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THE PLACE AND FUNCTION OF
THE LAWYER IN SOCIETY

CHARLES V. LAUGHLIN*

"I cannot believe that a republic could subsist at the present
time if the influence of lawyers in public business did not in-
crease in proportion to the power of the people."
—de Tocqueville.¹

The American people are sports minded and are well familiar
with competing teams, the crowd of spectators, and the umpire.
Might not the partisans of conflicting interests be likened to the
adversaries in an athletic contest with the lawyer as the umpire?

Obviously the term "the lawyer" is a figure of speech signifying
lawyers in their collective capacity. Although considerable differences
will be seen between the functions of the legal profession, i.e., the
lawyer, and individual lawyers, the concept of the former may be
best understood by determining the meaning of the latter.

What is a lawyer? Although private practitioners are probably
the largest element in the legal profession, it seems clear that judges,
quasi-judicial officials, law professors, legal employees of economic
groups, such as corporations and labor unions, must also be included.
In England both barristers and solicitors are lawyers. Such clergymen
as were particularly concerned with the administration of law were
lawyers in medieval Europe. The wise old men of primitive tribes,
whose efforts were devoted to the application of the customs of their
groups to the conduct of individual members, were lawyers. From
the foregoing examples it is seen that the essential characteristic of
a lawyer is that his function in society requires the recognition of
law. In present day America the legal profession may be presum-
tively equated to members of the bar. True, the two groups are not
coextensive. There are undoubtedly some persons who, although
licensed to practice, have long been engaged in occupations which
in no sense require an understanding of law. On the other hand,
there are individuals, not members of the bar, who are required

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¹ Democracy in America, c. 16.
regularly to recognize and apply law. For example, in many States membership in the bar is not a prerequisite for holding judicial office, even on the highest courts. Certainly no one would contend that a judge, even though not permitted to practice, is not a lawyer. However, a successful bar examination, with the consequent license to practice, is considered the Q. E. D. of a legal education.

If lawyers are defined as those persons who recognize and apply law, their function in society must depend upon the reason for the existence of law. The need for law arises from the inevitability of human conflict. Dean Pound points out that the limited supply of goods renders impossible the satisfaction of all demands of all men; it follows that conflicts, between individuals and between groups, will arise. Such conflicts of interest may well promote the progress of society so as to render more abundant the lives of a greater number of people. The welfare of the entire social organism, however, requires that the struggle by any individual or group, for purposes however just, proceed in such a manner as not to prejudice too greatly other parties in the attainment of their legitimate objectives. Therefore, a framework of rules becomes imperative.

The rules or laws governing the great contests of life are promulgated by the state, and thus, in a democratic society, by the contestants themselves. The state, as representative of the whole of society, occupies an anomalous position. Although it is the agency through which law is provided and enforced, it is also a party subject to law. Legal limitations upon the power of government exist in addition to those arising from written constitutions. The moment a government prescribes rules, and endeavors to act in accordance therewith, it has restricted its own power. Thus, if the state refuses to give John Doe a judgment against Richard Roe except upon an established cause of action it has abdicated its power to enter a judgment for any reason whatever, or for no reason. This self control, known as the "rule of law," may exist even in a monarchial or aristocratic state, but its

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2It follows that two individuals might do exactly the same work, e.g., adjustment of claims for an insurance company, and one of them, a member of the bar, be a lawyer, and the other not. The work involves the recognition of law to such an extent as to save the member of the bar from forfeiting his status as a lawyer; but not so strikingly as to require that he who is not a member of the bar be regarded as a lawyer.

3Essay in a symposium, "My Philosophy of Law" (1941) 251.

4See Madison, Federalist Paper No. 10.

5See Dickinson, My Philosophy of Law (1941) 100, n. 3.
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special significance in a democracy lies in the fact that the entire body politic has recognized that individuals and minority groups have rights even as against the aggregate of society.

A rule of law is demanded for two reasons. The first is the desire for a predictable consistency in the conduct of human affairs. It would be intolerable if the same questions were decided one way between one set of litigants and the opposite way between another. The severity of even an unjust law is mitigated if its victims are assured that by adhering to its extreme requirements they can avoid unpleasant sanctions. The second reason is the willingness of dominant groups to restrict their powers by recognizing minority rights, because the majority today may be the minority tomorrow. In fact, members of the majority simultaneously belong to minority groups. An athletic contestant may not insist on an arbitrary decision against his adversary, lest similar rulings soon be made against him.

Although deemed necessary and accepted, the law is not self-executing. There must be an umpire, or umpire group, separate and distinct from the participants in any struggle between individuals or economic interests. The "marked capacity of human beings to form and retain prejudices" has been recognized by the wisdom of the ages, in the decree that no man can be a just judge in his own cause. Madison states in the Tenth Federalist Paper:

"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time;..."

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7 For a further example the reader may be reminded of the attempt of a recent President of the United States to enlarge the membership of the Supreme Court so as to enable the appointment of justices believed likely to decide cases more favorable to his views. He was opposed by many of his erstwhile supporters, who, although regretting some of the decisions prompting the proposal, believed that if such a strategem could be used today for their benefit, it might be used tomorrow, by another administration, to their prejudice. The benefit of doctrinal consistency by an impartial adjudicating body may also be shown. "Liberals" denounced the due process clause of the 14th Amendment to the United States Constitution after such decisions as Lochner v. New York, 198 U. S. 198, 25 S. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133 (1905), and Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441, L. R. A. 1915C 960 (1915), and yet applauded when that same clause was invoked in Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 1093 (1940).
8 Katz in 1 Journal of Legal Education (1948) 209.
9 Publius Syrus, Maxim 540; Pascal, Thoughts, c. 4, 1.
It therefore follows that there must be an adjudicating group with "The Cold Neutrality of an impartial Judge."\(^{10}\)

The need for an impartial judiciary, independent of the policy determining branches of the government, has long been recognized and is probably accepted by most enlightened citizens. But not only that portion of the legal profession which sits on the bench, but the entire bar, may be regarded as the umpire of society. Lawyers may be classified as jurists and advocates. The jurist,\(^{11}\) (a judge, quasi-judicial officer or law professor) searches for and finds the law with no desire to support either side of a controversy. In contrast to the jurist, the advocate is a partisan. He has two loves, the recognition of law and the advancement of a cause, that of his client, that of an economic interest to which he adheres, or that of the entire social body acting through its agencies the state and government. He can well serve two masters because he does not owe them an equal allegiance. His allegiance to the integrity of the law is superior in quality because it is paramount; his obligation to the interest he serves is greater in quantity in that it will consume the major portion of his energies. He occupies a liaison position between the legal profession, of which he is a member, and the interests he particularly espouses. The most numerous members of the advocate group are private practitioners; but also included are legal officers of corporations, labor unions, municipalities and the government.

This advocate's dual position does not require him to judge the cause he represents. The jurist, sponsoring no cause, judges all causes. However, a question appears: why should those who represent interested parties be also members of a group expected to render disinterested decisions? The justification of advocacy is to be found in the fact that recognition of the law applicable to any particular controversy may be difficult and influenced by many considerations. No jurist, however learned, conscientious, and industrious, can discover everything to be weighed in the scales of justice, and might therefore overlook items of vital importance. With partisans on both sides the merits of the controversy should be fully exhausted. "Through the friction of minds comes the scintillation of truth."\(^{12}\) Before a

\(^{10}\)Edmund, Burke, Preface to Brissot's Address.

\(^{11}\)The term "jurist" rather than "judge" is used, because, although the most numerous members, judges do not exhaust the class of jurists. As here used, the term jurist connotes any member of the legal profession who is non-partisan. In addition to judges are law professors, administrative officers exercising quasi-judicial powers and some government attorneys.

\(^{12}\)Author unknown to me.
saint is canonized a "Devil's Advocate" is appointed to discover ruthlessly all evidence antagonistic to canonization. The very interest which precludes a party from being a just judge in his own cause will spur him to greater vigor in discovering all arguments supporting his contentions.

Advocacy further has the merit of equalizing parties to a controversy. That perfection, which requires that both sides be represented with great and equal ability, can rarely be obtained. It is well known that lawyers are unequal in aptitude. However, the gap between the smartest and slowest of attorneys is less than that which separates the cleverest and stupidest members of the public. Thus, a degree of equalization of ability is accomplished.

Advocacy also has a tendency to equalize influence. The monarch of a despotic state might base all decisions upon his uncontrolled will. Even then a class of representatives, all of whom have some standing before the crown, would serve the useful social purpose of tending to equalize political patronage. Regretably, the picture is not entirely different under a rule of law. The cynical observation is sometimes heard "whom you know is more important than what you know." It would be equally futile to attempt to rationalize or deny the effect of knowing the right people. Until favoritism is eliminated, its injustice is mitigated by the existence of a professional group whose members are more nearly equal in influence than are members of the general public.

The advocate has been established as a social necessity; it is further imperative that he belong to the same group as the jurist. Those who judge must rely, to a great extent, upon those who counsel. But if there were no common denominator of ethical standards, recognized by both jurists and advocates, there would be great inequality between competing forces, with the advantage to those willing to resort to the sharpest practice. With the advocate a member of the same group as the jurist, the latter knows that the former, although an intense partisan, is not the alter ego of the interest he represents; that he must limit his advocacy so as to conform to the demands of a paramount ethical discipline.

If the dual nature of the advocate, as a partisan and as a member of the umpire group, be borne in mind, it becomes obvious that the function of the individual lawyer in society is different from that of the legal profession as an aggregate. Bar associations are the means by which lawyers may collectively make their views articulate. If lawyers, as partisans, are to represent all competing interests, it fol-
laws that their sympathies must be those of a fair cross-section of the whole of society. They need not have common beliefs as to the nature of our destiny except as to the methods whereby conflicting policies may be promoted. That the legal profession, and its associations, does not participate in public controversies, other than those placing in issue the rule of law, is in no sense a matter for chagrin. To take sides would compromise its distinctive function as an umpire group. It seems likewise obvious that an individual advocate may espouse any cause which violates neither his conscience nor the supremacy of the law. Being itself neutral the legal profession provides the trained representatives for both sides of public controversies. Several years ago the former dean of a leading law school pointed with pride to the fact that the attorneys on both sides of a current labor controversy were graduates of his institution.

The function of the lawyer as an advocate is not limited to appearances before adjudicatory bodies. Of ever increasing importance has become the prevention of litigation. The services of an attorney as counselor are twofold. First, he helps to make policy decisions. A client is generally not interested in an academic evaluation of his rights; he wants to know what action to take. Legal and economic questions cannot be severed; each affects the other. So, the lawyer must, together with the client himself and other types of technical advisors, shape a course of action. The second function, that of draftsmanship, is more distinctively the work of an attorney. After a course of action has been decided upon, the documents necessary for its accomplishment must be prepared so as to prevent frustration of its purposes. Thus the lawyer helps in the making of policy decisions, and utilizes his distinctive functions of recognizing law in formalizing the decisions made.

But does not the position of the lawyer as an umpire group promote the legal profession into a ruling class? A negative answer recognizes a dichotomy between the making of law and its recognition. Lawyers, as such, do not make the substance of the law, although they may play a distinctive role in determining its form. Lawyers, as citizens in a democracy, do exert influence upon the course of legislation, an influence increased in proportion to their prestige in the community. But in that capacity they are not acting as lawyers because their views carry no more weight than those of many other citizens.

The truth of the foregoing thesis may best be demonstrated by examining the lawyer's relationship to the legislative process. It is
well known that members of the bar comprise the largest single element in our legislative bodies, Federal and State. But, like all other legislators, they represent the will of the citizens who elected them. The most obvious legal function of the legislator-lawyer is the recognition of constitutional law. As a member of the umpire group it is his duty not to espouse legislation which he regards as unconstitutional. There is an analogy between the relationship of the legislator-lawyer to his constituency and that of the practitioner-lawyer to his client. In each instance the recognition of law is part of his function. Constitutional law is to statutes as statutory law is to the activity of individuals and groups. Just as the practitioner-lawyer serves his client in additional ways than by the recognition of law, so the legislator-lawyer also serves his constituency by attempting to accomplish the enactment of legislation deemed favorable.13

The lawyer performs services in the legislative process, distinct from those performed by other legislators, in addition to the determination of constitutionality. Before undertaking to legislate it is important to know the existing state of the law so as to avoid the enactment of unnecessary statutes. Further, the lawyer is the draftsman who determines the form of legislation. His familiarity with patterns of judicial interpretation enables him to express the intent of the legislature in such a way as to reduce the likelihood of a construction which would mutilate the true purpose of the enactment. Finally, the most important aid the lawyer can render as a draftsman of legislation is the elimination of unnecessary harshness. Frequently statutes can be so drafted as to preserve the equities of minority groups more substantially than by merely meeting the minimum requirements of doctrines of Constitutional limitation. This service furthers the enlightened self-interest of the legislator-lawyer’s constituency by benefiting the entire body politic. And he will be serving the basic demands of jurisprudence, which are less concerned with ultimate objectives than with the means by which purposes are accomplished.

It might be argued that the judiciary, a branch of the legal profession, enacts positive law when it formulates legal doctrine. The term doctrinal law includes both the network of decisions which give vitality to constitutional and legislative provisions, and those

13At least some modern schools of jurisprudence regard private legal transactions as “law creating acts.” [Kelsen, General Theory of Law and State (1945) 137] The analogy is thus completed as a goodly part of the practitioner’s services to his client is in doing such acts as negotiating and drafting contracts and organizing corporations, i.e., in performing a truly legislative function.
legal principles and standards which are formulated entirely through the judicial process, the latter being generally known as "Common Law." That the jurist does not "make" such law follows from the fact that, unlike a legislature, he must find a basis, not merely a reason, for every judgment. In some cases that basis will be found in the purpose underlying legislation; in others it will be found in principles developed by prior decisions. However, the lack of controlling authority, or the need for altering legal principles, does not require the jurist to act as a legislator. He still must have a basis for his judgment, said basis being set forth in his opinion. He must deduce his decisions from premises he finds but does not make. If articulate authoritative materials are lacking, the jurist can only conscientiously validate his decision by finding what may be called an "inarticulate major premise." The search for such a premise does not involve a choice between custom and natural law. In neither case

\[\text{The term "doctrinal law" seems preferable to "common law" for two reasons: first, there is a psychological tendency in some people to regard the common law as existing during some undefined period of the past, and, therefore, interesting and dynamic, the use of the term "doctrinal law" avoids the psychological difficulties and dynamic the use of the term "doctrinal law" avoids the psychological difficulties in the use of the more usual term. The second reason for this preference is that the term "common law" is usually used to signify those doctrines which have their origin exclusively in the judicial process, to the exclusion of that great body of law which evolves out of the interpretation of constitutional and legislative enactments. Today this latter type of doctrine may be of more importance to the practitioner than the text of the statutes.}

\[\text{If it is true that the origin of doctrinal law is to be found in custom, the thesis that judges do not create such law is established. By hypothesis they do no more than discover and formalize into a norm, customs that already exist. But the thesis that judges do not legislate cannot be proven so easily because the proposition that the major premise underlying a rule of law is to be found only in custom, judicially recognized, cannot be established. It seems that custom may have its most important effect in connection with those questions which are regarded as mixed questions of law and fact, e.g., due care, reasonable time. That is particularly true if the question is regarded as belonging to the province of the jury. Furthermore, the existence of a custom may create a situation which requires the establishment of a rule of law or modification of an existing line of decision. For example, it was found that the old rules for the admissibility into evidence of business entries was insufficient to deal with modern accounting practice. Modernization of the law of evidence, in that particular, was usually made by legislative enactment, but sometimes by judicial decisions. See Massachusetts Bonding and Insurance Co. v. Norwich Pharmacal Co., 18 F. (2d) 989 (C. C. A. 2d, 1927). But the custom of accountants established the need for a legal rule, not what its content would be. It also appears that custom helps to determine the course of law by limiting its efficacy. It is well known that the "grounds" for divorce, as they exist in most states today, have little relationship to the reasons why marriages are in fact dissolved. But the converse is also true, and refutes the contention that custom is the sole origin of doctrinal law. Custom allows domestic animals to roam at will over land preempted from the} \]
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does the jurist legislate. If natural law be regarded as an inherent sense of justice, it may be concluded that the inarticulate major premises underlying judicial action are the currently accepted compromises between the forces of custom (what people actually do) and natural law (what they realize they should do). The distinctive function of the jurist-lawyer in the judicial process is analogous to the functions of the legislator-lawyer in the legislative process and the practitioner-lawyer in his relationship to his client; all are draftsmen. The jurist formulates the postulates of a particular society into legal principles useful in the decision of actual cases.

From the function of the lawyer, recognizing law in his capacity as an umpire, the nature of his services in regard to particular types of issues may be readily deduced. So far as the interests of the individual and those of the state may be conflicting, lawyers, as a group, must be neutral, with individual advocates promoting both sides of public domain. But the establishment of the doctrine of strict responsibility accomplishes a change in custom and inaugurates the practice of building fences.

The suggestion that the source of doctrinal law is the will of God is commonly called natural law doctrine. If it be assumed that such law exists, Kelsen has established that its content cannot be known by pure reason. It seems cynical, however, to deny the beliefs of countless philosophers, theologians and jurists. If natural law cannot be known with certainty there is a means whereby its content may be approximated, at least to the satisfaction of those who feel that its formulation is imperative. Whatever their origin may be, people do have moral beliefs. This sense of justice is institutional in its nature, and is closely akin to aesthetic feeling. A thing is unjust because it is offensive to disinterested and sensitive people. Freedom from interest is essential because it is easy to mistake personal or group demands for justice. This sense of justice often lies in the preference of long term values over short term values. President Wilson has referred to it as a preference for the "opinion of the age" to the "opinion of the moment" [Wilson, Congressional Government of the United States (1885) 165]. This idealization of basic social values seems to be Dean Pound's idea of positive natural law as distinguished from natural natural law. [Book Review (1948) 61 Harv. L. Rev. 724, 731] Society, like an individual, may be caught in the cross current of conflicting desires. Customs represent what the people actually do, i.e., their immediate interests; the sense of justice represents the ideal objectives of the same people.

I See note 16, supra.

My thesis is, that in the polarity which results from the conflicts between the forces of custom and those of the sense of justice is to be found the inarticulate major premises upon which jurists base doctrinal law. Custom cannot be disregarded; it limits the force of law. If either legislative or doctrinal law tries to change established custom too much it will be disregarded, and thus the law will lose its efficacy, creating a situation which adherents to the Pure Theory of Law called a Desuetudo. [Kelsen, General Theory of Law and State (1945) 119] Since the influence of custom is primarily negative, the affirmative element in the inarticulate major premise the jurist seeks is the sense of justice based upon long term values.
the controversy. The lawyer's relationship to the government may take many forms; he may be a legislator, or a judge, or may hold important executive positions, or may advocate the government's cause as its attorney. The importance of law in our society almost obligates the advocate to participate in public affairs and makes him a natural leader therein. His participation is not limited to his distinctive function of recognizing law; on the contrary he may go where his conscience takes him in promoting desired changes in our institutions, provided he does not challenge the basic concept of a rule of law. The jurist, on the other hand, cannot truly fulfill his distinctive function of recognizing law and applying it unless he remains aloof from controversy, even though the government, of which he is a part, be a party thereto. The legal profession, as an entity, should neither support nor oppose individual opportunity as against collective social security, private property and enterprise as against public ownership or control, or any of the other so called "basic rights." Individual advocates may take either side on any of the foregoing issues, and may conscientiously try to persuade public opinion to their respective views. No lawyer is bound to support the maintenance of our present form of government, provided he advocates no change except such as is accomplished by legal means. Neither individually or collectively may he take any position which challenges the rule of law itself, or establishes any interest, even the public interest, as the judge of its own cause. If an advocate, he must not judge; if a jurist, he must not advocate.19

There remains to be considered two specific problems regarding the relationship of the lawyer to the public: first, the availability of the services of the advocate; and, second, the popular attitude toward attorneys. The lawyer's place in society, as the umpire group, imperatively requires that his services be made available to all persons and interests. The availability of the lawyer's services will be considered from both the ethical and the financial points of view.

Private law generally, and notably tort law, involves a conflict between, and balancing of, social interests. Indeed fortunate is the

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19The position of the law professor seems to be a bit ambiguous, and may partake both of the qualities of the jurist and those of the advocate. He has heretofore been classified as a jurist (see note 11, supra). That should not preclude the law professor, however, from being a party in matters of controversy. He should be ever scrupulous, however, not to confuse his two functions. He should always recognize and represent his personal views to be such, and not hold himself out as an impartial and objective umpire, passing upon the methods used by antagonists, when he himself is partisan to one side of a controversy.
advocate with sympathy for the interest he represents. However, if it be borne in mind that the function of the lawyer is to recognize law, it will readily appear that the advocate may ethically protect legal rights incident to a cause he despises. Abraham Lincoln is known to have represented planters in the recapture of their fugitive slaves. Mr. Justice Holmes makes a picturesque differentiation between a good man's and a bad man's attitude toward law. The good man looks upon law as something to be known so that he can follow it in spirit as well as in letter. The bad man desires to know law only so that by technical compliance he can avoid its sanctions. The great Justice further points out that if one is to truly know law he should study it as the bad man does, rather than as the good man, so as to be constantly aware of the law's limitations. If guilty of violating the law the bad man should be punished, but the lawyer should not by judging his purposes, preclude him from defenses allowed by law however technical they may be. It is not contended that a particular attorney is obliged to protect the legal rights of individuals or groups whose purposes are objectionable to him, but merely, that he is morally free to do so.

The advocate should never impose upon the jurist, however. He should present the evidence and the legal authorities in such a way as to cast his client's cause in the most favorable light, but should be guilty of no misrepresentation. If the jurist cannot rely upon the advocate the justification for including him with the jurist within the same umpire group has failed. An attorney is not limited to such arguments as he would accept if he were a judge, but may present any theory which a reasonable judge might find persuasive. The test, I believe, is this: A case should be so presented on both sides that a judge can render an opinion without going back of the opposing arguments. Neither attorney should make any statement which his adversary can categorically deny with honor. The two briefs should present such a complete picture that the court can determine therefrom which of the rival interpretations of the facts and law should be adopted. That such a state of affairs does not always exist, does not militate against the validity of the test suggested; rather

\(^{20}\)Holmes, Collected Legal Papers (1921) 171.

\(^{21}\)The "bad man" may be selfish or anti-social, but it is not necessarily so. Realizing that law is generally the result of compromise between conflicting social interests, he may regard his social objectives as too important to be frustrated by following procedures which are legitimate but cumbersome. His vice may be fanaticism rather than ill will. Was John Brown a bad man? He violated the law but for the all consuming purpose of abolishing slavery.
it puts us on our metal by showing that the legal profession has not yet obtained ideal standards of professional competence and honor.

The lawyer cannot function as the umpire of society unless his services are reasonably available to all people. That such service should not be denied by prejudgment of a litigant's cause, has been shown. Neither should it be denied because of lack of financial resources. During long periods in the history of advocacy the problem of paying for legal services did not arise. Lawyers were "gentlemen," and, as the term's connotation in the period implies, had independent incomes and thus pleaded at the bar as an avocation or from a sense of public duty. In the modern democratic state such a system is impossible. It would be intolerable that a career at the bar be denied people merely because they have to work for a living. However, the lawyer's traditional sense of a duty to render service, may well provide a background for our consideration of the present day problem of bringing the benefits of representation to all classes of people. The problems relating to people of moderate income are somewhat different from those of people with little or no funds.

A person of average finances should be able to pay for such usual legal services as he may require, except for the fact that the need for an attorney is rarely anticipated and consequently finds no place in a budget otherwise committed. His problem may be solved in two ways: first, by such reduction of fees as may become possible by specialization; and second, by a type of law risk insurance.

Specialization by lawyers is mutually advantageous to both attorney and client. The benefits to the attorney lie in the fact that he can use his time to the best advantage. Whenever a lawyer handles a case which carries him into a new field of practice he must spend time in preliminary research for the purpose of orientation before he will have the background necessary to investigate his specific prob-

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22Radin, The Privilege of Confidential Communications Between Lawyer and Client (1928) 16 Calif. L. Rev. 487.

23One possibility for a modern system of making legal services universally available, which assimilates the tradition referred to, would be governmental subsidization of the legal profession. A sufficient number of competent lawyers could be paid from the public treasury, with service rendered by them to all litigants without additional compensation. Such a proposition would invoke the same controversy as is presently raging over the prospects of socialized medicine. In addition, there would be a burden upon the public treasury and technical difficulties—as to the method of selecting those who would receive the bounty. If it is remembered that lawyers should represent all, and conflicting, interests, it would seem undesirable that the bar be centrally selected and paid. Thus socialized law should be rejected unless there is no other way to make legal services universally available.
The specialist, on the other hand, is familiar with all of the general patterns of law in the field of his specialty, and need only locate the limited number of authorities specifically applicable to the problem at hand. Thus a specialist may brief a case more adequately in two hours than a general practitioner can do in two days. The specialist also reaps a time advantage from the fact that his cases are likely to be concentrated in the same tribunal or in a limited number of tribunals. Take for example the matter of traffic violations. The general practitioner will probably be required to spend more time waiting in court for his case to be called than he spends in the actual trial thereof. A specialist in traffic violations, however, may have several cases to be tried in the same court on the same day. Thus, the waiting period may be distributed over all the matters to be disposed of without serious injustice to either the attorney or any of his clients. When it is considered that the fee which can be expected in minor matters is limited, it becomes obvious that a law of diminishing returns sets in as the hours necessarily expended on a case increase. The elimination of unnecessary work occasioned by specialization allows an attorney to render services for lower cost, and at the same time earn a larger income in proportion to the effort expended.

There is always the possibility of an extraordinary type of legal expense, which will be formidable to the person of moderate income however highly specialized the legal profession may be. Like other unusual catastrophes, this type of expense may well be guarded against by insurance. As far as they go, existing types of liability coverage fulfill the need for such insurance. That here proposed would protect only against the expenses incident to the necessity for legal services in situations not covered by liability policies. To prevent abuse, there could be a minimum amount of each fee which would be paid by the insured. The person covered should be allowed free choice among those attorneys who stipulate not to charge in excess of schedules of reasonable fees agreed upon by insurance companies, individually or collectively, and bar associations. Any conceivable objection that such an arrangement would be illegal because it would involve corporations in the practice of law could well be obviated by legislation.24

24It is no objection that attorneys might lose some of their larger contingent fees. The contingent fee is objectionable because it is an incentive to attorneys to overstep ethical limits in attempting to win their cases. It also deprives a successful litigant of part of the funds necessary to compensate him for an injury received.
The problem of providing legal services at moderate cost for the average income group is not as troublesome as that of furnishing free advice to the indigent. It is suggested that the solution of this second problem is not to be found in any one method, but by the composite use of various agencies now available. The social demands upon the lawyer can best be discharged if his services are available through various channels. A sound approach to the problem in criminal litigation may be found in public defender systems supplemented by the established practice of attorneys defending cases without charge when requested to do so by a court. The problem of the indigent criminal defendant is further alleviated by recent decisions of the United States Supreme Court implying that an accused person has a constitutional right to adequate defense. The need of poor people for legal services frequently arises in connection with the prosecution of personal injury actions. That need is provided for by the use of the contingent fee. However unfortunate the necessity for resorting to such fees, it is believed that they are useful for the purpose of providing legal aid for those unable to pay.

In the normal type of civil case, the most obviously useful agencies for aiding the poor are legal aid bureaus. An objection to such societies as an exclusive method of providing assistance may be found in the fact that cases are sometimes pre-judged by social workers before being referred to lawyers. There might also seem to be the vice of over-centralization. Could a legal aid bureau provide attorneys for both sides of a controversy, if necessary?

The possibility of supplementing the work of legal aid societies by the voluntary activity of lawyers, either individually or as members of other organizations, should be considered. Most people, whether rich or poor, belong to one or more of the following: civic and fraternal groups, veterans associations, religious congregations, political party clubs, or labor unions. Many lawyers, as a matter of ethical principle, devote a part of their time to free work. There is no indication that services, compensated for only by good will, are inferior in quality to those of a financially remunerative nature. The legal services given to an indigent colleague in a club may well

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The only social value of such a fee system is that it provides a means whereby people, unable to pay, can receive legal services in some cases. For that reason the system should be retained where nothing better is available. But an attorney has no legitimate complaint for being deprived of a contingent fee if he is reasonably compensated for services actually rendered. And I believe that few lawyers would insist upon a contingent fee if assured of such reasonable compensation.

2See note 24, supra.
be a means by which a lawyer can discharge his self-assumed obligations to less fortunate members of society and at the same time can help to increase the morale of an organization of which he is a member.

Not to be overlooked is the possibility for legal aid service by law schools. A dual purpose would be served thereby, that of helping the needy, and of giving experience to law students. An unsolved problem in most law schools is that of finding an effective means for teaching procedural courses. A possible solution might lie in requiring students to work on actual cases, of course under the supervision of a competent practitioner. This suggestion has an advantage in that it is not colored by a suggestion of charity. A client of a law school bureau may well feel that the opportunity for practical experience which he gives the students is an adequate *quid pro quo* for the services received.

The lawyer's duty to the public has been considered; a converse problem involves the public attitude toward the lawyer. That the legal profession has been the subject of cynical remarks and is unpopular in the minds of some people is generally known. The reasons usually given by laymen for their distrust of lawyers do not stand up under close analysis. It is true that there are individual attorneys who do not live up to the high ethical standards set by public opinion and the organized bar. But other professions are not subjected to similar criticism, although they all have members with questionable characters. Pound has developed the jealousy theory as an explanation for the popular attitude toward advocates. He believes that other groups resent the position of leadership we of the bar enjoy.

Following the figure of speech which compares the lawyer to an umpire at an athletic contest, the reason for the aforementioned popular attitude is not difficult to find. It is a phenomenon similar to the vigorous manifestations of disapproval shown by the spectators at a sporting event toward the referee's decisions, especially toward decisions against the home team, comparable in a law suit to decisions against the more popular side. By the nature of things, both adversaries can never obtain entirely satisfactory results; sometimes neither does. Thus every court decision must be unpopular to someone. It is a paradox that the rule of law is most vindicated when decisions are the least popular. Usually the majority can protect itself through democratic processes; it is legitimate minority interests which would be lost but for impartial adjudication.

