The Doctrine of Judicial Review and Its Relation to a Declared Purpose or Policy of a Statute

Theodore S. Cox
THE DOCTRINE OF JUDICIAL REVIEW
AND ITS RELATION TO
A DECLARED PURPOSE OR POLICY
OF A STATUTE

THEODORE S. COX*

The most distinctive and significant American contribution to juridical theory is the doctrine of judicial review. Presidents and legislators, from the time of Mr. Jefferson to the present, have criticized it severely. With some justice they have pointed to the fact that in the Constitutional Convention the proposal to grant to the Supreme Court the equivalent of the executive veto power was rejected.1 Hence, successive critics have raised the cry of judicial usurpation. This criticism, however, ignores three important facts. First, the Constitution itself in declaring that the Constitution, and laws passed in pursuance thereof, should be the supreme law of the land, states: "and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."2 Certainly, so far as state action is concerned, this is a clear recognition of the authority vested in the courts to examine the provisions of state constitutions or state statutes in order to determine whether or not they conform to the Federal Constitution. This, of course, is judicial review. Secondly, statutory interpretation is an inherent judicial function. Where there is a document embodying the fundamental law which has been promulgated by the power in which resides the ultimate sovereignty, there is always a potential conflict between such document and statutes enacted in the ordinary process of legislation. The determination of this.

*Dean and Professor of Jurisprudence, College of William and Mary, Department of Jurisprudence.

1 Many of the members of the Convention, however, were of the opinion that the Supreme Court would exercise judicial review regardless of the absence of a specific provision authorizing it. This view that such power would be exercised is strengthened by the provisions of Article III, Section 2, giving the judicial power of the United States jurisdiction over cases arising under the Constitution, laws, and treaties.

2 U. S. Const. Art. VI.
conflict obviously is within this inherent judicial power. Thirdly, and fundamentally, the doctrine of judicial review is the normal result of the existence of a written constitution, the embodiment of the supreme law of the land. This supreme law *ipso facto* must be superior to ordinary enactments by transient legislatures.

The origin of judicial review in America was not sudden; it was the result of a slow historical development covering more than a hundred years. So far as the colonies were concerned, the basic fundamental law of each colony was its charter. A royal grant, the charter contained the powers, duties, obligations, and privileges conferred on the colony. The enactments of the colonial assemblies were subject to review by the crown and its agencies. With this colonial experience it is not surprising, therefore, to find the principle (that legislation was subject to review) continued after independence. Prior to the promulgation of the Constitution, there had been pronouncements to this effect by courts in Pennsylvania, New Jersey, New York, Rhode Island, North Carolina, and elsewhere. But the most complete formulation of the doctrine of judicial review was enunciated in Virginia in 1782. By the constitution of Virginia a pardon for treason could be granted only by the action of both branches of the Virginia assembly. A person convicted of treason was granted what he alleged to be a pardon, although it had been enacted by one house only. This alleged pardon being pleaded in a judicial proceeding, George Wythe, Chancellor of Virginia, held that no pardon had been granted, since the court was of the opinion that the purported grant of the pardon by a single house was intended by that house to remain inoperative unless concurred in by the other house. But Chancellor Wythe went on to state: "Nay, more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, 'here is the limit of your authority; and hither shall you go but not further.'" This was five years before the meeting of the Constitutional Convention in Philadelphia. While there is no evidence that John Marshall, during his very brief study of law under Chancellor Wythe at the College of William and Mary, was consciously

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8George Wythe, signer of the Declaration of Independence and a member of the Constitutional Convention of 1787, was Professor of Law and Police at the College of William and Mary from 1779 to 1790 when he was succeeded by St. George Tucker.

9Commonwealth v. Caton, 4 Call 5, 7 (Va. 1782).
THE DOCTRINE OF JUDICIAL REVIEW

aware of the great Chancellor's attitude toward judicial review, it is none the less interesting to speculate whether or not, perhaps, unconsciously, Marshall absorbed this legal philosophy from his instructor, since it was Marshall who established the doctrine in American Constitutional Law, that the Supreme Court of the United States is supreme, necessarily possessing the power to review legislation.

Under the American theory of government, of course, there are three separate departments. These three departments of government, Legislative, Executive, and Judicial are separate and distinct and are invested with separate grants of power. The character of these grants in the Federal Constitution is general and undefined, for example, in the several articles it is successively stated: "All legislative powers here-in granted shall be vested in a Congress . . . The executive Power shall be vested in a President . . . the judicial Power of the United States shall be vested in one supreme Court . . . "5 In all these grants the terms were not defined but they were, none the less, well known and well recognized things; so well known and understood as to be unnecessary of further definition. It should not be overlooked that the term judicial power as then used and understood included, of course, the power of interpreting the law.

But, each of the three branches of the government were presumably of equal dignity, and the members of the other departments were as much bound to support and defend the Constitution as was the judiciary. It is obvious, therefore, that the powers of the judiciary to declare executive acts beyond the constitutional grant or to declare certain legislative enactments not to be law, because they were not passed in pursuance of the Constitution, were subject to certain restrictive principles. It is a matter of tremendous concern for one co-ordinate department of the government to declare that one of the other departments has acted beyond the constitutional power given it or has erroneously exerted its authority. It is a much graver charge for the court to impugn the good faith of either of the other two departments. It is fundamental, therefore, in determining the constitutionality of a statute that the court proceed with the strongest kind of presumption that the legislation is constitutional, that it will not be overturned without clear evidence of its being beyond the limits granted to the legislature by the Constitution, and that the court wherever possible will so interpret the statute as to bring it within the constitutional limitations.

5U. S. Const. Art. I, II, and III.
There has been a tendency for the states to provide in their constitutions that the title of a statute shall cover its scope and that if matter be included in the statute which is not embraced by the title, such unincluded provisions must fail. For example, the Virginia constitution provides, "no law shall embrace more than one subject which shall be expressed in its title ..." The Federal Constitution, however, is silent on this point, and this silence, unfortunately, has encouraged the undesirable practice of attaching riders to bills. But in any case when a statute, federal or state, is before a court for interpretation, the purpose of the statute as indicated in its title and the policy of the statute (if the legislature has seen fit to include a declaration of policy) become highly pertinent facts. Care should be taken, however, to distinguish between purpose or policy and the motive which prompted the legislature to enact the statute. In determining the constitutionality of statutes, courts are concerned only with the question of constitutional power and the constitutional exercise of it. In such cases the important questions before the court regarding its constitutionality are, first, did the legislature possess the power to enact the statute, and secondly, was this power exercised constitutionally? In other words, a court in reviewing a tax statute, for example, of necessity, would inquire two things: did the legislature have the power to tax the thing taxed; is the purpose of the particular statute the raising of revenue? If the legislature possessed the power to levy the tax and the statute is for the purpose of raising revenue, the court cannot concern itself with the wisdom, the expediency, or the motive of such statute. But, if the statute obviously is for the purpose of regulation and not for the purpose of raising revenue, it must fail unless the legislature possessed the constitutional power to regulate. This would be true regardless of a legislative declaration of purpose or policy.

In applying the general principles of statutory interpretation, the court is entitled to believe that the legislature does not intend to exceed its powers and that the true purpose of the statute has been stated in the title and the declaration of policy unless the contrary is obvious.

Let us consider some of the leading cases involving the question of the effect of a legislative declaration of purpose or policy on the question of the constitutionality of a statute. In the case of Minnesota v. Barber, decided in 1890, the Supreme Court was confronted with the

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6Va. Const. § 52.
7186 U. S. 313, 10 S. Ct. 862, 34 L. ed. 455 (1890).
question of determining the constitutionality of a Minnesota statute which required meat offered for sale for human consumption in Minnesota to be inspected by Minnesota inspectors within twenty-four hours of slaughtering. Its purpose was described thus: “An act for the protection of the public health by providing for inspection, before slaughtering, of cattle, sheep and swine designed for slaughter for human food.” In holding the statute to be unconstitutional, as placing an improper burden on interstate commerce, the court stated: “The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.”

In 1928 the principle enunciated in *Minnesota v. Barber* was applied in the *Louisiana Shrimp Case.* The act under consideration declared that all shrimp and parts thereof in Louisiana waters were property of the state. It was made unlawful to ship any shrimp from Louisiana without removing the heads and hulls, while it also was made unlawful to export any raw shells, heads, and hulls since they were “required to be manufactured into fertilizer or to be used as an element in chicken-feed.” The facts showed that 95% of the Louisiana shrimp was intended for out of state consumption; that some shrimp bran was made in Louisiana from heads and hulls, all of which was shipped out of the state for use in making fertilizer; that no more than 50% of the hulls and heads removed in Louisiana was used for any purpose; and that the heads and hulls had no market value and frequently became a nuisance. The court held the statute to be unconstitutional as amounting to a burdensome regulation of interstate commerce, stating: “The facts alleged in the complaint, the details set forth on the plain-

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186 U. S. 313, 319, 10 S. Ct. 862, 863, 34 L. ed. 455 (1890).

The court cited a long line of cases in support of this doctrine, quoting from *Henderson v. Mayor of the city of New York*, 92 U. S. 259, 268, 23 L. ed. 543 (1875), as follows: “in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.”

tiffs' affidavits and the provisions of the Act to be restrained show that the conservation of hulls and heads is a feigned and not a real purpose. They support the plaintiffs' contention that the purpose of the enactment is to prevent the interstate movement of raw shrimp from the Louisiana Marshes to the plants of Biloxi [Mississippi] in order through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The conditions imposed by the Act upon the interstate movement of the meat and other products of shrimp are not intended, and do not operate, to conserve them for the use of the people of the State."

The court said further: "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce... In determining what is interstate commerce, courts look to practical considerations and the established course of business."

In 1904 in McCray v. United States with three justices dissenting, the Supreme Court held constitutional a federal statute levying a tax on colored oleomargarine at much greater rate than was levied on uncolored oleomargarine. The statute declared as its purpose the raising of revenue although neither the court nor the general public was so naive as to believe that the declaration of purpose disclosed the real legislative intent. But, the court, recognizing the deference due to an enactment by a coordinate branch of the government, chose to treat it as a valid exercise of the taxing power on the ground that the statute on its face was intended to raise revenue rather than to regulate. Since a statute which on its face is intended to produce revenue is none the less a taxing statute even though little or no revenue is produced and even though regulation results, the court refused to look behind the purpose as manifested by the legislative declaration and by the statute as a whole. This probably was correct since the judicial power cannot extend to a consideration of the soundness of constitutional theory, the wisdom of political action, or an undisclosed motive.

Fifteen years later the Supreme Court decided another important case quite analogous to the McCray case. In United States v. Dore-
the court held valid a federal statute placing a tax on the sale of narcotics and establishing considerable control over such sales. Although the statute in its terms declared that it was a revenue measure, its constitutionality was questioned on the ground that it was not an exercise of the taxing power but was an attempt to regulate a matter beyond federal control. By a five to four decision the court viewed the statute as a valid exercise of the taxing power since on its face it was a revenue producing measure which was not refuted by the statute as a whole, and beyond this point the court had no authority to inquire. Ironically, the future justified the position of the majority of the court in that the narcotic law has become a source of considerable revenue. In the case of Hill v. Wallace, decided in 1922, the Supreme Court held invalid a federal statute which was declared to be “An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes.” Mr. Chief Justice Taft, speaking for the court stated: “It is impossible to escape the conviction from a full reading of this law, that it was enacted for the purpose of regulating the conduct of boards of trade through the supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the act recites that one of its provisions is the regulation of the boards of trade.” Since the act sought to regulate a matter not shown to be subject to federal regulation, namely, intrastate commerce, the court held the statute beyond the federal authority. The court held that the Child Labor Tax case completely covered the case.

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14Other pertinent decisions are Linder v. United States, 268 U. S. 5, 45 S. Ct. 446 (1925), where it was held that the practice of a profession could not be regulated by the United States under pretext of raising revenue; United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. ed. 233 (1936) where it was held that “Congress in the guise of a taxing statute could not impose sanctions for violation of state law respecting the local sale of liquor;” and the Child Labor Tax case, 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817 (1922), in which a statute entitled “An Act to provide revenue and for other purposes” imposing a “tax” on persons knowingly employing children below certain ages in certain industries while those unknowingly doing the same thing were not subjected to the “tax” was held to be unconstitutional, the court taking the position that this alleged “tax” was in effect a penalty and was intended to regulate and not to raise revenue and stating, “scienter is associated with penalties not with taxes.”


22Italics, the Court’s.


in hand and quoted from the former as follows: "Out of a proper respect for the acts of a coordinate branch of the Government, the court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitations to the powers of Congress and completely wipe out the sovereignty of the States."¹⁹

A study of these cases suggests the quandary in which the courts are placed: either they must accept the declared purpose and policy of the legislature as controlling, even though the whole statute indicates something entirely different, or else they must declare that the legislature has committed an error or has been guilty of bad faith. There seems to be but one course for the courts to follow and that is for them, as they have done in the past, to view the statute as a whole and determine whether or not by any possibility it can be interpreted in accordance with the declared legislative purpose or policy. If this can be done, of course, in light of general principles of statutory construction, the statute will be held to be constitutional, but if the declared purpose and policy are at complete variance with the actual character of the statute and its operation, the court would be derelict if it relied solely on such declaration of purpose and policy. In fact such a view would be stultifying. To impugn the motives and good faith of a coordinate branch of the government, surely is a very serious matter, but to permit unconstitutional legislation to hide behind the cloak of a title or a declaration of policy is reprehensible.

The problem is aggravated when in addition to a declaration of purpose or policy the legislature includes a finding of fact. For example, after the Futures Trading Act was declared unconstitutional,¹⁰ Congress enacted another statute, the Grain Futures Act in which were recited congressional findings of fact that: transactions known as "fu-

¹⁹259 U. S. 20, 37, 42 S. Ct. 449, 450, 66 L. ed. 817 (1922).
tures” were affected with the public interest; they were susceptible to speculation, manipulation, and control; sudden and unreasonable fluctuations in price frequently resulted; such fluctuations in price were an obstruction to and a burden on interstate commerce; and that regulation was imperative to protect such commerce and the national public interest therein. The statute came before the court in the case of Board of Trade of the City of Chicago, et al. v. Olsen, et al., 21 decided in 1923. Mr. Chief Justice Taft again speaking for the court compared the instant case with Hill v. Wallace and quoting from the latter said: “It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or burden thereon.”22 The court held that the Grain Futures Act differed from the Futures Trading Act “in having the very features the absence of which” prevented the court from sustaining the earlier legislation.

Continuing its opinion, the court quoted from Stafford v. Wallace23 as follows: “Whatever amounts to more or less constant practice, and threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.” Then said the court, “in the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculations, manipulations and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the production of such commerce and the national public interest therein.” “It is clear” continued the court, “from the citations in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does

21262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 899 (1923).
22262 U. S. 1, 32, 43 S. Ct. 470, 476, 67 L. ed. 899 (1923).
23258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735 (1922).
work to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce in grain and that it is a real abuse." Two justices dissented from this opinion. The conclusion seems inescapable that a legislative finding of fact declared in a statute unless obviously false may result in the statute's being held constitutional when without such declaration the statute might be held void.

Somewhat similar to the two cases of *Hill v. Wallace* and *Board of Trade of the City of Chicago v. Olsen* are the cases dealing with the Agricultural Adjustment Act and the Agricultural Marketing Agreement Act. The former was considered in 1935 in the case of *United States v. Butler.* The Agricultural Adjustment Act declared that an economic emergency existed "due to the disparity of farm prices and those of other commodities, reducing farmers' purchasing power thus affecting transactions in farm commodities, burdening and obstructing interstate commerce." The act further declared that it was the policy of Congress to establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor as well as reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the past period. The technique employed was the levying of an alleged processing tax. Interestingly enough the government did not seek to have this statute upheld on the ground of regulating interstate commerce (despite the mention of it in the act) but sought to have it upheld as a valid tax. The court, with three justices dissenting, held that as a matter of fact the statute sought to regulate agricultural production and that the alleged tax was a mere incident, a means to that end. Since the majority of the court was of the opinion that regulation of agricultural production was beyond the power of the Federal Government to regulate, the statute was held unconstitutional.

Undaunted, Congress in 1937 enacted the Agricultural Marketing Agreement Act and declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing
power of the farmers.” Such interference was declared in the statute to “burden and obstruct the normal channels of interstate commerce.” And it was stated that it was the congressional policy, by the use of power delegated to the Secretary of Agriculture “to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period . . .”. The Supreme Court, by a five to four decision, upheld the constitutionality of the Agricultural Marketing Agreement Act in the case of United States v. Rock Royal Co-op., Inc., et al., which concerned marketing agreements affecting the production and distribution of milk.

The constitutionality of the Agricultural Marketing Agreements Act was again upheld in the case of H. P. Hood and Sons v. United States, decided at the same time. Mr. Justice Roberts dissented on the ground that there had been an unconstitutional delegation of legislative power to the Secretary of Agriculture. He maintained that there was no standard by which such administrative action was confined or executed, and that the only guide in respect to the choice of method which the Secretary of Agriculture might select for raising the price of milk was the declaration of policy embodied in the statute. Here

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27 With certain exceptions, as in the Agricultural Adjustment Act, the base period was fixed at August, 1909, to July, 1914, or if it was impossible to determine such period then the period 1919 to 1929.
29 Mr. Justice McReynolds and Mr. Justice Butler dissented, stating: “First, Congress possesses the powers delegated by the Constitution—no others. The opinion of this court in A. L. A. Schechter Poultry Corp. v. United States (1935), 295 U. S. 495, 79 L. ed. 1507, 55 S. Ct. 837, 97 A. L. R. 947, noteworthy because of modernity and reaffirmation of ancient doctrine—sufficiently demonstrates the absence of congressional authority to manage private business affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity, also sowing and reaping the fodder which inspires them.” 307 U. S. 533, 582, 59 S. Ct. 1017, 83 L. ed. 1446 (1939).
30 The dissenting justices stated further that even if this power were possessed by Congress it could not be delegated to another. Such delegation of power to the Secretary of Agriculture allowing him to “prescribe according to his own errant will and then to execute” was “not government by law but by caprice.” Mr. Justice Roberts, dissenting, maintained that the act was so administered, contrary to the terms of the statute, that all producers did not receive uniform prices for milk, thus the small handlers, placed at the mercy of the large ones, were destroyed and denied due process of law.
32 Mr. Justice McReynolds and Mr. Justice Butler joined in this dissent. 307 U. S. 588, 603, 59 S. Ct. 1019, 1027, 83 L. ed. 1478 (1939).
there is injected a new suggestion as to the effect of a legislative declaration of policy on the question of administrative action. It seems highly doubtful that this case was intended as authority for any such principle that a declaration of policy might replace a standard for administrative action.

In the field of public utilities we also are confronted with the effect of a legislative finding of fact on the constitutionality of legislative enactments. It is a truism that a business which is not by nature and character a public utility cannot be converted into one by legislative fiat. There have been instances in which legislatures have declared certain businesses to be public utilities which, by the nature and character of their holding out, were not, as a matter of fact, public utilities. Despite such legislative pronouncements, the courts have declared such statutes unconstitutional. But when a business once not considered one affected with a public interest becomes generally so considered, it would seem that a legislative finding of fact to that effect becomes of tremendous significance in a question of the constitutionality of the statute. Perhaps one should mention in passing a comparison of a legislative conclusion of law, for example, that a particular business is a public utility, with a legislative finding of fact which will support such conclusion of law.

The courts seem to have been impartial in holding unconstitutional legislation which, as a matter of fact, denies the declared constitutional purpose and policy since both federal and state statutes of this type have been declared invalid. There seems not to have been any greater tendency to declare state legislation unconstitutional because of an attempt by state legislatures to enact unconstitutional legislation behind the cloak of a declared purpose or policy than there has been in federal legislation, although probably there may have been in the mind of the court a belief that congressional legislation, since enacted by a coordinate branch of the government, is entitled to greater deference and consideration where declarations of purpose or policy and findings of fact have been included in such legislation. The Supreme Court seems to have been reasonably consistent, for in all the cases it has not been the declaration of purpose or policy alone that has been the determining factor, but such declaration coupled with the nature, character, operation and effect of the entire statute. In those cases dealing with the declaration of the finding of fact by Congress, such declaration seems to have been given greater weight in that the court has been unwilling to presume to doubt the correctness of this finding of fact.
THE DOCTRINE OF JUDICIAL REVIEW

unless there is no evidence to support it. It seems as if the court has applied here, the principle which is applied to administrative findings of fact, that such finding of fact will be accepted by the court unless from the evidence before it, such administrative body could not have arrived at the decision which it reached.

Let us consider by way of summary three types of statutes, one without a declaration of policy, another with such declaration, and still another with a legislative finding of fact added. In all three, of course, the presumption is in favor of their constitutionality, but in the second case a declared policy may result in a statute's being held constitutional when without it the opposite conclusion might be reached, since such declaration clarifies the legislative intent. And in the third case the likelihood of the statute's being held valid is enhanced, since the legislative finding of fact (unless arbitrary and without evidence) showing that the matter falls within the legislative power, supports the legislature's assumption of authority over it.

The position, therefore, of the court seems generally sound. It is inconceivable that a statute which actually, by nature and by operation, was intended to do one thing and attempts to do that thing should be held constitutional, if as a matter of fact it is unconstitutional, merely because the legislature has declared substantially that black is white. It is something like "a rose by any other name." Perhaps this attempt by a legislature to do something it feels would not receive sanction when reviewed by the courts, by including a declaration of purpose or policy quite different, would not exist were it not for judicial review. It is, perhaps, not too unreasonable to assume that did the responsibility for the constitutionality of legislation not rest ultimately on the courts the legislators might assume greater responsibility, to the end that legislation of doubtful constitutionality be not enacted. Unfortunately, even in the recent past, there have been instances where the executive and legislative branches both have presumed to secure enactment of legislation, regardless of any doubts of constitutionality, no matter how reasonable such doubts may have been. Such an attempt scarcely is calculated to impress the citizen with either the legal wisdom or good faith of such reckless proponents of doubtful legislation.

It is certainly true that a great deal of legislation inconsistent with the Constitution would have been allowed to stand had the courts been willing to accept as conclusive the legislative declarations of purpose and policy. If the Constitution is the supreme law of the land, as by its own terms it is declared to be, and if statutes enacted by transient
legislatures must conform to the fundamental law in order to be valid, and if the interpretation of such fundamental law and the statutes purportedly passed in pursuance thereof is a function of the judiciary, the courts must continue to hold unconstitutional legislative enactments which transcend the Constitution, even to the extent of looking behind the declaration of legislative purpose or policy when such declarations and the statutes themselves are irreconcilable. This they must do even though in the doing they question legislative good faith.
INCOME TAX DEDUCTIONS AS A MEANS OF EFFECTUATING GOVERNMENTAL POLICIES

ROBERT H. GRAY*

As a means of social control, income tax deductions obviously represent but a small segment of a much larger problem which permeates not only the entire field of taxation, but also the entire field of law, of politics, and of economics as well. The regulation of individual conduct has been a necessary by-product of all organized society. The planning and supervision of activity and the adjustment of differences have always been important parts of community life. Compliance has been secured by the use of self-restraint, coercion and hope for reward; the extent and the complexity of the machinery required for this purpose has varied with the economic and political development of the state and with the objectives desired and the means used to obtain them.

Contemporary industrial civilization, with its division of labor, its intricate financial system, and its large-scale production and distribution of goods, has demanded careful planning and coordination. Although opinions differ as to the proper place which government should occupy in this vast organization, few fail to appreciate the growing importance of political regulation and control. The Laissez-faire philosophy of the nineteenth century is being rapidly replaced by a less individualistic attitude. Administrative tribunals and state ownership and operation of property reflect this fundamental change. The close interrelationship between "government" and "business" makes it inevitable that the policies and actions of each depend upon and tremendously affect those of the other.

In addition to the direct control exercised by the federal, state, and local governments over public and private industry, the power to tax and the power to spend are being used to an increasing extent to supplement the more direct forms of regulation. In many types of situations the taxing power is a peculiarly effective method of effectuating "non-fiscal" policies. For many years it has been recognized that the

*Assistant Professor of Economics and Law, Washington and Lee University.

1 See Shoup, Facing the Tax Problem (1937) 129 et seq.

"Taxation for non-fiscal purposes is taxation not to produce revenue to carry on a given program of public expenditures but to produce directly certain eco-
collection of any tax necessarily affects social and economic institutions. Even when laid solely for the purpose of raising revenue, a tax may influence the buying habits of the public and consequently change the nature and location of industry; it may have a direct effect upon savings and upon the accumulation and distribution of wealth. In short, the government cannot collect revenue without “inevitably affecting social relations.” It is because of this inevitable effect that taxation assumes such great importance as a means of social control. “The only real issue,” it has been said, “is whether this powerful instrument shall be wielded blindly or whether it shall be intelligently directed toward the attainment of consciously sought social objectives.”

Greater recognition is being given to the fact that all governmental activities interact upon one another and unless there is a careful analysis of the purposes to be achieved by each there is great danger that they will nullify rather than support the general policies of the governing authority. The taxing and spending powers are thus being used with increasing effectiveness in the redistribution of income and wealth, to subsidize industry through tax exemptions and direct payments, and to encourage or prohibit certain types of conduct through special forms of taxation. Inheritance taxes, processing taxes and farmer benefit payments, protective tariffs, special taxes on oleo-margarine and state bank notes, exemptions from taxation, excess and undistributed profits taxes, taxes on liquor—these illustrate but a few ways in which the taxing and spending powers have been used to regulate the production, distribution, and consumption of goods and services.

However, in spite of the fact that federal, state, and local taxes
absorb more than one-fifth of the national income\textsuperscript{7} the wisdom of using the taxing power for non-fiscal purposes is still a subject of serious controversy.\textsuperscript{8} Although there has been no disagreement concerning the proposition that the collection of any tax necessarily affects business, there has been a sharp difference of opinion as to the proper method of treating this inevitable consequence of taxation. Many believe that the effect of taxation should be minimized as much as possible—that the principle of “neutrality” should be a fundamental tenet of public finance; if there must be social control, the control should be achieved by direct legislation enacted for that particular purpose. They emphasize the difficulty of constructing an equitable tax system under the most favorable circumstances and insist that, because of the scope and complexity of the revenue problem, any attempt to incorporate regulatory provisions into tax legislation makes it virtually impossible to secure a satisfactory answer to two questions which are said to be separate and distinct. The result of this failure to segregate taxation from regulation, it is argued, is inadequate revenue, ineffective control, or both.

This over-simplification of the problem, however, fails to take into consideration the fact that since all taxes affect the production, exchange, and consumption of goods and services, any attempt to “neutralize” this phenomenon is itself a method of social control. An insistence upon the maintenance of the \textit{status quo} requires a careful consideration of the effects of taxation and involves exactly the same type of “non-fiscal” judgment that is required when a tax is imposed for the purpose of raising revenue in a manner which will also lead to changed conditions of a kind thought desirable by the taxing authority. If the “leave-them-as-you-find-them”\textsuperscript{9} principle of taxation does not involve the exercise of control, then its proponents are reduced to the absurd position of advocating the collection of a tax regardless of its effect. This, of course, is never done. Whether “consciously, unconsciously, blindly, ignorantly, by greed and camouflage, by demagogic plutocracy or demagogic democracy,”\textsuperscript{10} the effect of a tax plays an important part in the legislative process. It is much better to accept the

\textsuperscript{7}See Moulton and others, Capital, Expense, Employment, and Economic Stability (1940) 271.

\textsuperscript{8}For example, see Lutz, Public Finance (1936) 371 et seq.; Tuller, The Taxing Power (1937) 13 et seq.; Todd, Taxation and the Redistribution of Wealth (1937) 22 Bulletin of the National Tax Association 269. Cf. Johnson, Vested Interests in Government Spending (1938) 17 Proceedings Academy of Political Science 73, 74, 75.

\textsuperscript{9}Buehler, Public Finance (2d ed., 1940) 658.

\textsuperscript{10}Commons, Instrumental Economics (1934) 821.
fact that legislators do consider expected effects and openly and intelligently to adapt them so that they will implement the policies of the government, than to permit a secret opposition to a changing order impair the very real value of an important instrument of control under the guise of economic doctrine.

Whatever may be the merits of the opposition to the use of taxation as a means of regulation, it is clear that so far as the income tax is concerned, taxation is being used for non-fiscal purposes. Although the need for revenue played an important part in the enactment of income tax legislation, the post-Civil War acts grew out of the Populist movement. The unrest and demand for social reform during the latter part of the nineteenth century contributed largely to the enactment of the tax declared unconstitutional in Pollock v. Farmers' Loan & Trust Co. While the bitter denunciation of the Court which followed this decision gradually subsided, the movement for tax reform continued and resulted in the Corporation Franchise Act of 1909 and the Sixteenth Amendment.

While the policy underlying the use of the graduated income tax has long been the subject of dispute, it is clear that regardless of whether its justification is found in the fact that it is the best measure of the taxpayer's "ability to pay" or that it is the most efficient means of "redistributing" income, the deduction provisions of the present federal statute are a necessary part of the successful operation of either policy. Since the taxpayer's gross income is brought within the scope of the statute and since two persons with the same gross income may have entirely different net incomes, neither the "ability" theory nor the "redistribution" theory will be followed unless the deduction section permits an accurate reflection of the prevailing concept of income.

In addition to the major function of determining income, the deduction section has been used for the purpose of effectuating other

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For a reprint of editorials see Department of Justice, Taxation of Government Bondholders and Employees (1938) Appendix Vol. 1, No. 10.

56 Stat. 11, 112.


See Internal Revenue Code of 1939 § 22.
INCOME TAX DEDUCTIONS

policies of the national government. The most obvious example is, of course, the deduction for charitable contributions.\footnote{\textit{Internal Revenue Code of 1939} § 23 (o), (q).} Largely in an effort to encourage private charitable institutions which perform a part of the activities of government, Congress has provided for a limited reduction in taxes for those who donate to such institutions.\footnote{\textit{E. g., see Committee Reports to this effect reprinted in 1939-1 (Part 2) C. B. \(741, 742, 769, 795.\)}\footnote{\textit{1939-1 (Part 2) C. B. 121.}} However, the deduction is not limited to charities. Contributions to federal, state, and local governments, and to war veteran and fraternal organizations are also encouraged. In an effort to "stimulate prospecting and exploration"\footnote{\textit{For the modified provisions see Internal Revenue Code of 1939 §§ 23 (m), 114 (b), (2), (3), (4).}} special deduction provisions have been included in various revenue measures.\footnote{\textit{Internal Revenue Code of 1939 § 23 (b).}} Deductions based on "discovery value" rather than cost and percentage depletion based on gross income have been used to encourage the development of the mining and oil and gas industries. Although the deduction of interest on indebtedness incurred to purchase or carry tax exempt securities is not permitted, an exception is made in the case of original subscribers who purchase United States obligations.\footnote{\textit{1939-1 (Part 2) C. B. 604.}} Since banks and other financial institutions pay interest on much of their funds used for investment, this exception was made in order to protect the market for federal bonds.\footnote{\textit{Internal Revenue Code of 1939 § 23 (p).}}\footnote{\textit{51 Cong. Rec. 5201.}}\footnote{\textit{1939-1 (Part 2) C. B. 761.}} Finally, the deduction of travelling expense while away from home incurred in the pursuit of a trade or business, "including the entire amount expended for meals and lodging"\footnote{\textit{Internal Revenue Code of 1939 § 23 (a) (1).}} and the deduction of payments made to irrevocable employees' pension trusts\footnote{\textit{For a discussion of the extent to which the combined income tax and estate tax deductions encourage gifts to charity see Harriss, Taxes and Philanthropy (1940) 32 Columbia Univ. Q. 112. See also Magill, Federal Regulation of Family}} were included for the respective purposes of encouraging persons to enter business for themselves (!)\footnote{\textit{For a discussion of the extent to which the combined income tax and estate tax deductions encourage gifts to charity see Harriss, Taxes and Philanthropy (1940) 32 Columbia Univ. Q. 112. See also Magill, Federal Regulation of Family}} and to prevent employees from being deprived of expected benefits which would result from a termination of revocable trusts.\footnote{\textit{261 Cong. Rec. 5201.}} Thus Congress has intentionally employed income tax deductions as a means of securing desired courses of conduct and in a very real sense much of this effort has been successful.\footnote{\textit{1939-1 (Part 2) C. B. 761.}}
However, as is usually the case with taxation, income tax deductions have produced consequences of both a favorable and unfavorable nature. For example, the deduction for interest is allowed even though not incurred in the production of income. Since the rental value of his residence is not taxed to the home-owner, this deduction, coupled with a similar one for taxes, encourages home ownership. In view of the exemption of building and loan associations from taxation this result appears to be consistent with congressional policy. But since the deduction is also allowed to corporations and since there is a policy to tax corporate income both to the corporation and later to the taxpayer when received in the form of dividends, the interest deduction offers an opportunity to avoid the tax to the corporation; by issuing bonds instead of stock to its shareholders, it is thus possible for many corporations greatly to reduce their taxable profit by the simple expedient of paying dividends in the form of interest.

