly, in the case of a distributee later paying a liability of the dissolved corporation, the taxpayer-distributee could reopen his return which had reported the receipt of the liquidating dividend, adjust downward the original capital transactions to reflect the loss from the subsequent repayment, and collect a refund. This practice of treating stockholder-distributee repayment as a reduction of the liquidating dividend originally received was repudiated by dictum of the Supreme Court in 1932. In the North American Oil case the Court declared: "If a taxpayer receives earnings under a
claim of right and without restriction as to its disposition, he has received income which he is required to return [on his tax form], even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged to restore its equivalent."16

Since this decision the courts and the Commissioner have considered that the stockholder-distributee payment of a corporation liability no longer could be used to reduce the liquidating dividend. It is suggested by a well considered note in the Yale Law Journal17 that the stockholder-distributee liability payments might well be specifically excepted from the rule barring reopening of prior returns, since it is the only significant situation in which the original "claim of right" receipt is a capital event.

The taxpayer's position that the subsequent payment should be treated as an ordinary loss was upheld in the 1950 decision of Commissioner v. Switlik.18 In that case the shareholders of a corporation received final distribution in complete liquidation in 1941, each reporting his profit on the distribution as long-term capital gain. In 1942 the Commissioner assessed tax deficiencies against the corporation for the years 1940 and 1941. There being no corporate funds with which to pay the deficiencies, the shareholder-distributees themselves paid the assessments in 1944. The Court of Appeals for the Third Circuit upheld the Tax Court's decision that, as the 1944 payments did not represent losses from the sale or exchange of capital assets, they were fully deductible in that year as ordinary losses.19 The holding is based on the well-established annual accounting concept that each year is a separate unit for tax purposes.20

Doubt was cast upon the Switlik case rule last year when the Commissioner's position that a subsequent payment by a shareholder-distributee is a capital loss was upheld in Commissioner v. Bauer.21 In that case the two shareholder-officers of a corporation received liquidating dividends pursuant to a plan of total liquidation during the years 1937 through 1940, and reported their profits as long-term capital gains in those years. At the time of the final liquidating dividend in 1940, a tort suit was pending against the corporation and

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15286 U. S. 417, 424, 53 S. Ct. 613, 615, 77 L. ed. 1197, 1200 (1932) [italics supplied].
16Note (1952) 61 Yale L. J. 1081, 1089.
18The taxpayers had claimed as deductions the losses they incurred as "losses incurred in a transaction entered into for profit." Int. Rev. Code 23 (e) (2).
19Henderson, Introduction To Income Taxation (1934) § 3.
20193 F. (2d) 734 (C. A. 2d, 1942).
against one of the shareholder-officers, Frederick R. Bauer, individually. In 1944, the two taxpayers were required to, and did, pay the judgment against the corporation, of whose assets they were transferees. The Court of Appeals for the Second Circuit, reversing the Tax Court's decision based on the Switlik case, held that since the liabilities which the taxpayers incurred under the judgment would not have existed except for the distribution, the two transactions should be tied together. Therefore, the 1944 payments on the judgment were treated as capital losses, even though one of the taxpayers incurred liability under the judgment as an officer as well as a distributee. This adoption of the Commissioner's position is to the disadvantage of the taxpayer, for under the law before October 20, 1951 discussed earlier, only 50 per cent of the long term loss was deductible. Even under the law today, which takes into account 100 per cent of all losses, the limitation that a capital loss can be used only to offset capital gains, plus $1,000 of ordinary income, would be to the individual's detriment in many cases.

This conflict between the Courts of the Second and Third Circuits in cases involving similar fact situations caused the Supreme Court of the United States to grant certiorari in the Bauer case, now under the title of Arrowsmith v. Commissioner. Adopting the view of the court below that the two transactions should be treated as one, the Supreme Court, speaking through Justice Black declared: "The losses here fall squarely within the definition of 'capital losses' contained in these sections [Int. Rev. Code Section 29, Section 115]. Taxpayers were required to pay the judgment because of liability imposed on them as transferees of liquidation distribution assets. And it is plain that their liability as transferees was not based on any ordinary business transaction of theirs apart from the liquidation proceedings. It is not even denied that had this judgment been paid after liquidation, but during the year 1940, the losses would have been treated as capital ones. For payment during 1940 would simply have reduced the amount of capital gains received during the year."

Continuing, the Court observed: "It is contended, however, that this payment which would have been a capital transaction in 1940 was transformed into an ordinary business transaction in 1944 because of

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23 Int. Rev. Code § 117 (b).
24 Int. Rev. Code § 122 (d) (2).
26 73 S. Ct. 71, 73, 97 L. ed. 19, 21 (1952).
the well established principle that each taxable year is a separate unit for tax accounting purposes. United States v. Lewis, 340 U. S. 590; North American Oil Co. v. Burnett, 286 U. S. 417. But this principle is not breached by considering all the 1937-1944 liquidation events in order to classify the nature of the 1944 loss for tax purposes. Such an examination is not an attempt to reopen and readjust the 1937 to 1940 tax returns, an action that would be inconsistent with the annual tax accounting principle."

In view of the Arrowsmith decision, taxpayer-distributees will ask whether they can do anything to minimize their income taxes. Where it appears that subsequent to the termination of corporate activity, liability may still arise, tax advantages could possibly be obtained by leaving with the corporation sufficient funds to cover such contingent liability. There would be in effect a partial final distribution with the reservation of a contingency fund. Any future payment of corporate liability would then be made directly from this fund. By this means, the distributee would avoid being taxed on the part of the liquidating dividends which he received only to pay back later. Such a device could have prevented the difficulty in the Bauer case, where the suit resulting in ultimate liability was in litigation at the time of the final liquidating dividend. For individuals on a cash accounting basis, this retention would have an added advantage even if the fund were not actually used, as its distribution in a later year would allow the taxpayer to spread his gains over more than one year, thus taking advantage of lower surtax brackets.

There are three capacities in which a shareholder of a corporation may be liable directly or indirectly for the debts of the corporation. First, the shareholder indirectly pays when the corporation itself satisfies liability, as would be the case where a reserve fund is retained. Second, the shareholder may be liable in his capacity as distributee of the corporate assets. Third, he may be individually liable as an officer or agent of the corporation. The last liability would arise as the result of a tort action against the individual, in which case the corporation would also be subject to suit under the doctrine of respondeat superior. The capacity in which one is sued or pays is apparently an important factor in determining the classification of the subsequent payment as a capital or an ordinary loss.

The decision in the Arrowsmith case appears to be limited to the situation in which the shareholder makes payment in his capacity as

\[733\text{ Ct. 71, 73, 97 L. ed. 19, 21 (1952) [italics supplied].}\]
distributee. The language of the Court is: "While there was liability against him [Bauer] in both capacities [as an officer and as a transferee], the individual judgment against him was for the whole amount. His payment of only half the judgment indicates that both he and the other transferee were paying in their capacities as such. We see no reason for giving Bauer a preferred tax position." The implication is that by paying in a personal capacity, rather than as a distributee, the transaction would be classified as an ordinary loss with the usual tax advantages. As an illustration, consider a small corporation where the officers are the only stockholders. After complete liquidation, a tort suit is threatened, and the tort is one for which the officers individually, as well as the corporation, are liable, A tax advantage could apparently be obtained by requesting the plaintiff to sue the officers in that capacity, rather than as distributees. Possibly a promise to place funds in the hands of the court pending the outcome of the litigation would be inducement even to the most hostile plaintiffs. Under these circumstances the same persons would be paying the same amount, but if the distributees made payment in the capacity of individual officers, the loss would be an ordinary one, whereas if they paid as distributee-shareholders, the loss would be considered a capital one.

Subsequent Receipts by Distributee-Shareholders

The Arrowsmith decision that subsequent payments by distributee-shareholders in satisfaction of corporate debts should be treated as capital losses presumably strengthens the rule that if property received in exchange for stock has no market value the transaction is not closed and later receipts or collections can result in capital gains.

It may, however, weaken the decision in Osenbach v. Commis-

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28 73 S. Ct. 71, 73, 97 L. ed. 19, 21 (1952).
29 Westover v. Smith, 173 F. (2d) 90 (C.A. 9th, 1949). Where the owner of all the stock of a corporation, on the dissolution of the corporation, received an assignment of a valuable royalty contract, the fair market value of which could not be ascertained, royalty payments thereunder in later years were treated as payments in exchange for stock and taxed as capital gain rather than as ordinary income. The decision is based on the rule that where the assets received in exchange for stock have no market value at that time, the transaction remains open until all payments are completed. Burnet v. Logan, 283 U. S. 404, 51 S. Ct. 550, 75 L. ed. 1143 (1930).
sioner\textsuperscript{30} that collections on notes received by taxpayers in a Code Section 112 (B) (7)\textsuperscript{31} liquidation are ordinary income. That ruling was based on the ground that the distribution in kind in exchange for their stock was a closed transaction. Under the \textit{Arrowsmith} case it is possible that a court might find that though there was no subsequent sale or exchange of the capital assets so received, yet the earlier liquidation distribution could be looked to \textit{in order to classify the nature of the later gain}, as a capital gain.

The \textit{Arrowsmith} decision will be of further significance when subsequent to apparent final liquidation its is discovered that the corporation has further assets to which the shareholders are entitled. If under appropriate state law the corporation is still in existence for the purpose of collecting these assets, no particular problem will arise.\textsuperscript{32} In such case the corporation will collect the assets, and distribute them to the shareholders in further liquidation, a capital transaction.

If under state law, the shareholders themselves can bring the action to collect the assets, a more complicated problem may arise, for then the taxpayer would again be presented the question of whether his recovery is a capital gain or an ordinary gain. Such a possibility is foreseen in Justice Jackson's dissent in \textit{Arrowsmith}. "Suppose that subsequent to liquidation it is found that a corporation has undisclosed claims instead of liabilities, and that under applicable state law they may be prosecuted for the benefit of the stockholders. The logic of the Court's decision here, if adhered to, would result in a lesser return to the government than if the recoveries were considered ordinary income. Would it be so clear that this is a capital loss [transaction] if the shoe were on the other foot?"\textsuperscript{33}

\textsuperscript{30}1958 F. (2d) 235 (C. A. 4th, 1952) affirming 17 T. C. 797. Taxpayer, as a stockholder in a corporation liquidation under the provisions of Code § 112 (b) (7), received in kind, certain loans, discounts, mortgages and other claims. Collections were later made thereon. \textit{Held}, the amounts received on collections were ordinary income and not capital gain, on the ground that the subsequent dealings with the loans, etc., did not involve sale or exchange, but collection, and hence could not qualify as capital transactions, even though the assets had originated in the closed, completed liquidation.

\textsuperscript{31}Code § 112 (b) (7) provides relief in the form of an election as to the recognition of gain in certain corporate liquidations occurring within one calendar month in 1951 or 1952. See Eaton, Liquidation Under Section 112 (b) (7), (1952), 38 Va. L. Rev. 1.

\textsuperscript{32}When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in place of the corporation for such purposes.

\textsuperscript{33}73 S. Ct. 71, 74, 97 L. ed. 19, 22 (1952).
This writer has been able to find no cases directly on the point. However, it is doubtful if mere "prosecution for the benefit of the stockholders" by the corporation would be sufficient to raise a doubt of whether the recovery is a capital or ordinary gain. If the funds pass through the hands of the corporation to the shareholders, it would appear that this would be a corporate distribution resulting in capital gain to the shareholder. If, however, the recovery is made directly by the shareholder for his own benefit, then the nature of the transaction is doubtful. Applying the *Arrowsmith* decision, the gain would be a capital gain.
CASE COMMENTS

CONSTITUTIONAL LAW—APPLICATION OF SEPARATE BUT EQUAL DOCTRINE TO RACIAL SEGREGATION IN LOWER PUBLIC SCHOOLS. [Delaware]

The origin of the "separate but equal doctrine" is commonly traced to the decision of *Plessy v. Ferguson* in which the Supreme Court upheld a Louisiana statute which required railroads to provide separate but equal facilities for white and colored patrons and provided criminal penalties for any member of either race using the facilities of the opposite race. The contention that the statute violated the Equal Protection Clause of the Fourteenth Amendment was defeated by the finding that the regulation was based on a reasonable classification, the Court declaring:

"In determining the question of reasonableness [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable."

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1 *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896). While this case is usually thought of as the origin of the doctrine, the Court, in support of its upholding of segregation in common carriers, noted that the state courts had upheld similar statutes requiring segregation in education. *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405 (1874); *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738 (1874); *Roberts v. City of Boston*, 59 Mass. 198 (1849); *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1891).


3 U. S. Const. Amend. XIV, § 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4 *Plessy v. Ferguson*, 163 U. S. 537, 550, 16 S. Ct. 1138, 1143, 41 L. ed. 256, 260 (1896). "Laws permitting, and even requiring, [the] separation [of Negroes and whites] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other...." *Ibid*, at 544, 1140, 258. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Ibid*, at 551, 1143, 261 [italics supplied]. Compare the language of Justice Harlan in dissent, *Ibid*, at 560, 1144, 264. "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly
In the nearly six decades which have elapsed since this decision, its rule has been extended to many fields other than common carriers, and in 1908 the philosophy of the separate but equal doctrine was applied to a controversy involving public education facilities. In Berea College v. Kentucky, without even touching upon the Fourteenth Amendment question, the Supreme Court held that a Kentucky statute requiring segregation was a valid exercise of the State's reserved power to amend the corporate charter of the college. In 1927, in Gong Lum

create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana."


211 U. S. 45, 29 S. Ct. 33, 53 L. ed. 81 (1908). Cf. Cumming v. Richmond County Board of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 (1899). In neither case did the Supreme Court feel that the precise question of the constitutionality of the state police power in requiring segregation was before it. "It was said at the argument that the vice in the common-school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. But we need not consider that question in this case. No such issue was made in the pleadings." Cumming v. Richmond County Board of Education, 175 U. S. 528, 543, 20 S. Ct. 197, 200, 44 L. ed. 262, 266 (1899). See Justice Harlan's dissent in Berea College v. Kentucky, 211 U. S. 45, 58, 29 S. Ct. 23, 36, 53 L. ed. 81 (1908).
the Court held that a girl of Chinese descent had not been
denied equal protection of the laws under a Mississippi statute which
resulted in denial of her entrance into "white" public schools of that
state. In recent years, the Supreme Court has had the opportunity to
review the question specifically, and though it has refused to overrule
the doctrine expressly, the Court, in cases dealing with education in
graduate schools, has emphasized the "equal" factor of the doctrine,
making it clear that the standard of equality is a real one and not a
legal fiction, and that segregation in fact must fall where inequality
is manifest.

In Missouri ex rel. Gaines v. Canada the Supreme Court refused
to consider the relative advantages or opportunities of study at the
University of Missouri and the universities of neighboring states which
plaintiff might have attended at state expense, but held that laws re-
quiring separation must be tested in light of the equality of facilities
offered the two groups within the state, thus overthrowing the state's
policy of segregation without a "clear and unmistakable" showing that
inequality did exist. In 1950, the Court, in Sweatt v. Painter, reversed
the Texas Court of Civil Appeals in ruling that equality could
not be found as between an old, established law school and a newly

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1149 (1950); Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950);
Sipuel v. Board of Regents, 332 U.S. 631, 68 S. Ct. 299, 92 L. ed. 247 (1948); Mis-
9Sweatt v. Painter, 339 U. S. 629, 635, 70 S. Ct. 848, 851, 94 L. ed. 1114 (1950);
"We cannot... agree with respondents that the doctrine of Plessy v. Fer-
guson... requires affirmance of the judgment below. Nor need we reach petitioner's
contention that Plessy v. Ferguson should be reexamined in the light of contem-
porary knowledge respecting the purposes of the Fourteenth Amendment and the
effects of racial segregation."
10Upon this standard, since Missouri provided no separate facilities for Negroes
in the study of law, inequality was inevitably found to exist. It certainly seems pos-
sible that the facilities at the out-of-state universities were substantially equal
to those at the University of Missouri, and it cannot be assumed that attendance
at one of them would have been less convenient to plaintiff; but the Court pre-
cluded such considerations. See Justice McReynolds' concurring opinion, 305 U. S.
11339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950), reversing Sweatt v. Painter,
instituted one. Then, in *McLaurin v. Oklahoma Board of Regents* the Court held that, once admitted, plaintiff could not be accorded any different treatment than that of other students of the University. While the Court did not in these cases rule upon the constitutionality of segregation, the rules enunciated have so tightened the standard of equality that racial separation in public graduate and professional schools has been, in practical effect, foreclosed.

In the field of primary and secondary education, the effect of the doctrine has been largely shaped by the state and lower federal courts. It has been generally held by these courts that there is a lack of requisite equality where the schools for each race fail to conduct terms of the same length, or do not furnish similar courses of study, or

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1\(^{14}\) Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro students by the State. In terms of number of faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close." *Sweatt v. Painter,* 339 U. S. 629, 633, 70 S. Ct. 848, 850, 94 L. ed. 1114, 1119 (1950).


3\(^{16}\) "... he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library; but not to use the desks in the regular reading room; and to sit at a designated table and to eat a different time from the other students in the school cafeteria." 339 U. S. 637, 640, 70 S. Ct. 851, 853, 94 L. ed. 1153 (1950).

4\(^{17}\) In the *McLaurin* case, the ruling that McLaurin must be given the exactly identical treatment as other students would seem to be a recognition by the Court that there are no basic differences between the two races as far as education is concerned, and would seem to destroy the premise upon which separation has been held constitutional—i.e., that race is a material and reasonable basis for classification in the field of education.


5\(^{18}\) Claybrook v. *City of Owensboro,* 16 Fed. 297 (D. C. Ky. 1883); Lowery v. *Board of Graded School Trustees,* 140 N. C. 33, 52 S. E. 267 (1905); *Jones v. Board of Education,* 90 Okla. 233, 217 Pac. 400 (1923).

6\(^{19}\) Inequality of facilities was found to exist where Negroes were not given similar instruction: *Davis v. County School Board,* 103 F. Supp. 337 (E. D. Va. 1952).
where by taking advantage of such similar courses, pupils encounter unequal circumstances. And it has been held that a state may not constitutionally discriminate in salaries paid as between teachers of each race, where their qualifications and training are substantially equal. In this connection the ratio of teachers to students and the relative competence and training of teachers as between the two school systems, while not conclusive, have usually been given due consideration. However, it has been agreed that identity of school plants, in respect to size, cost, and number, is not necessary in order to insure equal facilities, particularly where there is considerable variance in the number of pupils. The fact that certain colored pupils must travel


Discrimination found: Morris v. Williams, 149 F. (2d) 703 (C.C.A. 8th, 1945) (where based on custom or policy of school board); Alston v. School Board, 112 F. (ad) 992 (C. C. A. 4th, 1940) (where shown by a salary schedule); Davis v. Cook, 55 F. Supp. 1024 (N. D. Ga. 1944); McDaniel v. Board of Public Instruction, 59 F. Supp. 638 (N. D. Fla. 1941). But the fact that Negro teachers received a lower salary is not violative of Fourteenth Amendment where such is not based upon the difference in race: Reynolds v. Board of Instruction, 148 F. (2d) 754 (C. C. A. 5th, 1945) (lacking in experience and education); Thompson v. Gibbs, 60 F. Supp. 872 (E. D. S. C. 1945) (difference in professional attainments shown by lower grades made by Negroes on state examination).


Davis v. County School Board, 103 F. Supp. 337 (E. D. Va. 1952). No discrimination found: State ex rel. Hobby v. Disman, 205 S. W. (2d) 137 (Mo. 1952) (less convenient physical arrangements and lack of gymnasium and auditorium at Negro school); Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903) (building for large white school was larger than commodious building for a small colored school); Lowery v. Board of Graded School Trustees, 140 N. C. 33, 52 S. E. 267 (1905). Discrimination was found: Claybrook v. City of Owensboro, 16 Fed. 297 (D. C. Ky. 1889) (number of white schools were disproportionate to colored schools according to enrollment); Graham v. Board of Education, 153 Kan. 840, 114 P. (2d) 313 (1941) (lack of auditorium, music and athletic facilities at Negro school); Jones v. Board of Education, 90 Okla. 233, 217 Pac. 400 (1923) (value of colored school building vastly lower than value of white school building, and so crowded that classes met only half-time). See also, Corbin v. County School Board, 177 F. (2d) 924 (C. A. 4th, 1949).
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farther to reach school than any white pupil is required to travel to
reach his school, or must travel through dangerous or difficult ac-
cesses to reach school does not necessarily indicate inequality of fac-
ilities. Furthermore, the educational advantages afforded, as between
white and Negro Schools, need not exist in the same school district.

The recent Delaware case of Gebhart v. Belton, involving seg-
regated primary education, is outstanding as an illustration of meticu-
ous state court regard for the precise holdings of the United States
Supreme Court in this field and of consequent refusal to anticipate a
possible overruling of the separate but equal doctrine. The case was
composed of two separate bills in equity which, though substantially
different in their factual situations, were consolidated because of the
similarity of the questions of law involved. The relief sought in each
case was two-fold: (1) a declaratory judgment that the provisions of
the Delaware Constitution and laws regarding segregation in the
public schools of the state were in contravention of the Equal Pro-
tection Clause of the Fourteenth Amendment, and (2) an injunction
restraining the defendants, members of the State Board of Education,
from denying the plaintiffs admittance to schools maintained in their
districts for white children.

The trial court concluded from the evidence that in Delaware,
state-imposed segregation resulted in inferior educational oppor-
tunities for Negro children as a class, and expressed the opinion that
the separate but equal doctrine should be rejected. Recognizing,

54Disparity in distance and conditions of travel was not found to be discrimina-
tion: Winborne v. Taylor, 193 F. (2d) 649 (C. A. 4th, 1952) (round trip of about
thirty miles per day, where transportation facilities adequate); Corbin v. County
School Board, 177 F. (2d) 924 (C. A. 4th, 1949); McSwain v. County Board of
Education, 104 F. Supp. 861 (E. D. Tenn. 1952) (travel over a fine highway in a
new bus for one-way distance of nineteen miles); Roberts v. City of Boston, 59
Mass. 198 (1849) (plaintiff required to travel one-fifth mile further to colored
school than she would have to travel if allowed to attend nearer white school).
Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765 (1891) (colored children required
to travel three and one-half miles to reach a colored school, while no white child
in district had to travel further than two miles).

56Winborne v. Taylor, 195 F. (2d) 649 (C. A. 4th, 1952); Pearson v. Murray, 169

51 A. (2d) 137 (Del. 1952).

57Del. Const. (1897) Art. X §§ 1, 2.


