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CASE COMMENTS

CONSTITUTIONAL LAW—POWER OF STATE TO IMPOSE LICENSE TAX ON FOREIGN INSURANCE COMPANY DOING BUSINESS IN STATE. [United States Supreme Court]

The decision of United States Supreme Court in *Prudential Insurance Co. v. Benjamin*[1] constitutes the third step in a series of recent developments in federal and state regulation of the business of insurance. The first was the case of *United States v. South Eastern Underwriters Association*[2] decided in 1944, in which the court held, overruling seventy-five years of contrary decisions, that the business of insurance was interstate commerce, and thus subject to Federal regulation. Motivated by the threat seen in this decision to the validity of state regulation of insurance, Congress the next year passed the Ferguson-McCarran Act[3] declaring it to be the will of Congress that the states could and should continue to regulate insurance. The *Prudential* case followed in 1946, upholding the constitutionality of the McCarran Act. Although, at first consideration, the two cases appear to leave the Court open to a charge of inconsistency, closer study dispels this criticism and indicates that the decision in the *Prudential* case was quite foreseeable.

The *South Eastern Underwriters* case arose from the efforts of the Attorney General of the United States to apply the provisions of the Sherman Anti-Trust Act to the business of insurance.[4] Since the Sher-

[1]328 U. S. 408, 66 S. Ct. 1142 (1946).

[2]322 U. S. 533, 64 S. Ct. 1162, 88 L. ed. 1440 (1944).

[3]59 Stat. 33 (1945), Supp V, U. S. C. 256 (1946).

[4]322 U. S. 533, 535, 64 S. Ct. 1162, 1164, 88 L. ed. 1440 (1944). "The indictment makes the following charges: The member companies of S. E. U. A. controlled 90 per cent of the fire insurance and 'allied lines' sold by stock fire insurance companies in the six states where the conspiracies were consumated. Both conspiracies consisted of continuing agreement and concert of action effectuated through S. E. U. A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S. E. U. A. companies were punished by a withdrawal of the right to represent the members of S. E. U. A. and persons needing insurance who purchased from non-S. E. U. A. companies were threatened with boycott and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

man Act derives its efficacy from the commerce clause of the Federal Constitution, it could be applied only to those matters properly within Congress' power to regulate "commerce among the several states." This would seem to pose no problem, as the insurance business with its vast ramifications appears easily classifiable as interstate commerce. The difficulty was that for seventy-five years, beginning with *Paul v. Virginia*,[5] the Supreme Court had specifically held that the business of insurance was not interstate commerce, this view having been taken for the primary purpose of upholding state regulation thereof. The Court[6] in the *South Eastern Underwriters* case, expressly overruled these previous decisions to the effect that insurance was not interstate commerce, declared it to be such, and held that the Sherman Act did apply.[7]

Much apprehension was caused by this decision, and great concern was shown over the effect of it upon validity of state statutes regulating insurance.[8] The status of insurance in the overall scheme of government control was at best uncertain. Was the interstate commerce classification available as a shield against state regulation; which of the other Federal laws regulating commerce would be held applicable to insurance; was there to be a period of confusion while the federal government and the states tried to work out a new system of regulation?[9] Congress answered these questions in a prompt and concise manner by the passage of the McCarran Act.

"The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American 'trade or commerce' among the states."

[5]8 Wall. 168, 19 L. ed. 357 (1869).

[6]This was a four to three decision, Justices Roberts and Reed taking no part in the consideration or decision of the case.

[7]See Powell, Insurance As Commerce (1944) 57 Harv. L. Rev. 937, for his detailed criticism of the wisdom of the South Eastern Underwriters case. He maintains that the Court need not have classified the insurance business as interstate commerce in order to bring it within Congress' power to regulate. For seventy-five year, there has been a status quo in the insurance business; if Congress wished to change it, then let it, but the Court should have obeyed its maxim "leave it to Congress." Instead, the Court stepped in and upset the status quo.

[8]See 91 Cong. Rec. 503, Exhibit A, Jan. 25, 1945, which is a copy of correspondence between Senator Radcliffe and President Roosevelt discussing the gravity of the situation.

[9]322 U. S. 533, 583, 64 S. Ct. 1162, 1189, 88 L. ed. 1440 (1944), Stone C. J., dissenting:

"Its action in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications, cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business

The main provisions of the Act are in substance: (1) Continued State regulation of insurance is in the public interest; the silence of Congress is not to be interpreted as placing any barrier to state regulation; and the business is to be subject to state regulation. (2) No Act of Congress, except the Sherman, Clayton, and Federal Trade Commission Acts, is to be deemed to supersede any state statute on insurance unless it specifically so states. (3) A moratorium from federal prosecution of insurance companies under the Sherman, Clayton, and Federal Trade Commission Acts is to be in effect until January 1, 1948, after which date the three acts will be applicable to the business of insurance to the extent such business is not regulated by state law.[10] (4) Nothing in this Act is to make the Sherman Act inapplicable in case of boycott, coercion and intimidation. (5) The National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act are to continue to apply.[11]

The McCarran Act was passed before the Supreme Court was confronted with any of the questions which arose from the *South Eastern Underwriters* case. What the Court could and would have done had it been called upon to answer them is, of course, an academic question, but still it is an appropriate matter for discussion in drawing a comparison between legislative and judicial processes in the handling of such legal-political problems. It is submitted that the Court had no desire to thrust complete regulation of the insurance business upon the federal government and, without the McCarran Act, would have recognized that the states continued to have sufficient power to regulate insurance in the majority of its aspects. Mr. Justice Black, in the *South Eastern Underwriters* case, expressed the thought that the Court's

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and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system."

[10]As interpreted in the Senate, this section means that the states can, by positive action, permit certain practices which normally would be violations of the Sherman, Clayton and Federal Trade Commission Acts. 91 Cong. Rec. 1551, Feb. 27. 1945. However, it was understood that if the states wished to secure immunity from these statutes, they must not only act affirmatively, but also adequately and reasonably. Proceedings of 38th, 39th and 40th Annual meetings, Life Insurance Association of America, pp. 46-53.

[11]Polish National Alliance v. National Labor Relations Board, 322 U. S. 643, 64 S. Ct. 1196, 88 L. ed. 1509 (1944) held that the National Labor Relations Act applied to the business of insurance. This decision was handed down on the same day as the Southeastern Underwriters case. It is to be noted that the Ferguson-McCarran Act did not grant a moratorium as to the applicability of the National Labor Relations Act to the business of insurance.

declaration that insurance was interstate commerce was not aimed at invalidating any state regulation thereof, but had reference only to the subjection of the business to Federal Anti-Trust regulation.[12] And Chief Justice Stone in the dissenting opinion expressed disagreement with any decision which would take away state power to regulate insurance and confer such power solely on the federal government, in the absence of a clear congressional demand to that effect.[13]

As to how this policy could effectively be carried out, in view of the *South Eastern Underwriters* decision, reference should again be made to Mr. Justice Black's opinion in that case.

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In making out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."[14]

The classification suggested is fundamentally that developed in *Cooley v. Board of Wardens*.[15] Certainly nothing appears inherent in

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[12]322 U. S. 533, 548, 64 S. Ct. 1162, 1171, 88 L. ed. 1440 (1944), as quoted in text at note 14.

[13]322 U. S. 533, 580, 64 S. Ct. 1162, 1188, 88 L. ed. 1440 (1944): "But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on competition in the marketing of goods and services in an affecting interstate commerce, to be applied by the courts to the insurance business as best they may."

[14]322 U. S. 533, 548, 64 S. Ct. 1162, 1171, 88 L. ed. 1440 (1944).

[15]12 How. 299, 319, 13 L. ed. 996 (1851). "But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation

the nature of the insurance business which should prevent such a "local" classification being applied to the major portion of that business. Viewed in this light, only those few statutes which obstruct or discriminate against insurance across state lines would be held to be invalid exercises of state police power.[16] And whereas once any price-fixing combinations were prima facie discriminatory against interstate commerce,[17] it has been suggested[18] that even those measures which foster and supervise rate-making and similar combinations could be upheld under the liberal doctrine of *Parker v. Brown*.[19] Thus it appears that much of the unrest and apprehension based on the *Southeastern Underwriters* decision was unwarranted.

However, Congress did pass the McCarran Act, and once passed there was little reason to think that it would not be held constitutional if challenged. The Court has in recent years been willing to go very far in allowing congressional action to stand, and moreover there was ample precedent and doctrine for this sort of statute.[20] For instance, the transportation of liquor was once held to be immune from state interference because it was interstate commerce. Yet Congress in two successive acts removed whatever impediment to state regulation the clas-

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by congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."

[16]Note (1944) 44 Col. L. Rev. 772, 775-776.

[17]Note (1943) 43 Col. L. Rev. 837, 880, n. 273.

[18]Note (1944) 44 Col. L. Rev. 772, 776.