Because of the deliberate use which Congress has made of income tax deductions in the past and because of the inevitable effect such deductions have on corporate policies and individual conduct, it is to be expected that this practice will become of increasing importance in the future. By adjusting deductions particularly important to selected types of income, by classifying and giving varying effect to certain expenditures, by providing for new and eliminating old deductions, it is possible to penalize or subsidize industries, occupations and trades, and to regulate through coercion and reward. Unless the Constitution stands in the way, an absolute control over deductions offers another powerful weapon of social control.
INCOME TAX DEDUCTIONS

The Supreme Court of the United States has repeatedly expressed the view that federal income tax deductions are exclusively a matter of legislative concern; that they involve statutory and not constitutional problems. Typical of the many statements found in the Board of Tax Appeals, lower federal court, and Supreme Court opinions is the one appearing in Helvering v. Independent Life Insurance Company: "Unquestionably Congress has power to condition, limit, or deny deductions from gross income in order to arrive at the net that it chooses to tax."

While the cases fully support the statement that Congress has the power to deny all deductions from gross income, there is considerable doubt as to the power of Congress to condition such deductions. Taken literally it would, of course, give the national government tremendous power over matters heretofore considered to be exclusively within the control of the states. Because of the steeply graduated personal income tax rates and because of the magnitude of corporate deductions when compared with net income, the economic coercion resulting from a threat of disallowance would compel prompt compliance with many forms of regulation.

However, the broad generalizations of the type quoted above appear in cases dealing with interpretations of the Fifth and Sixteenth Amendments. The questions under discussion related solely to the constitutional rights of private persons and did not involve alleged encroachments by the national government upon the reserved powers of the states. Actually, the Supreme Court has not permitted Congress to exercise uncontrolled discretion over deductions. In 1921, Congress revised the income tax sections relating to life insurance companies for the purpose of providing a more equitable method of taxing their

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36 More than a hundred cases have been found which support those cited in note 34 supra.
37 The refusal of a deduction to a taxpayer in the highest income bracket would result in an increase in the surtax of 75 per-cent of the deduction disallowed. See Internal Revenue Code of 1939, § 12.
38 Aggregate federal corporate tax returns for 1936 reported total receipts of $132,722,502,000. Total deductions amounted to $124,951,715,000. Although $78,029,107,000 of this latter sum represented cost of goods sold, nevertheless even the balance amounted to almost six times the net corporate income. U. S. Treasury Department, Statistics of Income for 1936, Part 2, p. 24.
earnings. Of the various deductions permitted there was one for tax exempt interest and another for 4% of certain reserves less the amount of the aforementioned interest which had been previously deducted.\textsuperscript{9} In \textit{National Life Insurance Co. v. United States}\textsuperscript{40} the Supreme Court declared the act unconstitutional. "Congress had no power purposely and directly to tax state obligations by refusing to their owners deductions allowed to others."\textsuperscript{41}

In view of these conflicting statements, the extent to which Congress may use deductions from gross income as a means of attaining objectives which could not be reached by direct action is by no means clear. As Congress has made no attempt to use the deduction section to secure such objectives since the decision in \textit{National Life Insurance Co. v. United States}, there are no additional Supreme Court cases directly in point. However, a number of important cases growing out of similar federal tax legislation and a rapidly changing political and economic panorama suggest a probable solution to the problem.

The growing importance of government in business, the immediate sensitiveness of a competitive economy to a relative change in prices and purchasing power, the impossibility of insulating the effects of direct regulation, taxation, and public expenditures—all obviously require coordinated and cooperative action on the part of private enterprise and the national, state, and local governments. Seriously divergent policies must inevitably result in chaos. In a sense it is thus unfortunate that the uncertainty as to the nature and extent of the powers of Congress and of the several state legislatures has often led to an artificial selection of the instruments of social control. Instead of selecting the most effective means of reaching a desired result it has often been necessary to select a cumbersome and even an unsatisfactory method of attaining a legislative objective.

Since the power of Congress to "lay and collect taxes, duties, imposts and excises"\textsuperscript{42} is said to embrace "every conceivable power of taxation,"\textsuperscript{43} and since taxation inevitably affects economic and social relations, it is not surprising that this fortuitous conjunction of political and economic power should be exercised with increasing frequency.

\textsuperscript{9}Revenue Act of 1921, \S 245.
\textsuperscript{40}277 U. S. 508, 48 S. Ct. 591 (1928).
\textsuperscript{9}U. S. Const. Art I, \S 8. "The Congress shall have the power to lay and collect taxes, duties, imposts and excises."
\textsuperscript{43}Brushaber v. Union Pacific R. Co., 240 U. S. 1, 12, 36 S. Ct. 236, 239 (1916).
Aside from its superior effectiveness for many purposes, it has the obvious advantage of constitutional validity in many types of situations,\textsuperscript{44} a validity which makes its use advisable from a political point of view even though the exercise of some other, but less extensive, grant of authority would be more advantageous from an economic standpoint. Thus constitutional considerations compel congressional use and misuse of the taxing power. Constitutional considerations likewise form the basis of attack upon the exercise of this power. Undoubtedly a large part of the opposition to the use of the national taxing power for non-fiscal purposes is based upon either an objection to an extension of the activities of Congress in general or an objection to specific regulations in particular rather than because of any fundamental disapproval of regulation by taxation. By insisting upon a different and, allegedly, more direct method of social control, it has been frequently possible to raise serious constitutional doubts as to its validity and thus discourage its enactment, or, if this fails, to argue that the legislation is not in substance a tax even though it is in form. Since every tax statute represents at least an ostensible attempt to raise revenue and necessarily operates as a method of control,\textsuperscript{45} the Supreme Court has frequently been called upon to determine the permissible limits of this inherent power-to-regulate-through-taxation. Unless it is to be supposed that the taxing power of Congress is the Achilles heel of our dual system of government, some line must be drawn between permissible revenue measures and unconstitutional interference.\textsuperscript{46} Yet the drawing of this line is extremely difficult. Running counter to the concept of states' rights is the powerful force of economic necessity. The development of transportation and communication has obliterated state boundaries for many practical purposes.\textsuperscript{47} It has long been recognized that in many situations regulation must be nation-wide if it is to be effective. The internal affairs of the states are becoming increasingly subject to federal control.

\textsuperscript{44}\textit{See} Hall, \textit{Government and Business} (1939) 311-314.

\textsuperscript{45}"In the levying of every tax Congress must inevitably have a purpose other than the raising of revenue since it cannot escape the responsibility of controlling in the national interest the non-fiscal regulatory effects of the distribution of tax burdens. There can, in short, be no such thing as taxation for revenue only." Cushman, \textit{Social and Economic Control through Taxation} (1934) 17 Minn. L. Rev. 757, 764.

\textsuperscript{46}"Congress is not empowered to tax for those purposes which are within the exclusive province of the states." Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. 1, 199 (U. S. 1824). See also, Powell, \textit{Child Labor, Congress, and the Constitution} (1922) 1 N. C. L. Rev. 61, 69; Rottschaefer, \textit{Constitutional Law} (1939) 175 et seq.

\textsuperscript{47}E. g., the Shreveport case, Houston, E. & W. Texas Ry. Co. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1914).
In addition to the current trend toward greater centralization, those who oppose the use of the taxing power for non-fiscal purposes have been faced with a long-continued course of legislative conduct to the contrary, conduct which has been sustained, moreover, by numerous Supreme Court decisions.

The framers of the Constitution were well aware of the regulatory aspects of taxation. Colonial tariffs and the interstate barriers under the Articles of Confederation supplied ample training in the use of tax legislation for non-fiscal purposes. This recognition was voiced from the floor of the Convention and is contained in the Constitution itself. The requirement that direct taxes be apportioned is a lasting memorial to a keen appreciation of the possible effect of a national capitation tax upon the existence of slavery in the South.

The second act of the new Congress, a tariff on imports "for the support of government ... and the encouragement and protection of manufactures," eloquently describes the prevailing legislative opinion in 1789. Furthermore, this use of the taxing power to secure collateral results was not confined to import duties. In 1791 a tax was laid on domestic liquor; although enacted primarily for the purpose of raising revenue, one of the reasons given for this particular exaction was that it would tend to discourage the consumption of alcoholic beverages. Thus, the virtually contemporaneous action of members of Congress...
gress, many of whom were members of the Constitutional Convention, indicates that the latter body saw no objection to taxation for regulatory purposes—at least so long as the statute was in the form of a revenue measure habitually employed for fiscal purpose. Congress was deliberately given very broad taxing powers; there was no intention to perpetuate the fundamental weaknesses of the Confederation. These powers were known to have regulatory consequences, yet there was no attempt to confine such consequences within the limits of the other delegated powers.

In view of the scope of the federal taxing power and the historical basis for its use for non-fiscal purposes, it was to be expected that attempts to use it to burden and to prohibit would be sustained by the Supreme Court. And such has been the case. As long as the statute has been in the form of an ordinary revenue measure it has been invariably upheld. There has been no constitutional objection to a tax which "merely" handicaps or discourages a given course of conduct. Thus in Veazie Bank v. Fenno the "tax" on state bank notes was sustained even though it was clear that the statute would not produce revenue. Although the Court did mention the fact that Congress had the power to regulate currency, the decision was based squarely upon the proposition that Congress had the power to tax such notes and having this power, the Court would not inquire into the amount of the tax or the purpose for which it was enacted.

The doctrine of the Veazie Bank case was reaffirmed in McCray v. United States. Although it was argued that the federal tax on colored oleomargarine was so high that it would destroy the industry, the Court refused to inquire into the reason for its enactment. There being a power to tax, the rate was not a matter of judicial concern. Furthermore, even if there had been an abuse of power by Congress, the Court would not abuse its own power by disciplining another branch of the national government. Other but less extreme cases indicated the same judicial attitude. An inheritance tax was sustained in Knowl-

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55 Since 1789 the Federal Government has used the taxing power to encourage or discourage, or even destroy, certain businesses, regulate others, and prevent still others from entering the field.” Anderson, Taxation, Recovery, and Defense (1940) 168.
56 Wall. 533 (U. S. 1869).
57 195 U. S. 27, 24 S. Ct. 769 (1904).
58 195 U. S. 27 at 54, 24 S. Ct. 769 at 776 (1904).
ton v. Moore and a tax on foreign-built yachts in Billings v. United States, the former tax received strong congressional support because it was admittedly a method of reducing large family fortunes while the latter tax was enacted as a measure to protect domestic ship-building. An attempt to regulate corporations and at the same time to avoid, in part, the decision in Pollock v. Farmers' Loan & Trust Co. was successful when the Corporation Excise Tax Act of 1909 was upheld in Flint v. Stone-Tracy Co. The objection that a tax on corporations chartered by the states would enable Congress to destroy such institutions was said not to be a matter for the Court to decide. "The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice."

In addition to sustaining prohibitive sanctions in the bare form of tax legislation, the Supreme Court for a number of years indicated a willingness to sustain regulations which were incorporated in the statute for the ostensible purpose of aiding in the collection of the tax. In Nicol v. Ames a federal "statute of frauds" for boards of trade was sustained as a legitimate part of a tax statute. While the act prescribed in detail the information to be contained in the memorandum of sale, it was justified on the ground that the provisions were simply "means of identifying the sale, and for collecting the tax by means of the required stamp." Again, in Felsenheld v. United States, the Court upheld a section of the statute laying an excise tax on tobacco which prohibited the inclusion of "any article or thing whatsoever" on, in, or with the package containing the tobacco other than specified stamps and labels; even though the coupon in question was of inappreciable weight and in no way interfered with the collection of the tax, Congress could provide that the package bearing the revenue stamps "shall contain only the article which is subject to the tax."

A much more ambitious scheme to use the ancillary powers of taxation was sustained in United States v. Doremus. In declaring the Har-
INCOME TAX DEDUCTIONS

rison Narcotic Drug Act constitutional, the Court said that Congress was clearly authorized to select as a subject of taxation dispensers of narcotics; since the detailed provisions relating to their registration had the tendency to diminish the clandestine sale of narcotics without paying the tax,68 "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."69

Thus, for the first one hundred and thirty years under the Constitution, the Court refused to make a distinction between taxes for fiscal and for non-fiscal purposes. Although federal taxes had been declared unconstitutional because they were said to violate the requirement of apportionment,70 or were on exports,71 or were contrary to the doctrine of intergovernmental tax immunity,72 no tax statute had been held invalid because of its regulatory effect. The national government had a broad taxing power, and in the exercise of this power its discretion as to the amount to be exacted was not subject to judicial review. Taxation often acted as a deterrent and occasionally as a prohibition; the motive for such action was immaterial. The selection of the object of the tax always involved non-fiscal considerations.73 Consequently when President Taft, in order to eradicate an occupational disease resulting from the handling of white phosphorus, recommended,74 and Congress

68The tax was "$1. per annum."
72Collector v. Day, 11 Wall. 113 (U. S. 1871); United States v. Railroad Co., 17 Wall. 322 (U. S. 1873).
73"It is a common but, as we think, erroneous opinion in some quarters that the legislative body enacting a taxing statute cannot with propriety take into consideration any other matters but the revenue sought to be obtained, and that if it has other purposes besides raising revenue in imposing the tax, or in prescribing a particular manner in which it shall be levied, the tax is invalid. When enacting a statute, it is not only the right but the duty of a legislative body in such cases to take into consideration the effect of the tax in an economic way on the people as a whole, and the beneficial or injurious effects as the case may be which will result from the manner in which the tax is levied. If this were not done, the result might be highly injurious to the public generally, and result in a condition of affairs which would arouse so much protest and objection that our institutions would be endangered." Green, J., in F. Couthoui, Inc. v. United States, 54 F. (2d) 158, 162, 163 (Ct. Cl., 1931).
74Message of December 6, 1910.
enacted, a prohibitive tax on the manufacture of white phosphorus matches, the constitutional power of the national government was not seriously questioned.76

Because of the unbroken line of authority sustaining the taxing power it was only reasonable that, when an attempt to regulate child labor through the exercise of its power over commerce failed in Hammer v. Dagenhart,77 Congress should immediately thereafter seek to reach the same result through taxation. However, in Bailey v. Drexel Furniture Co.78 the Court refused to follow its earlier practice and declared invalid the tax on the net profits of a business knowingly employing child labor. While indicating a willingness to concede that the question of intent would not be considered when dealing with a prohibitory excise on “a commodity or other thing of value,” Mr. Chief Justice Taft, speaking for the majority, insisted that a detailed course of conduct prescribed by the act presented a different problem; it was an attempt to regulate subjects not entrusted to Congress. Although the Court said that the provisions appearing on the face of the statute were not “naturally and reasonably adapted to the collection of the tax,”79 and thus sought to distinguish it from the narcotics tax, it should be noted that the detailed specifications in the child labor statute, unlike those of the earlier legislation, were not enacted as an ostensible aid to collection. Instead, they were merely descriptive of the industries subject to the tax—just as “notes used for circulation,” “oleomargarine which is yellow in color,” and “white phosphorus matches” described, in part, the businesses subject to other federal excise taxes. It is difficult to see how an excise tax on a business employing child labor discloses a clearer intention to regulate matters within the control of the states than does an excise on matches containing white phosphorus; yet to Taft the President and Taft the Chief Justice (in both offices under oath to support the Constitution of the United States) the two were entirely different. If the classification was valid under the Fifth Amendment, the Tenth Amendment should not have stood in the way. As was illustrated by the state bank note, oleomargarine, narcotics, inheritance, and corporation tax cases, the power to tax necessarily carried with it the power to interfere with local affairs. Yet in Hill v. Wal-
lace, decided the same day, the Court again held a business tax invalid. A "tax" on the sale of grain at boards of trade other than those boards of trade which complied with the requirements of the statute was also said to be an attempt to regulate rather than to tax.

Beginning with the Child Labor Tax Case, the Court for more than a decade thereafter displayed a vacillating attitude with regard to the power of Congress to tax for non-fiscal purposes. For example, it refused to grant certiorari in two cases where lower federal courts sustained the federal tax on the sale of tickets away from the box office. Although the rate was so graduated that "the ticket speculator has no motive to sell for a premium of between 50 cents and $1," the lower courts did not consider this a direct interference with state activity. Perhaps the fact that the Supreme Court had previously held that the states themselves could not regulate the price of theatre tickets justified the belief that this was not an "unauthorized exercise by Congress of police power." Any doubt as to the availability of the taxing power for regulatory measures was put to rest by the Supreme Court in J. W. Hampton, Jr., & Co. v. United States. "So long as the motive of Congress and the effects of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action."

Yet in spite of this the Court in United States v. Constantine declared invalid a special excise tax on persons carrying on a liquor business in violation of state law. Since the exaction in question was in addition to the regular tax, since it was highly exorbitant, and since the condition of its imposition was the commission of a crime, the

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8423 F. (2d) 44, 47 (C. C. A. 2d, 1927).
85276 U. S. 394, 48 S. Ct. 348 (1928). Tariff Act of 1922, § 315, authorizing the President to regulate customs duties in order to equalize the costs of production in the United States and competing foreign countries held valid.
87298 U. S. 287, 56 S. Ct. 223 (1935).
Court declared it to be a penalty, and being a penalty, it was an attempt to "usurp the police powers of the state." Mr. Justice Cardozo in his dissenting opinion pointed out, however, that the classification was a reasonable one, that the large profits of an illegal business, the expense and difficulty of tax collection, and the propriety of a higher tax on illegality all led to the conclusion that the statute was an appropriate means of raising revenue.

In United States v. Butler88 the A. A. A. processing tax was held invalid since it was part of a scheme to regulate farm production. Since the statute under consideration contained detailed regulatory provisions relating neither to the description of the persons subject to the tax nor to the means of collecting it, it represented a departure from the earlier tax legislation. It was largely because of this departure that the act was declared unconstitutional. If the expenditure section of the statute had been carefully insulated from the tax section, under prior decisions89 the taxpayer would have been in no position to object to the manner in which the proceeds were used. Standing alone, the processing tax was clearly a valid exercise of the federal taxing power.90 Except as a lesson of doubtful value in the drafting of statutes, the Butler case has little bearing upon the question of regulatory taxation; and even the uncertainty created by the Constantine case has been largely dispelled.

The National Firearms Act91 providing for the registration and taxation of dealers, a tax of $200 on each transfer of certain types of firearms, and for the identification of transferees was sustained in Sonzinsky v. United States.92 Even though it was argued that the statute was enacted for the purpose of regulating and suppressing traffic in firearms, the Court refused to limit the federal taxing power. It said:

"Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed. . . . But a tax is not any the less a tax because it has a regulatory effect. . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. . . . Inquiry into the

91148 Stat. 1236 (1934).
hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."

Thus the Court reaffirmed the traditional view that a statute appearing on its face to be a revenue measure will be treated as an exercise of the taxing power. The fact that Congress intends to achieve some result in addition to an avowed purpose of seeking funds for public expenditure will not defeat the legislation; "objective constitutionality" and not "the process of psychoanalysis" determines its validity.

However, if the statute contains detailed regulations which do not facilitate the collection of revenue a much more serious question is raised. In *Carter v. Carter Coal Co.* a tax of 15% on the sale price of bituminous coal with a 13½% drawback for those operators who complied with the Bituminous Coal Conservation Act was declared to be a penalty and not a tax. But in *Sunshine Anthracite Coal Co. v. Adkins* the 19½% tax imposed by the Bituminous Coal Act of 1937 upon non-code members engaged in interstate commerce was sustained, the regulatory provisions being "clearly within the power of Congress under the commerce clause of the Constitution." Since the tax question was not seriously argued in the *Carter* case it is difficult to evaluate this method of regulation when the federal taxing power alone is the basis for the local interference. A conditional tax or a conditional drawback may be declared invalid even though a classified tax which gives something of the same result may be valid. That is, a "tax" may be used to discourage or prohibit a certain course of conduct even though it may not be possible to secure affirmative action through a coercive exaction; situations requiring administrative flexibility may be beyond federal control even though the static aspect of the same problem may be effectively regulated.

However, any implied limitations upon the federal taxing power must be carefully examined. The relatively few cases declaring federal tax statutes unconstitutional are being carefully reconsidered by the Supreme Court. The restriction against the taxation of the salaries of

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Cushman, Social and Economic Control Through Federal Taxation (1934) 18 Minn. L. Rev. 757, 774 et seq.
291 U. S. 381, 60 S. Ct. 907 (1940).
510 U. S. 381, 393, 60 S. Ct. 907, 912 (1940).
federal judges has disappeared. There is increasing reluctance to strike down retroactive taxes and there is a tendency to narrow the direct tax concept so that it includes only capitation taxes and assessments upon real property. The doctrine of intergovernmental tax immunity is rapidly disappearing, and it is even possible that the Court will revert to the view advanced by Chief Justice Marshall in *McCulloch v. Maryland* that state institutions are protected from the national taxing power only by the uniformity and apportionment clauses of the Constitution and by the locally elected members of Congress. In fact, the Court has sustained the use of "economic coercion" on the states in order to compel them to enact legislation thought desirable by Congress. The 80% credit against the federal estate tax for amounts paid to state governments under similar statutes was sustained over the objection of the State of Florida. And in *Chas. C. Steward Machine Co. v. Davis* a federal tax on employers with a 90% credit for contributions made by such employers to state unemployment funds established in compliance with federal regulations was held valid. Compared with the possible implications of the *Davis* and state employee tax case, the interference with local affairs objected to in *United States v. Constantine* appears mild indeed; and even if the *Constantine* decision has not been immunized by *Sonzinsky v. United States*, the strong dissent in the earlier case and the present attitude of the Court give it very doubtful authority.

The other cases holding federal tax statutes invalid because of their non-fiscal character are of small solace to opponents of federal regulation. *United States v. Butler* never amounted to more than a "lesson in legislative draftsmanship," and the rapidly expanding power over commerce has largely nullified the effects of the remaining cases. Four months after *Hill v. Wallace* Congress enacted a similar statute which

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102 Wheat. 316, 435, 436 (U. S. 1819).
was sustained in *Chicago Board of Trade v. Olsen*. The regulation of the bituminous coal industry which was declared invalid in *Carter v. Carter Coal Co.* was redrafted and upheld in *Sunshine Anthracite Coal Co. v. Adkins*. Even *Bailey v. Drexel Furniture Co.* has been effectively circumscribed by the implications of *National Labor Relations Board v. Jones & Laughlin Steel Corporation* by the specific provisions of the Fair Labor Standards Act of 1938, and by *United States v. F. W. Darby Lumber Co.*

The refurbishing of the taxing power, the broadening of the concept of interstate commerce and of the doctrine which permits national regulation of matters which "directly affect" such commerce, the control over foreign trade and banking and currency, the exclusive management of the postal service, and the power to enact bankruptcy measures—all combine to give tremendous power to the national government. In view of the multiple powers which may be exercised by Congress and the unsympathetic manner in which the Supreme Court has recently cited those tax decisions which overrode important national legislation, it may be reasonably supposed that future attempts to use the taxing power either as an independent source of authority for regulation or as an aid to some other delegated power will meet with little constitutional restraint.

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109 262 U. S. 1, 43 S. Ct. 470 (1923).
110 301 U. S. 1, 57 S. Ct. 615 (1937).
111 52 Stat. 1060 (1938) §§ 1 (f), 12.
THE ENFORCEMENT OF ORAL PROMISES TO GIVE REAL ESTATE SECURITY

Theodore A. Smedley*

Whenever a series of cases involves the use of a discretionary power by a court of conscience, the results of such cases and the reasoning advanced to support such results are certain to lack the quality of uniformity. As the discretion and the conscience of individual human beings differ, so differ the decisions in these cases. Nor can it ever be expected, even hoped, to be otherwise, because each slight variance in facts and circumstances of one case from another may and often should tip the balance of justice on one side or the other. The necessity of adhering to a uniform system could readily become an intolerable restraint on the efforts of the courts to obtain the proper solution to the problems raised in the litigation. However, freedom from the necessity of following a set standard of decision may also lead to interminable confusion. If no precedent is to be observed as binding, or even strongly persuasive, individuals have no means of ascertaining their rights and liabilities, attorneys have no bases for arguing their clients' claims in the courts, and the courts themselves have no guides to direct the course of their decisions. Non-uniformity becomes chaos, and litigation becomes pure gambling, turning on the flip of a court's conscience.

A better demonstration of the above truths could hardly be found than in the attempts of American courts to determine what effect should be given to oral promises to give real estate security for a loan or some similar obligation. The one point of general agreement in this question is that the giving of a legal mortgage on real estate involves such a transfer of an interest in land as to come within the scope of the Statute of Frauds.1 Thus, a purely oral promise to give a security interest in realty does not constitute a mortgage nor give any lien in the eyes of a court of law, no matter how solemn nor well-evidenced the oral promise may be. Since equity is known to be able in many circum-

*Assistant Professor of Law, Washington and Lee University School of Law.

stances to remedy the shortcomings of legal relief, and since equity courts can be especially adept at side-stepping the obstacles of a statute-prescribing formalities, it is natural that the courts of equity are frequently asked to decree the enforcement of oral security promises. The number and variety of different views which have been expressed in answer to requests for such equitable relief are amazing.

Take as an example the cases arising with these somewhat oversimplified facts as a nucleus. Landowner makes an oral agreement with lender that if the latter will lend a stated sum of money on stated terms, landowner will give a mortgage on his property to secure the repayment of the loan. The money is advanced and accepted, but for some reason a formal mortgage is never executed. Landowner failing to repay the loan, lender seeks the aid of equity to declare and enforce his security in the land. Perhaps the leading case in the field is *Sleeth v. Sampson*, decided by the New York Court of Appeals in 1923, ruling that the lender is not entitled to the lien sought. However, two earlier

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2Consider, for instance, the power of equity to grant specific performance of oral contracts to convey land absolutely, Clark, Principles of Equity (1919) § 130; McClintock, Equity (1936) § 55; and to declare a deed absolute in form to be a mortgage, Jones, Mortgages (8th ed. 1928) § 340; Walsh, Mortgages (1934) § 7: Oral Understandings At Variance With Absolute Deeds, (1939) 34 Ill. L. Rev. 189.

3In asking equity to give him the benefit of the promised security, the borrower may present his request in various forms. The bill may be for specific performance of an oral contract to give a mortgage; it may ask for the declaration and foreclosure of an equitable lien; or it may seek to impress a lien on land; or some other variation of one of these phrases may be employed.

It is to be understood that in case the rights of any bona fide purchaser of a legal interest from the landowner intervene, such rights will be superior to the claims of the borrower, who has merely an equitable interest. This discussion is intended to consider only the situation in which no such third parties are involved, so that the issue is simply as to the rights between lender and borrower. The authorities cited will go to this issue only, unless the contrary is expressly stated. However, this is not to say that persons in addition to the lender and borrower may not sometimes be involved. Creditors of the borrower are certainly interested, as are purchasers or incumbrancers who for some reason may not be classed as bona fide purchasers. No attempt will be made here to designate precisely what persons would stand prior to the lender in claiming an interest in the land. A few cases bearing on this point are: Farmers' State Bank v. St. Aubyn, 120 Kan. 66, 242 Pac. 466 (1926); Fitzgerald v. Fitzgerald, 97 Kan. 408, 155 Pac. 791 (1916); Lane v. Lloyd, 33 Ky. L. 570, 110 S. W. 401 (1908); Penn Mutual Life Ins. Co. v. Kimble, 132 Neb. 408, 272 N. W. 231 (1932); Herring v. Whitford, 119 Neb. 725, 232 N. W. 581 (1930); Bloomfield State Bank v. Miller, 55 Neb. 249, 75 N. W. 569 (1898); West v. First Baptist Church of Taft, 123 Tex. Civ. App. 388, 71 S. W. (2d) 1090 (1934). 237 N. Y. 69, 142 N. E. 355 (1923). It has been said that this case was properly decided because the loan was not actually made, and therefore no basis for an equitable mortgage was present. Walsh, Mortgages (1934) § 8, p. 48. However, Mr. Justice Cardozo, writing the opinion for the New York Court of Appeals said: "Some money
New York cases are the authorities most often cited for the proposition that the lender should be given the benefit of the security orally promised to him. In New Jersey, cases are on record from 1810 to 1937 upholding the propriety of equity's affording relief to the lender, but in 1938 the New Jersey Court of Errors and Appeals, in a 9-6 decision, reversed a lower court decision which had granted specific performance of the oral promise, apparently believing that the established rule of New Jersey was being invoked. The West Virginia Supreme Court of Appeals in 1925 decreed specific performance of the oral promise, even though counsel for the plaintiff did not think to argue his case on this theory. Yet eight years later the same court, with three of the same judges still on the bench, held that no such relief could be given, the court seemingly not remembering the existence of the earlier decision. In an old Maryland case, the court went out of its way to rule that the Statute of Frauds did not apply in such a case (the defendant had not contended that it did!), but within two decades the same court, reaching the opposite result in the same kind of a suit, took occasion to flay the former opinion unmercifully. In their "extreme generality" the earlier statements of the court would, "if adopted as rules of decision . . . operate as a judicial repeal of the statute of frauds."

The central bone of contention in most of these cases was whether or not the effect of the Statute of Frauds could be obviated by finding sufficient part performance by the lender-promisee to enable equity to decree that the landowner-promisor must specifically perform his part was then handed to the borrower, though exactly how much the witness who overheard the conversation was unable to state." 237 N. Y. 69, 71-2, 142 N. E. 355, 356 (1923).
of the oral agreement. Here, as in cases involving oral land sale contracts, a difference of opinion exists as to what constitutes sufficient part performance to take the case out of the operation of the Statute. It is to be noted in passing, that this disagreement in turn springs from a lack of consensus as to the basis and origin of the part performance doctrine itself. While these arguments rage, other authority contends that the issue is irrelevant entirely because the part performance doctrine of land sale cases is not applicable to oral security promise cases in any event, and some go so far as to cut the ground from under the whole basic issue of how equity can avoid the Statute of Frauds by declaring that the Statute was never intended to extend to cases calling for such special functions of equity powers. On the other extreme, there is an occasional refusal to recognize that equity courts even have jurisdiction in the cases under consideration, because the lender's remedy at law is adequate.

Cases holding for or against the lender's prayer for relief are frequently based on inadequate authority, and when confronted with

1941] THE ENFORCEMENT OF ORAL PROMISES 213


[4]Schram v. Burt, 111 F. (2d) 557 at 562 (C. C. A. 6th, 1940); Sprague v. Cochran, 144 N. Y. 104 at 113, 38 N. E. 1006 at 1002 (1894). See Costigan, Interpretation of the Statute of Frauds (1919) 14 Ill. L. Rev. 1. The last reference makes an argument that the original framers of the English Statute of Frauds specifically intended that it should apply only to law courts. The cases cited apparently derive their authority from the clause found in some modern Statutes of Frauds, to the effect that interests in land raised by operation of law are not within the mandate of the Statute. See note 42, infra.


[6]Brown v. Stapleton, 24 N. E. (2d) 909 at 911 (Ind. 1940) (ruling that oral promise is within Statute and therefore unenforceable is made in a subordinate clause, no authority cited); Brown v. Drew, 67 N. H. 569, 42 Atl. 177 (1894) (one paragraph opinion): Aaron Frank Clothing Co. v. Deegan, 204 S. W. 471 (Tex. Civ. App. 1918) (rules on Statute of Frauds issue in two sentences; one of two cases cited is a trust case, and several Texas cases to contrary are ignored); Williams v. Rice, 60 Mich. 102, 26 N. W. 846 (1886) (decision to enforce lien made in two sentences, no authority cited).
a precedent contrary to the result desired to be reached, courts have been known to distinguish the troublesome precedent with little more than a hollow oratorical flourish.\textsuperscript{20}

In this mass of irreconcilables, generalizations must be somewhat tenuous. Probably the numerical weight of authority is represented by cases enforcing the lender’s lien on the land in one manner or another.\textsuperscript{21} But the opinion is here ventured that there has been at least a noticeable trend since about 1920 toward the decision that the lender can be given nothing on the basis of the oral promise of his debtor to give security. Thus, since the case of \textit{Sleeth v. Sampson} in 1923,\textsuperscript{22} New York has held to the rule that the oral promise will not be enforced, though the earlier decisions in that state were thought to hold to the contrary.\textsuperscript{23} As already stated, New Jersey reversed its field in 1938, in a positive, if not well-considered, decision in \textit{Feldman v. Warshawsky}.\textsuperscript{24} In 1921, Ohio joined the jurisdictions denying relief.\textsuperscript{25} Also already referred to is West Virginia’s turn about between 1925 and 1933.\textsuperscript{26} Kansas, after having pursued an unusually intelligent course

\textsuperscript{20}For instance, \textit{Feldman v. Warshawsky}, 125 N. J. Eq. 19, 4 A. (2d) 84, 85 (1938). The chancery court had relied upon \textit{Dean v. Anderson}, 34 N. J. Eq. 496 (1810) which had been widely cited as authority in other cases. In reversing the chancery court decision, the Court of Errors and Appeals disposed of this old and venerable precedent with this observation: “In \textit{Dean v. Anderson} there was a complicated situation of exchange of properties, involving a mortgage. All the deeds were executed and delivered and all that remained was the delivery of one mortgage.” The court did not take the trouble to explain just why these facts were significant as distinguishing factors. Actually they seem to have provided no sensible distinction.