60... by implication, the Supreme Court of the United States has said a
separate but equal test can be applied, at least below the college level. This
Court does not believe such an implication is justified under the evidence. Never-
however, that Supreme Court decisions\textsuperscript{31} in the field of primary education had applied the separate but equal doctrine, the state Supreme Court affirmed the trial court’s refusal to enter the declaratory judgment argued for and declined to review that court’s position that segregation should be held illegal per se, saying:

“The Supreme Court of the United States has said that the states may establish separate schools if the facilities furnished are substantially equal for all. To say the facilities can never be equal is simply to render the Court’s holdings meaningless—in effect, to say that that Court’s construction of the Constitution is wrong. If so, it is for that Court to say so and not for us.”\textsuperscript{32}

The court then proceeded to a review of the evidence which plaintiffs submitted in an attempt to show that the facilities offered them were inferior to those offered white pupils similarly situated. In the first suit, plaintiff, colored and of high school age, was denied admission, solely on grounds of race or color, to Claymont High School, a school maintained in plaintiff’s school district for white students only, and was required to travel nine miles to Howard High School in a nearby city, the latter being the only high school maintained in plaintiff’s county which offered a complete high school course to Negroes. The lower court found that with respect to teacher training,\textsuperscript{33} pupil-teacher ratio,\textsuperscript{34} extra curricular activities,\textsuperscript{35} physical plants and aest-

\textsuperscript{32}Belton v. Gebhart, 87 A. (2d) 862, 865 (Del. Ch. 1952).
\textsuperscript{33}Belton v. Gebhart, 91 A. (2d) 137, 142 (Del. 1952).
\textsuperscript{34}Teacher training: Claymont: 59 per cent held Master’s degrees, 41 per cent had Bachelor’s degrees, none were without degrees. Howard: 37.73 per cent had Master’s degrees, 52 per cent held Bachelor’s degrees, 9.4 per cent held no degree (one teaching a vocational subject, another wood-working, another physical education). Belton v. Gebhart, 87 A. (2d) 862, 867 (Del. Ch. 1952).
\textsuperscript{35}Size of classes:

<table>
<thead>
<tr>
<th>Subject</th>
<th>Claymont</th>
<th>Howard</th>
</tr>
</thead>
<tbody>
<tr>
<td>English</td>
<td>25.56</td>
<td>32.25</td>
</tr>
<tr>
<td>Foreign Languages</td>
<td>25.75</td>
<td>31.19</td>
</tr>
<tr>
<td>Home Economics</td>
<td>16.2</td>
<td>24.71</td>
</tr>
<tr>
<td>Industrial Arts</td>
<td>17.14</td>
<td>23.9</td>
</tr>
<tr>
<td>Mathematics</td>
<td>29.80</td>
<td>33.25</td>
</tr>
<tr>
<td>Natural Sciences</td>
<td>34.87</td>
<td>32.25</td>
</tr>
<tr>
<td>Physical Education</td>
<td>24.28</td>
<td>42.87</td>
</tr>
<tr>
<td>Social Studies</td>
<td>33.88</td>
<td>32.05</td>
</tr>
</tbody>
</table>

The “average” teacher at Howard carried a teaching load of 178 pupils per week; Claymont, 149. Belton v. Gebhart, 87 A. (2d) 862, 867 (Del. Ch. 1952).

\textsuperscript{36}Claymont, School newspaper, Art Club, Drivers Club, Mathematics Club,
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thetic considerations, and travel conditions, Howard was inferior to Claymont. And the position was taken that if the educational opportunities provided for Negroes are, as to any substantial factor, inferior to those offered to white children similarly situated, the separate but equal doctrine is violated. The Delaware Supreme Court, finding this latter point of view too severe and likely to lead to the magnifying of minor differences, decided that plaintiffs should be entitled to relief only if they were actually injured by such inequalities as might exist. Reviewing the evidence with unbiased care, the upper court found that the trial court’s findings were too sweeping and concluded that, as regards the pupil-teacher ratio, formal teacher training, and average size of classes, the differences were only such as might be found between any two schools, whether white or Negro, and that none of these factors was such as to create substantial inequality of facilities. However, the upper court agreed that in respect to the course of physical education at Howard, the classes were so large as probably to prevent satisfactory instruction due to a lack of proper gymnasium facilities, and that since physical education was a necessary and required course, substantial inequality did exist in this respect. It also concurred in the finding of inferiority in the physical plants, but qualified the finding based upon aesthetic considerations. It agreed that travel conditions were inferior, and emphasized that these short-


While the Howard building as compared with the Claymont building was fairly good, it lacked a proper gymnasium. The Carver building, however, an integral part of the Howard plant, was an old building without a regular cafeteria, gymnasium, or auditorium, and contained but one lavatory which had an unsanitary cement floor.

Howard was located on three and one-half acres of land, without adequate playground facilities. It and Carver are surrounded by industrial buildings and "poor housing." Belton v. Gebhart, 87 A. (2d) 862, 866 (Del. Ch. 1952).

While the court does not say that the state does not provide transportation, its opinion implies such. The court found that plaintiff had to ride to school each morning and back in the afternoon, each way taking about fifty minutes. Plaintiff was also required to take a fifteen minute walk twice a week in order to take business courses. Belton v. Gebhart, 87 A. (2d) 862, 866 (Del. Ch. 1952).

In Physical Education the average class at Claymont was 24.88 and at Howard, 43.67, one class having an enrollment of 88. Gebhart v. Belton, 91 A. (2d) 137, 146 (Del. 1952).

"We are inclined to agree that if these two schools were substantially equal in all other respects such a difference [in sites, based upon aesthetic considerations] would hardly justify a finding of substantial inequality; but in this case esthetic considerations do not stand alone." The court felt that the Howard playground facilities were inadequate. Gebhart v. Belton, 91 A. (2d) 137, 145 (Del. 1952).
comings occurred not alone because of differences in comparative distances, but also because of a lack of adequate state-provided transportation to and from Howard, while transportation facilities to and from Claymont were adequate. As regards extra-curricular activities, the divergencies were found to be merely reflections of differences in interest and tastes and not the result of inadequacy of facilities in the Negro school. The court concluded that there were in existence such major inequalities—in plant and buildings, in physical facilities and instruction, and in the transportation systems—that the separate but equal doctrine was not satisfied.

The second suit was instituted on behalf of an eight year old Negro. In the county of her residence the State maintained two elementary grade schools, School No. 29, a four-room building with four teachers and one hundred and eleven pupils; and School No. 107, a two-room building with two teachers and forty-four pupils. The evidence disclosed that prior to 1951 the State had discriminated against School No. 107 in the allocation of funds, the value of School No. 107 had depreciated while the value of School No. 29 had appreciated, reflecting differences in maintenance, upkeep and improvements; that No. 29 had an auditorium, basketball court, accepted forms of drinking fountains, sanitary toilet facilities, adequate fire protection, and adequate transportation, while School No. 107 had none of these; and that teacher training at No. 29 was superior to that at No. 107. The upper court concluded that on the evidence the facilities of School No. 107 were, to the extent set forth, substantially unequal to those at School No. 29, and that plaintiff had suffered injury.

As a result of the findings that the separate facilities were not equal and that the plaintiffs were therefore being denied the equal protection of the laws, the Delaware Supreme Court affirmed the granting of an injunction requiring that plaintiffs be admitted to Claymont and School No. 29, even though the defendants had shown that facilities at Howard and School No. 107 would be equalized by September, 1953. In regard to this latter point the court relied upon pronouncements of the Supreme Court of the United States that the right to equal protection of the laws was a "personal and present" right, and concluded that plaintiffs could not, therefore, be denied such relief as was currently available.41

40School No. 29: Original cost (1932) was $55,000 while the present value is $77,000. School No. 107: Original cost (1922) was $21,000, while the present value was found to be only $13,000. Belton v. Gebhart, 87 A. (2d) 862, 870 (Del. Ch. 1952).
41Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. ed. 1114 (1950); Shelley
The Delaware court in disposing of those cases emphasized that it was under a duty to uphold the state constitutional requirement of separate schools for white and colored children and not to abrogate the requirement except insofar—and only insofar—as required to do so by a ruling of the Supreme Court of the United States. The state court correctly asserted that the Supreme Court has refused, thus far, to overrule the separate but equal doctrine applied in Plessy v. Ferguson, though expressly urged to do so. And in reply to the argument that "the cases of Plessy v. Ferguson and Gong Lum v. Rice... are without force today and that we should assume that they will be overruled," the Delaware court said, "We can make no such assumption. 'It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded'." In its approach to the problem of conflict between state and federal constitutional provisions with consequent federal supremacy, the Delaware court wisely followed the Supreme Court's own canons in refusing to "anticipate a question of constitutional law in advance of the necessity of deciding it," and in declining to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." The ultimate fate of the separate but equal doctrine and of state separate school laws must await the decision of the Supreme Court of the United States in the segregation cases presently before it.

WILLIAM C. GUTHRIE, JR.


Certiorari granted—Nov. 24, 1952 (21 U. S. L. Wk. 9144); case argued—Dec. 11, 1952 (21 U. S. L. Wk. 3161); case restored to docket for reargument at next term of court in the fall of 1953—June 8, 1953 (21 U. S. L. Wk. 1189).
CONSTITUTIONAL LAW—PROTECTION AGAINST DOUBLE JEOPARDY AS ELEMENT OF DUE PROCESS UNDER FOURTEENTH AMENDMENT. [United States Supreme Court]

Although it has been urged that the Fourteenth Amendment was intended to guarantee to citizens of the States the same rights as against the state governments that are guaranteed in the first eight amendments to federal citizens as against the federal government, the Supreme Court has repeatedly ruled that "due process of law" does not embrace all rights enumerated in the federal Bill of Rights. The test usually adopted for determining whether an alleged right is one to be protected under the Fourteenth Amendment turns on whether the right claimed by the accused involves a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or, differently stated, a principle "implicit in the concept of ordered liberty."

As a result of case-by-case determination of the scope of due process by the Supreme Court, rights held to be fundamental are the right to just compensation when private property is taken for public use under the power of eminent domain, freedom of speech, freedom of the press, free exercise of religion, the right of peaceable assembly, the right to assistance of counsel in special circumstances, and the right to

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10Townsend v. Burke, 334 U. S. 735, 68 S. Ct. 1352, 92 L. ed. 1690 (1948) (defendant was prejudiced either by the prosecution's submission of misinformation.
be free from unreasonable searches and seizures. On the other hand, the general right to assistance of counsel, the right to presentment or indictment by grand jury, freedom from self-incrimination, the right to a jury trial, freedom from the use of illegally seized evidence, and freedom from being placed twice in jeopardy for the same offense have been held not to be such fundamental rights as to receive the sanction of the Fourteenth Amendment.

The Supreme Court in the recent case of *Brock v. North Carolina*, by a 6 to 2 vote, has reiterated and extended its earlier ruling that the Fourteenth Amendment does not embrace protection against double jeopardy as a fundamental right within the due process provision. Here, the petitioner and two others, all of whom were striking mill employees, were arrested for allegedly firing five shots from a passing auto into the home of a watchman employed by the same mill. Upon being arrested, one of the petitioner's companions stated that the petitioner had helped plan the assault and had fired the shots. The two companions were tried and convicted, but before sentence was pronounced on them, the petitioner was placed on trial and the two companions regarding his prior criminal record or by the court's careless misreading of that record; Wade v. Mayo, 334 U. S. 672, 68 S. Ct. 1270, 92 L. ed. 1647 (1948) (defendant was an inexperienced youth incapable of adequately representing himself); De Meerleer v. Michigan, 329 U. S. 663, 67 S. Ct. 596, 91 L. ed. 584 (1947) (seventeen year old defendant was hurried through trial, nothing was said in his defense and the court did not inform him of the consequences of his plea of guilty).


* kz* Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937) held constitutional a state statute providing for a new trial on appeal by the state from a trial in which there were errors of law. This case is distinguishable from the Brock case in that a statute was involved, and the statute concerned a trial in which there were errors of law.
panions were called as witnesses by the state. When they refused to testify on grounds of self-incrimination, the prosecution requested and was granted a mistrial. Sentence later having been pronounced on the companions and their conviction upheld by the Supreme Court of North Carolina, the petitioner was again brought to trial. Although North Carolina has no constitutional guarantee against double jeopardy, the petitioner objected that he was being placed twice in jeopardy and therefore deprived of federal due process of law, but the trial court overruled the objection. At the second trial, one of his companions testified as a witness for the prosecution, and the petitioner was found guilty, which conviction was affirmed on appeal to the highest court of the state.

Justice Minton delivered the opinion of the Supreme Court of the United States which affirmed the judgments of the state courts holding that the petitioner had not been deprived of due process under the Fourteenth Amendment. The majority opinion, joined in by four other Justices, relied on a long-standing North Carolina rule that a trial court has the discretion to declare a mistrial and later cause the defendant to be tried again "if it be in the interest of justice to do so," and on the 1937 Supreme Court decision in *Palko v. Connecticut* that freedom from double jeopardy is not a fundamental right. Prior decisions of the Court were cited for the proposition that, consistent with the North Carolina view, "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."
Justice Frankfurter in a concurring opinion attempted to define more generally the scope of due process in this relation by stating the point beyond which double jeopardy would be a violation of the Fourteenth Amendment. "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."\(^2\) However, he did not feel that the record justified overthrowing the decision of the trial judge that a second trial would be fair and not oppressive to the petitioner.

Justice Douglas dissented, pointing out that as early as 1795, the North Carolina court, recounting the conditions in England which led to the fear of double jeopardy in the colonies, had concluded that the practice of allowing the prosecution to have a mistrial in order to prepare better evidence for a second trial of the accused for the same offense, is "so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country."\(^3\)

Chief Justice Vinson in a very thorough dissenting opinion stated that "For the first time in the history of this Court it is urged that a state could grant a mistrial in order that it might present a stronger case at some later trial and, in so doing, avoid a plea of former jeopardy in the second trial."\(^4\) The Chief Justice observed that North Carolina is one of only five states which have no provision in their constitutions forbidding double jeopardy,\(^5\) yet include such protection as part of their common law.\(^6\) He quoted extensively from two early North Carolina cases\(^7\) which point up the injustice of being placed twice in jeopardy for the same offense, and followed by observing that no case has been cited from another state which would allow a mistrial and a second trial in the circumstances of this case. The \textit{Palko} case was distinguished on two grounds: first, a statute was involved there, and the

\[^3\] State v. Garrigues, 2 N. C. 241 (1795), quoted at 73 S. Ct. 349, 357, 97 L. ed. 317, 327 (1953).
\[^5\] The others named were Connecticut, Maryland, Massachusetts, and Vermont.
\[^7\] In re Spier, 12 N. C. 491 (1828); State v. Garrigues, 2 N. C. 241 (1795).
Supreme Court has often recognized that such considered action by a state legislature "places the issue of constitutionality in a different posture in respect of due process of law," and second, under the statute, the state was seeking a second trial that would be free from error by the court prejudicial to the state. The Chief Justice added that while *Palko* does not control the present case, the following language from Justice Cardozo's opinion in the earlier case comforted him: "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider." \(^{32}\)

The dissenting Justices failed to stress the fact that *Brock v. North Carolina* is a non-capital felony case in which situation the North Carolina rule has always been that the trial judge has discretion to declare a mistrial and continue the case to a later date. \(^{33}\) The two North Carolina decisions on which the dissenting Justices rely are capital felony cases, \(^{34}\) and state the rule applicable only to such cases. Though it may be questioned that the distinction between capital and non-capital felonies is a logical one in this connection, it is difficult to see why a North Carolina rule which has been followed for over one hundred years should now be struck down because it suddenly would threaten "the hard-won victory achieved in the field of 'double jeopardy'." \(^{35}\)

The idea of due process in the procedural sense has become identified with the concept of fairness, \(^{36}\) and the difference of opinion between the Justices in the principal case seems to arise basically from their divergent views as to whether the procedure followed was so lacking in fairness that it violated fundamental principles of justice.

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\(^{33}\) *State v. Bass*, 82 N. C. 570 (1880) (non-capital felony); *State v. Tilletson*, 52 N. C. 114 (1859) (larceny; jury failed to agree and was dismissed) reference at p. 115 to *In re Spier*, 12 N. C. 491 (1828): "These cases may be considered as settling the law in respect to the class of felonies of which they treat, but the restricted range of judicial power, as established in them, has never been applied to offenses of inferior grades whether felonies or misdemeanors, and we think it is not applicable." *State v. Weaver*, 35 N. C. 203 (1851) (misdemeanor); *State v. Morrison*, 20 N. C. 114 (1856) (misdemeanor).

\(^{34}\) *In re Spier*, 12 N. C. 491 (1828); *State v. Garrigues*, 2 N. C. 241 (1795). Both were murder cases.


and ordered liberty. Independent of the question of fairness, the Supreme Court early decided that in the procedural field, process which was historic, even though by modern standards harsh, was yet due process and would be upheld. The majority of the Court seems to have had something of this principle in mind when it stressed the long continued use of the mistrial procedure in North Carolina. And the dissents’ reliance on the North Carolina practice in capital felony cases decided early in the state’s history was apparently prompted by the same consideration.

The general prohibition against double jeopardy is recognized by all the states, in forty-three by constitutional provision and under the common law in the other five. This widespread acceptance would seem to give the rule at least a near approach to being a fundamental principal of justice. The cases which have arisen concerning the specific point of mistrial have with only a few exceptions held that such a proceeding is a violation of the law of the jurisdiction, and this was especially true in the few cases where the mistrial was due to the inability of the prosecution to present testimony. Since other states faced with the same problem hold that the accused is placed under double jeopardy when subjected to a second trial following a mistrial.

\(^{37}\)Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 78 L. ed. 674 (1934) (pointing out specific objects on a viewing of scene by jury held proper historic process not overturned by Fourteenth Amendment); Corn Exchange Bank v. Coler, 280 U. S. 218, 50 S. Ct. 94, 74 L. ed. 378 (1930) (property of an absconding husband can be taken over and applied to support of wife and children prior to a judicial decree); Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. ed. 837, 17 A. L. R. 873 (1921) (defendant not allowed to defend a foreign attachment suit where he did not first furnish required security); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 4.33, 53 L. ed. 97 (1908) (freedom from self-incrimination not historically a protected right). In this regard, it should be noted that while historic process is held to be due process, the converse, that no type of process is due process unless it be historic, has not been adopted.


\(^{39}\)Allen v. State, 52 Fla. 1, 41 So. 593 (1906) (witness to testify for both prosecution and defense not present at first trial; jury discharged; plea of former jeopardy upheld at second trial); State ex rel. Meador v. Williams, 117 Mo. App. 564, 92 S. W. 151 (1906) (prosecuting attorney withdrew cause from consideration of jury because of absence of material witness); People v. Barrett, 2 Caines (N. Y.) 304 (1805) (mistrial because the prosecution did not have sufficient evidence); State v. Richardson, 47 S. C. 166, 25 S. E. 220 (1896) (prosecutor withdrew case from jury on finding a witness not present); Pizano v. State, 20 Tex. Crim. 139 (1880) (prosecutor requested discharge of jury on ground that principle witnesses for prosecution were not in court).
granted under the circumstances of the principal case, and since those states not having double jeopardy provisions in their constitutions include such protection as part of their common law, it seems that state legislatures and state courts almost universally regard this protection as a fundamental right. Furthermore, the application of Justice Frankfurter's test to the principal case points squarely to a violation of due process, for the North Carolina trial court has obviously prevented "a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."40

The majority opinion can be defended on the ground that even with respect to ancient rights specifically protected by the Bill of Rights as against federal encroachment, the presumption of constitutionality that attaches to state procedures having historic local sanction can be overcome only by convincing proof of essential unfairness to the accused in the particular instance—unfairness so patent as to contravene fundamental principles of justice.

For the second time, the Supreme Court has held that state procedure subjecting an accused to double jeopardy does not deprive him of due process under the Fourteenth Amendment. Although dicta in both cases indicate that a flagrant imposition of double jeopardy would be held to violate the due process guarantee,41 on neither occasion did the Court draw a precise line as to where deprivation of due process begins. However, the strong dissent in the present case, together with Justice Frankfurter's special concurrence,42 gives indication that the North Carolina procedure "went to the verge of the law."43

ROBERT E. GLENN

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41"What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials... There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." Palko v. Connecticut, 302 U. S. 319, 328, 58 S. Ct. 158, 160, 82 L. ed. 288, 293 (1937). There is no such inference raised in the Court's opinion in the Brock case, but Justice Frankfurter, concurring, said, "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted...." Brock v. North Carolina, 73 S. Ct. 349, 351, 97 L. ed. 317, 321 (1953).
42Justice Frankfurter's attempt to set a standard in his concurring opinion has not helped to clarify the situation materially, inasmuch as it seems that the instant case should have been decided the other way under this very test.
Constitutional Law—Recovery of Damages for Breach of Racial Restrictive Covenant in Deed as Violative of Fourteenth Amendment. [California]

Since the United States Supreme Court’s decision in Shelley v. Kraemer1 in 1948, state courts have given strict effect to, and in some instances extended, the principle that the granting of an injunction to enforce a racial restrictive covenant is state action denying to certain citizens the equal protection of the laws, and, as such, violative of the Fourteenth Amendment.2 The Supreme Court of Illinois relied on the Shelley ruling, which had to do with restrictions on the sale of property, as the basis for striking down an injunction which would have forced defendant to adhere to a covenant which prohibited leasing to members of the restricted races.3 The contention that the defendant-grantee took with notice of the restrictive covenant and was therefore "estopped" from claiming the constitutional protection accorded the defendants in the Shelley case4 has been rejected in cases involving

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1 344 U. S. 1, 20, 68 S. Ct. 896, 845, 92 L. ed. 1161, 1184 (1948): "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. . . . Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color." The constitutionality of specific enforcement of racial restrictive covenants was doubted by one authority before the Shelley case. See McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5. But with a single exception, Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892), the courts had never before refused to enforce a racial restrictive covenant on constitutional grounds. Note (1948) 34 Va. L. Rev. 306.

2 Coleman v. Stewart, 33 Cal. (2d) 703, 204 P. (2d) 7 (1949); Clayton v. Wilkins, 32 Cal. (2d) 892, 197 P. (2d) 162 (1948); Tovey v. Levy, 401 Ill. 393, 82 N. E. (2d) 411 (1948); Malicke v. Milan, 320 Mich. 65, 32 N. W. (2d) 253 (1948); Woytus v. Winkler, 357 Mo. 1082, 212 S. W. (2d) 411 (1948); Rich v. Jones, 142 N. J. Eq. 215, 59 A. (2d) 839 (1948); Kemp v. Rubin, 298 N. Y. 590, 81 N. E. (2d) 325 (1948); Earley v. Baughman, 200 Okla. 649, 199 P. (2d) 210 (1948). In Dorsey v. Stuyvesant Town Corporation, 299 N. Y. 512, 87 N. E. (2d) 541 (1949), cert. denied, 339 U. S. 981 (1950), the Court of Appeals of New York held that a private housing corporation which had been organized under a special state statute and was consequently subject to certain special limitations and supervision by the state in return for which it received tax concessions and certain other advantages, could refuse to accept tenants because of their race, color or religion; its action was not state action so as to violate the Equal Protection Clause of the Fourteenth Amendment. There was a strong dissent. See Note (1950) 23 Temple L. Q. 209.

3 Tovey v. Levy, 401 Ill. 393, 82 N. E. (2d) 441 (1948).

4 The Shelley case originated as a suit in equity for an injunction to restrain defendants from taking possession of the property and to divest defendants of the
restrictions on sale,\(^5\) and on use and occupancy and the right to lease.\(^6\) A decision which denied specific enforcement of a restriction in the form of a forfeiture provision was sustained by the Texas Court of Civil Appeals,\(^7\) which also rejected the plaintiff's contention that the covenant, although admittedly not entitled to specific enforcement, was a good defense to the defendant's cross-action for possession.\(^8\) In a habeas corpus proceeding, the Supreme Court of California decided that the petitioners, who had been imprisoned for contempt for refusing to obey an injunction issued to enforce a restrictive covenant before the *Shelley* case, should be released, because "it is unquestionable that commitment for contempt for refusing to obey the order of the court to vacate the restricted property amounts to 'state action' to enforce the restrictions, within the purview of the decisions in *Shelley v. Kraemer* ..."\(^9\) And, although it was made clear in *Shelley v. Kraemer* that the restrictive covenants standing alone and without enforcement by the courts were valid,\(^10\) a California court has refused to issue a declaratory judgment to that effect.\(^11\)

Despite this general agreement in the interpretation of the effect of the *Shelley* decision,\(^12\) however, the courts are in direct conflict on one issue: whether the covenantee may recover money damages for the breach of a racial restrictive covenant, or whether the awarding of damages constitutes judicial enforcement prohibited by the Fourteenth Amendment.\(^13\)

title. Defendants had purchased without actual notice of the restriction on the property; however, the contract carrying the restriction was recorded. 344 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).


\(^6\) Tovey v. Levy, 401 Ill. 393, 82 N. E. (2d) 441 (1948).


\(^8\) Ex parte Laws, 31 Cal. (2d) 846, 193 P. (2d) 744 (1948).


\(^11\) There has been speculation as to various means of circumventing this effect. See Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases (1949) 16 U. of Chi. L. Rev. 203; Scanlan, Racial Restrictions in Real Estate—Property Values Versus Human Values (1949) 24 Notre Dame Law. 157; Note (1949) 37 Calif. L. Rev. 493.