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26The Lay Tradition as to The Lawyer (1914) 12 Mich. L. Rev. 627.
The same reasoning applies to advocates, as a part of the umpire group. In every case one lawyer must espouse the unpopular cause. The reward of the county seat attorney, who regularly represents foreign insurance companies against local residents is not in popular acclaim. This distrust, however, has not, and will not impair the lawyer's position of leadership. He is saved by the fact that as a leader he is more likely to be identified with the cause he espouses than with his profession. Thus, people who dislike lawyers as a group usually make exceptions of specific members of the bar. And in most respects our influence should be as individuals, not as a group. Collectively our only concern is in maintaining the non-partisan adjudication of conflicts. So long as people are enlightened in their self-interest they will grumble over specific decisions but will not successfully challenge the rule of law.
A comprehensive new Juvenile and Domestic Relations Court law became effective in Virginia on July 1, 1950. This commentary is primarily concerned with the provisions relating to juveniles; its purpose is merely to introduce some background against which the legislation should be considered, and to point out some of the principal changes the new statute effects in the previous situation.

BACKGROUND

Since the establishment in 1899 in Chicago of the first separate court concerned with juveniles, it has become generally recognized in this country that juvenile courts are not based on the adversary theory with its concomitants of vengeance and punishment taken from the criminal law. The juvenile court rests its sanctions on the inherent right of the sovereign to protect his subjects. The theory is one of governmental support of the family as a unit as distinguished from a governmental "taking-over" of parental functions. If categorizing is required, the juvenile court is a court of chancery following the principles of equity.

The first Virginia juvenile court legislation was passed in 1914. Under this first and remarkably complete statute, courts of record and police and justice courts could hear cases concerning juveniles and adjudge them delinquent, neglected or dependent, if the facts met given definitions. Probation or commitment to the State board of charities and corrections might be ordered by the particular court hearing the case. Juvenile offenders were "deemed not to be criminals" or treated as such, and only aggravated offenses could involve trial as an adult. Councils of cities of over 50,000 population were authorized to appoint a justice of a separate juvenile and domestic relations court. In 1922, the General Assembly provided that there should be established in every city and county a juvenile and domestic relations court.

Though the philosophy and purposes of these laws were accepted,
they failed to accomplish their purpose, except in a few urban localities which took advantage of the provision for a separate court. In most of the remaining localities the child appeared in the open adult court and experienced the atmosphere of a criminal proceeding. While not sentenced to jail except for aggravated offenses, the only probationary supervision was from the well-meaning, but untrained, county sheriff or city chief of police. In 1936, the trial justices in counties, and the police court justices in cities not having special juvenile and domestic relations courts, were given primary jurisdiction of these cases.3

In 1945 the picture in Virginia was: 10,868 children before 83 courts, which were served by 26 full-time probation officers, 18 of whom were employed in 16 cities, leaving but 8 serving full time in all of the remainder of the twenty-four cities and one hundred counties of the state; and 800 children (then classified as delinquents) being committed annually to the State Board of Public Welfare.4 The void as to probation officers was met principally by reliance upon local departments of welfare. A survey of the 1945 situation showed that almost no two courts functioned alike. There were twenty types of replies to the question concerning when warrants were used. Seventeen types of procedure were indicated as to the use of petitions. Seventy-seven per cent of the courts were, commendably enough, using informal hearings without either warrant or petition, but the authority for such hearings were doubtful, to say the least. In 1946 almost 4,000 children of the state were in jail.5 Less than half the judges received salaries for juvenile court service; those who were paid received compensation ranging from $180.00 per year to $7,900.00.6

In the 1948 session of the General Assembly, Senate Bill 175 was introduced. Briefly, it proposed seventeen juvenile and domestic relations courts of record and would have created separate courts with specially qualified judges and the necessary probation officers. Its supporters cited Virginia's high and expensive crime rate, the alarming juvenile problem and the ultimate economy of an effective juvenile

4Baughman, Full-Time Problems and Part-Time Court, 1 Bulletin of the Virginia Conference of Social Work, p. 5, April, 1946.
5V. A. L. C. Reports on Senate Bill 175 (1948) p. 11 gives a figure of 2,650 for 1948.
6Figures used in this paragraph are taken from two articles in 1 Bulletin of the Virginia Conference of Social Work, April, 1946: Phillips, The Path to the Court, p. 9, and Baughman, Full-Time Problems and Part-Time Court, p. 5.
court system. This bill was referred to the Virginia Advisory Legislative Council for study and report to the 1950 session of the Assembly.7

THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL REPORT

On November 30, 1949 the Council reported on Senate Bill 175 (1948) and presented an alternate bill maintaining the earlier aims. The report labeled seventeen courts as "impractical," and did "not recommend that juvenile and domestic courts should at this time be made courts of record ...." In its report, the V.A.L.C. stated it "recognizes a need for, endorses and recommends the establishment of a State-wide system of juvenile probation and also a State-wide system of juvenile detention as provided for in Senate Bill 175."8 It did not, however, feel that it was necessary to establish an independent commission to provide the necessary overall supervision and administration to the courts and their related services. It was felt this could be adequately handled as a subdivision of the existing Department of Welfare and Institutions.

The V.A.L.C. offered its bill as an endeavor: (1) to correct the "inadequacy, or often the complete absence, of the probation, detention and psychiatric services which are indispensable to the proper administration of a juvenile court"; (2) to correct the striking weakness in jurisdiction under which a child could be indicted and tried without, at least, initial hearing in the juvenile and domestic relations courts;9 (3) to eliminate the statutory inconsistencies resulting from a quarter of a century of piece-meal amending; and (4) to make the law more uniform, more standardized and more comprehensive.10

MAJOR CHANGES PROPOSED AND ADOPTED

The law as proposed by the V. A. L.C. was changed in some details and adopted by the General Assembly as Chapter 383 of its 1950 Acts. It is found in the Code as Section 16-172.1 through Section 16-172.84. The statute now includes probably 95% of the provisions of the Standard Juvenile Court Act of the National Probation Association. Variations occur as to provisions of the Standard Act which never have been unanimously accepted.

8V. A. L. C. Report on Senate Bill 175 (1948) p. 11.
The following major provisions of the new law should be noted:

1. The requirement of a court for every county and city is retained, but with the right in cities and counties to join in establishing a district court.

2. The law is remedial. The welfare of the child is the paramount concern of the state, and to attain this purpose judges are granted “all necessary and incidental powers and authority, whether legal or equitable in their nature.” Quaere: Does this grant of equity powers to a court not of record give the power to issue injunctions, other than as incident to the power to suspend sentences? For example: to enjoin acts which contribute to the delinquency of a child or to enjoin removal of a child from the jurisdiction pending determination of a custody action.

3. City charter provisions conflicting with the new law are repealed. There is now a uniformity in the mode of selection of judges. In the counties and in cities of less than 25,000 population the circuit court appoints for a four-year term after the terms of judges in office July 1, 1950 have expired. In the remaining cities the corporation or hustings court appoints for a six-year term. If there are other courts of record, the selection is by “election” by those judges, any tie being broken by the Governor.

The statute provides that “... all judges elected or appointed under this law shall enter upon the discharge of their duties the first day of January next succeeding their election or appointment, ...” Quaere: Is there not a hiatus if an incumbent’s term expires (1) in December, and by oversight no appointee is named until after January 1st or (2) if it expires by his death before the end of his term? Section 16-172.9 only fills the gap as to a substitute judge’s acting in

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*The terminology of this comment follows the definitions of a child or juvenile as a person under 18 and a minor as a person over 17 and under 21 years of age. However, the statutory definition of a minor is over eighteen and under twenty one....* [Italics supplied]. Va. Code Ann. (Michie, 1950) § 16-172.3. This hiatus is apparently carried over from similar language in the V. A. L. C. Report on Senate Bill 175 (1948). However, the Report also referred to a minor as “between 18-21 years.” See pages 8 and 15 of the Report. It appears that the term “over eighteen” should be regarded as meaning “over the eighteenth birthday.”

*Va. Code Ann. (Michie, 1950) §§ 16-172.4 and 16-172.8. [Section references in the following notes are all to Va. Code Ann. (Michie, 1950)]

*Sec. 16-172.1.
*Sec. 16-172.84.
*Sec. 16-172.4.
*Sec. 16-172.7.
*Sec. 16-172.7.
the event of the resignation, death, removal or permanent disability of the judge or associate judge.

4. In all counties and in cities of less than 25,000 population, the trial justice "shall" be appointed if otherwise qualified. This provision rejects use of the word "may" by the V. A. L. C. which felt a trial justice would then be too busy as judge of two courts and often would have a private law practice on the side. The mandatory "shall" may prove a hindrance in populous counties, though at least one populous county has no trial justice as such.

5. Localities are required to provide a suitable courtroom, offices and equipment.

6. The judge is empowered to appoint a clerk, a bailiff, probation officers and, with limitations, such other employees as may be necessary.

7. The cooperation of public officials and certain institutions is required and the court authorized to seek the cooperation and assistance of public or private societies, agencies or institutions.

8. Jurisdiction is exclusive and original and is set forth in detail in Section 16-172.23.

Offenses involving two members of a "family" are heard by the court. However, "in-laws" still are not included in the definition of: "husband and wife, parent and child, brothers and sisters, grandparent and grandchild." They may be included, as would adopted children, in the court's jurisdiction over "any violation of law the effect or tendency of which is to cause or contribute in any way to the disruption of marital relations or a home." Such broad definitions will require close scrutiny of complaints, else trial justices and police justices will be hearing cases which develop as disrupting a home and which fall within the exclusive original jurisdiction of the juvenile and domestic relations court. If the child's age appears while criminal proceedings are pending then courts of record may, and other courts must, transfer the matter forthwith to the juvenile court.

Sub-sections 7 and 8 can be mis-read as limiting the court func-

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Sec. 16-172.4.
Sec. 16-172.19.
Secs. 16-172.11 and 16-172.71.
Sec. 16-172.21.
Sec. 16-172.41.
Sec. 16-172.23, Subsecs. 7 and 8:
Except as hereinafter limited they shall have within the corporate limits of a city or the boundaries of a county in which they sit exclusive original jurisdiction, and within one mile beyond the corporate limits of said city concurrent jurisdiction.
tion to that of an examining magistrate as to felonies committed by a child, as was held under the former law in Mickens v. Commonwealth. They must be viewed in the full context of the statute for Sub-section 1 (i) recites the court's jurisdiction over children as including violations of any state law; children—those under 18—cannot be "convicted" or designated "criminals" by reason of a juvenile court finding; and clearest of all Section 16-172.42 gives the court an option to retain jurisdiction or certify such child "for proper criminal proceedings" if the offense by an adult would be punishable by 20 years or less in the penitentiary. Offenses which would involve greater punishment if committed by an adult may likewise be retained or certified, subject to the right of the Commonwealth's Attorney to present the case to the Grand Jury and remove it from the juvenile court by obtaining an indictment.

Thus the court hears a case with two things in mind: should this offense, a felony if committed by an adult, be certified to a court of record for indictment and criminal trial, or should jurisdiction be retained and the case studied, keeping in view the welfare of the child? The question might be re-phrased to: Is the welfare of this child, who is 14 or over, so beyond repair that he should be certified for treatment as an adult criminal? In the words of the statute, is he beyond adequate control or inducement to lead a correct life? Here is found the tenor of the whole law. Hearings are not criminal in nature though such offenses may be involved. The welfare of the child is the paramount concern of the State. This approach is the justification for considering the evidence under the "preponderance" and not under the "beyond all reasonable doubt" standard.

with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving: ...

7. The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of this law which causes or tends to cause a child to come within the purview of this law, or with any other offense against a child except murder and manslaughter, provided, that, in prosecution for other felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate.

8. All offenses except murder and manslaughter committed by one member of the family against another member of the family; and the trial of all criminal warrants in which one member of the family is complainant against another member of the family, provided, that in prosecution for other felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to that of examining magistrate. The word "family" as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild; ....

24 Sec. 16-172.45.
9. Venue is tied to the actual presence of the child within the court's jurisdictional area "...unless the court for good cause shall otherwise determine." 26

10. A new section of particular interest to attorneys in the domestic relations field is quoted in full in the footnotes. 27 Other courts are not deprived of concurrent jurisdiction as to the custody of children when that question rises by way of a writ of habeas corpus or where that question or the question of guardianship is "... incidental to the determination of causes pending in such courts, ..."—e.g., divorce. Quaere: Can habeas corpus now be brought in the juvenile and domestic relations court, whether the juvenile court has assumed custody of a child or not? To be kept in mind is a ruling of the Attorney General that under the old law, (presumably this one, also), custody of a ward of the court remained solely in the juvenile or domestic relations court. 28

11. The initiation of juvenile cases is revised in major ways. 29 The court must require an investigation of facts and circumstances surrounding a complaint of a violation of the law before proceeding either informally or by petition. However, "any person" has the right to file a petition. The use of probation officers for all such investigations is presently impossible, for today the average juvenile court in

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26 Sec. 16-172.25.
27 Sec. 16-172.26:
Nothing contained in this law shall deprive any other court of the concurrent jurisdiction to determine the custody of children upon a writ of habeas corpus under the law or to determine the custody or guardianship of children when such custody or guardianship is incidental to the determination of causes pending in such courts, provided that when a court of record shall have taken jurisdiction thereof the juvenile and domestic relations court shall be divested of such jurisdiction. Such courts may certify such matters to the juvenile and domestic relations court for hearing and determination or for recommendation.
28 See report of J. H. Montgomery, Jr., Associate Judge, Juvenile and Domestic Relations Court, Richmond, Va., The Juvenile Court Act.
29 Sec. 16-172.30:
Whenever any person informs the court that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a minor traffic violation or violation of the fish and game law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person and if any such person does not file a petition a probation officer or a police officer shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires. In case of violation of the traffic laws, or game and fish laws the court may proceed on any summons issued without the filing of a petition.
Virginia has no probation officer or is understaffed. It is submitted that in many instances and until there are sufficient probation officers this may be handled, at least initially, by enlightened non-uniformed police investigation, through specially designated juvenile officers. Then a better result is often obtained, for the child ultimately placed under the guidance and counseling of a probation officer will not carry over that natural resentment against the person who uncovered the facts surrounding his violation. Counseling is more readily accepted.

The court now has stated authority to proceed informally and "make such adjustment as is practicable without a petition." Frequently complaints involve youthful transgressions which, at the time the complaint is made, stand out as those which may be "closed with a warning." A telephoned summons to the parents, a brief hearing and a conclusion that parental disciplines and control are adequate and that a warning is sufficient, are typical of informal hearings. Should the child be exonerated, he may be told so by the court. Should his problem be serious, then receipt of a petition may follow. Generally the result is to head off the development of serious child situations and to save time in the mechanics of handling a petition, summons, and notice to parents living within the state but at times outside of the court's jurisdictional area.

"Minor traffic" and game and fish law violations may be heard on any summons issued, without the filing of a petition.30

In adult cases latitude is granted paralleling juvenile informal hearings. If used, this authority can be most effective in, for example, cases against grown children for non-support of an aged and destitute parent. Ordinarily proof of ability to provide such support, beyond the needs of the adult son's family is hard to obtain. An informal adjustment might often better meet the aim of the law on the basis of a "voluntary" acceptance of the legal duty to support.31

12. Previously no warrant of arrest could be issued for any child under 12 years of age without the written permission of a judge of a court of record or a juvenile and domestic relations court justice. Now written permission is not required. The lower age limit for warrants has been raised to 14 "when use of such process is imperative."32

13. Formerly under Code Section 1918 the court had authority to require restitution and to impose a fine or imprisonment fee of up to

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30Sec. 16-172.30.
31Sec. 16-172.52.
32Sec. 16-172.61.
fifty dollars, and if a child over 13 could not be made to lead a correct life under the juvenile law, then the child could be proceeded against as if he were over 18 and in the process be committed to jail. In other words, the case of a thoroughly unruly 17 year old could be transferred to a criminal court not necessarily of record.

Now, reparation as well as restitution may be required, and the fine provision is retained. Unfortunately there is omitted any mention of a probation fee, and this effective power is lost to the court. The General Assembly has apparently retained the availability of possible transfer of a child to a criminal court for trial, with a lower age limit of 14 years and over. This is clearly so as to felonies under Section 16-172.42. The authority as to misdemeanors is found in Section 16-172.43, but is confusingly located after a sentence referring to the preceding section on felonies. The interpretation which ignores the felony-misdemeanor distinction is in line with better juvenile court theory, for the test is not what the child did but rather, in the words of the statute, can he be: "adequately controlled or induced to lead a correct life by use of the various disciplinary and corrective measures available to the court." 33

14. The appeal period has been reduced from 20 to 10 days with the new right in the court to grant a rehearing within 30 days. Juvenile court orders remain in effect during petition for or on the pendency of an appeal or writ of error unless otherwise ordered by the appellate court. The appellate court may enter its order or judgment and, as to both juveniles and adults, remand the matter to the juvenile court. 34

15. The court "may" reopen any case and revoke or modify its order after written notice to the complainant and the person or agency having custody of the child or minor. The section is labeled "Review of Order of Commitment." However, it is broad enough to cover any case. An indication that the General Assembly wished to rely on the court's discretion is found in the omission of the V. A. L. C. phraseology "The Court of its own motion or on written complaint of a parent, guardian or next friend of a child...may reopen..." 36

There is no limitation as to children committed to the State Board of Welfare and Institutions and subsequently placed by it in a foster home, a Virginia or out-of-state industrial school. In effect, then, local judges have been given a veto power if there are grounds for disagree-

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33Sec. 16-172.42-3.
34Secs. 16-172.41-43.
35Sec. 16-172.49.
ment with the disposition made of a child committed to the State Board.37

16. Of especial significance is the omission of the terms delinquent, neglected and dependent. A full column of the old code attempted definitions, but it is difficult to say which label was most appropriate. Many delinquencies grew out of dependency and neglect. The new phraseology is “within the purview of the juvenile court law.” It comes from the Standard Juvenile Court Act. Juveniles respond better and have no reason to become as angry and uncooperative as many were when told they were “delinquent.” The word was opprobrious, to say the least. “It is generally agreed that in dealing with the child as an individual the attempt to classify and label him is unnecessary and often impractical and harmful.”38

However, the three terms have been retained in Code Section 18-6 which includes the frequently used charge of “contributing to the delinquency of a child.” An appropriate legislative amendment is in order.

17. To a degree, a state-wide juvenile probation system has been established as recommended by the V. A. L. C. Officers are appointed from a state list. In addition to their former court assigned duties, the Director of the Department of Welfare and Institutions (or subordinate administrative officer) may assign duties and may now require records of the officer’s work.39 Information obtained by the officers is privileged now, subject, of course, to disclosure to the judge. Such information may not be disclosed to anyone else unless ordered by the judge or the judge of a court of record.40 On the state level, the Director is authorized to create a division in his department and to appoint a head thereof to administer the system including the supervision of local juvenile detention homes. Apparently for lack of funds no immediate appointment was made, though temporary assignment of the responsibility was given to Mr. Paul Keve in addition to his former duties with the Child Care Bureau. It has now been announced that Mr. Keve will, commencing July 1, 1951, have the permanent assignment. The Director is empowered to transfer the supervision of a probationer should the probationer move to another locality or state.41

37Note that Sec. 16-172.81 allows rehearing in any case for good cause shown and after due notice to interested parties.
39Sec. 16-172.75 (5).
40Sec. 16-172.76.
41Sec. 16-172.79.
If local governing bodies do not provide for a probation officer (by appropriation of one half of a salary determined by them), the local superintendent of public welfare or one of his assistants "shall serve." Otherwise, with limitations, they may serve.

Children and minors going back to their localities following commitment to state custody may now be returned "to the committing court for supervision by juvenile probation officers" or, as before, to the local superintendent of the department of public welfare. This important rehabilitative period can be controlled better in some instances by a man, yet, as the V.A.L.C. pointed out, "all but six of the local welfare departments have only women on their staffs." The problem has been of major proportions for about 2,000 children are "parolees," and that number exceeds the number of adults on parole.

When such children come back to the committing court and the court feels after full investigation that the child should not be replaced in his own home, then under certain conditions the state will pay for boarding him in a foster home or institution. Thus a child need not be returned to his home if the home was so bad as to cause his derelictions in the first instance.

CONCLUSIONS

The new law is a sweeping revision incorporating most features of the Standard Juvenile Court Act. It places greater emphasis on the welfare of the child and moves away still farther from the "criminal" approach. The possibility of continued use of trial justices as juvenile and domestic relations court judges and the local appointment of probation officers mean that the effectiveness of the law in creating separate and adequate courts still remains with the counties and cities of the state, for they may retain the status quo. While the greatest need for development is in the counties and smaller cities, both were left out of the appropriation act which gives certain cities 50% reimbursement of the salaries of probation officers. If any reimbursement is to be made, it should apply to all counties and cities. If district courts are to be created by two or more localities, it will have to be done now while incumbent judges are remaining in office, for most of them are judges of other courts and when new judges

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42Sec. 16-172.72.
43Sec. 16-172.73.
45Secs. 16-172.77-8.
are named in every area, each area will thereafter want to keep its own court. The overloading of local department of public welfare with probation work will not cease until a sufficient number of local probation officers are appointed so that they may take the initial load as well as be in a position to accept responsibility for "parolees."

The desires of social agencies and interested persons have been heard in preparation of the law. It would appear that the bar and particularly the judges of these courts should meet to discuss the statute to seek out points in conflict or in need of clarification and to recommend appropriate corrections in time for presentation to the 1952 session of the General Assembly.40

40Since this comment was written a meeting of the Virginia Council of Juvenile Court Judges was held in Richmond, January 22-23, 1951, at which this matter was discussed and placed on the agenda of the spring meeting of the Council to be held at the same time as the meeting of the Virginia Council of Social Work. Opinions of the Attorney General, some eighteen in number, relative to the Juvenile Court Law of 1950, were discussed. Their forthcoming publication in the opinions of the Attorney General will be of interest to those who work frequently with this law.
FORUM NON CONVENIENS UNDER THE UNITED STATES JUDICIAL CODE

ROBERT P. HOBSON*

Section 1404(a) of the Judicial Code of the United States provides:
"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."\(^1\)

The compelling reason for the passage of this particular section of the Code may be found in the rule first announced by the Supreme Court in the case of *Baltimore & Ohio R. Co. v. Kepner.*\(^2\) In that case, Kepner, an employee of the B & O and a resident of Ohio, was injured in an accident occurring in Butler County, Ohio, and asserted his cause of action under the Federal Employers’ Liability Act\(^3\) against the railroad company in the District Court of the United States for the Eastern District of New York. The B & O instituted an action in the Common Pleas Court of Hamilton County, Ohio at Cincinnati seeking to enjoin the process of the action by Kepner in the District Court of the United States for the Eastern District of New York upon the ground that there were open and convenient forums in Ohio for the prosecution of his case and the cost of trying the case in New York would be heavy and would place an unjust burden on the defendant and unduly burden interstate commerce. The trial court dismissed the action, and its judgment was successfully affirmed by the Court of Appeals and the Supreme Court of Ohio. On appeal by the railroad company to the Supreme Court of the United States in a majority opinion by Mr. Justice Reed, the Court concluded that Section 6 of the Federal Employers’ Liability Act, the venue section, providing that the action may be maintained in 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 the commencement

\(^1\)Stat. 937 (1948), 28 U. S. C. § 1404(a) (1950). Section 1406 governs the procedure where a case is filed laying venue in the wrong (not merely a less convenient) jurisdiction: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it could have been brought.” 62 Stat. 937 (1948) amended 63 Stat. 101 (1949), 28 U. S. C. § 1406 (1950).

\(^2\)314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 28 (1941).

\(^3\)45 U. S. C. § 51-60 (1949).

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*Member of the Kentucky Bar.*
of the action, conferred upon the injured employee the right to maintain his action in any district court where the defendant was doing business; and accordingly, the judgment was affirmed.

Apparently recognizing the practical objection to this decision, as well as the injustice to the defendant by reason of the exacting language of the venue section of the Federal Employers' Liability Act, the majority opinion observed: "If it is deemed unjust, the remedy is legislative...."4

It should be borne in mind that although the doctrine of forum non conveniens was urged upon the Court in this case, the decision does not touch this question, but only decides that a state court may not enjoin its resident from prosecuting a right given to him under a Federal Act. Nor does the decision attempt to decide the question of whether the District Court of the United States for the Eastern District of New York could properly refuse to assume venue in this case when requested to do so upon timely application by the defendant. Later, the Supreme Court, in the case of Miles v. Illinois Central Railroad Company,5 passed upon the identical question as applied to a state court proceeding under the Federal Employers' Liability Act. In that case, Mrs. Miles was appointed administratrix of the estate of her husband who was killed in an accident occurring at Memphis, Tennessee, and instituted a suit in the state court in Missouri to recover damages against the railroad company. The latter sought by injunction in the Chancery Court of Shelby County, Tennessee, to prevent the prosecution of the action by Mrs. Miles in St. Louis. Upon the issuance of the temporary injunction, Mrs. Miles, dismissing the Missouri action, was discharged as administratrix in the Tennessee Probate Court, and a Missouri administrator was then appointed who instituted another action in the State Court in Missouri. Thereupon, the railroad company filed an amended bill making the decedent's children defendants and seeking to enjoin the widow and the children from furthering the Missouri suit or receiving the proceeds of any judgment, and the temporary injunction was issued on the ground of the inconvenience and expense to the defendant and the necessary resulting burden upon interstate commerce. This judgment was affirmed by the Supreme Court of Tennessee and certiorari having been granted to the Supreme Court, it reversed the judgment. In an opinion by Mr. Justice Reed, the Court held that

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"The Missouri Court here involved must permit this litigation," and directed that the Tennessee action be dismissed.

Again, it should be observed that the doctrine of forum non conveniens was not applied in this case, although much language in the opinion indicates that the writer would not have approved it if the question had been raised. It should be borne in mind that the Miles case decides only that a Tennessee court may not enjoin its citizens from prosecuting an action under the Federal Employers' Liability Act in a proper jurisdiction although the effect of it would be to put the defendant to excessive and unreasonable expense.

Having once pointed out in the Kepner case that the remedy for the venue section of the Federal Employers' Liability Act is legislative and not judicial, the Court does not refer to it again in the Miles case.

The work of revising the entire Judicial Code was begun in 1943. Its purpose was not to amend existing laws but to revise the entire Judicial Code so as to furnish an adequate and complete system of procedure. One of the problems which confronted the Judiciary Committee charged with this responsibility was the manifestly unjust and unreasonable venue provision of Section 6 of the Federal Employers' Liability Act, and the committee and its advisers recognized the advisability of putting into the new Code a practical provision embodying the doctrine of forum non conveniens. This was felt to be necessary not only because of the apparent need for such a provision but also because its inclusion in the Judicial Code or other legislative act had been suggested by the Supreme Court in Mr. Justice Reed's opinion in the Kepner case as the only solution to the manifest injustice resulting from the decision of that case.

In showing the purpose of enacting Section 1404(a) the revisers submitted the following statement:

"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, 1941, 62 S. Ct. 6; 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and

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witnesses, and further, that it is in the interest of justice to do so."7

In 1945 the second draft of the entire Code, with the revisers' notes, was circulated to the Advisory Committee and the Judicial Consultants, Judge Parker, Judge Holtzoff and Professor James W. Moore. The revisers' note attached to the second draft states:

"Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of 'forum non conveniens' permitting transfer to a more convenient forum, even though the venue is proper."

Regarding the provisions of Section 1404(a), Professor Moore in his work on Federal Practice, published in December, 1948, says:

"The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal of any action to a proper and more convenient forum."8

The case of Ex Parte Joseph Collett9 interprets Section 1404(a). In 1943, Joseph Collett sustained a severe injury while employed by the Louisville & Nashville Railroad Company at Irvine, Kentucky, in the Eastern District. He brought a suit in the District Court of the United States for the Eastern District of Illinois against the railroad company under the Federal Employers' Liability Act to recover for his injuries. Defendant moved to transfer that case to the Eastern District of Kentucky in accordance with the provisions of 1404(a) by showing that it was for the convenience of the parties and witnesses and in the interest of justice, and the Court so adjudged.

Collett then instituted an original proceeding in the Supreme Court by moving for leave to file a petition for a writ of mandamus against the Judge of the District Court for the Eastern District of Illinois and a writ of prohibition against the Judge of the District Court for the Eastern District of Kentucky, requiring the former to retain the action and prohibiting the latter from trying it, upon the ground that Section 1404(a) did not apply to a cause of action under the Federal Employers' Liability Act. The case was assigned by the Supreme Court for hearing on the motion. The motion was denied

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7§ 1404(a) (1950), Historical and Revision Notes.
8Moore, Federal Practice (2d ed. 1948) 2141.
in an opinion by the Chief Justice on May 31, 1949 which held that
Section 1404(a) did apply to causes of action arising under the Federal
Employers' Liability Act and that the transfer of the action from the
Eastern District of Illinois to the Eastern District of Kentucky was
proper.\textsuperscript{10}

While the Collett case decides only the question of the application
of 1404(a) to cases arising under the Federal Employers' Liability Act,
there can be no doubt of its application to cases under other Acts of
Congress containing similar provisions as to venue.\textsuperscript{11}

It should be borne in mind that this section applies only to suits
brought in the Federal Courts, and of course, has no application to
suits in the State Courts, whether under the Federal Employers'
Liability Act, or otherwise.

Attention also should be called to the point that this section
authorizes the transfer of an action only to a district or division where
it might have been brought originally. The word "originally" does
not appear in the Act but this is the manifest intent of it. This means
that if an action is brought in New York, it cannot be transferred to
another district if it could not originally have been brought in such
other district even though it would be much more convenient to try
it in the other district.

It will be noted that the section authorizes the transfer, where it
is for the convenience of the parties and witnesses and in the interest
of justice, but it does not compel it. It is clear that the burden is upon
the party seeking the transfer to make a satisfactory showing of the
existence of these facts. On the question of convenience if the equities
are equally balanced, or indeed, unless the balance is strongly in
favor of the transfer, it should be denied. This question was squarely
raised in the case of Ford Motor Company v. Ryan,\textsuperscript{12} where an anti-
trust suit was brought against the Ford Motor Company in New York
and it sought a transfer to the District Court for the Eastern District
of Michigan at Detroit. The District Court for the Southern District
of New York overruled this motion and the Ford Motor Company
sought by mandamus in the Court of Appeals to compel the transfer.
The majority of the Court of Appeals held that mandamus was avail-
able, but that the trial court did not abuse his discretion in refusing
to order the transfer. In its well-considered and brief opinion the

1226 (1949) (Sherman Anti-Trust Act).
\textsuperscript{12}182 F. (2d) 329 (C. A. 2d, 1950).
court said that the transfer of cases under 1404(a) should rest upon the same basis as justified the refusal of a court to take jurisdiction under the doctrine of forum non conveniens, and that 1404(a) merely applied this doctrine to certain cases to which it was not theretofore applicable. It adhered to the rule announced in *Gulf Oil Corporation v. Gilbert*, that “unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” In other words, the party seeking the transfer "has the burden of making out a strong case for a transfer," and the plaintiff's privilege of choosing a proper forum in which to begin his action "is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties.'”