\textsuperscript{21}Of some sixty-odd cases found which turn on this issue, or consider it directly, approximately forty favored an enforcement of the lien on one theory or another. It is not pretended that these cases make up an exclusive list of the litigation in the field, but it is believed that they include the most important decisions and are representative of the entire body of the case law on this point.


\textsuperscript{23}Sprague v. Cochran, 144 N. Y. 104, 28 N. E. 1000 (1892); \textit{Smith v. Smith}, 125 N. Y. 224, 26 N. E. 259 (1891). See note 5 supra.

\textsuperscript{24}125 N. J. Eq. 19, 4 A. (2d) 84 (1938).

\textsuperscript{25}103 Ohio St. 230, 133 N. E. 70 (1921).

for several decades, in 1938 seems to have slipped into a rut of faulty reasoning in denying enforcement of an oral security promise. Early cases in Kansas granting relief on proper reasoning: Farmers' State Bank v. St. Aubyn, 120 Kan. 66, 242 Pac. 466 (1926); Fitzgerald v. Fitzgerald, 97 Kan. 408, 155 Pac. 791 (1916); Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 80 Pac. 49 (1905).


Relief has been favored, mostly in older cases which are apparently unquestioned, in Arkansas: King v. Williams, 66 Ark. 333, 50 S. W. 695 (1899); Lowe v. Walker, 77 Ark. 109, 91 S. W. 22 (1905); Florida: Craven v. Hartley, 102 Fla. 282, 135 So. 899 (1931); Illinois: Grigaitis v. Gaidauskis, 214 Ill. App. 111 (1919); Iowa: Vickers v. Hewins, 184 Iowa 689, 189 N. W. 119 (1919); Oklahoma: Allender v. Evans-Smith Drug Co., 3 Ind. Trr. 626, 64 S. W. 558 (1901); see Nelson v. King, 92 Okla. 5, 217 Pac. 360 (1923); Oregon: see Tucker v. S. Ottemeiner Estate, 46 Ore. 585, 81 Pac. 560, 561-62 (1905); South Dakota: Baker v. Baker, 2 S. D. 261, 49 N. W. 1064 (1891); Hollister v. Sweet, 32 S. D. 141, 142 N. W. 255 (1919); Wisconsin: Poole v. Tannis, 137 Wis. 563, 118 N. W. 188 (1908); Ludwig v. Ludwig, 170 Wis. 41, 172 N. W. 726 (1919).


Opinion in Kentucky appears to be about evenly divided: see Keeton v. Owens, 228 Ky. 522, 15 S. W. (2d) 487, 488 (1929); Lane v. Lloyd, 33 Ky. L. 570, 110 S. W.
As to the reason for this apparent shift of opinion, one can only speculate. Perhaps the tendency against granting relief is traceable to the increasing popularity in these cases of the part performance doctrine, and to the narrowing of this doctrine generally, evidenced in the stiffening reluctance of courts to allow the Statute of Frauds to be circumvented except where the part performance will actually (not merely possibly) leave the promisee with irreparable losses unless specific performance is granted. Or perhaps the judiciary is becoming of the opinion that in these days of universal education and a plentiful supply of legal counsel there is no excuse for the failure to put business transactions in written form as required by statute. With this view the writer has no quarrel. If the aim of the courts is to force upon the business public a more orderly system of dealing, it seems hardly open to question that the goal is a desirable one. But as to the methods used to attain this purpose, there is strong need for more consideration. Nor is the need for clearer thinking confined to the decisions denying enforcement of the oral promise to give security, for courts granting the relief do so as often as not on inaccurate reasoning.

The difficulty experienced by the courts in making sound determinations in these cases springs from the seeming close parallel between the situations in which a landowner has promised orally to give security in the land, and that in which a landowner has promised orally to sell the land. The promise to convey the security interest is thought to be equivalent to the promise to convey the absolute title, and the return promise to lend money is presumed to stand in the same position as the vendee’s promise to pay the purchase price for the land. Since the Statute of Frauds is held to cover both conveyances of an absolute title and of a security interest, the courts, having accepted the analogy between the two situations as being complete, naturally have reached the conclusion that the same manner of avoiding the effect of the Statute must apply identically whether the case involves an oral promise to sell land or an oral promise to give security in land.

\[401, 402 (1908); Sandy Hook Bank’s Trustee v. Bear, 252 Ky. 609, 67 S. W. (2d) 972, 974 (1934)\]

\[29] In four jurisdictions, Kentucky, Mississippi, North Carolina, Tennessee, the part performance doctrine has been completely rejected: Clark, Principles of Equity (1919) § 134; McClintock, Equity (1936) § 55. That the stricter view of when specific performance will be given is increasing in favor: Walsh, Equity (1930) § 78.

\[30] For example: Sleeth v. Sampson, 237 N. Y. 69, 73, 142 N. E. 355, 356 (1923) “We see no distinction in this respect between a payment for an absolute conveyance and a payment for a mortgage”; Feldman v. Warshawsky, 125 N. J. Eq. 19, 4 A. (2d) 84, 85 (1938). In virtually every security promise case turning on the part performance
Further examination of the two transactions, however, quickly brings to light several significant differences. In the first place, the intention of the contracting parties with regard to the land is not the same. The prospective vendee has the essential aim and purpose of obtaining ownership of the land, presumably motivated by such considerations as an expectation of taking produce from the land, or selling the land for profit, or making a home on it, and so on. The lender, on the contrary, ordinarily has no direct designs on the land itself. He does not particularly care to possess the land and has no specific intention of becoming its owner, either immediately or in the future; his desire is to assure the repayment of the money being loaned to the landowner. He takes the borrower's promise that the land shall stand as security because the land seems to be the best assurance of repayment that the borrower can give. Had some personal property been available for as sound a security, or some obligation of personal suretyship, the lender would probably have been as well satisfied.

From this factual difference arises a difference in the relief needs of the vendee and the lender. Since the vendee wants the land, and since land is regarded as of such an unique character that the loss of land cannot be compensated for in money damages, the need of the vendee for equitable relief arises instantly upon the making of the oral promise to convey the land. Whether he has or has not paid any or all of the purchase price, he stands in need of the assistance of equity if he is to be made whole. In fact, the full payment of the purchase price adds not one ounce to the weight of his plea to the equity court, for he is always presumed to be able to recover back by a law action the money paid out in reliance on the landowner's unfulfilled promise to convey land.\(^3\) As has been pointed out, the lender's desire is the repayment of his loan. Thus, until that loan is made, until the money is actually advanced to the borrower, the lender is in no position to seek the aid of equity. The making of the promise to give security establishes no "equity" in the promisee, as does the making of the promise to sell. The promisee in the first situation needs no equitable aid at this time because he is thought to have a complete remedy at

\(^1\) This statement cannot of course be true in two jurisdictions which appear to hold that mere payment of the purchase price is sufficient part performance by the vendee—lowa and Georgia. And in other jurisdictions, payment of the price may lend weight when accompanied by other acts of performance. But standing alone, the payment does not give any more of an "equity" than the vendee already had as a result of the making of the promise to convey.
law in the form of an action for damages for breach of contract. For unless the borrower will carry out his promise to give security, the lender is presumably justified in refusing to make the loan, and the total result is that the lender loses the prospective profits of the deal. These profits will be his damages awarded in a law action. Now when the loan is actually made on faith of the promise to secure, the lender's status changes. From the moment the money is advanced to the borrower, the lender needs equitable assistance, because unless the borrower gives the security as promised, the lender stands to be irreparably injured. That is, he will have to take his chances as an unsecured creditor—exactly the thing against which he sought to contract—and no judgment at law for damages can make him anything but an unsecured creditor as to past transactions. Although there has been some confusion on the point, it should be understood that no right of a lender to enforce a promise to give security should accrue until he has actually made the loan.

It may be argued that if there is not a written promise, the law courts will not recognize an action for damages. However, the action is for breach of the contract to accept a loan on certain conditions (including the giving of security in land), and is not for the breach of the contract to give a mortgage. Thus it is believed that a law court can grant damages for the loss of profits expected to be obtained through the loan transaction—i.e., interest charges. The oral promise to give security is not being enforced in such an action; rather it is only significant as being a condition of the loan which, when refused by the borrower, justified the lender in regarding the loan contract as breached.

At any rate, the absence of a legal right because of the absence of writing is not considered such a circumstance as to create an inadequate remedy at law. Failure to meet legal formalities, without more, obviously cannot be the basis of an equitable right.

Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written promise); Irvine v. Armstrong, 31 Minn. 316, 17 N. W. 343 (1883); Dean v. Anderson, 34 N. J. Eq. 496 (1910); Blake v. Blake, 98 W. Va. 346, 128 S. E. 139 (1925); McClintock, Equity (1936) § 58, p. 97; Walsh, Equity (1930) § 85.

Of course, as a judgment creditor he may perfect a lien which will give him priority over general creditors of the borrower, and over subsequent lien creditors. But such a lien is not enough to save the lender, because other intervening lien creditors will be superior in right even though they may not be in the class of "bona fide purchasers" who would have priority over the equitable lien interest based on the oral promise to give security. Also, as some cases have mentioned, resorting to a damages action involves the loss of the intended investment: Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written promise); Irvine v. Armstrong, 31 Minn. 316, 17 N. W. 343 (1883); Hughes v. Mullaney, 92 Minn. 485, 100 N. W. 217 (1904). Further, the judgment lien will ordinarily come too late to aid the lender, because the borrower will have become insolvent, and damages judgments will be uncollectable. Dean v. Anderson, 34 N. J. Eq. 496 (1910); McClintock, Equity (1936) § 58, P. 97.

Fred T. Ley and Co. v. Wheat, 64 F. (2d) 257 (C. C. A. 5th, 1933); Iowa Loan and Trust Co. v. Plewe, 202 Iowa 79, 209 N. W. 399 (1926); Milam v. Milam, 138 Tenn. 686, 200 S. W. 826 (1918); Walsh, Mortgages (1934) § 8.
Thus, the security and sale cases are in contrast both as to the point at which the need for equitable relief arises in the promisee, and as to the basis on which this need for equitable relief rests. This contrast is clearly demonstrated where the promises to sell or to give security are in writing, the Statute of Frauds problem thus being eliminated. When the written promise to sell land is made, the vendee is in position to seek specific performance of the contract, regardless of whether he has already paid the purchase price, because he wants to own the land, and cannot be compensated in money if he is deprived of this ownership. The lender, even under a written contract to give security, has no claim to equitable relief until he has advanced the money to the borrower, and then his need for relief springs not from the unique value of land but from the fact that only by being given security can he have a complete remedy for the borrower's breach of contract.

It was these factors upon which Professor Walsh based his categorical declaration that "these cases of equitable mortgages have nothing to do with the doctrine of part performance under the Statute of Frauds." Evidently this statement is intended to refer to the law as it should be, and not as it actually is, if many of the decisions are taken as an indication of how the law presently stands. For these decisions commonly argue not the issue whether the part performance doctrine is applicable, but rather merely whether there has been sufficient performance under the doctrine. The point of Professor Walsh's theory is passed by without even being noticed. This judicial snub results from a failure to realize the basis of the Walsh concept of the source of the lender's equity. The lender seems to be asking for a decree of specific performance, as does the vendee. From this it would seem to follow that his equity rests on his "right" to have equity grant the decree. And does not this “right” depend on the same considerations in the security as in the sale cases? The answer is no, but the fault in the courts' reasoning lies not only in the last step (though this is certainly open to criticism, as will be observed later); the basic fault is in the first and second steps—the assumption that the lender's equity depends on his right to a specific performance decree. His equitable right

\[\text{Walsh, Equity (1930) \S 85, p. 414; Walsh, Mortgages (1934) \S 8.} \]

\[\text{"Right" is technically a misnomer because the issuance of specific performance decree is said to be a discretionary power of equity. The remedy is a matter of grace, not of right. Miller v. Gardner, 198 So. 21 (Fla. 1940); Chesapeake and Ohio Ry Co. v. Douthat, 10 S. E. (2d) 881 (Va. 1940); McClintock, Equity (1936) \S 52; Walsh, Equity (1930) \S 19, p. 82-83.}\]
springs from the fact that only by his being given the security intended can he be made whole. It is true that in cases where an oral promise to secure has been made by the borrower, equity in awarding the lender the benefit of the security is in effect granting specific performance of the promise. But this is only incidentally so, for it is admitted by all that the recognition of rights under the broad equitable liens concept includes the granting of a variety of types of relief in addition to ordering the specific performance of express promises. In granting such relief, equity acts under broader and more elastic powers than merely its ability to grant specific performance. Stated in most general terms, it is the power to work justice. Expressed in maxims, it is the power of equity "to regard that as done which should have been done" or "to prevent the Statute of Frauds from being made an instrument of fraud," and so on. The granting of specific performance of oral promises is only one example of the processes used by equity in executing its fundamental function of preventing injustice and of ordering fair dealing. In confining themselves to the use of this particular method in the security cases, the courts are mistaking an incident of their powers for a limitation upon those powers.

It must be noticed that not all courts have fallen into such error. Decisions are available which show a better understanding of the true situation. One of the best statements appears in the Kansas case

Schram v. Burt, 111 F. (2d) 557 at 561-62 (C. C. A. 6th, 1940); Craven v. Hartley, 102 Fla. 282, 135 So. 899 at 901 (1931); Rutherford National Bank v. Bogle, 114 N. J. Eq. 571, 69 Atl. 180 at 182 (1939); Clark v. Armstrong and Murphy, 180 Okla, 514, 72 P. (2d) 362 at 365 (1937); Hollister v. Sweet, 32 S. D. 141, 142 N. W. 255 at 256 (1913); Walsh, Equity (1930) §§ 52, 85; Walsh, Mortgages (1934) § 8.

Common demonstrations of the power of equity to grant liens on land irrespective of the intention of the parties include: Equitable mortgages raised in absence of any promise to give security, see Conkling v. Conkling, 126 N. J. Eq. 142, 8 A. (2d) 298 (1909); Wright v. Buchanan, 287 Ill. 468, 123 N. E. 58, 57 (1919). Vendor's and vendee's liens on land granted, see Elerman v. Hyman, 192 N. Y. 113, 84 N. E. 937 (1908); Craft v. Latourett, 62 N. J. Eq. 206, 49 Atl. 711 (1901); Schram v. Burt, 111 F. (2d) 557 at 561-62 (C. C. A. 6th, 1940) (comparing vendor's lien with lien based on oral security promise); Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 at 1002 (1894) (same). "Equitable liens" granted, based on unfair or fraudulent conduct of the defendant, similar in nature to constructive trusts, see Ringo v. McFarland, County Judge, 232 Ky. 622, 24 S. W. (2d) 265 (1930) (presenting a situation appropriate for either constructive trust or equitable lien relief); Jones v. Carpenter, 90 Fla. 497, 106 So. 127 (1925). Constructive trusts, raised on the basis of "fraud," which fraud in some jurisdictions may be no more than an unjust refusal to perform a promise made in good faith, see Becker v. Neurath, 149 Ky. 421, 149 S. W. 857 (1912); Edwards v. Culbertson, 111 N. C. 342, 16 S. E. 233 (1892).
of Foster Lumber Co. v. Harlan County Bank,\textsuperscript{39} which held that the lender had a lien of an equitable mortgage on the borrower's land, dating from the time of the making of the loan in reliance on the oral promise to give a mortgage. The oral character of the security agreement was declared not to affect the validity of the lender's lien, this because "the lien actually decreed results from the operation of the law upon the entire conduct of the parties, and hence is, in terms, excluded from the inhibition of the statute."\textsuperscript{40} There is some mention in the opinion of the power of equity to treat that as done which under the agreement ought to have been done, and the necessity of preventing the Statute of Frauds from becoming an engine of fraud. It must be admitted that some quoted reference is made to the fact that the agreement had been executed on one side and thus is removed from the application of the Statute. But that the Kansas court realized the proper ground for the enforcement of the lien is indicated by a later case which cites the Foster Lumber Co. case as authority for the proposition that "liens in the nature of equitable mortgages based upon oral agreements are not at all uncommon, and they are upheld and enforced \textit{where equity and good conscience so require}."\textsuperscript{41} The Florida

\textsuperscript{39}71 Kan. 158, 80 Pac. 49 (1905). The prospective landowner orally promised to give a mortgage on land to secure a loan to be made by the Bank. The land had not yet been purchased but the prospective landowner had a contract of purchase which he left with the Bank to hold until a formal mortgage should be executed. The Bank then paid the loan money out for purposes as designated by the borrower, including a payment of part of the price of the land, and the Bank, as authorized took the deed to the land from the vendor (apparently the borrower being named as grantee). The borrower refused to give the promised mortgage, instead mortgaging the property to the Lumber Company. The latter had full notice of the claims of the Bank. In a suit by the Bank to collect the amount due on the loan, the court awarded it a lien on the land, this lien being expressly based on the oral promise to give a mortgage, as distinguished from any rights which might have been claimed on the basis of the deposit of a title deed.

\textsuperscript{40}71 Kan. 158, 80 Pac. 49, 50 (1905).

\textsuperscript{41}Farmers' State Bank v. St. Aubyn, 120 Kan. 66, 242 Pac. 466, 468 (1926) (italics supplied). This case has been interpreted, wrongly, it is submitted, as having turned on the part performance doctrine. See Hanna, Cases and Materials on Security (1st ed. 1932) p. 535, note 1.

This interpretation is based on the attention given by the court to the fact that the representative of the lender took (or continued in) possession of the property after the oral promise to give security was made. It was thought that this taking of or continuing in possession was esteemed to be a sufficient part performance to take the case out of the Statute of Frauds. Apparently some argument against such a ruling was made by the borrower's counsel, but a careful reading of the court's opinion indicates that the only regard in which the court considered the possession of the lender was on the issue of whether such possession gave notice of the lender's interest to a third party who purported to have purchased the property from the borrower. 242 Pac. 466 at 468.
court in \textit{Craven v. Hartley} held that the oral promise to give a real estate mortgage was not invalidated by the Statute of Frauds; it declared that "The doctrine of equitable liens does not depend on written instruments, but may arise from a variety of transactions to which equity will attach that character . . . not obnoxious to the statute of frauds because they arise by operation of law from the conduct of the parties."\textsuperscript{42} In other jurisdictions the courts have from time to time given clear and appropriate accounts of their powers to enforce equitable liens based on oral security promises.\textsuperscript{43}

Far more common of occurrence in cases in which enforcement of oral security promises is sought, are the decisions which turn on the issue of part performance. In \textit{Sleeth v. Sampson},\textsuperscript{44} already mentioned as a leading case, the court, after declaring that giving a mortgage is transferring an interest in land under the Statute of Frauds, found only one issue remaining in the case—"whether there have been acts of part performance sufficient to relieve from the production of a writing."\textsuperscript{45} The court ultimately denied that the oral promise could be enforced because it appeared that the lender's performance went no further than a payment of the loan to the borrower, while to be sufficient to overcome the absence of writing the part performance must be "'unintelligible or at least extraordinary' unless related to a contract to convey an interest in land."\textsuperscript{46} It was observed that in land sale contract cases, payment of the purchase price alone is not enough to meet this standard; there must also be such acts as taking possession of the land or making improvements thereon. And "we see no distinction in this

\textsuperscript{42}Craven v. Hartley, 102 Fla. 282, 135 So. 899, 901 (1931).

The use of the phrase "operation of law" is apparently a reference to the exception incorporated in some Statutes of Frauds to the effect that there need be no writing to support the creating or granting of interests in land by operation of law. See Fla. Comp. Gen. Laws (Skillman, 1927), Tit. I, Ch. 1, § 5660; Kan. Gen. Stat. (Corrick, 1935) § 33-105. Such provisions are virtually legislative declarations of the validity of the powers which are exercised by equity courts without the aid of statutory authorization—i.e., powers to ignore the formal requirements of the Statute of Frauds when such procedure is necessary to reach a just result. No case should turn on the presence or absence of this exception in the Statute. These qualifications in the Statutes of Frauds have seemingly never been thought to refer to matters arising in courts of law; certainly they do not affect the rule that a legal mortgage must be in writing.

\textsuperscript{44}Schram v. Burt, 111 F. (2d) 557 at 562 (C. C. A. 6th, 1940); Sandy Hook Bank's Trustee v. Bear, 252 Ky. 609, 67 S. W. (2d) 972 at 974 (1934) (court refused lien because of special circumstances); Sprague v. Cochran, 144 N. Y. 104 at 112, 38 N. E. 1000 at 1002 (1894); Poole v. Tannis, 137 Wis. 363, 118 N. W. 188 at 189 (1908).

\textsuperscript{45}237 N. Y. 69, 142 N. E. 355 (1923).

\textsuperscript{46}237 N. Y. 69, 73, 142 N. E. 355, 356 (1923).
respect between a payment for an absolute conveyance and a payment for a mortgage."

It may be said that the fault in this case and in a number of others which are decided in the same manner, lies with the lender's counsel who shaped his prayer for relief along specific performance lines, and so argued his case in the courts. However, in other situations the procedure in courts of equity has proved to be sufficiently flexible to allow the courts to give relief when a meritorious case is presented, even though it be presented in unfortunate terminology. And in fact we can be sure that it is not the form of the request which governs the answer, because equally respectable courts have refused relief on the same reasoning where the plea was that the court should "impress a lien," or "foreclose an equitable lien" on the land, or where some other slight variation of this phraseology was used. *Newman v. Newman* was an action "to subject lands to a lien." After disposing of the lender's argument that a constructive trust should be declared, the Ohio court suggested the possibility of giving relief in the form of an equitable mortgage; but this theory too was held unavailing because mere payment of the consideration is not sufficient to relieve an oral agreement to convey an interest in real estate from the operation of the Statute of Frauds. In the *Feldman* case the New Jersey Court of Chancery granted the prayer in an action to have an equitable lien or mortgage impressed on land. Though the promise to give the mortgage

\[\text{N. Y. 69, 73, 142 N. E. 255, 256 (1923).}\]
\[\text{Washington Brewing Co. v. Carry, 24 Atl. 151 (Md. 1893); Brown v. Drew, 67 N. H. 569, 42 Atl. 177 (1894); Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 Atl. 732 (1901); Meach v. Stone and Perry, 1 D. Chip. 182 (Vt. 1814).}\]
\[\text{See as examples of the adaptability of equity courts in this respect: Jones v. Gainer, 157 Ala. 218, 47 So. 142, 143 (1908) (though specific performance decree is denied because plaintiff fails to prove the contract as alleged, equity will declare a lien on the land for money expended by the plaintiff in improving the land, even though plaintiff did not seek such relief); Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084 (1902) (equity granted personal judgment against defendant, though this type of remedy was not asked for in the complaint); Sanitary District of Chicago v. Martin, 227 Ill. 260, 81 N. E. 417 (1907) (specific performance denied on ground of unreasonable hardship to defendant, but equity assessed damages for the default, though damages were not sought in plaintiff's complaint); Jackson v. Stevenson, 156 Mass. 495, 31 N. E. 691 (1892) (injunction against violation of building restriction denied because enforcement would be inequitable, but damages were assessed for breach of restriction, though not sought by complaint); 25 R. C. L. 345 (though specific performance decree cannot be given because defendant can not convey good title, damages will be awarded for breach of contract to convey, though not sought in complaint).}\]
\[\text{Ohio St. 230, 133 N. E. 70 (1921).}\]
as security for a loan actually made was oral, the court, finding that the evidence clearly indicated that the oral promise had been made as the lender declared, granted specific performance with the statement that the fact of the agreement being verbal was immaterial "since equity looks to its purpose and intent rather than to its form." Clinging ever to the part performance theory, it was decided that in New Jersey payment of the consideration in reliance on the oral promise was sufficient part performance to remove the case from the bar of the Statute of Frauds. This last proved to be more than the Court of Errors and Appeals could accept. That court reversed the decision of the Chancery Court, on the ground that a case of part performance was not made out merely by the payment of money.

In Spencer v. Williams, the West Virginia court was asked to impress a lien on land, on the basis of an oral promise by the owner to give a mortgage on the realty as security for the repayment of a loan. The court replied that it could not grant specific performance of the promise because in that jurisdiction such remedy was available only where the agreement was so far executed that a fraud would be worked on the petitioning party unless specific performance were decreed. It is interesting to note that this court went on to observe that no fraud would result here because the lender had a full remedy at law in the form of an action to recover back the money loaned. In fact, the lender showed that, relying on the oral security promise, he had waited so long to seek repayment from his borrower that now the Statute of Limitations barred any right of action at law—therefore not even a theoretical remedy at law existed. In this encounter, however, the court turned the lender's own weapon upon him by concluding that to give equitable relief in such circumstances would be to "put a premium on his delay."

It is hardly understandable how the West Virginia court could reach this decision when only a few years before it had decided a very similar case exactly in the contrary manner. The opinion in this case of Blake v. Blake stands as almost a point to point refutation of the law as announced in the Spencer decision. First the opinion points out that the lender has no adequate remedy at law, because an action at law would force the lender to rely only on the personal liability of his borrower, which was exactly the eventuality intended to be avoided. Only equity has the power to give him what he must have to be made

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52 Feldman v. Warshawsky, 125 N. J. Eq. 19, 4 A. (2d) 84 (1938).
THE ENFORCEMENT OF ORAL PROMISES

THE ENFORCEMENT OF ORAL PROMISES

whole—the security as promised. Then the court inquired of itself whether specific performance could be granted when that type of relief was not expressly asked for. This question was answered affirmatively on the basis of the general prayer for relief included in the plaintiff's bill, for under a general prayer, the plaintiff is entitled to any relief justified by the evidence. On the issue of the significance of the parol form of the borrower's promise, the court concluded that in this type of case the acts of the lender in advancing the money so that nothing remained to be done to complete the transaction except the execution of the mortgage, constitute sufficient performance to take the oral contract out of the Statute of Frauds. And equity will decree the relief because the borrower's refusal to execute the security instrument works a fraud on the lender. Finally, it was denied that the long delay in seeking judicial enforcement of the agreement could be said to make the lender guilty of laches, because the lender at no time had shown any disposition to abandon his claim, and because the delay had benefitted, rather than injured the borrower.

Indicative of the temper of the courts is the fact that even when relief is to be granted to the lender, the specific performance remedy and the part performance doctrine bob up to plague the argument. Of course this is in no sense an error in itself, for admittedly the granting of specific performance of an oral promise on the basis of the part performance doctrine is one process which equity may invoke to give the lender his needed security. The danger springs from the demonstrated tendency of courts to go one step further and conclude that this is the only method open to them in such cases. It is that conclusion which brings forth such decisions as those discussed above. One suspects from the language used in the opinion of Blake v. Blake that even there the court felt that its choice was to give specific performance or nothing—else why the particular effort to establish sufficient acts of part performance. In this respect it in nowise stands alone. For example, in Rutherford National Bk. v. Bogle the court

Of course it cannot be said absolutely that the courts in the following cases would not have granted relief on some other theory had the part performance doctrine not been available; but that impression lingers after a reading of the opinions. See Cole v. Cole, 41 Ind. 301 (1875); Hecht v. Anthony, 204 Minn. 432, 283 N. W. 753 (1939); Rutherford National Bank v. Bogle, 114 N. J. Eq. 571, 169 Atl. 180 (1933); Clark v. Van Cleef, 75 N. J. Eq. 152, 71 Atl. 260 (1908) (relief denied because claim was barred by limitations); Dean v. Anderson, 34 N. J. Eq. 496 (1810); Tucker v. S. Ottenheimer Estate, 46 Ore. 585, 81 Pac. 360 (1905) (relief denied because of special circumstances); Baker v. Baker, 2 S. D. 261, 49 N. W. 1064 (1891).
was apparently off to a perfect start in exercising its equitable powers to enforce a lien. It stated that “the whole doctrine of equitable liens or mortgages is founded upon that cardinal maxim of equity which regards as done that which has been agreed to be, and ought to have been, done.” And “the form which an agreement shall take in order to create and equitable lien or mortgage is quite immaterial, for equity looks at the final intent and purpose, rather than at the form.” But following these pronouncements, the court seemed to lose some of its enthusiastic confidence in the power of equity to drive straight to the goal of justice, for it soberly observed that since a mortgage involves a transfer of an interest in land, it must meet the dictates of the Statute of Frauds. And “an agreement to give a mortgage upon land is likewise within the inhibitions of the statute and unenforceable if not in writing unless there has been sufficient part performance to remove it from the bar of the statute.” Hence the vital issue here was whether there had been sufficient acts of part performance. The court eventually decided that there had been these required acts, and a happy ending was reached. But the whole decision shows disturbing confusion in the court’s mind regarding its authority to grant relief to lenders in search of promised security. Four years later the same court, in the person of the same Vice-Chancellor, redeemed itself admirably by pointing out that the power to grant specific performance on the basis of part performance by the promisee is “aside from and in addition to” the powers of equity to declare a lien under various other doctrines, expressed in such declarations as “treat that as done which ought to have been done,” “prevent the perpetration of a fraud,” and “give effect to purpose and intent rather than to form.” Other courts would better serve the interests of equity and good conscience, justice and fair dealing if they would better understand the source and foundation of their power to enforce the borrower’s promise to give security.

This discussion is not to be understood as a plea for the unquestioned enforcement of every assertion made by lenders that their borrowers have orally promised to give security. Beyond any doubt, such action would result in an unending procession of frauds, for every lender anxious about the chances of enforcing the personal liability of his debtor would have but to raise the claim that an oral promise to

\[^{\text{114}}\text{N. J. Eq. 571, 169 Atl. 180, 182 (1933).}\]
\[^{\text{114}}\text{N. J. Eq. 571, 169 Atl. 180, 183 (1933).}\]
\[^{\text{Feldman v. Warshawsky, 122 N. J. Eq. 596, 196 Atl. 205, 208 (1937). Ironically enough, the Feldman decision was reversed, 125 N. J. Eq. 19, 4 A. (2d) 84 (1938), while the Rutherford decision stands unimpeached.}\]
give security had been made, whereupon a lien on the borrower's land might be established. Before any court ventures to impress a lien on land in these cases, it must use every means to make sure that the oral promise was actually made as contended and that the lender is not asserting a false right. To this end, courts should and often do require that the lender assume the burden of proving his case and of offering evidence of clear and convincing nature. With strict standards of proof applied, very few fraudulent claims would prove successful.

Even conceding that an occasional lender might obtain the benefit of unwarranted security, can it be said that any particularly lamentable injustice has resulted? What the lender obtains is no more than just payment of a perfectly honest debt. The borrower has simply been forced to satisfy a valid obligation. The only parties possibly standing to be unjustly deprived of anything are creditors of the borrower, whose claims might have been satisfied out of the debtor's property had the other lien not been enforced against it. But the total assets of the debtor have been at one time, at least, augmented by the moneys advanced by the lender, and why should other creditors be entitled to benefit exclusively from this increase in the debtor's resources? On the other hand, observe the unfortunate consequences of refusing a valid security claim of the lender. In the usual case the debtor's personal liability will be no more valuable than the lender has esteemed it to be, and thus the lender will be unable to collect his debt, or at least all of it, even though he thought he had provided against the very contingency which has arisen. Other creditors will profit by the enrichment of the debtor's estate resulting from the advancement of the loan.

In this consideration lies another distinguishing feature between security cases and land sale cases. The enforcement of a fraudulent claim that an oral promise to convey land was made, results in the landowner being deprived of his land when there has been no intent on his part to risk his ownership in any way. Of course he receives the consideration which the purported vendee admits in order to make his claim enforceable, but the very fact that the owner resists the action indicates that he was unwilling to part with his land for that price. The claimant is correspondingly unjustly enriched by receiving the land for the price paid. The failure of the court to recognize a valid

and true claim in land sale cases prevents the vendee from making expected profits from the purchase of the land. If the vendee has paid part or all of the purchase price in advance, he stands to lose at least part of this if the vendor is insolvent and cannot satisfy a judgment at law for the return of the price paid. The vendor merely remains in the position formerly occupied—owner of the land.