[19] 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315 (1943). The Supreme Court upheld a California statute whereby raisin producers were required to turn 70 per cent of their production over to a central committee which controlled marketing to packers with the obvious purpose of restricting competition and maintaining the producers' prices. The U. S. Secretary of Agriculture had actively supported the plan, although he was authorized to institute a similar program as a federal measure.

See Note (1943) 43 Col. L. Rev. 837, 877- 886, especially n. 271, 273 and 285 for a discussion of Parker v. Brown and the inferences to be drawn therefrom. This discussion seems to indicate that perhaps the decision is still too new and liberal to be fully relied upon.

[20]See Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 424, 66 S. Ct. 1142, 1152 (1946) at footnote 28: "Legislation which, typically, has presented the problem is found in a variety of measures, of which the Wilson Act, 26 Stat. 313, 27 U. S. C. A. Sec. 121, is the prototype. Earlier legislation presenting the difficulty was that involved in the second of the Wheeling Bridge cases, Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421, 15 L. ed. 435." See also, footnotes 11, 29, 32, 33 and 34 of the Prudential case.

sification "interstate commerce" imposed.[21] Similarly, by congressional action, the "interstate commerce" bar to state action was removed in regard to convict-made goods.[22] Since the basic purpose of the McCarran Act was the same as that of the liquor and convict-made goods acts—that is, to allow the states to regulate some part of a business which had been classed as interstate commerce—it was not likely that differences in phraseology of the McCarran Act from the others would raise any appreciable distinction in the judicial determination thereon.

The constitutionality of the McCarran Act was questioned by the Prudential Insurance Company in an attack on a South Carolina statute which imposed a license tax on premiums collected in South Caro-

[21]The liquor cases involved a conflict between state and federal power to regulate liquor. Those interested in the sale of liquor invoked the protective shield of the commerce clause while the prohibitionists sought to circumvent the commerce clause in any expedient manner. It was decided in 1888 by Bowman v. Chicago & N. W Ry. Co., 125 U. S. 465, 8 S. Ct. 1962, 31 L. ed. 700, that the state could not constitutionally stop importation of liquor. But the prohibitionists sought to control dispositions of liquor after importation. This regulation was limited by Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128 (1889) invoking the original package doctrine which left states powerless over sales in original package. The Wilson Act, 26 Stat. 313 (1890) was then passed which provides that imported liquors and domestic liquors should be subject to state police power in the same manner, thus overruling the original package doctrine. Then the case of In re Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572 (1890) was decided upholding the Wilson Act and the local agencies selling original packages of liquor were abolished. Some citizens then resorted to mail-order liquor. This transaction was completely inter-state and the case of Rhodes v. Iowa, 170 U. S. 412, 18 S. Ct. 664, 42 L. ed. 1088 (1897) upheld the mail-order transaction. The final step to control was taken by Congress when the Webb-Kenyon Act, 37 Stat. 699 (1913) was enacted divesting liquor of its interstate character. Under this Act states were permitted to control the importation of liquor. The decision of Clark Distilling Co. v. Western Md. Ry. Co. & West Virginia, 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1916) upheld the Webb-Kenyon Act, reasoning that the power to regulate was plenary in Congress and that this act was an exercise of that power to a lesser degree than it existed. Thus Congress consented to state regulation and the Supreme Court upheld this expression that the states were empowered to regulate liquor in commerce.

[22]Although there was no court decision against state regulation of convict-made goods, the states were, in their efforts to regulate, running into objections based on analogy to Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128 (1889). Therefore, Congress passed the Hawes-Cooper Act, 44 Stat. 1084 (1929), 49 U. S. C. A. § 60 (Supp. 1946), which was for this subject what the Wilson Act was for liquor, and Whitfield v. Ohio, 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778 (1936) upheld it. Then, as in liquor, Congress passed the Ashurst-Summers Act to cover mail order business, 49 Stat. 494 (1935), 18 U. S. C. A. § 396b-396e (Supp 1946), and Kentucky Whip & Collar Co. V Ill. Cent. R. R. Co., 299 U. S. 334, 57 S. Ct. 277, 81 L. ed. 220 (1937) upheld it. See Dowling & Hubbard, Divesting an Article of Its Interstate Character (1921) 5 Minn. L. Rev. 100. Also Bikle, Silence of Congress (1928) 41 Harv. L. Rev. 200, for discussion of the doctrine of Congressional permission to state action on interstate commerce.

lina as a condition of receiving a certificate to do business within the state. It was alleged that this statute was unconstitutional as a regulaion of interstate commerce, and that the McCarran Act did not and could not give it validity because that Act was itself an unconstitutional delegation of power by Congress to the states. The Supreme Court, in a unanimous decision in *Prudential Insurance Co. v. Benjamin*,[23] found no difficulty in refuting these contentions. In essence, the Court ruled that Congress has plenary power over interstate commerce, limited only by the Constitution. Therefore, any type or degree of regulation is valid unless it violates some other provision of the Constitution, and that, the McCarran Act has not done. Thus, if Congress chooses to regulate interstate commerce (insurance) by cooperating with the states, or by permitting state statutes to apply to such commerce, it is a valid exercise of a power to a lesser degree than is possessed. The liquor and convict-made goods cases were cited with approval.

Considering the fact that the Court apparently had both the desire and ability to prevent complete regulation of insurance being thrust upon the federal government, the question arises as to whether Congress should have acted as it did. The answer is a clear and unequivocal affirmative. Aside from the fact that perhaps the Court could not have gone quite as far as did the McCarran Act, the time required to clear up the situation by court action would have been greater and the conclusions less comprehensive. This must be so from the very nature of judicial proceedings, a court being able to answer a particular question only as it is presented. The number of controversies necessary to present to the Supreme Court all the pertinent questions answered by the McCarran Act would have been great, and the amount of litigation in the state and lower federal courts preliminary to the solutions would have been immense.

Therefore, such action on the part of Congress is definitely to be commended. In doubtful situations it is far better that Congress does not wait for slow piecemeal court decisions, but rather steps in with a comprehensive scheme of legislation designed to solve the pending problems in a manner best serving the needs of the nation, even though a reasonable solution might be possible solely through court action.

ORVILLE L. HARDMAN
PAUL M. SHUFORD

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[23]328 U. S. 408, 66 S. Ct. 1142 (1946).

CONSTITUTIONAL LAW—RIGHT OF SCHOOL BOARD TO DISCRIMINATE BETWEEN APPLICANTS FOR USE OF THE SCHOOL BUILDING FOR PUBLIC MEETING. [California]

The continued efforts of legislatures to restrict the activities of the so-called "subversive element," who advocate the overthrow of the government by force, violence or other unlawful means, have brought the courts a long succession of cases to determine at what point the restrictions infringe upon constitutionally guaranteed liberties. In addition to direct criminal prosecution,[1] the suppressive measures often involve attempts to prohibit the dissemination of objectionable ideologies through the medium of speech and assembly. Such an attempt gave rise to the recent case of *Danskin v. San Diego Unified School District*,[2] wherein the Supreme Court of California squarely faced a question which it had by-passed in two previous cases[3] involving the same legislation.[4] By a 1945 amendment to the Civic Center Code, members of the school board were given the power to forbid the use of the school auditorium by speakers who were deemed to be affiliated with the subversive element which stands for violent overthrow of the government. To determine who fell within this category, the school officials considered affidavits concerning the speaker's character, read the speeches

[1]Cal. Criminal Syndicalism Act (1919). Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095 (1927) (conviction under Criminal Syndicalism Act for being a member of the Communist party); People v. McClennegan, 195 Cal. 445, 234 Pac. 91 (1925) (membership in the I. W. W. sufficient for a conviction under the Criminal Syndicalism Act).

[2]171 P (2d) 885 (Cal. 1946).

[3]In Payroll Guarantee Association, Inc. v. Board of Education of San Francisco Unified School Dist., 27 Cal. (2d) 197, 163 P (2d) 433 (1945) the use of the school auditorium was denied Gerald L. K. Smith on the ground that people would picket the building and disrupt evening classes. Thus, pickets who would disrupt classes contrary to law were the cause for denial of free speech. In Ellis v. Board of Education of San Francisco Unified School Dist., 27 Cal. (2d) 322, 164 P (2d) 1 (1945) the School Board adopted a regulation empowering themselves to make some organizations acquire a $100,000 personal liability insurance policy to absolve the District of any liability for any person injured while attending a meeting in the school auditorium. It was absolutely within the discretion of the board members whether or not they would require this insurance as a condition to the use of the building. They could deny anyone use of the auditorium by requiring the insurance which as a matter of fact no insurance company would underwrite. The majority of the court held that this regulation was void as it was in conflict with other provisions of the Civic Center Code imposing on the school district the duty to bear all necessary expenses. Justice Carter, concurring, said the issue was the power of the board to censor proposed programs. He believed that it could use this power to deny free speech and peaceable assembly.

[4]Cal. Civic Center Act, Education Code (1943) § § 19431-19439.

which were to be delivered, and studied the objective of the organization sponsoring the program. The board could, in its discretion, absolutely deny the use of the school auditorium as a site for presenting the program.