The final analysis of the situation seems to be:

1. The doctrine of forum non conveniens has been consistently recognized by the Federal Courts even before the enactment of 1404(a), but the enforcement of that doctrine resulted in the dismissal of a given case because the court had no power to transfer it to another district prior to the enactment of 1404(a).

2. Section 1404(a) simply empowers the trial court to transfer a civil action of which admittedly it had venue to another district, when such transfer is found to be in the furtherance of justice and for the convenience of the parties and witnesses.

3. The burden is on the party seeking the transfer to make a strong case of inconvenience and injustice by the retention of the case in the court where the case originated.

4. Under the doctrine of the *Kepner* and *Miles* cases a Federal Court could not, under forum non conveniens, dismiss an action properly brought under the venue section of the Federal Employers' Liability Act; but now, under the provisions of Section 1404(a), it may on a proper showing transfer such action for trial to another district where it might originally have been brought.

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NOTE

THE VIRGINIA ABSENT VOTERS SYSTEM

The urgent need for the revision of the absent voters system in Virginia has been recognized by the press and many of the political leaders of the state. The present Attorney General of the state has been quoted as declaring: "It is a notorious and disgraceful fact that in past elections political shysters, wardheelers, spurious notaries public, and even candidates for office have paraded the streets... with mail ballots in their possession, many of which were solicited and voted in violation of law. Some of these parasites have gone so far as to approach candidates... and endeavoured to bargain for the delivery of such votes under the absent voters law. Names have been forged... Persons have registered and voted by mail who could neither read nor write." A bill to repeal the absent voters act was rejected at the 1950 session of the General Assembly, and all attempts to modify the present law met with failure. The Assembly also turned down a proposal for study of the problem by the Advisory Legislative Council. Passionate appeals for reform made on the floor of the General Assembly and criticisms of the existing situation in the press have seemingly made little impression on the legislature. Yet, even a brief examination of the Virginia absent voters legislation demonstrates serious flaws in the system which have led to flagrant election frauds, and reveals several points at which revisions should be made.

Absent voters' balloting privileges first received widespread sanction in America during the War Between the States and again a half-century later during World War I when many legislatures provided systems whereby soldiers might vote while away from their regular polling places. While the practice grew out of the desire to avoid

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3The Honorable J. Lindsay Almond, Jr., Richmond Times-Dispatch, Mar. 3, 1950, p. 18.
4Richmond Times-Dispatch, Mar. 13, 1950, p. 4.
NOTE
disenfranchising service personnel, the statutes have continued in effect following war periods and have extended the absent voting privilege to other qualified citizens.\(^6\)

Some of the early legislation was declared unconstitutional as not requiring a voter to make, at the polling place of his residence, an offer to vote, or as not requiring the personal presence of the voter at the polls;\(^7\) but the validity of the modern statutes has generally been sustained.\(^8\) The provision in the United States Constitution lodging in state legislatures the power to determine the manner in which United States Senators, Representatives, and Electors for President and Vice-President shall be selected serves to protect absent voters statutes from restrictive regulations in state constitutions which might otherwise apply to these federal officers.\(^9\) In relation to the election of state government officials the absent voters acts have frequently been attacked on the ground that they violate state constitutional provisions regulating elections. In 1921, the Kentucky Supreme Court, while recognizing the high motive of the legislature in attempting to afford servicemen a means of voting, regretfully held the entire act to be in violation of the requirement in the state’s constitution that the ballot be furnished, prepared in private, and deposited at the polls. It was reasoned that a ballot could not be furnished to the voter at the polls if it were in fact mailed to the voter at some point outside the state.\(^10\) However, the North Carolina court decided that

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\(^7\)Bourland v. Hildreth, 26 Cal. 161 (1864); Opinion of the Judges, 30 Conn. 591 (1862); People v. Blodgett, 13 Mich. 127 (1865); Chase v. Miller, 41 Pa. St. 405 (1862); Opinion of the Judges, 37 Vt. 665 (1864); Note (1921) 14 A. L. R. 1256.


\(^9\)U. S. Const. Art. III, § 1 (President and Vice-President); Art. I, § 4 (representatives and senators); Art. VI (supremacy clause). See Commonwealth v. O’Connell, 298 Ky. 44, 181 S. W. (ad) 691 (1944) for decision in point and excellent discussion.

\(^10\)Clark v. Nash, 192 Ky. 594, 234 S. W. 1 (1921), construing Ky. Const. (1891) § 147 [since amended (1948) to make provision for absent voters].
the statute of that state did not violate the guaranty of a secret ballot nor the residence requirement for voters, and that the casting of an absentee ballot involved an offer to vote within the meaning of the state constitution. The latter term was said not to mean that the voter must be physically present at the polls, and the secret ballot was regarded as a personal privilege to protect the voter in the exercise of his suffrage, which he could waive if he chose to do so.\footnote{Jenkins v. State Board of Elections, 180 N. C. 169, 104 S. E. 346 (1920) construing N. C. Const. (1868) Art. 6, §§ 2, 6.}

In Virginia, the court in two decisions has upheld the validity of the absent voters statute.\footnote{Goodwin v. Snidow, 150 Va. 54, 142 S. E. 423 (1928); Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928). These two cases were decided on the same day. The facts in the Goodwin case were not discussed by the court, which based its decision squarely on the Moore decision, stating that the cases were heard together.} Here, again, it was held that an offer to vote did not require the physical presence of the voter at the polls. And since the state legislature is given unrestricted power by the constitution to determine the methods by which elections are to be conducted, the exercise of this authority is not a violation of the secret ballot guaranty. The court further declared that even though fraud was committed by the misuse of the statute, this fraud was in spite of the statute, not because of it; and since the statute denounces fraud, any relief would have to be legislative.\footnote{Moore v. Pullem, 150 Va. 174, 142 S. E. 415 (1928).} It is felt that although the court referred to "unrestricted power," it actually meant unrestricted power within specific constitutional limitations, and that the legislature is given no blanket authority by this language to conduct elections in any manner it may see fit.

An examination of the debates of the Virginia Constitutional Convention of 1901-02 discloses how the secret ballot provision came into the Virginia constitution. When the Committees on Suffrage and on Privileges and Elections reported the suffrage sections of the constitution to the convention there was no provision for a secret ballot. An amendment to the section as reported was offered by a delegate, and in the short debate on this amendment is found both the purpose and intent of the constitutional guaranty of secret ballot. The text of the debate follows:

"Mr. Kendall: ‘I will say, gentlemen, that there is nothing in the article, as now framed, as far as I can see, that requires that the ballot shall be secret, and there is no reason why the ballot could not be thrown on a table where the ballot-boxes are kept, and anybody could go up and prepare a ballot there. That
defeats the object of a secret ballot, and it gives the fullest opportunity for fraud.'

*Mr. Brooke:* 'Is there anything in the article which would prevent the Legislature from passing such a law?'

*Mr. Kendall:* 'No, sir; but I want to make it mandatory upon them to do it.'"

The amendment was adopted, forty-two to twenty-six, and now appears in the Virginia constitution as the last sentence of section 27.¹⁴ The purpose of amending the reported section is thus seen to be twofold: (1) to preserve the secrecy of the ballot; and (2) by preserving the secrecy of the ballot to reduce the opportunity for fraud in elections.

The debate also seems to disclose that the state constitution intended to impose an affirmative mandatory duty on the legislature to pass laws governing elections so that the secrecy of the ballot could not be violated. Since the Virginia court has held that the absent voters law is in all respects constitutional, and that the legislature has unrestricted power to prescribe the manner of conducting elections, the duty then lies on the legislature to pass election laws which will conform to the state constitution.

The Virginia absent voters law seems to fail to meet constitutional requirements in two important respects; first it does not preserve this absolute secrecy of the ballot, and second it does not provide that the ballot box be kept in public view, as is required by the Virginia constitution section 27, and in the Virginia Election Code 24-243.¹⁵

The absent voters statute provides that the ballots shall be in an envelope with the voter's name on the outside of the envelope, and that the election judges shall deposit the ballot, without examining it, in the ballot box with the rest of the ballots.¹⁶ However, this system

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¹⁴The text of the reported sections appears in 2 Debates Va. Const. Convention of 1901-1902, p. 2937. These sections have no provision for guarantee of secret ballot.

Text of the amendment of the reported sections: "So far as consistent with the provisions of this Constitution the absolute secrecy of the ballot shall be maintained, and to this end the General Assembly may enact such laws as may be necessary." 2 Debates Va. Const. Convention of 1901-1902, p. 3023.

Debate and vote on this amendment are found in 2 Debates Va. Const. Convention of 1901-1902, p. 3024.

Text of the amendment as written into the Virginia constitution: "So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained." Va. Const. (1902) § 27.


obviously affords an opportunity for an election official to look at any ballot, despite the fact that he is not supposed to do so. When the voter goes to the polls and votes in person instead of voting by mail, the code provides that the voter shall mark and fold his own ballot and hand it to an election judge who deposits the ballot in the ballot box without inspection. The vital difference between the two methods is that the voter who is present at the polls can watch the judge deposit the ballot, while the voter who is not present can not see that an election judge does not examine the absent ballot.

The Virginia constitution and the Election Code provide that the ballot box shall be kept in public view during all elections, and that the ballots shall not be canvassed or counted in secret. The absent voters act directs that absentee ballots shall be kept in a “separate container” in the custody of the electoral board until the time that these votes are delivered to the judges at the polls. Clearly this separate container is designed as a safeguard for the ballots, but the container might be anything from a shoebox to a black satchel. Manifestly the custody of the electoral board is not a public view as is required by the code and the constitution. The electoral board can actually have custody of the absentee votes for as long as sixty days prior to the election, and all this time out of the public view. There is nothing to prevent a member of an electoral board from filling the separate container with fraudulent ballots before delivering them to the election judges at the polls.

The privacy given to the act of voting and the publicity given to the ballot box are precautions which guard against fraud. Any statute which offers a cloak of secrecy for conduct detrimental to pure elections is of doubtful wisdom, even in the exercise of an unrestricted power.

The mechanics of absentee balloting are similar in North Carolina, Tennessee, Kentucky, West Virginia and Virginia. In general the acts require: (1) that the voter give a personal or written offer to vote to the registrar or other election official, and this requirement is satisfied by the application for a mail ballot; (2) that the official per-
personally give the ballot or mail it to the voter; that the voter mark the ballot in privacy, have it notarized, and return it personally or by registered mail to an election official; that an election official keep custody of the ballot and deliver it to the judges at the polls; and that the election judges at the polls deposit the mail votes in the ballot box with the other votes without examination of the mail ballot.

The provisions of the election codes of the above named states as to who is eligible to vote by mail differ widely. In Virginia, “any duly qualified voter who will, in the regular and orderly course of his business, profession, occupation, or other personal affairs, or while on vacation or during attendance, as a student at any school or institution of learning, be absent from the city, town or from the precinct in which he is entitled to vote, if in a county, and any such voter who may be physically unable to go in person to the polls on the day of election, may vote in any primary, special or general election, in accordance with the provisions of the [absent voters law].”

The provisions of the other state codes are essentially similar except that North Carolina, Tennessee, and Kentucky, require the voter to be out of the county, and West Virginia requires him to expect to be out of the state. Reasons for absence from the polls, if any are specified in the codes, are given variously as business, health,
education, and travel. North Carolina seemingly restricts the right by a decision which holds that a voter who is in fact present in his county on election day and is physically able to go to the polls can not vote by absent ballot.\(^2\) None of the codes of the other states has such a provision, nor is any decision to be found in Virginia, Tennessee, Kentucky, or West Virginia which is similar to the North Carolina case.\(^3\)

The Virginia act is broader than any of the others in that it allows a voter who will be absent from his precinct for personal affairs to vote by absentee ballot.\(^3\) According to the words of the statute, if a voter wanted to go fishing out of his precinct, if in a county, or out of his town or city, he could do so and vote by absent ballot. It would seem that this is an abuse of granting the suffrage privilege to absent voters, and that civic duty would require at least that the voter think enough of his elective privilege to stay at home and vote.

In view of the unusually broad scope of the absent voting privilege extended by the Virginia statute and the obvious opportunities for fraud created by the system, careful provision should be made to facilitate the prosecution of any who attempt to perpetrate election frauds through absentee ballot manipulations. To aid in the procurement of evidence of election irregularities, the state legislatures have generally offered some sort of immunity from prosecution to witnesses in election contests or other litigation growing out of illegal election procedure. The Virginia code provides: "No witness giving evidence in any prosecution or other proceeding under the preceding sections of this chapter shall ever be proceeded against for any offense made penal by any of such provisions, or any of the other election laws of this State, committed by him at or in connection with the same election, primary, or convention."\(^3\)\(^2\) The code further provides that a witness in an election contest shall not be compelled to testify in other manner than any other witness in a civil suit.\(^3\)\(^3\)

\(^2\)Robertson v. Jackson, 183 N. C. 695, 110 S. E. 593 (1922). This decision was based on a former law which did not include those physically unable to vote, but inasmuch as part of the votes held invalid were those of physically able voters it is felt that a decision under the present statute would not hold those voters in the county who are physically able to come to the polls entitled to absentee ballots.

\(^3\)Tenn. Code Ann. (Williams, 1949 Supp.) § 2253.18 does provide that a voter, while within the county, applying for an absentee ballot, "shall attach to said notice a statement from a licensed physician certifying that the illness or disability of said voter is such that said voter cannot safely appear at the voting precinct in person."


The North Carolina Election Law provision is almost exactly the same as Virginia’s as to the immunity of a witness, as is the code of Tennessee. However, the Tennessee court has held that the statute applies only to witnesses in criminal proceedings, and implies that a witness cannot be compelled to testify or be punished for contempt for failure to give evidence in a civil proceeding growing out of a fraudulent election. The North Carolina code provides that a witness must give evidence in criminal proceedings resulting from irregular elections. The Kentucky Election Code compels a witness to testify before a grand jury, or on behalf of the Commonwealth, and seems to grant complete immunity for witnesses in these two categories only. West Virginia’s Election Code does not have a section on immunity or compulsion of testimony but the sections of the West Virginia code dealing generally with immunity provide that evidence compelled to be given shall not be used against the witness in another proceeding.

The Virginia law thus extends broader protection to witnesses than those of her neighboring states, except possibly North Carolina.

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35 Lindsay v. Allen, 113 Tenn. 117, 82 S. W. 648 (1904). This decision interprets a former Tennessee statute, the wording of which has not been materially changed in the present code.


37 Ky. Rev. Stat. (1948) §§ 124.300, 124.310, 124.330. The latter section also provides that a witness giving testimony in any case pending under parts of the Corrupt Practices Act shall not have the evidence used against him in any prosecution or civil proceeding.


39 Two Virginia cases have interpreted the immunity clause in the Virginia Election Laws, Flanary v. Commonwealth, 113 Va. 775, 75 S. E. 289 (1912) and Stanley v. Commonwealth, 116 Va. 1028, 82 S. E. 691 (1914).

The immunity section of the election code by its literal words should extend only to offenders testifying under a few sections of the Pure Election Chapter of the Virginia Code [Va. Code Ann. (Michie, 1950) §§ 24-440 to 24-448 inclusive], which sections in general cover bribes and excess expenditures.

In the Flanary case the Supreme Court of Appeals upheld a conviction for contempt of court against the accused who had refused to testify in the prosecution of one Burchett on the grounds of self-incrimination. Burchett had been indicted for an offense not covered by the immunity section. The accused had testified before a grand jury as to offenses committed in the same election and covered by the immunity section, as well as to the offense committed by Burchett. In holding this grand jury testimony to be a bar to prosecution, and the immunity to satisfy the constitutional right of not testifying against oneself, the court said: “The immunity is as complete with respect to offenses against other election laws as it is with respect to an offense against the particular act within the terms of which the immunity is found.” 113 Va. 775, 785, 75 S. E. 289, 293 (1912).

In the Stanley case the court granted immunity because the accused had testi-
The purpose of the provision in the Virginia code, to enable the courts to arrive at the proper result of a contested election by enabling the witness to give testimony without fear of prosecution, is commendable. The practical result of this provision, however, is that the Virginia absent voters law can be used with impunity by election officials as a means of defrauding the public.

The Virginia absent voters act was adopted with a purpose of preventing an absent voter from being deprived of his right of suffrage.40 "But the motives for legislative acts are not fit subjects of judicial inquiry. If the power can be exercised for one purpose, it may be for another; the intention may always be effectually concealed. It is the principle of the law, and its capacity to be exerted for other objects than that which it professes to aim at in the particular case, that it is proper and necessary to look to."41 The capacity of the Virginia absent voters act to be used for other purposes than were intended raises a serious threat to fair elections.42 For example: (1) The

41From the contention of the successful plaintiff-in-error in Brown v. Maryland, 12 Wheat. 419, 425, 6 L. ed. 678, 680 (1827), opinion of the court by Marshall, C. J.
42While the examples set out in the text are hypothetical, many actual abuses have been made of the Virginia absent voters law. The instances below are taken from the depositions of a Scott County election contest which did not reach a court of appellate jurisdiction.

1) Absent voter who did not remember whether he ever had the ballot in his hand.
2) Absentee ballot of a voter partially marked by a candidate for office.
3) Absent voter within his own precinct on election day who had no idea of being absent from precinct on election day.
4) Absent voting by a voter who did not know whether he voted and registered at the same time.
5) Statement from absentee voter who was in precinct on election day: "I decided to vote at home and save running around."
6) Absent voter who never signed application for absentee ballot.
7) Voter who registered in Wise County to vote in Scott County by absentee ballot.
secretary of an electoral board, having connived with one of the candidates, decides to stuff a ballot box. He fills the separate container in his custody with fraudulent mail ballots, and turns these in to the judges at the polls. The defeated candidate contests the election and proves the ballots were invalid. The contestee would have the secretary subpoenaed and have him testify to violation of laws covered by the immunity section; the Virginia code thus gives him complete

8) Election workers bringing absent ballot to voter working on a farm. Voter had made no application for absentee ballot.
9) Absentee voter who lived less than 100 yards from polling place and had no idea of being absent on election day.
10) Absent voter who voted at home because she did not want to go to the polls without her husband.
11) Absentee voter had ballot delivered to him by person he did not know, voted under this person's supervision, and returned ballot to the stranger. "...just kinda like a dream to me...."
12) Absent voter describing how he applied:
   Q—"...just tell me exactly what happened...."
   A—"They just wrote a piece of paper and then signed my name to it, that was all. They did not ask me any questions at all."
13) Resident of Tennessee voting by absentee ballot in Virginia election.
14) Semi-literate voter having been voted by others by absentee ballot:
   Q—"Did they mark it to suit themselves or to suit you?"
   A—"To suit themselves."
15) Absentee voter who had his vote solicited:
   Q—"Tell us exactly what happened."
   A—"They opened it and told me they wanted me to vote and I told them I would rather not vote that way."
   Q—"How did they tell you they wanted you to vote?"
   A—"...and I told them I would rather not vote that way and they kept on, and I told them I didn't like to do that, it might get me in trouble, and they said no, there would not be any trouble to it."
   ... "Q—"And you wanted to mark it yourself?"
   A—"Yes, sir, I asked them to and they said they wanted to mark it themselves."
   Q—"And you let them mark it."
   A—"Yes, sir."
   ... "Q—"You know whether they marked it republican or democratic?"
   A—"I don't know."
16) Absentee voter in precinct on election day:
   Q—"How did you happen to vote by mail?"
   A—"I thought it would save me a trip to the polls."
17) Q—"...didn't you have their ballots in the absent voters ballot box and deliver it to the judges of election...without saying one word about whether or not they were legal voters, isn't that a fact?"
   A—"Yes, sir."
18) Party worker took ballots from Scott County to Wise County to be voted by absent voters who had made no application.
19) Candidate for public office prepared absentee ballot for a blind man.
immunity from prosecution. (2) The Virginia absent voters law provides that "No registrar shall solicit any application for a ballot."\(^4\)

The local registrar, scheming with a candidate, decides to solicit votes from people known to favor his candidate. When the other candidate loses, he contests the election. The scheming candidate would have the registrar testify and thus secure for the registrar complete immunity to prosecution for his fraud. (3) An election judge knows that one candidate will attempt to use fraudulent mail votes. When the absentee vote is delivered to the judges at the polls, the judge does not say anything about the wet glue on the envelopes containing the ballots. If the other judges do not notice the wet glue (or are in on the plot), the ballots are deposited in the ballot box. When the election is contested the contestee calls his fellow conspirators as witnesses and they are forever immune to prosecution.

In all of the above examples the absent voters act enables the officials to commit the fraud, and the immunity section of the code protects them. These officials have nothing to lose. If the fraud is not detected the election is won by fraud, and if the fraud is detected the official purges himself by his own testimony.

Thus the Virginia absent voters statute, in its present form, tends to compromise the secret ballot, to deny the absentee ballots the publicity attendant on actual physical voting at the polls, to place a cloak of secrecy around the absentee ballot box, and to place in the hands of any unscrupulous election official an instrument of fraud. The immunity section of the code, although designed to facilitate the discovery and correction of illegal elections, can readily be put to the practical use of protecting the very persons who committed the illegal acts.

Several alternative solutions to the problem are available. (1) The absent voters act might be repealed in its entirety. Approximately the same percentage of both parties in a general election or of both sides in a primary election will be absent on election day, so that in any honest election the absent voters act will have little or no bearing on the result.

(2) If public policy dictates that some absent voters be allowed to vote, the privilege could well be limited, among physically able voters, to servicemen only, or to those who are actually out of the state, and, among those physically disabled, to those voters who are permanently disabled, and who produce a doctor's certificate of physical disability to attend the polls.

(8) If absentee voting must be maintained, the provisions in the code allowing personal delivery of any absentee ballot or application should be eliminated. Instead, it should be required that all absentee ballots and applications be sent and returned by registered mail; that the outside of the mailing envelope for the ballot have printed on it in large letters, in front and back, ABSENTEE BALLOT; that the voter fill in on the back of the mailing envelope across the seal his full name; that the ballots be delivered to the physical custody of the clerk of the circuit court, to be held by him in constructive custody of the circuit judge; that the clerk deliver the mailing envelopes to the election judges at the polls on election day; and that the election judges then check the United States mail registration stamp on the envelope, and also check the list of absentee ballots issued against sending and receipt mail registry, and against the names on the mailing envelopes received, and then open and deposit the ballots. All steps of this procedure should be mandatory. Even these stringent rules could not, of course, completely eliminate dishonesty in the conduct of elections, as, for example, the solicitation of absentee ballots by a registrar. Nevertheless, increased protection would be given to the secrecy of the ballots of honest absent voters, and formidable obstacles would be created to deter fraudulent use of the absent voting system.

EMORY WIDENER, JR.
CASE COMMENTS

BILLS AND NOTES—RIGHT OF DRAWER OF CHECK PAID ON PAYEE FORGERY TO SUE COLLECTING BANK WHEN ACTION AGAINST DRAWEE IS BARRED BY LIMITATIONS. [California]

When upon examination of his canceled checks returned by a bank, a drawer discovers that the name of the payee on one of his checks has been forged, the generally accepted rules for adjusting the rights of all parties affected are as follows: The drawer of the check is entitled to have his account at his own drawee-bank recredited for the amount paid out on the check. If the forger has cashed the check at a bank other than the drawee-bank, the drawee-bank has a cause of action to recover the money which it paid out to the collecting bank that presented the check for collection. The collecting bank is left to pursue the forger to recover the money which was paid to him.

However, by the time the forgery is discovered the forger is usually out of reach or insolvent, and consequently, the party who first takes the check from the forger, whether it be the drawee-bank or a collecting bank, bears the loss of the forgery. While it may be proper to protect the drawer in most circumstances, the opinion is growing that an unfair financial burden is placed upon the banks when the forger is an employee of the drawer whose job it is to supply the drawer

"The general rule must be conceded that the undertaking of a bank is to pay out the depositor's money only on the order of the depositor and in accordance with that order. If it pays out money on a check drawn to order, upon a forged indorsement of the payee's name, it has not paid in accordance with the depositor's order, and, in the absence of anything further, has no right to charge such payment against the depositor's account." Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 501, 182 Pac. 293, 294, 5 A. L. R. 1193, 1196 (1919). It makes no difference how careful the bank was in making payment or how impossible of detection the forgery was. That is a risk which the bank and not the depositor assumes. Kessler, Forged Indorsements (1938) 47 Yale L. J. 863, n. 58.

Canal Bank v. Bank of Albany, 1 Hill 287, 290 (N. Y. 1841): Plaintiffs, the drawees, paid their money under the mistaken belief that the name was genuine. "They [defendants] have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; For other theories of recovery by the drawee-bank against the collecting bank see Britton, Bills and Notes (1943) § 199.

Kessler, Forged Indorsements (1938) 47 Yale L. J. 863, 880: "Thus the protection given to the true owner of an order instrument against the loss of the instrument by reason of a forgery of his signature is complete. It is obvious that the American rule is designed to place the ultimate liability upon the purchaser from the forger."
with the payees' names. Where this particular employer-employee relationship exists, the forgery might easily have been prevented or detected promptly if the drawer-employer had used proper business and accounting practice. Thus, the financial burden of the forgery should rest on the negligent drawer-employer whose employee perpetrated the forgery, and not upon the bank which took the check from the forger.

In some states the right of the drawer to shift to his own drawee-bank the loss caused by a forgery of his employee has been restricted by special statutes of limitations provisions. Such statutes limit to one or two years the time in which the drawer can, after return of his canceled checks from his drawee-bank, demand from his drawee-bank a recredit of his account upon discovery of a payee forgery. Thus, unjust results will be avoided where forgeries are reported so long after their occurrence that it is virtually impossible for the drawee-bank which took the forged check ever to recover from the forger. But these special limitations statutes do not extend their protection to a collecting bank, and in the event that a drawer is barred by limitations from getting a recredit at his own drawee-bank, he may attempt to recover directly from the collecting bank. The decisions on the liability of the collecting bank to the drawer are in conflict, and courts have seldom considered as material the fact that the forger was the drawer's employee who supplied payee names to the drawer.

Wherever an employee of a drawer forges one of the drawer's checks, the forgery is most likely to occur in the indorsement of the payee. If the drawer owes money to the payee, the forgery will soon be detected, for the payee, not receiving his money, will make a demand upon the drawer. But where the drawer actually owes no money to the payee, as where the purchasing agent of a drawer supplies the drawer with false claims by regular customers, there will be no demand to bring the forgery to light. Yet, a proper inventory would quickly reveal it. The ability to perpetrate this latter type of forgery is limited to employees who supply payee names to the drawer and, since proper accounting practice could prevent forgeries by this group, much attention has been recently given to this particular situation, especially by the American Banker's Association. For further discussion of the problem see Britton, Bills and Notes (1943) 664, 677.

Wis. Stat. (1947) § 116.285: "No bank shall be liable to a depositor for the payment by it of a check bearing a forged indorsement unless, within 2 years after the return to the depositor of the voucher for such payment, such depositor shall notify the bank that the check so paid bore such forged or unauthorized indorsement." For example of statutes limiting the drawer's recovery to one year see: Cal. Code of Civ. Proc. (1941) § 340(3); Tex. Stat. (Vernon, 1943 Supp.) Art. 342-711.

A collecting bank's liability upon warranty of genuineness of payee's indorsement has not been qualified by a statute providing that no bank should be liable to a depositor for payment of a check bearing a forged indorsement unless within two years after return of vouchers the depositor notifies the bank of such forgery. National Surety Corp. v. Federal Reserve Bank of New York, 70 N. Y. S. (2d) 636, aff'd 70 N. Y. S. (2d) 642 (1946).
The recent case of California Mill Supply Corp. v. Bank of America National Trust & Savings Association presented this issue on a typical fact situation. The plaintiff drawer-employer was a corporation which had in its employ a fraudulent purchasing agent, whose duty was to present to the plaintiff's signing officers all of the bills payable from the purchasing department so that checks could be issued in payment. Through the presentation of false documentary evidence to the signing officers, the purchasing agent had checks made out to payees to whom, unknown to the signing officers, the company owed no money. These checks were turned over to the purchasing agent for delivery to the payees, but he forged the indorsements of the payees and negotiated the checks. The checks were paid by the defendant collecting bank, which, in turn, sent them to the drawee-bank. The drawee-bank paid the collecting bank and returned the canceled checks to the plaintiff drawer-employer. After more than a year had elapsed from the time the canceled checks were returned, the drawer-employer, its suit against its own drawee-bank being barred by a statute of limitations, tried to recover directly from the collecting bank. The trial court refused to allow recovery, deciding, in line with more recent thought, that the drawer-employer should bear the financial burden of the forgery. But the California District Court of Appeals reversed the decision and allowed the drawer-employer to recover from the collecting bank.

In attempting to justify its decision, the appellate court relied upon the reasoning of the older cases and completely ignored the vital point of the particular employer-employee relationship involved. The position was taken "that the drawer has suffered a loss through the act of the collecting bank in accepting, presenting and securing payment of the check on a forged indorsement." If this means that the drawer's loss has resulted from a breach of a duty owed by the collecting bank to the drawer properly to identify the forger, it has been so held. But this duty has been questioned. If, instead, the

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8Cal. Code of Civ. Proc. (1941) § 340(3), in which an action on "a check that bears a forged or unauthorized indorsement" is limited to one year. Though it is not specifically stated in this statute, the statutory period has been held to run from the time the canceled checks are returned to the drawer. Union Tool Co. v. Farmers' & Merchants' Nat. Bank, 192 Cal. 40 at 52, 218 Pac. 424 at 429, 28 A. L. R. 1417 at 1426 (1923).
10The bank is "not relieved of its own duty of identification, and acted at its peril in paying the check to any person other than the payee named therein." First
statement means that the drawer has a right to rely on the warranty by the collecting bank to him of the genuineness of prior indorsements and thereby suffered loss, it is contrary to the prevailing view that the warranty runs to subsequent holders in due course and not to a drawer, who is not considered as such.

The California court cited Home Indemnity Co. of New York v. State Bank of Fort Dodge for the proposition that the direct action by the drawer-employer against the collecting bank is the most logical type of action to allow if the collecting bank is ultimately to bear the loss. But strictly applied, the Fort Dodge Bank case stands for the allowance of a direct action by the drawer against the collecting bank only when the ultimate liability of the collecting bank could be enforced if the normal proceedings in payee forgery cases were followed. In the Mill Supply case the first step of such proceedings, the drawer's suit against his own drawee-bank, is barred by a statute of limitations, and thus the drawee-bank would not have occasion to pass the liability on to the collecting bank.