It thus appears that the consequences of refusing to enforce an honest claim that an oral security promise was made are more unfortunate than those resulting from the inability of a vendee to obtain specific performance; that the wrong done the landowner when a fraudulent security claim is enforced is not so harsh as where a false sale claim is enforced; that therefore, the courts should be quicker to enforce an alleged oral security promise than an alleged oral sale promise; that the standards built up to control the sale cases should thus not be applied blindly in the security cases. In rebuttal of the above comparisons, it may be argued that there is no difference in the possible prejudice to the vendee and lender where an honest claim is rejected because the lender loses money which would represent a payment of the debt while the vendee loses money which would represent the return of the purchase price advanced—this in case of the inability of the landowner to satisfy personal liabilities. In fact, however, looking at the problem from the standpoint of what the usual circumstances will be, there is a distinction. For while the vendee may or may not have paid the purchase price in advance, the lender always will have made the loan. The making of the loan is the essence of his need for relief, whereas the vendee’s need for relief arises with the promise to convey. Thus, in every case in which a lender needs the equitable relief, the result of a refusal to grant his request will lead to a loss of the entire amount loaned—assuming an insolvent debtor; but in only some of the cases in which a vendee needs equitable relief will a denial of equitable aid result in a loss of the purchase price.

A further advantage will often stand with the vendee as contrasted with the lender, where both have actually advanced money to the landowner. In the normal case the vendee learns within a relatively short time after paying the purchase price that the vendor is refusing to carry out his oral promise to convey. The vendee then is warned to take steps to recover his money promptly, lest the landowner become insolvent. On the other hand, the lender in the normal case may continue for a considerable time in reliance on the borrower’s oral promise, and not find out until the debt has matured that the borrower intends
to repudiate his security agreement. In the lapse of time between the making of the loan and the discovery that no security exists, the borrower has often in fact become bankrupt and unable to pay his debts. A remedy at law which was perfectly adequate had it been recognized as necessary to pursue, becomes as a practical matter no remedy at all. 62

One further practical distinction appears in any comparison of sale and security cases when the part performance doctrine is under consideration. In a very large majority of the American states the courts have decided that mere payment of the purchase price by the vendee is not sufficient part performance upon which to decree the specific performance of an oral promise to convey land. 63 The reasoning advanced to support this rule takes two different forms, depending on the particular court's conception of the basis of equity's power to obviate the Statute of Frauds by application of the part performance doctrine. One view is that equity will enforce the oral promise where the acts of part performance have put the vendee in such a position that it is impossible except by granting specific performance to place him back in as good a situation as he stood before the oral contract was made. To refuse enforcement is said to countenance a

62 See Dean v. Anderson, 34 N. J. Eq. 496 (1810). Some cases stress the lender's loss of his "investment" as an irreparable injury which would result from a denial of equitable relief. The idea advanced is that even if money damages can be recovered, such an award falls short of the redress required to make the lender whole. Irvine v. Armstrong, 31 Minn. 316, 17 N. W. 343 (1883); Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written agreement). It has been said that the remedy at law is not adequate even where the borrower is solvent and there is a written agreement, because only nominal damages will be given for the breach until such time as an enforcement of the security is needed. McClintock, Equity (1936) § 58, p. 97.

A further question as to the adequacy of a damages remedy must remain unanswered for lack of authority. It is: Does the refusal of the borrower to give the security entitle the lender to declare the loan agreement rescinded and sue immediately to recover back the money advanced? The discussion in the text presumes an affirmative answer. If this is not correct, the lender is in a still worse position than that already described, because then the repayment of the principal of the loan can not be compelled until the agreed maturity date, and the lender's hands are thus tied during the interval in which the borrower may be becoming insolvent and judgment-proof. It is arguable that since the security promise is merely an incident to the loan transaction, the default on the promise is not sufficient to abrogate the essential purpose of the parties to make and receive a loan. If it is true, as McClintock states, that only nominal damages for the breach of a security promise could be obtained even where the promise is in writing, this may mean that the lender could not recover back the loan until the regular maturity date.

63 Clark, Principles of Equity (1919) § 131; McClintock, Equity (1936) § 56; Walsh, Equity (1930) § 78.
fraud on the vendee, or to subject him to irreparable injury. A different view is that equity will enforce the oral promise where the acts of part performance are such as to evidence clearly that an oral promise to convey was actually made by the lender. Here it is said that the acts must be "unequivocally referable" to a contract to convey, or "unexplainable except as related" to such a contract. Though a stricter standard of performance is probably applied by the courts following the first theory, it is agreed that mere payment of money is not enough under either view, because the vendee can be made whole (theoretically, at least) by an action at law to recover the money back, or because the payment of money refers as much to other possible transactions as to a conveyance of land. Added acts required are commonly the vendee's taking of possession of the land or his making valuable improvements on the land.\(^6\) Though it is open to serious question whether such additional actions in fact do make the performance "unequivocally referable" to a contract or subject the vendee to irreparable injury, nevertheless they are the forms of conduct which in most of the cases have persuaded the courts to decree specific performance. Conversely, the absence of such conduct is most frequently the reason for the courts denying that relief.

Consider then, the chances of a lender to show sufficient part performance in the great majority of our American courts. A prospective purchaser of land may commonly take possession of land and make improvements before title is actually transferred to him. How often does a lender who has loaned on the security of his borrower's land enter into possession of the land or make improvements on it? The answer is very, very seldom. In fact, only two cases have been found in which this procedure occurred. And in both of them there existed a family relationship between lender and borrower, so that the taking of possession was actually to be explained on the basis of the kinship of the parties rather than on their lender-borrower status.\(^6\) In applying sale promise rules to security promise situations, the courts are virtually denying that a remedy of specific performance exists in the latter cases. If a part performance doctrine is to be used in security

\(^6\) Clark, Principles of Equity (1919) §§ 132-134; McClintock, Equity (1930) § 56; Walsh, Equity (1930) § 78.

\(^6\) Charpie v. Stout, 88 Kan. 318, 128 Pac. 396 (1912) (lender was a sister of the borrower, and the latter stated that he put his sister in possession of the land "so as to give her something to live upon."); Smith v. Smith, 125 N. Y. 224, 26 N. E. 259 (1891) (lender was husband of borrower; former owned the land then conveyed it to his wife, the two of them living on the land with the husband managing it; husband spent substantial sums in improving the land after its conveyance to wife).
cases, it must be a different doctrine, designed to take cognizance of
the facts which normally exist in security cases.

By way of summary, the writer ventures to outline a correct pro-
cess of reasoning in the decision of such a case as is presented by the
simple hypothetical fact situation posed early in this discussion. First,
it is to be conceded that a defence of the Statute of Frauds must be
met, because a contract to give security in realty is a contract to
transfer an interest in land and therefore is required to be in writing
to be enforceable. But while courts of law have been strictly ruled by
the dictates of the Statute, equity has often declared its power to
ignore the formal requirements if only by such measures may justice
be served. Equity has jurisdiction to act because in the usual circum-
stances attending these cases, the lender has no adequate remedy at
law; only by the processes of equity can he be given the relief neces-
sary to save him for an irreparable injury, for only equity can decree
him a secured creditor. That equity should act is argued by the same
fact—a just and equitable conclusion to the whole transaction can be
attained only by the lender being given the benefit of security in the
land. Without this relief, a deceitful borrower will have perpetrated a
plain fraud on the lender, will escape his obligation to pay an honest
debt, and will leave to other creditors the unearned privilege of shar-
ing assets contributed by the lender. All this assumes the ability of
the court, by applying strict requirements of proof, to make sure
that the borrower actually made the oral promise as contended by
the lender. No reference to “specific performance” and no mention
of “part performance” need be made; nor should they be made, lest
the issue be confused by the use of oft-confusing terminology. The
remedy should be given under the broadest and most fundamental
function of equity, and not under one of the small segments of that
function. And whatever the form of the prayer for relief, such relief
as the facts call for should be given, without question of whether a just
remedy can be applied if not requested precisely in the proper words.

If this be treason in the form of a judicial repeal of the Statute of
Frauds, let the powers of equity make the most of it. And if the con-
sidered opinion of the lawmakers is that the interests of orderly and
careful business methods demand that in no case shall lenders be
given the benefit of security in land unless there has been a written
agreement for security, then let the legislature speak with a definite
command directed to the courts of equity.68

68An indication of precisely the opposite legislative sentiment may be thought
to exist in the “except by operation of law” qualifications found in several Statutes
of Frauds. See notes 17 and 42, supra.
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NOTES

THE MUTUALITY REQUIREMENT IN RES JUDICATA AND ESTOPPEL BY RECORD

The terms "res judicata," "estoppel by judgment," and "estoppel by record" are used indiscriminately by the courts to describe the effect of a prior court adjudication upon a later arising litigation. It is the purpose of this note, not to distinguish between, or to criticize these terms, but to outline the extent of their application, particularly with respect to the present-day status of the so-called mutuality requirement. Consideration is necessarily narrowed to existing judgments in full and operative effect, not reversed or otherwise set aside; to final judgments; to those rendered on the merits; to judgments which are not impeachable collaterally for lack of jurisdiction or fraud; and finally, to judgments in personam, since judgments in rem, and judgments as to status, are considered binding on all the world, and thus present no problem in the extent of application.

The general statement is that such a personal judgment or decree is conclusive of the rights of the parties thereto, or their privies in all other judicial tribunals of concurrent jurisdiction on the points and matters in issue and adjudicated in the first suit. A party is defined

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The general statement is that such a personal judgment or decree is conclusive of the rights of the parties thereto, or their privies in all other judicial tribunals of concurrent jurisdiction on the points and matters in issue and adjudicated in the first suit. A party is defined
as one who is directly interested in the subject matter and who has a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if any appeal lies. Privity denotes mutual or successive relationship to the same rights of property. The reasons given for this general principle are: that persons should not be vexed by endless litigation, that the dignity and respect of judicial proceedings must be upheld, and that there is a public interest in peace and order and in preventing unnecessary and expensive litigation.

The simplest illustration of the doctrine appears when the second suit is identical with the first—i.e., brought between the same parties or their privies, in the same capacity, on the same cause of action. In this case, however, the prior judgment is said to constitute a bar concluding the parties and their privies, not only as to matter actually offered but also to all questions of fact or law. That this is a sound rule is shown by a number of cases where it has been applied.


Speech is classified as being in estate—for example, joint tenancy, donor-donee, lessee-lessee; blood—for example, successor in title by descent; representation—for example, executor-testator; and in law—for example, personal representative—decedent. Greenleaf, Evidence (16th ed. 1899) §§ 525, 536; Riddle v. Cella, 128 N. J. Eq. 4, 15 A. (2d) 59 (1940); 1 Freeman, Judgments (5th ed. 1925) § 438; 30 Am. Jur. 957-8; 15 R. C. L. 954-5.


to sustain or defeat the claim or demand, but as to any other admissible matter that might have been offered for that purpose.\textsuperscript{15} Thus, where A sues B in tort for a personal injury caused by several acts of negligence, A must aver all grounds for recovery, and any judgment secured in the first suit bars subsequent actions for the same injury although other grounds are averred in the second suit.\textsuperscript{16} The principle applied in this manner, and in this manner only, is the true form of res judicata.\textsuperscript{17} We are not further concerned with it in this note.

The extent of the principle is varied somewhat when the second suit is again between the same parties, or their privies, but the cause of action is not the same, although issues adjudicated in the first suit are incidentally involved in the second. Here the same reasons for holding the parties precluded by findings in the prior suit apply, but the rule differs to the extent that only matter that has been actually adjudicated is conclusive against the parties.\textsuperscript{18} It is thus necessary, in the second suit, to determine what issues were actually litigated and determined in the first.\textsuperscript{19} Although an infallible standard is difficult to formulate, it is said that the former adjudication is conclusive only

\textsuperscript{15}Baltimore Steamship Co. v. Phillips, 274 U. S. 316, 319, 47 S. Ct. 600, 602, 71 L. ed. 1069 (1927); Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. ed. 195 (1876); Aetna Life Ins. Co. v. Board of Commissioners of Hamilton County, 117 Fed. 82 (C. C. A. 8th, 1902); Luce v. N. Y., Chicago & St. Louis Ry., 213 App. Div. 374, 211 N. Y. Supp. 184 (1925). As to whether the cause of action is the same, the best test is said to depend on whether the facts or proofs submitted to sustain each are the same. Jackson v. Pepper Gasoline Co., 253 Ky. 175, 144 S. W. (2d) 212, 214 (1940); Williams v. Messick, 177 Md. 605, 11 A. (2d) 472, 129 A. L. R. 1035 (1940); 2 Freeman, Judgments (5th ed. 1925) § 687; 15 R. C. L. 564-5.

\textsuperscript{16}Columb v. Webster Mfg. Co., 84 Fed. 592 (C. C. A. 1st, 1898); Trayhern v. Colburn, 66 Md. 277, 7 Atl. 459 (1885); 2 Freeman, Judgments (5th ed. 1925) § 682.


\textsuperscript{19}Russell v. Place, 94 U. S. 606 (1876); Capps v. Whitson, 157 Va. 46, 160 S. E. 71 (1931); 1 Greenleaf, Evidence (16th ed. 1899) § 532; 15 R. C. L. 952.
as to facts directly and distinctly put in issue and the finding of which is necessary to uphold the judgment, and also matters which follow by necessary and inevitable inference from an adjudication.\textsuperscript{20} This application of the general doctrine is not historically res judicata, but estoppel.\textsuperscript{21} It is often loosely referred to as "res judicata," and as "estoppel by judgment." It is not the judgment alone, however, but the record, as terminated by the judgment, which creates the estoppel,\textsuperscript{22} and the more correct terminology would seem to be "estoppel by record."\textsuperscript{23}

A prior adjudication between the parties can be shown in two ways: as evidence under the general issue, and by a plea in bar.\textsuperscript{24} According to the principles above stated, res judicata or estoppel, when pleaded in bar, is conclusive upon the parties.\textsuperscript{25} Some doubt has been expressed as to whether the former judgment is likewise conclusive when submitted in evidence, but the weight of authority in the United States seems to be that it is equally as conclusive in effect as if pleaded in bar,\textsuperscript{26} and must go to the jury as a conclusive establishment of facts previously

\textsuperscript{20}Williams v. Daisey, 7 Harr. 142, 180 Atl. 908 (Del. 1935); Winters v. Basaillon, 158 Ore. 509, 57 P. (2d) 1095, 104 A. L. R. 968 (1936); McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809 (1887); 2 Freeman, Judgments (5th ed. 1925) §§ 677, 689-693; 1 Greenleaf, Evidence (16th ed. 1899) § 534; 15 R. C. L. 976-980. A careful study has been made on this point by Professor Millar in the article, The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law (1940) 39 Mich. L. Rev. 238. The case of Last Chance Mining Co. v. Tyler, 157 U. S. 683, 15 S. Ct. 733, 39 L. ed. 859 (1895), says Millar, enlarged the rule of the "qualified" conclusiveness of the premises which confined finality to matters in issue as set out in Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195 (1876), to the rule of "relative" conclusiveness of the premises which allows a default judgment to conclude the parties as to matters express or implied in the pleadings, and which is the present majority rule. See Note (1940) 128 A. L. R. 472.

\textsuperscript{21}Millar, The Historical Relation of Estoppel by Record to Res Judicata (1940) 35 Ill. L. Rev. 41, 46.


\textsuperscript{23}Millar, The Historical Relation of Estoppel by Record to Res Judicata (1940) 35 Ill. L. Rev. 41, 46, 52, 58.

\textsuperscript{24}1 Greenleaf, Evidence (16th ed. 1899) § 531.

\textsuperscript{25}The theory is said to be that the prior judgment presents evidence of the facts of so high a nature that nothing could be proved by other evidence which would be sufficient to overcome it, and therefore the party is estopped from submitting evidence, or precluded by law from doing so. 15 R. C. L. 953-4.

\textsuperscript{26}Southern Pacific R. Co. v. U. S., 168 U. S. 1, 59-60, 18 S. Ct. 18, 31, 42 L. ed. 355 (1897); Trayhern v. Colburn, 66 Md. 277, 7 Atl. 459 (1886); 1 Greenleaf, Evidence (16th ed. 1899) § 531. For an extensive annotation on the methods of pleading estoppel by record, see Note (1939) 120 A. L. R. 8, 55 et seq.
decided. For the purposes of the remainder of this note, it will be assumed that this difference in the method of presenting a former adjudication in a later case does not create varying results so far as conclusive effect is concerned.

Whereas a judgment or decree is mutually binding on all the parties to the proceedings and their privies, either as a bar or as conclusive evidence, the universal rule is that strangers are not bound. As a concomitant of this rule, its converse has been accepted as established law—i.e., if the person claiming the benefit of the former adjudication is a stranger to it, and is not bound thereby, he cannot assert the judgment against one who was a former party. This is known as the rule of mutuality. Stated another way, no party is bound in a subsequent suit by a prior judgment unless the person seeking to secure the benefit of the former adjudication would have been bound by it if it had been determined to other way.

Although this rule of mutuality is obviously applicable where the same parties are again litigating, difficulty has been encountered in finding rational support for it as an immutable principle where third parties are concerned. It frequently operates against the policy of the res judicata-estoppel doctrine that an end should be put to unnecessary litigation, and it has been expected to, evaded, or abolished in many situations. As well accepted as the principle itself are the exceptions made when a party to both first and second suits is pitted against different persons between whom exists derivative liability. For example, a plaintiff sues a servant for tortious acts committed by him in the course of the master’s business. The servant is primarily liable as the wrongdoer, and the master is secondarily, or derivatively liable by the doctrine of respondeat superior. If the plaintiff fails to recover, the servant’s acts being found not to constitute negligence, the master is allowed the benefit of this prior adjudication as a bar to a later ac-


tion by the same plaintiff against him on the same facts. The mutuality principle is violated, because if the plaintiff had prevailed in the first suit against the servant, the master would not have been bound thereby, being a stranger to that suit. Yet since the master's liability is predicated upon the servant's negligence, and the servant has been found free from negligence, the exception is a most rational one. It has been uniformly followed where derivative liability exists and where, as in the above example, the plea is used by the person secondarily liable as against a party to the prior suit who has once tried his case against the primary wrongdoer and lost. Thus where the successive suits are against the agent and the principal, indemnitor and indemnitee, and lessor and lessee, the exception is made. Since in all derivative liability cases there is a liability over from the primary wrongdoer to the party secondarily liable if the latter is subjected to loss by virtue of suit against him by the injured party, these holdings are fortified by the fact that it would be an anomalous situation

30Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63 (C. C. A. 8th, 1907); 16 L. R. A. (N. S.) 677 (1908); 1 Freeman, Judgments (5th ed. 1925) § 469.

31Emma Silver Mining Co. v. Emma Silver Mining Co. of N. Y., 7 Fed. 401, 408 (C. C. S. D. N. Y., 1880); Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N. E. (2d) 758, 760 (1937); 112 A. L. R. 401, 404 (1938); 1 Freeman, Judgments (5th ed. 1925) § 469: 15 R. C. L. 1006-7; 30 Am. Jur. 951 et seq. If the master had participated in the first suit, he would have been bound by the adjudication. Footnote 9, supra.

32This is obviously the case where a former judgment in favor of a principal is used by the surety in a later case, as against a party to the former suit. Here the surety's obligation does not arise unless the principal is liable. 1 Freeman, Judgments (5th ed. 1925) § 496.


if the party who is secondarily liable should sue the primary wrongdoer on the liability over where the primary wrongdoer has once been exonerated of the very same wrong in a former suit. Thus the principle has also been applied in favor of a municipality which is sued for injuries caused by the negligent condition of streets, railways, etc., when the municipality has the right of recovery over against the primary wrongdoer who may be an abutting landowner, railway company, and the like.\(^{35}\)

The same exception to the mutuality rule has been made where a suit is first brought against the party secondarily liable instead of against the primary wrongdoer, and the judgment is against the plaintiff. Here the person primarily liable is allowed to take advantage of the former adjudication.\(^{36}\) For example, the plaintiff sues the master for injuries caused by his servant in the course of the master's business, and the master prevails on the ground that the servant was not negligent. The plaintiff then sues the servant as the primary wrongdoer for the same injuries. The servant is held to be entitled to the benefit of the prior adjudication, although he was not a party to it and thus could not be bound if the prior judgment had been in favor of the plaintiff. Here it is necessary to show that the prior adjudication was upon the issue of the wrongdoer's negligence and not upon some collateral defense available to the master alone, such as lack of authority of the servant to do the act in question.\(^{37}\) The examples cited include:

- Betor v. City of Albany, 193 App. Div. 349, 184 N. Y. Supp. 44 (1920);
- Brobston v. Darby, 290 Pa. 331, 138 Atl. 849 (1927);
- Town of Waynesboro v. Wiseman, 163 Va. 778, 177 S. E. 224 (1934);
- Sawyer v. City of Norfolk, 136 Va. 66, 116 S. E. 245 (1923); 1 Freeman, Master, Judgments (5th ed. 1925) § 451.
- Anderson v. West Chicago St. R., 200 Ill. 329, 65 N. E. 717 (1902);
- Chicago & R. I. R. v. Hutchins, 34 Ill. 108 (1864); Atkinson v. White, 60 Me. 396 (1872); Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627 (1855); Brown v. Wabash Ry., 222 Mo. App. 518, 231 S. W. 64 (1925);
- Tighe v. Skillings, 297 Mass. 504, 9 N. E. (2d) 532 (1937);
ception made in such cases is a defensible one. Since the master's liability is completely dependent upon a determination that the acts of the servant were acts wrongful in law, it would follow that where the master is exonerated upon a trial on those issues alone, the servant should not be liable on the same issues in a later suit. To reach this result, however, a significant step is taken. The servant is absolved, not because his guilt is dependent upon the master's guilt, but because it is dependent upon those identical facts and issues which have been given judicial consideration in the former suit and found to be legally non-actionable. It is difficult to support this position under the rationale of the cases making exception to mutuality where one person's culpability is dependent upon the culpability of another. Mutuality appears to be actually ignored under the guise of the case being one of derivative liability.88

The only remaining successive suit which can arise involving derivative liability is that by which the party secondarily liable has been sued, has had a judgment taken against him, and in the second action is suing the party primarily liable on the basis of the liability over. The ultimate liability rests upon the party primarily liable and it is his duty, therefore, to defend in the first suit if he knew of that suit.89 Under such circumstances he is the same as a party to the suit and is bound by that adjudication.40 If, however, the party primarily liable has not had notice of the suit, he should in no wise be bound by the prior adjudication since he was not a party to it and should not be prejudiced thereby.41 Of course, if the party secondarily liable prevailed in the first suit, there is no basis for a liability over.

In the above cases the party to the former suit is said to have had his "day in court" on those issues and is thus not prejudiced, although a stranger to the first suit asserts that judgment against him. Under the general rule of mutuality it might seem that the purpose is not only that of avoiding undue prejudice to the former party, but also that of avoiding undue benefit to the stranger. But the latter con-

88 1 Freeman, Judgments (5th ed. 1925) § 469.
89 Robbins v. Chicago City, 4 Wall. 657, 18 L. ed. 427 (U. S. 1866); City of Richmond v. Davis, 135 Va. 319, 116 S. E. 492 (1923).
sideration would not be compelling so long as the former party is not unduly prejudiced. It thus appears that in the derivative liability cases, the former party is subjected to a greater degree of prejudice unless it can be said that those cases have some quality which justifies the mutuality relaxation. Such a quality appears to inhere in the fact that there is greater ease in showing that two people's cases are necessarily upon the same issues where the fact of derivative liability exists. If such is the correct explanation, it would seem to follow that where two people's cases are necessarily upon the same issues and each participates in a separate suit against a common adversary and the first prevails in the prior suit, the second could plead an estoppel irrespective of a derivative liability connection.

Many, though not all, such cases involve joint tort-feasorship. The orthodox statement is that an adjudication in favor of one joint tort-feasor is not a bar to a suit against the other. It is based upon the thought that even though the tort-feasors participated in one act of wrong and the issues of liability are the same for either, it is the separate wrong of each upon which the judgment rests, and that any other result would violate the principle of mutuality. The question still remains, however, when the identical issues are given judicial consideration in one suit, should not an adjudication operate against a party to that suit when he presents the same facts as the basis of a claim against another person in a later suit, irrespective of the mutuality requirement?

All cases involving a third person's use of estoppel by record as against a party to a former suit can be divided into two general categories: first, where the winner of the prior suit is later either suing or being sued, and is asserting the estoppel against a stranger to the former suit; and second, where the loser of the first suit is suing or being sued in a later action, and is met by a plea of estoppel asserted by a stranger to the former suit. The first group may be quickly disposed of. As has been seen, a stranger to a judgment is not bound by it since he has had no opportunity to try the issues. It is with the sec-

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45 Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260, 263 (1934); See Notes 27 and 31, supra.
ond group that we are mainly concerned. There are four cases in which the prior judgment was against a party to the present suit, and a stranger asserts that judgment as an estoppel against him in the second suit:

1. A formerly losing plaintiff brings another suit against a third party on the same issues.
2. A formerly losing defendant brings a suit against a third party on the same issues.
3. A formerly losing plaintiff is sued by a third party in a suit involving the same issues.
4. A formerly losing defendant is sued by a third party in a suit involving the same issues.

The majority of cases dealing with the derivative liability situation arises under the first category, and it is apparently here that the greatest willingness to abolish the mutuality doctrine has been shown, even where no derivative liability exists. A now-leading authority for this latter proposition is the Delaware case of *Coca-Cola Co. v. Pepsi-Cola Co.*46 The Coca-Cola Company had brought a suit in equity against three dealers apparently to prevent their putting Pepsi-Cola into Coca-Cola bottles. The complaint had been dismissed on the grounds that the dealers did not do the acts in question. In a second action, the Coca-Cola Company sued the Pepsi-Cola Company on a claim for a reward which the latter company had offered to whomever should give information leading to the detection of any person who put Pepsi-Cola into other than Pepsi-Cola bottles. The court, noting that identity of issues was necessary, and assuming such to be true, held:

"... a plaintiff who deliberately selects his forum and there unsuccessfully presents his proof, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirements of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one."47

Although this language restricts the holding of the case to above-listed situations (1) and (3) where the formerly losing party was a plaintiff in the first suit, additional language apparently comprehends all four

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situations, whereas the facts of the case are limited to situation (1) alone. 48

In the California case of *Duell v. Metro-Goldwyn Mayer Corp.*, 49 a plaintiff had sued a defendant in equity to enjoin a breach of contract, and the controversy had been determined for the defendant on the ground that no contract existed because the plaintiff had acted fraudulently. The same plaintiff was barred by a plea of estoppel by record from suing a second defendant for inducing a breach of the same contract. A similar holding was made in the Minnesota case of *Wilson v. Erickson* 50 where a plaintiff had sued his guardian for an accounting, on the ground that the guardian sold the plaintiff's property to an eventual purchaser through several buyers, fraudulently securing to these buyers a substantial profit. The proceeding had been dismissed because the charge was not sustained. The intermediate buyers, later sued by the same plaintiff on the same facts, were allowed to use the plea of estoppel by record on the issue of the fraud although they were not parties to the first suit. In *Sonnentheil v. Moody* 51 the plaintiff had brought a suit against a U. S. marshal for wrongful attachment of property, and had lost in that suit. In a second action against others for wrongfully inducing the marshal to levy the attachment in question, the Texas court allowed the former adjudication as a bar to the second suit. Although it thus appears that the mutuality requirement is abandoned where the same plaintiff brings another suit against a third party on the same issues, a few cases have applied the mutuality rule to prevent the defendant from raising the prior judgment. 52

In the second type of case, where a formerly losing defendant sues a third person on the same issues, it seems that, unless the theory of mutuality is strictly adhered to, the losing defendant should be barred from later suing another on issues which have already been decided against him in a previous suit which he has defended on the merits. 53 The case differs from the first type only in that it is an adjudication upon a defense, rather than an offense which binds the present plaintiff.

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48 The rule of the Coca-Cola case has been followed by the federal court sitting in Delaware. *Cohen v. Superior Oil Corp.*, 16 F. Supp. 221 (D. Del. 1936).


53 See Note (1938) 112 A. L. R. 404, 405-6.
A North Carolina case has apparently so held, and in the derivative liability situations, this change of parties has not been held to affect the outcome. Most cases, however, seem to abide by the strict mutuality requirement and deny the right plead an estoppel where no derivative liability exists. An interesting example is the Alabama case of Interstate Electric Co. v. Fidelity and Deposit Co. of Maryland. Here the Electric Company, believing that an employee had defrauded it, made a report to its bonding company, setting out facts upon which the alleged fraud was predicated. The employee sued the Electric Company for the publication of this report as a libel, and recovered, the report being found false. In a later suit the Electric Company sued the bonding company on the fidelity bond for the losses allegedly caused by the fraud of the employee. The bonding company was not allowed to plead the former adjudication that the report was false. The ground for the holding was the mutuality requirement. Again in the Utah case of Taylor v. Barker there was a collision between cars A and B, whereby both cars were damaged, and a guest in car A received personal injuries. The guest was assigned the claims for property damage by the owner of car A. In a suit against the owner of car B for the personal injuries and property damage, the guest recovered on both claims. Later the owner of car B sued the owner of car A for property damage to car B. Although the former suit had necessarily decided the issues of negligence and contributory negligence against the owner of car B, no estoppel was permitted as against him "since there was nothing to show an exception to the rule which requires the estoppel of a judgment to be mutual." No privity was held to exist as between assignor and assignee. A similar holding was made in Vermont in the case of

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54 Garret v. Kendrick, 201 N. C. 388, 160 S. E. 349 (1931). A doctor sued a patient for services rendered and secured judgment. Later the patient sued the doctor for damages caused by malpractice in performing the services in question. The court held that the patient was estopped because the defense of malpractice should have been raised in the first case. The adjudication was also held to be available to prevent the patient from suing another doctor who cooperated in performing the services.


56 Interstate Electric Co. v. Fidelity and Deposit Co. of Maryland, 228 Ala. 210, 153 So. 427 (1934).


58 In cases similar to this one, the former adjudication has been binding since
Fletcher v. Perry. A car owned by Fletcher was involved in an accident with a car owned by Kingsley. Kingsley's car being damaged, he joined Fletcher and Fletcher's driver in a joint suit for property damage and recovered a judgment, it being found that Fletcher's driver was negligent. Fletcher later sued the bailee-driver of Kingsley's car for property damage caused to his car and was met by a plea of estoppel to the effect that he had already lost in a prior suit on the identical issues necessary to the maintenance of this suit. A demurrer to the plea was sustained on the grounds of the mutuality requirement.

The same problem arises where a present plaintiff has been previously convicted of a crime and is asserting claims in a civil action which are inconsistent with issues formerly decided against him. It is said to be the weight of authority that a judgment of conviction or acquittal in a former criminal case cannot be given in evidence in a purely civil action to establish the truth of the facts on which it was rendered. The reasons given for this rule are that a criminal case involves different purposes and procedures, and is controlled by different standards of burden of proof. In addition to these reasons, an acquittal, being beneficial to the party to the prior criminal action, would be set up against a stranger to the prior suit who would have had no opportunity to try those issues. It appears, however, that the reasons for the general rule do not bear weight when the person previously convicted asserts civil rights, in a later action, on issues which have been formerly decided against him in the criminal action. Thus

privity was found to exist as between assignor and assignee. Goldberg v. Schlessinger, 86 N. Y. Supp. 209 (1904); Godding v. Colorado Springs Livestock Co., 4 Col. App. 14, 34 Pac. 942 (1893); Note (1928) 55 A. L. R. 1037.

A very similar case is Kessler v. Fligel, 240 App. Div. 232, 269 N. Y. Supp. 664 (1934). Here a president of a corporation accused A of the crime of coercion and A was prosecuted and discharged. Later the corporation sued A in equity for the same acts of coercion and A was found guilty. In a third suit, A sued the president for malicious prosecution and the president was not allowed to take advantage of the adjudication against A in the prior equity suit. The holding was based on the mutuality requirement alone.

Cottingham v. Weeks, 54 Ga. 275 (1875); Corbley v. Wilson, 71 Ill. 209, 22 Am. St. Rep. 98 (1874); Note (1924) 31 A. L. R. 261, 270 et seq.
in the New York case of *Schindler v. Royal Insurance Co.*, under those circumstances the rule was relaxed to the extent that the criminal conviction was admissible as prima facie evidence of the facts involved in it, although not as conclusive evidence, or as a bar. The Virginia case of *Eagle Star & British Dominions Insurance Co. v. Heller* extended this relaxation even further by holding a prior conviction conclusive as to the facts adjudicated, irrespective of the mutuality rule, where one convicted of burning his buildings to defraud was later suing an insurance company for recovery of insurance on those buildings. In spite of the obvious expediency and logic of these latter positions, both appear to be minority holdings.