\(^12\) The American Law Institute's Restatement of the Law considers a judgment for damages for breach to be enforcement of the contract. Restatement, Contracts (1932) § 14. See Note (1949) 12 Detroit L. J. 81.
During the year following the Supreme Court's momentous decision, the Missouri court, in *Weiss v. Leaon*, upheld a judgment for damages for the breach of a racial restrictive covenant on the ground that damages and injunctive relief are two distinct judicial remedies, and that the *Shelley* case, while declaring the injunctive relief to be unconstitutional, had decided nothing as to the question of damages. In the absence of any authority bearing directly on the issue, the court referred to the fact that the *Shelley* opinion had conceded that the covenant itself was valid, and then generalized: "For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages...."

Although this view has been severely criticized by reviewing writers, the Supreme Court of Oklahoma adopted substantially the same position in 1951 in *Correll v. Earley*. The specific question there was the sufficiency of a petition which alleged that the defendants had conspired to sell restricted land to an insolvent white person, who would then sell to Negroes, with the intent that the plaintiff should be damaged. The trial court, acting on the basis of the *Shelley* case, had sustained a general demurrer to the complaint, but the highest court of the state reversed, holding that the complaint stated a good cause of action for damages. The court professed to be giving full effect to the principle of the *Shelley* case, and once more it was emphasized that the United State Supreme Court had said the restrictive covenants themselves were valid. While this was a tort action, rather than one for breach of covenant, the court made it clear that the "vice of the

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1^359 Mo. 1054, 225 S. W. (2d) 127 (1949), noted (1950) 7 Wash. & Lee L. Rev. 178.
2^The court is here assuming the very thing which needs to be proved. Nowhere in the *Shelley* opinion did the Supreme Court refer to "specific enforcement." The term used throughout the opinion was "judicial enforcement." 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).
3^359 Mo. 1054, 225 S. W. (2d) 127, 131 (1949).
conspiracy" was the plan to deprive the plaintiff of his right to pursue defendants directly for damages for breach of contract.20

Opposing these decisions is the recent California case of Barrows v. Jackson,21 which finds direct support in decisions of the Supreme Court of Michigan and the United States District Court for the District of Columbia22 in declaring that "The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to buy a home and live in it. Distinction between direct and indirect state action is tenuous. The enforcement of a covenant by an action for damages furnishes a prepotent motive to prevent use or occupancy of property by non-Caucasians..."23 The California court, concluding that the Weiss case had confused "enforcement" with "specific enforcement,"24 took the position that the question in the Shelley case did not relate to the nature of the relief sought, but rather to whether the courts could take any action at all.25 "The thrust of the decision is aimed at prohibition of

20The court said, "This is one vice of the conspiracy." 205 Okla. 366, 237 P. (2d) 1017, 1022 (1951). But the language and tenor of the whole opinion bears out the belief that this was the vice of the conspiracy.

2112 Cal. App. (ad) 534, 247 P. (2d) 99 (1952). Three of the plaintiffs, the predecessor of the fourth plaintiff, and the defendant, owners of lots of land in Los Angeles, entered into a written agreement by which each bound himself and his successors by a covenant running with the land that no part of his realty should "be used or occupied by any person or persons not wholly of the white or Caucasian race." The agreement provided that if any of the lots should be used or occupied by any person not wholly of the white or Caucasian race, the covenantors of that lot and his successors would be liable to the other covenantors and their successors for all damages which they suffered as a result of the breach. The defendant conveyed one of the restricted lots without incorporating the restriction in the deed or making any reference to it. The day after the defendant moved off the property, persons not of the Caucasian race moved in. The action for damages was brought against the covenantor-conveyor.


24See note 15, supra.

25The Civil Rights Cases declared that the Fourteenth Amendment "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizen of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them equal protection of the laws." 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L. ed. 895, 899 (1883). The court in the Barrows case called attention to this declaration in a footnote, 247 P. (2d) 99, 111. Justice Bradley for the Supreme Court in the
judicial participation in the maintenance of racial residential segregation.... [Either injunctive relief or the damages remedy] necessarily calls upon the courts for action; each is, therefore, equally state action and equally within the proscription of the Fourteenth Amendment."26

To maintain racial discrimination was the purpose of the covenant; and liability for a damages judgment would serve that purpose as surely as would the availability of injunctive relief.27 The coercive effect of the damages remedy would be enhanced by the vexation and expense of defending a lawsuit. Though the Shelley opinions28 expressly stated that the Equal Protection Clause of the Fourteenth Amendment would not be violated so long as the purpose of racial restrictive covenants were effectuated by voluntary adherence to their terms, adherence to a covenant could never be said to be voluntary if the covenantee could recover damages from the covenantor for its breach.

In the only two other cases involving this question since the Shelley holding, the same conclusion was reached. A federal district court, in Roberts v. Curtis, interpreted "the ruling of the Supreme Court"29

Civil Rights Cases also said: "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges...."109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L. ed. 835, 839 (1889).


27"The coercive device of retribution in the form of damages is as effective as the coercive effect of injunction relief, although not as immediate." 112 Cal. App. (2d) 534, 247 P. (2d) 99, 112 (1952).

28Strict authority for the Roberts ruling was Hurd v. Hodge, 334 U. S. 24, 68 S. Ct. 847, 92 L. ed. 1161 at 1180 (1948), companion case to Shelley v. Kraemer which arose in the District of Columbia, a case in which the supreme Court based its holding against the granting of an injunction to enforce a racial restrictive covenant not on constitutional grounds, but rather on a federal statute, the Civil Rights Act of 1866. See Note 34, infra. Strictly speaking, therefore, the Roberts decision is not based on constitutional grounds, either. But the court there spoke of the Shelley and Hodge decisions in a single breath, seeming to regard them as separate expressions of one principle: "In the cases of Hurd v. Hodge and Shelley v. Kraemer, however, the Supreme Court changed the prior rules of law applicable to these covenants. The Supreme Court held that such contracts are not invalid so long as their purposes are achieved by voluntary adherence of the parties to the terms of the agreement. [This point was made in both decisions.] The Supreme Court further held that it was contrary to the Fourteenth and Fifteenth Amendments to the Constitution [this was held in the Shelly case, but not in the Hodge case] and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings [this was held in the Hodge case, but not in the Shelley case]." 93 F. Supp. 604 (D. C. D. C. 1950). In any event, the principle of the Roberts holding would seem to be the same as that of the Barrows decision—i.e., the giving of damages for breach of a racial restrictive covenant is enforcement of the covenant, and the Shelley and Hodge decisions barred judicial proceeding of any kind to enforce such covenants.
as "witholding any assistance by way of judicial action of any kind from the enforcement of such restrictive covenants." In Phillips v. Naff the highest court of Michigan alluded, as did the California court, to the "voluntary adherence" language in the Shelley opinion, and believed that the Supreme Court meant there could be nothing more than voluntary adherence. As to the effect of liability for a damages suit, the point was made, and later concurred in by the Barrows case, that it "would operate to inhibit freedom of purchase by those against whom the discrimination is directed...."

It seems plain that it is the intervention by the state, not the particular form of intervention, that is barred by the Fourteenth Amendment. Persons have a right to acquire, enjoy and dispose of property without being subject to any state interference based on racial considerations. If the vendor to persons in racial minority groups is to be liable in damages when he breaches a covenant not to sell to them, such persons are being hindered by the state. Vendors bound by such covenants then usually will be unwilling to sell to the proscribed persons; or, if they do sell, they will be inclined to raise the sale price of the property by an amount likely to cover any damages judgments they may incur. The vandees, although themselves members of the proscribed minority groups, may be bound by the covenant not to sell to another member of their own race unless they, also, are prepared to pay a damages judgment. And it will be less likely that they can sell to someone not of their own race for a fair price, since

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24 U. S. Const. Amend. XIV; Shelley v. Kraemer, 334, U. S. 1 at 10, 68 S. Ct. 836 at 841, 92 L. ed. 1161 at 1179 (1948); Terrace v. Thompson, 263 U. S. 197 at 215, 44 S. Ct. 17-18, 68 L. ed. 255 at 274 (1923); Buchanan v. Warley, 245 U. S. 60 at 74, 38 S. Ct. 16 at 18, 62 L. ed. 149 at 160-161 (1917); Holden v. Hardy, 169 U. S. 366 at 391, 18 S. Ct. 387 at 780 at 790 (1898); Sei Fujii v. State, 38 Cal. (2d) 718, 242 P. (ad) 617 at 624 (1950). Section 1978 of Revised Statutes, 8 U. S. C. A. § 42 (1942), 2 F. C. A. title 8, § 42 (1936), which was derived from § 1 of the Civil Rights Act of 1866, enacted by the Congress while the Fourteenth Amendment was under consideration, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." See also Civil Right Cases, 109 U. S. 3 at 22, 3 S. Ct. 16 at 29, 27 L. ed. 823 at 835 (1883); Strauder v. West Virginia, 100 U. S. 303 at 307-308, 25 L. ed. 664 at 665 (1880).
CASE COMMENTS

their occupancy has made the property less attractive to other persons, even for investment purposes.

The decision in Barrows v. Jackson, and earlier, the decisions in the Roberts and Phillips cases, more closely adhered to the spirit and language of the Shelley opinion than those decisions which construed that opinion as leaving untouched the availability of the damages remedy for the breach of a racial restrictive covenant. It is to be hoped that the Supreme Court of the United States may soon have an opportunity to make an express ruling that the damages remedy, like injunctive relief, is barred by the Fourteenth Amendment in these cases.

DONALD S. LATOURETTE

CONSTITUTIONAL LAW—VALIDITY OF STATUTE MAKING MEMBERSHIP IN SUBVERSIVE ORGANIZATION EVIDENCE OF UNFITNESS FOR EMPLOYMENT IN SCHOOLS. [United States Supreme Court]

The current congressional investigations directed at communist influences among teachers in American schools give renewed significance to the recent controversy over the attempt of the New York legislature to expel subversive persons from employment in the state public school system. In 1949 the New York legislature enacted the Feinberg Law to implement Section 12-a of the New York Civil Service Law, which authorizes the removal from public employment of anyone who advocates the forcible overthrow of the government. The Feinberg Law empowers the Board of Regents, after notice and hearing, to list subversive organizations, membership in which constitutes prima facie evidence of unfitness to serve as a public school teacher. After having been under attack in the New York courts since 1949, the constitutionality of this enactment has now been confirmed

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37Since the writing of this comment, the Supreme Court has affirmed the decision and approved the reasoning of the California court. Barrows v. Jackson, 73 S. Ct. 1031 (1953).

*Acknowledgement is made of the contribution of John C. Calhoun, Law Class of February, 1953, to the preparation of this comment.

1New York Laws (1949) c. 360.
by the United States Supreme Court in Adler v. Board of Education of the City of New York,4 the first occasion upon which such a statute has been passed on by the high court.5 The plaintiffs, who are taxpayers, parents, and teachers in New York, contended that the Feinberg Law was unconstitutional because it deprived them of free speech and assembly guaranteed by the First Amendment and made applicable to them by the Fourteenth, and because the procedure set up to fix guilt through proof of membership in listed organizations constituted a deprivation of property without due process of law.

In rejecting these arguments, the Supreme Court followed its previous pronouncement in United Public Workers of America (C. I. O.) v. Mitchell6 that public employment is a privilege, not a right, and consequently that restrictions of speech and assembly which would be unconstitutional in other circumstances, may be valid when imposed upon persons in public employment. The New York statute was held not to deny due process of law, because membership in listed organizations merely raises a rebuttable presumption against the plaintiffs and is not conclusive of guilt.7 Justice Douglas, with whom Justice

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5330 U. S. 75, 67 S. Ct. 556, 91 L. ed. 754 (1947). Federal government employees contested the constitutionality of the Hatch Political Activity Act, 53 Stat. 1147 (1939), 18 U. S. C. Supp. V, Section 611 (1946), which limits the freedom of government employees to participate in political campaigns. The Court held that federal government employees are in a peculiar status, for political activity on their part would threaten efficient administration, and a Congressional Act to forestall this occurrence is constitutional.

6This fruitless contention by the plaintiffs was based upon the theory that the law proclaimed that membership in an organization listed by the Board of Regents constituted prima facie evidence of disqualification, whereas the fact found allegedly bears no relation to the fact presumed. In this instance the fact found was that an organization of which the person in question was a member had for its purpose the violent overthrow of the government and that this purpose was known by the person, and the fact presumed was that such person is disqualified for employment. The Court rejected plaintiffs' argument and took the view that disqualification follows as a reasonable presumption from membership in and support of listed organizations. A further due process objection raised by the plaintiffs was similarly denied by the Court because the presumption growing out of a prima facie case remains only so long as there is no substantial evidence to the contrary. Moreover, a hearing is afforded the aggrieved party at which substantial evidence to rebut the presumption will be heard, and once such evidence is received, the officer who made the order of ineligibility then has the burden of sustaining the validity of the order by a fair preponderance of the evidence. At this point should an order of ineligibility be issued, the party in question may still avail himself of the review procedure according to Section 12 (d) of the Law. The Feinberg Law was thus held to provide adequate assurance of due process.
Black concurred in dissent, rejected the Court's view that when a person enters public service he sacrifices his civil rights, and expressed unwillingness to concur in the Court's acquiescence in "a principle repugnant to our society—guilt by association...." Justice Frankfurter also dissented, but on the ground that the issue was not ripe for decision because the plaintiffs had failed to show any present injury and thus had no standing to raise the question of constitutionality.

In such controversies involving charges of governmental invasion of civil rights, courts must decide in favor of one of the two divergent concepts: the interest that a government has in preserving itself from those who would destroy it, as opposed to constitutional guaranties normally enjoyed by citizens. In arriving at a decision, a court necessarily employs a balancing process, and it is apparent in the principal case that the imminent threat of communistic infiltration in the public schools was deemed sufficiently serious to sway the balance in favor of the preservation of constitutional government.

In opposition to the Court's affirmation of the privilege theory, Justice Douglas' able dissent makes the point that nowhere in this country's tradition is there support for the view lately taken by the

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6 Adler v. Board of Education of the City of New York, 342 U. S. 485, 508, 72 S. Ct. 380, 393, 96 L. ed. 295, 308 (1952). The crux of Justice Douglas' dissent is that the Constitution guarantees freedom of thought and expression to everyone in our society and that the mere fact that a person enters the employment of the government is no just reason for denying him his full civil rights. Furthermore, the manner in which the Feinberg Law proceeds is appalling to Justice Douglas for as he termed it the use of "guilt by association," when drawn to its extremity, will turn the school system into a spying project, and the result will become constant surveillance of the teachers—a typical police state measure.


8 Note (1952) 5 S. C. L. Q. 85, 86. "The preamble of the Feinberg Law, Section 1, makes elaborate findings that members of subversive groups, particularly of the Communist Party and its affiliated organizations, have been infiltrating into public employment in the public schools of the State; that this has occurred and continues notwithstanding the existence of protective statutes designed to prevent the appointment to or retention in employment in public office, and particularly in public schools, of members of any organizations which teach or advocate that the government of the United States or of any state or political subdivision thereof shall be overthrown by force or violence or by any other unlawful means...." Adler v. Board of Education of the City of New York, 342 U. S. 485, 493, 72 S. Ct. 380, 385, 96 L. ed. 295, 300 (1952). "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern...." 342 U. S. 485, 493, 72 S. Ct. 380, 385, 96 L. ed. 295, 300 (1952).
Court that when a citizen takes the mantle of public office he no longer enjoys the full constitutional rights of other citizens. This argument is persuasive, and Justice Douglas dramatizes its significance by labelling public school teachers "second class citizens." However, the soundness of the contention may suffer somewhat upon analysis. Men in the armed services on this reasoning would have to be termed "second class citizens," because they have relinquished a portion of the full complement of constitutional rights that other citizens enjoy. It is recognized that since a serviceman is charged with public responsibility in defending the national security, he temporarily must give up some personal rights normally guaranteed by the Constitution, in order effectively to assure the carrying out of this responsibility. This sacrifice, however, is not regarded as reducing his rank as a citizen. Similarly a teacher who "works in the sensitive area in a schoolroom" in shaping "the attitude of young minds toward the society in which they live," is engaged in public employment in an area in which "the State has a vital concern" and for which the State may establish requirements of "fitness and loyalty." The teacher should not, for this reason, be termed a second class citizen when called upon to forego certain rights normally enjoyed by others not so sensitively situated.

It is notable that the Supreme Court did not expressly mention the traditional "clear and present danger" test, first announced by Justice Holmes in Schenck v. United States in 1919, and amplified by Justices Brandeis and Holmes in their dissenting opinion in Gitlow v. People of New York in 1925. In the Gitlow case the majority of the Court up-

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12a 268 U. S. 652, 672, 45 S. Ct. 625, 632, 69 L. ed. 1138, 1149 (1925). Because the defendant printed and circulated "The Left Wing Manifesto," a journal depicting the necessity for overthrowing the government by force and violence, he was convicted of violating the New York criminal anarchy statute, under which the advocacy or teaching of the doctrine of the overthrow of the government by force and violence was made felonious. The majority of the Court upheld the statute as a reasonable exercise of the police power in the face of a threat to the security of the state, and rejected the need for a clear and present danger because it was not deemed reasonable for the state to be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbance of the public peace or imminent and immediate danger of its own destruction.

The dissent, on the other hand, reasoned that the clear and present danger test should have been applied because an admittedly small minority followed the defendant's views, and thus the ideas expressed in the "Manifesto" had no real
held the New York penal law authorizing the arrest and conviction of any person teaching the violent overthrow of the organized government, because the statute was deemed a reasonable exercise of the police power of the State. The Court held that the clear and present danger test had no application in the situation where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character. Under this view, if the statute constitutes a reasonable means to avert a threat to public security it will be upheld. However, the reasonableness test was not followed in subsequent cases. Rather, the Court returned to the clear and present danger test, applying it strictly in cases in the 1940's to strike down a statute prohibiting picketing and a statute requiring the registration of labor organizers. In 1951, in Dennis v. United States, however, the Court refused to be bound by the "present" aspect of the test, announcing instead that if the threat was sufficiently substantial, the fact that the danger was not immediate was immaterial. The Court pointed out that:

"Obviously, the words [clear and present danger] cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

Sustained by this recent precedent, the Court was able to approach the principal case from the standpoint of a balance of interests, instead of being bound by a strict application of the clear and present danger test. On this basis it was ruled that the constitutional right of free speech and assembly are not abridged in the present situation.

chance of starting a present conflagration. For the statute to qualify as a privileged withdrawal of First Amendment guaranties under this view, it must be calculated to avert a clear and present danger to the state's security, and also the threatened danger must have some chance of success.

2Gitlow v. People of New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925). The defendant, who was convicted of the statutory crime of advocating and teaching the overthrow of the government by force and violence, attacked the statute as repugnant to the Due Process Clause of the Fourteenth Amendment. The Court upheld the statute as a reasonable means taken by the state to insure its primary and essential right of self-preservation.

Teachers have no right to work for the state on their own terms, but rather are subject to reasonable terms imposed by the state authorities. If they do not choose to work on such terms, they are at liberty to retain their associations and go elsewhere; and certainly, one’s associates and conduct are reasonable factors to be considered in determining fitness and loyalty. As a prelude to the Adler decision, the Court had previously upheld a state statute requiring a candidate for public office to take an oath that he is not a member of a subversive organization, and a city ordinance requiring a loyalty oath of each of its officers and employees. In each of these cases the position was taken that one who accepts the privilege of public office-holding may be required to surrender some liberties enjoyed by citizens generally.

The Court unquestionably encountered a difficult balancing process when it was confronted with the Adler case. Having already sapped the strength of the clear and present danger test in the Dennis case, the Court had to employ a new standard. Thus, the “privilege view” of the Mitchell case was coupled with a reasonableness test strikingly similar to the test employed in Gitlow v. People of New York to form the new criterion for determining the constitutionality of statutes which infringe First Amendment guaranties. An interesting point of speculation is whether or not it was intended in the Adler case to rehabilitate the Gitlow case test of reasonableness. The latter decision was cited with approval and without qualification. Futhermore, the “appropriateness” of testing loyalty by considering one’s associates, mentioned in the Adler case, and the “reasonableness” of the statute as a means to prevent the violent overthrow of the government by force, mentioned in the Gitlow case, are undeniably similar—if not synonymous—tests.

JOHN P. WARD

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20 Accord: Board of Regents v. Updegraff, 205 Okla. 301, 237 P. (2d) 131, 137 (1951) (a teacher does not have a constitutional right to government employment, and the legislature can make reasonable restrictions).
25 For further law review comment on the Adler case see: Notes (1952) 66 Harv. L. Rev. 89, 121; 36 Minn. L. Rev. 961; 100 U. of Pa. L. Rev. 1244.
While generally the fixing of punishment for one convicted of crime is the function of the presiding trial judge, and the jury is limited to the determination of the guilt or innocence of an accused, a number of states, including Virginia, have provided by statute that the jury shall either recommend or actually assess the proper punishment.

In the operation of this system, the courts are divided as to the extent to which the jury, in the execution of its sentencing function, is to be informed of the possibility that its sentence may in some manner be set aside, changed, or modified by the operation of laws relating to pardons, paroles, or the commutation of sentences. While there is considerable authority which holds that the jury is entitled to be fully and adequately informed of these matters, there are decisions sustaining the proposition that no such information should be given. Even among courts adopting the latter position, disagreement arises as to the consequences of error committed in the trial court in this regard. Some courts have ruled that though a voluntary instruction concerning the parole system was "unfortunate," or even error, it was not so serious as to warrant reversal. An opposite result

1 14 Va. Code Ann. (Michie, 1950) § 19-267. "The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law."


3 C. J. S., Criminal Law § 1379.


7 People v. Sukdol, 322 Ill. 540, 153 N. E. 727 (1926).
has been reached in other cases, where such an instruction is held to constitute reversible error because it induced the jury to impose a greater punishment than it would otherwise have done,⁸ or because it might result in a compromise verdict.⁹ One court, while disapproving of the voluntary instruction concerning parole laws, held that a response to an inquiry by the jury on this subject is not error if fair and not indicating or suggesting what the jury should or should not do; however, this court suggested that in the future, the trial court should fairly answer the inquiry but the answer should be coupled with an admonition that the jury should not speculate on what might happen after the verdict.¹⁰ Yet when this course was followed in another jurisdiction, it was held to constitute reversible error.¹¹

The Supreme Court of Appeals of Virginia was squarely faced with this problem recently in Jones v. Commonwealth,¹² and while the decision was unanimous that the trial court had committed reversible error in its directions to the jury in this matter, the Justices were split 4 to 2 in regard to what was the proper course for the trial court to follow. The defendant was indicted for first degree murder, punishable in Virginia by life imprisonment or death, for having stabbed his wife to death upon a public street in the presence of a number of disinterested witnesses. The defense interposed was that the defendant, while admittedly attempting to disfigure his wife for the avowed purpose of making her less attractive to other men, was suddenly overcome by a blackout spell during which he knew nothing of his actions. Evidence was admitted that the defendant had previously suffered such attacks, and medical records, including a medical discharge from the army, corroborated evidence that the spells were epileptic in nature.

After the jury had considered its verdict for about two hours, the foreman came before the court and, in the presence of the defendant, his counsel, and the commonwealth's attorney, stated that the jury had decided that the defendant was guilty of murder in the first degree, but the jurors wanted to know whether, if they gave him life imprisonment, a term of ninety-nine years or any long terms of years, they would have any assurance that the defendant would not "get out." The court replied that it could "not give that assurance; that would be

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¹⁰State v. Carroll, 52 Wyo. 29, 69 P. (2d) 542 (1937).
¹²194 Va. 273, 72 S. E. (2d) 693 (1952).
in the hands of the executive branch of the government and that the court was of the judicial branch; that you and I represent the judicial branch and have nothing to do with that."

Defendant's counsel then inquired of the court, out of hearing of the jury, whether it would be proper to advise the jury that a person sentenced to life imprisonment is not eligible for parole, but the court answered in the negative. Following these colloquies, the jury again retired and after twenty or twenty-five minutes returned a verdict of guilty of murder in the first degree and fixed the punishment at death.