Contending that such requirements constituted an infringement upon their constitutional rights of free speech and assembly, the petitioners[5] in the *Danskin* case refused to furnish in advance copies of their proposed speeches or to take an oath denying their affiliations with any organization advocating violent overthrow of the government. The use of the building being denied them, they instituted mandamus proceedings to compel the school board to grant a permit without condition.

The majority of the California Supreme Court ruled that though the state could refuse to open school buildings for any non-school purposes, yet if they were so opened, the state could not place an unconstitutional condition on their use. It was reasoned that the "subversives" can not be denied the use of public buildings for meetings except under circumstances which would enable the state to prohibit them from speaking publicly anywhere, even in privately owned places. To justify such a prohibition, the court decided that a situation must exist in which the speakers create a "clear and present danger" of bringing about the substantive evils that the legislature has a right to prevent. Holding that the petitioners presented no such danger, the majority declared the amendment to the Civic Center Code unconstitutional as an instrument whereby the school board could abuse the freedoms of speech and assembly by censoring those speakers who advocated doctrines with which the board disagreed. The court's test of whether the exercise of the rights to speak and assemble would present a clear and present danger does not depend on the organization presenting the program, but on whether the words said will be such an abuse of the rights that they will create that danger. Thus, the school auditorium was held to be a place where the citizen can exercise his rights of free speech and assembly, unhampered by suppression in the guise of "precautionary measures," just as he can in the public streets and parks.

The two dissenting judges[6] argued that the state can not be re-

[5]Marine Colonel Evans F. Carlson, The District Attorney, a former judge, a United States Commissioner, 3 ministers and Clarence Novotny.

[6]171 P (2d) 885, 898 (Cal. 1946). Justices Spence and Shenk dissented from the majority holding of the other five justices.

quired to maintain its public buildings for a meeting place of those who advocate overthrow of the government by forceful and violent methods. They denied the applicability of the clear and present danger test in such situations, relying for authority on the opinion of the Supreme Court of the United States in *Gitlow v. New York*,[7] where it was ruled that the state is not acting arbitrarily or unreasonably when it exercises its judgment as to measures necessary to protect the public peace and the security of the government. The state should not be required to wait until it is being attacked but should be allowed to "suppress the threatened danger in its incipiency."[8]

The degree to which the attitude of American courts on this issue has been modified during the past fifty years is aptly demonstrated by a comparison of the majority view in the *Danskin* case and the opinion of Mr. Justice Holmes at the turn of the century, as expressed in the Massachusetts case of *Commonwealth v. Davis*.[9] An ordinance which prohibited public addresses in the Boston Commons without a permit was sustained with the declaration that "For the legislators absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private home to forbid it in his house."[10] This view was affirmed by the Supreme Court of the United States speaking through Mr. Justice White, who reasoned that "the right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such as may be availed of, as the greater power includes the less."[11]

While an ordinance aimed at the direct suppression of the fundamental liberties has not been considered valid, yet the same result has on occasion been effectively accomplished indirectly by allowing a city official to use his discretion as to the issuance of a permit to speak.[12]

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[7]268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925).

[8]Danskin v. San Diego Unified School Dist., 171 P (2d) 885, 900 (Cal. 1946), quoting from Gitlow v. New York, 268 U. S. 652, 669, 45 S. Ct. 625, 631, 69 L. ed. 1138 (1925).

[9]162 Mass. 510, 39 N. E. 113 (1895).

[10]Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895).

[11]Davis v. Massachusetts, 167 U. S. 43, 48, 17 S. Ct. 731, 733, 42 L. ed. 71 (1897).

[12]People v. Smith 263 N. Y. 255, 188 N. E. 745 (1934). Persons who expounded religious beliefs needed no permit to do so on the streets. Defendant, an atheist who was required to seek a permit, was denied a permit to speak his views because he was a potential trouble maker. See People v. Kieran, 26 N. Y. S. (2d) 291 (1941), where the court intimated this decision was in effect overruled by Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 83 L. ed. 1423 (1939).

The requirement that a permit be obtained from city authorities as a condition to holding public street meetings is, within proper limits, a valid exercise of police power.[13] But under recent Supreme Court decisions this regulation can only be used as a means of controlling, in the interest of public safety, the time, place and manner of meetings,[14] and must not be employed as an instrument of arbitrary suppression of the constitutional rights of free speech and peaceable assembly.[15] Such control is justifiable, because these rights are not absolute,[16] but rather must be exercised subject to the well-recognized rights of others to use the public thoroughfares in pursuit of their lawful purposes.[17] Consequently, ordinances which require permits for street speeches are valid if they regulate in order to control traffic,[18] or as a means of dispatching competent police authority to the scene to prevent any disorders which might occur.[19]

The line between valid and invalid regulation in this respect, however, becomes difficult to discern in close cases, and the courts must stand ready to forestall attempts at arbitrary action. A demonstration of this judicial function appears in *Hague v. Committee for Industrial Organization*,[20] wherein the United States Supreme Court declared an ordinance unconstitutional because it allowed the licensing official to refuse to permit a meeting "on his mere opinion that such a refusal will prevent riots, disturbances or disorderly assemblage." The Court

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[13]Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. ed. 1049 (1941); 2 Dillon, Municipal Corporations (5th ed. 1911) § 598.

[14]Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. ed. 1049 (1941); Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. ed. 1292 (1943) (strong dissent implies that regulation of streets in interest of public order is permissible, and this is nowhere denied by majority).

[15]Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 83 L. ed. 1423 (1939).

[16]Gitlow v. New York, 268 U. S. 652, 667, 45 S. Ct. 625, 630, 69 L. ed. 1138 (1925). "That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

[17]Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. ed. 1049 (1941).

[18]City of Buffalo v. Till, 192 App. Div. 99, 182 N. Y. Supp. 418 (1920). A permit was required in order to keep soap-box orators from attracting crowds in the downtown streets and thus congesting the areas so that persons could not pursue normal businesses.

[19]City of Duquesne v. Fincke, 269 Pa. 112, 112 Atl. 130 (1920). Opposing labor factions had caused previous disorders resulting in bloodshed, and it was necessary to prevent speakers from inciting fresh disturbances. The permit requirement gave officials a chance to apprise the speaker of the circumstances and if necessary forcibly to restrain him from speaking.

[20]307 U. S. 496, 59 S. Ct. 954, 83 L. ed. 1423 (1939).

observed that " uncontrolled official suppression of the privilege [of free expression] can not be made a substitute for the duty to maintain order in connection with the exercise of the right."[21] Streets and parks were declared to be held in trust for the citizen, for his use to communicate his thoughts and to discuss public questions. "Such use of the streets and public places has, from ancient times been a part of the privileges, immunities, rights and liberties of citizens."[22]

While the use of the streets is thus a recognized right of the citizen, the employment of school buildings for other than school purposes, such as social, recreational and religious meetings, depends largely upon authorizing statutes. In the absence of such statutes, courts have held that the taxpayers, who paid for the building, did not intend any use for other than school purposes.[23] Where there is a statute authorizing non-school activities, the cases turn on the issue of whether the purpose is for private gain and enjoyment, in which case the courts refuse to allow the use of the building,[24] or for the proper benefit of the community as a whole, bearing some relation to educational and recreational activities of the school.[25] When it is established that the proposed activity is one contemplated by statute, then it should follow that the denial of the use of the building must rest upon some test other than the personal convictions of the school authorities. The Supreme Court of the United States has established the clear and present danger test[26] for determining whether the state's police power[27] can be in-

[21]Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. ed. 1423 (1939).

[22]Hague v. Committee for Industrial Organization, 307 U. S. 496, 515, 59 S. Ct. 954, 964, 83 L. ed. 1423 (1939).

[23]Spencer v. Joint School District, 15 Kan. 259, 22 Am. Rep. 268 (1875). See Sugar v. Monroe, 108 La. 667, 32 So. 961 (1902) where the court said that as times changed it was possible that such a view might be relaxed and other activities allowed.

[24]Lewis v. Bateman, 26 Utah 434, 73 Pac. 509 (1903). The use of the school room for a social dance by a private organization was denied because the statute did not contemplate such use. There was the added factor that desks would have to be removed with possibility of injury to school property. See Note (1933) 86 A. L. R. 1195 where cases cited tend to show that if the school does not suffer damage to property and if it benefits financially or educationally, then the social events of private organizations may properly be held in the school building.

[25]Merryman v. School Dist. 43 Wyo, 376, 5 P (2d) 267, 86 A. L. R. 1181 (1931).

[26]Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. ed. 470 (1919). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

[27]As the test was originally adopted in 1919, it was for use in determining

voked to deny persons the right to speak and assemble in private places. The question then is, assuming this to be a good test in those cases, is it equally appropriate where the denial is not of the right to speak and assemble, itself, but merely of the right to do so in public buildings. Since the exercise of these rights in the public streets can not be arbitrarily denied, it should follow that they can not be denied merely because the forum is a public-building.