Although it can thus be seen that there is a diversity of opinion as to the mutuality requirement to estoppel by record where the formerly losing party is *prosecuting* the second suit and sets up issues formerly decided against him in a prior suit, the cases appear to hold, almost without exception, that mutuality is necessary where a formerly losing party is *being sued*, and the estoppel is set up in offense. Here the plaintiff in the second suit asks that the formerly losing party be estopped to set up as defenses, issues formerly decided against him. Practically all such cases have arisen where the defendant in the second suit was a defendant in the first, and most involve automobile or railroad accidents.

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68Cases indicating a more liberal result are *Savage v. McCauley*, 302 Mass. 457, 19 N. E. (2d) 695 (1939) where a defendant was prevented from relitigating essential issues in the same case after a substitution of parties plaintiff against him; and *U. S. v. Wexler*, 8 F. (2d) 880 (W. D. Mo. 1925) where a judgment in a former divorce action was held to bind the then defendant on issues later asserted against him in proceedings brought under the Naturalization Law to set aside his certificate of naturalization. See also *Liberty Mut. Ins. Co. v. George Colon & Co.*, 260 N. Y. 305, 183 N. E. 506 (1933).
69In *Macedonia State Bk. v. Graham*, 198 Iowa 12, 199 N. W. 248 (1924), 34 A. L. R. 148 (1935), a former plaintiff was a defendant in the second suit and was there bound by the first suit on issues pertaining to existence of certain negotiable paper of which he was the maker.
In Haverhill v. International Ry., a truck collided with a street car. The driver of the truck recovered a judgment against the railway company for personal injuries, the issues necessarily decided being that the railway company was negligent and that the driver of the truck was not. Later the truck owner sued the railway company on the issues of negligence. It was held that the prior judgment, because of the mutuality rule, did not constitute a basis for recovery by the owner. It should be noted that this decision was made in spite of the fact that it was a case of derivative liability. In the Virginia case of Rhine v. Bond a man, his wife, and three children, riding in their automobile, were run into by defendant. The man, as administrator, recovered a judgment against the defendant for the death of one of the children, the issues necessarily decided being that defendant was negligent and that the father was not. In later actions for their own personal injuries, the other occupants of the car asserted the prior judgment against the defendant as conclusive of the issues of negligence. It was held that the case fell within the general rule of mutuality, and that the former adjudication could not be utilized. The court said:

"We have not been cited to, and have not found, any case in which a judgment in an action of tort in favor of a sole plaintiff injured by the negligence of a defendant has been held to conclude that defendant when sued by another person for personal injuries received by him at the same time and in the same accident." 

In the recent New York case of Bisnoff v. Herrman, a final adjudication in an action commenced by plaintiff's fellow passengers against defendant for injuries received in an automobile accident with defendant's vehicle was held not to establish the liability of the defendant as a matter of law where the plaintiff later brought suit for personal injuries received in the same accident. Said the court:

"The holding of the former [Good Health case: derivative liability case in which the mutuality rule was followed] is that a prior judgment may constitute a defense, while the determina- 

of the latter [Haverhill case: derivative liability case in which
the mutuality rule was followed] is that a recovery may not be predicated upon such a prior judgment.\textsuperscript{74}

The court, however, by dictum, went further than the necessities of the case required, and adopted the completely orthodox view:

"Where as here, there is no privity or relationship approximating privity, a judgment cannot be res judicata, even as a defense, in favor of one who was not a party and who would not have been bound had the judgment been adverse."\textsuperscript{75}

Another recent New York decision contains some pertinent suggestions. In \textit{Elder v. New York and Pennsylvania Motor Express, Inc.},\textsuperscript{76} there was a collision between two motor trucks, one owned by the U. S. Trucking Corporation (hereinafter called U. S. Corp.), and the other owned by the New York and Pennsylvania Motor Express, Inc. (hereinafter call Penn. Corp.). Each corporation sued the other for property damage to the trucks. The actions were consolidated and a jury verdict was rendered in judgment for the U. S. Corp. The issues necessarily decided were that Penn. Corp.'s driver was negligent and that U. S. Corp.'s driver was not contributorily negligent. A later action was brought by Elder, the driver of U. S. Corp.'s truck, against Penn. Corp. for personal injuries received in the accident. Elder asked for whatever benefit he was entitled to from the prior adjudication on the issue of Penn. Corp.'s negligence, and U. S. Corp.'s driver's freedom from negligence, would "eliminate entirely the requirements of mutuality of estoppel and of privity . . . . overrule fundamental conceptions and overrule authorities."

Upon a new trial of the same issues, the jury found precisely contrary to the previous jury finding, and the case was dismissed. The dissenting judge felt that because of the consolidation of the two actions, the first jury necessarily decided the vital issues against the Penn. Corp., and that therefore the truck driver was entitled to an estoppel by record. The dissenting statement, however, is expressly limited to situations where the formerly losing party was a plaintiff in the prior action. The statement is made that mutuality has not been relaxed where the

\begin{itemize}
\item[Bisnoff v. Herrman, 260 App. Div. 663, 666, 23 N. Y. S. (2d) 719 (1940). (italics supplied)]
\item[Bisnoff v. Herrman, 260 App. Div. 663, 666, 23 N. Y. S. (2d) 719 (1940). (italics supplied)]
\item[Elder v. N. Y. & Penn. Motor Express, Inc., 284 N. Y. 350, 31 N. E. (2d) 188 (1940).]
\end{itemize}
party against whom estoppel is pleaded is the defendant in both actions; and that ordinarily where such a party was a plaintiff in the former action and a defendant in the present action, estoppel does not apply. It can readily be seen that if Penn. Corp. had been a plaintiff in the former action, and failed to recover, the failure may have been due to the contributory negligence of its own driver rather than the lack of negligence of U. S. Corp.'s driver, in which case the driver of U. S. Corp.'s truck could not plead the former judgment, since the absence of his own contributory negligence was not there adjudicated. It is fundamental in all estoppels by record, however, that the issues concerned in both actions be the same. It appears that the prior action in which Penn. Corp. lost as a defendant would be the one most apt to contain issues identical with those in the second suit, since that case necessarily decided both that Penn. Corp.'s driver was negligent, and that Elder was not.

The policy of res judicata and estoppel by record would appear to prompt the abandonment of the mutuality requirement where a person has had one opportunity to prove his case before a court of competent jurisdiction and has failed. To allow him to assert a position contrary to the former adjudication merely because his opponent in the second case is not bound by the first is apparently an acknowledgment on the part of the courts that the first adjudication may have been incorrect. Such acknowledgment of undependability is out of harmony with the policy that there be an end to unnecessary litigation. Insofar as judges and juries are affected by the personal element, and render verdicts subjectively according to parties, rather than objectively according to merits, fairness to the formerly losing party might prompt the assumption that the first court was unduly favorable to his opponent. Also it might be argued that the formerly losing party would have urged his case more strenuously had he known that he would be bound thereby in later suits by or against third parties. Neither argument is compelling. The first is a rather weak-kneed admission of judicial incompetence. The second may explain the greater willingness of the courts to protect the formerly losing party when he was a defendant in the first suit, rather than a plaintiff, as noted by the dissenting judge in the Elder case, and particularly where the formerly losing party is a defendant in both suits. It seems, however, that the party could hardly claim this protection in derogation of the well-recognized public policy

of avoiding relitigation of issues, where he has been once afforded a fair tribunal in which to try them.

Certainly, however, there is something in the nature of the cases in which a formerly losing party was a defendant in the first suit, and the cases in which the formerly losing party is "hauled into court" with the issues already decided against him, that makes the courts wary of a liberal rule of estoppel by record. Up to this point, however, it seems that public policy in preserving peace, the desire for freedom from vexatious litigation, and the interest in the dignity of tribunals of justice hold sway in liberal courts where a formerly losing party tries to sue another on issues formerly decided against him in a court of competent jurisdiction.

FRED BARTENSTEIN, JR.

CONSTITUTIONAL LIMITS OF LEGISLATIVE PRESSURE TO INDUCE ACCEPTANCE OF ELECTIVE WORKMEN'S COMPENSATION ACTS

Workmen's Compensation Acts\(^1\) are now widely adopted in recognition of the fact that the common law negligence action against an employer is entirely inadequate from both a social and economic point of view to meet the need for monetary compensation for the injuries befalling workmen in modern industry. These acts have been passed, therefore, to facilitate the legal procedure available to workingmen injured in the course of their employment by assuring them of a speedy and certain recovery for the injuries.\(^2\)

Although the statutes of the several states vary in many important respects, the fundamental difference from a constitutional point of view is whether the act be optional or compulsory. The right of a legislature to impose liability upon the employer, independently of his negligence, is no longer open to question under either type of statute. The courts have held that the compulsory statutes, and \textit{a fortiori} the optional statutes, do not impinge upon the due process or equal protection clauses of the Constitution.\(^3\) Today, therefore, the legislative power

\(^1\)Hereinafter referred to as "W. C. A."

\(^2\)Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

to create absolute liability under a compulsory W. C. A. is settled, and litigation is mainly concerned with problems growing out of optional or so-called "elective" statutes.

In every instance in which a state legislature has been content to adopt an elective statute, it has been found that its provisions were not sufficiently attractive to the employers within the jurisdiction to enlist their unanimous adherence. Methods of making the employers who took advantage of their statutory right to elect not to come under the compensation system, see the "desirability" of a change of mind became necessary to eradicate the evils that a W. C. A. is designed to eliminate. These methods have taken three forms: (1) Abolition of the employer's common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant rule; (2) Imposition of presumptions of negligence against the employer; (3) Creation of rules of evidence designed to facilitate the proof of the injured employee's case.

A. Abolition of Common Law Defenses

The first persuasive legislative device was that of the abolition of the common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant doctrine as to employers who refused to enlist. The power to abolish these defenses rests upon the principle that no person has any property right or vested interest in any rule of law, and that the legislature may change such rules if they deem it best for the good of the state. It has been held that to do so as a means of compelling employers to accept the provisions of the act is not unreasonable coercion, but merely a declaration of the public policy of the state. Legislative action of this character has been uniformly upheld, but standing alone has lacked the vigor of a compelling force. Resort to additional means became necessary.

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This is true unless, of course, a peculiar state constitutional prohibition is contravened, it being settled that the Federal Constitution has no applicable measures.


*Hunter v. Colfax Consolidated Coal Co., 175 Iowa 245, 154 N. W. 1037 (1915); Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).

*Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245 (1915).

*This method of coercion is well sanctioned as being constitutional. The cases are collected in Note, L. R. A. 1916A, 409, 413.
B. Imposition of Negligence Presumptions

In legal effect there is no difference between saying that for accidental injuries received by a workman is the course of his employment, and employer shall be (1) "absolutely liable," or (2) "conclusively presumed to be negligent." A legislature could, therefore, without contravening the due process or equal protection clauses of the Fourteenth Amendment, phrase an act so as to provide for a "conclusive presumption of negligence against an employer" in proceedings under its W. C. A. Under an elective act, however, as against an employer who did not enlist, the action of an injured employee would still be based upon negligence. To make the liabilities of both types of employers as equal as possible under an elective act, the legislature might do away with the necessity, or at least ease the burden, of the employee's proving negligence against a non-complying employer. To effectuate this purpose an absolute liability or conclusive presumption of negligence might be imposed upon the non-complying employer; or merely a prima facie or rebuttable presumption of negligence might be used to be inferred from the fact of the injury itself. By this means, the fact that the workman was injured in the course of his employment would create either a conclusive or prima facie presumption that such injury was caused by the negligence of his employer. Such an enactment brings into issue the extent of the power of a legislature to tamper with the precepts of logic, and by fiat to declare that upon proof of one fact another shall be inferred. Many cases have dealt with this legislative right, and it is now well established that a state has the general power to prescribe the evidence which shall be received and the effect that shall be given to it in her courts. The state may exert this power by providing that proof of one particular fact shall be prima facie evidence of another. The only qualification upon this right is that the enactment be not an arbitrary mandate or one that discriminates between different persons in substantially the same situation; if this demand has been met, the legislation will not create a denial of due process or equal protection of the laws. As was said in the leading case on statutory

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9 This would not be true had not the employer been already denied the common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant rule.

10 The leading case affirming this right is the United States Supreme Court decision in Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 51 S. Ct. 136, 55 L. ed. 78 (1910). A Mississippi law provided that in all actions against railroads for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company should be prima facie evidence of the want of reasonable skill and care on the part of the servants of such company.
presumptions, *Mobile J. & K. R. R. v. Turnipseed*, it is "... only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."\(^1\)

Under the principles laid down in the *Turnipseed* case, prima facie presumptions have been upheld from one instance in which the fact of recklessness was inferred from the fact of driving an auto ten m.p.h. through a city street,\(^2\) to one in which violations of the city's garbage ordinance were inferred in certain instances from the use of the city's water supply.\(^3\) A multitude of rebuttable inferences possessing varying degrees of rationality have been sustained in attacks upon both civil\(^4\)

This was upheld by the Court, which said: "The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference. That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So also it must not under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed." 219 U. S. 35, 43, 31 S. Ct. 136, 138, 55 L. ed. 78 (1910).


\(^2\)Morrison v. Flowers, 308 Ill. 189, 139 N. E. 10 (1923). A motor vehicle act provided that if the rate of speed through town on a public highway exceeded ten miles per hour, such rate of speed should be prima facie evidence that the person operating such motor vehicle was running at a rate of speed greater than was reasonable and proper. This Illinois statute survived an attack based on the Fourteenth Amendment.

\(^3\)State v. Spiller, 146 Wash. 180, 262 Pac. 128 (1927). Under a city ordinance, it was made mandatory that all who had garbage to dispose of should do so by means of a certain type of garbage can prescribed. If the householder did not possess such a can, the fact that he was using city water raised the prima facie presumption that he was creating garbage, and, therefore, violating the statute. This statutory presumption was held not to be a violation of due process of law.

\(^4\)Cunningham v. Chicago & A. R. Co., 215 S. W. 5 (Mo. 1919) (delay by carrier creates presumption that the carrier was negligent); People v. Polthenus, 567 Ill. 185, 10 N. E. (2d) 966 (1919) (presumption that transfer was made in contemplation of death); Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911) (presumption that a sale was fraudulent); Ferry v. Ramsey, 277 U. S. 88, 48 S. Ct. 443, 72 L. ed. 796 (1928) (insolvency at time of deposit is prima facie presumption that officer knew of insolvency and assented to the deposit); Commonwealth v. Kroger, 276 Ky. 20, 122 S. W. (2d) 1066 (1938) (prima facie inference that a traffic violation was committed by or with the car owner’s consent). Contra: Tipton v. Estill Ice Co., 279 Ky. 793, 132 S. W. (2d) 347 (1939) (mere failure to secure an operator’s permit not prima facie evidence that the driver involved in the accident was negligent).
and criminal\textsuperscript{16} statutes, under the due process and the equal protection clauses of the Federal Constitution.

Similarly, though less frequently, conclusive presumptions have been enacted and have been upheld by the courts. In \textit{Packard v. O'Neil}\textsuperscript{17} an Idaho statute created an absolute legal presumption of negligence for personal injuries and property damage against a man who drove a car while under the influence of intoxicating liquor. The court held that this presumption was created not as a principle of evidence, but as a measure to insure and regulate safety upon the highways. The legislature had thought that there might be difficulty in establishing lack of due care, and that this would leave room for so much question that the conclusive presumption of negligence ought to prevail.

In many instances, however, legislatures have gone even further, extending the class of injuries for which a defendant is absolutely liable.\textsuperscript{17} Thus, railroads have been made absolutely liable for property damage caused by sparks emitted from their engines,\textsuperscript{18} and automobile owners have been held to an absolute liability for injuries caused by the negligence of operators driving with their consent.\textsuperscript{19}

\textsuperscript{16}Hawes v. Georgia, 258 U. S. 1, 42 S. Ct. 204, 66 L. ed. 431 (1922) (prima facie evidence that the person in actual possession had knowledge of a still on the premises); Yee Hem v. U. S., 268 U. S. 178, 45 S. Ct. 470, 69 L. ed. 904 (1925) (opium presumed to have been imported illegally); Bandini Petroleum Co. v. Superior Court of Los Angeles County, 284 U. S. 8, 52 S. Ct. 103, 76 L. ed. 136 (1931) (the blowing, release, or escape of natural gas into the air prima facie evidence of unreasonable waste); Cockrill v. California, 268 U. S. 258, 45 S. Ct. 490, 69 L. ed. 944 (1925) (presumption that a conveyance was made with intent to avoid escheat); People v. Fitzgerald, 14 Cal. App. (2d) 180, 58 P. (2d) 718 (1936), cert. denied, 299 U. S. 593, 57 S. Ct. 115, 81 L. ed. 437 (1937) (possessor of dynamite made prima facie guilty of a felony); State v. Nossaman, 107 Kan. 715, 193 Pac. 347 (1920) (presumption of cigarettes prima facie evidence of the selling or keeping for sale); State v. Elkin, 177 La. 427, 148 So. 668 (1933) (failure to pay worthless check in ten days prima facie evidence of intent to defraud); State v. Fitzpatrick, 141 Wash. 638, 251 Pac. 875 (1927) (possession of burglary tools prima facie evidence of the intent to use the same to commit crime). Contra: McFarland v. American Sugar Co., 244 U. S. 79, 39 S. Ct. 498, 60 L. ed. 899 (1916) (presumption of being a party to a monopoly or a combination in restraint of trade or commerce held invalid); Stafford v. City of Valdosta, 49 Ga. App. 243, 174 S. E. 810 (1934) (purchase of intoxicating liquors within the city limits not to be presumed from mere possession).

\textsuperscript{17}Idaho 427, 262 Pac. 881 (1927).

\textsuperscript{18}In cases other than those involving W. C. A. controversies, this is going much further because the common law defenses are still available to the defendant under a conclusive presumption of negligence, while under liability without fault they are immaterial.

\textsuperscript{19}St. Louis & S. F. RY. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. ed. 611 (1897).

\textsuperscript{20}Hodge Drive-It-Yourself Co. v. City of Cincinnati, 284 U. S. 335, 52 S. Ct. 144, 76 L. ed. 523 (1932). See also Jones v. Brim, 165 U. S. 180, 184, 17 S. Ct. 282, 284,
A review of the numerous cases in which statutory presumptions have been upheld establishes the power of a legislature to declare that upon proof of one fact another shall be inferred. With the view of persuading non-complying employers to enlist under a W. C. A., legislatures have, in several instances, declared that the fact of the workman's being injured in the course of his employment shall be prima facie evidence that such injury was caused by the negligence of the employer. In *Lykes Bro. S. S. Co. v. Esteves*, a federal court considered a provision in the Puerto Rican W. C. A., creating a prima facie presumption of negligence against an employer who had elected not to come within the act, and the constitutionality of the provision was upheld under a due process attack. The court reasoned that it was not dealing with liability for negligence generally, but with a W. C. A. confined entirely to industrial injuries, *in which a jurisdiction if it wished could impose absolute liability*. It was observed that the employer could preclude resort by the employee to such action by securing accident compensation in accordance with the act, and the presumption was sanctioned as a constitutional means of coercion.

In *Hawkins v. Bleakly* a statute with a presumption to substantially the same effect was upheld under an equal protection attack. It was held not to be arbitrary as it treated all employers alike and all employees alike. The fact that it served as a "strong inducement" to the employer to come within the W. C. A. was again held not to be unconstitutional coercion.

In the light of such precedent, it is surprising that the Pennsylvania court in the decision of *Rich Hill Coal Co. v. Bashore* reached the opposite conclusion. There, the wording of the act creating the prima

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41 L. ed. 677 (1897). Where an owner or tender of sheep, cows, etc., drove them over a public highway constructed on a hillside, he was held to be absolutely liable for all damages they did to the banks, etc. The Court held that "The statute, being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power does not deny to the defendant the equal protection of the laws." And "So, also, as the statute clearly specifies the condition under which the presumption of neglect arises, and provides for the ascertainment of liability by judicial proceedings . . .", that it was not a taking of property without due process of law. In the opinion the Court observed that the legislature had said, in effect, that such a passage was so likely, if great caution was not observed, to result in damage to the road, that where this damage followed such a driving, there ought to be no controversy over the existence or non-existence of negligence, but that there should be an absolute legal presumption to that effect resulting from the fact of having driven the herd.


facie presumption against the non-complying employer was unusually cautious, expressly providing for the right of the employer to introduce testimony showing the injury to have arisen from another cause, and making the final determination a question of fact for the jury. This provision was held to be in violation of the Fourteenth Amendment under both the due process and equal protection clauses. In failing to recognize a "manifest connection between the fact proved and the fact presumed," the decision not only ignored the fact that the courts have not applied the highest degree of logic in the inferential step, but completely turned its back on two rulings of federal courts to the contrary. Such a decision stands in need of support, for it is thought that the somewhat limited authority on the issue goes to support state legislatures in creating a prima facie presumption of negligence against an employer in an action by his employee for injuries received in the course of employment.

On the question of the power of a legislature to create a conclusive presumption in this regard, however, even less case authority is available. In 1923, a legislative effort to make a non-complying employer liable without fault was sustained by the North Dakota Supreme Court in *Fahler v. City of Minot*. In 1940, however, the West Virginia Supreme Court of Appeals, in the decision of *Prager v. W. H. Chapman & Sons Co.*, held that it violated the principle of due pro-

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28Section 210, 1 (a) of 77 Penn. Stat. § 42.
29The court also held the act invalid as contravening the Pennsylvania Bill of Rights which declares that no person can "be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." Pa. Const. Bill of Rights Art. I, § 9.
29State v. Nossaman, 107 Kan. 715, 193 Pac. 347 (1920) (rational connection between the possession of cigarettes and the sale of them or the keeping of them for free distribution); Commonwealth v. Kroger, 276 Ky. 38, 122 S. W. (3d) 1006 (1938) (violation of a traffic law had a rational connection with the inferred fact that same was committed with the car owner's authority or permission); State v. Spiller, 146 Wash. 180, 262 Pac. 128 (1927) (use of the city's water made prima facie evidence in certain situations of the violation of a garbage disposal ordinance).
29The North Dakota legislature had provided that a non-complying employer could be sued by a complying employee either before the administrative tribunal or at his option before the courts of law. If he chose the latter he was held to have the benefit of the conclusive presumption of negligence the same as if he were before the tribunal. Laws of 1919, Ch. 162, § 11.
2949 N. D. 960, 194 N. W. 695 (1923).
299 S. E. (2d) 880 (W. Va. 1940), noted (1940) 2 Wash. and Lee L. Rev. 170.
cess of law for the legislature to make non-complying employers liable regardless of fault. The court believed the act to be unconstitutional because the W. C. A. was not compulsory and had not, therefore, sought to impose liability upon all employers. It was observed that the provision might have been intended to compel all employers to become subscribers to the W. C. A., but that this fact did not make the act effective, because if the legislature had that purpose in mind, there was open to it a plain, simple, and direct way in the passage of a compulsory W. C. A.\textsuperscript{30}

The reasoning of this conclusion is not in line with precedent. It must be remembered that conclusive presumptions applying to other situations have been upheld,\textsuperscript{31} and that the provisions of the Fourteenth Amendment are not contravened by legislation of this type if a rational basis exists for the rule enacted.\textsuperscript{32} The true idea of due process of law is that the processes of government shall not be exerted or imposed in an arbitrary or capricious manner at the whim of some judge or executive, but rather in accordance with the letter and spirit of certain prescribed rules or well established usages.\textsuperscript{33} Thus, unless there is a substantial invasion in a highhanded manner so as to represent unguided or arbitrary action, the courts of the United States are reluctant to interfere on the ground that a state has violated the due process clause; and therefore, unless outstanding, matters of state procedure, in particular, are not subject to these attacks.\textsuperscript{34}

Upon an attack under the equal protection clause, also, there is a

\textsuperscript{30}Borgnis v. Falk Co., 147 Wis. 327, 138 N. W. 209, 37 L. R. A. (N. S.) 489 (1911).
\textsuperscript{33}Bank of Columbia v. Okley, 4 Wheat. 235, 1 L. ed. 878 (U. S. 1819); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908); Arizona Employers' Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1918); see Truax v. Corrigan, 257 U. S. 312, 329-30, 42 S. Ct. 124, 128, 66 L. ed. 254 (1921), 27 A. L. R. 375, 384 (1923), where the Court said: “It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.”
\textsuperscript{34}Matson v. Dept. of Labor and Industries of Washington, 284 U. S. 151, 52 S.. Ct. 69, 76 L. ed. 214 (1934).
preference in favor of the classification\textsuperscript{35} made by the legislature,\textsuperscript{36} and of legitimate grounds for distinction.\textsuperscript{37} The one who assails a classification under the equal protection clause must, therefore, carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.\textsuperscript{38}

Upon these principles, accompanied by a recognition of the fact that a legislature if it wishes may impose an absolute liability under a compulsory statute, the decision of the North Dakota court\textsuperscript{39} allowing liability without fault is to be preferred. The best reason that can be given in support of this conclusion is that which underlies the very public purpose justifying a compulsory W. C. A.—i.e., the realization that there is a pecuniary loss resulting from these industrial injuries which the employee should not bear. The primary if not the legally termed "proximate cause" of these injuries is the employment itself, and in this adventure both the employer and the employee are engaged. Compensation acts provide for reimbursement to the employee because it is on him that the first brunt of the loss falls. They further require that payment shall be made by the employer because he takes the gross receipts of the common enterprise, and can, by reason of his control, make the proper adjustments to distribute the loss.\textsuperscript{40} This is certainly a public policy of great worth.\textsuperscript{41}

There is one obvious objection to a conclusive presumption in these cases, however, that remains yet to be treated. It is one thing to hold an employer liable for damages occurring without fault when the damages are more or less limited by a prescribed scale (as under a W. C. A.), and quite another to hold him liable for all the damages a jury might assess. The latter allows the legislature to subject the non-com-

\textsuperscript{35}By classification is meant the fact that the legislature made the terms of the act applicable only to a certain group or kind of cases rather than giving it universal application.


\textsuperscript{37}People v. Monterey Fish Products Co., 195 Cal. 548, 234 Pac. 398 (1925).

\textsuperscript{38}Lindsey v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. ed. 369 (1911).

\textsuperscript{39}Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923).

\textsuperscript{40}By insurance, by increasing selling prices, and by reducing wages. (But the latter action is obviously not possible since the advent of large scale union contracts).

plying employer to a jury assessment after stripping him of his common law defenses. A question of whether such an employer has been afforded the equal protection of the law is, therefore, appropriately raised. In Fahler v. City of Minot the court met this objection by saying that where the employer did not come within the statute, the claim of the injured employee was necessarily subject to the hazard of the employer's financial responsibility and the delay and inconvenience of a suit through the regular legal channels rather than the simplified procedure before a Workmen's Compensation Bureau. This seems a fair exchange, and with this objection also erased, there can be no further logical basis for a Fourteenth Amendment attack upon a conclusive presumption of this type. Any remaining discriminations must be accepted. The whole basis upon which a W. C. A. is conceived is that there is an adequate distinction between the employer class and the employee class.

Finally, all the employer has to do if he finds the role of a non-complier too burdensome is to subscribe to the act, the power to adopt these means of coercion being recognized.

C. Liberalization of Rules of Admissibility of Evidence

Under an elective statute, when a workman is suing a non-complying employer, there are several things that he must prove if he would take advantage of the statutes abolishing the common law defenses of his employer. In such a case, the workman must prove that the injury

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49 N. D. 960, 194 N. W. 695 (1923).

"This may be admitted, but still the question asked whether there is any adequate basis of distinction between an employer who elects to come within the act and one who does not? It seems that the courts have long recognized this distinction when they have denied the common law defenses to the latter class. In Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923), the court answered this question further by pointing out that the employee was forced to submit to the inconvenience of a law suit and the danger that his employer would be insolvent.

Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1917); Lykes Bros. S. S. Co. v. Esteves, 89 F. (2d) 528 (C. C. A. 5th, 1937). In Ferry v. Ramsey, 777 U. S. 88, 94, 48 S. Ct. 443, 444, 72 L. ed. 796 (1928), a Kansas act provided that the fact that a banking institution was insolvent or in a failing condition at the time of the reception of a deposit should be prima facie evidence that the director or officer had knowledge and had assented to such deposit. The Court held that the legislature might have made the director personally liable to the depositors in every case if it had wished, and thereby have made one taking the position assume the risk. The Court said: "The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way or reaching it." See also Lykes Bros. S. S. Co. v. Esteves, 89 F. (2d) 528 (C. C. A. 5th, 1937).
was the result of his employer's negligence; that it was sustained "in the course of his employment"—i.e., occurred while he was on his job; that is was sustained "out of the course of his employment"—i.e., occurred as a consequence of his employment; and that it resulted in certain damages to him. To facilitate the proof of these issues by the workman, a legislature might make evidence which was prohibited at common law admissible in the proof of these points.

In the only instance in which this has been attempted the statute was declared void in the Pennsylvania case of Rich Hill Coal Co. v. Bashore. To supplement a provision creating a presumption of negligence, the Pennsylvania legislature passed a further enactment that anything the injured employee said to anybody within twelve hours after the injury would be adjudged "competent evidence" in any action brought to recover damages for personal injuries against a non-complying employer. This was the construction put upon the following statute by the highest court of the state:

"When an employee sustains an injury in the course of his employment, declarations, remarks, and utterances, made by the injured employee within twelve hours after the injury was sustained shall be admissible as competent evidence." 47

The court held this provision to deny to the non-complying employer the equal protection of the laws under the Fourteenth Amendment. 48 In reaching this conclusion the court regarded the act as having the effect of creating a conclusive presumption of negligence and therefore to be invalid for the same reason that a direct attempt to create that result would have been. 49 If this were the only ground for

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46See Harper, Law of Torts (1933) § 212.
47Pa. 449. 7 A. (2d) 902 (1939).
48See 201.1 (b) of 77 Penn. Stat. § 42—this provision being applicable only in respect to employers who had elected not to come within the scope of the act.
49The court found two other grounds of unconstitutionality: (1) the act contravened the principle that the rules of evidence must be uniform and impartial, (2) it was "special legislation" and therefore invalid under a provision of the Pennsylvania Constitution that the legislature "shall not pass any local or special law... regulating the... rules of evidence in, any judicial proceeding or inquiry before courts...." Pa. Const. Art III, § 7.
50While recognizing the logical distinction between making a fact conclusive proof of a fact in issue and making an unsworn utterance of an injured employee "competent evidence," the court thought that the "practical effect" of the latter was to make a finding of the employer's fault almost inevitable from the mere fact of the employee's injury. The basis of this reasoning was that in most injuries of this type the only witness was the employee himself and thus the rule would make the employer's right of rebuttal practically valueless. This would put the employer in the same position as if the legislature had made the mere fact of the injury conclusive proof of the employer's fault.
holding the act invalid, the decision of the court would be very doubtful, for it has been seen that the right to create conclusive presumptions in workmen's compensation cases has been affirmed by other courts.

The court, however, found several other faults. The employee might use these statements even though he survived the injury and was able to appear on the witness stand.\(^{50}\) The employee might make willfully false statements within the twelve hour period\(^{51}\) to third persons. Such remarks could be testified to by these third persons, who would not in testifying stand in danger of being prosecuted for perjury, which danger would face the workman if he were to testify falsely himself. Thus, the employee could absent himself from the jurisdiction,\(^{52}\) and establish his case by these witnesses. Cross examination of such witnesses upon this hearing would not be effective,\(^{53}\) because their knowledge would be limited in most instances to the content of the employee's own statements. The declarations made would, furthermore, not have to relate to the injury, but could be prejudicial remarks on irrelevant matters.\(^{54}\) The court held these ex parte declarations to be unacceptable as evidence for four reasons: (1) they did not have to be made under oath; (2) they were not part of the res gestae; (3) they did not need to be made under the solemnity of impending death; (4) they were not subject to cross examination.

The statute does seem to present an imposing array of irregularities, and there is no doubt that as a general rule of evidence, it would be open to serious objections. It must be remembered, however, that it is

\(^{50}\)A witness is not allowed to testify as to an unsworn statement made by himself upon a former occasion. A declaration of a witness out of court inconsistent with his testimony is not admissible to prove the truth of the facts stated, but only for purposes of impeachment. Spear v. United Railroads of San Francisco, 16 Cal. App. 637, 117 Pac. 956 (1911); Backes v. Movsovich, 82 N. J. L. 44, 81 Atl. 497 (1911); Southwestern T. & T. Co. v. Thompson, 157 S. W. 1185 (Tex. Civ. App. 1913).

\(^{51}\)"Which the court observed was ample time for the designing of testimony."

\(^{52}\)"Hearsay evidence does not become admissible by reason of the fact that the declarant has left the jurisdiction or is sick or cannot be examined or compelled to testify or is incompetent as a witness." 22 C. J. 217.

\(^{53}\)The court held cross-examination to be more than a privilege—that it was a right.