The Supreme Court of Appeals, concluding that the court erred in the nature of its response to the inquiry put to it by the jury and that such error was sufficiently prejudicial as to warrant reversal, remanded the case for a new trial. The majority of the court followed the rule established in 1935 by Coward v. Commonwealth, that, upon inquiry of this nature by the jury, the trial court shall instruct that it is the duty of the jury, if it finds the accused guilty, to impose such punishment as it considers to be just under the evidence and within the limits of the court's instructions, and not concern itself with what may afterward happen. Therefore, by answering that it could not give the requested assurance that the accused would not "get out," the trial court in the principal case had led the jury to believe that the defendant might be released at some future time, whereas in truth, had the defendant received a sentence of life imprisonment he would not have become eligible for parole.

The procedure adopted under the Coward decision was designed to enable the trial court to avoid any semblance of influencing the jury in its decision, either in increasing or decreasing the severity of the penalty which it might consider proper. A second consideration advanced for denying information concerning the operation of post-trial, extra-juridical machinery of pardons and paroles, is that a contrary rule, providing for a fully informed jury, would tend to frustrate the operation of laws which are designed for the handling of prisoners.

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194 Va. 273, 275, 72 S. E. (2d) 693, 694 (1953).

164 Va. 639, 178 S. E. 797 (1935). Defendant, convicted of driving while under the influence of intoxicants and sentenced to three months in jail and fined $100, excepted to the trial court's action, in response to an inquiry by the jury as to what time the defendant would get off while confined in jail, of reading the statute providing for commutation of sentence, conditioned upon good behavior, at the rate of ten days per month of sentence. The court held that the response was reversible error in that it permitted the jury to fix the actual time of confinement; but by way of dicta, it was indicated that such an error was harmless where the minimum sentence was imposed and harmless in murder cases where the sentence is death.
Those laws, relating to the good conduct allowances made to prisoners, are designed to further the interest of both the public at large and the convict by promoting good conduct in the penal institutions. Any consideration of the possible operation of such a system, made at the time that sentence is passed, could well work an injustice on the accused and defeat the legislative intent. Thus, a jury which considers ten years imprisonment adequate for the crime charged, might, upon being apprised of the possible effects of a law relating to parole or commutation of sentence, impose a sentence of twenty years in order to be sure defendant would actually be confined for at least ten years. Viewed from the opposite standpoint, however, the rationale of the Coward rule has been said to rest on the possibility that a jury will view its task lightly if advised that its sentence may not be carried out, but rather is subject to modification by the operation of law relative to pardons and paroles. The Virginia court further noted that since arguments by counsel are precluded from touching upon the subject of possible subsequent parole action, it should hardly be the subject of an instruction to the jury, voluntary or otherwise. Counsels have been repeatedly warned that comment of this nature is “improper and out of place;” but usually, while criticizing such conduct, the courts refuse to reverse the case on this point alone. However, in the face of general criticism of this practice, the

16 "Plainly, such a verdict would be indefensible." Coward v. Commonwealth, 164 Va. 639, 642, 178 S. E. 797, 798 (1935); also see State v. Mosley, 102 N. J. L. 94, 131 Atl. 292, 297 (1923) (dissenting opinion).
17 See State v. Carroll, 52 Wyo. 29, 69 P. (2d) 542, 561 (1937). This consideration may explain the dicta found in Coward v. Commonwealth (see note 14, supra) that the giving of such instructions, while generally objectionable, is harmless in murder cases where the sentence is death, for it could hardly be said then that the jury viewed its task lightly.
19 Some cases distinguished between instances where the questionable instruction is “voluntary”—i.e., given by the court as a part of its charges to the jury sui sponte—and where the instruction is responsive to an inquiry put to the court by the jury, but the problem is much the same. As an example of a voluntary instruction, see State v. Rombolo, 89 N. J. L. 565, 99 Atl. 434 (1916); the principal case exemplifies an instruction responsive to an inquiry.
20 Commonwealth v. Earnest, 342 Pa. 544, 21 A. (2d) 38, 41 (1941). Also People v. La Verne, 212 Cal. 29, 297 Pac. 561 (1931); Wechter v. People, 53 Colo. 89, 124 Pac. 183 (1912); Pollard v. State, 201 Ind. 180, 166 N. E. 654 (1929).
21 People v. La Verne, 212 Cal. 29, 297 Pac. 561 (1931); Wechter v. People, 53 Colo. 89, 124 Pac. 183 (1912); People v. Murphy, 276 Ill. 304, 114 N. E. 609 (1916); Holmes v. Commonwealth, 241 Ky. 573, 44 S. W. (2d) 592 (1931). Contra, State v. Hawley, 229 N. C. 167, 48 S. E. (2d) 35 (1948).
absence of reversal can hardly be viewed as implied permission by the courts to counsel to make such comments to the juries. The concurring minority of the Virginia court in the principal case rejected the Coward rule as being against both reason and authority, and asserted that the trial court, instead of refusing completely to respond to the jury's inquiries, should fully inform the jury of the good conduct allowances for convicts, of the eligibility of a convict for parole, and of the constitutional power of the Governor to grant pardons or reprieves. These Justices felt that "no prejudice would have resulted had such information been given in simple and direct language." Under this view, the reversal of the verdict was required because the trial court's reply to the jury was so grossly inadequate as to be misleading and prejudicial to the interest of the accused.

In support of its rule, the concurring minority contended not only that it is in accord with the weight of authority, but also that an understanding of these laws is necessary to enable the jury to make a proper and intelligent determination of the sentence. Furthermore, the fact that the jury, of its own volition, directed the inquiry to the court is indicative that at least one or more of the jurors had some knowledge of the existence of laws relating to pardon and parole, and only by an adequate and accurate answer could erroneous concepts concerning such laws be effectively dispelled. A refusal to answer the jury's inquiry would only leave the jurors confused and subject to the incomplete knowledge of those having even a remote understanding of these matters. The opinion of the concurring minority also

22But see Note (1941) 90 U. of Pa. L. Rev. 221, 222, adopting a contrary view by stating that "most courts permit the prosecutor to mention parole possibilities in addressing the jury."


25Va. Code Ann. (Michie, 1950) § 53-228; Va. Const. (1902) § 73. Since the gubernatorial pardon is an extraordinary power, rarely restored to, and applicable to all sentences regardless of their severity, it cannot be thwarted by the jury's varying of the sentence, and would seldom influence their decisions.

26Jones v. Commonwealth, 194 Va. 273, 283, 72 S. E. (2d) 693, 698 (1952) (concurring opinion).

27State v. Carroll, 52 Wyo. 29, 69 P. (2d) 542 (1937).

28Jones v. Commonwealth, 194 Va. 273, 280, 72 S. E. (2d) 693, 697 (1952): "The object of the penalty is to punish the accused, deter others from crime, and to protect the public. In considering these elements, questions naturally arise whether the accused will be required to suffer the punishment imposed, or will be able to escape therefrom by reason of the provision of some other law. In such consideration, the jury cannot act intelligently in determining the measure of punishment to fit the crime and the man, unless they have knowledge of the possible consequences of the law relating to the payment of the penalty by the convict."
noted that when the judge is charged with passing sentence, he knows, or ought to know, whether the penalty imposed will be diminished at some future time by some other agency; therefore, when the jury is charged with this duty, it should be similarly informed.

The Supreme Court of Appeals' decision in the principal case is consistent with its earlier decisions in that the case was remanded because of the possibility that the defendant was prejudiced, yet its application of the procedure laid down in the Coward case seems unwarranted, if not illogical, under the facts and law applicable to this case. Basically, the Virginia court considers that the Coward rule gives the accused the benefit of any and all parole laws, by denying the jury the possibility of increasing the sentence in order to frustrate the operation of these laws. Certainly the procedure which prohibits the trial court from giving any information to the jury commends itself in the simplicity of its application, and in cases in which parole possibilities actually exist, there is little likelihood that this practice will directly influence the jury. Yet it is subject to the objection that it fails to dispel erroneous notions implanted earlier by partially informed jurors, despite the fact that the court, in lieu of an answer, admonishes the jurors that "such matters are not a proper matter of your concern." It would appear that this objection might be removed by including within the final instructions to the jury an admonition that it is to exclude any considerations of possible pardon or parole,29 since these matters have no application whatever to a criminal trial.30 While this would represent somewhat of an innovation, it would avoid the pitfall of leaving the matter without proper instruction until brought to the fore by an inquiry by the jury, and would stifle the exchange of erroneous ideas by preventing one ill-informed juror from foisting his "little learning" upon the others.

The rule providing for full information, as applied to cases in which parole possibilities actually exist, appears defective in that it indirectly encourages as a part of the present determination of sentence

29Such an instruction to the jury might proceed as follows: "In the event that you determine that the accused is guilty of the crime as charged, it is then your duty to impose such penalty as you think appropriate, in view of the nature and circumstances of the crime, and the character of the accused as revealed by his record and your impressions of him at the trial and at no time during your deliberations shall the possible subsequent action of laws relating to commutation of sentence or parole, or possible action by the Governor, enter into, or in any manner affect these deliberations, for these are matters of which you are not properly concerned."

30"The Parole Law . . . has no application whatever to criminal trials and it was error for the court to give the instruction." People v. Sukdol, 322 Ill. 540, 153 N. E. 727, 729 (1926).
by the jury, unfounded speculation as to the future actions of the accused, the Board of Paroles, and, indeed, of the Governor.

However, in order for these considerations to be valid, the case must be one in which the possibility of commutation of sentence or parole actually exists, for otherwise there is no legislative intent capable of being defeated, and the jury, in fixing the sentence would have no occasion to be motivated by commutation or parole possibilities.

The court did not take notice of the fact that in the principal case the possibilities of parole did not actually exist, since the jury has but two choices of sentence, either life imprisonment, from which there is no parole, or death. Thus, the Coward rule, designed as a safeguard for the accused, could not possibly aid the accused under the circumstances. On the contrary, the procedure required by the Coward rule could obviously work to the detriment of this defendant, as the facts of the principal case emphatically demonstrate. Under this self-imposed judicial silence the court leaves the jury in position to believe erroneously that there is a possibility that if it should sentence the accused to life imprisonment only, he may be eventually paroled. Since the majority of states do permit life-termers to be paroled, and the newspapers carry frequent accounts of such paroles being granted, it is entirely reasonable for the jury to entertain such a belief. Thus, the jury may feel compelled to render a death verdict in order to protect society from a repetition of such a crime, although it might well feel that, because his offense was committed involuntarily when under a mental affliction, the accused does not deserve to be put to death. The manner in which the jury in the principal case proceeded in fixing the accused's sentence indicates that it thought he needed only to be isolated from society for the remainder of his life, and that it would have preferred to impose that sentence if granted the assurance which is in

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8As to the length such speculation might be carried, consider the following: A and B commit the same offense and both are found guilty. The jury deems 10 years confinement as an adequate punishment considering the nature of the offense. A appears recalcitrant and is obviously an incorrigible, whereas B, on the other hand, is the epitome of humility and is overcome with remorse. Would a sentence of 10 years for A, and 20 years for B, be proper? This would appear absurd, but, had the jury inquired of the court and been advised of the laws relating to commutation of sentence or parole, it would realize that B, because of his virtues, would probably become eligible for parole when but one half of his sentence had expired, whereas A, because of his surly nature, probably would never qualify for parole. Thus, the jury, by considering parole possibilities, and indulging in sheer speculation, could almost certainly effectuate its desire that each offender serve 10 years in prison, but such a result would be an outrage.

fact provided by the legislature in excluding life-termers from parole.\textsuperscript{33}

It would seem, therefore, that since the reason for the Coward rule fails, the rule should not be applied to Virginia cases wherein the charge is first degree murder. Thus, while the members of the Virginia court have divided as to which of two rules to adopt, they could have very properly considered the advisability of applying the one rule or the other to each case as the circumstances of the individual case dictate, limiting the Coward rule to cases wherein the possibility of parole or commutation of sentence exists. Regardless of the relative merits of either the "no-reply" rule or the "fully responsive" rule, the Virginia Supreme Court of Appeals has embraced a rule thought to be most favorable to the accused, and by doing so has failed to recognize that it operates to the accused's disadvantage when he is found guilty of first degree murder. If the adoption of a rule or rules governing the trial court's instructions to the jury is to depend upon securing to the accused the greatest advantage, then under its own reasoning, the Virginia court could well consider the following possibilities:

(a) Where the sentence involves the possibility of parole, then the Coward rule of refusing to answer an inquiry concerning the effect of laws relating to parole should be applied.

(b) Where the sentence involves no possibility of parole, then the full and responsive answer should be given.

Kimber L. White

DOMESTIC RELATIONS—LIABILITY OF ESTATE OF DECEASED DIVORCED HUSBAND FOR SUPPORT OF CHILDREN UNDER DIVORCE DECREE. [Virginia]

Among the innumerable problems, legal, social, and moral, which arise out of divorce, the courts are properly most deeply concerned with those which affect the welfare of the children of the separated parents.\textsuperscript{1} One of the perplexing legal issues in that regard, on which

\textsuperscript{33}See Jones v. Commonwealth, 194 Va. 273 at 282, 72 S. E. (2d) 693 at 698 (1952).

\textsuperscript{1}Over 371,000 divorces were granted in the United States during the calendar year 1951, a ratio of almost one divorce out of every five marriages performed in that same year. In the state of Virginia alone 6,005 divorces were granted over the year, constituting a break-up of one family for every six marriages recorded over the same period. "The child in every divorce case has ipso facto a status of disadvantage which challenges the judge, and opens to him the duty to reduce it so far as possible." Waite, Children of Divorce In Minnesota: Between The Millstones (1948) 32 Minn. L. Rev. 766.
the decisions are in wide disagreement, is whether the divorced father's liability for the support and maintenance of his minor children survives his death, thereby operating as an enforceable lien against his estate.

This question has recently been decided for the first time in Virginia in the case of *Morris v. Henry.* Twenty years earlier the present defendant had been granted an absolute divorce from her husband on grounds of adultery, and that decree ordered the husband to pay the complainant wife "as alimony and support for the infant daughter . . . until further order of this Court," $40 a month; gave permanent custody of the child to the complainant and terminated all property rights of each in the property of the other. The decree further provided that an injunction previously granted, restraining the defendant from disposing of his property, be continued in force; that if the defendant failed to make the payments required by the decree, the complainant should have the right to apply to the court for such order as might be necessary to subject the defendant's property 'held under the said injunction'; and the cause was retained on the docket for such further orders relative to alimony and support as the court should consider necessary and proper." Just two months after the issuance of that decree the husband conveyed his real estate to his father, and some six months thereafter he died intestate. His infant daughter, in the custody of the mother, did not reach the age of 21 until nearly eighteen years later. The deceased husband's father instituted the present suit asking for a decree that all real estate conveyed to him by his deceased son be absolved of any lien or encumberance as a result of the earlier divorce decree against his son; or if such earlier decree did constitute a lien, then for a determination of the amount of that lien. On plaintiff's appeal from an adverse decision of the Circuit Court, the Supreme Court of Appeals held that, under the Virginia statutes the offending husband in this case was charged with the payment of a monthly sum for alimony and support of his infant daughter, which sum was to become a lien upon the land he then owned, and "to the extent . . . that the amount thereof was for the benefit of the infant daughter, was . . . to . . . continue in effect after the death of her father, and until she became twenty-one years old or self supporting . . .." and that such part of this monthly sum "as the court should, after hearing evidence, determine to have been for the support of the

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daughter should be a charge against the estate of..." the deceased.5

The conflict in the decisions of the various jurisdictions on this issue appears to be traceable to four factors.

First: The fundamental common law concept is that a father's obligation to support his minor children operates only during his lifetime and terminates on his death. Generally, the father's duty to support his minor children during his lifetime is regarded as a legal duty which is "correlative to and dependent on the parent's right to the custody and services of the child..."6 and which "springs from the fact of parentage."7 Though the growing tendency of the law is to protect children who are caught in the midst of a statutory marital dissolution,8 the heavy hand of the common law prevails so strictly that the courts in some jurisdictions are still reluctant to overthrow the firmly entrenched principle that the duty of support terminates on the death of the father.9

Second: The matter of care and support for minor children of divorced parents is now generally regarded as governed by divorce

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7Whitsett, Selected Essays On Family Law, Comment on "Extent Of A Parent's Duty Of Support" (1950) 1072. Even the strict common law jurisdictions hold the father liable for support during his life regardless of whether there is a divorce or separation unless the court expressly orders that the mother support the child instead: Blades v. Szatai, 151 Md. 644, 135 Atl. 841, 50 A. L. R. 232 (1927); Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 452 (1887); 17 Am. Jur., Divorce and Separation § 953. See Mullen v. Mullen, 188 Va. 259, 49 S. E. (2d) 349 (1948); Hawkins v. Hawkins, 187 Va. 595, 47 S. E. (2d) 436 (1948).
legislation rather than common law principles. However, since the statutes speak in extremely broad language and usually fail to make express provision on the point, it still remains for the courts to determine whether the law of the state goes beyond the common law rule by making the divorced father's liability for support continue after his death. Though it appears that all statutes properly could be construed as so extending the common law liability, not all courts have done so, and the decisions contain numerous instances of inconsistent interpretations of practically identical statutory provisions.

Third: The methods of enforcing a decree of support against the divorced father differ greatly throughout the various jurisdictions. Most courts declare that the divorce decree itself operates as a lien on the real estate of the divorced father, thereby rendering the child a judgment creditor, who can foreclose against this estate at any time upon the father's failure to pay the stipulated amount required in the decree. Generally, this lien is held equally applicable to future accruals and to presently due installments, and so operates against the father's estate after, as well as before, his death. A minority of

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11E.g., Fla. Stat. Ann (1943) § 65.14 which states that the court shall provide such support for the children as is "fit, equitable and just."
12See 2 Vernier, American Family Laws (1932) § 95. See also dissenting opinions in Guinta v. Lo Re, 159 Fla. 488, 31 S. (2d) 704, 706 (1947); Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948). It has been noted that Florida has a sufficiently broad and comprehensive statute, which the court failed to consider in the Guinta case, to enable it to support the survival of liability for support against the father's estate. Note (1948) 1 Fla. L. Rev. 95. The same would appear to be true under the West Virginia type statute as is suggested in the dissent to the Robinson case.
courts, nevertheless, are hesitant to carry the judgment lien principle this far, excluding its application as to all future accruals or installments becoming due after the father's death.\(^\text{17}\)

Finally: The divorce decrees often fail to make specific provision for what is to happen with regard to the father's liability for support in the event of his death. Usually, when the decree states that the payments shall be made "during the minority of the children" the courts hold the father's estate liable.\(^\text{18}\) But the most common type decree, one which is to take effect "until further order of the court," has been held susceptible to both constructions.\(^\text{19}\) And, in case the decree contains no provision at all for support or its duration, some courts will take it upon themselves to modify the decree so as to find the father's estate liable, while others will not do so.\(^\text{20}\) Frequently the problem of support is erroneously confused with the problem of alimony,\(^\text{21}\) though the two concepts are entirely distinct, alimony being an obligation created by statute and support an obligation arising under the common law.\(^\text{22}\)

The Virginia court's decision in *Morris v. Henry*\(^\text{23}\) is in accord with the majority view and the present trend in the decisions with regard to the scope of the divorced father's obligation to support his child.\(^\text{24}\)

\(\text{\footnotesize \text{\textsuperscript{17}}:\text{Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455 (1948). See: Blades v. Szatai, 151 Md. 644, 135 Atl. 841, 845 (1927); Note (1948) 33 Iowa L. Rev. 703.}\)

\(\text{\footnotesize \text{\textsuperscript{18}}:\text{Note (1949) 35 Va. L. Rev. 482, 493. Smith v. Funk, 151 Okla. 188, 284 Pac. 668 (1930); Murphy v. Moyle, 17 Utah 113, 53 Pac. 1010, 70 Am. St. Rep. 767 (1899).}\)

\(\text{\footnotesize \text{\textsuperscript{19}}:\text{Liability was imposed under such a decree in: Newman v. Burwell, 216 Cal. 608, 15 P. (2d) 511 (1932); Miller v. Miller, 64 Me. 484 (1874); Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 14 Am. St. Rep. 656 (1906). Contra: Barry v. Sparks, 306 Mass. 80, 27 N. E. (2d) 728, 128 A. L. R. 983 (1940); Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455 (1948).}\)

\(\text{\footnotesize \text{\textsuperscript{20}}:\text{See West v. West, 241 Mich. 679, 217 N. W. 924 (1928); Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 14 Am. St. Rep. 656 (1906) where the decree was modified. Contra: Guinta v. Lo Re, 159 Fla. 488, 31 S. (2d) 704 (1947) where decree did make provision for support but made no mention as to its duration.}\)

\(\text{\footnotesize \text{\textsuperscript{21}}:\text{See Roberts v. Roberts, 150 Md. 513, 154 Atl. 95, 100 (1931); Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274, 275 (1904); Warren, Schouler Divorce Manual (1944) § 338; 2 Vernier, American Family Laws (1932) § 104; Notes (1949) 35 Va. L. Rev. 482, 483; (1948) 33 Iowa L. Rev. 703. Note (1936) 11 Wash. L. Rev. 45, discusses the question of alimony survival.}\)

\(\text{\footnotesize \text{\textsuperscript{22}}:\text{See West v. West, 241 Mich. 679, 217 N. W. 924, 925 (1928); Warren, Schouler Divorce Manual (1944) § 338; Note (1949) 35 Va. L. Rev. 482, 484: "Thus a child may have a valid claim for maintenance against his father while his mother would not be entitled to alimony."}\)

\(\text{\footnotesize \text{\textsuperscript{23}}:\text{193 Va. 631, 70 S. E. (2d) 417 (1952).}\)

\(\text{\footnotesize \text{\textsuperscript{24}}:\text{Newman v. Burwell, 216 Cal. 608, 15 P. (2d) 511 (1932); Myers v. Harrington, 70 Cal. App. 680, 234 Pac. 412 (1925); Miller v. Miller, 64 Me. 484 (1874); West v. West, 241 Mich. 679, 217 N. W. 924 (1928); Creyts v. Creyts, 143 Mich. 375,}\)
On the issue of whether the courts have power to provide for payments by the father to support the child after the death of the father, it was noted that the very comprehensive Virginia statutes authorize the court to make such decree as it deems necessary and expedient "concerning the estate and the maintenance of the parties, or either of them, and the care, custody and maintenance of their minor children..." under the circumstances arising out of a divorce suit. In refutation of the view adopted by the minority jurisdictions that the common law still controls the issue of support of minor children in divorce cases, Virginia and the majority decisions accept the statutes as the governing factors in issues which arise out of divorce decrees. Such statutes are remedial and demand liberal construction "in the protection of the rights and interests of infant defendants," and "the evident purpose of the legislature was to give to the court the largest discretion in respect to the estate of the parties, and not to relieve the offending parents of any duty, moral, social, or otherwise." As a basis for imposing liability on the father's estate, the Virginia court embraced the reasoning of the early Maine case of Miller v. Miller: "We do not controvert the position..., that, by the rules of the common law, a father is under no legal obligation to provide for the support of his children after his death. It may be that he can disinherit them and leave them to be supported by others.... But we think such can only be the law when the family relations remain intact, and when there is no great danger..."}

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Exemplary are the following provisions from the Virginia Code: 4 Va. Code Ann. (Michie, 1950) § 20-108 provides for revision, alteration or modification of such decrees by the court on petition or by its own motion; 2 Va. Code Ann. (Michie, 1950) § 8-386 provides that every judgment for money operates as a lien on real estate of one against whom it was rendered; § 8-343 provides further that every decree or order of the court which requires payment of money shall have the effect of a judgment; and § 8-344 provides that those persons who are beneficiaries of the decree or order which requires the payment of money shall be deemed as judgment creditors.


64 Me. 484 (1874).
that such arbitrary power will be exercised. We think that when, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate."\(^{30}\) This point of view thus subscribes to a distinction between the fathers duty to support his minor children and the effect of a judgment based on such duty: "... the duty in absence of any adjudication terminates upon death, the judgment does not."\(^{31}\)

Having determined that the divorce court had the power to provide for such support, the Supreme Court of Appeals concluded that the 1932 divorce decree did, in fact, impose a lien on the realty of the father which is enforceable as against the plaintiff, as subsequent grantee of the property, and that the minor daughter stood as a judgment creditor against her deceased father's estate.