The majority of the California court in applying the clear and present danger test in the principal case has apparently extended it to a new type of situation, for in past cases the test has been applied only to situations where the words have already been spoken or published.[28]

The utterances having been made, the decisions have been either that they were such words as would incite persons to disorder and riot and thus create the kind of danger which justifies arrest and punishment, or that they were harmless in effect. Therefore, in declaring the test inapplicable, the dissenting judges are correct to the extent that strict reliance on precedent cases is controlling. The majority recognizes that the test is indefinite but believes that it offers "practical guidance"[29] in reaching a just result. A consideration of practical results supports this view. If the dissenting judges' view, that the power of the state to exclude speakers altogether from using the school auditorium includes the power to allow the use subject to any desired conditions, were acceptable law today,[30] then the state could prevent the

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whether an action of the Congress was violative of freedom of speech and the press as guaranteed by the First Amendment of the Federal Constitution. Since that time, the Supreme Court has established the rule that those fundamental liberties protected from Federal Government action by the First Amendment are embodied in the Fourteenth Amendment protection against state government action. This view was expressed in dictum in Gitlow v. New York, 268 U. S. 652, 666, 45 S. Ct. 625, 630, 69 L. ed. 1138 (1925) and was included in the holding of Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108 (1927). And see Palko v. Connecticut, 302 U. S. 319, 324, 58 S. Ct. 149, 151, 82 L. ed. 288 (1937).

[28]Since the advent of the clear and present danger test, the Supreme Court has cited the Schenck case at least twenty-nine times in later decisions. In sixteen instances the case was cited either in the majority opinion or the dissent for the specific clear and present danger test. In every such case the words had been spoken or published, and the determination was whether these words already spoken or published created a clear and present danger so that the speaker or publisher could be punished.

[29]Danskin v. San Diego Unified School Dist., 171 P. (2d) 885, 889 (Cal. 1946).

[30]This judicial technique, used by Mr. Justice White in Davis v. Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 L. ed. 71 (1897), of saying the right to exclude all use includes the right to permit use subject to conditions, was repudiated in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910).

holding of meetings in public buildings in cases in which the same meetings could not be prohibited if held in private buildings. The actual effect in many communities would be a practical denial of an important phase of the right to assemble and exercise free speech, inasmuch as public buildings are often the only ones available to accommodate large audiences.

It is not contended that a requirement of a permit to speak in the school auditorium is the imposition of an unconstitutional condition to free speech. This regulation is proper in that it gives school authorities an opportunity to arrange a schedule avoiding conflicts in time of presentation, and to notify police authorities, charged with the duty to keep public order, that a meeting will be held. Thus, if the speakers do incite violence and disorder, competent officers will be present to arrest the speakers and quell the disturbance. Sanction of this kind of regulation was expressed in *Dejonge v. Oregon*,[31] where the Supreme Court declared that those who abuse the constitutional rights of free speech and assembly should be punished, but the rights themselves should never be curtailed.[32]

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[31]299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937). Defendant was a speaker at a meeting sponsored by the Communist party. The meeting was conducted in an orderly and peaceable manner, but defendant was convicted under the Oregon Criminal Syndicalism Act on the basis of his being a Communist attending a meeting of the Communist party. The Supreme Court held this was a denial of the rights of free speech and peaceable assembly. The holding of meetings in peaceable manner for lawful discussion can not be proscribed.

[32]This approach also marks the Court's decisions in newspaper censorship cases. Near v Minnesota, 283 U. S. 697, 713, 715, 51 S. Ct. 625, 630, 75 L. ed. 1357 (1931). The Saturday Press, a periodical, published statements charging the mayor and law enforcement officers of Minneapolis with allowing racketeers and bootleggers to control the city. In pursuance of a statute authorizing injunctive means to suppress scandalous and defamatory publications, the defendant was restrained by the state court from publishing any future edition. In holding the statute unconstitutional, the United States Supreme Court declared: "In determining the extent of the constitutional protection [of freedom of the press], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent *previous restraints* upon publication ..But it is recognized that *punishment for the abuse* of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions." [Italics supplied]

CONSTITUTIONAL LAW—VALIDITY OF STATE TAX ON INTERSTATE CARRIER LEVIED IN LIEU OF GASOLINE TAX. [Virginia]

With the development of the large-scale business of the interstate transportation of freight and passengers by motor vehicles, the states have been confronted with the difficult problem of devising an adequate and valid means of taxing these carriers. Obviously, some special measures are direly needed, because a large truck or bus will do much more damage to the highways and thus add more to the state's maintenance costs than will the ordinary non-commercial vehicle.[1] But conflicting with the interest of the states in attempting to extract from the motor carriers a fair share of the burden they put on state highways is the interest of the carriers in attempting to operate in an efficient and profitable manner.[2] Various forms of taxation have been attempted by the states, but most of these have proved to be unsatisfactory, either because they have been declared unconstitutional under the Commerce Clause or because they have not succeeded in obtaining from the carriers a fair payment for their damaging use of the road.[3] The general gallonage tax on gasoline, in universal use by 1929, proved inadequate as applied to the taxation of interstate carriers because of the ease with which it is evaded. The tax rates vary among the states, ranging from two to seven cents per gallon,[4] and it became standard practice for the transportation companies to purchase gasoline in a state with a low tax rate and consume that gas in their operations in high tax rate states.

For the purpose of preventing interstate carriers from using Virginia highways without contributing to the cost thereof, the Virginia legislature in 1942 enacted a statute[5] which requires motor carriers,

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[1]See McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 184, 60 S. Ct. 504, 508, 84 L. ed. 683 (1940).

[2]For a complete discussion of the economic and social factors involved, see Kauper, State Taxation of Interstate Motor Carriers (1933) 32 Mich. L. Rev. 1, 171, 351.

[3]See Clark v. Poore, 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199 (1927) (license tax); Interstate Busses Corp v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. ed. 551 (1928) (mileage tax); Interstate Transit Co. v. Lindsey, 283 U. S. 183, 51 S. Ct. 380, 75 L. ed. 953 (1931) (privilege tax); Board of Railroad Commissioners v. Aero Mayflower Transit Co., 172 P. (2d) 452 (Mont. 1946) (gross operating revenue tax). For a complete discussion of the failure of the earlier methods of taxation, see Kauper, State Taxation of Interstate Motor Carriers (1933) 32 Mich. L. Rev. 1, 171, 351.

[4]See tables in Crawford, The Gasoline Tax in the U. S., 1934, (1935) 6, and Tax Systems of the World (7th ed. 1938) 168.

[5]Va. Acts of Assembly (1942) c. 108, p. 127.

whether operating in intrastate or interstate commerce or both, to purchase in Virginia[6] the gasoline required to operate the vehicles in Virginia, or to pay to the state "an amount equivalent to the prevailing State tax on the amount of gasoline necessary for its operation as a motor carrier within the State over and above the amount of tax paid on gasoline actually purchased in the State." This levy is expressly designated as compensation for the use of Virginia highways, and when collected it is dedicated to the construction and maintenance of the highways of the state. The validity of this statute has only recently been tested in the case of *Mason and Dixon Lines, Inc. v. Commonwealth*,[7] through an attempt of the state to apply it to a motor carrier operating over Virginia highways in interstate commerce. From 1942 to 1945 the defendant Company failed by 559,178 gallons to purchase in the state the amount of fuel needed to operate its trucks while in Virginia, or to pay to the state the amount of the prevailing gasoline tax upon the deficiency. When sued for the amount of the unpaid tax plus a $1000 penalty provided for by the Act, the defendant argued that the tax was invalid because it placed a burden on interstate commerce. The State Supreme Court of Appeals found little difficulty in sustaining the constitutionality of the statute under the rule of the United States Supreme Court, that "While a state may not lay a tax on the privilege of engaging in interstate commerce it may impose even upon vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon."[8]

Earlier decisions of the United States Supreme Court have made it clear that, in the absence of Congressional legislation on the subject, a state may impose a non-discriminatory tax on motor vehicles, including those moving in interstate commerce, as compensation for the use of its highways.[9] However, the cases have emphasized that such a tax

[6]This does not mean that each individual truck must purchase in Virginia the gasoline that it uses in Virginia on a particular trip, but means that over a quarterly period of time the company must have purchased in Virginia an amount of gasoline equal to the number of gallons used by all its trucks in the state, or else pay the state gallonage tax on that amount which they did not buy in Virginia.

[7]41 S. E. (2d) 16 (Va. 1947), cert. denied, 67 S. Ct. 1190 (1947).

[8]Quoted by the Virginia Supreme Court of Appeals from Interstate Transit Co. v. Lindsey, 283 U. S. 183, 185, 51 S. Ct. 380, 381, 75 L. ed. 953 (1931).

[9]Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. ed. 385 (1915); Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. ed. 222 (1916); Continental Baking Co. v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 1155 (1932); Aero Mayflower

on interstate commerce must affirmatively appear from the statute itself,[10] or from an allocation of the tax proceeds,[11] or from the nature of the imposition,[12] to be a fair contribution to the cost of constructing and/or maintaining the highways, or to be imposed to defray the expenses of regulating traffic for the public safety and convenience.[13] The Virginia statute was carefully drafted to satisfy these prescribed conditions of validity in that: one, the tax is non-discriminatory; two, its purpose is to reimburse the state for the use of the highways; three, the tax rate per gallon is reasonable, not constituting a burden on interstate commerce; four, the tax bears a direct relationship to the actual use of the highways; and five, the method of enforcement constitutes no unreasonable burden.