\(^{54}\)This construction seems not only unnecessary, but to be unrepresentative of the usual treatment of a court passing on the constitutionality of a statute. A court will, if possible, put a construction upon a statute that will make it possible to hold the act constitutional. If the court had construed the act so that the only remarks available would have been remarks relevant to the issue—that is, have made the rule of "relevancy, competency, and materiality" paramount to the implications of the legislative enactment—it could have avoided this objection, at least.
confined to cases of a particular type, and will serve only as an aid on certain particular issues in suits of that type. It might be well, therefore, to analyze the act as it would apply to the several proofs that a workman must establish in a suit against a non-complying employer.\(^5\) It will be noticed that the act opens with the words “when a workman is injured in the course of his employment.” It is a possible construction that the legislature intended that before the rule of evidence under review is to be available to the employee, he must first establish that he was injured “in the course of his employment”—which term in Pennsylvania also embraces the requirements of the usual “out of the course of employment” phrase.\(^6\) Under such an interpretation, evidence of the type made admissible by the statute could not be used by the employee to show that he was injured in or out of the course of his employment.\(^7\) Perhaps a more common construction would be that the evidence is to be admissible on any issue in the case, including whether the injury happened in or out of the course of the employment. Under this interpretation, the act would be open to serious objection, as it would be a threat to extend an employer’s liability to all cases in which his employee was injured, whether on the job or not. As a means of avoiding an unnecessary invalidation of the statute, the court might well have adopted the former construction, even though it may not be the most obvious meaning of the words used by the legislature.

As to this “radical” rule of evidence being available to prove damages received, it is hard to see how the act in any way prejudices the

\(^{5}\) As set out, supra, these points are: (1) that the injury was caused by the employer’s negligence; (2) that it was sustained in the course of the employment; (3) that it was sustained out of the course of the employment; (4) and that it resulted in certain damages to the employee.

\(^{6}\) Pennsylvania is a state that has eliminated the customary “out of the course of the employment” requisite. Thus the term “in the course of the employment” is usually deemed to embrace both concepts. For a discussion of this point and the general distinction between “in the course of” and “out of the course of”, see Harper, Law of Torts (1933) § 212.

\(^{7}\) On the issue of whether the injury was “accidental” or not as it is customarily used in a W. C. A. an interesting point is raised. When a W. C. A. requires that an injury be accidental it means that it shall not be caused by the attempt of the workman to commit suicide or wilfully to inflict injury upon himself or another person. This, however, only applies to suits against workers under the W. C. A. As to suits against non-complying employers, which suits are common law actions, such an issue would not come up because it would ordinarily arise under the defense of contributory negligence, and this defense has been taken from non-complying employers. It will be noticed that the Pennsylvania act read “When injury results. . . .” It did not require it to be an accidental injury as it would have had to be under the W. C. A.
NOTES

Statements of general pain and suffering constitute a recognized exception to the hearsay rule and are thus admissible without the aid of a statute. It is difficult to conceive of any other kinds of statements that the employee might make within twelve hours after his injury that could be used effectively to establish damages that did not in fact exist. Of course very abusive statements about the employer might be introduced to incite the jury's general prejudice against him, but still the employer would have available the usual sources of objective proof regarding the extent of the employee's injuries. If the award of the jury exceeded to any substantial extent the injuries received, the verdict could be set aside upon this ground.

The mere fact that the evidence is admissible, moreover, does not mean that it will be credible. If the plaintiff is in court, cross-examination is available to disprove the truth of his statements; and if he is not at the trial, it is likely that his very absence would raise serious doubts in the jurors' minds as to the validity of the evidence. If an injured workman with designs on undeserved economic gain remarked within the period that he had received everything from a fractured skull to a lacerated little toe, that he anticipated a nervous breakdown and life long ill-health as a result, he might absent himself from the jurisdiction and use these remarks to establish his damages. However, he could hardly remove the attending doctors, the ambulance drivers, and the hospital nurses from the jurisdiction and destroy doctors' and hospital records as well. It is for these reasons that the rule of evidence seems harmless as far as any chance of increasing the amount of damages is concerned.

This leaves only one other matter in which the rule of evidence may be thought to facilitate the proof: the question of the negligence of the employer. But it has been seen that a legislature has the right to create a W. C. A. that imposes absolute liability, as well as an act that creates an absolute presumption of negligence against a non-complying employer. This, then, is a return to the old issue of whether the legislature can do indirectly what it has the right to do directly. That is, if the legislature has the power to create an absolute presumption of negligence against a non-complying employer, can it not create a rule that operates to enable the presentation of merely a strong case of negligence?

See Wigmore, Evidence (1940) § 1718.

"State ex rel Davis-Smith Co. v. Clausen, 65 Wash. 156, 177 Pac. 1101 (1911), 37 L. R. A. (n. s.) 466 (1912)."

"Fahler v. City of Minot, 49 N. D. 960, 194 N. W. 695 (1923)."
against a non-complying employer? The thing to be considered is the result reached, not the possibly artificial or clumsy way of reaching it.61

When the operation of the particular rule of evidence under review is analyzed, it is difficult to see upon what ground the Pennsylvania court could have held it to be violative of the principles of the equal protection clause. The theory of workmen's compensation is based upon the assumption that there is a sufficient basis of distinction between employer and employee. The cases upholding the denying of common law defenses and the imposing of the presumptions of negligence established the view that there is a valid basis of distinction between enlisted and unenlisted employers.

The court said, however, that this rule of evidence was denied to the defendant employer, and considered that the legislature was thereby opening the door of "loose hearsay testimony" for the benefit of one party, while keeping it closed to the other. It is doubtful whether there are any evils implicit in this situation. True, the rule relates to remarks made by the employee only, and not to remarks made by the employer, but the justification for this discrimination rests upon the very nature of the relief being afforded as well as the nature of the employment relationship which has long been recognized as the basis of a W.C.A.

The rules of hearsay have been meddled with before by the legislatures. It is a well-known rule of common law evidence that what is hearsay does not cease to be so because the person who made the remark may have died.62 In situations like this, however, statutory changes in two states have admitted the statements of decedents as exceptions to the hearsay rule.63 Although involved in numerous cases, these statutes have apparently never been questioned under the Fourteenth Amendment.64 Moreover, cases have held that the admission of incompetent evidence is not a denial of due process of law.65 Statutes making a writing or memorandum of any kind, whether made in the regular course of business or not, admissible evidence may be found, and have been held not to violate the principles of due process

64See cases collected in 22 C. J. 216.
This is an analogous situation to the rule under discussion, and the chances for fraud and deceit are as great in the memorandum cases as in the oral remark cases. When it is considered that the memorandum statutes are statutes of general application and the statute under review is one confined only to a particular type of action which is created to effectuate a great public purpose, it seems that the Pennsylvania court became unduly alarmed about the efficacy of this rule of evidence as an agency for the forces of evil.  

A look into the way the common law rules of evidence have been relaxed with an increasing degree of liberality in administrative proceedings before workmen's compensation boards further strengthens the argument against the Pennsylvania decision. Many statutes provide that the commission shall not be bound by the common law or statutory rules of evidence. In at least two states great liberality exists in that the courts may not reverse a finding because of any informality in the manner of taking evidence. Thus, either as a result of express statutory command or by construction of statutes relaxing the rules of evidence, hearsay may be admitted and considered by the commissions in several states. When it is seen that employers who have accepted a W. C. A. are subjected to these relaxed rules of evidence in a proceeding before a commission, is it such a discrimination to subject a non-complying employer to the same "ordeal" before a court of law?

As long as a rule of evidence is available only in aid of finding of an employer's negligence, it should not be considered objectionable in the constitutional sense. Should it be so drawn as to facilitate proof

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67 Conversely, legislative attempts in the opposite direction, in the way of excluding testimony admissible at common law, have been made. In the recent case of Kirsch v. Posimal, 294 N. W. 865 (Wis. 1940), a statute provided that no statement made by an injured person within seventy-two hours after receiving an accident or injury should be received in evidence in an action for damages for personal injuries unless the same should be admissible as part of the res gestae. The constitutionality of this statute has not been questioned under either due process or equal protection clauses.


69 Ocean Accident and Guarantee Corp. v. Industrial Comm., 34 Ariz. 175, 269 Pac. 1127 (1938); Baker v. Industrial Comm., 44 Ohio App. 539, 186 N. E. 10 (1933); see Note, (1939) 24 Iowa L. Rev. 576.

67 The point is arguable, however, that such a relaxation of rules might be permitted before commissioners experienced in the evaluation of testimony, but that a jury might not be equally fortified against the deceptions of hearsay testimony.
on other issues, such as that the workman was injured in the course of his employment, then its constitutionality might be questioned.

Conclusion

It should be remembered that workmen's compensation legislation, made to equalize the liabilities of the two types of employers and to persuade the non-complying employer to enlist under the act, is not dealing with injured plaintiffs in general, but only with plaintiffs who are employees injured in the course of their employment by the negligence of their employer. These are pieces of legislation with great public purpose behind them. The object of all these acts is to create a liability against the employer for a certain class of injuries regardless of his fault. If an employer chooses not to come within the W C. A., an attempt to aid a workman in proving the employer negligent is in order. Abolition of common law defenses, imposition of presumptions of negligence and regulations of the admissibility of evidence are proper if exercised in this direction, and in this direction only. They are not, furthermore, to be considered as unconstitutional means of coercion when their only efficacy is in the carrying out of this purpose.

William M. Martin
RECENT CASES

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

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

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

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


\(^{2}\)The intestate, Mr. Flegenheimer, is doubtless better known as "Dutch Schultz" of "bootlegging" fame. This fact may well be considered as partially explaining the decision of the court.

\(^{3}\)The fact that this agent had legal title to the stock may lead one to inquire whether the true relationship was not that of trustee and cestui que use. But it appears that it is not unusual for an agent to hold general title to lands or chattels. 1 Bogert, Law of Trusts and Trustees (1935) § 15. The court here did not question the allegation that Vogel was an agent, and indeed, it is believed that the distinction is immaterial in this case.
aid of the court in her endeavor to disengage herself (as administratrix) from the unlawfulness of the conduct of her intestate.”

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

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

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

5Judge Finch, dissenting, considered the case from the standpoint of illegal contract, and concluded that the plaintiff should be allowed to recover since she relied only on her ownership of the property which was the subject of the contract. He made no distinction between cases in which the suit was between the parties to the contract and cases in which the suit was between one party to the contract and a stranger. Judge Conway, dissenting, considered the case solely from the standpoint of public policy. He was of the opinion that public policy would bar recovery in an action by the principal against the agent, but should not bar a recovery against the defendant.
the property, such a defence should be available to the transferee from the agent.6 Thus the immediate, and what is believed to be the controlling question in the case: Did Vogel, the agent, have a valid defence to an action by the intestate, the principal, to recover the stock? There is no defence by virtue of anything expressed or implied in the contract of agency. There is only the possible defence that the contract was executed for an illegal purpose.

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

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

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

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


8278 Ill. 17, 115 N. E. 844, 3 A. L. R. 1631 (1917).


10Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732 (U. S. 1865) (recovery of profits from the illegal purchase and sale of soldiers' warrants); Clarke v. Brown, 77 Ga. 606
criticized by legal writers, and not without cause. Today, when legal problems are approached with much less emphasis upon their strictly formal aspects, it is evident that the earlier reason for the rule—that the illegality of the contract is irrelevant since the action is based upon the agent's receipt of property belonging to the principal—will no longer suffice. Consequently, the whole problem is resolved into a conflict between two phases of public policy. On the one hand is that policy which requires the strictest fidelity on the part of the agent. On the other is that policy which requires that courts be free from the burden of enforcing honor among thieves.

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

Applying the third qualification of the rule of the Restatement to the principal case, has a crime involving more than a minor offense
been accomplished? The New York statute\(^4\) provides that persons making false statements in applications for a license or permit shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or both. The federal statute\(^5\) provides for a fine of not more than one thousand dollars, and further provides that the administrator of the statute, with the consent of the Attorney-General, may compromise the liability. It cannot be fairly implied from these statutes that either the Legislature of New York or the Congress of the United States intended to make one guilty of such a misconduct an outlaw, to be barred from legal relief which in no way enforces or upholds the violation of the statute. To refuse relief here is to enforce a punishment other than that prescribed by law and to violate the public policy against forfeiture of property for crime,\(^6\) as well as to enable the defendant to escape all responsibility for the tortious conversion of a small fortune.\(^7\)

In such a decision as was reached in the principal case there is unquestionably an unjust deprivation and an unjust enrichment as between the parties. Logic demands a recovery. The refusal to heed that demand can only be justified on the ground of public policy. But there is "more than one phase to sound public policy. One of these that ought to be paramount is that courts should close their ears when dishonest men attempt to wrest and quote rules of law in an effort to shield them from their misdeeds."\(^8\)

BRYCE REA, JR.

\(^{14}\)Laws of 1934, c. 478 § 130.
\(^{16}\)See 6 Williston, Law of Contracts (1938) § 1750 on the similar problem arising in suits by beneficiaries in life insurance policies. The author notes an increasing tendency to allow recovery in cases where the insured died while committing a felony.
\(^{17}\)The loss alleged to have been suffered exceeded $200,000.
CONSTITUTIONAL LAW—"NAVIGABLE WATERS OF THE UNITED STATES" HELD TO INCLUDE STREAMS CAPABLE OF BEING MADE NAVIGABLE BY IMPROVEMENTS. [United States Supreme Court]

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

In 1926, the Appalachian Electric Power Co., proceeding under the provisions of the Federal Water Power Act of 1920, petitioned the Federal Water Power Commission for a license to construct a dam on the New river above Radford, Virginia. The commission made a finding that the New river was not a navigable water of the United States but that interests of interstate commerce would be affected by the dam. After some further controversy, the commission adopted another resolution stating that the New river was a navigable water of the United States under the Federal Water Power Act. Notwithstanding this, the Appalachian Co. began construction work, which caused the federal government in 1935 to file a complaint seeking to enjoin the construction of the dam on the ground that it constituted an obstruction to navigation in violation of the Rivers and Harbors Act of 1899 and the Federal Water Power Act of 1920. The Federal District Court

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61 S. Ct. 291, 85 L. ed. 201 (1940).
3A suit was begun by the Appalachian Co. to enjoin the commission from interfering with the construction, but the action was dismissed because of lack of personal jurisdiction over the defendants. Appalachian Electric Power Co. v. Smith, 4 F. Supp. 3, 6 (W. D. Va. 1931), aff'd, 67 F. (2d) 451 (C. C. A. 4th, 1933).
and the Circuit Court of Appeals held that the New river was not in fact a navigable water of the United States and that the construction of the dam would not impair the "navigable capacity" of any "navigable waters of the United States." The Supreme Court in the instant decision reversed this finding and held that the New river was in fact navigable. Furthermore, the Court held constitutional certain license provisions of the Federal Power Act, the terms of which were not related to navigation.

The courts in the United States have generally accepted the civil law test of navigability, that all rivers which are navigable in fact are navigable. United States v. Appalachian Electric Power Co., 23 F. Supp. 83 (W. D. Va. 1938), aff'd, 107 F. (2d) 769 (C. C. A. 4th, 1939). Federal Water Power Act of 1920, 41 Stat. 1068, as amended by the Federal Power Act of 1935, 49 Stat. 842, 16 U. S. C. A. § 803. The Supreme Court held that the power of the federal government over navigable waters of the United States is not limited to the purposes of navigation, and in effect overruled the dicta in the cases sustaining this restrictive principle. See James v. Dravo Contracting Co., 30 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 318 (1937); Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655, 51 L. ed. 956 (1907); Port of Seattle v. Oregon and Washington Ry., 255 U. S. 56, 41 S. Ct. 287, 65 L. ed. 500 (1921); United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610, 78 L. ed. 1267 (1935); United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. ed. 339 (1926); Wisconsin v. Illinois, 278 U. S. 367, 49 S. Ct. 163, 73 L. ed. 426 (1929). The Court would seem to have taken the correct approach in holding these license provisions constitutional on this basis. For since the federal government does have a plenary power to license obstructions in navigable streams, and since in regulating navigation other objectives may be incidentally accomplished, it would seem to follow logically that the government could impose license provisions not related to navigation if they were secondary to the principal consideration of keeping the stream open for navigation.

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

It has generally been stated that at common law navigable streams were only those in which the tide ebbed and flowed. Grand Rapids & Indiana R. R. v. Butler, 159 U. S. 87, 15 S. Ct. 991, 40 L. ed. 85 (1895); Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439 (1859); St. Louis I. M. & S. Ry. v. Ramsey, 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559 (1890); See also 45 C. J. 404; 27 R. C. L. 1299, § 211; Note (1899) 42 L. R. A. 305. This doctrine was adopted in England because all of the streams were short and few were navigable in fact above the ebb and flow of the tide. But some cases have refused to accept this definition on the ground that the ebb and flow test was not the only measure of navigability at common law, and that the prevailing test was actual usability for navigation. Schurmeier v. St. Paul & P. R. R., 10 Minn. 82, 88 Am. Dec. 59 (1856); McManus v. Carmichael, 3 Iowa 1 (1850); See also 27 R. C. L. 1300, § 212. The confusion of navigable with tidal water prevailed in the United States for some time notwithstanding the differences existing between the topography of England and America. Barney v. Koekuk, 94 U. S. 321, 24 L. ed 224 (1876).
Navigable in law. The classic definition in The Daniel Ball has been the basis of the federal rule in this respect:

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

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

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130 Wall. 430, 22 L. ed. 391 (U. S. 1874).

130 Wall. 430, 22 L. ed. 391 (U. S. 1874).

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

15 Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. ed. 771 (1922); United
recent or potential navigability, or one that is temporary, precarious or unprofitable. But it is not necessary that a boat be able to pass over all portions of the stream, and occasional interruptions or retardations of navigation by falls or rapids do not render the stream non-navigable where in fact it is used or susceptible of use for navigation.

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

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

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

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

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

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


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

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

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

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

*See the lower courts' decisions for an excellent analysis of the physical characteristics of the New, 23 F. Supp. 85 (W. D. Va. 1938), and 107 F. (2d) 789 (C. C. A. 4th, 1949).*
The strip of river from Radford downstream, across the Virginia-West Virginia border, to 25 miles above Hinton, is one of the most impassible of the entire stream. This stretch of about 60 miles is rocky and drops rapidly. Any trips made on this part of the river were irregular and attended with great difficulty. There is no evidence that any trips in keel boats were made between Radford and Hinton, nor that appreciable commerce of any kind was ever conducted between these points.27

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

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

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

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

29 It will be noticed that the Supreme Court made a statement that when once a stream becomes a navigable water, it always remains so. 61 S. Ct. 291, 299. The only
money to improve the stream or even contemplated doing so. The only limitation is that there must be a balance between cost and need at a time when the improvement would be useful. No authority is cited to uphold this position and none could be found. But, even applying this test, it is inconceivable that the New river could be made navigable by anything approaching a reasonable expenditure of money.

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

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


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

CARTER GLASS, III

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

By its decision in United States v. F. W. Darby Lumber Co.,¹ the Supreme Court of the United States has again acknowledged the urgency of present-day demands for social reform; on this occasion it has overruled its earlier adjudication which had denied that Congress' power to regulate interstate commerce embraced the right to prohibit child labor in industry. This move has in its general effect further broadened the scope of the commerce clause, and has given to the federal government a regulatory function previously thought to rest exclusively with the states. Thus the query is raised whether, in the light of this decision, there is now any necessity for the passage of the long-proposed Child Labor Amendment to the Federal Constitution. But in spite of the apparent new departure of the Court, it may be questioned whether the overruling of Hammer v. Dagenhart² is actually an innovation in the law, or whether it comes merely as a confirmation of principles already established.

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

¹ 261 S. Ct. 451 (1941).
³ 52 Stat. 1060 (1938), 29 U. S. C. A. §§ 201-219 (Supp. 1940). The real purpose behind the act was probably the protection of New England industry against
manufactured under labor conditions which fail to conform to the requirements set up by the act. The act fixes both minimum wages and maximum hours of work for employees coming within its provisions. The defendant was engaged in the business of acquiring raw materials which he manufactured into finished lumber with the intent to ship in interstate commerce when manufactured; and he did in fact so ship a large part of the lumber produced. He was charged with violating the act by having employed workmen at less than the prescribed minimum wage or for more than the prescribed maximum hours, without payment of wages for overtime. The Court in upholding the act was faced with two questions. First, could Congress prohibit the carrying of goods in interstate commerce if the goods were manufactured under conditions other than those imposed by the act; and second, could it prohibit the employment of workmen in the production of goods for commerce at other than the prescribed wages and hours? In answering the first question, the Court found that the prohibition of shipment of the proscribed goods in interstate commerce was a valid exercise of congressional control over commerce between the states. It was declared that the power to control embraced the power to prohibit. In connection with this holding, the Court specifically overruled the case of Hammer v. Dagenhart. To the second issue, also, an affirmative answer was given. The Court found that the defendant's activities came within the phrase "production for commerce" and were within the meaning of the statute. The power of Congress to regulate interstate commerce was de-

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

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

8247 U. S. 251, 98 S. Ct. 529, 62 L. ed. 1101 (1918), 3 A. L. R. 649 (1919). The Court need not have even considered the child labor question in the principal case,
RECENT CASES

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

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

Eight years later, in *Hipolite Egg Co. v. United States*, the Court upheld the power of Congress to prohibit the introduction of impure foods and drugs into states by means of inter-

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8 188 U. S. 321, 23 S. Ct. 521, 47 L. ed. 492 (1903).


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

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

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

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

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

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


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

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

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

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

1The instant case and *Hammer v. Dagenhart* may be thought to be distinguishable since there seems to be a difference between the two cases in what goods are prohibited. In the instant case it is apparent that the only goods prohibited were those manufactured under conditions prohibited by the act; whereas in *Hammer v. Dagenhart* all of the products of the mill or mine were prohibited if children had worked within 30 days prior to their removal. This, of course, included not only the goods actually made by child labor, but also all of the products made in the mill whether by child labor or otherwise.

2*61 S. Ct. 451, 458 (1941).*


4This case is easily distinguished from the other cases mentioned in note 21, infra. The Hepburn Act, 34 Stat. 584 (1906) , 49 U. S. C. A. §§ 1-9 (1929), made it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined or produced by it or under its authority or which it may
merce became harmful in their use. In reality, then, *Hammer v. Dagenhart* for the first time presented a case of prohibition of goods in themselves harmless; and even though the decision of the Court may have been wrong, it cannot be said that the Court failed to follow the then prevailing interpretation of the commerce clause.

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

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


Professor Willis says, “This decision was another five to four decision, and it is believed that it was an incorrect decision, that it is a stumbling-block in the way of necessary social control, and that the constitutional law on the subject of interstate commerce will never be in a satisfactory state until this decision has been overruled.” Willis, Constitutional Law (1936) 841.

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

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

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

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

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25 It has been said in an effort to distinguish Kentucky Whip and Collar Co. v. Illinois Central R. R. Co. from Hammer v. Dagenhart, that in the latter case the effect of the statute was to bring about a control by the federal government in the state of origin of the goods, whereas in the former case the effect was to exercise control in the state of destination. For other discussions of Kentucky Whip and Collar Co. v. Illinois Central R. R. Co., see Notes (1937) 11 U. of Cin. L. Rev. 357, and (1937) 15 Tex. L. Rev. 371. One must remember in reading these comments, however, that they were written before the deciding of Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092 (1939).
Child Labor Amendment. Since Congress by virtue of the present state of the law can regulate child labor by means of prohibiting the shipment in interstate commerce of the products of child labor, it is apparent that no amendment is necessary to enable Congress to control child labor effectively in industries sending their products into other states. Further, because it has long been accepted that Congress can control intrastate commerce if it is so connected with the interstate commerce as to make its control necessary in order to regulate interstate commerce, Congress can to a large extent prohibit child labor in intrastate commerce also. Due to the increasing complexity of modern industry and commerce, almost every business to some extent affects interstate commerce, and hence wide powers of regulation are permissible. Thus, without extending the basis of its powers, Congress can readily regulate child labor in almost any industry in which such regulation seems advisable, and such powers are almost as broad in scope as any that would be granted by amendment.

EDMUND SCHAEFER, III

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

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

30Law review writers have taken the view that such an amendment is unnecessary. Notes (1937) 13 Notre Dame Lawyer 59, and (1937) 22 Wash. U. L. Q. 401. It
CONTRACTS—LIMITS OF PROMISSORY ESTOPPEL AS BASIS OF ENFORCING GRATUITOUS PROMISES. [Pennsylvania]

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


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

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

The doctrine finds frequent application where the promisor announces his intention of abandoning an existing right and thereby misleads another relying on this representation by some action or forbearance. Faxton v. Faxton, 28 Mich. 159 (1873), where the plaintiff promised the son of the deceased mortgagor that if he would remain on the land and cultivate it, the mortgage would never be enforced. Thom v. Thom, 294 N. W. 461, 464 (Minn. 1936): "A promise relating to the intended abandonment of an existing right which influences the promisee to act to his prejudice may be the basis of an estoppel, where substantial injustice will result unless the promise is enforced, although there is no consideration for the promise." Stevens v. Turlington, 185 N. C. 191, 119 S. E. 210 (1923).

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

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

See (1938) 16 Tex. L. Rev. 569.
County Bank of Jamestown, Judge Cardozo ruled that the setting up of an endowment fund in the promisor's name was consideration for the promise to contribute the money for the fund. Upon closer analysis, however, it seems clear that no consideration in the orthodox sense was present and that the decision in effect rests upon the principles now generally termed promissory estoppel.

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

In only a comparatively few cases has a promise between two individuals been enforced by promissory estoppel. One of the earliest cases is Board of Home Missions v. Manly, 129 Cal. App. 541, 19 P. (2d) 21 (1933); Alleghany College v. National Chautauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927), 57 A. L. R. 980 (1928).

The courts of some jurisdictions in enforcing charitable subscriptions have held that the several promises of the subscribers constituted a sufficient consideration for each other. Lagrange Female College v. Carey, 168 Ga. 291, 147 S. E. 390 (1929); Cotner College v. Hyland, 133 Kan. 922, 299 Pac. 607 (1931); Greenville Supply Co. v. Whitehurst, 202 N. C. 413, 163 S. E. 449 (1932). In the same kind of situation some courts have relied on the performance of the enterprise for which the subscription was given as the consideration. Board of Home Missions v. Manly, 129 Cal. App. 541, 19 P. (2d) 21 (1933); Alleghany College v. National Chautauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927), 57 A. L. R. 980 (1928).

A promise to make a gift in the future is not actionable because of lack of consideration; but where the promisee in reliance on the subscription has assumed the performance of some duty, or has performed services, done work or expended money, the gratuitous promise is converted into a valid and enforceable contract. See 60 C. J. 956.

A defense of lack of consideration can not be made to a promissory note given as a gift, if money has been expended or liabilities incurred which cause injury or loss to the person so expending money. Trustees of Baker University v. Clelland, 86 F. (2d) 14 (C. C. A. 8th, 1936); South v. First National Bank of Fayette, 17 Ala. App. 569, 88 Co. 219 (1928); Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432 (1898). For complete discussion, see Eastern State Agricultural and Industrial League v. Vail's Estate, 97 Vt. 495, 124 Atl. 568 (1924).
clear applications of the doctrine was made by the Nebraska court in 1898. It appeared that deceased had given his granddaughter a promissory note for $2,000, saying that none of his granddaughters worked and he did not like for her to do so. Though the deceased did not actually request her to stop working, the granddaughter gave up her job in reliance on the note. She later sued to collect on the note, and was met by the defense of lack of consideration. The court conceded that heretofore equitable estoppel had been applied only to representations of past or present facts, but in this case it was deemed necessary, as a means of preventing injustice, to extend the estoppel principle to enforce representations as to future conduct, or promises which were calculated to induce reliance on the part of the promisee and upon which the promisee did reasonably rely so as to suffer a detriment.

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

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

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

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2Restatement, Contracts (1932) § 90.
3This adoption gave rise to considerable disapproval and adverse criticism from those who relied on the American Law Institute merely to restate the law as it was already established. Even at this late date, the adoption of promissory estoppel was branded as a radical attempt to change the law.
was enforced by estoppel, because the promisee in reliance on the promise had gone into another business.\(^\text{17}\)

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

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

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

\(^{18}\)14 A. (2d) 127 (Pa. 1940).
RECENT CASES

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

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

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

The objection that promissory estoppel destroys the fundamental
concepts of consideration is minimized by the fact that in many cases
in which the doctrine could have been applied, the courts have enforced
the promise by finding a consideration of doubtful existence. Inasmuch
as the trend of the law seems to be to enforce gratuitous promises re-
lied on by the promisee, the outright adoption of the promissory
Domestic Relations—Constitutionality of Statute Authorizing Retrospective Modification of Prior Award of Permanent Alimony. [Virginia]

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

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


4 10 S. E. (2d) 893 (Va. 1940), noted (1941) 19 N. C. L. Rev. 388; (1941) 27 Va. L. Rev. 415. Holt, J., dissented.
alimony, though fixed by a final decree, was not a vested property right. By this decision the Virginia court refused to follow the New York decision in Livingston v. Livingston which had established the prevailing rule that the retrospective portions of statutes authorizing a subsequent alteration of the alimony provisions of an absolute divorce decree are unconstitutional interferences with the wife's vested right in unaccrued alimony.

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


7Fuller v. Fuller, 49 R. I. 45, 139 Atl. 662 (1927), noted (1928) 28 Col. L. Rev. 664; Blethen v. Blethen, 177 Wash. 431, 32 P. (2d) 545 (1934); Notes (1903) 3 Col. L. Rev. 356; (1903) 16 Harv. L. Rev. 521; (1903) 1 Mich. L. Rev. 675. See Note (1935) 97 A. L. R. 1188.

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

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

The divorced wife's creditors may not subject the alimony payments to the satisfaction of a debt contracted prior to the divorce decree. Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 22 Am. St. Rep. 544 (1892). The contrary rule apparently obtains for debts contracted subsequent to the decree. The Romaine case would imply that alimony is not property in the general sense of the term, but is an allowance for the wife's maintenance. A debt contracted after the decree is presumably for her support; the creditor relies upon the award as the means of payment. Alimony is not such a debt as to be subject to garnishment in the hands of the husband for debts of the wife. Malone v. Moore, 204 Iowa 625, 215 N. W. 625 (1927), 55 A. L. R. 356 (1928). It is not a debt provable in bankruptcy, nor is it affected by a discharge granted the husband. Audubon v. Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009 (1901).

Alimony, accrued but unpaid at the time of the wife's death, may be collected
either Eaton v. Davis or Livingston v. Livingston. Upon analysis it would seem that the sound and socially desirable position was taken by the Virginia court.

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


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

The type of the alimony award may influence a court's analysis of its nature. In Smith v. Rogers, 215 Ala. 581, 112 So. 190 (1927) the court held that an award in gross made without a reservation of the power to modify was a vested right. But in Epps v. Epps, 218 Ala. 667, 120 So. 150 (1929) a monthly allowance was held to be in the nature of maintenance and subject to modification. Cases collected, Notes (1931) 71 A. L. R. 700, 743.

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

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


Vernier and Hurlbut, The Historical Background of Alimony and Its Present Statutory Structure (1939) 6 Law and Contemp. Prob. 197. Twenty-seven American jurisdictions, including Virginia, Va. Code Ann. (Michie, 1936) § 5104, recognize the divorce a mensa (temporary divorce). In Colorado this divorce from bed and board is called "separate maintenance." Apparently Florida is the only state which forbids the limited divorce. 2 Vernier, American Family Laws (1932) § 114; id. (1938 Supp.) § 114.
duty of the husband to support his wife. As the primary object of the award was to provide a continuing maintenance for the wife, the basic factors determining its amount were the needs of the wife and the ability of the husband to pay. Changed circumstances of the parties were considered sufficient to justify a subsequent revision of the award.

The statutes and decisions which have established the divorce a vinculo for the most part are reflective of these ecclesiastical practices. In 1938, Professor Vernier found statutes authorizing the revision of alimony awarded by a final decree of absolute divorce in thirty-four American jurisdictions. A few states recognize that the power to revise inheres in the courts without such authority and absent a reservation of the right to modify.

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

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32Vernier, American Family Laws (1932) § 104.


35Smith v. Smith, 45 Ala. 264 (1871); Kennard v. Kennard, 191 Fla. 473, 179 So. 660 (1938); Hardy v. Pennington, 187 Ga. 523, 1 S. E. (2d) 667 (1939); Gilcrease v.
upon the general theory that an adjudication by a court having juris-
diction over the subject matter and the parties is conclusive as to the
matters controverted and those which should have been litigated as an
incident thereto. The divorce decree not only dissolves the marriage
relation, but is also a final determination of the right to
alimony. Since the parties are no longer married, the court's jurisdiction over
the marital status is exhausted save as to the enforcement of the ali-
mony provision. Moreover, the plea of res judicata would preclude
future modification of its terms. When a power to modify is reserved
in the decree, the court does not thereby confer jurisdiction upon itself
to alter the alimony award subsequently; it merely retains the right to
exercise the unexhausted portion of the jurisdiction which it already
had, to subject the unaccrued payments to revision based on the parties'
changed conditions.