Exemplifying the reasoning of the minority of courts which have taken a quite positive position contrary to the Morris decision is the relatively recent case of Robinson v. Robinson.\(^{32}\) There, under facts almost identical with those in the principal case, the West Virginia court held that a divorce decree against the father requiring him to support his minor children during their minority added nothing to his common law obligation, and, therefore, would terminate on his death. The court argued that it is not logical "that an order of a court for support of children, based as it must be on his common law obligation, should be given the force and effect of a judgment for payment of money, and creating a lien for money not due at his death."\(^{33}\) This contention is supported by the observation of the earlier Maryland case of Blades v. Szatai, that it is difficult to see why "a child should be in a better position in respect to his father's estate than he would be without the decree for divorce."\(^{34}\) However, the Virginia court, in common with those following the majority view,\(^{35}\) answers with the argument that a father who has forfeited custody of his children under a divorce decree against him might easily be embittered as a result, thereby losing interest in his children, and being, therefore, more inclined to exercise

\(^{32}\)191 W. Va. 160, 50 S. E. (2d) 455 (1948), noted (1949) 6 Wash. & Lee L. Rev. 208.
\(^{34}\)151 Md. 644, 135 Atl. 841, 843 (1927).
\(^{35}\)See note 24, supra.
his arbitrary common law right to disinherit them than he would have been had the family remained intact. Similarly, moved by a vengeful spirit, he could, if the decree for support imposes no lien on his property, defeat the children's right to support by merely squandering the property or by confessing judgment in favor of his creditors. As the Virginia court states, "a court dealing with the health and happiness of infant children ought not to be ... powerless..." to guard against such possibilities. The minority jurisdictions further contend that imposing a lien on the father's property for the support of his children would restrict the marketability of the property by putting the title under a cloud, and would seriously impair the father's right of testamentary disposition over his property. The counter argument under the prevailing viewpoint is that the child's welfare is at least as important as the father's right of free alienation and testamentary disposition of his property. It is pointed out that the imposition of a lien for support affects these rights of the father no more than any other judgment against him would do. "The right of inheritance does not exist until debts are paid. So also with the right to give or take by will." However, the West Virginia court argued that since "our law treats the rights of creditors as superior to any claim children may have for support, during their minority, out of the estates of the parents," to

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5Morris v. Henry, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952): "The death of a father does not end the need of his infant children for food and shelter." Miller v. Miller, 64 Me. 484, 487 (1874): "We think that when, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate." See dissenting opinion in Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948).  
7Robinson v. Robinson, 131 W. Va. 160, 50 S. E. (2d) 455, 462 (1948), citing Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927), observes that "to hold otherwise would be to disrupt the general theory of inheritance, prefer one child over another, and interfere with the common rules firmly established by statute law, governing the descent and distribution of the property of a decedent." See Note (1919) 35 Va. L. Rev. 482, 492.  
9131 W. Va. 160, 50 S. E. (2d) 455, 460 (1948). On that same page the West Virginia court adds further that if a ruling were handed down in favor of the infant defendant in that case, it would necessitate placing the "entire estate of a decedent beyond the reach of his creditors, and apply it to the support and maintenance of his children during their minority...there is simply no law which would authorize such a procedure..."
hold such decree as a judgment lien in favor of the minor child would unfairly prejudice the rights of these creditors. But, under the majority view, the child himself is elevated to the position of creditor by virtue of such lien, the general creditors bearing the same relation to such judgment as they do to other judgments.\footnote{Morris v. Henry, 193 Va. 631, 641, 70 S. E. (2d) 417, 423 (1952): "... creditors of the father bear the same relation to the judgment in favor of the child as to other judgments."} Finally, it is suggested that, since the lien is necessarily uncertain in amount and duration, its existence will prolong the administration of the estate of the deceased, resulting in considerable expense and consequent loss to heirs and devisees of the father.\footnote{See Note (1949) 35 Va. L. Rev. 482, 494.} Recognition of the lien will therefore defeat the sound policy in favor of the speedy settlement of all estates. But, as noted in the principal case, if the settlement of decedent's estate is postponed for too great a period, or if the exact amount of the lien is undetermined, methods can be devised for providing an early windup in its administration and for determining the amount of the lien itself.\footnote{It has been held that the father's personal representative will be required to pay a lump sum out of the estate into the court sufficient to meet the future installments which will accrue from the date of the death of the father and until the child reaches majority, or becomes self supporting in the meantime. Newman v. Burwell, 216 Cal. 608, 15 P. (2d) 511 (1933).} Then, too, if other children of either spouse or children of a subsequent marriage would be unduly prejudiced by a lien favoring the child involved in the divorce, payments ordered by the decree are subject to adjustment under most statutes.\footnote{Note (1949) 35 Va. L. Rev. 482, 494, illustrating the broad discretionary range open to the courts under which to meet extraordinary contingencies and fortuitous circumstances arising under these support decrees. It is noted that if the child dies before reaching majority once the father's estate has been held liable, then the balance of the sum designated for support is returned pro rata to those parties who have obtained an interest in the father's estate. See Newman v. Burwell, 216 Cal. 608, 15 P. (2d) 511 (1933); Murphy v. Moyle, 17 Utah 113, 53 Pac. 1010 (1898).}

Through the considerations relied on to support the minority view cannot be completely discounted, it appears that in most states the statutes are adequate to meet and solve such complications as may arise from holding the father's estate subject to a lien for support of children under a divorce decree. The majority of the courts today will not presume that society is to take over the burden of supporting children when the father's means of supporting the children are not exhausted, and those courts properly regard the father's obligation of support as being paramount to his freedom of disposition of his prop-

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erty by deed, will or intestacy, and to his right of disinheriting his children. Enabling such child to attain the favored status of a judgment lien creditor against his father's real estate, even after the death of that father, obviously places a child of divorce in a more favored position than that held by a child who is not involved in such marital dissolution. But this benefit merely helps to offset the many serious prejudices suffered by the children of separated parents. The Virginia court displays foresight in pointing out that the "possession of the power to bind the parent's estate need not and would not result in its being exercised in all cases. It should, of course, be used only where the necessities of the case and the ends of justice require." Ample provisions are found in the statutes in which to modify, alter, revise, or abrogate such decrees altogether in the light of the size of the estate involved, the claims of the creditors against the estate, and the needs of other children and beneficiaries involved.

ROBERT J. INGRAM

EQUITY—INJUNCTION AGAINST ESTABLISHMENT OF FUNERAL HOME IN RESIDENTIAL DISTRICT AS "NUISANCE IN FACT." [Louisiana]

The equity courts generally have approved the classification of nuisances from the point of view of their nature, as those which are "nuisances per se" and those which are "nuisances in fact." A nuisance per se, sometimes called a nuisance at law, has been defined as an act, thing, or omission, or the use of property, which in and of itself is a nuisance, and hence not permissible or excusable in a particular area. However, in seeking to define such a nuisance as an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings, the courts have employed the term per se in a misleading manner, as a nuisance cannot be created

unless someone is affected by the act. It is held in most jurisdictions that a nuisance per se will not be declared when the act, erection, or the use of property is lawful and authorized by competent authority, as such an activity can by care and precaution be conducted without danger or inconvenience to others. Activities which are not nuisances per se, but may become nuisances because of surrounding circumstances or the manner in which an activity is conducted, have been classified as nuisances "per accidens" or "in fact." The effect of the difference between a nuisance per se and a nuisance per accidens lies in the proof of the wrong, rather than in the remedy. A nuisance per se becomes nuisance as a matter of law and the right to relief is established by averment and proof of the mere act. However, in the case of a nuisance in fact, the proof of specific harmful consequences

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4Northern Pac. Ry. Co. v. Whalen, 149 U. S. 157, 15 S. Ct. 822, 87 L. ed. 686 (1895); Town of Colton v. South Dakota Cent. Land Co., 25 S. D. 309, 136 N. W. 507 (1910); Everett v. Paschall, 61 Wash. 47, 111 Pac. 879 (1910). In Melker v. New York, 190 N. Y. 481, 83 N. E. 566 (1908), the court observed that whether a thing is a nuisance per se depends upon the surrounding circumstances, including the location, and each case depends upon its own facts for classification as a nuisance, except when the act is malum in se, when the surrounding circumstances have no bearing upon the question. Under this rule, a business can be a nuisance per se in some localities, nuisance in fact in other localities and perfectly lawful in other localities. 


is necessary,\textsuperscript{12} and the act will not be enjoined until it is proved that unduly offensive consequences will arise from it.\textsuperscript{13}

A type of case in which the courts must strike a most delicate balance of interests in passing on the sufficiency of the proof of the existence of a nuisance arises when property owners attempt to enjoin the proposed establishment of a funeral home in a strictly residential area. The operation of a funeral home being an admittedly legal and necessary business, it is conceded that no nuisance per se is involved.\textsuperscript{14} Representing the difficulty of determining whether a nuisance in fact is being threatened is the recent Louisiana case of \textit{Frederick et al. v. Brown Funeral Homes, Inc.}\textsuperscript{15} The defendant proposed to erect an undertaking establishment in a strictly residential community. The plaintiffs, nearby residents, brought suit to have the opening of the business restrained on the allegation that it would constitute a nuisance in fact, because of the locality and surroundings. They contended that their homes would be rendered physically uncomfortable, that the occupants would be exposed to noxious odors and gases, and that property values would be depreciated. The trial court granted a preliminary injunction, but a stay order was obtained by defendants, pending an appeal to the Louisiana Supreme Court. On the original hearing that court, with two Justices dissenting, adopted the rule that "the inherent nature of the business is such that, if located in a purely residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of residential property..." in such a way as to make it a nuisance in fact.\textsuperscript{16} However, on rehearing, this same tribunal, with one Justice dissenting, abandoned its original position, and, admitting that it was reaching a decision contrary to the strong weight of authority, ruled that, "unless the establishment and operation of the funeral home is prohibited by rules of police or custom of the place, it cannot be enjoined prior to its operation and then only if it is operated in such a manner as to cause damage to those living in neighboring houses."\textsuperscript{17}


\textsuperscript{13}Thomson v. Sammon, 174 Ga. 751, 164 S. E. 45 (1932); Board of Education of Louisville v. Klein, 90 Ky. 234, 197 S. W. (2d) 427 (1946); Hamlin v. Durham, 235 Ky. 842, 32 S. W. (2d) 413 (1930).

\textsuperscript{14}White v. Luquire Funeral Home, 221 Ala. 440, 129 So. 84 (1930); Fentress v. Sicard, 181 Ark. 173, 25 S. W. (2d) 18 (1930); Wescott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490 (1887); 54 Am. Jur., Undertakers & Embalmers § 7.

\textsuperscript{15}62 S. (2d) 100 (La. 1952).

\textsuperscript{16}62 S. (2d) 100, 110 (La. 1952).

\textsuperscript{17}62 S. (2d) 100, 110 (La. 1952). Justice Hawthorne, who had written the original
The majority of the court thought the authority relied on by the plaintiff's persuasive, but not decisive of the issue, in view of the Louisiana statute which states:

"Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor."18

Mere inconvenience to neighboring residents and depreciation of the value of their properties was declared not necessarily enough to constitute a nuisance. Physical annoyance of the inhabitants must be proved, and the majority thought it impossible to determine in advance whether the defendant's enterprise would be operated in a manner to cause such consequences. The Justice who had written the opinion for the court on the original hearing still maintained his position that an injunction should issue, declaring:

"I cannot believe that the average person in this jurisdiction is any less sensitive to the depressing effects of a funeral home than is the average person in the common-law jurisdiction where it has been concluded that as a matter of fact funeral homes are by their very nature so depressing that their close proximity deprives one of the enjoyment of his home and that they can be enjoined when they seek to intrude themselves into an exclusively residential district."19

A number of jurisdictions in the United States, upon which the final majority of the court apparently relied,20 have held in cases involving different fact situations, that if there is no physical danger from noxious vapors or exposures to disease, the depressing influence does not constitute the undertaking parlor a nuisance.21 Thus, in Westcott v. Middleton22 an injunction sought against the maintenance of an established funeral home on a lot adjoining the one on which the plaintiff resided was refused, where it appeared that no

opinion, now dissented, and the two former dissenting Justices were now joined by the rest of the court to form the majority.

19S. 2d 100, 111 (La. 1952).
20These jurisdictions were not mentioned in the final majority opinion, but were cited on the original hearing by the two dissenting judges, who became part of the majority of the court on rehearing.
2243 N. J. Eq. 478, 11 Atl. 490 (1887).
noxious vapors or germs of disease were detectable as a result of the business, and the main feature of offensiveness resulted from the plaintiff's over-sensitive nature and repugnance to anything pertaining to death. The New Jersey court relied upon the principle of an English case, that "the injury [complained of] must be physical, as distinguished from purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy." The Oregon court ruled that these principles should govern in a case in which an adjacent landowner complained of an injury which was of a mental nature rather than physical, and thereby all persons were not affected adversely, but only those who were over-nervous or supersensitive. Similarly, the Kentucky court has declared that the injury or annoyance which will warrant relief must be of a real and substantial character and such as impairs the ordinary enjoyment of property, and not a mere sentimental injury. These cases can be readily distinguished from the Frederick case in that they dealt with either a permanently established funeral home or a defendant undertaker who had conducted a home in the past so as not to interfere with the adjoining property owners and it is not even clear that the Wescott case dealt with an establishment located in a strictly residential area. While the Louisiana court did not believe that a depreciation in the value of the surrounding property was a sufficient justification for granting injunctive relief, one of these so-called minority cases admitted that there had been no depreciation of property value during the past conduct of the funeral home.

As the dissent in the principal case contended, a large majority of the jurisdictions in this country, in accordance with the general principles governing the granting of injunctions against threatened nuisances, have given relief to prevent the establishment of a funeral

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[28] As a general rule an injunction will be granted only to restrain an actual, existing nuisance, Reynolds v. Union Savings Bank, 155 Iowa 519, 136 N. W. 529 (1912); Pfingst v. Senn, 95 Ky. 556, 23 S.W. 358 (1893); Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516 (1873). But it is well settled that a court of equity may enjoin a threatened or anticipated nuisance, where it clearly appears that a nuisance...
home in a residential section of the city, when it appears that the
maintenance of such establishment will substantially interfere with
the comfort, repose, and happiness of the neighboring residents and
will materially decrease the value of their property. Even when the
risks of physical discomfort or harm are not present, the inherent
nature of the business in a strictly residential area has led the courts
to enjoin, as a nuisance, the continuance of the existing funeral
parlor. In support of this practice, the Alabama court has observed:

"The hearse, the ambulance, the morgue, are reminders of the
presence of the dead; the funeral procession and service with
all the incidents of grief-stricken relatives forced upon frequent
attention of those entitled to the quiet, peace, and happiness of
the home, bring depression and discomfort to the normal person
unschooled to such conditions.

"Such discomfort cannot be regarded as fanciful, imagina-
tive, nor due to over-sensitiveness. Conditions, inherent in the
business, bring such an atmosphere about the place as to render
it less desirable as a place of residence, and if less desirable the
property becomes less valuable for residence purposes."

will necessarily result from the contemplated act or thing which is sought to be en-
joined. Missouri v. Illinois, 180 U. S. 208, 21 S. Ct. 531, 45 L. ed. 497 (1901); St. Louis
§ 151; Prosser, Torts (1941) § 74.

20 Mutual Service Funeral Homes v. Fehler, 254 Ala. 369, 48 S. (2d) 26 (1950);
Laughlin, Wood & Co. v. Cooney, 220 Ala. 556, 126 So. 864 (1930); Brown v. Arbuckle,
88 Cal. App (2d) 258, 198 P. (2d) 550 (1948); Bevington v. Otto, 223 Iowa 509, 273
N. W. 98 (1937); Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202, 43 A. L. R. 1155
(1944). For further authority, see cases cited in Frederick et al. v. Brown Funeral
Homes, Inc., 62 S. (2d) 100, 105 (La. 1952); Jackson, The Law of Cadavers (2d ed. 1950)
457. In Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925), the court held that if the con-
sequences of a nuisance about to be erected or commenced will be irreparable in
damages, and such consequences are not merely possible but to a reasonable degree
certain, a court of equity may interfere to arrest the nuisance before it is completed.
In Saier v. Joy, 198 Mich. 295, 164 N. W. 507 (1917), a proposed funeral home was
enjoined when it appeared that the value of the plaintiff's property would be mater-
ially decreased by the defendant's business.

21 These courts have based their decisions many times on the theory that a con-
stant reminder of death is a nuisance: White v. Luquire Funeral Home, 221 Ala. 440,
129 So. 84 (1930); Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925); Saier v. Joy, 198
Mich. 295, 164 N. W. 507 (1917). For further cases see Jackson, The Law of Cadavers
(2d ed. 1950) 457, n. 82.

22 White v. Luquire Funeral Home, 221 Ala. 440, 443, 129 So. 84, 86 (1930). It is
universally held that a funeral home in a business district does not constitute a nui-
sance, Kirk v. Mabis, 215 Iowa 769, 246 N. W. 759 (1933); Smith v. Fairchild,
193 Miss. 556, 10 S. (ad) 172 (1943); Jackson, The Law of Cadavers (2d ed. 1950) 458.
See Fentress v. Sicard, 181 Ark. 173, 45 S. W. (2d) 18, 19 (1930). The decisions, however,
are not in accord whether the courts should enjoin a proposed funeral home in a
district undergoing transition from a residential section to a business district. In Daw-
Although the statute involved in the principal case permits one to use his property as he pleases even though he should occasion some inconvenience to his neighbors, the Louisiana court, to be consistent with the strong majority view, should have found that a funeral home in a residential district is more than a "mere inconvenience" and would be a nuisance in fact. In view of the admitted depressive effect of a funeral home on both the use and sale value of residential property, it seems that the court should have conceded the existence of such an invasion of a property right as will generally be enjoined by equity.

Alvin Y. Milberg

Insurance—Scope of Liability of Insurer Under Omnibus Clause Covering Automobile Driven by Other Than Named Assured. [Federal]

With the increasing use of automobiles and consequent greater traffic hazards, it has become general practice to incorporate into automobile liability insurance policies an "omnibus clause" which extends protection to persons other than the owner, using the car with his permission. Though the terms vary in detail, a generally standardized clause has been developed which provides that "the unqualified word ‘insured’... includes not only the named assured, but also any person while using the automobile and any person or organization legally responsible for the use thereof provided,... that the declared and actual use of the automobile is with the permission of the named assured...."¹

¹Hauser v. Actna Cas. and Sur. Co., 187 So. 684, 687 (La. App. 1939); Miller, The Omnibus Clause (1941) 15 Tulane L. Rev. 422; 5 Am. Jur., Automobiles § 533 (1952 Supp.) For the most part the courts have not given any particular effect to minor variations in wording. The most important change effected by the "new" clause in the standard policy is that of substituting the words "actual use" for "use" in the phrase, "provided that the actual use is with the permission of the named assured...." According to Appleman, Automobile Liability Insurance (1958) 110, the change was made to make clear that the use of the car at the time of the accident had to be one actually contemplated by the parties at the time when the original bailment was made. The Ohio Court followed this construction in Gulla v. Reynolds, 320 Ohio App. 243, 81 N. E. (2d) 406 (1948). However, the weight of authority rejects this view and holds the change to be of little or no importance. Vezolles v. Home Ind. Co., 38 F. Supp. 455 (W. D. Ky. 1941), aff'd 128 F. (2d) 257
It is agreed that the major effect of the clause is to extend the insurance coverage within the limits of the policy to any person using the automobile with the consent of the assured, but not to enlarge the insurance coverage as defined in the policy. In spite of repeated holdings that the provision is not ambiguous, however, there has been a great deal of litigation concerning the specific application of the omnibus clause. Such controversies arise most frequently over the meaning and scope of the term "permission" to drive the automobile. Under the present standard clause, the only person having the capacity to grant permission is the named assured, yet disputes still arise when the permission is granted by the named assured's legal representative, or where the named assured is a corporation or other impersonal entity, or where the bailee of the vehicle extends permission to a third person for use of the car.


Hawkeye Cas. Co. v. Western Underwriter's Ass'n, 53 F. Supp. 256 (S. D. Idaho 1944). This view that there is no ambiguity seems to be based on the maxim that policies are to be construed in favor of the insured. However, the rule to the effect that the terms of the policy cannot be enlarged or diminished by judicial construction is also employed by the courts. Denny v. Royal Ind. Co., 26 Ohio App. 566, 159 N. E. 107 (1927); 5 Am. Jur. 806.

A common variation on the "standard" clause provides that permission may be granted by an adult member of the named assured's household who is not a chauffeur or domestic servant. This provision raises many questions concerning who has the capacity to grant permission. See Appleman, Special Phases of the "Omnibus Clause" in Insurance Policy (1936) 22 A. B. A. J. 613, 45 C. J. S. 901; Note (1931) 72 A. L. R. 191.

Antone v. New Amsterdam Cas. Co., 335 Pa. 184, 6 A. (2d) 566 (1939). Hobbs v. Cunningham, 273 Mass. 529, 174 N. E. 181 (1930), is to the effect that under the omnibus clause, the legal representative of the named assured may give permission after the assured's death so long as the car remains an asset of the estate. However, under most policies, provision for such eventualities is made in a separate clause.


Where any sub-bailment has been expressly forbidden, the original permit-
When the alleged permittor has the capacity to give permission, controversies arise as to what constitutes "permission" within the meaning of the clause. Either by specific policy provision or by judicial construction, it is established that the giving of consent may be either express or implied. 8 Both types must involve "a mutuality of agreement," either directly and distinctly stated or based on "an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent." 9

The most troublesome problem presented to the courts in the omnibus clause cases has been the determination of the scope of permissible activity which the law will include within the permission actually granted by a qualified person. The typical situation, as stated by the federal court in the recent case of Branch v. United States Fidelity & Guaranty Co., 10 is that in which "possession of the insured

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Permission is implied by the courts much more readily when it is shown that a close social relationship exists between the parties, such as good friends or members of the family. Jordan v. Shelby Mutual Plate Glass & Cas. Co., 142 F. (2d) 62 (C. C. A. 4th, 1944). See United States Fid. & Guar. Co. v. Brann, 297 Ky. 381, 180 S. W. (2d) 102, 104 (1944). Similarly where an employee has broad, general discretion to use the assured's vehicle (as is often the case with salesmen), it has been held that all of the uses of the automobile come within the protection of the omnibus clause through implied authority. Maryland Cas. Co. v. Ronan, 37 F. (2d) 449, 72 A. L. R. 1560 (C. C. A. 1st, 1930); Ocean Acc. & Guar. Corp. v. Bear, 220 Ala. 491, 125 So. 676 (1929); Stovall v. New York Ind. Co., 157 Tenn. 301, 8 S. W. (2d) 473, 72 A. L. R. 1368 (1928).

car was obtained by the driver with permission of the owner for a specific purpose, and the driver, without authority from the owner used the car for other purposes of his own, in the course of which an accident occurred." In this case, a garage employee agreed to go to the car owner's home early the next morning and take the car to the garage for washing, with the promise that it would be returned to the owner's home by two o'clock in the afternoon. The car was picked up as planned but rain interrupted the work about noon, and the employee thereupon drove the car to the railroad station to meet his wife. It developed that she was not on the train, and so he drove to his home and then started for a town thirty-five miles distant to get his wife, but during this trip, about fourteen miles from the garage, he met with a serious accident. As a result he was sued for damages and a judgment for $8,422 was obtained against him. Execution being wholly unsatisfied, plaintiff brought this action against the insurance company, from whom the owner held a liability insurance policy, claiming that the employee was included as an insured under the omnibus clause extending coverage to "any person while using the automobile...providing the actual use of the automobile is with the permission of the named assured." The Federal District Court dismissed the action and the Court of Appeals, purporting to apply a Tennessee law, affirmed, on the reasoning that since the employee held only limited possession for the purpose of doing work on the car, and had no authority to use it for his own purposes, he was using the car without the owner's "permission" at the time of the accident.