Turning to a different line of reasoning, the California court asserted that, "simple justice requires that the liability of the collecting bank to the drawer be upheld on the theory of money had


1First Nat. Bank of Bloomingdale v. North Jersey Trust Co., 18 N. J. Misc. 449, 14 A. (2d) 765, 768 (1940), states that "There is no allegation of facts which give rise to a duty owing by the defendant [collecting bank] to this plaintiff [drawer], and there is nothing to indicate that the defendant allowed the forged indorsement to slip by because of its failure to exercise ordinary care."

2Farmers' State Bank in Merkel v. United States, 62 F. (2d) 178, 179 (C. C. A. 5th, 1932): "A cause of action against the [collecting] bank in favor of the appellee [drawer] accrued as a result of the [collecting] bank breaching its implied warranty of the genuineness of the indorsements of the name of the payee by bringing about the presentation of the checks and collecting the amounts thereof."

3Railroad Bldg., Loan & Savings Ass'n v. Bankers Mortgage, 142 Kan. 564, 51 P. (2d) 61, 64, 102 A. L. R. 140, 144 (1935). "While it is difficult in many cases to say who is or is not a holder in due course we are cited to no authority, nor do we find any, holding the drawer of a check to be such. In our opinion, the drawer is not a holder in due course, and, not being such holder, the contract of the Ottawa [collecting] Bank, evidenced by its indorsement, was not for his benefit, but solely for the benefit of subsequent holders in due course."

4Wood Iowa 103, 8 N. W. (2d) 757 (1943).

5Home Indemnity Co. of New York v. State Bank of Fort Dodge, 233 Iowa 103, 8 N. W. (2d) 757, 777 (1943): "And, had the Brady Company [drawer] not provided insurance for itself and the drawee, against the loss so sustained by the forgery, it could and would have required the drawee to withdraw the debits against its account, and the drawee upon doing so, could and would have required the appellee to reimburse it for the money which it wrongfully collected from the drawer."
and received." Though there is an opposing authority on this point, many courts do rule that there is an implied contract, growing out of the circumstances, to pay to the true owner (the drawer-employer) the money received by the collecting bank and paid by it to the wrongdoer on the strength of the forged indorsement.

Since the theories advanced by the court have been questioned, consideration should be given to the main argument of the defendant collecting bank backed by the case of Lavanzer v. Cosmopolitan Bank & Trust Company. There, when the collecting bank paid out money in reliance on a forged indorsement, the court held that it was not the drawer's money that was being paid out, for the drawer's money was still on deposit in the drawee-bank. Under this line of reasoning, "The relation between a bank and its depositor is that of debtor and creditor, not of agent and principal. The money deposited becomes part of the bank's general funds, and it impliedly contracts to pay the depositor's checks, acceptances, notes payable at the bank, and the like, to the amount of his credit; but in discharging its implied obligation, it pays its own money as a debtor, not its depositor's money as an agent."

As applied to the Mill Supply case, the Lavanzer decision would require the ruling that the collecting bank had not paid out the drawer's money in reliance on a forged indorsement; the drawer's money was still in the general fund of the drawee-bank. Since the drawer's suit against the drawee-bank was barred by the statute of limitations, he could not require that the amount of the check be recredited to his account, and so he would have to bear the loss of the forgery.

But the California court held the Lavanzer case to be inapplicable on the ground that the debtor-creditor relationship which is the basis

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17First Nat. Bank of Bloommgdale v. North Jersey Trust Co., 18 N. J. Misc. 449, 14 A. (2d) 765, 768 (1946), denies recovery on this theory, stating: "The common-law basis for such a cause is the relation of debtor to creditor. The existence of a debt due from the defendant to the plaintiff is essential to the action. Obviously a reading of the complaint demonstrates that the real cause of action is neither for a debt for the value of goods sold and delivered by the plaintiff to the defendant, nor for moneys received by the defendant for the use of the plaintiff;"
of that decision "is true only so long as the depositor retains a right of action against his own bank. When, however, it is impossible for the depositor to recover from his own bank—as where the statute of limitations has run— he has suffered a loss directly traceable to the act of the collecting bank.""21 The court properly refused to extend the general doctrine of the Lavanier case, for the doctrine is so broad that, once extended, it would apply to all payee-forgery cases. Though its application would be desirable in cases similar to the Mill Supply case, its extension would likewise require the drawer unjustly to bear the financial burden of the forgery when the forgery grew out of circumstances under which the drawer had no ability to forestall the wrongdoing.

It appears that neither of the contesting parties in the principal case has advanced persuasive arguments to support his contentions. In fact situations like that of the Mill Supply case, the drawer-employer should have been able to deter the forgery by proper accounting practices, and there is a growing opinion that the loss should be placed upon him if he fails to do so.22 Thus, the court's decision putting the loss on the collecting bank, though supported by precedent, rests on controverted legal theory and achieves an undesirable result. Yet, the court correctly refused to extend the rule of the Lavanier case, which was the basis for the defendant collecting bank's theory of the principal case.

The American Banker's Association has suggested a decisive solution to the problem. An amendment to Section 9(3) of the Negotiable Instruments Law has been proposed which will clearly and definitely place the loss on the drawer-employer in payee forgery cases where the employee-forgery supplies the names of the payees to the drawer-employer. The amended section provides:

"The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing or living person not intended to have any interest in it and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee."23

Applying this amendment to the facts of the Mill Supply case, it is seen that the intent of the purchasing agent that the payees have no interest in the checks is sufficient to make the checks bearer paper.

22 Britton, Bills and Notes (1949) 664, 677.
23 Britton, Bills and Notes (1949) 677, n. 12.
When the checks become bearer paper, the collecting bank can take from the forger without a break in the chain of title. Thus, the bank gets good title to the checks and the loss due to the forgery falls upon the drawer-employer. This revision of the Negotiable Instruments Law has been passed by several states and has been incorporated into the 1950 Uniform Commercial Code. If the amendment proposed by the American Banker's Association receives widespread adoption among the various states, a long-standing fault in this segment of the commercial law will be corrected.

Virgil S. Gore, Jr.

Constitutional Law—Application of "Separate but Equal" Facilities Standard to Racial Segregation in Education. [United States Supreme Court]

In the recent highly publicized and widely discussed case of Sweatt v. Painter, the United States Supreme Court handed down a new decision in the segregation in education controversy which could lead to the virtual elimination of racial segregation in state-supported institutions of higher learning in the South. By the same reasoning, the legal barriers which separate the two races in the public secondary schools might eventually crumble as well.

The Supreme Court viewed the case as presenting this question: "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" That a state may constitutionally distinguish between persons of different races for certain purposes and within determinable

74 The amendment proposed by the American Banker's Association was passed in California in 1945. See Cal. Civ. Code (1947 Supp.) § 3090(3). However, the transactions leading to the Mill Supply case occurred prior to the passage of the amendment so that the amendment had no application to the case. The case would not have arisen had the facts which gave rise to it occurred subsequent to the passage of the amendment.


76 "With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons, or their agents or confederates: . . . an agent or employee of the drawer who has supplied him with the name of the payee intending the latter to have no such interest." Uniform Commercial Code (1950) § 3-405-1(c).

77 70 S. Ct. 848 (1950).

limits has been accepted since the case of *Plessy v. Ferguson*,\(^3\) decided in 1896. In upholding the validity of a state statute requiring railway companies to provide separate accommodations for white and colored passengers, the Court first put its stamp of approval on the doctrine of "separate but equal" facilities for the two races. The gist of this doctrine, which includes a frequently cited dictum upholding segregation in schools, is stated in the opinion in the case:

"Laws permitting and even requiring [the separation of the races], in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."\(^4\)

Two years later in *Cumming v. Richmond County Board of Education*,\(^5\) this dictum was approved by the Court, which pointed out that "the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."\(^6\) In 1914, Justice Hughes, speaking for the Court in *McCabe v. A. T & S. F. R. Co.*,\(^7\) concluded that the authority of the separate but equal doctrine announced in the *Plessy* case was no longer open to question, and that under it a railroad must, in providing facilities for its passengers, accord substantial equality of treatment to all persons traveling under like conditions. Again in *Gong Lum v. Rice*,\(^8\) the Court held that a Chinese citizen was not denied equal protection of the law in violation of the Fourteenth Amendment, by reason of being required to attend a colored school furnishing equal educational facilities. Chief Justice Taft declared that "The right and power of

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\(^3\)163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256 (1896).
\(^4\)Plessy v. Ferguson, 163 U. S. 537, 544, 16 S. Ct. 1138, 1140, 41 L. ed. 256, 258 (1896).
\(^5\)175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 (1899).
\(^6\)Cumming v. Richmond County Board of Education, 175 U. S. 528, 545, 20 S. Ct. 197, 201, 44 L. ed. 262, 266 (1899).
\(^7\)235 U. S. 151, 35 S. Ct. 69, 59 L. ed. 169 (1914).
\(^8\)275 U. S. 78, 48 S. Ct. 91, 72 L. ed. 172 (1927).
the state to regulate the method of providing for the education of its youth at public expense is clear."

Not until 1938, however, was the highest federal tribunal confronted with a question similar to that presented in the *Sweatt* case. In *Missouri ex rel. Gaines v. Canada*, a Negro citizen of Missouri possessing the necessary qualifications had applied for and was refused admission to the state university's law school. Affirming the petitioner's right to enter the latter school, the Supreme Court asserted that the small number of Negroes desiring legal training and the provisions made by the State of Missouri to finance their study elsewhere, did not excuse the state from protecting Gaines' rights guaranteed by the Fourteenth Amendment.

"It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity."11

This view was reaffirmed by the Supreme Court in 1948 in *Sipuel v. Board of Regents of the University of Oklahoma*, holding that not only must the State of Oklahoma provide for the Negro petitioner the legal education afforded white students, but must "provide it as soon as it does for applicants of any other group."12 The separate but equal doctrine of the *Plessy* case was thus in no wise disturbed by the decisions in the *Gaines* and *Sipuel* cases, but rather was expressly recognized and followed. It was only because Missouri and Oklahoma maintained no separate law schools for Negroes that Gaines and Sipuel as citizens of their respective states were entitled to avail themselves of the existing facilities for the study of law by white students within the boundaries of those states.

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9Gong Lum v. Rice, 275 U. S. 78, 85, 48 S. Ct. 91, 93, 72 L. ed. 172, 176 (1927). The Cumming and Plessy cases were cited as authority.
11*Missouri ex rel. Gaines v. Canada, 305 U. S. 37, 59 S. Ct. 232, 83 L. ed. 208 (1938). The Court rejected the argument that the petitioner was not discriminated against because the provision for payment of tuition at schools outside the state was only temporary, pending actual establishment of a law school for Negroes within the state. By virtue of the statutory discretion of the curators, discrimination against the petitioner might continue indefinitely and could not, therefore, be excused "by what is called its temporary character."
It was not until the principal case that the Supreme Court was called upon to determine whether the separate educational facilities provided within a state met the test of substantial equality. Although a number of states and lower federal courts have dealt with this problem only as it affected secondary and grade schools, their conclusions would seem equally applicable to state-supported colleges and universities. There has been substantial agreement that a state may not constitutionally differentiate in salaries paid white and colored teachers whose qualifications and services are relatively equal. In addition such factors as the relative competence of teachers and ratios of teachers to pupils, length of school terms and the proportions in which school revenues have been appropriated, have been considered. Sufficient facilities of the same type, although not necessarily identical in size or number, have been deemed adequate to meet the standard of substantial equality. The Supreme Court's interpretation of "substantial equality" in Sweatt v. Painter, however, went considerably beyond any of these more conventional applications of the term.

Sweatt, the petitioner in the case, began his efforts to obtain admission to the University of Texas Law School four years before the controversy reached the Supreme Court. When his application for entrance into the school in February, 1946, was denied, Sweatt brought suit for mandamus against the appropriate university officials. In the light of constitutional precedent these officials and others of the State of Texas, upon receiving Sweatt's application for admission to the state university law school, had one of three courses open to them: Admit him in violation of the constitution and statutes of the state; abandon the University of Texas Law School, thereby denying a legal education to all; or establish a separate law school for Negroes as nearly equal to that at the University of Texas as possible. Having chosen this last course, it but remained for the courts to determine whether or not the facilities and opportunities offered the petitioner were substantially equal to those available to white students.

The trial court in Texas continued the case for six months to allow the state to supply substantially equal facilities and, at the expiration of that time, denied the writ in view of plans then under-way to open a law school for Negroes the following February. The Texas courts subsequently found that the newly established Negro

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34See Note (1948) 5 Wash. & Lee L. Rev. 105, 110-112 and cases cited.
law school offered opportunities substantially equivalent to those available to white students at the state university and denied mandamus.16

The case was brought before the Supreme Court of the United States on a writ of certiorari and the judgment of the state courts was reversed. After examining the facilities and opportunities afforded by the two schools, the Court was unable to find "substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior."17

The Court did not end the comparison at that point, however. Another, and more important, inequality was found to exist. 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 adminis-

16Petitioner refused to register in the newly established Negro law school when it opened. The Texas Court of Civil Appeals, meanwhile, set aside the trial court's judgment and ordered the cause remanded to the trial court for further proceedings. On remand, the trial court found that the Negro law school offered opportunities substantially equivalent to those available to white students at the University of Texas Law School, denying mandamus. This finding was affirmed by the Texas Court of Civil Appeals in Sweatt v. Painter, 210 S. W. (2d) 442 (1948), and an application for a writ of error was denied by the State's Supreme Court.

17Sweatt v. Painter, 70 S. Ct. 848, 850 (1950). The University of Texas Law School was staffed by a faculty of 16 full-time and three part-time professors. The student body numbered 850. The library contained around 65,000 volumes (30,000 to 35,000 excluding duplicates). Also available to the students were a law review, moot court facilities, scholarship funds and Order of the Coif affiliation. At the time of the decision of the principal case, the law school at the Texas State University for Negroes had a faculty of five full-time professors, a student body of 23, a library of 16,500 books with a full-time library staff, a practice court and a legal aid association. In addition, the students were privileged to use the entire library of the Supreme Court of Texas, numbering approximately 42,000 volumes and located about 300 feet from the law school building. Any other needed texts, legal periodicals or reports were to be made available on a loan basis from the law library of the University of Texas.

The University of Texas Law School had three classrooms for the instruction of 850 students, whereas there were two classrooms for the student body of 23 at Texas State University for Negroes. The latter institution was apparently soon to be accredited. In respect to entrance requirements, examinations, regulations, fees, degrees awarded, classroom practices and courses offered the first-year class, the two schools were almost identical. The Texas Court of Civil Appeals also emphasized the greater opportunities for individual attention available at the Negro law school due to the small size of the student body. See Sweatt v. Painter, 70 S. Ct. 848 (1950) and Sweatt v. Painter, 210 S. W. (2d) 442 (Tex. Civ. App. 1948).
tration, position and influence of the alumni, standing in the community, traditions and prestige." To other Southern states which now, or may hereafter, find themselves confronted with a similar problem, this latter pronouncement presents what may well be an insuperable obstacle to the maintenance of a separate but equal educational system. Assuming that the State of Texas had been able to provide Sweatt and others of his race with a law school whose physical plant, library and curriculum were equal to those of the University of Texas and which offered all the other enumerated advantages, there still would seem to be no way to set up a new institution which would immediately be imbued with the intangible factors required.

Any remaining possibility of meeting the separate but equal standard appears to have been precluded by yet another part of the opinion in the Sweatt case. The law school at Texas State University for Negroes, to which the State was willing to admit Sweatt, excluded 85% of the population of Texas—i.e., the white population. In this group are included most of the lawyers, witnesses, jurors, judges and other officials with whom Sweatt would deal as a member of the Texas bar. Referring to this aspect of the situation, the Court asserted that "With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School." The implications of this conclusion are

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20Earlier courts recognized that to impose a standard of exact equality for the maintenance of segregated schools would be to require the virtually impossible; hence, the qualifying term "substantial equality." It has been argued that the words "substantial equality" are in themselves incompatible. To this contention the Texas Court of Civil Appeals replied: "Equality like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the Fourteenth Amendment, employ the expressions 'equal' and 'substantially equal' and as synonymous." Sweatt v. Painter, 210 S. W. (2d) 442, 445 (Tex. Civ. App. 1948).
21Sweatt v. Painter, 70 S. Ct. 848, 850 (1950). In McLaurin v. Oklahoma State Regents, 70 S. Ct. 851 (1950), decided the same day as the principal case, the Supreme Court held that the University of Oklahoma, after admitting a Negro to its graduate school of education, could not constitutionally attempt to set him
readily discernable: Any Negro institution which excludes white students, irrespective of its size, facilities, reputation or national standing, is inferior per se; or so the Court seems to say. In arriving at its decision, the Court was compelled to announce no new law nor overrule any existing authority. The separate but equal doctrine of the Plessy case still remains. It is evident, however, that this new interpretation of "equal" may mean that "separate" is no longer possible.

Inasmuch as the assault upon the barriers of racial segregation appears to be taking on the characteristics of an organized campaign, it is imperative that the Southern states face the problem squarely and attempt to arrive at a tenable result. The more economical solution would be the abolition of segregated schools, but such a move in the immediate future seems unlikely in the absence of strong pressure. On the other hand, an attempt by each of the states to provide equal educational facilities in as many respects as possible, without regard to relative demand, would probably prove to be financially prohibitive.

WILLIS M. ANDERSON

CONSTITUTIONAL LAW—Scope of Police Power as Basis for Regulation of Practice of Professions. [Washington]

There is no question as to the necessity, existence, or validity of the states' police power to regulate the practice of dentistry, medicine, law, or any other vocation or profession so far as is essential to protect the health, safety, morals, or general welfare of the public. However, apart from the other students in the school. By compelling him to sit in an assigned seat in the classroom in a row specified for colored students, to use an assigned table in the library and to eat at a special table in the cafeteria, the appellant was "handicapped in his pursuit of effective graduate instruction" and deprived of "his personal and present right to the equal protection of the laws." 70 S. Ct. 851, 853, 854 (1950).

The executive secretary of the Virginia Conference, National Association for the Advancement of the Colored People, stated on December 11, 1950 that the NAACP will "continue to work toward [the] absolute elimination [of racial segregation] from all phases of American life. The economic instability of the South itself, demands that the dual system of education be abolished." The Roanoke Times, Dec. 12, 1950, p. 2, col. 1.

Speaking of the police power of a state, Justice Strong stated: "It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the State." Railroad Co. v. Husen, 95 U. S. 405, 470, 24 L. ed. 527, 530 (1877). See 16 C. J. S., Constitutional Law § 175; 11 Am. Jur., Constitutional Law § 245.
the power is not without limitations, which must be determined and applied by the courts through judicial review. The question faced by the courts is one of degree in that they must decide whether a particular statute or part thereof has unreasonably invaded personal or private rights. Thus, the party attacking the constitutionality of the legislation must convince the court that the law is without rational basis within the knowledge and experience of the legislators.

In defining those who shall be subject to regulation as members of a profession, many statutes refer only to "one who holds himself out as being able to practice or who shall make an offer or undertake to practice," and there appears to be no plausible basis for questioning the legality of such a definition. However, other legislatures have greatly broadened the scope of the statutes by including within their effect anyone who "owns, maintains or operates an office for the practice of the profession." This extension of the regulation to persons who are not actually engaged in the practice of the profession has given rise to the charge that the legislature has made an arbitrary

2For a good discussion of the police power and its limitations, see Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 501, 38 L. ed. 385, 388 (1894): "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not duly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

3This "rational basis" test was stated and applied in West Va. Board of Education v. Barnette, 319 U. S. 624, 639, 63 S. Ct. 1178, 1186, 87 L. ed. 1628, 1638 (1943): "The right of a state to regulate...may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting."

4N. Y. Consol. Laws Ann. (Baldwin, 1938) Art. 49, § 1300: "A person practices dentistry within the meaning of this article, who holds himself out as being able to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums, or jaws, and who shall either offer or undertake by any means or method to diagnose, treat, operate, or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same..." Among the states having similar statutes are Kansas, New Hampshire, Massachusetts, Mississippi, Pennsylvania, South Carolina and Tennessee.

exercise of the police power which violates the Equal Protection and Due Process clauses of the Fourteenth Amendment.

In the recent decision of State v. Boren\(^6\) the Supreme Court of Washington was called upon for the second time within a half century to determine the constitutionality of a prohibition against owning, maintaining or operating an office for the practice of dentistry without a state license. The two defendants, Boren and Shepherd, had never been licensed to practice dentistry as required by statute, but had in fact been practicing and were co-partners in the ownership, maintenance, and operation of dental offices. This partnership entered into a conditional sales contract for their practice with a licensed practitioner, Harlow, and as a part of the deal, Boren was employed as manager at a salary of $500 per month. His duties were to manage the office, buy supplies, watch the charts, make out accounts and payments, and look after the advertising. Under this arrangement, the partnership of the defendants received $750 per month on the sales contract and Boren, in addition to his regular salary of $500 per month, received over $14,000 in a period of eighteen months as “bonus” payments “in appreciation of the increase of the business.” The State of Washington, and two interveners, brought these facts before the trial court alleging that the defendants were then illegally practicing dentistry within the meaning of the state dental laws, and prayed that they be enjoined from such illegal practices. The trial court found that Boren and Shepherd did own, maintain, and operate a dental office, and thus, the case rested squarely on the validity of the “owning, maintaining or operating” clause of the statute. Although stating that he was doing so against his own opinion, the trial judge held the statute unconstitutional on the precedent of State v. Brown\(^7\) wherein the Supreme Court of Washington had earlier struck down a previous enactment of substantially the same provision. On appeal, the appellants urged the Supreme Court to overrule the Brown case and the court did so, reasoning that:

"the state, in the exercise of its police power, has said that he cannot, without a license, practice dentistry. The state has said, in its wisdom, that a person practices dentistry 'who owns, maintains or operates an office for the practice of dentistry.' There can be no question but that the activities of Boren and Shepherd come within this definition. The state has decided that such a practice does not adequately protect the health of

\(^6\) 219 P (2d) 566 (Wash. 1950).
\(^7\) 37 Wash. 97, 79 Pac. 685, 68 L. R. A. 889 (1905).
its people. Clearly, such a regulation is a reasonable exercise of its police power."

The *Brown* case, tried before the same Washington court forty-five years ago, was the first case to test the validity of such a clause. It was there declared that: "The police power does not justify the withholding from one individual of a natural privilege or right, in order that a corresponding advantage may be added to the rights or privileges of another. The restriction is permissible only as a preventive of evil results reasonably to be expected without such limitation." It appears that the court's decision was based upon two illogical conclusions: (1) That the statutes are passed to help the private aims of individuals, and (2) that no evil is likely to result from allowing one not qualified nor licensed to practice dentistry to control such practice. Obviously, the licensing acts are not passed to promote the personal ends of individuals, but are for the safety, health, and welfare of the people. The court also failed to recognize the probability that enterprising business men would attempt to commercialize the practice of dentistry and the other "learned professions" just as they have made the profit motive the dominant factor in business. To permit dentistry to be practiced as a commercial business would inevitably destroy a necessary and valuable personal and private relationship between the dentist and his patient.

A few courts have attempted to avoid this issue by distinguishing between the regulation of the strictly technical side and the regulation

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737 Wash. 97, 79 Pac. 635, 637, 68 L. R. A. 889, 891 (1905).
9In a decision involving police power regulation of dentistry, a Colorado court said: "We are not now concerned with an ordinary trade or calling. Law, medicine, and dentistry are generally considered as learned professions." People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928, 930 (1929). It is also significant to note that the courts generally apply the same or similar reasoning to all of these professions in regard to police power regulations. This is clearly stated in Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 881 (1904): "Similar legislation has obtained in a large number of states ... In some instances the question arose under acts regulating the practice of medicine, and in others, as here, regulating the practice of dentistry; but the same reasoning would apply and the same constitutional provisions govern as to the validity of provisions of a dental as of a medical act ... and the power of the state to regulate as to both in the interest of the public is equally clear."

"The purpose of regulation is to protect the public from ignorance, unskillfulness, unscrupulousness, deception, and fraud. To that end the states require that the relation of the dental practitioner to his patients and patrons must be personal." Winslow v. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 Pac. 308, 309 (1924).
of the purely business side of the profession. To apply this distinction, however, is to place the dentist in a position of divided allegiance between his employer from whom he receives his pay, and his patient, to whom he owes his professional loyalty. It would place the actual control of the practice in the hands of one who was unlicensed and not qualified. The legislature and the courts are under a duty to prohibit such commercialization of the extremely personal and private professions.

A favorite, but ambiguous, argument employed in support of the Brown case viewpoint is found in the statement that "To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist." This appears to say either that there was no necessity for such a statute, or that the framers of the Constitution did not intend that police power statutes should be allowed to prohibit the owning or managing of property. It is possible that the circumstances at the date of the Brown decision did not warrant strict and extensive control of the professions. However, the reasoning that the police power could not go so far as to prohibit certain property rights is untenable, for by its very nature the police power involves regulation, and regulation is inseparable from prohibition.

If there is a necessity for some control, the limitation on

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12See Parker v. Board of Dental Examiners of State of California, 216 Cal. App. 285, 1 P (2d) 501 (1931). The District Court of Appeals in this case held that a statute regulating dentistry, if construed as prohibiting unlicensed persons from managing purely business affairs of a dental office, would be unconstitutional. However, on appeal, the Supreme Court of California fully refuted the contention by saying: "The law does not assume to divide the practice of dentistry into that kind of departments. Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is treated as a whole." Parker v. Board of Dental Examiners of California, 14 P. (2d) 67, 72 (1932).

13A good demonstration of the recognition by the courts and legislatures that the professions must be jealously guarded in the public interest is found in a statement by Justice Holmes: "It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession." Liggett Co. v. Baldridge, 278 U. S. 105, 115 (1928). See also 13 Am. Jur., Corporations § 887.

1437 Wash. 97, 79 Pac. 685, 687, 68 L. R. A. 589, 591 (1905).

15"Since the very foundation of the police power is the control of private interests for the public welfare, a statute or ordinance is not rendered unconstitutional by the mere fact that private rights of person or property are subjected to restraint or that loss will result to individuals from its enforcement." Town of Ascarate v.
the power to regulate is only that its extreme must not be so unreasonable as to violate constitutional rights.

Advocates of the restriction of this phase of the police power almost invariably rely on *Liggett Co. v. Baldrige*,16 decided by the United States Supreme Court in 1928, holding unconstitutional a statute prohibiting a corporation, association, or co-partnership from owning a pharmacy or drug store unless all members were licensed pharmacists. It is significant that the Court declared that the police power may be exerted even where it infringes upon private property rights if such regulation bears a real and substantial relationship to public health, morals, safety, or general welfare. But the question was regarded as one of degree and the statute was invalidated on the grounds that ownership of a drug store by one not a licensed pharmacist did not substantially affect public health. However, in view of the nature of the modern day drug store and the method in which pharmacy is practiced, this case cannot be taken as a proper authority for the unconstitutionality of the “owning, maintaining, or operating” type clause in regard to the regulation of the practice of the learned professions. Fountain service, magazine stands, patent medicines, cosmetics, and other such items form a major part of the modern pharmacy, and the prescription service consists of merely following the written directions of the licensed physicians. Such service is usually in a separate part of the store, and very often the customer does not even see or talk to the druggist. This is certainly not analogous to the doctor-patient or lawyer-client relationships which involve so much of a personal and private nature.

In overruling the *Brown* case, the Washington court in the principal decision fully refutes its former position:

“We agree with the general statements in *State v. Brown* that to own and manage property is a natural right. But there is a clear distinction between the right of the state to interfere with the owning and managing of property, as such, and its right under its police power, to protect the health of its people.”

The court then recognized the existence of the personal relationship between the dentist and his patient; that the care and treatment of

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Villalobes, 223 S. W. (2d) 945, 950 (Tex. 1949), quoting 12 C. J. 931, 16 C. J. S. 581. It is also a well established principle of law that “Where public safety and welfare, as well as peace and health are involved, the sovereign may abridge, abrogate, impair, or even destroy property.” *U. S. v. Asher*, 90 F. Supp. 257, 259 (W D. Mo. 1950).

22278 *U. S.* 105, 49 S. Ct. 57, 73 L. ed. 204 (1928).

2219 P (2d) 565, 572 (Wash. 1950).
teeth is not a business or a commercial transaction, but is a profession; that to allow one who is not a licensed dentist to own, maintain, or operate an office for the practice of dentistry would not adequately protect the health of its people; and that such a regulation is clearly a reasonable exercise of a state's police power. This reasoning appears to be infallible.

The Boren case is supported, both in result and reasoning by the Michigan court in the case of People v. Carroll,18 and two other courts,19 employing the same reasoning, have gone so far as to suspend the license of a dentist who accepted employment from one who came within the purview of the statute in question. There also seems to be an inclination in the modern courts to bring the field of optometry within the learned profession class.20

It is hoped that the Boren case, having eliminated the principal decision upon which the restrictive view has been based, will not only provide support for other courts passing on the constitutionality of similar statutes, but will also impress upon the legislatures which have not yet enacted the "owning, managing, or operating" type clause into their state laws the importance of doing so. The failure to pass and enforce strict regulations of the learned professions will result in allowing those not qualified to do indirectly that which they cannot do directly, and thus evade the purpose of the law to protect the health and welfare of the public.

HARRY G. CAMPER, JR.

CRIMINAL LAW—APPLICATION OF DOUBLE JEOPARDY PROHIBITION IN CASE OF TWO DEATHS RESULTING FROM SINGLE ACT OF WROUGHT-DOING. [Ohio]

The common law, the United States Constitution and virtually all of the state constitutions guarantee that no person shall be twice

19People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928 (1929) and Taber v. State Board of Registration, 137 N. J. L. 161, 59 A. (2d) 231 (1948). The court in the Taber case in referring to the "owning, managing or operating" type clause states: "The constitutionality of the latter statutory provisions is not disputed. It could not well be, for the restrictions so imposed upon personal liberty of actions are within the police power of the state to provide for the general welfare of its people and to that end to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." 137 N. J. L. 161, 59 A. (2d) 231, 232 (1948).
20McMurdo v. Getter, 298 Mass. 363, 10 N. E. (2d) 139 (1937); State v. Superior Court for Chelan County, 17 Wash. (2d) 323, 135 P (2d) 839 (1943).
put in jeopardy for the same offense. The purpose of the guaranty is to protect the citizen against vexatious criminal prosecutions, but in applying this safeguard to individual rights the courts must give consideration to the chief design of penal laws which, apart from their reformatory aspects, have in view the double aim of protecting society and preventing crime.