First, it is to be noted that any contention that this statute discriminates against interstate carriers is without merit, since the purpose of the statute is to check evasions of the gasoline tax by interstate carriers and thus to require them to bear their fair share of the burden which intrastate carriers are already carrying by payment of the tax. Also, under the terms of the Act, intrastate carriers are expressly included as subject to the tax. A Supreme Court decision of fifteen years standing clearly rules that such a tax is not discriminatory toward instrumentalities of interstate commerce.[14]

The most important consideration is whether the Virginia tax is levied as compensation for the use of the highways, or whether it is a

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Transit Co. v. Georgia Public Service Comm., 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439 (1935). Note the dissenting opinion of Justices Black, Frankfurter and Douglas in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 60 S. Ct. 504, 84 L. ed. 683 (1940) where it is suggested that the federal government should, by appropriate legislation, preempt the field.

[10]Ingels v. Morf, 300 U. S. 290, 57 S. Ct. 439, 81 L. ed. 653 (1937).

[11]Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199 (1927).

[12]Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. ed. 551 (1928).

[13]Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. ed. 833 (1928); Interstate Transit Co. v. Lindsey, 283 U. S. 183, 51 S. Ct. 380, 75 L. ed. 953 (1931). This rule grew out of the conflict between obstruction to interstate commerce on one hand and the growing idea that "interstate commerce must pay its way," as early expressed by Justice Clarke in Postal Telegraph Cable Co. v. Richmond, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. ed. 590 (1919), and Justice Holmes in New Jersey Bell Telephone Co. v. Tax Board, 280 U. S. 338, 351, 50 S. Ct. 111, 115, 74 L. ed. 463, (1930).

[14]Gregg Dying Co. v. Query, 286 U. S. 472, 52 S. Ct. 631, 76 L. ed. 1232 (1932). A South Carolina tax on gasoline bought in another state, which has come to rest within the taxing state, was held not to be discriminatory since it applied to local consumers as well as to those engaged in interstate commerce.

tax on an instrumentality of interstate commerce. "If the former the tax should be sustained, but if it is the latter it clearly contravenes the commerce clause."[15] The severity of the threat of this argument issues from the case of *Helson v. Kentucky*,[16] holding that a tax which was levied on gasoline used within the state, but bought outside the state, by an interstate ferry, was invalid as a tax on an instrumentality of interstate commerce. The broad wording of the Supreme Court's decision in that case would preclude validity of the Virginia statute.[17] However, in the *Helson* case the incident of the tax fell upon an interstate water carrier rather than on a vehicle traveling over the roads. Thus, the element of the expense to the state of maintaining facilities for the carriers' use was not present to justify the levying of the Kentucky tax,[18] whereas the Virginia statute expressly confines its scope to the taxation of motor carriers using the highways of the state. Later Supreme Court decisions have emphasized this distinction in limiting the *Helson* case to its particular factual situation.[19]

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[15]Bingamin v. Golden Eagle Lines, 297 U. S. 626, 628, 56 S. Ct. 624, 80 L. ed. 928 (1936).

[16]279 U. S. 245, 49 S. Ct. 279, 73 L. ed. 683 (1929).

[17]The Court declared that a tax on gasoline bought outside of the state and used in any form of interstate commerce was invalid as a tax on an instrumentality of interstate commerce.

[18]In a separate concurring opinion in the Helson case, Mr. Justice Stone, joined by Justices Brandeis and Holmes, said that there is no " practical justification for . an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application which is neither aimed at nor discriminates against interstate commerce." 279 U. S. 245, 253, 49 S. Ct. 279, 281, 73 L. ed 683 (1929).

[19]Eastern Air Transport v. Tax Commissioner, 285 U. S. 147, 52 S. Ct. 340, 76 L. ed. 673 (1932) sustained a state sales tax on gasoline purchased by an airline for interstate flights, on the basis that a non-discriminatory tax on local sales does not impose a burden on interstate commerce. The court distinguished the Helson case on the basis that the tax there was laid directly upon the *use* of the gasoline in interstate commerce. In Edelman v. Boeing Air Transport Co., 289 U. S. 249, 53 S. Ct. 591, 77 L. ed. 1155 (1933) the court ruled that the Helson case was inapplicable to a situation where gasoline was purchased outside of the state by an interstate airline and stored within the state, because stored gasoline was deemed to have been used within the state. To the same effect see, Nashville C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. ed. 730 (1933). In Bingamin v. Golden Eagle Lines, 297 U. S. 626, 56 S. Ct. 624, 80 L. ed. 928 (1936) a state statute requiring all carriers bringing gasoline into the state for sale or consumption to take out a distributor's license was held invalid as applied to interstate carriers because the highest state court had construed the statute as imposing an excise tax on the *use* of an instrumentality of interstate commerce. In dictum the Supreme Court stated that if the tax had been construed as a charge for compensation to the state for use of its highways, it would have been valid. In Varney Air Lines v. Babcock, 1

Determining whether such a tax as that imposed by the Virginia statute is a tax on the use of an instrumentality of interstate commerce and thereby invalid under the rule of the *Helson* case, or whether it is a method of extracting a fair measure of tax from the interstate motor carriers for the use of the highways, involves extremely nice legal distinctions. But the point to be made is that if the purpose of the state legislature was to accomplish the latter, then that purpose should not be overthrown by allowing the argument that it actually accomplished the former. The constitutionality of the state taxing scheme is to be determined by substance rather than form, and the Court should look to the purpose and effect of the statute in passing on its validity.[20] In *Bingamin v. Golden Eagle Lines*[21] the Supreme Court ruled that, the highest court of the state having construed the provisions of the statute in issue, the Federal District Court was right in concluding that it was bound by that construction. Under this rule, the construction of the Virginia Supreme Court of Appeals, to the effect that the statute is to provide compensation for use of the highways, is binding.

In the Supreme Court decision of *Interstate Transit Co. v. Lindsey* it was stated that this type of tax is valid if "... it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways, or to defray the expense of regulating the motor traffic thereon. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, or by the express allocation of the proceeds of the tax to highway purposes."[22] Such an indication has been made in the Virginia statute in a clause which expressly provides that the funds so collected shall go toward the construction and maintenance of the state highways.[23]

However, it is not enough to show that the funds collected from

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F. Supp. 687 (D. C. Idaho 1932) the court upheld a state tax on gasoline purchased outside of the state by an interstate airline and stored in the state for use by interstate flights, on the basis that the state furnished air navigation facilities and the tax was a reasonable charge for the use thereof. The court distinguished the Helson case on the ground that Kentucky furnished no facilities for use in operation of the ferry.

[20]Gregg Dyeing Co. v. Query, 286 U. S. 472, 476, 52 S. Ct. 631, 633, 76 L. ed. 1232 (1932).

[21]297 U. S. 626, 56 S. Ct. 624, 80 L. ed. 928 (1936).

[22]283 U. S. 183, 186, 51 S. Ct. 380, 381, 75 L. ed. 953 (1931).

[23]In Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702, 71 L. ed. 1199 (1927) a clause in the state tax which is similar to the Virginia clause was held to indicate that the tax was levied only as compensation for the use of the highways.

the tax are expended upon the highways of the state; it must also appear that the tax as laid has a fair relationship to the use of the highways for which the charge is made. Consequently, a tax imposed by the state of Arkansas[24] on each gallon of gasoline above twenty brought into the state by any motor vehicle for use as fuel in such vehicle was held invalid by the United States Supreme Court in *McCarroll v. Dixie Greyhound Lines*.[25] The Court implied that if the tax had applied only to gas used in the taxing state then the statute would have been valid,[26] but since only part of such gasoline might be used in the taxing state, there was no reasonable relation of the tax to the use of the highways. The Virginia legislature, enacting its statute in the present form soon after the *McCarroll* decision, avoided the defect in the Arkansas act by making the tax applicable only to the gasoline actually used in Virginia. The Supreme Court of the United States has already decided that a tax based on the number of miles traveled in the state bears a reasonable relation to the use of the highways.[27] And inasmuch as the number of miles traveled bears a direct relation to the amount of gasoline used, there would seem to be no constitutional objection to the Virginia statute on the basis of the "reasonable relation" requisite.

To avoid conflict with the Commerce Clause, the enforcement of the tax must be carried out without unreasonably hampering interstate carriers in their efficient operation. Presumably, the amount of the Virginia charge is not too great, since the same rate of tax will be paid by intrastate transport businesses employing vehicles using gasoline. The method of enforcement is designed to relieve the interstate carrier companies from all but a minimum of administrative effort. The statute does not require individual vehicles to check in at tax stations en route. Rather, the company merely is required to file periodic reports stating the mileage traveled and the gasoline or other fuel purchased within the state, and the amount paid to the state in lieu of the

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[24]Ark. Gen. Assembly (1933) Act 67.