In determining the extent to which deviation from the purpose and use for which permission was granted is allowable without precluding coverage for the permittee under the omnibus clause, the courts have followed three general theories.13

A small minority of the courts employ what is termed the strict or conversion rule, that the insurer will be held liable only if permission was given for the particular use being made at the time of the accident, and the accident took place within the time limits and geographical area specified or contemplated by the parties at the time of permission. 14 Unless all three of these elements—purpose,

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14Johnson v. American Automobile Ins. Co., 131 Me. 288, 161 Atl. 496 (1932);
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time, and place—are satisfied, the use of the automobile constitutes a
conversion, and permission of the owner cannot be found to exist. This
view, when rigidly adhered to, has the merit of furnishing a very
definite standard for deciding the cases; and since it seems to apply a
literal meaning to the words of the policy, it probably affords the
most logical solution to the issue of the extent of coverage. Yet, one
court even while condemning more liberal rules and declaring that
"a use by the operator outside the scope of the owner's contemplated
permission excludes such use from being a permitted use within the
terms of the policy," went on to concede that "even under this doc-
trine, a slight deviation would not necessarily exclude coverage..."
This characteristic modification introduces ambiguity into a rule, the
chief strength of which lies in its definiteness, and defeats the an-
nounced purpose to confine liability to the literal terms of the policy.
However, it is obvious that unless some flexibility is allowed in the
application of the rule, it will frequently lead to very unsatisfactory
results.

A logical justification for rejecting the rule of strict construction
of the omnibus clause has been found in the reasoning that the lia-
bility insurance contract is as much for the benefit of the members of
the public as for the contracting parties, and that therefore when an
injury has occurred an important purpose of the insurance is de-
feated if compensation is withheld from the injured parties by legal
refinements regarding the status of the wrongdoing driver of the insured
car. This view is reinforced by the traditional rule of construc-


Appleman, Special Phases of the "Omnibus Clause" in Insurance Policy (1936) 22 A. B. A. J. 613, 616, 617. The Ohio court, pointing out the change in the
standard clause from "use" to "actual use" concluded that "it seems logical to this
court that the term 'actual use' be construed as referable to the use being made at
the time and place of the accident..." Gulla v. Reynolds 320 Ohio App. 243, 81 N. E. (2d) 406, 408 (1948).


Coverage was denied in Sauriolle v. O'Gorman, 86 N. H. 39, 163 Atl. 717 (1932)
when an employee, sent on an errand to another town had an accident during a
detour of about one-half a mile made to let a school friend, whom he had picked
up, off closer to her destination.

Behaney v. Travelers Ins. Co., 121 F. (2d) 838 (C. C. A. 3d, 1941); Dickinson
v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866, 41 A. L. R. 500 (1924); Nyman
v. Monteleone-Iberville Garage, Inc, 211 La. 375, 39 S. (2d) 123 (1947); Rikowski v.
that the terms of the policy are always to be construed most strongly against the insurer.\textsuperscript{19}

Supported by these considerations, many courts have taken the extreme position, in favor of the injured party, that the bailee only need have permission to take the vehicle in the first instance and that any use he may make of the car thereafter while it remains in his possession is within the "permission" intended in the omnibus clause, regardless of whether it was within the contemplation of either of the partes at the time of bailment.\textsuperscript{20} This rule has the advantage of applying an easily proved and definite standard of recovery and of providing the broadest possible protection to members of the public who have become the victims of the negligent operation of automobiles. In its most absolute form, the liberal view has been held to extend coverage even to the case in which the particular use being made of the car at the time of the accident was in express violation of the named assured's instructions.\textsuperscript{21} But such a result is hardly justified, since express prohibition and permission cannot exist at the same time, and most of the courts applying the liberal rule have so held.\textsuperscript{22} Thus, again, the incorporation of necessary qualifications has resulted in the creation of uncertainties in the operation of a rule, of which one of the greatest claimed virtues has been certainty.\textsuperscript{23}

The development of Tennessee law over a period of two and one half decades presents a study of this process of qualification. In the first instance, the decision of \textit{Stovall v. New York Indemnity Co.} very positively embraced the liberal view in ruling that "If... the automobile... is delivered to another for use, with the permission of the... insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession."\textsuperscript{24} Subsequent decisions, however, created successive limitations denying coverage when the bailee so used the vehicle as to violate the insured's expressed instruc-

\begin{itemize}
\item \textsuperscript{19}See cases cited, note 18, supra.
\item \textsuperscript{21}United States Fid. & Guar. Co. v. DeCuers, 33 F. Supp. 710 (E. D. La. 1940).
\item \textsuperscript{22}Note (1949) 5 A. L. R. (ad) 650 and cases collected therein.
\item \textsuperscript{23}Stovall v. New York Ind. Co., 157 Tenn. 301, 8 S. W. (ad) 473, 72 A. L. R. 1368 (1928).
\item \textsuperscript{24}157 Tenn. 307, 8 S. W. (ad) 473, 477, 72 A. L. R. 1368, 1375 (1928).
\end{itemize}
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tions, or where the bailee permitted a third party to drive, or when the bailee retained the car after the period of permissive use has expired.25 Finally the court has come to the conclusion that the "initial permission is not controlling where the use is limited to a specific purpose for a limited time...."26 This transition from liberal to what seems to be an intermediate view has not been smooth, but rather has been marked by startling reversals, so much so that the federal court, attempting to apply the Tennessee law in the principal case, encountered much difficulty in determining just what that law was.27 It thus becomes manifest that a court which adopts either of the extreme views will find many situations in which obvious injustice would arise from the application of its chosen rule. Attempts to avoid such results have created many exceptions and thereby brought confusion into the law.28

This insurmountable defect in either of the two extreme rules has led many courts to adopt an intermediate position, exemplified by the holding of the principal case, which has come to be known as the minor deviation rule. This view requires permission as to the time, place and purpose of the use being made of the vehicle at the time of the accident in order for coverage to be extended under the omnibus clause (as in the strict or conversion rule), but provides that minor deviations in any of these factors will not destroy the protection of the

27After having reached what appeared to be an intermediate position (discussed below) in Hubbard v. United States Fid. & Guar. Co., 240 S. W. (2d) 245 (Tenn. 1951), the Tennessee court distinguished the Hubbard case and pointedly reaffirmed the Stovall case saying that it has "been the law in this State for many years...." Foley v. Tennessee Odin Ins. Co., 246 S. W. (2d) 202, 204 (Tenn. 1951). While the principal case was pending before the Court of Appeals, the Tennessee court in Moore v. Liberty Mutual Ins. Co., 246 S. W. (2d) 960, 961 (Tenn 1952) distinguished both the Stovall case and the Foley case from the Hubbard decision on the ground that there was a general permission instead of a limited permission (though in neither of the cases was that made a test, and in reference to the Foley case the court admits that even though "the opinion does not so show, the Court was of the opinion that the driver of the truck had a general permission to use it"), and gives the intermediate (minor deviation) rule as applicable in the cases where limited permission exists. This rule is, of course, followed by the federal court in the principal case.
28Compare Dickinson v. Maryland Cas Co., 101 Conn., 369, 125 Atl. 865, 41 A. L. R. 500 (1924) which is often cited as a leading case for the liberal view, with Mycek v. Hartford Acc. & Ind. Co., 128 Conn. 140, 20 A. (2d) 735 (1941) which reinterprets the Dickinson case and expressly repudiates the liberal view as presented in the Stovall case.
policy. Since this approach involves an attempt to set up a flexible formula for deciding the cases, it is difficult to apply, the various jurisdictions differing widely on the question of what constitutes minor and major deviations.

Despite this serious objection, however, it would seem that this view is to be preferred above the two extreme rules. Either of the other rules is too rigid for satisfactory application to all fact situations. The intermediate position has the necessary flexibility but by the same token tends to leave both the injured complainant and the insurance company to the varying whims of juries. It would seem that the insurance companies should attempt to devise a wording of the clause which would definitely delimit the scope of the coverage, but this action would tend to remove needed insurance protection from the public-at-large which is a danger of injury in automobile accidents. Perhaps a proper solution would lie in a legislative requirement based on public policy, of a minimum amount of liability coverage to which the liberal rule would be applied in determining coverage under the omnibus clause, while a stricter view should be exercised by the courts in regard to any coverage in excess of the required amount on the grounds that this coverage is merely for the benefit of the parties to the policy.

EUGENE M. ANDERSON, JR.


30The Virginia court has worked out a helpful formula for guidance in its application to the effect that when the deviation was slight and not unusual, the court may as a matter of law determine that it was within the scope of permission; where it was very marked and unusual, the court may determine it was not a use within the permission; and when the facts fall between the two extremes, the question should be left to a jury. Phoenix Ind. Co. v. Anderson, 170 Va. 406, 196 S. E. 629 at 633 (1938).

31Massachusetts has approached more closely than any other jurisdiction to the actual application of such a rule. In Blair v. Travelers' Ins. Co., 288 Mass. 285, 192 N. E. 467 (1934) the court allowed recovery up to the statutory amount although the actual use at the time of the accident was clearly not within the permission of the named assured; but Blair v. Traveler's Ins. Co., 291 Mass. 432, 197 N. E. 60 (1935) denied any additional recovery over the statutory amount. Also Guzenfield v. Liberty Mutual Ins. Co., 286 Mass. 133, 190 N. E. 23 (1934).
One of the most perplexing problems in the law of life insurance is posed when an insured, having reserved the right to change the beneficiary, has before his death manifested a desire that someone other than the named beneficiary receive the proceeds of the policy but has failed to comply with all the formalities required by the terms of the policy for changing beneficiaries. The various courts follow widely inconsistent rules in different cases as to what extent the insured must have complied with the policy terms to effectuate the change of beneficiaries, and the approval of irreconcilable principles even within the same opinion has been observed. To add to the uncertainty in these controversies, there is sharp disagreement as to whether the fault of non-compliance with the policy can be asserted only by the insurer, or whether the original beneficiary can also object to the validity of the attempted change.

In determining the validity of the attempt to change beneficiaries, courts in different jurisdictions, have followed three basic rules. A few courts hold that there must be "strict compliance" with the terms of
the policy in order for the insured to effect a valid change of beneficiary. These jurisdictions regard the right of the named beneficiary as a vested one, subject to being divested only by a strict fulfillment of the required formalities of the policy by the insured. However, most of these courts mitigate the strictness of the rule if the insured did everything he could possibly have done to effect the change before his death, and all that remains to be done is some ministerial act of the insurer.

The majority of the courts follow the rule of "substantial compliance," where the insurer has acceded to the attempted change of beneficiary by intepleading the claimants. Under this view it is said that "the general rule is that to effectuate a change of beneficiary the method prescribed by the policy must be followed..., but an exception is made where the insured in attempting to change his beneficiary has done all he could to comply with the policy requirements and has substantially complied therewith." Obviously, it is not possible to lay down an inflexible rule as to how near the insured's actions must have approached complete compliance, and so the courts must make


6For the New Jersey courts have held that a beneficiary of a life insurance policy has a vested interest in the policy even though by a change which the insured has reserved the right to make that interest may subsequently be divested. The New Jersey courts have further held that where a policy stipulates that the beneficiary may only be changed by following a specified procedure including surrender of the policy for endorsement a change of beneficiary cannot be effected by any thing short of the procedure specified in the policy." United States v. Burgo, 175 F. (2d) 196, 198 (C. A. 3d, 1949).


20It was amply illustrated by the Colorado court (which usually follows the substantial compliance rule) in Finnerty v. Cook, 118 Colo. 310, 195 F. (2d) 979 (1948) that substantial compliance is not actually necessary under this doctrine. The insured, a prisoner of war in Japan who was allowed to write only certain relatives, wrote his mother a postal card asking that she have the beneficiary
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their decisions rest largely on the facts in the individual situations in the different cases.\textsuperscript{11}

Other courts have taken the position that the intent to change the beneficiary should be given effect when that intent is manifested by some affirmative act on the insured's part even though he has made no effort to comply with the policy terms concerning change of beneficiary, provided the insurer, by interpleading the claimants, waives the right to insist upon strict compliance with the policy terms.\textsuperscript{12} Thus it has been held that where the insured scratched out the old beneficiary's name on the policy and substituted the name of another person as beneficiary, and also left in a box along with the insurance policy a letter to the insurer requesting that the insurance proceeds be paid to the substituted beneficiary, there was a sufficient act on the part of the insured to make a valid change of beneficiary.\textsuperscript{13}

The confusion existing in this phase of the law is amply illustrated in the recent Texas case of Kotch v. Kotch.\textsuperscript{14} The insured delivered his insurance policy to his wife, the named beneficiary, who kept it with other valuable papers in a trunk to which both had access. The ins-

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\textsuperscript{11}The statement that when the insured has done all he could to effect the change of beneficiary equity will regard as done that which should be done and recognize the change as valid, is often made by courts which follow the substantial compliance doctrine. Farley v. U.S., 291 Fed. 238 at 241 (D. C. Ore. 1923); Johnston v. Kearsns, 107 Cal. App. 557, 290 Pac. 640 at 642 (1930); Barrett v. Barrett, 173 Ga. 375, 160 S.E. 399 at 402, 78 A. L. R. 962 at 967 (1931); Saiter v. Miller, 108 Ind. App. 373, 27 N. E. (2d) 900 at 904 (1940); Parks' Ex'rs v. Parks, 288 Ky. 435, 156 S. W. (2d) 480 at 483 (1941).


\textsuperscript{14}251 S. W. (ad) 520 (Tex. 1952).
sured thereafter went to live with a son by a previous marriage, and the wife left for a visit with relatives in Florida. Thereafter the insured wrote his wife requesting that she write their landlady to ship the trunk to him, so that he might obtain the title to his car, which was in the trunk with the insurance certificate. The wife returned to their home, but instead of sending the trunk, sent only the title to the car. Thereafter, two weeks before his death, the insured sent in an application to substitute his son as beneficiary and an application for a duplicate of the allegedly lost insurance certificate, but no action had been taken on these applications when the insured died. Upon the insured's death, the insurance company interpled the claims of the son and the widow to the proceeds of the policy.

The trial court applied the rule of substantial compliance, and entered judgment for the widow on the ground that the insured had not done all that he reasonably could have done to effect the change. Since he at no time made a demand upon his wife for the return of the insurance certificate, it was ruled that he had not substantially complied with the terms of the policy requiring that the certificate be returned with the application for the change of beneficiary so that the change might be endorsed on the certificate.

The Court of Civil Appeals reversed that judgment, holding that the insured had substantially complied with the insurance contract requirements despite his failure to return the policy to the insurer with the application for change of beneficiary, because he asked his wife to send the trunk and because it was never proved that he knew positively where the original certificate was located. The intermediate court further ruled that "a former named beneficiary having no vested right in the policy, not being a party to the contract, will not be heard to contend that a subsequent change in the beneficiary was made inconsistent with the provisions contained in the insurance contract..." and that the insurer, by paying the proceeds of the policy into court, had waived the requirements that the insured must comply strictly with the terms of the insurance contract.

The Texas Supreme Court reversed the Court of Civil Appeals and affirmed the judgment of the trial court holding that the original beneficiary has legal standing to contest the validity of the attempted change of beneficiaries, because, while she had no vested interest prior to insured's death, nevertheless the provisions in the policy requiring certain formalities for changing beneficiaries amounted to a "con-

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tract between the insurer and insured for the benefit of a third party—the named beneficiary...."

On the specific issue of whether the attempted change should be sustained, the court ruled that the insured had not done all that he reasonably could have done to comply with the policy terms, his failure to make a positive demand on his wife for the return to the old certificate precluding any showing of substantial compliance.

Both the trial court and the Supreme Court appear to consider the requirements that the insured do "all reasonably possible" to carry out the policy terms, and that he "substantially comply" with those terms, as alternative forms of stating the same essential factor for a valid change of beneficiaries. Under this approach there can be no "substantial compliance" unless insured had done "all reasonably

16Kotch v. Kotch, 251 S. W. (2d) 520, 523 (Tex. 1952). There are two views taken by the courts as to the interest a beneficiary has in an insurance policy, in which the insured has reserved the right to change the beneficiary at will, during the life of the insured. One view is that such a beneficiary has a mere expectancy of a gift at the time of the death of the insured. The fact that the insured reserves control of the policy indicates his intention that nothing is to pass to the beneficiary during the life of the insured, and the designation of the beneficiary is only a manifestation of the desire of the insured, at that time, that the named beneficiary shall have the proceeds of the policy upon insured's death. The formalities required by the policy to effect a change of beneficiary are for the benefit of the insurer, and the beneficiary has no standing to complain if the insurer and insured subsequently agree upon a change of beneficiaries without complying with all of the required formalities in the insurance contract. Grimm v. Grimm, 26 Cal. (2d) 173, 157 P. (2d) 841 (1945); Shay v. Merchants Banking Trust Co., 335 Pa. 101, 6 A. (2d) 536 (1939); Vance, Insurance (3d ed. 1951) 677; 29 Am. Jur., Insurance § 1276.

The second view is that the beneficiary has a vested right in the policy at the time he is designated as beneficiary, and the reservation of the right to change beneficiaries merely gives the insured the right to divest the beneficiary of the right he has in the policy if the insured exercises the reserved right during his life in accordance with the required formalities of the policy. Indiana Nat. Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (n. s.) 192 (1913); Woehr v. Travelers Ins. Co., 134 N. J. Eq. 38, 34 A. (2d) 136 (1943); Vance, Insurance (3d ed. 1951) 677.

If the right to change the beneficiary is not expressly reserved in the insurance contract, the named beneficiary has a "true vested interest" in the policy which cannot be affected by any act of the insurer or the insured, without the consent of the named beneficiary. The one qualification to this rule is that the interest of the beneficiary may be destroyed by the insured by any act which would result in the destruction of the status of the insured, as by forfeiture of the policy. 2 Couch, Cyclopedia of Insurance Law (1929) § 306; 1 Richards, Insurance (5th ed. 1952) § 116.

"...the purported change will be given effect only if the insured has 'substantially complied' with them, or 'done all he reasonably could have done' in that behalf."

"Nor do we regard the request for a new certificate as the equivalent of returning the certificate or 'all he could do' in that direction...." Kotch v. Kotch, 251 S. W. (2d) 520, 523, 524 (Tex. 1952).
It is uniformly held that where insured's failure to submit the policy to the insurer for endorsement thereon of change of beneficiary is caused by the named beneficiary's refusal to deliver the policy upon demand, the change of beneficiary will be held valid if the insured has done everything else required of him by the terms of the contract to effect the change. It would appear logical that the claimant relying on the attempted change of beneficiary, in order to prove a refusal by the named beneficiary to deliver the policy would have to prove that the insured had made a demand upon that party for the return of the policy. However, the majority of the courts have held that it is not essential to prove a demand, for if the evidence establishes that the insurance policy was in the possession of the named beneficiary, it is a fair inference that the policy would not have been surrendered even if a proper demand had been made.

While the Court of Civil Appeals thus announced the correct rule of law according to the majority of the courts, the Supreme Court seems to have adopted the better view. There should be something more than an assumption of the court that the beneficiary would have refused to deliver up the policy had a proper demand been made by the insured. The insured should be required to fulfill as far as possible the prescribed formalities of the policy, so that he will realize fully "Farley v. First Nat. Bank, 250 Ky. 150, 61 S. W. (2d) 1039 (1933); Harris v. Metropolitan Life Ins. Co., 330 Mich. 24, 46 N. W. (2d) 448 (1951); Gayden v. Kirk, 207 Miss. 861, 43 S. (ad) 568, 19 A. L. R. (ad) 1 (1949); Manley v. New York Life Ins. Co., 147 Neb. 646, 24 N. W. (2d) 652 (1946); Prudential Ins. Co. v. Swanson, 111 N. J. Eq. 477, 162 Atl. 597 (1932); John Hancock Mut. Life Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154 (1914). Vance, Insurance (3d ed. 1951) 687; 29 Am. Jur. 987; 46 C. J. S. 80. But see Acacia Mut. Life Ins. Co. v. Feinberg, 318 Mass. 246, 61 N. E. (2d) 122 (1945), where a written demand on the beneficiary was held insufficient. That court held that the insured had not done all he could do to regain possession of the policy since he could have instituted a suit in equity for the return of the policy."


29In Prudential Ins. Co. v. Mantz, 128 N. J. Eq. 480, 17 A. (2d) 279, aff'd 130 N. J. Eq. 385, 22 A. (2d) 241 (1941) a purported change of beneficiary was held ineffective partly on the ground that the insured had not made every reasonable effort to comply with the terms of the policy relating to change of beneficiary since it was not proven with certainty that the insured ever made a demand on the beneficiary for the return of the policy, and in Carson v. Carson, 166 Okla. 161, 26 P. (2d) 738 (1933) it was held that the insured did not do all in his power to effect a change since he at no time made a demand upon his wife for the policy.
the import of his acts. A less demanding rule may often ultimately result in a failure to carry out the intent of the insured. For example, it could easily happen that an insured might comply with some of the formalities to effect a change of beneficiary and then decide not to carry out his purpose, and therefore take no further action. Knowing that he has failed to comply fully with all the requirements to effect a change, he subsequently goes to his death assuming that the first named beneficiary is still the valid beneficiary. Any qualifications of the essential element, "all that he could have reasonably done," might serve to defeat the insured's intention to have the originally named beneficiary collect the proceeds of the policy. Since the strength of the substantial compliance view lies in the flexibility with which it may be applied to effectuate the insured's intention, the courts should avoid embracing any rule of thumb which might often operate to defeat that intent if regarded as controlling in the many varying situations of the cases.

LAWRENCE C. MUSGROVE

SALES—LIABILITY OF WHOLESALER TO CONSUMER INJURED BY EATING UNWHOLSESOME PACKAGED GOODS. [Texas]

Consumers who have suffered personal injuries from eating unwholesome packaged food quite commonly seek to recover from retailers and manufacturers, but in the recent Texas case of Bowman Biscuit Co. of Texas v. Hines the consumer chose the relatively rare course of bringing an action for damages against a wholesaler. Though the manufacturer, the wholesaler, and the retailer may all be regarded as in some degree responsible for the harm done, the legal remedies against any of the three have been surrounded within some uncertainty. In earlier times, the manufacturer was generally immunized from liability under the legal reasoning that there was no privity of contract between manufacturer and consumer, or that there was no implied warranty of wholesomeness from the manufacturer even to the retailer and no basis for putting the manufacturer under greater duty to the consumer than to the retailer. Modern courts, however, are fairly in accord that liability can be imposed on the manufacturer, on one of several bases. Some decisions hold that an implied warranty of

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1 251 S. W. (2d) 153 (Tex. 1932).
3 11 R. C. L., Food § 28.
wholesomeness has been breached in the production of unfit food,⁶ but most courts insist that liability must rest on tort for negligence,⁷ because a warranty cannot run with the article so as to benefit one not dealing with the warrantors.⁷ These theories for allowing recovery are sometimes supplemented by the arguments that the duty of the manufacturer is based on a general public policy as declared by the pure food laws,⁸ and that the common law rule of caveat emptor does not apply because the consumer has no chance to protect himself by inspecting packaged goods before purchasing them.⁹

The continuing uncertainty on the issue of retailer liability, as well as on the question of wholesaler liability, is demonstrated by the Hines case, an action to recover for injuries sustained from swallowing a wire allegedly contained in an "apricot puff" purchased in a sealed cellophane package by plaintiff's wife from a retail grocery. The retailer had purchased it in the same package from the defendant wholesaler, but no negligence or express warranty was alleged by plaintiff against defendant. The lower court certified the following question to the Supreme Court of Texas: "Where the ultimate consumer of food, sold in the original sealed package for human consumption, suffers injury and damage from such food being contaminated, is the wholesaler, or middleman, as well as the manufacturer

⁷Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1908); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915); Norfolk Coca-Cola Bottling Works v. Krausse, 162 Va. 107, 173 S. E. 497 (1934). It is generally held that foreign substance found in a sealed package or container raises a presumption of negligence on the part of the manufacturer under the doctrine of res ipsa loquitur. Bissonette v. National Biscuit Co., 100 F. (2d) 1003 (C.C.A. 2d, 1939); Watkins v. Dalton Coca-Cola Bottling Co., 66 Ga. App. 484, 19 S. E. (2d) 316 (1942); Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 Atl. 866 (1922); Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924); Ritchie v. Sheffield Farms Co., 129 Misc. 765, 222 N. Y. Supp. 724 (1927). Some authorities hold that the doctrine of res ipsa loquitur does not apply and that some additional evidence is required. Evans v. Charlotte Pepsi-Cola Bottling Co., 216 N. C. 716, 6 S. E. (2d) 510 (1940); Hollis v. Armour & Co., 190 S. C. 170, 2 S. E. (2d) 681 (1939). The latter view obviously greatly lessens the chances of recovery by the consumer, as under modern mass production methods it is very difficult to prove specific negligence in the producing of any single item of goods.
⁸Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921); Nelson v. Armour Packing Co., 76 Ark. 352, 90 S. W. 288 (1905); Crigger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155 (1915).
and retailer, liable to such ultimate consumer for damages proximately resulting to him by reason of the eating of such food, under an implied warranty imposed by law as a matter of public policy?" On original hearing the question was answered in the affirmative by a five to four majority. But on rehearing, one of the original majority Justices delivered an opinion concurring with the original minority that the question should be answered in the negative, and thus on final disposition of the case the liability of the wholesaler to the consumer was denied by a five to four majority. Eight of the nine Justices agreed that the wholesaler is liable to the consumer if the retailer is liable, but the eight were equally divided on whether the retailer should be liable. The ninth Justice decided on rehearing that the wholesaler should not be liable, irrespective of the liability of the retailer.