This inevitable conflict in interest between the accused and the State gives rise to such difficult problems of interpretation of the double jeopardy prohibition as was involved in the recent case of State v. Martin, which resulted from a highway collision causing the death of two men who were riding on a motorcycle. Defendant, the driver of the truck which struck the motorcycle, was charged with unlawfully killing one John Batori as a result of operating his vehicle in a manner prohibited by law. At the trial, the defendant entered the plea of former jeopardy based on the fact that he had been previously tried and acquitted for the very crime specified in the indictment. The only variance between the present and prior indictments lay in the identity of the person killed, the first indictment having charged the death of John Police, who had been Batori's companion on the motorcycle. In support of his contention, the defendant showed that both parties were killed at or about the same time and as a result of the same accident. The Ohio Court of Appeals overruled the State's demurrer to defendant's plea on the theory that his acts constituted only one offense, if any, and for this he had previously been placed in jeopardy.

2 22 C. J. S., Criminal Law § 238.
3 In People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397, 402 (1938), a case growing out of facts similar to those of the principal case, the court observed: "Decided cases in which pleas of former jeopardy have been considered fall into three principal classes: (1) Where there are different degrees of the same offense and the defendant has been acquitted or convicted of a charge involving one of those degrees. In such case the plea will be sustained . . . (2) Where the commission of larceny consists of the felonious act and different kinds of articles of property or articles of different owners are stolen there is but a single larceny . . . and (3) where a single felonious act results in the commission of two or more crimes not embraced in different degrees of the same offense. This case falls within the third class. There was but a single physical act—the collision—from which two persons met their deaths."
4 90 N. E. (2d) 706 (Ohio 1959).
The court based its decision upon the premise that a single act of unlawfully operating a vehicle could be only one violation of the manslaughter statute, irrespective of the number of deaths which this single act might produce. From this view, it would seem that the act and not the result is the thing prohibited, or perhaps that the act and the results are identical. This line of reasoning, which has been adopted by a number of courts, is contrary to the rule followed in a majority of American jurisdictions, which holds there are as many offenses as there are deaths, though there may have been but a single wrongful act.

The majority view is predicated upon the idea that the act and the offense are two different elements. Thus it is said that "Two things, not one, are necessary to constitute the offense in this case [manslaughter]. The first is the act of culpable negligence. The second is the killing of a person. Until the second thing occurs, no offense has been committed." The constitutional prohibition deals with duplication in relation to the criminal offense, without regard to the quantity of acts. "In order for one prosecution to be a bar to another, it is not sufficient to show that the act is the same, but it must be shown that the offense, also, is the same in law and in fact."

In determining whether there is an identity of offenses, the courts generally look to see whether the facts alleged in the later indictment would, if found to be true, have justified a conviction under the former. If the proof necessary to sustain a conviction under the later indictment is the same in every particular as that required in the former, then the offenses charged are identical and a plea of former jeopardy will be sustained.

In following this identity of offense rule, the courts which subscribe to the majority view hold that an indictment for the death of A does not charge the same offense as an indictment for the death of B, although both deaths are caused by the same act. The singular proof of the death of B in the trial under the first indictment could...

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6 State v. Wheelock, 216 Iowa 1428, 250 N. W. 617 (1933); State v. Cosgrove, 103 N. J. L. 412, 135 Atl. 871 (1927); People v. Barr, 259 N. Y. 104, 181 N. E. 64 (1932); State v. Damon, 2 Tyler 387 (Vt. 1809).
7 People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938); State v. Fredlund, 200 Minn. 44, 275 N. W. 353, 113 A. L. R. 215 (1937); Lawrence v. Commonwealth, 181 Va. 582, 66 S. E. (2d) 54 (1943); 1 Wharton, Criminal Law (12th ed. 1932) 537.
9 People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397, 403 (1938).
10 "The words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." State v. Rose, 89 Ohio St. 383, 106 N. E. 50, 51 (1914). Also Garner v. State, 31 Ala. App. 52, 11 S. (2d) 872 (1943); State v. Midgett, 214 N. C. 107, 198 S. E. 613 (1938).
not sustain a conviction for the death of A. Consequently, a subsequent trial for the death of B does not place the defendant in double jeopardy.\textsuperscript{11}

The argument as to whether a single act may be more than one offense has arisen repeatedly in other branches of the criminal law.\textsuperscript{12} It has been decided both in a murder case\textsuperscript{13} and in a malicious shooting case\textsuperscript{14} that a violent act injuring two people is two separate offenses; but it has also been held that it is two offenses only when the act was not part of a general design to effect a multiple injury.\textsuperscript{15} An acquittal for arson in burning a building was held not to bar a subsequent indictment for burning the contents thereof with intent to defraud an insurance company;\textsuperscript{16} and an embezzlement from two individuals is two offenses even though committed by the same act.\textsuperscript{17} Likewise an acquittal for forging the election returns of one town is not a bar to an indictment for forging the election returns of another town, although the forgery was all part of one act.\textsuperscript{18} An armed robbery from two people at the same time is two offenses.\textsuperscript{19} And a like result was reached in a case where defendant sold liquor in violation of law to two different individuals.\textsuperscript{20}

The court in the instant case relied on the case of \textit{State v. Hennessey}\textsuperscript{21} in which it was held that a person who, in a single act of stealing, appropriated the property of two individuals committed only one offense of larceny. In answer to the state's contention that there were as many acts of larceny as there were owners, the court explained that "The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense."\textsuperscript{22} Virtually all courts agree that this is correct law as regards the crime of larceny, because

\begin{itemize}
\item 22 \textit{C. J. S., Criminal Law} § 298.
\item \textit{People v. Majors}, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295 (1884).
\item \textit{People v. Fox}, 269 Ill. 300, 110 N. E. 26 (1915). Such a case may be regarded as falling within the Illinois court's first category as involving different degrees of the same offense. See note 3, supra.
\item \textit{State v. Laughlin}, 180 Mo. 342, 79 S. W. 401 (1904).
\item \textit{Commonwealth v. Trimmer}, 84 Pa. 65 (1877).
\item \textit{Harris v. State}, 50 Tex. Cr. 411, 97 S. W. 704 (1906).
\item \textit{Ohio St. 339}, 13 Am. Rep. 253 (1872).
\end{itemize}
here the crime is the taking itself, and the individual owner's loss is merely an incidental thereto. But a majority of courts refuse to draw an analogy between larceny and crimes such as manslaughter, as did the court in the instant case. The death of the person in a manslaughter case finds its equivalent in a larceny case in the taking of the property, not in the loss of the property by the owner.

As already pointed out, the ownership of stolen property is alleged merely for purposes of describing the offenses; it is not an essential part of the indictment. But in cases of homicide, it is incumbent upon the state to prove the corpus delicti. The death is a necessary ingredient of the crime, and in some states the identity of the specific person alleged in the indictment must be proven. The name specified in a manslaughter indictment is not merely a descriptive word, but is necessary to prove the crime; and merely to allege that death resulted, without proof of the death of the person named in the indictment, could never sustain a conviction.

In order that the courts may properly protect the public against the multiple consequences of a single act, it is contended that the perpetrator must be compelled to answer for each result of his wrongful doing. The courts which follow the majority view believe that multiple penalties are proper for the person whose act resulted in multiple wrongs, and that such a wrongdoer is not protected by the double jeopardy provision of a constitution because this provision specifies offense and not act, and hence should be construed in that light.

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23People v. Israel, 269 Ill. 284, 109 N. E. 969 (1915); State v. Douglas, 26 Nev. 196, 65 Pac. 802 (1911); State v. Emery, 68 Vt. 109, 54 Atl. 432 (1895); 1 Bishop, Criminal Law (9th ed. 1929) 778.

24"Of course it must be conceded that 'when the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, a prosecution to final judgment for stealing some of the articles will bar a subsequent prosecution for stealing any of the other articles taken at the same time.' State v. Fredlund, 200 Minn. 44, 273 N. W. 353, 355, 113 A. L. R. 215, 218 (1937). Also People v. Allen, 568 Ill. 368, 14 N. E. (2d) 397 (1938).


26Amsus v. People, 47 Colo. 167, 107 Pac. 204 (1910); State v. Weston, 102 Ore. 102, 201 Pac. 1083 (1921); 3 Warren, Homicide (1938) 108.

27Amsus v. People, 47 Colo. 167, 107 Pac. 204 (1910); Wall v. State, 5 Ga. App. 305, 63 S. E. 27 (1908); 3 Warren, Homicide (1938) 111.


29But the courts fail to explain why a person who steals from two people should not be punished for hurting both owners, as is his counterpart in the manslaughter case. Perhaps the difference in the magnitude of the crimes is the deciding factor.

On the other hand, the jurisdictions which follow the view adopted by the court in the instant case take the position that there has been only one act against the peace and dignity of the sovereign, and consequently only one injury for which punishment should be given. Making a single offense the basis of numerous criminal actions is known as "carving," and all authorities concede that it is illegal. The minority contend that to allow the state to prosecute the defendant for each person who was injured by his single act is to permit carving. The divergence between the two views thus turns on the issue of whether or not such a practice is in fact dividing a single offense or merely handling a multiplicity of offenses.

The cases are in sharp conflict on the subject and there is little hope of the views becoming reconciled in the foreseeable future by judicial action. Inasmuch as the choice between the two views lies more directly in theories of penology than in principles of law, a legislative solution may be more desirable as well as more possible of attainment.

F. Bert Pulley

DAMAGES—APPLICATION OF AMERICAN AND ENGLISH RULES FOR MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO SELL LAND. [Kentucky]

The fundamental principle of assessing damages for the breach of a contract is to give the innocent party the value of the performance as nearly as possible by awarding damages for loss of the bargain. However, for breach of contract for sale of land, the English courts nearly two centuries ago adopted an exception to the usual measure of damages by refusing to award the plaintiff lost profits but allowing recovery of any purchase money paid, with interest, plus incidental expenses incurred while investigating the vendor's title. Numerous American courts adopted this English rule, but the United States Supreme Court in 1821 established the "American," or loss of bargain, rule which applies the normal theory of contract damages by awarding

1See cases cited, note 6, supra.
3Williston, Contracts (Rev. ed. 1937) § 1358; McCormick, Damages (1935) § 137; 1 Sedgwick, Measure of Damages (9th ed. 1920) § 30; 1 Sutherland, Damages (4th ed. 1915) § 12; Restatement, Contracts (1932) § 329.
5Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218 (U. S. 1821).
the difference between the contract price and the reasonable market value of the land at the time for conveyance under the contract.\footnote{Any amount paid on the purchase price is added to the award.}

The action of the Court of Appeals of Kentucky in the recent case of Razsor v. Jackson\footnote{Gober v. Leslie, 307 Ky. 477, 211 S. W. (2d) 657 (1948) (wife's refusal to join); Potts v. Moran's Executors, 236 Ky. 28, 32 S. W. (2d) 534 (1930) (same); Crenshaw v. Williams, 191 Ky. 559, 231 S. W. 45, 48 A. L. R. 5 (1921).} clearly demonstrates the uncertainty which has developed in the application of these divergent views and reveals the most important factors upon which qualifications of the general rules have been based. The defendant, knowing his ownership of a tract of land to be only an undivided one-half interest, but honestly believing that his wife who owned the other one-half interest would join in conveying, sold to plaintiff as the unconditional owner. Upon the refusal by the wife to join, the plaintiff sued for breach of contract, asking damages for loss of the bargain. Relying on previous Kentucky decisions,\footnote{Gober v. Leslie, 307 Ky. 477, 211 S. W. (2d) 657 (1948) (wife's refusal to join); Potts v. Moran's Executors, 236 Ky. 28, 32 S. W. (2d) 534 (1930) (same); Crenshaw v. Williams, 191 Ky. 559, 231 S. W. 45, 48 A. L. R. 5 (1921).} the trial court held that where the vendor acts in good faith without positive fraud, the measure of damages extends only to refund of the purchase money with interest plus costs of investigating the title. In reversing this judgment the Court of Appeals re-examined the "good faith doctrine", distinguishing Crenshaw v. Williams\footnote{Gober v. Leslie, 307 Ky. 477, 211 S. W. (2d) 657 (1948) (wife's refusal to join); Potts v. Moran's Executors, 236 Ky. 28, 32 S. W. (2d) 534 (1930) (same); Crenshaw v. Williams, 191 Ky. 559, 231 S. W. 45, 48 A. L. R. 5 (1921).} from Potts v. Moran's Executors,\footnote{Gober v. Leslie, 307 Ky. 477, 211 S. W. (2d) 657 (1948) (wife's refusal to join); Potts v. Moran's Executors, 236 Ky. 28, 32 S. W. (2d) 534 (1930) (same); Crenshaw v. Williams, 191 Ky. 559, 231 S. W. 45, 48 A. L. R. 5 (1921).} reaffirming the former case and overruling the latter. In the Crenshaw case the vendor's wife had a life estate with remainder to her children, and though she and her child joined in the conveyance and she was past the normal childbearing age, the possibility of more children made the title defective in point of law. This was considered to be a latent or unknown defect for which "reimbursement damages" of the English rule were properly awarded, since the court felt that the vendor layman could not be required to know that the circumstances gave rise to a legal encumbrance, and therefore he had acted in good faith. The defect of title in the Potts case was caused by the seller's inability to convey because his wife would not release her dower right. Under those circumstances the court in the present case felt that a patent or known defect was involved for which reimbursement damages were inadequate, since the seller could have made no mistake as to the present extent of his own title. The court...
concluded that the good faith doctrine of the *Crenshaw* case was still sound doctrine in Kentucky but that it had been unjustifiably extended in the *Potts* case. The correct rule was then stated to be that:

"where a seller unconditionally agrees to convey real property, knowing he has no title or with knowledge of an outstanding interest therem owned by a third party, he is bound by his undertaking to deliver a good deed to the purchaser; the question of good faith is immaterial if he breaches his agreement; and if the buyer is so damaged, he may recover the difference between the contract price and the reasonable market value of the property at the time the contract was executed." 8

Although the court obviously intended to impose damages for loss of the bargain in this case, it did not adopt the usual measure of damages for such purpose. The American rule is the difference between the contract price and the reasonable market price at the time for conveyance, not at the time of execution of the contract. This inadvertence was probably of no consequence in the *Raisor* case because there was no indication of any change in value between the time the contract was executed and the time for conveyance; but it may cause uncertainty when future litigants attempt to benefit by the peculiar form of the measure of damages here stated.

In order properly to classify states or even single decisions as following one rule or the other, the development of the English and American rules must be noted.

The decision of *Flureau v. Thornhill* 10 in 1776 marks the origin of the English, or *Flureau*, rule that only reimbursement damages, should be awarded except where the vendor's conduct amounts to legal fraud, intentionally misleading the innocent vendee. The theory was that both the vendor and vendee contracted upon the implied condition that the vendor had a good title; and if he did not have it, restoration to status quo was all either was entitled to expect. 11 A decision of 1826 12 limited the doctrine by holding that a person who sold land knowing his title to be incomplete must respond in damages for loss of the bargain. This qualification of the *Flureau*

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rule was alternately accepted and rejected by the English courts until the 1826 case was overruled by the House of Lords in Bain v. Fothergill in 1874. That decision held that the Flureau rule was to be followed “without exception” and that the vendee could not recover damages beyond the expenses he had incurred even though the vendor knew he had no title and no means of acquiring it. However, subsequent English cases have implemented a new means to escape the force of the Bain rule by imposing the more extensive damages for bad faith where the vendor fails to make every reasonable effort to remove defects of title, even though he contracted in ignorance of any defect. Obviously, the recent trend of the English decisions represents a radical change from the original Flureau rule that a vendor, without fraud, may not be held for loss of the bargain. It appears that the present English rule may be stated as follows: Where the vendor acts either with knowledge or in ignorance of a defect of title and afterwards does all he reasonably can do to remove the defect, the vendee will be reimbursed only for what he has paid, with interest, plus investigative costs. Otherwise, damages for loss of the bargain shall be imposed. Approximately one-half of the American jurisdictions follow a rule in some degree analogous to this “English rule.”

The leading case which established the American rule imposing

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15L. R. 7 H. L. 158 (1874).

16This was a considerable extension since the Flureau case made an exception where the vendor acts fraudulently.

17A line of cases has established the present rule in England that the vendor must “do his best” or make every “reasonable effort” to remove the defect. The vendor was held to have acted in bad faith in: Thomas v. Kensington, [1942] 2 K. B. 181 (vendor was unable or unwilling to redeem a mortgage in order to pass good title); Braybrooks v. Whaley, [1919] 1 K. B. 425 (vendor-mortgagee failed to obtain leave of court to sell where statute required such leave); Daniel v. Vassall, [1917] 2 Ch. 405 (vendor failed to secure the release of property from a mortgage because he was financially unable to do so); Day v. Singleton, [1899] 2 Ch. 320 (vendor of leaseholds assignable only with consent of lessor failed to obtain that consent). See 29 Halsbury’s Laws of England (2d ed., Hailsham, 1938) § 537.


19Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218 (U. S. 1821). In Doherty v. Dolan,
loss of bargain damages determined that the motives of the vendor were immaterial, since in every case the vendee's damage is the same. This view has prevailed without material qualification in approximately one-half of the jurisdictions of the states and is consistently employed as the federal rule except where, in deference to local land law, state law is held to be binding.

American jurisdictions which follow the "English rule," while asserting that in general only reimbursement damages are recoverable, have imposed full damages for loss of the bargain wherever "bad faith" is found. As in England, "bad faith" is an extremely broad term. It refers not only to any case where there is actual fraud, but also to cases in which the vendor, though not a wilful wrongdoer, knew or should have known at the time of contracting that he could not then pass title. Loss of bargain damages are almost uniformly imposed for bad faith where: the vendor had title but either arbitrarily refuses to perform or by his own act incapacitates himself from performance; the vendor with a partial interest contracts to sell knowing that a spouse or other third party must join and the latter refuses to do so; the vendor is without title but honestly believes that he can secure title in time to perform, and later fails to secure the title. The same result, of course, is reached in American rule jurisdictions, since the

65 Me. 87, 20 Am. Rep. 677 (1876) the court stated some eight reasons, including an analogy to breach of contract for sale of personal property, for its preference of this measure of damages. However, plaintiff has an election either to sue for rescission and recover the amount paid or affirm and sue for breach of the contract to recover his loss of bargain.

23Foley v. McKegan, 4 Iowa 1, 66 Am. Dec. 107 (1856); McAdam v. Leak, 111 Kan. 704, 208 Pac. 569 (1922) (refusal by vendor on ground that price was too low); Horner v. Holt, 187 Va. 715, 47 S. E. (2d) 365 (1948) (refusal on ground that price of building materials had increased); Arentsen v. Moreland, 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973 (1904) (failure of vendor to reacquire title to timber upon land).
25Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463 (1869); Seidle v. Bradley, 293 Pa. 379, 14 Atl. 914, 68 A. L. R. 134 (1928) (where vendor contemplated making purchase for resale to vendee). But see Hamaker v. Bryan, 178 Cal. 128, 172 Pac. 391 (1918) (fact that vendee knows of his inability at time does not, per se, show bad faith where he had made arrangements to secure title).
heavier measure of damages is applied in all cases. Thus, all of these so-called "English rule" jurisdictions follow the American rule in so far as they impose damages for loss of bargain, while they follow the early English rule in so far as they deny damages for loss of the bargain.

The difficulty in terminology is illustrated by considering a line of New York decisions, a state which is generally considered to have adopted the English rule. In Pumpelly v. Phelps, decided in 1869, the trustee-vendor refused to convey because the cestui qui vies would not give her consent due to personal reasons. The court imposed damages for loss of the bargain, stating that the general rule of damages would compensate plaintiff for the loss of bargain, but that an exception to the rule would apply where a vendor acts without knowledge. Subsequent New York decisions of 1908 and 1924 used the same terminology, citing the Pumpelly case with approval. In a recent case, Holdridge v. Roberts, wherein the vendor was unable to convey marketable title because a garage encroached upon adjoining land, the court decided that the purchase of that land was a "reasonable expense" the vendor should have incurred, and imposed loss of bargain damages for his failure to do so. The rule of New York is stated by the court in an ambiguous fashion that one cannot with finality declare which view, American or English, is generally followed there.

As a result of the principal decision it cannot be said with any degree of accuracy that Kentucky courts follow either rule to the exclusion of the other. Kentucky's view is like the American rule in

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27McCormick, Damages (1935) § 179.
2840 N. Y. 59, 100 Am. Dec. 463 (1865).
32Compare the requirement of "reasonable expense" in the Holdridge case with the "reasonable effort" or "do his best" requirement of the present English rule, note 17, supra.
33In speaking of when a vendee may recover for loss of the bargain, the court said: "the rule in New York is that he cannot recover where the vendor has acted in good faith, and is unable to give a good title; but can recover where the vendor has not acted in good faith, or has knowingly contracted beyond his powers, or is able to give a good title and refuses, or is able at reasonable expense to remedy defects in his title and arbitrarily refuses to do so." 195 Misc. 646, 89 N. Y. S. (2d) 619, 622 (1949).
that loss of bargain damages will be given regardless of the vendor's motive where he knew or should have known he could not convey title, as was true in the principal case. Kentucky's view is like the early English rule in that only reimbursement damages will be given where the vendor neither knew nor should have known of his inability to convey. Kentucky's view is unlike the present English rule in that if the vendor knew or should have known he could not pass title, the fact that he subsequently "does his best" to cure the defect is apparently immaterial and he will be charged with loss of bargain damages.

Without question, the labels "English Rule" and "American Rule" have become misleading, and many jurisdictions defy classification unless arbitrary definitions of the two rules are adopted for the sake of making classification possible. Better understanding of this segment of the law might be achieved if these treacherous labels were abandoned and the decisions explained in more general terms. In this regard the following conclusions may be ventured: (1) The present rule in England bears little resemblance to the rule of the Flureau case as reaffirmed by Bain v. Fothergill, having been radically changed by the "reasonable effort" or "do his best" requirement of recent decisions in England. (2) Present "English rule" jurisdictions in the United States differ from the present rule in England in that once the concept of bad faith is found, the fact that a vendor does his best will not excuse him from damages for loss of the bargain. (3) Since loss of bargain damages are always imposed in American rule jurisdictions, all American states impose the loss of bargain damages where the mentioned concept of bad faith is found to exist. (4) The only fact situation where different results are certain to follow is that in which a vendor is held for loss of the bargain in an American rule jurisdiction even though he acted with purest motives. (5) A questionable area exists in situations in which the court may decide that a vendor who actually did not know of a defect, nevertheless should have known, and therefore may hold such vendor for loss of the bargain.

Emmett E. Tucker, Jr.

DOMESTIC RELATIONS—Authority of Guardian To Bring Action For Divorce In Behalf of Insane Ward. [Florida]

Statutes providing for the appointment of guardians of mental incompetents invest the guardian with general power to sue and be
sued on behalf of the ward. Under this broad authority the representa-
tive may prosecute such actions for the ward as for annulment of his marriage, for torts against the ward's person, and for damages inflicted on his property. However, the courts, while giving the statutory authority broad application in most respects, have been reluctant to recognize its application to suits for divorce brought by the guardian for an incompetent spouse.

In Scott v. Scott the question was recently certified to the Supreme Court of Florida in a case of first impression, and the resulting decision denying the guardian's power to seek the divorce aligned that state with the large majority of jurisdictions which have passed on the controversy. Though a valid ground for divorce apparently existed, the court reasoned that the guardian's power to maintain actions in behalf of his ward does not include the authority to sue for a divorce, because "the right to maintain the suit is of such a strictly personal and volitional nature that it must of necessity, remain personal to the spouse aggrieved by the acts and conduct of the other." This reasoning employs the theory that no marital wrongs are of themselves sufficient to dissolve the bonds of matrimony nor insusceptible of being condoned, and, therefore, the marriage can be set aside only with the consent of the aggrieved spouse, which consent cannot be given if he or she is mentally incompetent.

Other courts adopting this position have stressed the point that

1A typical example of such a statute is the New York Civil Practice Act § 1377, Clevenger's Practice Manual (1950), which provides in part as follows: "A committee of the property may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made."

2Scott v. Scott, 45 S. (2d) 878 (Fla. 1950).

3Scott v. Scott, 45 S. (2d) 878 (Fla. 1950).


5Fla. Stat. (1945 Supp.) § 744.61 reads in part: "Suits to enforce or to declare rights of the ward shall be brought jointly in the name of the guardian and the ward." § 744.04 provides: "This law [Guardianship Law] shall be liberally construed to the end that controversies and the rights of the parties may be speedily and finally determined; and the rule that statutes in derogation of the common law shall be strictly construed does not apply."

6Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885).
to allow the guardian to obtain a divorce for the incompetent would deprive the incompetent of the right to forgive and excuse the guilty party if he or she so desired.\(^8\) Regardless of the nature of the offense, it is reasonable to suppose that the incompetent might want to exercise his right of condonation. Because of religious beliefs or for other reasons the insane party may consider marriage a sacrament which can be broken only by death.\(^9\) Moreover, in some instances insanity may prove to be only temporary; the insane spouse might regain sanity and to his dismay and sorrow find that he has secured a divorce.\(^10\) Further, the right of securing a divorce is not an inherent or vested right,\(^11\) and since the stability of the marriage relationship is a matter of public concern, courts have felt that its continuance or dissolution should never be trusted to the discretion of a legal representative, absent express statutory authority.\(^12\)

A rather questionable process of statutory interpretation is indulged in to support the refusal to permit the guardian to maintain divorce actions. The typical guardianship statute is a general grant of authority, neither expressly enumerating the actions that can be brought nor excluding any specific actions from the authorization.\(^13\) Thus, the grant of power would seem to include all types of action. But instead of so holding, the courts rule that divorce actions are not included because the legislature did not expressly specify that divorce actions could be brought by the guardian.\(^14\) The view seems to be taken that the guardian statute should not apply since it was the intent of the legislature to deal with divorce actions separately and completely in other statutes.\(^15\) Having thus construed an unexpressed exception into the statutes already passed by the legislatures, the courts declare that any authority of the guardians to bring divorce actions must be granted by the legislatures. In the words of a New York court:

". . . the fact is pressed upon us that unless a cause of action for divorce may be pleaded in his behalf by his committee, the

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\(^8\) Mohler v. Shank's Estate, 93 Iowa 273, 61 N. W. 981 (1895).
\(^10\) Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885).
\(^12\) Johnson v. Johnson, 284 Ky. 77, 170 S. W. (2d) 889 (1943).
\(^13\) See note 1, supra.
\(^15\) For a criticism of this argument see the dissenting opinion in Mohrmann v. Kob, 291 N. Y. 181, 51 N. E. (2d) 921, 925 (1943).
plaintiff wife may subject him to grave injustice. The argument carries strong appeal but is more properly to be addressed to the Legislature. Until that body has enacted a statute which expressly or by clear implication authorizes a committee of an insane person to make that choice, the courts may not assume to grant that power.”

Apparently taking note of this trend of judicial decisions, the Massachusetts legislature has forestalled a restrictive interpretation of its statute by providing expressly that “the libel [for divorce] shall be signed by the libellant, if of sound mind and of legal age to consent to marriage; otherwise it may be signed by the guardian of the libellant or by a person admitted by the court to prosecute the libel as his next friend.” Under this mandate the Massachusetts courts have granted divorces to insane spouses where the facts clearly indicated that the interests of the parties required abrogation of the marriage.

Only in England and Alabama do the courts seem to have included divorce actions within the guardian’s authority without an express statutory provision. The Matrimonial Causes Act of 1857 provided for absolute divorce to be granted by the Court for Divorce and Matrimonial Causes and took away from the ecclesiastical courts their jurisdiction over that type of cases. Shortly after the passage of this Act, it was held that since the statute did not expressly say the action for divorce might not be maintained against an incompetent, the court could not impose such a limitation by implication. It was later decided in Baker v. Baker that the same rule must apply when the action is brought in behalf of an insane spouse. The court ruled that “as proceedings for divorce are civil, though no provision for the case of lunatics is contained in the Act, recourse must be had in such a case to the ordinary forms of civil courts where lunatics are litigants.”

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3320 & 21 Vict., c. 85 (1857). Prior to the enactment of this statute an absolute divorce could be granted only by Parliament, though the ecclesiastical courts granted legal separations and in some instances adjudged marriages void where there was a lack of capacity on the part of the parties to consent to marriage, or where the ceremony was entered into under duress, fraud, and the like. See 1 Nelson, Divorce and Annulment (2d ed. 1945) § 1.01; Keezer, The Law of Marriage and Divorce (Moreland, 3d ed. 1946) § 240.
34Mordaunt v. Moncrieffe, 2 L. R. (Scotch & Divorce Appeal Cases) H. L. 374 (1874).
355 P. D. 142 (1880).
CASE COMMENTS

v. Campbell\(^2\) took notice of the rule of the majority of jurisdictions that absent statute an action for divorce cannot be maintained on behalf of the incompetent, but decided that the Alabama statute enabling persons of unsound mind to sue by next friend entitled the next friend to bring divorce actions.\(^2\) Inasmuch as the provisions of this enactment concerning the powers of the guardian\(^2\) are similar to those in Florida and other states, the Campbell decision is squarely in conflict with the instant case.\(^2\) Under this broad interpretation of the statute, the Alabama court declared that “The court has ample power to protect the interest of the incompetent complainant, and the equity of the bill must be determined on its averments, independent of the state of the complainant's mind as if he were suing of his own volition.”\(^2\)

Despite the persuasive practical arguments advanced to support the prevailing doctrine, it has the unfortunate effect of rendering the marriage indissoluble on behalf of the incompetent spouse. It is questionable whether such a rigid prohibition is consistent with sound social policy. It is true that the stability of the marriage relationship is the very essence and foundation of modern society, and it is a function of law to encourage the parties to live amicably together and to prevent separation. But some marriages, consistent with the public welfare at the time of the ceremony, cease to be beneficial at some subsequent date, and are in fact detrimental. In such a situation divorce is not prejudicial but desirable. The English court in Baker v. Baker, realizing this fact, observed:

“... if reasons of expediency are to be regarded, great wrong might arise from holding that no proceedings for divorce can be maintained against the adulterous wife of a lunatic. She might

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\(^2\)The Florida court in the instant case noted Campbell v. Campbell, but declined to accept the logic by which the Alabama court had reached its decision.

\(^2\)Whenever a person of unsound mind has a guardian appointed under the laws of this state the guardian must sue or defend for and in the name of such person of unsound mind. If he has no duly appointed guardian, or if he have such a guardian who fails or refused to sue or defend for him, or if the interest of the guardian is adverse to that of the person of unsound mind, he may sue by a next friend and must defend by a guardian ad litem, and the person of unsound mind may prosecute a cross-claim by his guardian or guardian ad litem.” Ala. Code (1940) Equity Rule 8, Tit. 7, p. 1047. Compare the Florida statute, note 5, supra.