[25]309 U. S. 176, 60 S. Ct. 504, 84 L. ed. 683 (1940).

[26]This implication, in dictum, is directly contra to the decision of Helson v. Kentucky, 279 U. S. 245, 49 S. Ct. 279, 73 L. ed. 683 (1929), insofar as that decision applied to *all* interstate carriers, including motor carriers using the highways of the state. The McCarroll case has been regarded as settling the issue and allowing state non-discriminatory taxation of gasoline purchased outside of the state by an interstate carrier where the tax bears a direct relationship to the use of the highways. See, Notes (1940) 18 N. C. L. Rev. 344; (1940) 27 Va. L. Rev. 97; (1947) 31 Minn. L. Rev. 193.

[27]Interstate Busses Corp v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. ed. 551 (1928).

purchase of gasoline. The tax may cause an incidental hardship in the operation of the trucks by precluding the convenient practice of providing the vehicles at the point of departure with sufficient fuel to avoid the necessity of stopping en route. Following this procedure in the face of the Virginia tax would result in the payment of two gasoline taxes, the one levied by the state where the fuel is actually purchased and the other required by the statutory charge referable to the gasoline used in traversing Virginia highways. This economic disadvantage will virtually force the carriers to buy much of their fuel while in Virginia.[28]

If an interstate motor carrier can later show that the amount of the gasoline tax and the registration tax together is unreasonable, then its constitutionality could be challenged on that basis,[29] in that it would be the straw that broke the camel's back. That problem is relatively unimportant in the overall picture, however. The essential factor is whether the Virginia gasoline tax with its evasion-prevention provision, standing alone, offers a sound model which other states, not yet having adopted similar legislation, may employ to tax motor carriers in such a way as to obtain from them a sum proportionate to the actual use of the highways. The refusal of the Supreme Court to consider the principal case on certiorari apparently furnishes an affirmative answer. It is true that this tax falls short of perfection from the viewpoint of the state, in that the enforcement of the measure is difficult. But this problem does not affect its constitutionality, only its practicality. And practically, there should be little evasion of the statute, since reputable firms can scarcely run the risk of turning in false reports, not only because of a statutory penal provision, but also because of the unfavorable publicity and the consequent lowering of public esteem.

EDWIN P PRESTON

DAMAGES—COUNSEL FEES AS ITEM OF DAMAGES FOR MALICIOUS INDUCEMENT OF BREACH OF CONTRACT. [Federal]

The recent federal decision of *Blum et al. v. William Goldman Theatres, Inc.*[1] extends to unprecedented lengths the right of a plain-

[28]However, in many instances the vehicles do not have tank capacity great enough to enable them to make non-stop trips. And even as to those which have, the few minutes lost in a gasoline stop can hardly be called unreasonable when balanced against the necessity for extracting payment from the carrier for the damage it does to the state highways.

[29]Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. ed. 551 (1928).

[1]69 F. Supp. 468 (E. D. Pa. 1946).

tiff to recover counsel fees incurred in the litigation as an item of damages. In a case of first impression under the new Federal Rules of Civil Procedure, the court held that inasmuch as law and equity causes can be combined in one suit, the counsel fees referable to the equity action for specific performance of a contract can be recovered as damages under the law action for malicious inducement of the breach of contract. Although the court disclaimed any intention to depart from accepted principles of law, its ruling on this point seems to be unique in American jurisprudence.

The general rule in the United States[2] firmly denies recovery of attorney's fees and other expenses of litigation in actions at law, allowing the successful party only those limited "costs" provided for by statute.[3] Various reasons for this proposition have been advanced:[4] (1) expenses of litigation are too remote a consequence of defendant's wrong; (2) determining those expenses within reasonable limits would be too much of a burden for the courts; (3) awarding of such expenses is properly a legislative function;[5] (4) the purpose of allowing damages being to compensate for an injury, it would be inconsistent to require an unsuccessful plaintiff to pay for asserting a legal right; and (5) requiring the losing party to pay the expenses of the winning party would tend to discourage adjudication of claims.

Several recognized limitations on this general rule have been established in various jurisdictions.[6] Equity has been the source of the

[2]English law contains no such provision denying liability for expenses of litigation. For a comparison of the English and American rules, see Goodhart, Costs (1929) 38 Yale L. J. 849.

[3]St. Peter's Church v. Beach, 26 Conn. 355 (1857); State ex rel. Macri v. City of Bremerton, 8 Wash. (2d) 93, 111 P (2d) 612 (1941), including a discussion of the development of the general rule in this country; 15 Am. Jur., Damages § 142. Statutory "costs" are usually only a nominal sum, completely inadequate to compensate the successful party for his outlays in attorney's fees and other expenses incident to litigation.

[4]St. Peter's Church v. Beach, 26 Conn. 355 (1857); McCormick, Damages (1935) 256; 1 Sedgwick, Damages (9th ed. 1912) § 230; Note (1941) 15 U. of Cin. L. Rev. 313, 314.

[5]Manko v. City of Buffalo, 271 Misc. 286, 65 N. Y. S. (2d) 128, 143 (1946): " the question here presented involves the age old controversy whether costs fully compensate a litigant. Concededly they do not. Yet it has been the public policy of this state, from time immemorial, to regard them as adequate. It has never been the rule, except in limited classes of litigation, to allow, as damages, prior legal expenses. If the cause of action authorized by this statute is to become another exception to the usual rule of damages, that should be done, not by the courts, but by the legislature, the proper branch of government to change the public policy."

[6]For a comprehensive discussion of these exceptions to the general rule, see State ex rel. Macri v. City of Bremerton, 8 Wash. (2d) 93, 111 P (2d) 612 (1941).

large part of these limitations,[7] recovery being allowed as a general practice in several types of proceedings.[8] Numerous statutory qualifications to the usual exclusionary rule require even the law courts to grant damages for counsel fees in designated situations.[9] Contractual liability for litigation expenses may sustain such awards, as is often provided for in promissory notes.[10] And a few law courts have expressly

[7]Malloy v. Carroll, 287 Mass. 376, 191 N. E. 661 (1934); State ex rel. Macri v. City of Bremerton, 8 Wash. (2d) 93, 111 P. (2d) 612 (1941). In New Jersey the discretionary equitable practice of awarding counsel fees has been authorized by statute which provides that "in any cause, matter or proceeding in the court of chancery the chancellor may make such allowance by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper.. " 1 N. J. Comp. St. (1910) "Chancery," § 91 p. 445.

[8] (a) One who incurs counsel fees bringing in, protecting, or preserving a common fund or estate will usually be reimbursed from that fund or estate. Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157 (1881); Hempstead v. Meadville Theological School, 286 Pa. 493, 134 Atl. 103, 49 A. L. R. 1145 (1926). See Note (1927) 49 A. L. R. 1149 for an exhaustive collection of cases in point.

(b) A party who secures the dissolution of an injunction can generally recover the reasonable expenses of the litigation from the injunction bond. Webb v. Beal, 20 N. M. 218, 148 Pac. 487 (1915); Littleton v. Burgess, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N.S.) 49 (1907). See Note (1911) 33 L. R. A. (N.S.) 844 for numerous other authorities.

(c) A wife may be awarded reasonable counsel fees expended in the prosecution or defense of a divorce suit, predictated upon the common law duty of the husband to provide support as long as the marriage exists. Ex parte Austin, 245 Ala. 22, 15 S. (2d) 710 (1943); Dunn v. Dunn, 181 Md. 665, 29 A. (2d) 664 (1943); Jensen v. Jensen 119 Neb. 469, 229 N. W. 770 (1930).

[9]Typical are statutes which award attorney's fees to successful plaintiffs in prosecution of legitimate claims against insurance companies and common carriers. The statutes usually provide that if the claim has not been satisfied within a specified time after presentation, the successful plaintiff may recover his counsel fees in a suit upon the claim. Generally the statute declares the maximum amount which may be allowed by the court. Though such statutes usually provide for recovery by successful plaintiffs only, they have been held not to violate either the equal protection or the due process clauses of the Fourteenth Amendment. Missouri, K. & T. Ry. Co. v. Cade, 233 U. S. 642, 34 S. Ct. 678, 58 L. ed. 1135 (1914). For a thorough discussion of the validity of attorney's fees statutes, see Note (1921) 11 A. L. R. 884.

Federal statutes authorize the allowance of counsel fees in actions to recover for injury caused by violations of various federal acts, including the copyright law, 17 U. S. C. A. § 40 (1927), and the anti-trust laws, 15 U. S. C. A. § 15 (1941), both providing for the allowance of reasonable fees within the court's discretion. In litigation falling under these statutory provisions, allowance of attorney's fees of $42,500 and $7,500 were held not an abuse of discretion where recoveries were $277,329.58 and $25,637.09, respectively. William H. Rankin Co. v. Associated Bill Posters, 42 F. (2d) 152 (C. C. A. 2d, 1930), cert. denied, 282 U. S. 864, 51 S. Ct. 36, 75 L. ed. 764 (1930).