The three possible bases for retailer liability are negligence, express warranty, and a warranty imposed by law on the grounds of public policy. The four majority Justices agreed that the first two factors would justify imposing liability on either the retailer or wholesaler, but neither negligence nor express warranty was alleged in the complaint in the principal case. An implied warranty must have as its basis some reasonably inferred reliance, and these Justices argued that "it must be assumed that the plaintiff necessarily knew that the wholesaler and retailer had no superior knowledge of the contents of the sealed package," and that it is just as impractical for the retailer to analyze or inspect the goods as it is for the consumer to do so. Though at common law a retailer has been held implied to warrant the fitness of food for immediate consumption, this rule does not

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1Bowman Biscuit Co. of Texas v. Hines, 251 S. W. (2d) 153, 154 (Tex. 1952). The Court of Civil Appeals assumed the liability of the retailer in its certified question to the Supreme Court, on the basis of the Texas case of Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S. W. (2d) 835 (1942), but four of the majority Justices of the Supreme Court refused to concur with this assumption and based their decision on the view that the retailer is not liable.

2Am. Jur., Food § 94.


apply to food in a can or sealed package because of this lack of opportunity to inspect.\textsuperscript{15}

The four dissenting Justices pointed out that in cases decided under the Uniform Sales Act it has been "presumed"\textsuperscript{16} by the courts from a completely equivocal term of the statute that the consumer relied on the retailer's skill and judgment in regard to the fitness of food sold,\textsuperscript{17} no distinction between packaged and unpackaged goods being recognized in the application of the rule.\textsuperscript{18} This being a judicial assumption, the minority argued that it may be indulged in to justify retailer liability even in jurisdictions like Texas which have not adopted the Sales Act.

It has been suggested that there are three reasons to justify this assumption: it is borne out by human experience in merchandising fields; it achieves a socially desirable result by providing the victim with a practicable remedy; and it serves procedural convenience by allowing the victim to recover from the party he deals with directly.

\textsuperscript{15}Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933); Pennington v. Cranberry Fuel Co., 117 W. Va. 680, 186 S. E. 610 (1936). In Bigelow v. Maine C. R. Co., 110 Me. 105, 85 Atl. 996, 998 (1912), the court declared: "We know of no rule of law which will imply a warranty of that of which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investigation, however great."


\textsuperscript{17}Uniform Sales Act § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment..., there is an implied warranty that the goods shall be reasonably fit for such purpose." It is to be noted that the Act states that an implied warranty will be found if "it appears that the buyer relies on the seller's skill and judgment...." See Waite, Sales (2d ed. 1938) 224, n. 71. Cf. Uniform Commercial Code, Sales § 2-315: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." "Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller." U. C. C., Official Draft (A. L. I. 1952) 108.

\textsuperscript{18}Martin v. Great Atlantic & Pacific Tea Co., 301 Ky. 429, 192 S. W. (2d) 201 (1946); Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225 (1918); Bonenberger v. Pittsburgh Mercantile Co., 245 Pa. 559, 28 A. (2d) 913 (1942). In the Ward case the court stated that § 15 (1) of the Uniform Sales Act is merely a codification of the common law and that at common law the fitness of food is taken as warranted by the seller. In Waite, Sales (2d ed. 1938) 224, n. 71, the writer points out the difficulty in application of the Uniform Sales Act § 15 (1) to canned goods.
after which the retailer can pass the liability on to the manufacturer with whom he dealt. The four majority Justices refuted two of these arguments in stating that human experience does not justify the imposition of liability on the basis of superior knowledge which, in fact, does not exist; nor can it be socially desirable to hold an innocent party liable by fabricating a warranty on this erroneous basis. And mere procedural convenience is declared not to be a proper foundation for imposing liability, because an innocent retailer "should not be required to shoulder an unwarranted burden merely for the convenience of the consumer;" rather, the consumer should be required to resort directly to his remedy against the manufacturer.

Though Texas has not adopted the Uniform Sales Act, the State Supreme Court had ruled in 1942 in *Griggs Canning Co. v. Josey* that a retailer is liable to a consumer under the circumstances of the principal case, without any express warranty or negligence being shown as a basis for liability. Since the propriety of that holding is sustained by the weight of general authority and by the fact that the Texas legislature has not seen fit to change the rule by statute, the dissent contended that it should control the present controversy. The four majority Justices, on the other hand, were convinced that the *Griggs* case was decided erroneously, and would have overruled it. Since the ninth Justice turned the principal case decision on grounds other than retailer liability, he took the position that the question of overruling the *Griggs* case was not before the court and could not be decided. Thus, the rule in Texas remains, however tenuously, in agreement with the general view in those states having the Uniform Sales Act, and in a number of states not having the Sales Act in force, that a retailer is liable to an injured consumer under an implied warranty theory.

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22139 Tex. 623, 164 S. W. (2d) 835 (1942). In this case the defendant retailer sold an unfit can of spinach to the plaintiff's wife, and the plaintiff's wife and stepson became ill as a result of eating the spinach. The court held the defendant retailer liable to the plaintiff on the basis of an implied warranty.
23Swengel v. F. & E. Wholesale Grocery Co., 147 Kan. 555, 77 P. (2d) 930 at 933 (1938). In Waite, Sales (2d ed. 1938) 377, it is stated that thirty-two states have passed the Sales Act which allows retailer liability on the basis of an implied warranty. There are also a number of states which have not passed the Sales Act but which hold the retailer liable on an implied warranty. *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S. W. (2d) 835 at 838 (1942). Professor Williston also agrees that a retailer should be liable to the consumer on an implied warranty theory. 1 Williston, Sales (3d ed. 1948) § 242.
24See note 22, supra. Also, Waite, Sales (2d ed. 1938) 226.
The question of wholesaler liability still remains in some doubt, as does the further question of whether the situation of the wholesaler should be governed by that of the retailer, although eight of the nine Justices of the Texas court agreed that it should be.24

The arguments employed to justify the imposition of liability on retailers and manufacturers are generally inapplicable to the case of wholesalers. No such privity of contract exists between consumer and wholesaler25 as does between consumer and retailer; and a wholesaler does not have the opportunity to know the contents of a sealed package26 and does not make representations to consumers through advertising, as does the manufacturer. Since the consumer has no personal contact with, or even knowledge of the identity of the wholesaler, he cannot be presumed to rely on the wholesaler's skill and judgment in choosing products likely to be wholesome. Further, it may well be that if the consumer has a cause of action against the retailer or manufacturer of the defective product, he is afforded ample remedy for his injuries without also allowing him rights against the wholesaler.

In rebuttal, however, it is argued that the injured consumer may find his retailer financially irresponsible and the manufacturer so distantly located as to make suit against him very burdensome or even impractical.27 In such case, a remedy against the wholesaler is necessary to provide compensation for the injuries suffered. And since the wholesaler would presumably have an action over against the manufacturer with whom he had dealt, liability would ultimately be placed on the party basically at fault in causing the damage. The contention is also made that if the consumer can recover from the retailer, and the retailer can in turn pass the liability on to the wholesaler,28 it is a sensible expedient to allow the consumer to sue the wholesaler directly, without benefit of contract, as he can do in the case of the manufacturer. The dissent in the principal case posed this as the next

28See Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S. W. (2d) 336, 339 (1936). Although this case held that a wholesaler is not liable to a consumer on an implied warranty, the court stated that a retailer held liable to a consumer would have a recovery over against the wholesaler.
logical legal step to take after the recognition of liability in both the non-negligent manufacturer and retailer to the consumer.\(^2\)

Though the courts should seek to effectuate the strong public policy to protect the public health against the menace of unwholesome food, this aim furnishes no justification for holding wholesalers liable for damages to injured consumers. While they have an important commercial function in distributing the products, wholesalers do not produce or prepare the food for shipment, do not generally advertise its merits to the public, and do not sell directly to consumers. Under modern business conditions, they are virtually powerless to prevent such injuries as occurred in the principal case. The mere fact that the customers' remedies against retailers and manufacturers may in some few cases prove inadequate to provide compensation hardly justifies burdening all wholesalers with a liability for which the courts can find no sound legal basis.

Douglas M. Smith

STATUTE OF LIMITATIONS—Time at Which Limitations Period Begins To Run in Regard to Actions for Wrongful Death. [New Mexico]

Under the common law no civil action could be brought for the death of a human being resulting from the wrongful act of another;\(^1\) personal rights of action were said to die with the person, and the wrongful death created no new cause of action in the victim's dependents for loss of services or support.\(^2\) The original basis for the rule came probably from the doctrine that the wrongful act when amounting to a felony merged in the crime,\(^3\) but later cases seemed to find a policy against allowing the value of human life to be mathematically
Whatever the reasoning behind it, the rule wrought the double injustice of absolving the malefactor from civil liability and of leaving the deceased's dependents without right or remedy.

The first step in eliminating these injustices was made in the English Survival Acts, which abolished the common law rule that personal causes of action were extinguished on the death of the wronged person. Similar enactments in most, if not all, American states now provide that personal actions shall not abate on the demise of the wronged person but shall survive him and be prosecuted by his personal representative, or if the action has already begun, his personal representative may revive the action. But the Survival Acts left the family without a remedy, since the proceeds of the survival action went to the decedent's estate. It was not until the passage of Lord Campbell's Act in 1846, and subsequent corresponding legislation in the American states creating a right of action for wrongful deaths, that the dependents of the victim were afforded a remedy for loss of support resulting from the death. Since every state already had a Survival Statute in effect when the Death Acts were adopted, the courts were faced with the problem of whether there now exists an independent cause of action under each statute, or only a single cause of action, the newer statute merely enlarging the recovery under the earlier statute to include damages for loss to the dependents occasioned by the death.

One of the significant specific issues that arises in connection with this problem of interpretation concerns the application of the Statute of Limitations to wrongful death actions. The general rule, absent express statutory provision, applies the ordinary statute governing actions founded on injuries to the person. But the question remains as to when the limitations period begins to run. Some statutes include provisions specifying the date of death or the date of injury to the de-

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4 See Philby v. Northern P. R. Co., 46 Wash. 179, 89 Pac. 468, 470 (1907); Note (1909) 19 L. R. A. (N. S.) 633.
5 Tiffany, Death by Wrongful Act (2d ed. 1913) §§ 19, 25.
6 McCormick, Damages (1955) 335; Note (1950) 21 Miss L. J. 592. See also Prosser, Torts (1941) § 109, and Note (1955) 48 Harv. L. Rev. 1008 for a classification of such statutes.
7 9 & 10 Vict. c. 93, 86 Stat. at Large 531 (1846).
8 Tiffany, Death by Wrongful Act (2d ed. 1913) §§ 19, 23, 24.
9 Prosser, Torts (1941) § 105; 16 Am. Jur. 47, 48 and cases cited.
10 Graham v. Updegrave, 144 Kan. 45, 58 P. (2d) 475 (1936); In re Danick Estate, 208 Minn. 430, 59 N. W. 465 (1940). See Note (1910) 17 Ann. Cas. 519 for peculiar applications of the statute of limitations in various jurisdictions.
CASE COMMENTS

ceased. But other statutes merely state the requirement that the action be brought within a particular time, without defining the point of time from which the limitation shall run, and still others simply declare the necessity of bringing the suit within a certain period after "the accrual of the cause of action." Under such provisions the court must determine whether the enactment on which the suit is based is a Survival Act, under which the cause of action accrues at the time of injury to the deceased, or whether the statute is a Death Act creating a new and independent cause of action, commencing at the death of the victim.

The courts of New Mexico have recently been confronted with this controversy in the case of Natseway v. Jojola. The administrators, parents of a nine year old boy, sought damages of $15,000 for his death occasioned by the wrongful act of defendants in the giving to their minor son a rifle as a Christmas present, the child carelessly inflicting a fatal wound on the plaintiff's son. The shooting occurred on December 28, 1949, but no suit was brought until six months after the boy died on March 28, 1951. The New Mexico Death By Wrongful Act Statute states that whenever the death of a person is caused by a wrongful act of such nature that it would, if the death had not ensued, have entitled the party injured to maintain an action for damages, the person who would have been liable if death had not ensued is liable notwithstanding the death of the injured person. The same Act creates a limitation on the right to sue as "within one year after the cause of action shall have accrued."

Defendant argued that since the complaint was

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Statutes denoting death as the starting point of the statute of limitations may be found in the following: Lute's Adm'r v. Gray-Von Allmen Sanitary Milk Co., 254 Ky. 750, 72 S. W. (2d) 720 (1934); Davis v. Norfolk-Southern R. Co., 200 N. C. 345, 157 S. E. 11 (1931). Illustrative cases denoting date of injury as the point of origin are as follows: Christilly v. Warner, 87 Conn. 461, 88 Ad. 711 (1913); Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934); Flynn v. Chicago Great W. R. Co., 159 Iowa 571, 141 N. W. 401 (1913).

It is usually held under such statutes that the cause of action accrues at the time of death. Hanna v. Jeffersonville R. Co., 32 Ind. 113 (1869); Bowles v. Portelance, 145 Kan. 940, 67 P. (2d) 419 (1937); Weatherman v. Victor Gasoline Co., 191 Okla. 423, 190 P. (2d) 527 (1942).


Tiffany, Death by Wrongful Act (2d ed. 1913) § 19. Cases pointing up this issue are found also in Note (1931) 72 A. L. R. 1319.

251 P. (2d) 274 (N. M. 1952).

not filed until twenty-two months after the fatal injury was inflicted, the cause of action was barred; but plaintiffs contended that the limitations period started to run only from the date of the death. The majority of the court ruled that the action was barred on the reasoning that the Death By Wrongful Act Statute was a Survival Statute under which the cause of action arises when the tort is committed, not when death occurs. Without actually examining the statute to determine its proper classification, the court felt that it was bound by precedent, basing its decision on two earlier New Mexico cases\(^\text{18}\) which had in turn based their rulings on the Missouri court's interpretation of legislation of that state \(^\text{19}\) from which much of the New Mexico Act had been copied. Though faced with the fact that the Missouri courts have overruled decisions which had initially followed the survival construction, and further faced with the hardship that this type construction will engender, this court did not find itself able to supply "what the Legislature has omitted or to omit what it has inserted."\(^\text{20}\)

A better-reasoned dissenting opinion discounted the authority of the earlier decisions\(^\text{21}\) and argued that the Wrongful Death Act does not revive a cause of action belonging to the deceased, but rather creates a new and independent cause of action for the benefit of named parties. And it was pointed out that "in states having wrongful death statutes similar to ours the courts have almost unanimously

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\(^{18}\)The earlier cases relied on were DeMoss v. District Court, 55 N. M. 135, 227 P. (2d) 937 (1951) and Hogsett v. Hanna, 41 N. M. 22, 63 P. (2d) 540 (1936). Both cases were regarded as holding the New Mexico statute to be a survival statute. Yet the court in the principal case evidences a confusion when it first states that the Hogsett case stood for the rule that the intervention of death following the injury created no new cause of action, but four paragraphs later, in answering plaintiffs' contention that infancy of the intestate brings the case under the saving clause for infants found in the statute, the court states that the statute under which the claim creates a new right. Natseway v. Jojola, 251 P. (2d) 274, 276 (N. M. 1952).

\(^{19}\)The Missouri cases cited and quoted as authority for such ruling in Hogsett v. Hanna, note 18 supra, were: Proctor v. Hannibal & St. J. Ry. Co., 64 Mo. 112 (1876); Gray v. McDonald, 104 Mo. 399, 16 S. W. 398 (1891); Casey v. St. Louis Transit Co., 205 Mo. 721, 103 S. W. 1146 (1907). DeMoss v. District Court, note 18 supra, re-affirms the decision of the Hogsett case.


\(^{21}\)The dissent points out that the precedent is not worthy of being followed, because the statements of the court on the issue now involved were dicta in the earlier cases, and because the three Missouri cases cited and quoted as authority for the ruling that the wrongful death statute was a statute of survival rather than a statute creating a new cause of action had been overruled by the Missouri Supreme Court in Thomas v. Daues, 314 Mo. 13, 283 S. W. 51 (1926), ten years prior to the decision in the Hogsett case. Natseway v. Jojola, 251 P. (2d) 274, 279, 280 (N. M. 1952).
held that the cause of action does not exist or come into being until
death."\textsuperscript{22} To the dissenting Justice, the right did not arise from the
decedent’s injury, but from his death, which gave rise to the need of
the beneficiaries for compensation; and this right is completely inde-
pendent from any action the deceased might have had if he had not
died.

The great weight of general authority in this controversy lies with
the dissent, for statutes similar to Lord Campbell’s Act are most widely
accepted as creating a new right of action.\textsuperscript{23} The basic components of
this type Act are that a right of action is maintainable whenever death
is the result of a wrongful act which would have entitled the person
injured to maintain an action if death had not ensued, that such suit
is for designated beneficiaries of deceased’s family, and that damages
obtainable are those experienced by the beneficiaries because of the
death.\textsuperscript{24} The New Mexico Statute contains these identifying factors,
and text writers,\textsuperscript{25} legal encyclopedias,\textsuperscript{26} and case decisions\textsuperscript{27} all con-
strue the New Mexico type Death By Wrongful Act Statute as pro-
viding a totally new action independent of the right of action for
personal injuries and based on different principles.

However, the New Mexico holding in the principal case is not
unique, for in a few jurisdictions such statutes allowing actions for
wrongful death are regarded as mere Survival Acts, on the theory that
the cause of action was in decedent from the time of the injury and
that the Act merely enlarged the recovery to include damages suf-
fered by reason of the death.\textsuperscript{28} Under this view, the statutes create
no new action upon death, but rather the right which the deceased
had before his death is imparted to the beneficiaries. Though the
statute of limitations normally is held to run from the time of injury

\textsuperscript{22}Natesey v. Jojola, 251 P. (2d) 274, 279 (N. M. 1952).
\textsuperscript{23}Tiffany, Death by Wrongful Act (2d ed. 1913) § 19; Note (1950) 21 Miss L. J.
392, 393, 397. For list of those states adhering to the new cause of action theory,
see 16 Am. Jur. 48.
\textsuperscript{24}McCormick, Damages (1935) 336. See Schumacher, Rights of Action under
\textsuperscript{25}Tiffany, Death by Wrongful Act (1st ed. 1893) §§ 23, 24.
\textsuperscript{26}25 C. J. S. 1079; 16 Am. Jur. 48, 49.
\textsuperscript{27}Chamberlain v. Missouri-Arkansas Coach Lines, 354 Mo. 461, 189 S. W. (ad
538 (1945); Jordan v. St. Joseph Ry., Light, Heat & Power Co., 335 Mo. 519, 73 S. W.
(2d) 205 (1934); Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W.
(2d) 920 (1933); Thomas v. Daues, 314 Mo. 13, 283 S. W. 51 (1926).
\textsuperscript{28}Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Cincinnati, H. & D. R. Co. v.
McCullom, 193 Ind. 556, 109 N. E. 206 (1915); Notes (1948) 174 A. L. R. 844 (1950)
21 Miss. L. J. 392, 393.
in such a construction, some jurisdictions upholding this interpretation unaccountably rule that the statute of limitations does not start to run until death occurs.

Such an approach to Death By Wrongful Act Statutes evidences a confusion with statutes providing for survival of actions in tort. The two types of statutes are different in intent. A Survival Act provides that any cause of action, whether in tort, fraud, breach of contract, etc., accruing to a person is not extinguished by the death of the person but survives for the benefit of his estate, and the action which survives is for the original wrong to the deceased. The creation of a wrongful death action authorizes statutory beneficiaries, rather than the personal representative, to sue for damages on account of the death. It is manifest that the Death Acts do not merely provide for the survival of the action which the party injured might have brought, for, though the suit is allowable only when death is the result of such a situation as would have entitled the injured party to bring suit, the death action is not for recovery of damages resulting from the personal injury to the deceased, and hence by survival to his estate. It is brought only for damages for loss resulting from death to the surviving members of the family. Thus, no action can be brought by the beneficiaries against the wrongdoer until after death of the victim of the wrong. If the death occurs after an interval longer than the statute of limitations period, then under the view of the New Mexico court, the remedy of the beneficiaries of the statute would be destroyed before the right ever came into existence. That very situation prevailed in the principal case, as the death did not result until fifteen months after the injury was inflicted. It seems clear that no such construction should be put on the ambiguous terms of a remedial statute which would defeat the purpose the legislation was designed to effectuate.

Rather than approaching the problem of the principal case analyt-


30 See Goodwin v. Bodcaw Lumber Co., 109 La. 1050, 34 So. 74 (1902) and Kennard v. Illinois C. R. Co., 177 Tenn. 311, 148 S. W. (2d) 1017 (1941), holding the limitation period does not begin until the time of death. For an excellent note on death by wrongful act and survival of personal injury in Virginia, see Note (1952) 38 Va. L. Rev. 959. There are conflicting decisions in Virginia as to whether that state adopts the survival theory or the new cause of action theory. Later cases would evidently classify the Death Act as a Survival Statute but the statute of limitations does not start to run until death. See also Note (1948) 174 A. L. R. 844.

31 Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 27 S. W. 66 (1894); St. Louis & S. F. R. Co. v. Goode, 42 Okla. 784, 142 Pac. 1185 (1914).
ically, the New Mexico court has chosen to rest the decision on authority which has been discredited at its source. Instead of immediately correcting an unsatisfactory situation by overruling the prior decisions as contrary to the overwhelming weight of authority, as well as logic, reason, and justice, the majority of the Justices were willing to leave the problem to future uncertain action of the legislature.

D. Henry Northington

Torts—Liability for Physical Injury Resulting From Nervous Shock at Witnessing Negligent Acts Toward Third Party. [Maryland]

The common law doctrine which refused recovery to a plaintiff who had suffered injuries due to the negligent acts of the defendant unless there was a concurrent "impact" has been abrogated in England and seriously questioned in the United States. Generally, in situations where the plaintiff suffers physical harm as a consequence of nervous shock resulting directly from defendant's negligence, recovery is al-

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3The Texas court refused to follow the New York doctrine laid down in the Lehman case and allowed recovery to a woman who suffered a miscarriage resulting from fright incurred when she saw the defendant assault two Negroes in her yard. The court observed: "That a physical personal injury may be produced through strong emotion of the mind there can be no doubt." Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890). In stating the prevailing Maryland rule the court observed, "It has long been established in this state that recovery may be had for physical injuries resulting from nervous shock, even though there is no actual physical impact." Resavage v. Davies, 86 A. (2d) 879, 886 (Md. 1952). Accord: Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918); Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916); Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202 (1907); Throckmorton, Damages for Fright (1921) 34 Harv. L. Rev. 260.
However, most courts deny recovery for negligently caused shock or fright, unaccompanied by physical injury. While the issue in two-party situations, therefore, is well on its way to settlement in favor of allowing recovery for physical injury, such is not the case where the plaintiff seeks a recovery for physical harm resulting from nervous shock sustained while witnessing the defendant's negligent acts toward a third party, which do not place the plaintiff in a position of personal danger. Formerly, the English courts denied recovery, but this rule was repudiated in the leading case of Hambrook v. Stokes Brothers, which is now the accepted authority for granting recovery. The general American rule denying recovery to the plaintiff in this three-party situation is typified by the recent Maryland case of Resavage v. Davies. The plaintiff was on her front porch watching her two minor daughters as they stood on the curb of a Parkway in front of their residence, awaiting the arrival of a bus. The defendant negligently drove her automobile over the curb, striking and killing the two girls, in full view of the plaintiff. Plaintiff was "petrified with horror at the sickening scene unfolded before her and torn with anxiety, ran to the children, who were languishing in pools of blood and in a dying condition." Thereafter, plaintiff sought to recover damages for physical injuries sustained from nervous shock occasioned by the death of her two minor children...