\(^2\)There was a dissent filed in the Campbell case on the grounds that no statutory authority existed for such an action, and that in the absence of such authority such suits should not be allowed because of the social implications. Campbell v. Campbell, 242 Ala. 141, 5 S. (2d) 401, 402 (1941).

\(^2\)Campbell v. Campbell, 242 Ala. 141, 5 S. (2d) 401, 402 (1941).
be left in possession of property settled on her by her husband, which she and her paramour might enjoy to the exclusion of the lunatic. She might exercise powers of appointment in favor of the paramour or the children of her and his adultery, a spurious offspring might be foisted upon her husband and his family, by which the devolution of estates or titles might be diverted in favor of the illegitimate objects. These evils would only be avoided by a dissolution of the marriage.\textsuperscript{28}

If divorces are granted neither as a punishment of the offending spouse nor as a favor to the innocent one, but for the benefit and well-being of society as a whole,\textsuperscript{29} the application of the minority rule will be more practical and more in line with obvious justice in situations similar to the one illustrated in the Baker case. However, the courts generally find it necessary to reason that since marriage is an institution in which the public is deeply interested, changes in the mode of dissolving marriages should come from the legislature and not by judicial decisions.\textsuperscript{30}

The fact that a divorce is denied does not necessarily mean that the insane spouse has no remedy in the courts. Where the aggrieved spouse was insane at the time of the marriage, a guardian may bring an action to annul the marriage even though divorce proceedings could not be maintained.\textsuperscript{31} The two rules are reconcilable. Divorce and annulment are closely related, yet the two proceedings differ in nature. The theory of an annulment action is that a valid marriage never came into existence, whereas a divorce action is to dissolve a marriage legally consummated.\textsuperscript{32} Where a person lacks sufficient mental capacity to give an intelligent assent, there can be no valid marriage. In some jurisdictions the marriage of an insane person is void, but in other jurisdictions the marriage is not void but is voidable only.\textsuperscript{33} Where the suit is to obtain a judicial decree of the invalidity of a void marriage there is no reason for denying the guardian’s power to

\textsuperscript{28}P D. 142, 151 (1880).

\textsuperscript{29}"As the state favors marriages for the reasons stated, so the state does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interest of society will be better served, and that parties will be happier, and so the better citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted." Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 37 (1896).

\textsuperscript{30}Mohrmann v. Kob, 291 N. Y. 181, 51 N. E. (2d) 921 (1943).

\textsuperscript{31}Nelson, Divorce and Annulment (2d ed. 1945) § 31.10.

\textsuperscript{32}McDonald v. McDonald, 6 Cal. (2d) 457, 58 P (2d) 163 (1936).

\textsuperscript{33}Nelson, Divorce and Annulment (2d ed. 1945) § 31.21.
bring such an action. Clearly there is no marriage to be dissolved. In jurisdictions where the marriage of an insane person is voidable only, the sane spouse not having knowledge of the insanity at the time of the ceremony can secure an annulment, but one who knowingly mar-
ries an insane person would seem to be bound as if he or she were legally married until such time as the incompetent party might obtain an annulment decree. However, there is no valid marriage until it is ratified by the insane spouse, something that cannot be done as long as the insanity exists. If the guardian secures an annulment while the ward is insane, no valid marriage has been dissolved because the marriage was voidable by the incompetent from the very beginning. If sanity is regained and the marriage is ratified, no annul-
ment can be obtained thereafter.

In New York, an action by an incompetent spouse for separate maintenance has been allowed though under a later decision it appears that a suit for divorce could not have been brought. The court was of the opinion that the action must be permitted because no legislative intent could be found to the contrary, and also because factors which require refusal of a divorce were not present.

However, annulment and separate maintenance remedies are not adequate to relieve the incompetent spouse of the burden of an un-
fortunate marriage, and divorce should be made available in appro-
riate cases. Though the rule of the principal case works hardships in many instances, American courts have shown no inclination to take a more liberal position in the face of this sociological-legal issue. It seems that a legislative solution must be provided, and it is to be hoped that the demonstration of the unrelenting attitude of the courts as found in the principal case may help to stir state legislatures to action.

JAMES C. TURK

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Waughop v. Waughop, 82 Wash. 69, 143 Pac. 444 (1914).
DOMESTIC RELATIONS—LIMITATIONS ON APPLICATION OF HEART BALM STATUTES. [New Jersey]

Since 1935, the legislatures of fifteen states have enacted so-called "Heart Balm Acts,"1 abolishing civil actions for alienation of affections, criminal conversation and breach of promise to marry. The primary purpose was to destroy forms of action that had become weapons of blackmail and extortion.2 The statutes were sweeping in their nature, in that they abolished the remedy not only to the fraudulent blackmailer, but also to the truly injured party.3

The alacrity with which the judiciary approved this type legislation is manifested in the New Jersey court's opinion in Bunten v. Bunten. "Never were the words, 'this is a good bill and ought to pass' more properly spoken by a member of the Legislature than in the case of this measure. It was a good bill, is a splendid law, and I hold it to be constitutional."4 The right of the states to abolish these actions has been founded on the plenary power5 which the law making bodies have over the subject of marriage, and on the authority to legislate for the benefit of the general welfare.6 Admittedly, the legislatures took away no property right in abolishing these actions


2 Young v. Young, 236 Ala. 627, 184 So. 187, 190 (1938): "The well known reason for striking down the causes of action named in the act, was in response to a public sentiment, after wide discussion, to the effect that such actions had been so abused, made the means of exploitation and blackmail, that the existence of such causes of action had become of greater injury than of benefit to society." Grave abuses also existed in awarding damages. See Note (1936) 30 Ill. L. Rev. 764, 772: "In regard to seduction the average jury recognizes only two bases for damages—the plaintiff's beauty and the defendant's ability to pay."

3 Bunten v. Bunten, 15 N. J. Misc. 522, 192 Atl. 727, 729 (1937): "It is impossible to save the remedy for the honest, well-meaning, truly injured spouse without leaving the door wide open for the 'racketeer.' Therefore, the spouse having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society."


6 Young v. Young, 236 Ala. 627, 184 So. 187 (1938). The Indiana Heart Balm statute was designated as one to promote public morals. See Note (1936) 30 Ill. L. Rev. 764 at 773.
because it has long been recognized that an individual has no property right or vested interest in common law rules,7 and courts have repeatedly upheld other legislation which does away with common law forms of action.8 Heart Balm statutes have been struck down in only two states.9 The Illinois statute was held unconstitutional in Heck v. Schupp10 as being in violation of the bill of rights provision that every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive to his person, property or reputation. In Indiana11 that part of the statute which made it an offense to bring the action was declared contrary to the constitution, because the practical effect would be to prohibit one from contesting the constitutionality of the Act. The remaining part of the Act was sustained.

With the validity of Heart Balm legislation now commonly accepted, questions as to the scope of the statutes are frequently arising. Such a problem was recently before the New Jersey court in the case of Grobart v. Grobart.12 Plaintiff brought an action alleging that defendants maliciously conspired to injure her in her marital relations with her husband, with the result that she was deprived of certain rights in her husband's property, was prevented from obtaining separate maintenance, and was forced to compromise certain claims at less than their true value. The complaint also charged that plaintiff's husband was maliciously induced to bring suit for divorce on the ground of adultery, and that the suit was successfully defended at great expense to plaintiff. It was further alleged that because of these and other acts, plaintiff's health, good name and reputation were impaired. The trial court dismissed the complaint on the ground that it attempted to set forth a cause of action for alienation of affections and was therefore barred by the Heart Balm Act. On appeal to the Supreme Court of New Jersey, plaintiff contended that her complaint was not grounded in alienation of affections, but rested upon the theory of conspiracy, formed to deprive her of and injure her in property interests, and that if the statute were to be construed to

7Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).
8In Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929), aff'g 108 Conn. 371, 143 Atl. 240 (1928), a Connecticut statute which abolished a guest rider's right to recover because of negligent operation of car was held valid. Accord: Rogers v. Brown, 129 Neb. 9, 260 N. W. 794 (1935); Shea v. Olson, 185 Wash. 145, 53 P (2d) 615 (1936).
9See Note (1947) 4 Wash. & Lee L. Rev. 185.
10394 Ill. 296, 68 N. E. (2d) 464 (1946), noted (1947) 4 Wash. & Lee L. Rev. 185.
11Pennington v. Stewart, 212 Ind. 553, 10 N. E. (2d) 619 (1937).
125 N. J. 161, 74 A. (2d) 294 (1950).
bar her action, then it was unconstitutional in that it deprived her of property without due process of law. The court reversed the judgment of dismissal on the ground that the complaint asserted causes of action outside the purview of the Heart Balm Act.

That the New Jersey statute abolished the cause of action for alienation of affections was not questioned, but the court reasoned that the plaintiff was not asserting that cause of action. The gist of such an action, it was pointed out, is the loss of consortium, "by which term is meant loss of the marital affections, comfort, society, assistance and services of a spouse who has been wrongfully enticed away." By contrast, the action here was regarded as being for injury to property interests, and as such, beyond the scope of the statute. The court declared: "We cannot conceive that the statute was designed to deprive plaintiff of redress for such wrongs merely because they are related or incidental to the marital relation."

In general, Heart Balm statutes have been strictly construed, so as to limit the causes of action abolished to those that are within the defined intent of the legislatures. The New Jersey court had already had occasion to pass on the scope of its statute in the case of Glazer v. Klughaupt. Defendant had promised to marry plaintiff, who then started working for the defendant as a stenographer. Defendant withheld part of plaintiff's wages, such wages to be given to plaintiff when the marriage was consummated. Defendant later refused to marry the plaintiff, who brought action to recover the wages withheld. The defense was that the action was barred by that part of the Heart Balm Act which abolished the right to recover damages for breach of promise to marry, but the court rejected this contention, saying: "The pleaded cause of action rests upon the contract of hire, and not the asserted contract to marry."

A California District Court of Appeals also refused to bar a complaint merely because it was related to breach of promise to marry. The complaint stated that defendant fraudulently represented to plaintiff that he intended to enter into a valid marriage with her and because of such representation plaintiff gave to defendant half the proceeds from the sale of a certain piece of property. In a suit to recover the money given to defendant, the court ruled that plaintiff's

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cause of action was not for breach of promise to marry but rather was for obtaining money upon fraudulent representation.

In *Burger v. Nueman*, Plaintiff alleged that defendant had forced her to have sexual relations with him, had professed his love for her and had promised to marry her. It was further alleged that defendant had acknowledged paternity of plaintiff's child and in consideration of certain promises made by the plaintiff, defendant had agreed to make financial provisions for her and to support the child until he reached the age of twenty-one. When defendant failed to support the child, plaintiff brought suit and was met with the argument that the action was against public policy and was barred by the Heart Balm Act of New York. However, it was held that the complaint stated a good cause of action because the gist of the action was not seduction or breach of promise to marry, but was the breach by defendant of his promise to support plaintiff and her child.

In spite of this consideration for property rights, the New York courts have refused to allow the injured party recovery for gifts, typically rings, given in contemplation of marriage. Such a result has been put on the ground that recovery of gifts made in contemplation of marriage is based on breach of contract to marry and is thus barred by Heart Balm Acts. However, where a subsequent agreement has been made to return such gifts, the courts have found no trouble in enforcing the agreements. In *Spitz v. Maxwell*, Plaintiff had given defendant several articles of jewelry in contemplation of marriage. The parties mutually agreed to cancel their contract to marry and a new agreement was entered into, whereby each party was to return the gifts received. Plaintiff sued to recover damages for breach of the agreement, and the judgment was for plaintiff, the court observing that “the breach of the agreement made after the contract was mutually cancelled and rescinded gives rise to a valid cause of action, for the new contract has no relation whatever to the contract to marry.” Another New York court reached the same result in a similar case, reasoning that “The mere fact that a contract to marry,
and its breach, are alleged in a complaint, is not in and of itself, sufficient to bring the action within the ban, if the cause of action is not based thereon. The opinion pointed out that the contract to marry was alleged merely by way of fixing the time and the occasion for the making of the gifts.

Still another case indicating that a cause of action only incidental to a breach of contract to marry is not barred by Heart Balm legislation is *Warneck v. Kielly*. Plaintiff, having himself breached the contract to marry, brought an action to recover funds held in trust for him by defendant. Plaintiff was allowed to maintain a suit for the money so held on the ground that his cause of action was not based upon the breach of contract to marry.

The foregoing review of cases clearly demonstrates the unwillingness of the courts to bar actions merely because they might be incidental or closely related to actions for breach of promise to marry. In each case the contract to marry had been breached, yet the court felt that the action was not based upon breach of marriage contract, but upon deprivation of property rights.

In determining what actions legislatures intended to place within the interdiction of Heart Balm statutes, it must be remembered that the primary purpose behind the enactment of the legislation was the prevention of such evils as blackmail and extortion. But since there is no similar evil to be corrected in cases involving injury to property rights, it seems illogical to assume that the legislatures intended to abolish such causes of action as were asserted in the cases here considered merely because they are incidental to the marital relation. A consideration of the purposes behind the enactment of Heart Balm Acts, and the holding of various courts defining the scope of these statutes leads to the conclusion that the decision in the *Grobart* case is justifiable from a legal standpoint and is not objectionable on policy grounds.

S. Maynard Turk

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2368 N. Y. S. (2d) 157, 158 (1946): "It does not appear that this cause of action is based upon the breach of a contract to marry or seeks damages for the breach of such a contract. The fact is that the contract was breached by the plaintiff."
24Note (1936) 30 Ill. L. Rev. 764, 771: "In general, the objections to the retention of the actions were that they had become encumbered with an incoherent mass of theories and rules of procedure, evidence, and damages, and secondly, that they were rapidly becoming nothing more than vehicles for blackmail, extortion and 'fake' cases."
25Antonelli v. Xenakis, 368 Pa. 375, 69 A. (2d) 102, 104 (1949): "The Act being in diminution of the jurisdiction of the court of Common Pleas of the Commonwealth, it is not to be presumed that the legislature intended thereby to abolish a right of action not expressly brought within the statute's purview."
Federal Procedure—Appearance of Federal Question on Face of Complaint as Necessary to Federal Court Jurisdiction. [United States Supreme Court]

More than half a century ago the Supreme Court, in *Tennessee v. Union & Planters’ Bank*, 1 established the rule that a case arises under the Constitution or laws of the United States, so as to confer jurisdiction on the federal courts, when the plaintiff's cause of action shows on its face that some right, title or interest may be defeated by one construction of the law or Constitution and upheld by another construction. 2 It is not enough that the federal question is presented by the defendant's answer or by the plaintiff anticipating a defense based on a federal question. 3 The federal jurisdiction is taken wholly from the face of the plaintiff's cause of action. 4

Because of this rule, it was not until after the Federal Declaratory Judgments Act 5 was passed in 1934 that an alleged infringer of a patent was allowed to sue the patentee to determine the validity of the patentee's right or to disprove the alleged infringement. Instead, he was forced to wait to establish his rights until he was sued by the patentee, even though he had a good defense. 6

Some courts have argued that the Declaratory Judgments Act, in allowing the alleged infringer to bring the suit for a declaration that the patent held by the patentee is or is not valid, does not expand federal jurisdiction but simply creates a new procedural device. 7 Yet later federal cases have allowed suits to be brought by the alleged infringer which before the Act would have been dismissed because a federal question was not presented on the face of the plaintiff's

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1 *Tennessee v. Union & Planters’ Bank*, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511 (1894). It is interesting to note that this case, which is credited with establishing the rule that the federal question must appear on the face of the plaintiff's complaint, was brought into the federal court upon the petition of the defendant that this case be removed from the state court where it was originally instituted.


complaint. In rebutting the argument that these actions brought by the alleged infringer were without precedent, the courts argued that the Act was a remedial statute and was passed for the purpose of allowing relief in cases that could not be tried under existing forms of procedure. Therefore, it should be applied liberally to allow certain suits to be brought in the federal courts which would not otherwise come within the federal jurisdiction.⁸

In spite of this demonstrated tendency to relax the general rule in cases arising under the Declaratory Judgments Act, the Supreme Court in the recent case of Skelly Oil Co. v. Phillips Petroleum Co.⁹ has held that even though the action is for a declaratory judgment, in order to invoke federal jurisdiction the federal question must be presented on the face of the plaintiff's complaint, and not by the plaintiff anticipating a federal defense or by the defendant's answer. The Phillips Co. entered into contracts with petitioners, three oil companies, to purchase gas produced by them for resale to the Michigan-Wisconsin Pipe Line Company. The latter company was seeking a certificate of public convenience and necessity from the Federal Power Commission for the construction and operation of a pipe line to carry natural gas. Each of the contracts provided that in the event the Federal Power Commission had not granted the certificate to the Michigan-Wisconsin Pipe Line Company by October 1, 1946, the seller would have the right to terminate the contract by written notice to the buyer, Phillips, at any time after December 1, 1946, but before the certificate was issued.

The Federal Power Commission issued an order dated November 30, 1946, granting the certificate of public convenience and necessity,¹⁰ but the content of the order was not made public until December 2. Also on December 2, the petitioners severally notified Phillips Co. of termination of the contracts on the ground that a certificate of public convenience and necessity had not been granted. Phillips Co. sought a declaratory judgment stating that these contracts were still in effect,

⁸Dewey & Almy Chemical Co. v. American Anode, Inc., 137 F. (2d) 68 (C. C. A. 3d, 1943); Alfred Hofmann, Inc. v. Knitting Machines Corp., 123 F. (2d) 458 (C. C. A. 3d, 1941). In Borchard, Declaratory Judgments (2d ed. 1941) 809, after arguments have been put forth stating that the Act does not expand federal jurisdiction, it is said: "...it might be argued that the action for a declaration that the plaintiff is not infringing as charged or that the patent on which the defendant relies is invalid, is an expansion of federal jurisdiction. If so it is a proper one."


evidently basing federal jurisdiction on the necessity of a construction of the Natural Gas Act to show that the certificate of necessity and convenience had actually been issued by the Commission within the required time.

The District Court held that it had jurisdiction and decided the case on its merits. The Court of Appeals affirmed the decision, but the Supreme Court then reversed the lower courts and ruled that the plaintiff did not state a case arising under the Constitution or laws of the United States on the face of its complaint. It was held to be a suit on a contract, a state created right, and the plaintiff's artful pleading which attempted to raise a federal question was merely anticipating a defense. Therefore, the suit could not be brought in a federal court, there being no diversity of citizenship.

Counsel for the plaintiff cited the patent cases as indicating that the federal question does not have to appear strictly on the face of the plaintiff's cause of action in a suit for a declaratory judgment. It was argued that the "federal courts often have jurisdiction over claims for declaratory relief even though no other type of action based upon the same facts would meet the requirements for establishing federal jurisdiction." Inasmuch as this contention was squarely before the Supreme Court, it is significant that these patent cases were not mentioned in its opinion.

There are two possible explanations for this omission. The Court may have intended this decision to cover all cases concerning declaratory judgments, including the patent cases, and thereby rule that the Declaratory Judgments Act would not be given a liberal interpretation.

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21The court, in finding that it had jurisdiction, stated that the primary question presented was whether the order of the Commission of November 30, 1946, constituted a certificate of public convenience and necessity, within the requirements of the Natural Gas Act. The court held that plaintiffs' claim arose out of, and was dependent upon, the construction and application of federal law. The reasoning was that it was necessary that plaintiffs state as a part of their affirmative cause of action the grounds upon which they challenged the claims asserted by the defendants, and this was not an anticipated defense. Skelly Oil Co. v. Phillips Petroleum Co., 174 F. (2d) 89 (C. A. 10th, 1949).

22The Court held that there was no federal jurisdiction as to two of the petitioners, Skelly Oil Co., and Stanolind Oil and Gas Company. However, there was federal jurisdiction as to Magnolia Petroleum Co. based on diversity of citizenship. Therefore as to Magnolia, the judgment of the Court of Appeals was vacated and the cause was remanded for further proceedings. Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667, 70 S. Ct. 876 (1950).

23Counsel, in their brief, cited Arlac, Inc. v. Hat Corp. of America, 166 F. (2d) 286 (C. C. A. 3d, 1948), and cases cited at 166 F. (2d) 286, 292, n. 9. Skelly Oil Co. v. Phillips Petroleum Co., brief of respondent, 52.
tion in this respect. If this is true, the Court has "silently" overruled the patent cases. The other possibility is that the Court intends to rule on these cases separately at some later time, perhaps to make an exception of them as to the requirements of federal question jurisdiction.

If the first approach proves to be the correct one, it is probable that this decision will necessitate a more narrow application of the requirements of federal jurisdiction in subsequent patent cases. The Court of Appeals for the Seventh Circuit in the leading patent case of *E. Edelmann & Co. v. Triple-A Specialty Co.* reasoned that since, before the Declaratory Judgments Act was passed the owner of the patent might sue to enjoin the infringement of his patent, now under the new procedural devices of the Act, the alleged infringer could sue to determine whether or not he was infringing the patent of the patentee. It was observed that the suit is the same regardless of who brings the action and that in either instance the controversy is essentially one arising under the patent laws. However, the Supreme Court in the *Skelly* case stated:

"The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress has authorized the District Courts to adjudicate—were not impliedly repealed or modified." Therefore, since the requirements of jurisdiction have not been repealed or modified it would seem to make a great deal of difference which of the parties brings the action in the patent cases. If the alleged infringer institutes the action there will not be federal jurisdiction, since the federal question will not appear on the face of his complaint. This argument was recognized but disposed of in the *Edelmann* case:

"Appellant urges, however, that the prayer for damages because of circulation of charges of infringement among dealers and potential customers, stamps appellee's suit as one to enforce a common-law remedy, namely, recovery of damages for unfair competition. If this were the only end sought and the jurisdic-

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1488 F. (2d) 852 (C. C. A. 7th, 1937).
tion of the court invoked to secure only that relief, the conten-
tion would necessarily prevail. But appellee relies upon two
remedies: First, the determination of whether the patent is valid
and infringed; and, second, if either of these questions is an-
swered in the negative, whether it is also entitled to damages
for violation of its common-law rights.18

However, it seems that the first remedy relied upon by the infringer
was not a right or immunity of his own, but rather the absence of
this right or immunity in the patentee. Therefore, it would seem that
this is an anticipated defense, which it has been repeatedly held will
not confer federal jurisdiction,19 even though the action is for a
declaratory judgment as in the principal case.20

If the Court intends to make an exception of the patent cases,
and allow them to stand even though they do not fulfill the require-
ments of federal jurisdiction, it could well be argued that this devia-
tion serves a justifiable purpose.

It has been pointed out that it is good policy to allow the alleged
infringer to bring the suit rather than force him to wait until the
patentee has sued him to determine the validity of his defense. For,
by simply refusing to bring the suit and by continuing to make public
threats against the alleged infringer and to warn merchants not to
buy these goods from him, the patentee could force a settlement
without risking a judicial determination of his claims. Thereby the
business of the one charged with infringement would be injured and
he would have no remedy in a federal court.21 If the earlier inter-
pretation of the Declaratory Judgments Act is sustained, the alleged
infringer is allowed to bring the suit and thus to determine the
validity of the patentee's claim before he has suffered great damage.22
This exception could be based on the theory that in the patent cases
the suit by the alleged infringer is similar to a bill quia timet.23 The
parties are thus reversed in the position they would hold in a tradi-
tional suit, in the sense that the plaintiff or infringer would be assert-
ing what normally would be the defense, and the defendant or patentee

19Taylor v. Anderson, 234 U. S. 74, 34 S. Ct. 724, 58 L. ed. 1218 (1914); The
Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 S. Ct. 410, 57 L. ed. 716 (1913);
Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 53 L. ed. 126
(1908).
21Note (1935) 45 Yale L. J. 160.
22E. Edelmann & Co. v. Triple-A Specialty Co., 88 F. (2d) 852 (C. C. A. 7th,
1937); Note (1935) 45 Yale L. J. 160.
23Borchard, Declaratory Judgments (2d ed. 1941) 232.
would be asserting what in a regular coercive action would be the complaint. On this basis, it could be argued that the defendant or patentee was not asserting a defense but was simply being forced to state his cause of action—t. e., the cause of action he would assert in a coercive suit between himself and the infringer when and if he brought the suit he has been threatening to bring and which he is entitled to bring by his own allegations.

That this exception would not open the door wide for many other types of cases to be brought in the federal courts which normally would not fill the requirements of federal jurisdiction can be shown by applying this theory to the *Skelly* case. Thus tested, defendant would not be in the position of stating a cause of action "arising under" federal law, as would a defendant-patentee in a declaratory judgment action. Rather, defendant's position would be one of asserting a state-created right based on contract.

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**INSURANCE—CONSTRUCTION OF DELIVERY-IN-GOOD-HEALTH CLAUSES IN LIFE INSURANCE POLICIES. [Oklahoma]**

With the widespread incorporation of delivery-in-good-health clauses in life insurance policies, the courts have had to determine

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24Borchard, Declaratory Judgments (2d ed. 1941) 232; Developments In the Law, Declaratory Judgments—1941-1949 (1949) 62 Harv. L. Rev. 787.

25Developments In the Law, Declaratory Judgments—1941-1949 (1949) 62 Harv. L. Rev. 787. At page 803, this theory of reversal of parties has been referred to as the preferable rule: "In the absence of Congressional clarification, certainly necessary here, the preferable rule would seem to be that the declaratory action seeking to test a defense is triable in the federal courts provided this defense would normally arise in answer to a complaint which itself would properly raise a federal question. Jurisdiction would depend on the nature of the coercive action which the declaratory action has anticipated, and substantial conformity with the principles applicable to conventional actions would thus be achieved. In addition the rule would remove any doubt as to the propriety of suit for a declaration of noninfringement and invalidity of a patent brought against a patentee threatening suit for infringement."

Valid delivery requires: (1) The intention of the party executing the policy to give it legal effect as a complete instrument. (2) Evidencing of this intention by some word or act indicating that the insured has put the instrument beyond his legal control though not necessarily beyond his physical control. (3) The insured's acquiescence in this intention. Franklin Fire Ins. Co. v. Colt, 20 Wall. 560, 22 L. ed. 423 (U. S. 1874); Home Life & Accident Co. v. Compton, 144 Ark. 561, 222 S. W 1063 (1920); New York Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273 (1898); Newark Machinery Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060 (1898).

In a 1921 survey it was found that 112 out of 125 companies issued policies containing the delivery-in-good-health clause. Note (1934) 34 Col. L. Rev. 1508, n. 2.
what standards should be applied in deciding whether the insured\textsuperscript{3} has fulfilled the good health condition. Aside from the pure questions of fact as to what the insured's particular state of health actually was, a difficult question of law presents itself: whether apparent good health will satisfy the clause or whether actual good health is the requisite.

Demonstrating the troublesome nature of the problem is the recent case of \textit{Farmers & Bankers Life Ins. Co. v. Baxley},\textsuperscript{4} which resulted in a six to three division among the Justices of the Oklahoma Supreme Court. The insured made a non-medical application for life insurance, both the application and the policy containing the clause that no liability attached unless the insured was in good health upon delivery and receipt of the policy. About five months before the application was made, the insured had had an ovarian cyst removed and on June 11, 1946, six days after application for the policy, the insured, having consulted a physician because she was "not feeling well," was informed that a further operation was necessary to remedy a condition known as stenosis of the cervix. On June 17 the policy was delivered. The operation took place on June 20, and on August 27 the insured died of peritonitis fever, something latent in her system having caused the peritonitis to develop. Although the physician who recommended the operation testified that he would not have passed the insured for an insurance policy had such an examination been held on June 11, the court ruled that there was sufficient evidence to support the jury's finding that the insured was in good health within the meaning of the clause. In interpreting the policy, the majority of the court declared: "In the absence of fraud or bad faith, we are of the opinion that the policy requirement of sound health does not extend to slight or periodic ailments or disorders."\textsuperscript{5} The dissenting justices argued that the evidence to prove good health was insufficient to be presented to the jury, and that on the basis of the undisputed testimony of the doctor that insured was not in good health there should have been a directed verdict for the defendant insurance company.

The courts are in general agreement that "good health" is a comparative term which does not require freedom from slight ailments, but rather from grave or serious diseases or defects which have a

\textsuperscript{3}"Insured" is used to indicate the person by whose life the duration of the insurance contract is measured, as distinguished from the beneficiary.

\textsuperscript{4}215 P. (2d) 941 (Okla. 1950).

\textsuperscript{5}Farmers & Bankers Life Ins. Co. v. Baxley, 215 P. (2d) 941, 945 (Okla. 1950).
definite tendency to impair the system or shorten life. However, in applying this principle, some courts hold that apparent or ostensible good health is sufficient, while others rule that actual, existing good health is the standard to be met. One of the leading cases supporting the latter view is Packard v. Metropolitan Ins. Co. The insured, a boy of ten, had contracted a heart disease before delivery of the policy and was taken to the doctor by his mother, but the mother was not informed that the condition existed. The disease was of such a nature that only a physician could have detected it, the outward appearance of the boy being indicative of good health. In holding the insured's health to be unsound, the court gave the term "good health" a literal meaning and declared that lack of knowledge of the existence of the disease did not alter the fact that the boy's health was unsound. This point is further amplified in Murphy v. Metropolitan Ins. Co. where upon medical examination by the insurance company's physician, the insured was passed and said to be in good health. About fifteen days before receipt of the policy the insured had a little trouble with his knee, which did not appear to be serious when he had it treated by a doctor, but which some months later was found to be a cancerous condition. The insured was held to be in unsound health because he did in fact have the cancerous condition at the time of receipt of the policy, absence of knowledge being held to be immaterial. However, in Greenwood v. Royal Neighbors of America, where the insured had a fatal heart disease which was not known or apparent and did not become so even to physicians until after death, the court held that the term good health was no more than a non-expert opinion as to an honest belief of good health in the sense known to the man in the street. The United States Supreme Court has declared that the representation of good health need be only "honest, sincere, not fraudulent."

Upon this comparison it is seen that lack of knowledge of the defect has no effect under the actual good health theory, but in the

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772 N. H. 1, 54 Atl. 287 (1902).

8106 Minn. 112, 118 N. W. 355 (1908).

9118 Va. 929, 87 S. E. 581 (1916).

apparent good health theory, lack of knowledge is a material and
decisive factor. In the jurisdictions that follow the latter theory,
where there is a conflict of evidence the questions of knowledge and
good faith ordinarily are jury questions,11 and the defense of fraud
must be established by affirmative proof. The fact that the statements
made by the insured were false in fact does not raise a presumption
of fraud.12

While the majority of the Oklahoma court in the principal case
appears to have decided that the insured could be said to have been in
actual good health when the policy was issued, this conclusion is
questionable when viewed against the evidence of her previous and
prospective operation, her own admission of not feeling well, and
her death within six weeks thereafter, caused by a condition which
had apparently existed for some time previously. Several of the state-
mens in the opinion suggest that the court might have been thinking
of apparent good health, and the decision might have been more
logically placed on that ground.