[10]First Nat. Bank & Trust Co. v. Canzo, 169 Misc. 268, 7 N. Y. S. (2d) 334 (1938); Brenner v. Plitt, 182 Md. 348, 34 A. (2d) 853 (1943); Merchants & Planters Bank v. Farney, 183 Va. 83, 31 S. E. (2d) 340 (1944). See Uniform N. I. L. § 2 (5).

Stipulations of liability for attorney's fees may be included in any type of con-

countenanced the awarding of these expenses against a wilful wrongdoer as exemplary damages.[11]

The only generally recognized exception which has been formulated by the courts of law applies in situations in which the defendant's legal wrong has resulted in the plaintiff's having become involved in previous litigation with a third party. Reasonable counsel fees charged by his attorney for services in the *prior proceedings* may be allowed plaintiff as an item of damage in the subsequent suit against the defendant for his original wrong.

Typical cases in which the defendant's breach of contract has created a situation for the operation of this exception are those in which he has sold land or goods to the present plaintiff, under false covenants warranting the title or quality, and plaintiff has resold to a third party with like guarantees. If the sub-vendor is required to defend his warranty, and the original warrantor refuses to assume the defense, then in a later action for breach of the original warranty recovery is usually allowed the plaintiff for the counsel fees expended in defending the first action.[12]

More frequently it has been the defendant's tort which has involved the plaintiff in prior legal proceedings. Thus, where defendant's fraudulent misrepresentations induced plaintiff to give negotiable notes which defendant then endorsed to a holder-in-due-course, plaintiff attempted to defend when sued upon the notes, and in a later action against defendant for fraud, was awarded the expenses incurred in the previous action.[13]

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tract in jurisdictions which do not consider them penal and invalid. A recent California decision awarded $7,000 as reasonable counsel fees under a contractual liability clause, although the recovery allowed to the plaintiff for the destruction or loss of the property involved was only $6,500. The court considered "not only the amount or value of the property involved, but also the intricacy and importance of the litigation, the labor and necessity for skilled legal training and ability in drawing the pleadings and trying the cause and the time consumed therein." Palm Springs-LaQuinta Development Co. v. Kieberk Corporation, 46 Cal. App. (2d) 234, 115 P (2d) 548, 552 (1941).

[11]Marshall v. Betner, 17 Ala. 832 (1850); Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817 (1888); Kemp v. Miller, 166 Va. 661, 186 S. E. 99 (1936). See Note (1922) 16 A. L. R. 771, 856. Craney v. Donovan, 92 Conn. 236, 102 Atl. 640 (1917) indicates that in Connecticut such expenses constitute the limit to which punitive damages may be given.

[12]Robert A. Reichard, Inc. v. Ezl Dunwoody Co., 45 F. Supp. 153 (E. D. Pa. 1942); Field v. Jones, 8 S. (2d) 711 (La. App. 1942); Seitz v. People's Savings Bank, 140 Mich. 106, 103 N. W 545 (1905).

[13]McOsker v. Federal Insurance Co., 115 Kan. 626, 224 Pac. 53 (1924). Typical also is Curtley v. Security Savings Society, 46 Wash. 50, 89 Pac. 180 (1907), in which

These illustrations indicate that the "previous ligitation" exception is based on three essential elements: (1) the prosecution or defense of a prior action (2) against a third party (3) involving a different cause of action than the subsequent suit in which the expenses are claimed as damages. However, the New Jersey court has in one notable decision extended the exception by recognizing liability for expenses sustained in a prior suit against the *present defendant,* where the first litigation arose on a different cause of action.[14] Defendant had sold property to plaintiff under a false claim of title, and plaintiff's suit for specific performance was unsuccessful because of defendant's lack of title. In a later law action against defendant for deceit, plaintiff was allowed to recover the expenses of the chancery suit, the court reasoning that such damages were natural and proximate, and within the contemplation of the fraudulent vendor at the time he misrepresented his ownership. This drastic modification of the generally restrictive rule has received favorable comment from text authority,[15] but has been rejected by other courts.[16]

In the principal case, the federal court expressly adopted the New Jersey view of *Feldmesser v. Lemberger*[17] in allowing recovery where the two actions were against the same defendant, but went even further by allowing the two causes of action to be combined in one proceeding. Plaintiffs had contracted with the trustees of a theatre for a lease. Defendant intentionally induced the trustees to breach the contract with the plaintiffs, and acquired the lease of the theatre himself. As defendant took his lease subject to the equities of plaintiffs, equitable relief was granted consisting of specific performance, injunction, and an accounting for profits. With their equitable cause, plaintiffs combined an action at law for inducing the breach of the contract with the trustees, and claimed as damages upon the second action the counsel fees and expenses incurred in obtaining the relief in equity.

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plaintiff had contracted to have a house built upon land which he had purchased from defendant, who had made a false claim of title. He was allowed to recover from the fraudulent seller the counsel fees expended in the unsuccessful defense of a previous suit brought by the building contractor for damages for not having been allowed to build the house as per contract.

[14]Feldmesser v. Lemberger, 101 N. J. L. 184, 127 Atl. 815, 41 A. L. R. 1153 (1925).

[15]McCormick, Damages (1935) 247-248.

[16]Ritter v. Ritter, 381 Ill. 549, 46 N. E. (2d) 41 (1943); Stickney v. Goward, 161 Minn. 457, 201 N. W 630, 39 A. L. R. 1216 (1925). See Note (1925) 39 A. L. R. 1218 for an elaborate collection of cases following the view that the previous litigation must have involved third parties and not the present defendant.

[17]101 N. J. L. 184, 127 Atl. 815, 41 A. L. R. 1153 (1925).

That the two actions were combined presented no difficulty in the federal court, because the Federal Rules of Civil Procedure make it possible to include in the one suit two causes of action which would have required two separate suits under common law pleading systems.[18] The opinion points out that "the absence of authority directly upon the point arises, no doubt, from the fact that until the Federal Rules of Civil Procedure permitted the combining of actions in equity and at law, separate suits were always necessary in a situation such as the present."[19]

In classifying this case within the *Feldmesser* case interpretation of the "previous litigation" exception, the court seems, at first glance, to have applied logical reasoning in stating that it could determine "no substantial difference between a situation where a plaintiff has expended money in attempting to enforce a contract induced by the defendant's fraud and one where he has expended money in enforcing a contract, the breach of which the defendant maliciously induced."[20] The New Jersey decision was relied upon to demonstrate that the distinction between previous suits with third parties and those against the present defendant is "unimportant."[21] But the overwhelming weight of authority is definitely not in accord with this view.[22]

Even conceding the correctness of the *Feldmesser* decision, the federal court seems in error in concluding that there is no material difference between that case and the *Blum* case, and that the same result should therefore be reached in both. Further study indicates that a distinction of such degree does exist between the cases that the effect of the *Blum* case is to propose a virtual repudiation of the long established general rule. In the *Feldmesser* case the plaintiff was *unsuccessful* in his previous suit in chancery. His subsequent legal action was based on an entirely different cause of action, and it appears proper for the court to have awarded the expenses of the prior litigation as damages in the later action.[23] Dean McCormick has favored this view

[18]Fed. Rules of Civ Proc. (1938) Rule 18 (a); 28 U. S. C. A. § 723c (1941).

[19]Blum et al. v. William Goldman Theatres, Inc., 69 F. Supp. 468, 470 (E. D. Pa. 1946). This does not, of course, explain why no such precedents were available from state courts in jurisdiction where code pleading forms have long allowed combining equitable and legal causes of action.

[20]Blum et al. v. William Goldman Theatres, Inc., 69 F. Supp. 468, 470 (E. D. Pa. 1946).

[21]Blum et al. v. William Goldman Theatres, Inc., 69 F. Supp. 468, 470 (E. D. Pa. 1946).

[22]See note 16, supra.

[23]Smith v. Chaffee, 181 Minn. 322, 232 N. W. 515 (1930) has construed the Feld-

over that of the cases which declare that the previous litigation must have involved third parties rather than the present defendant. He submitted "that the true test is whether the present defendant has been guilty of some wrongful conduct and the present plaintiff has been involved thereby in some litigation other than a mere suit by the present plaintiff to secure redress for such conduct."[24] Applying this test to the *Feldmesser* case it appears obvious that a correct result was achieved, but in the *Blum* case the same pattern does not evolve, because there the plaintiffs were completely *successful*[25] in their equity proceeding. The court decreed all the relief they requested by granting specific performance, an injunction, and an accounting for profits, thus compensating plaintiffs for all losses suffered as a result of defendant's wrong, except the expenses of litigation. Having thereby been made whole, they had no second and different cause of action against the same defendant arising out of the original wrong, and the plaintiffs' law action had no basis for a recovery other than for the expenses of litigation in the equity suit. To allow such a recovery is to permit them to avoid the rule denying allowance of expenses of litigation, merely by filing a subsequent claim for such expenses incurred in the prior proceeding.[26] This obvious subterfuge has not heretofore been countenanced by other decisions, and the court's action in the principal case thus represented not merely an extending of the exception proposed by the *Feldmesser* case, but rather a complete breaking away from the general rule.