1 Central of Georgia Ry. Co. v. Kimber, 212 Ala. 102, 101 So. 827 (1924); Orlo v. Connecticut Co., 128 Conn. 231, 21 A. (2d) 402 (1941), noted 3 Wash. & Lee L. Rev. 177; Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 Atl. 688 (1909); Lambert v. Breaster, 97 W. Va. 124, 125 S. E. 244 (1924); Restatement, Torts (1941) § 313, p. 850.

2 "The general rule supported by the weight of authority is that mental pain and suffering will not alone constitute a sufficient basis for the recovery of substantial damages." 25 C. J. S., Damages § 64; Prosser, Torts (1941) 216.

3 After the abrogation of the "impact" requirement, the English court in Hambrook v. Stokes Brothers allowed the plaintiff to recover damages for the death of his wife resulting from nervous shock incurred because of the negligence of the defendant's servant when he had allowed an improperly parked truck to roll down the street. The deceased was not an eye witness but was close enough to appreciate the danger to her child. Lord Justice Bankes observed: "I am merely deciding that in my opinion the plaintiff would establish a cause of action if he proved to the satisfaction of the jury... that the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses... and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children." Hambrook v. Stokes Brothers, [1935] 1 K. B. 141, 152; Prosser, Torts (1941) 218.

4 Resavage v. Davies, 86 A. (2d) 879 (Md. 1952). The majority of the court followed the rule laid down in Waube v. Warrington, 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394 (1935), where no recovery was allowed to the plaintiff whose intestate had died as a result of seeing defendant strike and kill intestate's child. The Wisconsin court ruled that no duty was owed to the plaintiff's intestate by the defendant.
fendant's negligence toward her daughters. The trial court sustained the defendant's demurrer to the declaration and the plaintiff appealed. By a three to two majority the Court of Appeals affirmed the action of the lower court on the ground that defendant violated no duty owed to plaintiff. The majority observed: "We think the operator of a motor vehicle on the highway is not liable to spectators in a place of safety off the highway for visible shock to them. If such a rule were adopted it would involve a tremendous extension of liability to the world at large, not justified by the best considered authorities." The minority of the court would have extended the liability of the defendant to include the plaintiff, on the ground that previous decisions in the Maryland court, such as *Bowman v. Williams* and *Mahnke v. Moore*, had extended the allowable scope of recovery to plaintiffs who were not put in personal danger by the defendant's acts.

The principal decision concurs with the view of most courts that in such a situation the defendant is not liable to an injured person who is out of the scope of foreseeable danger. The main problem in these three-party situations is really one of how far the courts will extend the liability of defendants in allowing or denying recovery to plaintiffs. The minority in the principal case recognizes this to be the crux of the problem and proceeds to examine Maryland cases to ascertain the extent to which they have gone in allowing recovery. The conclusion is reached that under the test of foreseeability, employing either a duty or a proximate cause approach, the courts have allowed

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2. 164 Md. 397, 165 Atl. 182 (1933) (plaintiff allowed to recover for injuries resulting from shock and fright incurred through defendant's negligence toward plaintiff's children directly and toward plaintiff indirectly when defendant's truck was allowed to crash into side of plaintiff's house).
3. 77 A. (2d) 923 (Md. 1951) (illegitimate child of deceased allowed to recover from the father's executor for physical injuries resulting from nervous shock sustained when she saw her father shoot her mother and then himself).
5. Under the duty theory, a duty must be found owing to the particular plaintiff, while in the proximate cause theory the duty runs to society in general, and the plaintiff need not be specified. Judge Cardozo clarified the former situation in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 101 (1929), when he observed: "If the harm was not wilful, he [plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended."

Judge Andrews in his dissent in the *Palsgraf* case, summarized the existence
recovery for much less foreseeable injuries than were suffered by the present plaintiff.

In jurisdictions which follow the majority view of the Resavage case, the cases are turned on the issue of the existence of a duty in the defendant to the particular plaintiff, and no duty is found because it is said not to be foreseeable that the plaintiff will suffer physical harm from mere fright when he is not put in any danger of direct personal injury by the negligent acts of the defendant. Unforeseeability is used here in the sense that to impose liability would place an onerous and unwarranted burden on the defendant to comprehend that that specific kind of injury will be sustained by that particular plaintiff or that group of plaintiffs who are not within the orbit of direct and immediate harm or fear of harm.

The dissenting opinion is representative of the minority view which allows recovery to the plaintiff in three-party situations, on the reasoning that defendant's negligence is the proximate cause of the injury suffered by the plaintiff. Under this approach there must be fore-

of a duty in the proximate cause view when he observed: "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A. B. or C. alone.... Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain." Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99, 102, 103 (1928).


In Waube v. Warrington, 216 Wis. 608, 258 N. W. 497, 500, 98 A. L. R. 394, 401 (1935) the court observed: "Fundamentally, defendant's duty was to use ordinary care to avoid physical injury to those who would be put in physical peril, as that term is commonly understood, by conduct on his part falling short of that standard.... It is quite another thing to say that those who are out of the field of physical danger through impact shall have a legally protected right to be free from emotional distress occasioned by the peril of others, when that distress results in physical impairment."

Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Bowman v. Williams, 164 Md. 397, 165 Atl. 182, 184 (1933) ("The physical damages which the plaintiff sustained naturally, directly, and reasonably arose from this negligent act or omission, without the intervention of any other cause, and so the causal connection between the injury and the occurrence is established."); Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890); Frazee v. Western Dairy Products, 182 Wash. 578, 47 P. (2d) 1037 (1935); Hambrook v. Stokes Bros., [1925] 1 K. B. 141.
seeability of some harm to someone as a result of defendant's act. Once this is established, however, defendant is liable for all harm to anyone flowing in an unbroken causal sequence from the act and which is the "proximate result" of the act.17

Support for the minority view is also found in certain situations in the decisions of jurisdictions which normally adhere to the majority doctrine. Such support arises in cases granting recovery to the plaintiff when the acts of the defendant toward the third party are intentional,18 when such acts are perpetrated merely as a practical joke,19 or when the plaintiff is pregnant and subsequently suffers a miscarriage.20 Similarly, courts have imposed liability on the defendant when it can be established that a specific duty was owed to the plaintiff as well as to the person directly injured.21 Illustrative of this latter ten-

17Judge Andrews in the Palsgraf case observed: "...when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former....what we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99, 103 (1928.)

18Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916) (defendant shot plaintiff's dog which was near plaintiff's child); Rogers v. Williard, 144 Ark. 587, 233 S. W. 15 (1920) (defendant pointed pistol at plaintiff's husband); Ex parte Heigho, 18 Idaho 566, 110 Pac. 1029 (1910) (defendant attacked son-in-law of plaintiff in her presence); Mahnke v. Moore, 77 A. (2d) 923 (Md. 1951) (plaintiff saw her father shoot her mother and himself); Renner v. Canfield, 36 Minn. 90, 30 N. W. 435 (1885) (defendant shot plaintiff's dog while she was watching); Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890) (plaintiff witnessed defendant assault two Negroes on her premises).


21Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912) (plaintiff and her husband were standing beside their buggy, in which plaintiff's children were riding, when defendant's negligently driven automobile frightened plaintiff's horses causing them to run away; plaintiff allowed to recover for physical injuries resulting from fright suffered from fear for safety of her children as well as for a breach of duty to her personally); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933) (plaintiff allowed recovery for nervous shock and fright suffered due to his fear for safety of his children when he saw defendant's negligently operated truck run
dency is the Maryland case of Bowman v. Williams, in which the defendant was held liable for injuries suffered by the plaintiff when the defendant’s negligently driven truck crashed into the side of the plaintiff’s home and protruded into a basement room, above which the plaintiff was standing and in which two of his children were known to be playing. In finding a duty running both to the plaintiff and his children, the court observed, “The master has the right to drive the truck upon the highway, but, in the exercise of this right, the master owes a duty to ... occupants of the contiguous premises so... that an injury to [them]... will not be inflicted by the failure of the master to operate the truck with reasonable care and caution under the circumstances.”22

The differing legal theories of the duty approach on the one hand and proximate cause view on the other are not the true legal basis for the apparently divergent results achieved by their use. Since both turn on the test of foreseeability, it appears clear that the same result may be attained by the application of either approach in a given situation. The minority in the principal case gave guarded expression to this point by observing that “There is a difference between the question of proximate cause and the question of duty, but not as great a difference as defendant argues.... the element of foreseeability has not the same but a similar place in each question.”23 In a situation like that of the Resavage case, it is submitted that the presence of a parent in the vicinity of the endangered child is quite as foreseeable as the coming of a rescuer to the aid of a victim imperiled by the wrong of another party. Of the latter situation, Judge Cardozo wrote in Wagner v. International Ry. Co.: “The cry of distress is the summons

into the side of his house); Gulf, C. & S. F. Ry. Co. v. Coopwood, 96 S. W. 102 (Tex. Civ. App. 1909) (plaintiff allowed to recover for injuries resulting from nervous shock sustained when she witnessed the negligence of the defendant railroad toward her daughter who was ill); Frazee v. Western Dairy Products Co., 182 Wash. 578, 47 P. (2d) 1079 (1935) (held a jury question whether recovery should be allowed when, due to defendant’s negligence, his truck was allowed to run up on the plaintiff’s lawn upon which plaintiff knew her son was standing); Hambrook v. Stokes Brothers, [1925] 1 K. B. 141 (plaintiff allowed to recover for wife’s death caused by shock and fright when she found out that her daughter had been injured by the negligence of the defendant; plaintiff did not see the accident, but was close enough to appreciate the risk of harm to her child); Richards v. Baker, [1943] 5 Austr. St. 245 (plaintiff allowed recovery for injuries suffered from fright as a result of seeing her child struck by defendant’s car as plaintiff and child were walking down highway). Contra: Kelly v. Fretz, 19 Cal. App. (2d) 356, 65 P. (2d) 914 (1937); Keyes v. Minneapolis & St. L. Ry. Co., 36 Minn. 290, 30 N. W. 888 (1886); Lone Star Gas Co. v. Haire, 41 S. W. (2d) 425 (Tex. Civ. App. 1931).

22Bowman v. Williams, 164 Md. 397, 165 Atl. 182, 183 (1933).
to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.... The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."24 So, it may be argued, is the wrongdoer accountable as if he had foreseen the presence of the mother, and this is true whether the Wagner case is accepted as a proximate cause decision or is reinterpreted in the light of Judge Cardozo's later opinion in Palsgraf v. Long Island Ry. Co.,25 as a "negligence-duty" decision.

Since the legal theories employed offer no adequate explanation for the decision reached by the courts in three-party situations, it is apparent that the real issue with which the courts are confronted is how far they are willing to go in constricting or expanding the limits of liability. Those jurisdictions which follow the circumscribed view of liability base their decisions on the policy ground that an expanded liability would subject the courts to a flood of litigation,26 and would impose upon users of the highway an unreasonable and disproportionate burden.27 However, in a Resavage situation the fear of the parent for the safety of her child is just as real and injurious as the fear of the parent for her own safety would be if she were placed in personal peril of bodily harm. The imposition of liability for these injuries, while it increases the penalty for negligent driving, does not add to the degree of care required, for if drivers operate their cars in the manner necessary for the protection of those within the area of direct danger, they very seldom will be subjected to suits of third parties.

ROBERT R. KANE, III

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27Cote v. Litawa, 96 N. H. 174, 71 A. (2d) 792, 795 (1950); "Such consequences are such an unusual and extraordinary result of the careless operation of an automobile that to recognize such a right and impose such a duty would, in our opinion, place an unreasonable burden upon users of the highway." Waube v. Warrington, 216 Wis. 603, 258 N. W. 497, 501, 98 A. L. R. 394, 401 (1935): "The liability imposed by such a doctrine is wholly out of proportion to the culpability of the negligent tortfeasor [and] would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."
Although workmen's compensation legislation now governs the liability of the employer to an employee for injuries arising out of the employment, the question of whether the employee's statutory right against his employer affects the generally recognized common law right of recovery from a negligent fellow-employee at whose hands he was injured remains a point of disagreement. In at least one state, the Compensation Act specifically denies such recovery, providing that "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employment." In some other jurisdictions, provisions making the compensation award the exclusive remedy for "any injury arising out of the employment" have been applied to bar any action against a negligent fellow-employee, where the injury occurred in the course of their mutual employment.

The statutes of most states, however, are ambiguous on this specific point. They normally contain sections providing that the employee's cause of action against third parties causing injury is preserved, and that an employer who has paid compensation to the injured employee under the Workmen's Compensation Act is subrogated to such right; and, on the other hand, they specify that an employee included under the Act can collect from his employer and "those conducting his business" only by means of a workmen's compensation.

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1Workman's Compensation statutes have been passed in all states, all United States territories, and by the federal government. For an indexed collection and comparison of the statutes of the different jurisdictions, see 4 Schneider, Workmen's Compensation Statutes (1940) 4411-4443.


3The Workmen's Compensation Laws of the following have provisions making the compensation award the "exclusive remedy" [all citations refer to Schneider, Workmen's Compensation Statutes (1939-40)]: Alabama, 1 Schneider 4; Arizona, 1 Schneider 118; Colorado, 1 Schneider 325; Montana, 3 Schneider 2069; Oklahoma, 4 Schneider 3127; Oregon, 4 Schneider 3185; Washington, 4 Schneider 4102. Kowcut v. Bybee, 182 Ore. 271, 186 P. (2d) 790 (1947); Peet v. Mills, 76 Wash. 437, 136 Pac. 685 (1913).

4No state has a statute specifically conferring a right of action against a fellow employee.
award. This form of legislation gives rise to the issue of whether a co-employee causing injury is liable under the first type of provision as a "third party," or is immune under the second type of provision protecting "those conducting his [employer's] business."

The recent case of Nolan v. Daley pointedly illustrates the divergence of opinions under such indefinite statutes. The plaintiff was injured on the job as a result of his co-employee's negligent operation of a crane. After having collected an award from his employer under the South Carolina Workmen's Compensation Act, he sought to recover additional damages in a negligence action against the co-employee. The South Carolina statute provides: "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident in the manner herein specified." The majority of the court, finding itself faced with a case of first impression but drawing on Virginia and North Carolina authority, denied recovery, resting the decision on the premise that the negligent employee is within the scope of the immunity offered by the statute to those conducting the employer's business. To prove that the intent of the legislature was to include fellow-employees under the immunity clause, the majority opinion argued that to allow such suits as the plaintiff here seeks to bring would defeat the fundamental purpose of the law to put industrial accidents in the category of general business risks, compensable by the employer from the profits of his enterprise. In support of this conclusion, the court reasoned that if the plaintiff were allowed a right to recover from his co-employee, as an unprotected third party, the employer, having paid the compensation award, could exercise his right of subrogation to the injured employee's cause of action against the

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7 73 S. E. (2d) 449 (S. C. 1953).
8 The employee operating the crane negligently swung the boom into a high tension wire on the premises of the employer, seriously burning the plaintiff employee.
co-employee, thus passing the loss on to his employees instead of absorbing it as a general business risk. In reference to the implication arising from the section excluding common law liability of employers and those conducting their business, but not mentioning rank and file employees in this respect, the majority opinion cited the unfairness of immunizing employees of a managerial nature while leaving lower employees subject to personal liability, and pointed out that the purpose of the Act would be defeated by the subjection of either category of employee to liability. It was concluded that the legislature would not have intended to establish such an unjust distinction or allow for an incidental right which would undermine the primary objective.

The dissent, which is well supported with persuasive authority, contended that the words of the immunity section of the South Carolina statute do not provide immunity to a co-employee, since a mere employee cannot be considered to be "conducting business" for his employer. It was further pointed out that, while another section of the Act expressly precludes an employee from exercising his common law rights and remedies against his employer, there is no term abrogating his right against his fellow-employee, this omission indicating that the latter rights are still in effect. The purpose of the statute was asserted not to be to relieve wrong-doing persons causing injury from liability, but rather to assure just compensation to the injured person.

Under the interpretation put on the inconclusively phrased statutes in other jurisdictions, a co-employee is generally held to be a third party liable for his negligent injury to his fellow servant, even though both are covered by the compensation provisions of the Act. Some

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11 "To hold otherwise would, in a large measure, defeat the very purpose for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act, G. S. § 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency." Nolan v. Daley 73 S. E. (ad) 449, 452 (S. C. 1952).


courts go so far as to allow this right even after the injured employee has accepted payments under the Compensation Act, thus creating a problem of double compensation for a single injury.\(^\text{15}\) The decisions following this view are based upon the principle that an employee who contributes nothing to the compensation fund and who is himself a potential beneficiary of it has done nothing to deserve protection under the statute from liability for his own wrongdoing.\(^\text{16}\) These employees are held still to owe the common law duty of due care to their fellow employees, and it is argued that refusal to allow actions against co-employees would encourage carelessness among workmen and result in generally greater occupational hazards.\(^\text{17}\) One opinion expresses the idea that as each employee is under a separate contract of labor, even though contracting with a common employer, their relationship to each other is separate and independent.\(^\text{18}\) The decisions

\(^{529}\) 146 Atl. 30 (1929); McGonigle v. Gryphan, 201 Wis. 269, 229 N. W. 81 (1930); 3 Schneider, Workmen’s Compensation (3d ed. 1949) § 842 (c); 71 C. J., Workmen’s Compensation Acts § 1585.

The benefits under the Workmen’s Compensation statutes of the various states are generally held to be exclusive only as applies to the employer and not to interfere with the employee’s common law right of action against a third party who was responsible for his injury. It is quite generally provided in the statutes that the employee cannot recover in full from both the employer and the negligent third party, though he may bring simultaneous actions against both parties under some statutes. Some of the Compensation Acts require the employee to elect whether he will claim compensation or prosecute his remedy against the negligent third party, while others permit him to go against the employer if the amount of his recovery from the third party is not sufficient to cover his damages. The statutes of the various states present a wide variety of modifications of these types of provisions. The following cases represent some of these variations: Arkansas Valley Ry., L. and P. Co. v. Ballinger, 65 Colo. 548, 178 Pac. 566 (1919); U. S. F. & G. Co. v. N. Y., N. H. & H. R. Co., 101 Conn. 200, 125 Atl. 875 (1924); Travelers Ins. Co. v. Georgia Power Co., 51 Ga. App. 579, 181 S. E. 111 (1935); Lebak v. Nelson, 62 Idaho 95, 107 P. (2d) 1054 (1940); O’Brien v. Chicago City Ry. Co., 505 Ill. 244, 137 N. E. 214 (1922); Black v. Chicago G. W. R. Co., 187 Iowa 904, 174 N. W. 774 (1919); Lowe v. Morgan’s La. & T. R. & S. S. Co., 150 La. 29, 90 So. 429 (1921); Bunner v. Patti, 343 Mo. 274, 121 S. W. (2d) 153 (1938); Corria v. Fink Bros., 45 R. I. 80, 120 Atl. 321 (1923); Merrill v. Marietta Torpedo Co., 79 W. Va. 669, 92 S. E. 112 (1917). See also 3 Schneider, Workmen’s Compensation (3d ed. 1943) § 834. See Note (1953) 9 Wash. & Lee L. Rev. 916 for a discussion of one phase of the double recovery problem arising out of workmen’s compensation legislation.

\(^{15}\)See Nolan v. Daley, 73 S. E. (2d) 449, 453 (S. C. 1952) (dissenting opinion).

\(^{17}\)“To hold that a fellow servant is not liable for his tortious acts in such an action as the one at bar would... mean a free hand to everybody to neglect his duty toward his fellow servant, and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty.” McGonigle v. Gryphan, 201 Wis. 269, 229 N. W. 81, 83 (1930). See also Rehn v. Bingaman, 151 Neb. 196, 36 N. W. (2d) 856, 860 (1949).

\(^{18}\)Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 at 131 (1929).
following this view reason that the preservation of the cause of action against a fellow servant furnishes the employer a deserved right of reimbursement, through the subrogation procedure provided for in most compensation statutes.\textsuperscript{19}

In spite of the clear statement in the Acts that only statutory compensation can be collected from the employer and "those conducting his business," the courts seem to make no consistent distinction between an employee in some type of managerial capacity and a mere workman in the ranks. Thus, despite the fact that the employer was covered by workmen's compensation, liability has been imposed on such employees as the chief of a municipal fire department,\textsuperscript{20} the vice-president of the corporation employing the injured employee,\textsuperscript{21} a railway company which was the agent of an express company employing the plaintiff,\textsuperscript{22} the manager of an electric company employing an injured lineman,\textsuperscript{23} and a foreman in charge of the gang in which the the injured party was working.\textsuperscript{24}

The view followed by the majority in \textit{Nolan v. Daley}\textsuperscript{25} has been adopted in only a few jurisdictions,\textsuperscript{26} and in denying liability these courts also make no clear delineation between the employee in an executive or managerial position and a mere employee.\textsuperscript{27} Like the South Carolina court in the principal case, they predicate their decisions on the logical ground that workmen's compensation legislation was con-
ceived as a means of affording to an employee speedy relief at a uniform rate of damages, such damages to be borne by the employer as one of the risks of business. To impose upon a fellow employee liability to a workman whom he has negligently injured, and to allow their common employer to be subrogated to the right of an injured employee by statutory provision, would be to make the employees, rather than the business which they carry on, the ultimate bearers of the loss.

These courts also argue that the workmen's compensation statutes were intended to abolish all common law rights of an employee against fellow servants as well as employers, unless expressly reserved by a statutory provision. As a matter of principle, it would appear that the view expressed by the majority of the South Carolina court has logic and fairness on its side. From a practical standpoint, the argument advanced by the advocates of preserving the fellow employee's common law liability that a denial of such liability would encourage carelessness among workers seems unsound; it is probably safe to assume that the average workman will exercise the same degree of caution and humane consideration toward the men with whom he works daily regardless of the extent of his legal liability. It is also questionable in the light of the expressed purpose of the Workmen's Compensation Acts whether the argument in favor of giving the employer a right of reimbursement is a valid one, since, as argued by the courts following the majority view, this would allow him to foist the ultimate loss off on

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28 The underlying reason behind such provisions is to provide the employer a means of recovery from a third party stranger, not connected with the industry, whose negligence has resulted in injury to an employee who has in turn claimed compensation from the employer. To hold the employer liable for such injuries which do not arise from his business without chance for repayment would be to pervert the express intention of the Workmen's Compensation Acts and overextend the employer's already broad liability. Such injuries were not intended to be ultimately cast upon the business, and the purpose of the subrogation provisions was to give the employer an opportunity to recoup that loss from such negligent third parties. See Feltig v. Chalkley, 185 Va. 96 at 102, 83 S. E. (2d) 73 at 76 (1946), for an excellent discussion of this point.

29 "One purpose of the Workmen's Compensation Act was to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer insured under the act, and not to preserve for the benefit of the insurer or of the insurer and those injured liabilities between those engaged in the common employment which but for the act would exist at common law." Bresnahan v. Barre, 286 Mass. 593, 190 N. E. 815, 817 (1934).

his employees. It would seem only logical that an employee who elects to accept the benefits of a workmen's compensation award should forego any additional right of recovery against a fellow employee, where the injury occurred within the scope of the employment. While the fellow employee has contributed to no specific fund for his relief, he has given up his common law rights against the employer for a guaranteed award under the Compensation Act.

Since no state statute expressly allows a right of action against a fellow employee, the responsibility for the seemingly illogical rule in the majority of jurisdictions rests with the courts, and the legislatures in those states should amend their workmen's compensation laws so as to effectuate fully their intended purpose of making compensation for industrial injuries a risk of business.

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