An analysis of the facts tending to support an apparent good health
view shows: First, the application was non-medical,13 which would
seem to preclude any intention that the insured be required to make
representations with the authoritative ness of a physician. Second, the

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12Supreme Tribe of Ben Hur v. York, 70 Colo. 175, 197 Pac. 1012 (1921). How-
the insured had been treated by several physicians for tubercular bronchitis and
cystitis yet was reported by the insurance company's medical examiner to be a good
risk, the court found a strong case of misrepresentation as to the question of good
health and other related questions, and therefore, ordered that peremptory instruc-
tions be given to the jury in favor of the defendant.
13Statements in a non-medical application are held to be valid if false unless
they were intentionally and wilfully false. Nor can the insurance company be heard
to call sound health a condition precedent, as the company had full opportunity
for a medical examination. Schmidt v. Prudential Ins. Co. of America, 190 Minn.
239, 251 N. W. 683 (1933); Elness v. Prudential Ins. Co. of America, 190 Minn. 169,
251 N. W. 183 (1933); Hafner v. Prudential Ins. Co. of America, 188 Minn. 481, 247
N. W. 576 (1933); Eckard v. Metropolitan Life Ins. Co., 210 N. C. 130, 185 S. E.
671 (1936). "Sound health" in a policy issued without medical examination are
equivalent to words "good health" in the application. Tool v. National Life &

Where a policy is issued upon a medical examination, the sound health clause
applies to any interim change between the examination and the delivery of the
policy, but where there is no medical examination the sound health clause must
be fulfilled irrespective of the time of origin before delivery. Western & Southern
Life Ins. Co. v. Downs, 301 Ky. 322, 191 S. W. (2d) 576 (1945); Minzenberg v. Metro-
politan Life Ins. Co., 177 Pa. Super. 557, 43 A. (2d) 377 (1945); Hatfield v. Sovereign
insured was told that she was recovering satisfactorily from the first operation. This would indicate absence of wilful misrepresentation as far as that operation is concerned, inasmuch as fraud is an affirmative defense and "facts to prove fraud 'must be inconsistent with any other reasonable or probable theory.'" Third, knowledge of the pending operation did not imply a condition of bad health, for that operation was required by a minor ailment which does not preclude good health. Finally, evidence tended to show that the insured looked healthy and had conducted herself as a normal, active person, which would be strong evidence in her favor before a court that follows the apparent good health doctrine.

On the other hand, it may well be argued that allowing recovery on the policy under either interpretation of the decision constitutes a case of "sticking the insurance company." The dissent found reasonable grounds for declaring that the insured both was in bad health and was or should have been aware of that fact. Nevertheless, the decision in the instant case is in accord with the trend toward a general liberalization of interpretation of insurance policies, best demonstrated by the long process of reducing the strict common law warranty to the status of a representation. In 1786, Lord Mansfield evidenced the prevailing view in declaring:

"There is a material distinction between a warranty and representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with."

Over the years, however, the courts recognized that such a rule extended undeserved protection to the insurance company and imposed severe hardships on the insured. Late in the nineteenth century, legislation began to appear providing that misrepresentations made in the negotiation of a policy of insurance should not avoid the policy unless the misrepresentations were fraudulently made or increased the risk. This principle has become the accepted rule, even though the

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1^Ley v. Metropolitan Life Ins. Co. of New York, 128 Iowa 203, 94 N. W. 568, 569 (1903).
2^Galloway v. Prudential Ins. Co., 112 Kan. 720, 212 Pac. 887 (1923) held that an operation to correct a retrofixed uterus does not take the insured out of the meaning of "good health."
representations in question may have been branded as "warranties" by the insurer. The adoption of the "apparent good health" standard can be regarded as merely an extension of this interpretive process. The very essence of a representation is that the insured is purporting only to make statements to the best of his ability; he is not making the statement from the standpoint of an authority or expert. Nor does it seem feasible to require a layman, who merely wishes to protect himself with insurance, to make any statement with the same authority as would be required of a physician. Similarly, the main feature of a non-medical application is that it requests an insurance contract on the basis of information divulged by the applicant without any recommendation by a physician. It would seem, then, to be a complete divergence from the purpose of the application to require statements made by the applicant to be measured by the same standards of knowledge used in measuring statements made by a physician.

Conversely, it would seem that the "actual good health" doctrine, and the technical standards by which it is viewed, could be compared to the rigid enforcement of the warranty, not in that minor ailments will permit the insurance company to avoid the policy but in that a statement of good health is held to be one of absolute fact as to serious diseases. And in some cases this standard was higher than that of a physician who on a previous examination passed the applicant for insurance when the applicant was actually in bad health. It seems incongruous to hold a layman to such standards of good health in view of the present policy of treating the warranty as a representation, especially in the case of a non-medical application.

JACKSON L. KISER

PROCEDURE—DISQUALIFICATION OF GOVERNMENT EMPLOYEES AS JURORS IN CRIMINAL CASES. [United States Supreme Court]

In 1909, the United States Supreme Court decided in *Crawford v. United States*¹ that the common law rule that a servant of the Crown was not a qualified juror in cases in which the Crown was a party was in force in the District of Columbia. Hence, a clerk of the post office was not a qualified juror in a case in which the defendants were accused of defrauding the United States. Because of the large

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¹Those states not having such statutes are Colorado, Florida, Iowa and Maine. The Virginia law may be found in Va. Code Ann. (Michie, 1950) § 38-371, pgf. 3.
number of government employees in the area, this decision made it very difficult to secure juries for criminal cases in the District. To remedy this situation Congress in 1935 amended the District of Columbia code so as to make those employed by the government qualified for jury duty.\(^2\)

In *Wood v. United States*,\(^3\) decided in 1936, it was argued by a defendant convicted of larceny from a private corporation that this Act was unconstitutional because it deprived accused parties of an impartial jury as guaranteed by the Sixth Amendment.\(^4\) The Supreme Court held that a more careful research than had been employed in the *Crawford* decision showed that it was not a "settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, unrelated to the particular issues or circumstances of a criminal prosecution, created an absolute disqualification to serve as a juror in a criminal case,"\(^5\) and in the alternative that even if such a disqualification did exist at common law it was not substantive and therefore could be removed by Congress.

The issue again came before the Court in *Frazier v. United States*\(^6\) in which the defendant was tried for violation of the Narcotics Act before a jury composed entirely of government employees, one juror and the wife of another being employed by the Treasury Department, the agency responsible for enforcement of the Narcotics Act. It was held that government employees were qualified jurors and that the challenge to the two jurors connected with the Treasury Department should have been made for actual bias while the jury was being impanelled and could not be raised on a motion for a new trial. Justice Jackson wrote a dissenting opinion\(^7\) urging that a distinction be made between the *Wood* and the *Frazier* cases on the grounds that in the *Wood* case the government was only a nominal plaintiff while in the *Frazier* case it was a real litigant. On this basis he argued that all government employees should have been disqualified as partial in the latter case.

The same problem in perhaps its most serious form has recently

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\(^3\)299 U. S. 123, 57 S. Ct. 177, 81 L. ed. 78 (1936).

\(^4\)"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" U. S. Const. Amend. VI.

\(^5\)299 U. S. 123, 141, 57 S. Ct. 177, 183, 81 L. ed. 78, 86 (1936).


\(^7\)335 U. S. 497, 514, 69 S. Ct. 201, 210, 93 L. ed. 187, 200 (1948).
been raised in *Dennis v. United States.*

Dennis, Secretary of the Communist Party, was indicted for contempt of Congress for refusing to appear before the Un-American Activities Committee. Government employees were listed on the jury panel and defendant challenged them for cause on the ground that government employees were subject to Executive Order 9835, popularly known as the "Loyalty Order," requiring the investigation of all government employees and discharge of all those disloyal to the United States, and that, therefore, government employees would be reluctant to vote for acquittal because of fear of losing their jobs. The trial court denied the challenge and the defendant appealed. The Supreme Court, with Justice Minton writing for the majority, held that the case was controlled by the *Wood* and *Frazier* decisions, and that a "holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible."

Although adhering to his position taken in the *Frazier* case, Justice Jackson in a concurring opinion expressed the view that to make an exception in this case would afford Communists a protection not afforded persons of other political beliefs, thereby destroying equal protection under law.

Justice Frankfurter, who also had dissented in the *Frazier* case, wrote a dissenting opinion acquiescing in the precedent of the *Wood* and *Frazier* cases, but objecting to any extension of the doctrine promulgated by those two decisions. In a separate dissenting opinion, Justice Black took the position that the *Wood* and *Frazier* cases permitted disqualification of government employees without prejudice in the subjective sense when the circumstances would make government employees unsuitable as jurors, and that under the circumstances of the instant case employees of the government were not qualified jurors.

Neither Justice Clark nor Justice Douglas took part in the consideration of this case. However, in *Morford v. United States* Justice Douglas expressed the view, in a concurring opinion, that the case should have been reversed "for the reasons stated by the dissenting Justices in *Frazier v. United States* ... and in *Dennis v. United States* ..." *339 U. S. 258, 250, 70 S. Ct. 586, 587, 94 L. ed. 544, 545 (1950).* Justice Clark's views on the subject are still not known, for he did not take part in the decision of the *Morford* case.
In the light of the Dennis case, the problem in these decisions appears to be the determination of what constitutes implied bias. The Court in the Wood case declared that bias "may be actual or implied—that is, it may be bias in fact or bias conclusively presumed as matter of law." But it was also said that "In dealing with an employee of the government, the court would properly be solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular government activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him." And at another place in the opinion the observation was made "that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting, to employees of the treasury it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances."

The Frazier decision said of the Wood case that "the Court regarded 'actual bias' or challenge 'to the favor' as including not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise.'" In spite of the unfortunate use of the word "implicitly" in reference to actual bias, it appears that the Frazier case made a proper evaluation of the Wood decision. However, if actual bias is bias in fact, it is difficult to understand how actual bias can include any prejudice other than prejudice that exists in a subjective sense. This rather loose use of the terms actual and implied may account for some of the difficulty the Court had in deciding the Dennis case, and unfortunately the decision in that case does not clarify the scope of these terms.

The confusion caused by the terminology is clearly evidenced by the concurring opinion of Justice Reed. He read the Court's decision "to mean that Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case." Apparently Justice Reed is
not using the term implied bias in the same sense that it was employed in the opinion of the Court, for there it was said unequivocally that a "holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible." Probably Justice Reed intended to limit the term actual bias to bias in the subjective sense and used the term implied bias to include all bias not shown in the subjective sense, which is a more logical use of the term than was applied in the Wood and Frazier cases. If this was the manner in which Justice Reed employed the terms, then implied bias as used in his opinion and actual bias as used in the opinion of the Court, assuming the Court used the terminology adopted in previous decisions, are not mutually exclusive.

The law as announced by the Supreme Court seems to harmonize with the decisions of the state courts. No state has by judicial decision disqualified all government employees. However, government employees have been declared incompetent to act as jurors in cases where the circumstances of their employment have made them unsuitable as jurors. Special circumstances sufficient to disqualify have been: employment as deputy prosecuting attorney; employment as deputy sheriff where the sheriff was paid from convictions; employment as justice of the peace where the juror issued the warrant in the case and was paid for that service only if there was a conviction; employment as deputy

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\[23\] Block v. State, 100 Ind. 397 (1884).

ment as a police officer in a prosecution for violation of a municipal ordinance; and employment as a police officer.

Decisions of the Missouri and Indiana courts go furthest among the state courts in establishing governmental employment as a basis for disqualification. A deputy sheriff has been disqualified as a juror in Missouri as being partial because he or his superior officer might be in position to derive additional compensation if a conviction was secured, and because as a member of the police force he probably would have received information about the case which would lead him to pre-determine the guilt of the accused. In the same state a police officer has also been excluded from a jury because "It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom police officers are going to testify, should be tried by a jury made up of police officers." A police officer has also been excluded from a jury because "It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom police officers are going to testify, should be tried by a jury made up of police officers." In an Indiana decision a deputy prosecuting attorney was disqualified as a juror on the reasoning that the prosecuting attorney was for practical purposes the plaintiff in the case, and since the deputy prosecuting attorney is his employee, the latter was not qualified to serve on a jury because an employee of one of the parties to a suit is not competent to act as a juror. This reasoning goes far to eliminate all governmental employees as jurors, but in later cases decided by the Indiana court where the employee of the state has been disqualified, there has been some special interest.

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26Shapiro v. City of Birmingham, 30 Ala. App. 563, 10 S. (2d) 38 (1942). An interesting distinction has been made by the Alabama courts. In Shapiro v. City of Birmingham a police officer was disqualified in a prosecution for violation of a municipal ordinance because the officer was an employee of the prosecuting city. But a municipal police officer is a qualified juror in a prosecution by the state. Brackin v. State, 31 Ala. App. 228, 14 S. (2d) 383 (1943).


28"It is obvious that he might be interested in a conviction because of the additional fees and prison board the sheriff might thereby collect. He might be interested because his own salary might, if so agreed, depend upon the number of convictions, as is often the case, in certain counties. His loyalty to his chief and fellow deputies would certainly have its weight. The likelihood exists that he had become conversant with the facts in the case, and was more or less convinced as to the guilt of defendant. Moreover, our statute exempts a deputy sheriff from jury service. Obviously such exemption exists because of the impropriety of officers acting as jurors in cases wherein they may be called upon to perform other and inconsistent duties." State v. Golubski, 45 S. W (2d) 873, 873 (Mo. App. 1932).


30Block v. State, 100 Ind. 357 (1884).

31Lockhart v. State, 145 Md. 62, 125 Atl. 829 (1924); Berbette v. State, 109 Miss. 94, 67 So. 853 (1915); State v. Dushman, 79 W Va. 747, 91 S. E. 809 (1917); 50 C. J. S., Juries § 221.

32Gaff v. State, 155 Ind. 227, 58 N. E. 74 (1900) (sheriff's salary paid by county,
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If there can be instances where government employment can be grounds for disqualification, as the Wood and Frazier cases and the state courts have determined there can be, the problem presented the Court in the instant case was whether special conditions existed to make the general rule that government employees are qualified jurors inapplicable. Statutes such as the Act of 1935 represent a policy of facilitating the administration of justice by making it reasonably easy to secure juries. Cases like the Dennis case bring this policy into conflict with another policy of the law that an accused be tried by a completely impartial jury. Excluding government employees from juries in the few criminal cases involving persons whose affiliations are such that their loyalty might be doubted would produce a small burden on the administration of justice. It is therefore submitted that the solicitude afforded every accused criminal should require the exclusion of government employees in such cases because as average men the "Loyalty Order" might influence their decision in the case.

ALBERT F. KNIGHT

PROCEDURE—SETTLEMENT OF CLAIM AGAINST ONE JOINT TORT-FEASOR WITH RESERVATION OF RIGHTS AGAINST OTHERS. [Virginia]

When a party plaintiff has a single cause of action against several tort-feasors, he may wish to settle with, or forbear to exercise his right against, one of them, either gratuitously or on receipt of compensation. Of the several legal devices which have been employed by plaintiffs attempting to preserve rights against one or more of the wrongdoers while surrendering the rights against the others, the most common are the accord and satisfaction, the release, and the covenant not to sue.

In an accord and satisfaction the parties agree to give and accept something in full settlement of a claim which one has against the other, and then execute their agreement.1 The "accord" is the agreement and the "satisfaction" is the execution of the agreement.2 A

2 Cano v. Arizona Frozen Products Co., 38 Ariz. 404, 300 Pac. 953 (1931); In re Trexler Co. of America, 15 Del. Ch. 76, 132 Atl. 144 (1926); Davis v. Davis, 109 Okla. 83, 229 Pac. 479 (1924).
release is similar in that it is also a device for settling a claim,\(^3\) but a release is a relinquishment or giving up of a claim, while an accord and satisfaction is the discharge of a claim by a performance which is accepted as full compensation, although it may actually be less than the party receiving it considers himself entitled to.\(^4\) A covenant not to sue is a covenant made by one who has a right of action against another, whereby he agrees not to enforce his right.\(^5\)

It has been rather generally held that an accord and satisfaction with one of several joint tort-feasors operates to discharge the others,\(^6\) the theory being that where a plaintiff has a single cause of action, he may have but one satisfaction of his claim.\(^7\)

Similarly, at common law it seems to be accepted that an absolute, unqualified release of one joint tort-feasor releases all.\(^8\) But upon the question of whether a release of one joint tort-feasor, coupled with a reservation of rights against the others, releases all, there is much conflict.\(^9\) Some authorities reason that since a release is a relinquishment of the releasor's right, that right cannot be alive as to one wrong-doer and extinct as to another, and hence a release of one, even with a reservation of rights against the others, discharges all from liability.\(^10\) Other authorities maintain that the intention of the parties is

\(^{11}\)Coopey v. Keady, 73 Ore. 66, 144 Pac. 99 (1914).
\(^{12}\)Frazier v. Ray, 29 N. M. 121, 219 Pac. 492 (1923).
\(^{14}\)Steenhuis v. Holland, 217 Ala. 105, 115 So. (2d) (1927); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 698 (1912); Brewer v. Casey, 196 Mass. 384, 82 N. E. 45 (1907); Dulaney v. Buffum, 173 Mo. 1, 73 S. W 125 (1903); Cooley, Torts (Throckmorton, 1930) 182. It seems that where the payment is intended and accepted as partial, rather than full, compensation, no accord and satisfaction has been effected. See note 19, infra.
\(^{17}\)The Adour, 21 F. (2d) 858 (D. C. Md. 1927); Louisville & N. R. Co. v. Allen, 67 Fla. 257, 65 So. 8 (1914); Ruble v. Turner, 2 Hen. & M. (12 Va.) 98 (1808).
the controlling factor, and hence a release with a reservation of rights against others operates as a covenant not to sue.\textsuperscript{11} A covenant not to sue one of several joint tort-feasors is regarded as personal to the covenantee and does not discharge other wrongdoers.\textsuperscript{12}

In Virginia, the strict view that a release of one joint tort-feasor, even with a reservation of rights against others, operates to discharge all, has long been adhered to.\textsuperscript{13} In the recent case of \textit{Shortt v. Hudson Supply & Equipment Co.},\textsuperscript{14} the Supreme Court of Appeals of Virginia had occasion to determine whether an instrument in form a covenant not to sue one of several joint wrongdoers, with a reservation of rights against the others, might operate to discharge the others. Plaintiff sustained personal injuries in a grade crossing collision between a tractor and trailer and a train on which he was employed as a fireman. Prior to bringing suit against the owner and the operator of the tractor and trailer, plaintiff, in consideration of $3,500 paid by the railroad company, covenanted not to sue that company for any damages resulting from the collision.

The language of the instrument indicated clearly that it was not intended to operate as a release,\textsuperscript{15} but the court nonetheless held that plaintiff's right of action against the owner and the operator of the tractor and trailer was barred, since by accepting the $3,500 from the railroad company plaintiff had effected an accord and satisfaction.\textsuperscript{16}

Citing its own holding in an earlier case in which a plaintiff had settled a claim with one of two joint wrongdoers, the court declared that "where two are jointly and severally liable in tort for an injury caused by their negligence or misconduct, the satisfaction of the injured party's single cause of action by one discharges the other, since

\textsuperscript{11}Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); Feighley v. C. Hoffman & Son Milling Co., 100 Kan. 430, 165 Pac. 276 (1917); Adams Express Co. v. Beckwith, 100 Ohio St. 248, 126 N. E. 300 (1919).

\textsuperscript{12}Pacific States Lumber Co. v. Bargar, 10 F. (2d) 335 (C. C. A. 9th, 1928); Texarkana Telephone Co. v. Pemberton, 86 Ark. 529, 111 S. W 237 (1908); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915); City of Chicago v. Babcock, 143 Ill. 958, 32 N. E. 271 (1892); Cooley, Torts (Throckmorton, 1950) 189.

\textsuperscript{13}The doctrine was laid down in the early case of Ruble v. Turner, 2 Hen. & M. (12 Va.) 38 (1808), and has been followed by later Virginia cases. McLaughlin v. Siegel, 166 Va. 374, 185 S. E. 873 (1936); Bland v. Warwickshire Corp., 160 Va. 131, 168 S. E. 443 (1933).

\textsuperscript{14}191 Va. 306, 50 S. E. (2d) 900 (1950).

\textsuperscript{15}The instrument stated: "It is expressly understood that this instrument is merely a covenant not to sue and not a release." Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 309, 60 S. E. (2d) 900, 902 (1950).

the transaction "is similar in its operation to an accord and satisfaction. This is true, even though the parties did not intend to discharge the other joint wrongdoer." 17

Although an accord and satisfaction with one of several joint tortfeasors operates to discharge all, 18 it has often been held that in order for an agreement to operate as an accord and satisfaction, the consideration must have been intended by the party giving it and accepted by the party receiving it, as full satisfaction of the claim. 19 There remains the problem of how to determine whether the payment was so intended and accepted. Where the instrument specifically recites that the payment is in full satisfaction, there is no difficulty in holding that an accord and satisfaction has been effected.20 If there is no such specific provision, a number of courts apparently decide entirely from the form of the instrument whether plaintiff has received full satisfaction for his injury. Such courts have ruled that if the instrument takes the form of a covenant not to sue, plaintiff has received partial satisfaction only, 21 or if the instrument expressly reserves rights against others responsible for the same wrong, the amount paid was not intended to be full compensation.22 Other courts have taken the position that whether an accord and satisfaction has been made is a question of fact to be determined from all relevant circumstances.23

That the holding in the principal case defeats the intention of the parties, as expressed in the instrument, seems to be beyond question. The unequivocal language used and the express reservation of rights against the other wrongdoers would indicate to the satisfaction of a number of courts that the sum received by plaintiff was not intended to be full compensation for the injury suffered.24

The Virginia court conceded that the instrument did not "state

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18 Bedwell v. DeBolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943). Also cases cited in note 5, supra.
19 City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Schmidt v. Austin, 159 N. E. 850 (Ohio App. 1927); Blackmer v. McCabe, 85 Vt. 303, 85 Atl. 113 (1912); Thompson, Trials (2d ed. 1918) 1018.
22 McKenna v. Austin, 134 F. (2d) 659 (App. D. C. 1943); Black v. Martin, 88 Mont. 256, 252 Pac. 577 (1930).
23 City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271, (1892); Bedwell v. DeBolt, 221 Ind. 600, 50 N. E. (2d) 875 (1943); Haney v. Cheatham, 8 Wash. (2d) 310, 111 P (2d) 1103 (1941).
24 See cases cited in notes 21, 22 and 23, supra.
in terms" that the money was paid in full satisfaction of plaintiff's claim; but apparently the court sought to align itself with those jurisdictions holding that the question of whether full satisfaction has been received is one to be determined from all relevant circumstances. It declared that "to interpret the circumstances as showing that this substantial sum was paid and accepted for anything less than a full satisfaction of the plaintiff's claim against the Railway Company would compel us to shut our eyes to the plain purpose of the settlement and the other actualities of the situation."

Yet it seems doubtful that the fact of settlement alone, although for a substantial, as distinguished from a nominal, sum, is enough to warrant a holding that the circumstances show an intention that the payment be accepted as full compensation. At that stage of the proceedings, there is no evidence upon which the court can determine the extent of plaintiff's injury, and if the amount of damage is unknown, it hardly seems tenable to say that a settlement for a specified amount was intended to be in full satisfaction of the claim.

It thus appears that the Virginia court's holding is not in accord with those cases which determine the parties' intentions purely from the instrument itself, nor is it completely in harmony with those cases which state that the question is to be decided on the basis of all the relevant circumstances. Rather, the court seems to be simply laying down a rule that if the payment is substantial, plaintiff has, as a matter of law, effected an accord and satisfaction, discharging the others responsible for the same tort, regardless of the form of the instrument.

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26 See cases cited in note 23, supra.
28 Even had the instrument expressly recited that the sum received was not intended as full satisfaction or was intended as partial compensation only, it is doubtful that the Virginia court would have reached a different result, so long as the payment was substantial. "...the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent." Shortt v. Hudson Supply & Equipment Co., 191 Va. 306, 313, 60 S. E. (2d) 900, 904 (1950), quoting from Cooley, Torts (4th ed.) 269. "The rule is that even if the writing be appropriately drawn to make it a covenant not to sue, the court, nevertheless, must construe it in the light of the facts and circumstances surrounding its execution to ascertain whether it was in substance and effect given for a consideration which is reasonably compensatory." Short v. Hudson Supply & Equipment Co., 191 Va. 306, 313, 314, 60 S. E. (2d) 900, 904 (1950), quoting from Haney v. Cheatham, 8 Wash. (2d) 310,
From a practical standpoint, however, there is much to be said for the result of the case. The rule has been generally stated that where a payment made to a plaintiff is given and received as partial satisfaction only, and hence other tort-feasors are not discharged, the payment should work a pro tanto reduction of the liability of the unreleased tort-feasors in a later suit by the plaintiff against them for the full amount of the damages. Although the soundness of the rule may be conceded, its application may impose problems of a practical nature. The cases stating the rule have been very vague as to just how the courts are to effect a reduction of the liability of the unreleased defendants. The reduction of liability could be achieved in one of a number of ways. The trial court could instruct the jury to take into account the fact of partial satisfaction when considering the question of damages, and the verdict rendered would presumably be for an amount equal to the difference between plaintiff's total damages and the partial payment already received. Or the court could allow the jury to return a verdict for the whole amount of plaintiff's damages, and then enter judgment for the amount of the verdict reduced by the amount already paid. Another alternative might be for the court to enter judgment for the full sum, and then to credit the defendants with the amount already paid by way of partial satisfaction.

However, under the Virginia rule, as announced by the Shortt case, the mechanical problem of applying a pro tanto reduction of liability will not arise whenever the original payment is substantial, since the plaintiff may not then proceed against the other tort-feasors at all.

The rule of the principal case may have varying effects upon the adjustment of controversies by the parties involved. Clearly a plaintiff is taking an unnecessary chance if he attempts to make piecemeal

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111 P (2d) 1003, 1008 (1941). It is perhaps likely that had the sum received by plaintiff in the principal case been nominal, the court would have given effect to the expressed intention of the parties as evidenced by the writing. The court recognized the difference between a covenant not to sue and a release as affecting the liability of joint tort-feasors. Shortt v. Hudson Supply & Equipment Co., 191 Va. 306 at 310, 60 S. E. (2d) 900 at 903 (1950).


3One practical difficulty which almost certainly would be encountered if such a solution were adopted is that instructions of the type in question would almost inevitably have varying effects upon different juries, with consequent variations in verdicts rendered.
compromises with each of several wrongdoers. A single settlement for a fully compensatory sum offers the one practical solution for the person who wishes to settle his case out of court. Parties to a controversy are often prone to reach a compromise, and if they know that one substantial payment is all that the law will allow, they will doubtless tend to adjust their claims for sums which bear a close relationship to the actual damage sustained.

On the other hand, one wrongdoer may be willing to pay for a proportionate part of the damages, but unwilling to pay a sum which would be fully compensatory. If, in such a case, the other tort-feasors are unwilling to pay for part of the damage, it seems likely that no compromise can be attained because the plaintiff would not be safe in accepting from the party willing to settle any payment which might be considered "substantial."

At all events, the distinction between a release and a covenant not to sue as affecting the liability of joint tort-feasors is at best technical and artificial. A decision which goes far toward wiping out such a distinction is indicative of a healthy trend in procedural law.

J. Forester Taylor

PUBLIC UTILITIES—POWER OF PUBLIC SERVICE COMMISSIONS OVER CONTRACTS BETWEEN PARENT AND SUBSIDIARY UTILITY CORPORATIONS. [California]

Many of the problems growing out of the relationship between public utility holding companies and their subsidiaries have been resolved by state and federal statutes, but the notorious service contract still provides much difficulty for regulatory commissions and courts. Recently the California Supreme Court in Pacific Telephone and Telegraph Company v. Public Utilities Commission, was

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2Note (1936) 49 Harv. L. Rev. 927, 982-89.
4"These contracts may be for the supply of services, such as expert engineering, accounting or legal advice, or for the sale or rental to the operating company of necessary materials either manufactured or bought wholesale by the affiliate." Note (1932) 18 St. Louis L. Rev. 62. The Public Utilities Holding Company Act forbids such contracts when made directly with the holding company, but allows service companies which are subsidiary to the holding company to make service agreements under control of the Securities and Exchange Commission. 49 Stat. 825 (1935), 15 U. S. C. A. § 79 (m) (1941). The Act, of course, applies only to holding groups engaged in interstate commerce and regulates only those companies which control gas and electric utilities.
6215 P. (2d) 441 (Cal. 1950).
again faced with one of the long-standing problems created by these service arrangements: whether a state public service commission may determine the terms on which a subsidiary utility may contract with its parent company. The Pacific Telephone and Telegraph Company had attacked the orders of the state Public Utilities Commission prescribing the terms on which Pacific could contract with the American Telephone and Telegraph Company for certain services. American owned approximately 88 per cent of the capital stock of Pacific, and as a result of this domination the commission found that the contract between the two, whereby Pacific paid one per cent of its gross receipts for American services, was in reality an arbitrary exaction from Pacific by the parent company. A majority of the court found that the commission had exceeded its authority, but two dissenting justices\(^6\) took the position that the broadly phrased statute, which gave the commission general regulation over public utilities, authorized the control action.

Part of the uncertainty in regard to the scope of governmental regulation of the holding company lies in the fact that while such organizations have often served as instruments for illegal financial manipulations, they also have numerous beneficial and completely legitimate functions. During the early stage of the development of the public utility industry, the device of the holding company lent itself readily to the solution of the financial and managerial problems facing small local utility organizations. When a small operating company found it difficult to sell stock without giving it a preferred status, a holding group would step in and purchase a large part of this common stock with funds received in the sale of its own securities. This transaction was continued until in many instances the holding company became the central control authority for a vast empire of related utilities. Then, because of its central position and large financial resources, the company was able to supply highly skilled technicians to the subsidiary at a comparatively low cost. Since the limited scale of operation of the subsidiary did not warrant the establishment of a separate technical staff, the subsidiary readily entered into agreements with the holding company whereby it would be extended the use of the services of the parent organization. Thus the service contract evolved.\(^7\)

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\(^6\)Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State, 215 P. (2d) 441, 447, 448 (Cal. 1950). There were two separate dissenting opinions, one by Justice Shenk, the other by Justice Carter. The latter provides an excellent short discussion on the evils of the service contract.