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

Gilcrease, 186 Okla. 451, 98 P. (2d) 906 (1939), 127 A. L. R. 735 (1940), noted (1940) 88
U. of Pa. L. Rev. 880; Sampson v. Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 249
(1899); Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938); Ruge v. Ruge, 97
Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721 (1917). Cases collected, Notes (1917)
L. R. A. 1917F, 729: (1931) 71 A. L. R. 723, 726, 734; (1940) 127 A. L. R. 741, 742,
744. Generally, when alimony is omitted from the divorce decree, it cannot there-
after be inserted, even though statutory authority empowers the courts to modify
the award. Duvall v. Duvall, 215 Iowa 24, 244 N. W. 718 (1932), 83 A. L. R. 1242

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


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

153 S. E. 879 (1936), 71 A. L. R. 700 (1931); Capell v. Capell, 164 Va. 45, 178 S. E.
894 (1935); Casilear v. Casilear, 168 Va. 46, 190 S. E. 314 (1937).

St. Rep. 600 (1903); Fuller v. Fuller, 49 R. I. 45, 139 Atl. 662 (1927); Blethen v.
Blethen, 177 Wash. 431, 32 P. (2d) 543 (1934).

Van Loon v. Van Loon, 132 Fla. 535, 182 So. 205 (1938); Walker v. Walker, 155
N. Y. 77, 49 N. E. 665 (1898); Golderos v. Golderos, 169 Va. 496, 194 S. E. 706 (1938).
202.
circumstances similar to those involved in the *Eaton* case. In deciding that the retroactive portion of the New York statute was an unconstitutional interference with the wife's property in the unaccrued alimony, the court adopted the theory that the final divorce decree changed the husband's obligation to support. The new obligation created by the judgment was in the nature of a vested right which the legislature was powerless to invade. A later New York court has explained that the *Livingston* case did not decide that alimony was a mere debt. It recognized that the foundation of the award rested on the husband's marital duty to support, but held that this previously indefinite obligation was liquidated by the divorce decree.30

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

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

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34Cf. the dissent of O'Brien, J., in Livingston v. Livingston, 173 N. Y. 377, 389, 66 N. E. 123, 127, 61 L. R. A. 800, 805, 93 Am. St. Rep. 600, 606 (1903) in which it was contended that an alimony award was a mere creation of equity and had "... no more of the attributes of property than the common law right to marital support for which it is an imperfect substitute."
parties and the other conditions affecting its award change.35 By this holding no violence is done the principle of res judicata; the divorce decree is "final" in that it operates res judicata as to the facts existing at the time of its award.36 There would appear to be nothing unusual for an equity decree to be absolute in some respects yet variable in others.37

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

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

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

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

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1*Wis. L. (1939) c. 57*.
2*Wis. Laws (1939) c. 57, § 111.06 (2).
3The term 'collective bargaining unit' shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in section 111.05 (2d) so to do." *Wis. Laws. (1939) c. 57, § 111.02 (6).*
the hotel company. The unions in appealing from the order of the board relied upon two recent cases, *Thornhill v. Alabama* and *Carlson v. California* to uphold the contention that the Wisconsin statute in requiring the approval of a majority of the employees before there could be an authorized strike was in violation of that freedom of speech which is guaranteed by the Fourteenth Amendment of the Federal Constitution and by the Wisconsin Constitution. The Wisconsin Supreme Court affirmed the order of the board by holding that the legislature can provide that only a majority of a collective bargaining unit has the power to authorize a strike, and that picketing is an unfair labor practice unless a strike has been called with proper authorization.

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

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1. *310 U. S. 88, 60 S. Ct. 730, 84 L. ed. 1093 (1940).*
2. *310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 1104 (1940).*
3. *294 N. W. 632, 640 (Wis. 1940).*
However, the language of the statutes does not seem to sustain this view, and the debates on the Labor Relations Act in both houses of Congress show a contrary legislative intent. Further, the Labor Relations Board has taken a position opposing the Court's dicta, in ruling that the employer violates the act by negotiating with any group other than that representing the majority of the employees, or by entering into agreements with the employees individually. It has been very pertinently observed that the view denying the majority the right to negotiate for the whole body conflicts with the fundamental precepts of democratic institutions and undermines the essential purposes of the act. Therefore, while no ultimately compelling authority is available, the position of the Wisconsin court seems justified on this point.

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

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

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

The Court went even further in declaring that:

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

Thus, peaceful picketing is per se a means of lawful exercise of one's freedom of speech. It may therefore seem difficult to understand how a state can make a majority vote of all the employees a pre-requisite to the enjoyment of that right which is given to the individual by the Federal Constitution. In American Federation of Labor v. Bain17 an Oregon statute prohibited all picketing or patrolling unless there was a bona fide "labor dispute," and a "labor dispute" was defined as an "actual bona fide controversy in which the disputants stand in proximate relation of employer and the majority of his or its employees...."18 The Oregon court held the statute unconstitutional, saying:

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

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

15310 U. S. 88, 102, 104-5, 60 S. Ct. 736, 744-5, 84 L. ed. 1093 (1940).
16310 U. S. 88, 105, 60 S. Ct. 736, 745-6, 84 L. ed. 1093 (1940).
17106 P. (2d) 544 (Ore. 1940).
18Oregon Laws (1939) c. 2, § 1. See 106 P. (2d) 544, 547 (Ore. 1940).
19106 P. (2d) 544, 555 (Ore. 1940).
20The Oregon Court expressly recognized this aspect of the statute with which it was concerned. The broad coverage of the term picketing was said "to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities which the Supreme Court holds the state may not lawfully suppress." American Federation of Labor v. Bain, 106 P. (2d) 544, 554 (Ore. 1940).
was viewed as referring only to the kind of picketing which the Supreme Court had expressly recognized as subject to state regulation aimed at preservation of peace and protection of life and property.\textsuperscript{[21]} This interpretation of the statute was based on the clause by which the legislature declared that the act should not "be so construed as to invade unlawfully the right to freedom of speech."\textsuperscript{[22]} Thus, while the prohibitory provision itself is unrestricted as regards the kind of picketing covered, the courts are saddled with the duty of applying it only within the limits allowed by constitutional guarantees of free speech.

That there is a permissible area of state regulation is recognized in the \textit{Thornhill} case in these words:

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

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

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

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

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

\textsuperscript{[24]}294 N. W. 632, 642 (Wis. 1940).
the significant fact that violence occurred during the picketing, and in view of the court's repeated mention of the clause in the statute to the effect that the act shall not be applied to infringe on freedom of speech, it seems probable that the order of the board was sustained as a prohibition of further picketing in this unauthorized strike, such prohibition being justified by the fact that there had been violence and disorder in the previous activities of the pickets. The recent Supreme Court decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies* sanctions the enjoining of all future picketing where in past picketing there has been violence of such nature as to have a coercive influence in future activities. Thus, the statute as applied to the situation before the board and court does not appear to invade any constitutionally guaranteed civil liberties.

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

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

26 "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.... It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.... Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." 310 U. S. 88, 97, 98, 60 S. Ct. 736, 741, 742, 84 L. ed. 1093 (1940); but cf. opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341, 56 S. Ct. 466, 480, 80 L. ed. 688 (1936).
no such application shall be made. If, on the other hand, the Supreme Court rulings are regarded as not covering the issue presented in this situation, the regulation of the Wisconsin statute would probably be extended to all types of picketing in the promotion of an "unauthorized" strike. Such is the legislative mandate.

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

\textit{Lynnell G. Skarda}

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

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


\textsuperscript{28}It is not unusual for the members of a union to constitute a minority of the employees of a collective bargaining unit. See American Federation of Labor v. Bain, 105 P. (2d) 544, 554 (Ore. 1949).

\textsuperscript{29}Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 294 N. W. 632 at 642, and 296 Wis. 829, 295 N. W. 634 at 635, (1941).

\textsuperscript{1}116 F. (2d) 75 (C. C. A. 3rd, 1940).
to be subrogated to the exact position of the creditor—Commonwealth of Pennsylvania, the Surety Company claimed the right to receive the same percentage dividends of the assets in future liquidation payments as the Commonwealth would have received. The Federal District Court upheld this contention. However, the Circuit Court of Appeals for the Third Circuit reversed this decision, holding that the share of the Surety Company in the distribution of the Bank's assets should be based on the amount which the Surety Company actually had paid in satisfying the Commonwealth's claim. This is to say that as the Bank pays further liquidation dividends, the Surety Company will receive its payments on the basis of a total claim of $68,500, instead of on the basis of a $135,000 total claim which would have applied had the Commonwealth been receiving the dividend as a depositor.

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

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233 F. Supp. 722 (E. D. Pa. 1940). The comments in (1940) 54 Harv. L. Rev. 349 and in (1940) 40 Col. L. Rev. 11448 approve the holding of the District Court. It is to be understood, of course, that the total recovery of the surety would not be allowed to exceed the sum it had actually paid.


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


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

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

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

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

The remedy of subrogation is patently to be preferred, for through

lateral. This has been called the preferable rule. Jamison v. Adler-Goldman Co., 59 Ark. 548, 28 S. W. 35 (1894); Erle v. Lane, 22 Colo. 273, 44 Pac. 591 (1896); Wheat v. Dingle, 32 S. C. 473, 11 S. E. 994 (1890); Note (1924) 8 Minn. L. Rev. 232, 239.

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

Arant, Suretyship (1931) 357. (Italics supplied)

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

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

Arant, Suretyship (1931) § 73.
its use the surety can have the advantage of any sort of preference which the creditor might have enjoyed.\textsuperscript{12}

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

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


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

\textsuperscript{14} 16 F. (2d) 75, 77 (C. C. A. 3rd, 1940).

\textsuperscript{15} Maryland Casualty Co. v. Cox, 104 F. (2d) 354 (C. C. A. 6th, 1939).

\textsuperscript{16} The case of In Re Thompson, 300 Fed. 215, 217 (W. D. Pa. 1924) supports the opposing rule, but it concerns the problem of rights of a surety against co-sureties.
from the insolvent Bank if the plaintiff can only claim for the amount he has paid. But this additional recovery is purely a windfall which the creditors would not have enjoyed had the Commonwealth sought its full share of the liquidated assets, in the absence of a surety. The issue is clear enough: Whether to grant the general creditors a windfall, or to let the subrogation be complete and enable the Surety Company to approach nearer to a full recovery.\(^{17}\) The other creditors had no part in obtaining the surety, and it would seem that as to their claims all the dictates of equity and fairness would be met by treating those claims exactly as they would have been handled if there had been no surety.

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

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

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

\(^{18}\)The case of Pace v. Pace's Adm'r., 95 Va. 792, 30 S. E. 361 (1898), favors the rule which allows proof of the full amount in the interest of greater certainty and uniformity to the surety's position. See also, In Re Thompson, 300 Fed. 215, 217 (W. D. Pa. 1924) which supports the opposite rule to that of the principal case as applied to the analogous problem of the right of a surety against the co-sureties.
on whether the surety pays the creditor before any dividends are paid to the creditor or after some liquidation payments have been made. For the court concedes that the windfall which it proposes to give the other creditors would not be available if the surety paid its creditor's claim immediately and entered its own claim for the full amount of deposit. In the case of *In Re Thompson*, where a closely similar problem was decided, it was pointed out that "Equity would seem to require that the rights of the parties should be definitely fixed by law rather than made dependent on the uncertain procedure of the creditor." Surely if this benefit can validly be swept away from the general creditors by so simple an action as paying earlier in the proceedings, the loss of benefit does not give such unfair and inequitable results as to necessitate the abrogation of the general suretyship doctrine of subrogation. In other instances the surety's right of subrogation has been guarded jealously by the courts, as where the surety is declared to be released because it has been deprived of its right of subrogation by the creditor's extension of time to the principal debtor.

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

JOHN E. PERRY

**TAXATION—POWER OF STATE TO IMPOSE TAX MEASURED BY INTRASTATE EARNINGS ON DECLARATION OF DIVIDENDS BY FOREIGN CORPORATION.**

[United States Supreme Court]

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

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Arant, Suretyship (1931) § 68.

61 S. Ct. 246, 85 L. ed. 222 (1940), rehearing denied, 61 S. Ct. 444 (1941).
RECENT CASES

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

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

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

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

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

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

5 18 Wall. 206, 21 L. ed. 888 (U. S. 1873).


7 143 U. S. 305, 12 S. Ct. 493, 36 L. ed. 164 (1892).

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

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

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

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11Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910).
12Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 32 S. Ct. 218, 56 L. ed. 445 (1912). In 1920, however, a Connecticut statute (Conn. Laws of 1915, c. 292, Part IV, §§ 19-29) taxing income attributed to business done in the state was upheld, inasmuch as it was not shown that income earned outside that state was included.
the measure of the tax by gross receipts was invalid. A few years later a Texas franchise tax\(^{15}\) was declared void, because though its subject was one over which the state had control, it imposed too great a burden on interstate commerce.\(^{16}\) In 1925, the Court considered a Massachusetts statute\(^{17}\) which imposed an excise for the privilege of carrying on or doing business within the Commonwealth, the tax being levied on shares of stock attributed to such business and on the proportion of the income attributed to such business. The tax was held invalid because its subject (interstate commerce) was not a taxable subject, though on this occasion the Court seemed to think that the measure was a valid one.\(^{18}\)

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


\(^{15}\)Galveston, H. & S. A. Ry. \(v.\) Texas, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1091 (1908). But during this same period a Minnesota statute [Rev. Laws of Minn. (1905) c. 11.], which imposed a tax on gross receipts in lieu of all other taxes, was upheld. The Court said this was allowed because it was done in the exercise in good faith of a legitimate taxing power, and though the measure covered some elements not taxable, the tax was not an attempt to burden the conduct of interstate business as it was in lieu of all other taxes. U. S. Express Co. \(v.\) Minnesota, 223 U. S. 355, 32 S. Ct. 211, 56 L. ed. 459 (1912).


\(^{17}\)Loney \(v.\) Crane Co., 245 U. S. 178, 38 S. Ct. 85, 62 L. ed. 230 (1917).


\(^{19}\)Alpha-Portland Cement Co. \(v.\) Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916 (1925).


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

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

At the present term, the Supreme Court in Wisconsin v. J. C. Penney Co.24 took the final step in the progression when it held valid a Wisconsin statute25 which levied a tax on the privilege of declaring dividends from profits earned in Wisconsin, which dividends were paid out by the company in New York.26 Mr. Justice Frankfurter, speaking for the majority in sustaining the statute, observed that in reality it involved merely an additional income tax on a corporation doing business in the state, in spite of the fact that the legislature had specifically said that the tax was on the privilege of declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin. The Court held that if Wisconsin had provided such a tax as the price of the privileges offered corporations within its borders, it would clearly be upheld.27 The proper test was stated to be whether the property was taken without due process of law, and it was concluded that the privilege of doing business in Wisconsin was ample basis for this levy.

Looking at the tax from the viewpoint of the Wisconsin legislature, it is plain that the subject was bad, because the tax attempted to cover activities that were done entirely outside of Wisconsin. All money received by the defendant in Wisconsin was sent to New York, and all dividends of the company were declared and paid in New York. On the other hand, the measure of the tax was a proper one. It was based on a formula that had already been accorded the approval of the Supreme Court28—i.e., the income to be attributed to Wisconsin bears the same relation to the total income of the company as the gross busi-

23For a general discussion, see Isaacs, The Unit Rule (1926) 35 Yale L. J. 898.
2461 S. Ct. 245, 85 L. ed. 222 (1940), rehearing denied, 61 S. Ct. 444 (1941).
ness and property in Wisconsin bears to the total gross business and property of the company. In substance, it appears that the Court has said that even though the subject is bad, the measure used to ascertain the tax is a good one and is fair; therefore, the tax will be sustained. Of course, Mr. Justice Frankfurter did not say directly that the subject is bad, but he seems tacitly to admit as much by abandoning the legislative declaration of the nature of the levy and saying that the tax is nothing more than an additional income tax. By applying this title to the levy, the majority then had no trouble distinguishing this case from Connecticut General Life Insurance Co. v. Johnson, for there the tax had been called an excise tax; and, further, there it was the measure, and not the subject, that was invalid.29

Thus, after once having considered that only the subject of a state tax was of significance, then having regarded a valid subject and measure both essential, the Court now seems to require only an acceptable measure. This is apparently a radical departure from previous concepts of taxing power, but the change in legal rules may be necessitated, as the Court observed, by practical considerations in the form of the great need of the states for additional revenue. It is not believed that Mr. Justice Robert's fears that Wisconsin could now levy an ad valorem tax on property outside of Wisconsin because it returned income in Wisconsin30 will come true. But this case has every indication of allowing states to tax as personal income, dividends to out-of-state stockholders of foreign corporations doing business in the state. It is to be supposed, however, that the Supreme Court will not approve any tax that is not essentially fair. The tax in the principal case seems to meet the test of fairness in that it is a tax on profits that were earned in Wisconsin, even though the subject of the tax was said by the legislature to be something entirely out of the jurisdiction of the state.

G. Murray Smith, Jr.

29The four dissenting Justices contended that the tax must be declared invalid on the authority of Connecticut General Life Insurance Co. v. Johnson, therein concurring with the decision of the Wisconsin Supreme Court. See note 26, supra.
TORTS—LEGAL BASIS FOR THE OPERATION OF THE FAMILY PURPOSE DOCTRINE. [Texas]

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

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

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2. The alleged liability of the mother was based upon her presence in the car and her failure to exercise proper control over the son's driving. This phase of the case is not relevant to the discussion of the family purpose doctrine, and will not be considered here.
5. *Trice v. Bridgewater*, 125 Tex. 75, 81 S. W. (2d) 63, 64 (1935): "A consideration of these cases [previously cited] leads to the inescapable conclusion that there is no sound or logical basis in law or reason on which liability of the father for the negligent acts of his son, while in the pursuance of his own personal ends and pleasure, can be grounded."
on the father, and so seemingly made its former rejection of the family purpose doctrine complete and all-inclusive.  

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

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

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

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6In Trice v. Bridgewater, 125 Tex. 75, 81 S. W. (2d) 69, 67 (1935), the court limited its decision in these words: "The question of liability of a father, if any, for negligent acts of his child while driving the family car in furtherance of some particular mission of the father or some business mission which may involve the moral, intellectual, and material welfare of the child or other members of the family, and in which matter the father has a direct interest, is in no manner to be affected by this decision." In the principal case the court decided that the son in playing football was in pursuit of his own personal pleasure, and that it was wholly immaterial that he was driving the car with permission of his father or that the son received credit in school for playing football.


9Harper, Torts (1933) § 283, p. 620.

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

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

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

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

\textsuperscript{13}King v. Smythe, 140 Tenn. 217, 204 S. W. 296, 298, L. R. A. 1918F, 298, 296 (1918).

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

\textsuperscript{15}34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929).
upon the agent's doing something for the principal's benefit or in the principal's stead. Factual agency is hard to find when a member of the family is using the family automobile for his own personal pleasure which is in no way connected with the family relationship. To the argument that the doctrine satisfies the dictates of justice, this court answered that the head of the family is guilty of no negligence in allowing members of his family certain pleasures, and should not be held an insurer against any injury resulting from the negligence of the permitee.

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

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

"It is to be observed that the agency explanation of the 'family car' principle is not very convincing. This, however, in no sense militates against the desirability of the doctrine as a matter of social engineering." Harper, Torts (1933) § 283, p. 621. See also Notes (1914) 28 Harv. L. Rev. 91; (1921) 19 Mich. L. Rev. 543; (1928) 81 U. of Pa. L. Rev. 60; (1928) 25 Mich. L. Rev. 187, where the writers agree to the desirability of the doctrine from a social standpoint but find no legal basis for it in our common law. They suggest that the family purpose doctrine is a good subject for legislative action.

31 Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 689 (1920). The court's position was that any vehicle requiring as much legislative regulation as an automobile should be classed as a dangerous instrumentality. But that an automobile is not a dangerous instrumentality, see Smith v. Callahan, 34 Del. 129, 144 Atl. 46 (1928), 64 A. L. R. 830 (1929); Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Hartley v. Miller, 165 Mich. 115, 130 N. W. 336 (1911); Note (1928) 81 U. of Pa. L. Rev. 60. The Florida court later reversed its stand and now appears to be in line with the almost unanimous holding that an automobile is not a dangerous instrumentality. Herr v. Butler, 101 Fla. 1125, 132 So. 815 (1931); Engleman v. Traeger 102 Fla. 756, 136 So. 527 (1931); Green v. Miller, 102 Fla. 767, 136 So. 532 (1931).

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

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

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

21 An attempt at such a compromise may be found in the inauguration in Illinois of a doctrine called the "Family Errand Doctrine." This state had formerly repudiated the family purpose doctrine in White v. Seitz, 342 Ill. 266, 174 N. E. 271 (1931). In O'Haran v. Leiner, 306 Ill. App. 230, 28 N. E. (2d) 315 (1940), a husband was held liable for his wife's negligence when she was driving the car to purchase a dress for the daughter. The court seems to adopt a modified form of the family purpose doctrine, holding the head of the family liable when the car is being used for family business. See Note (1940) 39 Mich. L. Rev. 309.

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

23 According to Justice Holmes' view, the whole law of agency is based on the theory that the father as head of the family should be liable for acts of the members of the family, since the acts of the family were considered acts of the father. See
Either theory which may be accepted may be thought to give a foundation for the present application of the family purpose doctrine. If the very origin of respondeat superior lies in judicial legislation, then the extension of the concept by further judicial legislation to embrace the policy of the family purpose doctrine does not seem a surprising development. Changes in the conditions of man's existence continually result in modifications of legal rules to fit the new circumstances. On the other hand, under the Holmes view, the family purpose doctrine seems not to be a new principle at all. Rather, it appears as a return to a simple and fundamental precept which was thought necessary under the family system of ancient times, and may at present have become again as necessary under different conditions.

Forrest Wall

Torts—Liability in Conversion of Landlord Disposing of Chattels Left on Premises by Former Tenant. [Massachusetts]

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

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

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

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

129 N. E. (2d) 552 (Mass. 1940).
her belongings, but continued, with the consent of the Council, to use
the room during that summer. When she terminated her tenancy and
left the community at the end of the summer, she intended to return
and get the rest of her property. In May, 1933, plaintiff was notified
by the Council that it was vacating the building and that everything was
to be moved out. By June, 1933, the Council had removed all its prop-
erty, but in the room formerly occupied by her, the plaintiff had left
a suitcase and two old trunks, one of which was unlocked. These were
filled with manuscripts, letters and documents, family photographs,
and other personalty of varying intrinsic and sentimental value. Plaintiff returned to the room in July, 1933, and at that time left the prop-
erty unchanged. She came back to the premises on August 1, but could
not enter the building because a new lock had been put on it. And
later she learned that in the meantime, on July 13, 1933, defendant by
his agent had entered, foreclosed the mortgage, and caused the “debris,”
including plaintiff’s property, to be removed.

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

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

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2The trunks also contained photographic plates and films, a 17th century Jap-

anese lacquered escritoire, two antique sewing boxes, some linen and embroidery,
a carved ivory tusk, some books and china, some silver spoons and silver plated ware,
a crayon portrait, and some curiosities from New Zealand.

329 N. E. (2d) 552, 554 (Mass. 1940).
RECENT CASES

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

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

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


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


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


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

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

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13Velzian v. Lewis, 15 Ore 539, 16 Pac. 631 (1888). See Carver v. Ketchum, 53 Idaho 595, 26 P. (2d) 139 (1933); Lee Tu#. v. Burkhart, 59 Ore. 194, 116 Pac. 1066 (1911); 26 R. C. L. 1098, §§ 2, 3; Restatement, Torts (1934) § 226.
15The principal case referred to this right of the building owners to remove goods to a warehouse. 29 N. E. (2d) 552, 554 (Mass. 1940).
quite as far as the principal case, in that here no notice was given by the
defendant to plaintiff to remove her property.

The plaintiff in *Row v. Home Savings Bank*,\(^8\) by her negligent de-
lay in removing her goods and failure to notify defendant of her owner-
ship, set up appearances that to a reasonable person occupying the
premises would indicate that the property had been abandoned. It is
true that Row did not actually abandon the property and the owner-
ship did remain in her, because to constitute abandonment there must
be a clear and unequivocal intent to abandon on the part of the
owner.\(^9\) However, the plaintiff left goods which were to the ordinary
eye worthless junk. Seemingly the things had not been taken by their
owner because she no longer wanted them. In this connection, it must
be remembered that the premises had not been used actively for several
months prior to the defendant's taking possession. The fact that the
defendant had no dealings with the plaintiff and no knowledge that
she ever occupied the premises makes defendant's conduct all the more
reasonable. The case appears to fit exactly into the sensible rule, an-
nounced by the Massachusetts court in an early decision:

“The unauthorized appropriation of personal chattels will
generally be sufficient of itself to enable the true owner to main-
tain an action for their conversion. . . . But this severe rule of law
will not be applied when the action of appropriation can be
justified as having been authorized in any manner by the owner
of the property.”\(^20\)

**Howard Wesley Dobbins**

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

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

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\(^8\) 1829 N. E. (2d) 552 (Mass. 1940).

\(^9\) See Notes 5 and 6, supra.

\(^1\) See Notes 5 and 6, supra.

\(^2\) Hills v. Snell, 104 Mass. 178, 177, 6 Am. Rep. 215, 218-9 (1870). In this case
the defendant, a baker, ordered flour from a merchant, C, who had to buy flour
from B to fill the order. B gave C an order on a warehouse for the flour. The flour
delivered to the defendant was not the flour which had been bought from C, but
was of a higher quality than ordered, mistakenly sent, and belonging to A. Defendant
consumed it, not knowing the difference. Other cases have acknowledged the ex-
N. E. 391 (1893); Somerville National Bank v. Hornblower, 293 Mass. 965, 199 N. E.
918, 104 A. L. R. 1107 (1936).

\(^3\) 17 A. (2d) 58 (C. C. N. J. 1949).
gence by upholding the right of an infant child to recover damages for personal injuries sustained while the child was *en ventre sa mère* and caused by the negligence of a doctor. The complaint in the case alleged that the defendant had negligently diagnosed the condition of the mother of the child and applied X-ray treatments to her; that she was in fact pregnant; and that the result of the treatments was the birth of the infant child as a microcephalic idiot without skeletal structure or powers of sight, hearing, or locomotion. Defendant's motion to dismiss the complaint was denied.

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

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


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

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

14 (1901) ("youngest child" held to be child en ventre sa mere); Mason v. Jones, 2 Barb. 229 (N. Y. 1848) (child en ventre sa mere will take in trust in accumulation for children); Jenkins v. Freyer, 4 Paige Ch. 47 (N. Y. 1833) (child en ventre sa mere is considered as in esse, conditioned on his live birth, and will take as if born during life time of testator); Stedfast v. Nicoll, 3 John. Cas. 18 (N. Y. 1802) (child en ventre sa mere took a vested estate subject to ulterior contingent remainderman); Laird's Appeal, 85 Pa. 339 (1877) (child en ventre sa mere held to be "issue living"); Smart v. King, 1 Meigs 149, 35 Am. Dec. 137 (Tenn. 1898) (child en ventre sa mere included in "all my grandchildren"); Trower v. Butts, 1 Sim. & St. 181, 57 Eng. Rep. 72 (1829) (child en ventre sa mere held to be a child "born within testatrix's lifetime" so as to include it within terms of trust); Snow v. Tucker, 1 Sid. 153, 82 Eng. Rep. 1027 (1714) (devise to child en ventre sa mere is good); see 10 Am. & Eng Enc. 624 and note.


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


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

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

See Boggs, J. in Allaire v. St. Luke's Hospital, 184 Ill. 259, 56 N. E. 638, 48
The thirteen cases which militate against the child's right to maintain the action give six reasons for the denial. It is said that such an action has never been previously allowed and that there is no common law action for such injuries; that a child *en ventre sa mere* has no existence apart from that of its mother until its birth, and thus no duty of care is owed it until that time; that no right of action in the child is needed because the mother may recover damages for all the injuries to the unborn child, if they are not too remote; that the death statutes sued upon do not include such a person within their meaning; that to allow a recovery under these facts would result in great inconvenience and danger of fraudulent actions and uncertainty of proof; and that the court has no power to legislate judicially.

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


See cases discussed in body following, and cited in notes 16 to 21, 30, 31, 53, 54, 37.


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

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

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23Justice Holmes thought that any arguments for recovery based on analogies to the criminal law were destroyed by the fact that, though the Massachusetts statute made attempted abortion a crime and increased the punishment if the mother died, yet no distinction was made to turn on whether the child lived or died.
25A wrongful death action is an action given by statute to the surviving dependent relatives of the deceased person or to the administrator of the estate. It is an entirely new action, unknown at common law, and modeled after Lord Campbell's Act, 9 & 10 Vic. C. 93. It is independent of any action which deceased could have brought in his own right had he survived. Harper, Law of Torts (1933) § 279; McCormick, Damages (1935) § 93.
27A survival statute permits the administrator of the deceased to sue upon a claim which deceased could have maintained during his life time, or to revive and follow to judgment any suit actually instituted by the deceased. At common law, the cause of action was wiped out by death; a survival statute prevents this, but gives no new ground of action, merely preserving the old. Harper, Law of Torts (1933) § 279; McCormick, Damages (1935) § 93.
28In Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901), the court held that where the mother, quick with child, was injured due to the negligent maintenance of a building and as a result the child died from
may not be the same as that owed by a doctor to one of his patients. 29

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

Ten years later the Supreme Court of Illinois ruled on the question in Allaire v. St. Luke's Hospital. 32 The mother of the plaintiff alleged that she contracted with the defendant hospital for care during the approaching birth of her child and for the care of the child, and that both mother and child were injured directly through the negligent operation of an elevator in the hospital. A demurrer to the complaint was sustained, with one Justice strenuously dissenting. The court cited Dietrich v. Northampton and Walker v. Great Northern R. Co. as authority. However, the dissent pointed out that neither of these two cases was in point. In the Dietrich case the child was not capable of independent life at the time of its birth while here the child was still living. This factor affords grounds for a differentiation between the rights of a viable child and one incapable of life at the time its rights were injured. 33 In the Walker case there was no averment of knowledge
in the railroad of the existence of the child nor any contractual rela-
tionship between the defendant and the mother with respect to the
unborn child, while here the mother contracted directly with the hos-
pital with respect to the child as well as with respect to herself, and the
hospital owed them a duty of care. Mention was also made by the
dissent of the civil and criminal rules concerning a child en ventre sa
mere, these rules being cited as supporting the view that the action
should lie.

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

"The indisputable fact is that one is answerable to the
criminal law for killing an unborn child who to that end is
regarded as in esse, and the further fact is that the unborn child,
so far as the property interests are concerned, is regarded as an
entity, a human being with the remedies usually accorded to an
owner. But the argument then proceeds that one must respect
the rights of ownership, and, so far as a civil remedy is con-
cerned, disregard the safety of the owner. In such argument there
is not true sense of proportion in the protection of rights. The
greater is denied; the one lesser and dependent on the very ex-
istence of a person in esse and entitled to protection is respected.
... In my view, justice should not be turned aside and wrongs
go without remedies because of apprehension of what may hap-
pen in jurisprudence if it be decided that an unborn child has
some rights of the person."8

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

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

4232 N. Y. 220, 133 N. E. 567 (1921).
Cardozo dissenting. In delivering the prevailing opinion, Judge Pound said:

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

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

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

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

\[\text{232 N. Y. 220, 224, 133 N. E. 567, 568 (1921).}
\[\text{248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913).}
\[\text{9 & 10 Vict. c. 93.}
RECENT CASES

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

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

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


4See 17 A. (2d) 58, 62 (C. C. N. J. 1940).