\(^7\)See Note (1936) 49 Harv. L. Rev. 957 for a discussion on the servicing function of the public utility holding company.
On its surface, the service contract appears to be an innocuous contrivance, but when it is remembered that the holding concern has managerial control over the operating utility it becomes quite apparent that such an agreement is laden with dangerous possibilities. Within this control mechanism is the ability to force unreasonable demands on the affiliate, and since, as often occurs, the holding company has relatively little capital investment in the operating institution there is likely to be no deterrent force to constrain exploitation. Consequently, many holding companies have found the service relation a ready means for obtaining increased income; and inasmuch as these excessive exactions necessarily reflect as operating expenses—an important item in calculating consumer rate schedules—the nature of the service contract becomes a proper item for consideration by the rate-making body.

As early as 1892 it was recognized that the rate-making power includes the power to disallow improper expenditures, and yet before 1930 public service commissions were not disposed to reject payments made under contracts as improper items in calculating a fair rate base. In fact, the commissions were inclined to give complete approval of and occasionally even throw in a commendation for the holding company. On the other hand in a few situations, especially those where the famous "license contract" of the American

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9 See Note (1929) 14 St. Louis L. Rev. 299.
11 This process of rejecting payments is called disallowance. In disallowance the regulatory body does not prevent the subsidiary company from making payments under the service contract, but it does refuse to recognize such payments as operating expenses. This is done because operating expenses are a legitimate item in calculating the rates which the utility may charge its customers, and thus any increase in expense must necessarily reflect itself in increased rates. Therefore, if the regulating commission were to allow the arbitrary exactions often made through the service contract medium, the rate-payer would bear the ultimate financial burden. As it is, under disallowance, the burden falls on the subsidiary. Note (1936) 49 Harv. L. Rev. 957, 985-986.
13 The license contract of the American Telephone and Telegraph Company is a form of service contract granting the use of certain patent rights and other services to a subsidiary telephone company in return for payments based on a fixed percentage of the subsidiary's gross receipts. It can readily be seen that these payments bear no relation to the actual cost of production of the services rendered by the parent, and if the subsidiary should secure a rate increase by showing the cost of the contract as an operating expense, the parent company would receive a windfall. For an example of a license contract, see State v. Southwestern Bell Telephone Co., 115 Kan. 236, 223 Pac. 771 (1924).
Telephone and Telegraph Company was involved, commissions often questioned the fees paid to the parent group. Some commissions went so far as to reduce and in a few instances even disallow expenses incurred under service agreements as improper items in so far as rate calculations were concerned. However, in the cases of City of Houston v. Southwestern Bell Telephone Company and Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Company, the Supreme Court of the United States severely limited state interference with service contracts. In the Houston case the Court declared that service contracts were not to be disallowed so long as reasonable and less in cost than could be secured elsewhere in the competitive market. The Missouri case placed even more drastic restrictions on the states by directing that bad faith would have to be shown before the contract expenses could be disallowed. As a direct consequence of these decisions the disallowing actions of rate-making bodies were often overruled as being confiscatory. However, in 1930 in Smith v. Illinois Bell Telephone Company these two decisions were disregarded as the Court indicated that rate-making bodies might now refuse to accept as operating expense any payment made to the parent company in excess of the actual cost of producing the service plus a reasonable profit to the parent group.

While the Smith case went a long way toward allowing commission control over service contracts, it did not solve the problem entirely. Control by disallowance was at best indirect, and it did not prohibit the payment of the agreed service fee to the holding company. Thus, when a commission refused to recognize the service expenditure in rate calculations, the utility would have to meet the contract costs from its own profits or be negligent in plant replacement and service to the consumers. To prevent these undesirable effects the commissions turned to the legislatures, and by 1936 at least eighteen states had

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49 Harv. L. Rev. 957, 989 n. 112.

The following cases are typical: Chesapeake and Potomac Telephone Co. of Baltimore City v. Whitman, 3 F. (2d) 938 (D. C. Md. 1925); Northwestern Bell Telephone Co. v. Spillman, 6 F. (2d) 663 (D. C. Neb. 1925); Indiana Bell Telephone Co. v. Public Service Commission of Indiana, 300 Fed. 190 (D. C. Ind. 1924).


enacted statutes giving commissions direct control over utility-affiliate contracts.\textsuperscript{20} Nine\textsuperscript{21} of the states merely authorized disapproval of service contracts if not in the public interest,\textsuperscript{22} but the others\textsuperscript{23} acted more positively and required that the contracts be affirmed by commissions as a condition precedent to their validity.\textsuperscript{24}

\textsuperscript{20}The New York parent statute was upheld by the New York Supreme Court in International Railway Company v. Public Service Commission, 36 N. Y. S. (2d) 125 (1942), aff'd 289 N. Y. 850, 47 N. E. (2d) 435 (1943). The validity of the Kansas statute was recognized by implication in State ex rel. Steger v. Capital Gas and Electric Co., 139 Kan. 870, 33 P. (2d) 731, 734 (1934). Lockard v. City of Salem, 127 W. Va. 237, 32 S. E. (2d) 568 (1944) applied the West Virginia statute granting commission control over utility contracts without question as to its constitutionality. It has been stated that these statutes can be supported by analogy to commission powers to supervise the issuance of securities and grant or refuse certificates of convenience and necessity. "These involve interference in questions of management which are no more drastic than the exercise of power to forbid the making of such contracts." Simpkins, State Regulation of Contracts with Public Utility Affiliates (1934) 20 St. Louis L. Rev. 1, 57.

\textsuperscript{21}Alabama, Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, New York, Pennsylvania, and Vermont.

\textsuperscript{22}The parent statute of this type provides "No management, construction, engineering or similar contract, hereafter made, with any affiliated interest, as hereunbefore defined, shall be effective unless it shall first have been filed with the commission, and no charge for any such management, construction, engineering or similar service, whether made pursuant to contract or otherwise, shall exceed the reasonable cost of performing such service. In any proceeding to determine the reasonable cost of such charge or service the burden of proof shall be on the company. If it be found that any such contract is not in the public interest, the commission, after investigation and a hearing, is hereby authorized to disapprove such contract." New York Public Service Law (1934) § iio (3).

\textsuperscript{23}These states were Illinois, Maine, New Jersey, North Carolina, Oregon, Virginia, Washington, West Virginia, and Wisconsin.

\textsuperscript{24}The Wisconsin statute provides: "Whenever the commission shall find upon investigation that any public utility is giving effect to any such contract, without such contract... having received the commission's approval as required by this section, the commission shall issue a summary order directing the public utility to cease and desist from making any payments or otherwise giving any effect to the terms of such contract..., until such contract... shall have received the approval of the commission. The circuit court of Dane county is authorized to enforce such order to cease and desist by appropriate process, including the issuance of a preliminary injunction, upon the suit of commission." Wis. Stat. (1947) c. 196, 52 § 6. The West Virginia statute while not being as specific as the Wisconsin act states: "The commission shall prescribe such rules and regulations as, in its opinion, are necessary for the reasonable enforcement and administration of this section, including the procedure to be followed, the notice to be given of any hearing hereunder, if it deems a hearing necessary, and after such hearing or in case no hearing is required, the commission shall, if the public will be convenient thereby, enter such order as it may deem proper..." W. Va. Code Ann. (Michie, 1949) § 2562 (2). If an order made in pursuance of the West Virginia statute is violated by any person or public utility that person or public utility "shall be guilty of contempt, and the commission shall have the same power to punish therefor as is now conferred on the circuit court, with the right of appeal in all cases to the supreme court of appeals." W. Va. Code Ann. (Michie, 1949) § 2573.
In jurisdictions in which surveillance over contracts has not been specifically granted by legislative enactment there has been some doubt as to whether commissions should be allowed to dictate terms of utility-affiliate contracts. The Pacific Telephone case takes the view that without specific legislative authority a commission should only have the power to disallow, for rate-making purposes, payments that it finds excessive. The court reasons that the broadly phrased California statute dealing with commission control of public utility activities extends authority only to those transactions that "directly affect the service the rate-payer will receive at a particular rate," and since the service contract involves a supplier-utility relationship rather than a utility-consumer relationship, the commission is powerless. Although the California court conceded that the service contract under question was not arrived at through arms-length bargaining, it insisted that there was no legislative policy against utility-affiliate agreements. To allow the commission to prescribe contract terms under these conditions would be tantamount to allowing it to manage the affairs of all utilities subject to its jurisdiction. This majority interpretation is supported by the only two cases which have considered a statute similar to that of California in regard to the service contract. However, in view of the paucity of decisions on the subject, the dissent of Justice Carter is significant. Justice Carter, who thought

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25Writers on service contracts were uncertain as to how the courts would react to commission attempts to determine the terms of utility-affiliate agreements. See Buchanan, The Public Utility Holding Company Problem (1937) 25 Calif. L. Rev. 517, 538; Note (1932) 45 Harv. L. Rev. 729, 736.


27Section 32 of the Act provides that "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates charged or collected by any public utility or that the rules, regulations, practices or contracts, of any of them, affecting such rates are unjust, unreasonable, discriminator or preferential, or in anywise in violation of any provision of law the commission shall determine the just, reasonable or sufficient rates practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided " Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State, 215 P. (2d) 441, 444 (Cal. 1950).


30Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State,
that the general grant of authority in the Act covered the service arrangement, recognized a vital fact that the majority overlooked when he explained that the net effect of a harsh service contract might be to hamper seriously the ability of the utility to serve its consumers. In this respect the dissenting opinion was far closer to reality than the majority which concluded that only a buyer-supplier relationship was involved. By adopting this point of view and insisting that the legislature had expressed no policy on the subject, the majority displayed superficiality in not realizing that the commission was actually doing what the legislature had expressly gone on record as favoring—insuring the public adequate service at a reasonable rate without discrimination. It is suggested that there is no valid reason why a commission operating under a general statute, such as California has, should not dictate the terms of affiliate service contracts. As Justice Carter maintained,

“It may be that some measure of protection is afforded by the power to refuse to recognize the license fee contract when fixing rates, but having that power, it of necessity follows that they may lock the door before the horse is stolen. If they may affect the utility management indirectly by subsequent action, surely they may take precautionary measures in advance.”

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215 P. (2d) 448 (Cal. 1950). Although no cases have been found supporting the dissent, the argument used therein was developed by the Alabama public service commission in Re Southern Bell Tel. & Tel. Co., P U. R. 1932E 207.

"It may be asked why should the commission, as representative of the consumers be concerned over a 'raid on the treasury of the operating utility.' Directly the consumers will not be affected whether the utility is solvent or insolvent. Their rates are based upon a fair return on a fair value and it should not matter to them who gets it. Unfortunately, this argument overlooks the simple facts that an insolvent utility has no credit with which to obtain the capital necessary for the continuous expansion of service demanded from a utility under modern conditions and that operation of a utility by receivers seems usually to be thought to result in higher operating expenses than would ordinarily be incurred." Simpkins, State Regulation of Contracts with Public Utility Affiliates (1934) 2 St. Louis L. Rev. 1, 58 as quoted by Justice Carter in the Pacific Telephone Case, 215 P. (2d) 441, 449 (Cal. 1950).

2The majority itself admitted that "the primary purpose of the Public Utilities Act, Gen. Laws, Act 6986, is to insure the public adequate service at reasonable rates without discrimination." Pacific Telephone and Telegraph Co. v. Public Utilities Commission of State, 215 F. (2d) 441, 444 (Cal. 1950). This admission lends support to Justice Carter's contention that in reality the commission was endeavoring to safeguard the ability of the utility to serve the rate-payers.

TORTS—LIABILITY IN CONVERSION OF THIRD PARTY WHO KNOWINGLY RECEIVED PROCEEDS OF CONVERSION FROM PRIMARY WRONGDOER. [Maine]

The victim of a conversion often finds his rights against the converter useless because of the inability of the wrongdoer to satisfy a judgment for damages. If a third party has contributed to a sequence of events, the total effect of which gave rise to the conversion, the property owner’s only hope for reimbursement may lie in extending the liability for the wrong to the third party.

Such an effort was made in the recent case of Lewiston Trust Company v. Deveno in which the defendant, Deveno, had executed a chattel mortgage on his truck to the plaintiff trust company. Deveno was the debtor of the other defendant, Perlstein, who, knowing the truck was mortgaged, had advised Deveno to sell it and had implied that if what was due him was paid he would make Deveno a new loan. Deveno sold the truck, thereby converting the plaintiff's interest, and turned all of the proceeds over to Perlstein. In the action for trover for damages, the trial court directed a verdict for the defendant, Perlstein, and the Supreme Court of Maine affirmed, ruling that the action taken by Perlstein, though it did “not commend itself to a desirable standard of honesty,” still did not sufficiently implicate him in the wrong to make him liable as a converter.

The courts have given approval to the imposition of liability on third parties for conversion if being generally asserted that “Every person is liable in trover who personally or by his agent commits an act of conversion, or who participates in the conversion by instigating, aiding or assisting another or who knowingly benefits by its proceeds in whole or in part.” However, the actual holdings of the cases seldom support such a broad proposition, and the statement that one may be held liable because he has knowingly benefitted from the proceeds of the conversion is either dicta, or an alternative basis for liability where the other grounds might exist.

1 Lewiston Trust Co. v. Deveno, 74 A. (2d) 457, 459 (Me. 1950).
Cases clearly come within the general rule where the third party wrongdoer, though he had no actual possession of the converted property has nevertheless had constructive possession of it, as where he stands in the relationship of principal with the primary wrongdoer agent who acted within the scope of his authority.\textsuperscript{6} If the agent acted outside the scope of his authority, however, liability is not extended to the principal\textsuperscript{7} unless he received the proceeds under such circumstances as to amount to a ratification of the act.\textsuperscript{8}

Liability is also extended to a third party who, although he acted as an agent for the principal, aided the primary wrongdoer in a conversion.\textsuperscript{9} The prevailing view is that if the agent negotiated the transaction for his principal in which the agent had actual possession of the goods, he thereby asserts such an adverse claim that he is liable to the owner for the conversion,\textsuperscript{10} and his lack of knowledge of the true ownership is immaterial. On this reasoning, an auctioneer is held liable for an unauthorized sale and delivery of the chattel to a buyer.\textsuperscript{11} But liability is not extended to the agent if he merely innocently receives and transports the converted goods and has no part in the transaction which constituted the conversion, because by his act he merely purports to change the position of the goods and not the property interest.\textsuperscript{12} If, however, the agent has reason to know of the owner's rights he may be liable on the theory of aiding by


\textsuperscript{7}The Quantico Cotton, 24 Fed. 325 (C. C. E. D. La. 1885); Bruten v. Sakarrison, 21 N. M. 438, 155 Pac. 725 (1916).


giving faith and credit to the instruction of the principal.13

Where a bailee has property delivered to him by a bailor who is the primary wrongdoer and re-delivers to the bailor, no liability will attach to him14 unless before the re-delivery was made he had received notice of the owner’s claim, in which case he is then required, at his peril, to see that he delivers to the proper person.15 If the bailee, under the orders of the bailor, delivers to a third party the better view is to protect him from liability, provided he does not himself negotiate the transaction to deliver to another.16 But the weight of authority is that the bailee is liable, unless the delivery was part of the original agreement of bailment.17

It is not essential that the third party wrongdoer ever have had either actual or constructive possession of the converted chattel in order to extend liability to him for having aided in its conversion.18 Where the aid was given to bring about the taking of the property of another the third party wrongdoer may be held liable if he participated in a deception which made it possible for the primary wrongdoer to convert,19 or if he knowingly aided by cooperating in the arrangements necessary for the act which constituted the conversion,20 or if he “instigated” the conversion.21 It is immaterial whether or not

22Edwards v. Max Theme Chevrolet Co., 191 So. 569 (La. App. 1939); Warder-Bushnell & Glessner Co. v. Harris, 81 Iowa 153, 46 N. W. 859 (1890).
23Coleman v. Francis, 102 Conn. 612, 129 Atl. 718 (1925); Restatement, Torts (1934) § 235.
26Varney v. Curtis, 213 Mass. 309, 100 N. E. 650, L. R. A. 1916A, 629 (1913); Restatement, Agency (1933) § 349. Comment d. (delivery to another, not part of original agreement). Parker v. Lombard, 100 Mass. 405 (1868) (delivery to another, part of the agreement of bailment).
29Davin v. Dowling, 146 Wash. 137, 262 Pac. 123 (1927). In this case, although the defendant was not held liable for the portion of the crop which was converted without the defendant’s aid even though the defendant had knowingly received the proceeds from its sale, the defendant was held liable for the portion of the crop which was converted with the defendant’s aid.
30The word “instigate” is rarely used as the basis of imposing civil liability on the defendant. Even when used, its meaning is seldom defined. E.g., Bowen v.
he stood to gain from the wrongdoing. However, liability is not extended to the third party where his only act was to advise the conversion.

Where the third party has done no act affecting the disposition of the property itself, but has only dealt with the proceeds of the sale thereof, liability will not extend to him if there was no knowledge that they were the fruits of a conversion, except as he might incur liability as the principal of a converting agent. Where there was knowledge that the funds were the fruits of a conversion, one line of authority holds that sufficient participation in the conversion exists to impose liability on the third party receiving the proceeds. This view is in conflict with the position taken by the court in the principal case in refusing to extend liability to the defendant Perlstein.

The latter position is well supported by the reasoning of the Washington Supreme Court in Dawn v. Dowling. The plaintiff had a statutory lien on the crops of his tenant, of which the defendant bank was charged with notice. The bank loaned the tenant money on the crop, part of which the tenant sold to a third party, and the bank, knowing the tenant sold the crop without the landlord's permission (which action amounted to a conversion), received the proceeds of the sale and applied them to the indebtedness of the tenant. The court, holding the bank not liable in trover as to this portion of the crop, reasoned that the statutory lien was upon the crop and

Yellow Cab Co., 13 S. W. (2d) 708 (Tex. Civ. App. 1929). In Cone v. Ivinson, 4 Wyo. 203, 35 Pac. 933, 938 (1894), it was pointed out: "To say that one 'requested' another to do an act does not imply that there was anything wrong in the act, but to say that one 'instigated' another to do any act does imply that the act itself was wrongful. The word is never used properly with reference to a good, virtuous, lawful act." In regard to whether such "instigation" would extend civil liability to the instigator the court said: "If, under the law, one who instigates another to the commission of a crime is guilty as principal, how can it be doubted that one who instigates another to the commission of a civil wrong is as completely a principal as he would have been had he actually performed the wrongful act himself?" Cone v. Ivinson, 4 Wyo. 203, 35 Pac. 933, 938 (1894).


Kelly v. Oliver Farm Equipment Sales Co., 169 Okla. 269, 36 P. (2d) 888 (1934). Ignorance is material where one received the benefits of a conversion unless defendant actually or constructively received the possession of the converted property.


146 Wash. 137, 262 Pac. 123 (1927).
not upon the money received for it,28 and that although money under certain circumstances may become the subject of conversion,29 yet there can be no conversion of money unless it was wrongfully received by the party charged with the conversion or unless such party was under an obligation to return the specific money to the party claiming it.30 The court observed:

"It cannot be said that the bank when it received the money, knowing that it was the proceeds of the crop, and applied it to the indebtedness of Dowling's did so wrongfully or was under any obligation to deliver the specific money. It could have done nothing more than refuse to receive the money on a legitimate indebtedness of Dowling, and then Dowling would have been free, so far as the bank was concerned, to have disposed of it as he saw fit. He could have paid it to Davin or any other of his creditors."31

However, in a Kansas case32 in which the operative facts were quite similar33 and in which the defendant advanced arguments con-
sistent with the reasoning of the *Dawn* case, the opposite result was reached. The court pointed out that when the defendant took the money he knew he had no right to it, and although mere receipt of proceeds would not render the defendant liable for conversion, if the sale had been lawful, yet when the sale is illegal, this rule has no application. The defendant's liability does not rest on the conversion of the money; rather, a finding that the defendant knowingly received the proceeds of a conversion will justify the implication that the defendant was sufficiently connected with the conversion of the chattel to be held liable in trover.34

The principal case is not merely an application of the more restrictive of these two points of view as to liability, because on the facts of the case, the defendant had a part in the conversion transaction beyond the mere receipt of the proceeds of the sale. Taking the testimony in the light most favorable to the plaintiff, as the court indicated it was bound to do in testing the validity of a directed verdict, it appears that the defendant Perlstein induced Deveno to sell the truck by inferring that he could thereby obtain another loan from Perlstein, and then accepted the full amount of the sale price, not only knowing of its source but also impliedly in furtherance of the negotiation of a new loan. Such conduct might be regarded as "instigation" of a conversion, but at least could clearly come within the general term "participation" by a combination of advising the wrongdoer prior to the conversion and subsequently knowingly receiving the proceeds thereof.35

Under this construction of the situation, the third party defendant fairly comes within the principle that "where several parties unite in an act which constitutes a wrong to another under circumstances which fairly charge them with intending the consequences which follow, it is a very just and reasonable rule of the law which compels each to assume and bear the responsibility of misconduct of all."36

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35 It is suggested, however, that the part of the opinion of the Maine court which pertains to this point was dictum as the same results would have been reached even though the truck on which there was an unrecorded mortgage had been transferred to Perlstein who had knowledge of the mortgage because of the construction the Maine court has put on its chattel mortgage recording act—that any mortgage which is unrecorded is invalid as to all except the parties to it, even though others have actual knowledge of it, unless there was actual intent to defraud.
By extending liability to persons who contrive to benefit directly from acts infringing on the property rights of others, without themselves actively committing the wrongful acts, the law might serve the salutary purpose of raising standards of business ethics in some quarters, as well as adding stability to the types of security interests readily subject to conversion.

JAMES W. H. STEWART

WORKMEN'S COMPENSATION—REMEDIES OF EMPLOYER OR INSURER AGAINST THIRD PARTY CAUSING INJURY TO EMPLOYEE. [New Jersey]

When an employer, or his insurer, has been compelled to make payment of compensation to an injured employee under workmen's compensation legislation, the need for providing a means of obtaining recovery from an ultimately responsible third party has led to the adoption by almost all states of statutory provisions prescribing the rights of the various parties. Within the scope of such statutory formulae falls the burden of assuring full compensation to the employee, full reimbursement to the employer, and protection from any possibility of injustice to the third party.¹

A recent case which illustrates one manner of coping with the problem of reimbursement from third parties is United States Casualty Company v. Hercules Powder Company.² The insurer of an employer, after paying compensation to several employees who had been injured through the handling of defective fuses in the course of their employment, sought reimbursement from the manufacturer of the fuse. On the theory that it was subrogated to the rights of the employer by its policy, which included such a provision, the insurance company based its action on the manufacturer's breach of implied warranty of fitness, and prayed for relief in the amount of loss which had been sustained as a result of that breach—i.e., the compensation paid to the injured employee. The trial court dismissed the complaint of the United States Casualty Company as failing to

¹An excellent expression of the general purpose and method of all workmen's compensation legislation is found in United States Casualty Co. v. Hercules Powder Co., 4 N.J. 157, 72 A. (2d) 190, 193 (1950): "The act was intended to accomplish an economic reform in the legal rights and responsibilities between employer and employee, and to accomplish its purpose it made the employer responsible to his employee for injuries sustained in an accident arising out of and in the course of his employment even though no negligent act of the employer caused the accident and even though the accident was the result of the negligent act of a third party."

²4 N.J. 157, 72 A. (2d) 190 (1950).
state a cause of action. The basis for the dismissal was that the insurer was subrogated by the terms of the New Jersey Workmen's Compensation Act only to the rights of the employee, and that he must therefore bring his action in tort, as this would have been the employee's only remedy. In reversing this decision the Appellate Division held that, aside from the Workmen's Compensation Act, a cause of action in contract for breach of warranty arose in favor of the employer from the circumstances of the case, and that the insurer should therefore be allowed to seek recovery through this remedy to which it was subrogated by the terms of its policy. On review of the decision of the appellate court, the Supreme Court of New Jersey denied that reimbursement for the compensation could be recovered in an action ex contractu, and insisted that for this purpose the plaintiff must bring its case in tort, since under the Workmen's Compensation Act of that state the employer, or his insurer, is subrogated to the right of action of the injured employee only.

The Act preserves for the employee his right of action in tort against the third party, but in the event of recovery in such an action the employee holds for the benefit of the employer or insurer the amount recovered up to the amount of compensation received. If the employee does not bring such an action within a prescribed period, the employer or insurer may do so, and in the event of recovery, he holds for the benefit of the employee any amount in excess of the compensation paid. That this assignment of the employee's right of action under the Act affords the insurer his exclusive remedy to

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6The statute provides that the suit of an employer against the third party "shall be only for such right of action that the injured employee or his dependents would have had against the third person or corporation . . ." N. J. Stat. Ann. (West, 1940) 34:15-40 (f).
7The statute provides that if the sum recovered by the employee from the third party is in excess of the expenses of the suit and the attorney's fees, the employer, or his insurer, shall be entitled to be reimbursed for the compensation paid. N. J. Stat. Ann. (West, 1940) 34:15-40 (b). This provision merely gives the employer a right of action in rem against the money received by the employee. See Feinsod v. L. & F. Const. Co., 16 N. J. Misc. 514, 2 A. (2d) 357, 360 (1938), aff'd 17 N. J. Misc. 65, 4 A. (2d) 692 (1939). Other jurisdictions go so far as to grant the employer a lien on the award, judgment or fund out of which the employee is paid by the third party. The Illinois statute illustrates this type of provision. Ill. Rev. Stat. (1947) c. 48, § 166.
recover the amount of compensation paid was the opinion of the majority of the court. It was not denied that the employer's common law right of action in contract still existed, but it was declared that in an action thereon the measurement of damages could not include the amount of compensation paid under the Act.9

Perhaps the fundamental reason for this restriction of the employer-insurer rights lies in the fact that the New Jersey Workmen's Compensation Act, along with the statutes of several other states, leaves to the employee his common law right of action against the negligent third party even after recovery of compensation from the insurer of the employer.10 In fact, while the New Jersey court was considering the principal case an action in tort had been brought against the Powder Company by the injured employees,11 and was still undetermined. This being the situation, if the insurer were allowed to recover the payment of compensation from the third party on the grounds of any action other than that of the employee to whose rights he is subrogated under the Act, the result would be to subject the third party to double liability for the injury caused to the employee.

Though this decision affords protection to the negligent third party, it seems equally clear that it works a hardship on the employer. At common law, if an employee recovered a judgment against his employer for injuries and loss sustained by reason of defective equipment, the employer could include the amount of such a recovery in the measurement of damages in a suit against the manufacturer of the faulty equipment on the basis of implied warranty.12 To declare that for the purpose of an employer's recovering a loss sustained by reason of payment of compensation to an employee similarly injured the remedy under the Act is exclusive is in effect to deprive the employer of his common law right of action to the extent of loss sustained by reason of the payment of compensation. Certainly such a ruling operates to deprive an employer of the full amount of

recovery he formerly could have received under his common law right of action in contract, and forces him to carry the burden in a tort action of proving negligence on the part of the third party, while subjecting him to the defense of the employee's contributory negligence.

In jurisdictions whose statutes are similar to the New Jersey Act with respect to recovery from third parties, it seems clear that the result reached in the Hercules Powder Company case is inevitable under the circumstances involved. Wherever the statute expressly preserves the employee's common law cause of action, the courts find it more just to impose this hardship on the employer or insurer than to require the third party to bear double liability for his wrong.

Such a result must also be reached in jurisdictions embracing the federal type of statute, as is illustrated in cases involving the United States Employees' Compensation Act. It is held that unless a specific assignment of the employee's cause of action has been made to the employer, the United States, that right of action still exists in the employee. Thus, under the Federal Act the right of action of the injured employee against the third person continues to exist in the employee by necessary implication from the terms of the Act. States whose statutes are similar to the Federal Act in this respect do not expressly give the employee the right to recover compensation and also to sue the third party, but by implication they arrive at that result. Typical among these states is Texas.

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17The pertinent term of the United States Employees' Compensation Act, 39 Stat. 742 (1916), 5 U. S. C. A. § 776 (1949) provides that the United States may require the injured employee to assign his claim to the government or to prosecute his claim against the third party. This section is interpreted as implying that the employee's common law cause of action must remain in him until a specific assignment is made. Lassell v. City of Gloversville, 217 App. Div. 323, 217 N. Y. Supp. 128 (1926). Accord, Cary v. Burris, 169 Ore. 24, 127 P. (2d) 126 (1942).

Other jurisdictions have met the problem of avoiding the sub-
jection of third parties to the possibility of double liability by provi-
sions embodying rules for an election of remedies by the injured
employee. Thus, in Alabama it has been held that the right granted
to the employee under the Alabama statute was merely the right
to elect to proceed against the employer or the third party causing
the injury, and that the acceptance of benefits from the employer
constitutes an election binding on the employee so that he cannot
thereafter proceed against the third party. It is clear that in a
jurisdiction requiring such an election of remedies, the argument
against allowing the employer to recover his compensation payment
in an action ex contractu for fear of rendering the third party subject
to double liability must fail. The action of the employee in his own
right against the third party is barred by his election.

A statutory provision similar to the New Jersey Workmen's Com-
pensation Act, but with an additional limitation which might afford
a solution to the problem at hand is found in Indiana. It is pointed
out in Weis v. Wakefield that under the Indiana Workmen's Com-
pensation Act an injured workman may proceed against both his
employer for compensation and a negligent third party for damages,
and may obtain an award against the employer and also a judgment
against the third party; but at that point he must elect to recover
from one or the other of the defendants, and recovery from one bars
recovery from the other. The provision establishing the right of

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may collect from the third party in the name of the employee indicates that he
may take advantage of a judgment which was obtained by the employee against a
third party prior to the employee's election to receive compensation. It appears
from the statute that an assignment of such a judgment takes place by operation
of law upon receipt of compensation by the employee. The term "may" in the
subsequent provision that in order to collect the employer "may commence an
action at law" against the third party would seem to be directory rather than man-
datory, since the commencement of an action at law in the employee's name would
be barred by the previous judgment on the merits. Ind. Stat. Ann. (Burns, 1949
Supp.) § 40-1213.
the employee to proceed both under the Act against the employer and on his common law right against the tortfeasor precludes the possibility of the injured employee's being unduly restricted or suffering by reason of a compulsory election of remedies before he can ascertain which will be the more beneficial to him. The further provision that recoveries from the employer and from the third party are mutually exclusive successfully insulates the third party from the threat of double liability. In the absence of this threat to the third party the basis for the New Jersey court's argument, that the employer's remedy under the Act must be exclusive, disappears, and there remains no valid grounds on which the employer should be deprived of his common law right to recover in contract for any loss he has sustained by reason of a breach of warranty.26

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