4Finnerty v. Cummings, 132 Cal. App. 48, 22 P. (2d) 77 (1933); Jackiewicz v. United Illuminating Co., 156 Conn. 310, 158 Atl. 151 (1927); Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N. E. 440 (1931); Scanlon v. Kansas City, 325 Mo. 125, 28 S. W. (2d) 84 (1930).


which the child, had it been a person in the eyes of the law, could have sued in his own right.\textsuperscript{50}

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

\textbf{George F. McInerney}


\textsuperscript{51}XXXVII Time 68 (Feb. 24, 1941).
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SCHOOL OF LAW
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LEADING ARTICLES

A Discussion of the Soldiers' and Sailors' Civil Relief Act of 1940 . . . . . . Karl R. Bendetson 1

Ambiguous Payees of Negotiable Paper . Charles R. McDowell 44

The Doctrine of Judicial Review and Its Relation to a Declared Purpose or Policy of a Statute . . Theodore S. Cox 177

Income Tax Deductions as a Means of Effectuating Governmental Policies . . . Robert H. Gray 191

The Enforcement of Oral Promises to Give Real Estate Security . . . . . . Theodore A. Smedley 210
CONTRIBUTORS OF LEADING ARTICLES

KARL R. BENDETSON, A.B. 1929, LL.B. 1932, Leland Stanford Junior University. Member of the Washington and California Bars. General practice, Aberdeen, Washington, 1932-1940; member, Stewart and Bendetson, 1940; Captain, Judge Advocate General's Department, United States Army, May, 1940-date.

THEODORE SULLIVAN COX, A.B., University of Michigan; LL.B., University of Virginia; Research in History, Stanford University; Research in History, Politics, and Public Law, Johns Hopkins University. Sometime Instructor in Law, University of Virginia; Professor of Jurisprudence, College of William and Mary 1930-1932; Dean of the Department of Jurisprudence, College of William and Mary, 1932-date. Member of the Virginia Bar Association, American Bar Association, American Judicature Society, American Law Institute, American Historical Association, Phi Beta Kappa, Order of the Coif. Delegate, International Congress of Comparative Law, The Hague, 1932, 1937. Contributor to Dictionary of American Biography, legal and other periodicals.

ROBERT HANES GRAY, B.S. 1932, Washington and Lee University; M.B.A. 1933, Harvard University Graduate School of Business Administration; LL.B. 1936, Washington and Lee University. Admitted to practice in Virginia, 1935; in West Virginia, 1936. Assistant Professor of Economics and Law, Washington and Lee University, 1938-date; on leave of absence for graduate study at Columbia University School of Law, 1940-1941. Member of Phi Beta Kappa.

CHARLES R. McDOWELL, A.B. 1925, Centre College; M.A. 1920, Columbia University; LL.B. 1924, Yale University. Member of the Kentucky and Florida Bars. General practice, Danville, Kentucky, 1924; associated with firms of Wideman & Wideman, and Winters, Fosket & Wilcox, West Palm Beach, Florida, 1925-1927. Professor of Law, Washington and Lee University, 1927-date.

THEODORE ALLYN SMEDLEY, A.B. 1935, Illinois College; J.D. 1938, Northwestern University. Member of the Illinois Bar. Assistant Professor of Law, University of Wyoming, 1938-1939; Assistant Professor of Law and Law Librarian, Washington and Lee University, 1939-date. Member of Phi Beta Kappa and Order of the Coif.

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INDEX—DIGEST

Numerals in italics refer to Leading Articles. Numerals in plain type refer to Notes and Recent Cases. Reference is made to page at which discussion begins.

ADMINISTRATIVE LAW

Administrative remedies under Soldiers' and Sailors' Civil Relief Act of 1940.................... 18

AGENCY

Agent's duty to account for property in his hands by virtue of the agency .................... 268
Conversion by third party of property given to agent by principal for illegal purpose............. 267

BANKRUPTCY

Basis of creditor's claim against insolvent bank where creditor holds security..................... 306

CONSTITUTIONAL LAW

Child labor, prohibition of, by federal government .................. 279
Constitutionality of:
  Extension of substituted service of process to non-resident business men.......................... 75
  Legislative pressure to induce acceptance of elective workmen's compensation acts........... 250
  Abolition of employer's common law defenses............ 251
  Imposition of negligence presumptions............. 252
  Liberalization of rules of admissibility of evidence........ 259
Soldiers' and Sailors' Civil Relief Act of 1940............... 34
  Statute authorizing retrospective modification of prior award of permanent alimony........... 252
  Statute making majority vote of collective bargaining unit a pre-requisite to peaceful picketing........ 299
Use of taxation to effectuate governmental policies........ 197
Workmen's compensation statute imposing liability without fault on non-contributing employers............... 170
Interstate commerce power of federal government in regulation of industry......................... 279
Judicial Review, doctrine of.......................... 177
Legislative declaration of purpose or policy of statute.................. 180
Legislative finding of fact stated in statute..................... 184
Picketing as exercise of right to freedom of speech.................. 300

CONTRACTS

Employers' attempts to contract against future competition by employees.................. 106
Installment contracts, as affected by Soldiers' and Sailors' Civil Relief Act of 1940............ 17
Promissory estoppel as basis of enforcing gratuitous promises................ 287

DAMAGES

Liquidated damages provisions in employment contracts.................. 107

DOMESTIC RELATIONS

Injunction against prosecution of divorce action in foreign jurisdiction.................. 111
To prevent evasion of domestic laws.......................... 115
To prevent irreparable injury to spouse.................. 113
Retrospective modification of prior award of permanent alimony........... 292
Wife's right against liquor and drug vendors to recover for loss of husband's consortium........ 153

EQUITY

See Injunction

Enforcement of oral promises to give real estate security.................. 210
<table>
<thead>
<tr>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part performance in oral security promise cases..........................212</td>
</tr>
<tr>
<td>Specific performance of oral promise to give real estate security........212</td>
</tr>
<tr>
<td>Equitable servitudes on chattels, in America.................................95</td>
</tr>
<tr>
<td>In England....................................................................................98</td>
</tr>
</tbody>
</table>
| ESTOPPEL
| Estoppel by record—the mutuality requirement.................................233 |
| Promissory estoppel, limits of..................................................287 |
| EVIDENCE
| Admissibility rules liberalized in workmen's compensation cases...259 |
| Objection after verdict to admissibility of evidence......................122 |
| Presumptions of negligence in workmen's compensation cases..............252 |
| FUTURE INTERESTS
| Life estate with absolute power of disposal declared to be a fee simple...118 |
| Rule as applied to ambiguous or general devise with absolute power of disposal.................119 |
| Virginia statutes affecting rule..............................................120 |
| Remainder after life estate with absolute power of disposal...............117 |
| INJUNCTION
| Against employee's entering a competing business..........................108 |
| Against prosecution of a divorce action in foreign jurisdiction.........111 |
| To prevent evasion of domestic laws.........................................115 |
| To prevent irreparable injury to spouse......................................113 |
| INSURANCE
| Life insurance, as affected by Soldiers' and Sailors' Civil Relief Act of 1940.........................14 |
| LABOR LAW
| Majority vote of collective bargaining unit as pre-requisite to peaceful picketing...............299 |
| LANDLORD AND TENANT
| Conversion liability of landlord disposing of chattels left on premises........321 |
| Landlord's duty to tenant to repair leased premises.......................149 |
| Rent, as affected by Soldiers' and Sailors' Civil Relief Act of 1940...........10 |
| LIBEL AND SLANDER
| Qualified privilege of telegraph company to transmit defamatory message........141 |
| MORTGAGES
| Enforcement of oral promises to give mortgage on realty................210 |
| Real and personal property mortgages, as affected by Soldiers' and Sailors' Civil Relief Act of 1940...13 |
| NEGOTIABLE INSTRUMENTS
| Ambiguous payees of negotiable paper......................................44 |
| American Bankers' Associations' proposed amendment to N. I. L. § 9 (3)..............63 |
| Geneva Codes on Bills of Exchange and Checks................................46 |
| N. I. L. § 9 (3): recommended re-draft......................................71 |
| NUISANCE
| Liability of vendor of property for injuries caused by nuisance........149 |
| Meaning under N. Y. Multiple Dwelling Law................................150 |
| Prescriptive right to maintain nuisance......................................159 |
| PLEADING AND PRACTICE
| See Procedure
| Estoppel by record in derivative liability cases..........................237 |
| Mutuality requirement in res judicata and estoppel by record..............233 |
| Objection after verdict to admissibility of evidence........................122 |
| Presumptions of negligence in workmen's compensation cases..............252 |
### PRINCIPAL AND AGENT

See Agency

#### PROCEDURE

See *Judgment, Pleading and Practice*

Substituted service of process on:

- Non-resident business men
- Non-resident motorists

#### PROPERTY

See *Future Interests*

- Equitable servitudes on chattels
  - In America
  - In England
- Liability of vendor of realty for injuries caused by defective condition of premises
- Literary property at common law
- Property right in performance of musical composition
- Abandonment of, by publication

#### PUBLIC LANDS

- Rights in, as affected by Soldiers' and Sailors' Civil Relief Act of 1940

#### RADIO

- Right of recording orchestras against radio stations using records for broadcast purposes

#### RIGHT OF PRIVACY

- Protection against publication of newsworthy information

#### STATUTE OF FRAUDS

- Applied to oral promises to give security in real estate
- Part performance in oral security promise cases

#### STATUTES

- Arizona Employers' Liability Law
- Elective workmen's compensation acts
- Legislative declaration of purpose or policy of statute
- Legislative finding of fact in statute
- Married Women's Acts
- National Guard Bill
- New York Multiple Dwelling Law
- Pennsylvania workmen's compensation legislation
- Selective Training and Service Act of 1940
- Soldiers' and Sailors' Civil Relief Act of 1940
- Soldiers' and Sailors' Civil Relief Act of 1918
- Statutes of Limitations in prescriptive nuisance cases
- Virginia Acts of 1908 and 1919 on grants of life estate with absolute power of disposal
- Virginia statute authorizing retrospective modification of prior award of permanent alimony
- West Virginia Workmen's Compensation Act
- Wisconsin labor legislation regulating picketing

#### SURETYSHIP

- Subrogation of surety paying creditor's claims against insolvent bank

#### TAXATION

- Governmental regulation through taxation
- Income tax deductions as means of effectuating governmental policies
- Constitutionality of
- State tax on declaration of dividends by foreign corporation
- Subject and measure of state taxes
- Taxes, as affected by Soldiers' and Sailors' Civil Relief Act of 1940

#### TELEPHONE AND TELEGRAPH

- Qualified privilege of telegraph company to transmit defamatory message

#### TORTS

See *Domestic Relations, Landlord and Tenant, Libel and Slander, Nuisance, Property, Right of Privacy, Telephone and Telegraph, Workmen's Compensation*
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stated</td>
<td>317</td>
</tr>
<tr>
<td>Liability in conversion of landlord disposing of chattels left on premises by former tenant</td>
<td>321</td>
</tr>
<tr>
<td>Liability of doctor for prenatal injuries to child</td>
<td>320</td>
</tr>
<tr>
<td>Liability of liquor or drug vendor to wife for loss of husband's consortium</td>
<td>153</td>
</tr>
<tr>
<td>Liability of landlord to tenant for injuries caused by defective condition of premises</td>
<td>149</td>
</tr>
<tr>
<td>Liability of vendor of realty for injuries caused by defective condition of premises</td>
<td>148</td>
</tr>
<tr>
<td>Proximate cause in loss of consortium cases</td>
<td>155</td>
</tr>
<tr>
<td>Respondeat superior, origin of doctrine</td>
<td>320</td>
</tr>
<tr>
<td>Right of child to recover in tort for prenatal injuries</td>
<td>320</td>
</tr>
<tr>
<td>Status in law of child en ventre sa mere</td>
<td>326</td>
</tr>
<tr>
<td>Meaning of “competition”</td>
<td>101</td>
</tr>
<tr>
<td>Radio broadcasts of recordings</td>
<td>99</td>
</tr>
<tr>
<td>Scope of doctrine</td>
<td>99</td>
</tr>
<tr>
<td>Contest of wills, parties having sufficient interest</td>
<td>166</td>
</tr>
<tr>
<td>Creditor of heir of testator: Right to compel heir to contest will</td>
<td>169</td>
</tr>
<tr>
<td>Right to contest will</td>
<td>166</td>
</tr>
<tr>
<td>Legatee's right to disclaim legacy to prejudice of his creditor</td>
<td>170</td>
</tr>
<tr>
<td>UNFAIR COMPETITION</td>
<td></td>
</tr>
<tr>
<td>Meaning of “competition”</td>
<td>101</td>
</tr>
<tr>
<td>Radio broadcasts of recordings</td>
<td>99</td>
</tr>
<tr>
<td>Scope of doctrine</td>
<td>99</td>
</tr>
<tr>
<td>Abrogation of employer's common law defenses</td>
<td>171, 251</td>
</tr>
<tr>
<td>Constitutionality of: Imposition of liability without fault on non-electing employers</td>
<td>170</td>
</tr>
<tr>
<td>Legislative pressure to induce acceptance of elective acts</td>
<td>250</td>
</tr>
<tr>
<td>Abolition of employer's common law defenses</td>
<td>251</td>
</tr>
<tr>
<td>Imposition of negligence presumptions</td>
<td>252</td>
</tr>
<tr>
<td>Liberalizations of rules of admissibility of evidence</td>
<td>259</td>
</tr>
<tr>
<td>Construction of West Virginia Act as imposing liability without fault on employers</td>
<td>172</td>
</tr>
</tbody>
</table>
TABLE OF CASES

Numerals in italics indicate a case referred to in a LEADING ARTICLE; in plain type, a case referred to in a NOTE or RECENT CASE discussion; in plain type within brackets, a case which is the subject of a NOTE or RECENT CASE discussion.

<table>
<thead>
<tr>
<th>Case (or Article)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aaron Smith &amp; Another v. Shepperd</td>
<td>46</td>
</tr>
<tr>
<td>A. J. Canfield Co. v. McGee</td>
<td>[106]</td>
</tr>
<tr>
<td>Alleghany College v. National Chautauqua County Bank of Jamestown</td>
<td>288</td>
</tr>
<tr>
<td>American Federation of Labor v. Bain</td>
<td>302</td>
</tr>
<tr>
<td>American Surety Co. v. Bethlehem National Bank</td>
<td>[305]</td>
</tr>
<tr>
<td>Angle v. The Ry.</td>
<td>100</td>
</tr>
<tr>
<td>Bagot Pneumatic Tyre Co. v. Clipper</td>
<td>93</td>
</tr>
<tr>
<td>Bailey v. Drexel Furniture</td>
<td></td>
</tr>
<tr>
<td>Co.</td>
<td>183, 204, 209</td>
</tr>
<tr>
<td>Barber v. Stickney</td>
<td>94</td>
</tr>
<tr>
<td>Bassham v. Evans</td>
<td>25, 26</td>
</tr>
<tr>
<td>Baumann v. Baumann</td>
<td>113, 114</td>
</tr>
<tr>
<td>Benton v. Kerman</td>
<td>[159]</td>
</tr>
<tr>
<td>Billings v. United States</td>
<td>202</td>
</tr>
<tr>
<td>Bisnoff v. Herrman</td>
<td>247</td>
</tr>
<tr>
<td>Blake v. Blake</td>
<td>224, 225</td>
</tr>
<tr>
<td>Board of Trade of the City of Chicago v. Olsen</td>
<td>285, 286</td>
</tr>
<tr>
<td>Borgnis v. Falk Co.</td>
<td>172</td>
</tr>
<tr>
<td>Brewer-Elliott Oil and Gas Co. v. United States</td>
<td>278</td>
</tr>
<tr>
<td>Buel v. United Rys Co.</td>
<td>332</td>
</tr>
<tr>
<td>Caledonian Insurance Co. v. National City Bank of New York</td>
<td>66</td>
</tr>
<tr>
<td>Carlson v. California</td>
<td>300-305</td>
</tr>
<tr>
<td>Carter v. Carter Coal Co.</td>
<td>207, 209</td>
</tr>
<tr>
<td>Champion v. Ames (The Lottery Case)</td>
<td>281</td>
</tr>
<tr>
<td>Charnley v. Shawano Water Power Improvement Co.</td>
<td>161</td>
</tr>
<tr>
<td>Chas. C. Steward Machine Co. v. Davis</td>
<td>208</td>
</tr>
<tr>
<td>Cheney v. Doris Silk Corp.</td>
<td>103</td>
</tr>
<tr>
<td>Chicago Board of Trade v. Olsen</td>
<td>209</td>
</tr>
<tr>
<td>Child Labor Tax Case</td>
<td>183, 205</td>
</tr>
<tr>
<td>Coca-Cola Co. v. Pepsi-Cola Co.</td>
<td>242</td>
</tr>
<tr>
<td>Commonwealth v. Caton</td>
<td>178</td>
</tr>
<tr>
<td>Commonwealth for use of Coleman v. Farmers Deposit Bank</td>
<td>62, 63, 64, 66</td>
</tr>
<tr>
<td>Connecticut General Life Insurance Co. v. Johnson</td>
<td>313, 315</td>
</tr>
<tr>
<td>Couthouri, Inc. v. United States</td>
<td>209</td>
</tr>
<tr>
<td>Craven v. Hartley</td>
<td>222</td>
</tr>
<tr>
<td>Daniel Ball, The</td>
<td>274, 275</td>
</tr>
<tr>
<td>Dansk Rekyluffelsyndikat Aktieselskab v. Snell</td>
<td>93</td>
</tr>
<tr>
<td>Davidson v. Doherty &amp; Co.</td>
<td>80, 82</td>
</tr>
<tr>
<td>Delaware Railroad Tax Case</td>
<td>311</td>
</tr>
<tr>
<td>De Mattos v. Gibson</td>
<td>98, 95</td>
</tr>
<tr>
<td>Detroit Piston Ring Co. v. W. C. &amp; H. Savings Bank</td>
<td>62, 63, 64, 65</td>
</tr>
<tr>
<td>Dietrich v. City of Northampton</td>
<td>328-330</td>
</tr>
<tr>
<td>Doggett v. Peck</td>
<td>[82]</td>
</tr>
<tr>
<td>Doherty &amp; Co. v. Goodman</td>
<td>81-83</td>
</tr>
<tr>
<td>Drobner v. Peters</td>
<td>331, 332</td>
</tr>
<tr>
<td>Dublin v. Dublin</td>
<td>115</td>
</tr>
<tr>
<td>Duell v. Metro-Goldyn Mayer Corp.</td>
<td>243</td>
</tr>
<tr>
<td>Dunlap &amp; Co. v. Cody</td>
<td>150, 152, 153</td>
</tr>
<tr>
<td>Eagle Star &amp; British Dominions Insurance Co. v. Heller</td>
<td>246</td>
</tr>
<tr>
<td>Eaton v. Davis</td>
<td>[308]</td>
</tr>
<tr>
<td>Elder v. New York and Pennsylvania Motor Express, Inc.</td>
<td>248</td>
</tr>
<tr>
<td>Ener v. Gandy</td>
<td>[316]</td>
</tr>
<tr>
<td>Face &amp; Son v. Cherry</td>
<td>165</td>
</tr>
<tr>
<td>Fahlcr v. City of Minot</td>
<td>256, 259</td>
</tr>
<tr>
<td>Feldman v. Warshawsky</td>
<td>214, 223</td>
</tr>
<tr>
<td>Felsenheld v. United States</td>
<td>202</td>
</tr>
<tr>
<td>First National Bank of Portland v. U. S. National Bank</td>
<td>69, 70</td>
</tr>
</tbody>
</table>

1940-1941
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flandermeyer v. Cooper</td>
<td>155, 156</td>
</tr>
<tr>
<td>Flegenheimer v. Brogan</td>
<td>[267]</td>
</tr>
<tr>
<td>Fletcher v. Perry</td>
<td>245</td>
</tr>
<tr>
<td>Fletcher American National Bank v.</td>
<td></td>
</tr>
<tr>
<td>Crescent Paper Co.</td>
<td>66</td>
</tr>
<tr>
<td>Flexner v. Farson</td>
<td>75-77, 79-82, 85</td>
</tr>
<tr>
<td>Flint v. Stone-Tracy Co.</td>
<td>202</td>
</tr>
<tr>
<td>Flynn v. Reinke</td>
<td>145-147</td>
</tr>
<tr>
<td>Fontopia, Ltd. v. Bradley</td>
<td>100</td>
</tr>
<tr>
<td>Foster-Fountain Packing Co. v. Haydel</td>
<td>181</td>
</tr>
<tr>
<td>Foster Lumber Co. v. Harlan County Bank</td>
<td>227</td>
</tr>
<tr>
<td>Galveston, H. &amp; S. A. Ry. v. Texas</td>
<td>312</td>
</tr>
<tr>
<td>Geisler v. Stevenson Brewing Co.</td>
<td>324</td>
</tr>
<tr>
<td>Gibbons v. Ogden</td>
<td>275</td>
</tr>
<tr>
<td>Goldstein v. Goldstein</td>
<td>[111]</td>
</tr>
<tr>
<td>Grand Lodge of Kansas v. Emporia National Bank</td>
<td>66</td>
</tr>
<tr>
<td>Greenburg v. Greenburg</td>
<td>116</td>
</tr>
<tr>
<td>Gulbranson-Dickinson &amp; Co. v. Hopkins</td>
<td>68</td>
</tr>
<tr>
<td>Halleman v. Harward</td>
<td>158</td>
</tr>
<tr>
<td>Hamilton v. Kentucky Distilleries</td>
<td>37</td>
</tr>
<tr>
<td>Hammer v. Dagenhart</td>
<td>204, 205</td>
</tr>
<tr>
<td>Hampton Jr. &amp; Co. v. United States</td>
<td>205</td>
</tr>
<tr>
<td>Haverhill v. International Ry.</td>
<td>247</td>
</tr>
<tr>
<td>Hawkins v. Bleakly</td>
<td>285</td>
</tr>
<tr>
<td>Helvering v. Independent Life Ins. Co.</td>
<td>197</td>
</tr>
<tr>
<td>Hess v. Pawloski</td>
<td>79, 84</td>
</tr>
<tr>
<td>Hester v. Sawyers</td>
<td>160</td>
</tr>
<tr>
<td>Hill v. Wallace</td>
<td>183, 185, 186, 204, 208</td>
</tr>
<tr>
<td>Holmgren v. United States</td>
<td>281</td>
</tr>
<tr>
<td>Home Building &amp; Loan Ass'n v. Blaisdell</td>
<td>37, 36</td>
</tr>
<tr>
<td>Hotel &amp; Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board...[299]</td>
<td></td>
</tr>
<tr>
<td>H. P. Hood &amp; Sons v. United States</td>
<td>187</td>
</tr>
<tr>
<td>Horn Silver Mining Co. v. New York</td>
<td>311</td>
</tr>
<tr>
<td>International News Service v. Associated Press</td>
<td>99, 100, 102-104</td>
</tr>
<tr>
<td>Interstate Electric Co. v. Fidelity and Deposit Co. of Maryland</td>
<td>244</td>
</tr>
<tr>
<td>Ives v. South Buffalo Ry.</td>
<td>174</td>
</tr>
<tr>
<td>Jones v. Herald Post</td>
<td>139</td>
</tr>
<tr>
<td>Kearney v. Webb</td>
<td>269</td>
</tr>
<tr>
<td>Kentucky Whip and Collar Co. v.</td>
<td></td>
</tr>
<tr>
<td>Illinois Central R. R. Co.</td>
<td>284</td>
</tr>
<tr>
<td>Kilmer v. White</td>
<td>151, 152</td>
</tr>
<tr>
<td>Klein v. Western Union Telegraph Co.</td>
<td>146, 147</td>
</tr>
<tr>
<td>Knowlton v. Moore</td>
<td>207</td>
</tr>
<tr>
<td>Krause v. Krause</td>
<td>120</td>
</tr>
<tr>
<td>Leovy v. United States</td>
<td>274</td>
</tr>
<tr>
<td>Ling Su Fan v. United States</td>
<td>42</td>
</tr>
<tr>
<td>Livingston v. Livingston</td>
<td>293, 294, 296-298</td>
</tr>
<tr>
<td>Lord Strathcona Steamship Co. v.</td>
<td></td>
</tr>
<tr>
<td>Dominion Coal Co.</td>
<td>95</td>
</tr>
<tr>
<td>Lottery Case, The</td>
<td>281</td>
</tr>
<tr>
<td>Louisiana Shrimp Case, The</td>
<td>187</td>
</tr>
<tr>
<td>Lykes Bros. S. S. Co. v. Esteves</td>
<td>255</td>
</tr>
<tr>
<td>McCray v. United States</td>
<td>182, 207</td>
</tr>
<tr>
<td>McCulloch v. Maryland</td>
<td>35, 208</td>
</tr>
<tr>
<td>McKinney v. Trustees of Emory &amp; Henry College</td>
<td>165</td>
</tr>
<tr>
<td>McNair v. Burt</td>
<td>164</td>
</tr>
<tr>
<td>Maine v. Grand Trunk Ry. Co.</td>
<td>311, 312</td>
</tr>
<tr>
<td>May v. Joynes</td>
<td>118-121</td>
</tr>
<tr>
<td>Melvin v. Reed</td>
<td>139</td>
</tr>
<tr>
<td>Metter v. Los Angeles Examiner</td>
<td>159</td>
</tr>
<tr>
<td>Milk Wagon Drivers Union v. Meadowsmoor Dairies</td>
<td>304</td>
</tr>
<tr>
<td>Miller v. Acme Feed, Inc.</td>
<td>[129]</td>
</tr>
<tr>
<td>Minet v. Gibson</td>
<td>59, 65</td>
</tr>
<tr>
<td>Minnesota v. Barber</td>
<td>180, 181</td>
</tr>
<tr>
<td>Mobile J. &amp; K. R. R. v. Turnipseed</td>
<td>253</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td>PAGE</td>
</tr>
<tr>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>Monongahela Navigation Co. v. United States</td>
<td>47</td>
</tr>
<tr>
<td>Montello, The</td>
<td>274</td>
</tr>
<tr>
<td>Moore v. Holbrook</td>
<td>117</td>
</tr>
<tr>
<td>Mulford v. Smith</td>
<td>285</td>
</tr>
<tr>
<td>Murphy v. Christian Press Ass'n</td>
<td>97</td>
</tr>
<tr>
<td>National Fire Insurance Co. v. Mellon National Bank</td>
<td>64</td>
</tr>
<tr>
<td>National Labor Relations Board v. Jones &amp; Laughlin Steel Corp.</td>
<td>209</td>
</tr>
<tr>
<td>National Life Insurance Co. v. United States</td>
<td>298</td>
</tr>
<tr>
<td>National Phonograph Co. v. Mench</td>
<td>94</td>
</tr>
<tr>
<td>Nebbia v. New York</td>
<td>42</td>
</tr>
<tr>
<td>Newman v. Newman</td>
<td>223</td>
</tr>
<tr>
<td>New York Bank Note Co. v. Hamilton Bank Note Co.</td>
<td>95</td>
</tr>
<tr>
<td>New York v. United States</td>
<td>39</td>
</tr>
<tr>
<td>Nichols v. Ames</td>
<td>202</td>
</tr>
<tr>
<td>Norton v. Hall</td>
<td>317</td>
</tr>
<tr>
<td>Nugent v. Brooklyn Heights Ry. Co.</td>
<td>331, 332</td>
</tr>
<tr>
<td>Nye v. Western Union Telegraph Co.</td>
<td>144-147</td>
</tr>
<tr>
<td>O'Brien v. Western Union Telegraph Co.</td>
<td>141</td>
</tr>
<tr>
<td>Packard v. O'Neill</td>
<td>254</td>
</tr>
<tr>
<td>Palmore v. Morris</td>
<td>151</td>
</tr>
<tr>
<td>Pennoyer v. Neff</td>
<td>75, 76, 80</td>
</tr>
<tr>
<td>Peterson v. Western Union Telegraph Co.</td>
<td>144</td>
</tr>
<tr>
<td>Pharm v. Lituchy</td>
<td>148</td>
</tr>
<tr>
<td>Pollock v. Farmer's Loan &amp; Trust Co.</td>
<td>194, 202</td>
</tr>
<tr>
<td>Prager v. W. H. Chapman &amp; Sons</td>
<td>170, 256</td>
</tr>
<tr>
<td>Pratt v. Daly</td>
<td>155</td>
</tr>
<tr>
<td>Price v. Neal</td>
<td>70</td>
</tr>
<tr>
<td>Ravelio San Carlos, Inc. v. Bank of Italy National Trust &amp; Savings Ass'n</td>
<td>66</td>
</tr>
<tr>
<td>R. C. A. Mfg. Co. v. Whiteman</td>
<td>86</td>
</tr>
<tr>
<td>Rhine v. Bond</td>
<td>247</td>
</tr>
<tr>
<td>Rich Hill Coal Co. v. Bashore</td>
<td>255</td>
</tr>
<tr>
<td>Rochia v. United States</td>
<td>125</td>
</tr>
<tr>
<td>Row v. Home Savings Bank</td>
<td>321</td>
</tr>
<tr>
<td>Rutherford National Bank v. Bogle</td>
<td>225</td>
</tr>
<tr>
<td>Schindler v. Royal Insurance Co.</td>
<td>246</td>
</tr>
<tr>
<td>Schumaker v. Shawhan</td>
<td>160</td>
</tr>
<tr>
<td>Sidis v. F-R Publishing Co.</td>
<td>133</td>
</tr>
<tr>
<td>Sleeth v. Sampson</td>
<td>211, 214, 222</td>
</tr>
<tr>
<td>Smith v. Callahan</td>
<td>318</td>
</tr>
<tr>
<td>Smith v. Streatfeld</td>
<td>143-145</td>
</tr>
<tr>
<td>Sonnentheil v. Moody</td>
<td>243</td>
</tr>
<tr>
<td>Sonzinsky v. United States</td>
<td>206, 208</td>
</tr>
<tr>
<td>Southworth v. Sullivan</td>
<td>118, 120</td>
</tr>
<tr>
<td>Spencer v. Williams</td>
<td>224</td>
</tr>
<tr>
<td>Stelmack v. Glen Alden Coal Co.</td>
<td>290</td>
</tr>
<tr>
<td>Stemmer v. Kline</td>
<td>325</td>
</tr>
<tr>
<td>Stouts Mountain Coal Co. v. Ballard</td>
<td>162</td>
</tr>
<tr>
<td>Strafford v. Wallace</td>
<td>185</td>
</tr>
<tr>
<td>Sunshine Anthracite Coal Co. v. Adkins</td>
<td>207</td>
</tr>
<tr>
<td>Swanson v. Ball</td>
<td>158</td>
</tr>
<tr>
<td>Tatlock v. Harris</td>
<td>37, 58</td>
</tr>
<tr>
<td>Taylor v. Barker</td>
<td>244</td>
</tr>
<tr>
<td>Thornhill v. Alabama</td>
<td>300-305</td>
</tr>
<tr>
<td>Ticket Scalper Cases, The</td>
<td>99</td>
</tr>
<tr>
<td>Trice v. Bridgewater</td>
<td>316</td>
</tr>
<tr>
<td>Tulik v. Moxhay</td>
<td>91, 92, 95</td>
</tr>
<tr>
<td>U</td>
<td></td>
</tr>
<tr>
<td>Union Bank &amp; Trust Co. v. Security First National Bank</td>
<td>70</td>
</tr>
<tr>
<td>United Cigar Stores Co. v. American Raw Silk Mill Co.</td>
<td>69</td>
</tr>
<tr>
<td>United States v. Appalachian Electric Power Co.</td>
<td>272</td>
</tr>
<tr>
<td>United States v. Butler</td>
<td>186, 206, 208</td>
</tr>
<tr>
<td>United States v. Constantine</td>
<td>205, 206, 208</td>
</tr>
<tr>
<td>United States v. Delaware and Hudson Co.</td>
<td>283</td>
</tr>
<tr>
<td>United States v. Doremus</td>
<td>182, 202</td>
</tr>
<tr>
<td>United States v. Dressler</td>
<td>124</td>
</tr>
<tr>
<td>United States v. F. W. Darby Lumber Co.</td>
<td>209, 279</td>
</tr>
<tr>
<td>United States v. Rock Royal Co-op, Inc.</td>
<td>187</td>
</tr>
<tr>
<td>Name of Case</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>U. S. Cold Storage Co. v. Central Mfg. District Bank</td>
<td>66</td>
</tr>
<tr>
<td>Veazie Bank v. Fenno</td>
<td>201</td>
</tr>
<tr>
<td>Vere v. Lewis</td>
<td>58</td>
</tr>
<tr>
<td>Virginia Hot Springs Co. v. McCray</td>
<td>165</td>
</tr>
<tr>
<td>Walker v. Great Northern Ry</td>
<td>330, 331</td>
</tr>
<tr>
<td>Waring v. WDAS Broadcasting Station, Inc.</td>
<td>[86]</td>
</tr>
<tr>
<td>Werdeman v. Societe Generale D'Electricte</td>
<td>93</td>
</tr>
<tr>
<td>Western Union Telegraph Co. v. Cashman</td>
<td>145</td>
</tr>
<tr>
<td>Wilson v. Erickson</td>
<td>243</td>
</tr>
<tr>
<td>Wisconsin v. J. C. Penney Co.</td>
<td>[310]</td>
</tr>
<tr>
<td>Wright v. Vinton Branch</td>
<td>38</td>
</tr>
</tbody>
</table>