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messer case to mean that plaintiff was allowed to recover only the costs which had been taxed against plaintiff in the unsuccessful suit for specific performance. This view seems incorrect, however.

[24]McCormick, Damages (1935) 248.

[25]1 Sedgwick, Damages (9th ed. 1912) 473 states that "A distinction has sometimes been made to the effect that if the plaintiff is successful in the prior litigation he cannot recover counsel fees, for he has been fully indemnified by receiving the taxed costs, though the rule is otherwise if he is not successful; but the better view is that counsel fees also are recoverable as well when he was successful as when he failed." In support of this doctrine Sedgwick cites only Seitz v. People's Savings Bank, 140 Mich. 106, 103 N. W. 545 (1905), which appears of doubtful force for such contention because the situation there was clearly distinguishable from the normal circumstances in which the "previous litigation" exception applies.

[26]Ritter v. Ritter, 381 Ill. 549, 46 N. E. (2d) 41 (1943); Marvin v. Prentice, 94 N. Y. 295 (1884). Only five years previous to the Blum case the same judge had declared: " ..it is well settled that a plaintiff cannot recover attorney's fees incurred in connection with a suit to recover damages for a tort. Nor can he avoid the effect of this rule by bringing a separate and subsequent action to recover them." Insuranshares Corp. of Delaware v. Northern Fiscal Corp., 42 F. Supp. 126, 129 (E. D. Pa. 1941).

The policy of the rule denying counsel fees as damages has been criticized by legal writers,[27] who point out that the classic arguments supporting it are at best very tenuous. To say that the expenditure of counsel fees by the injured person in an effort to secure legal redress is a remote and unexpected consequence of the wrongdoer's unlawful conduct is patently to ignore the obvious facts of common experience. The other make-weight reasons which have been recited are equally unconvincing.[28] Legislatures have repudiated the rule in special classes of cases,[29] and in one state in a general statute covering situations in which "the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."[30] There have been a few instances of direct judicial attack on the principle,[31] and the indirect encroachment effected in the development of the "previous litigation" qualification may well be a tacit admission of the weakness of the exclusionary rule.

Though the result of the *Blum* case is a further extension of the *Feldmesser* case than the court apparently realized, it seems in harmony with the more enlightened practice employed in the English law courts. The decision is perhaps indicative of the increasing dissatisfaction with the American rule denying recovery beyond the anti-

[27]McCormick, Damages (1935) § 71; 1 Sedgwick, Damages (9th ed. 1912) § 230; Note (1941) 15 U. of Cin. L. Rev. 313, 318.

[28]Though it is true than an added burden would be put on the courts in having to guard against the award of unreasonable amounts for expenses of litigation, this is no greater a difficulty than courts regularly face in preventing excessive verdicts on other kinds of damages items. Only by allowing recovery of such expenses can an injured party be completely reimbursed. Allowance of counsel fees would tend to discourage frivolous and doubtful claims, and tend to encourage settlement and arbitration.

[29] See note 9, supra.

[30]Ga. Civ. Code (1910) § 4392.

[31]In a fact situation comparable to the Blum case, the Illinois Appellate Court allowed the plaintiff to recover counsel fees expended in a successful previous suit against the same defendant. A strong dissenting opinion pointed out the distinction that no cases allow recovery of counsel fees to a plaintiff who was successful in the prior litigation. Ritter v. Ritter, 308 Ill. App. 337, 32 N. E. (2d) 185 (1940); Ritter v. Ritter, 313 Ill. App. 407, 40 N. E. (2d) 565 (1942). However, in 1943 the Illinois Supreme Court reversed the decision of the Appellate Court, stating, "that where an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action." Ritter v. Ritter, 381 Ill. 549, 46 N. E. (2d) 41, 44 (1943).

In Malloy v. Carroll, 287 Mass. 376, 191 N. E. 661 (1934) an equity court allowed the expenses of the litigation to be recovered in the same suit, where the defendant's wrong was of such character that plaintiff was forced to employ counsel to protect his legal rights.

quated statutory "costs," and may help to estblish a new federal doctrine in this field.

JAMES M. BALLENGEE

DOMESTIC RELATIONS—CONSTITUTIONALITY OF "HEART BALM" LEGISLATION. [Illinois]

In the decade following the advent of the first "Heart Balm Act" in Indiana,[1] fourteen other states have adopted similar statutes.[2] In general these enactments abolish civil actions for alienation of affections, criminal conversation, breach of promise to marry, and seduction. Their function is to eliminate remedies which have fallen into disrepute because of repeated use by blackmailers and extortionists. The statutes themselves often disclose this aim in abolishing the actions,[3] and the courts[4] have expressed similar declaration of purpose in construing the laws. The ease with which these suits have made the newspaper headlines, coupled with excessive verdicts awarded by juries,[5]

[1]Indiana Laws (1935) c. 208. See Feinsinger, Legislative Attack on "Heart Balm" (1935) 33 Mich. L. Rev. 979. It is interesting to note that the Indiana statute was introduced in the legislature by the sole woman member of the Assembly.

[2]Alabama Sess. Laws (1935) No. 356, p. 780; California Laws (1939) c. 128, § 2-4; Colorado Laws (1937) c. 111, p. 403-409; Florida Comp. Gen. Laws (Skillman, Supp. 1945) § 771.01-08; Illinois Rev. Stat. (1945) c. 38, 246.1-.5; Massachusetts Laws (1938) c. 350, p. 326; Maine Laws (1941) c. 104, p. 140; Michigan Sess. Laws (1935) No. 127, p. 201; Nevada Laws (1943) c. 53, p. 75-76; New Hampshire Laws (1941) c. 150, p. 223-224; New Jersey Sess. Laws (1935) c. 279, p. 896; New York Laws (1935) c. 263, § 2A Civil Practice Act; Pennsylvania Stat. Ann. (1935) Title 48, 170-171; Wyoming Laws (1941) c. 36, p. 32-33.

[3]New Jersey Public Laws (1935) 896: "Whereas, The remedies herein provided for by law for the enforcement of the actions based upon alleged alienation of affections, criminal conversation, seduction, and breach of promise to marry have been subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies have been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, it is hereby declared as the public policy of the State of New Jersey that the best interests of the people of the State will be served by abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination .. "

[4]Fearon v. Treanor, 272 N. Y. 268, 273, 5 N. E. (2d) 815, 817 (1936): "Thoughtful people who have given attention to the matter have long realized that the scandals growing out of actions to recover damages for breach of promise to marry constituted a reflection upon the courts and a menace to the marriage institution, and thereby a danger to the State."

[5]Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758 (1925) (a $465,000 verdict was

made them lucrative sources of blackmail. The situation came to the point which led the New Jersey court to say:

> "It is impossible to save the remedy for the honest, well-meaning, truly injured spouse without leaving the door wide open for the 'racketeer.' Therefore, the spouse having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society."[6]

Heart Balm legislation came back in the news and before the courts in the recent case of *Heck v. Schupp*.[7] This was an action by a husband against another man for alienation of the wife's affections. The defendant moved for dismisal on the ground that the filing of the suit was in contravention of the Illinois Heart Balm Act. The lower court granted the motion to dismiss, but upon appeal to the Illinois Supreme Court, the judgment was reversed and the statute was declared unconstitutional, in that it takes away certain civil rights arising from the marriage contract, in violation of Section 19, Article II, of the Illinois Constitution, which provides that "every person ought to find a certain remedy in the laws for all injuries and wrongs" suffered.[8] In this regard it was declared that the statute ". . tends to put a premium on the violation of moral law, making those who violate the law a privileged class, free to pursue a course of conduct without fear of punishment even to the extent of a suit for damages." And in this light it ". . appears to us to be contrary to all sense of justice."[9] The legislative purpose of preventing blackmail and extortion was summarily discounted by pointing out that any other contractual relationship might present a possible source of the same evil and that many other of the common law causes of actions could be made instruments of the same abuse.

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awarded for alienation of affections, but reduced to $125,000 because excessive); Scharringhaus. v. Hazen, 269 Ky. 425, 107 S. W (2d) 329 (1937) ($80,000 not excessive); Harlow v. Harlow, 152 Va. 910, 143 S. E. 720 (1928) (in suit for alienation of affections against husband's family, verdict of $20,000 was reduced to $13,500 and held not excessive, where two of the defendants were dismissed because of insufficient evidence, thus reducing the damages proportionately).

[6]Bunten v. Bunten, 15 N. J. Misc. 532, 192 Atl. 727, 729 (1937). But see Prosser, Torts (1941) 938: "It may be that they do away with spurious suits at too great a price, and that other methods of limitations or control are to be preferred."

[7]394 Ill. 296, 68 N. E. (2d) 464 (1946).

[8]Ill Const. (1870) Art. II, § 19; "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

[9]Heck v. Schupp, 394 Ill. 296, 68 N. E. (2d) 464, 466 (1946).

The fate of the Illinois Act might have been anticipated on the basis of its previous experience in the courts. The Federal District Court in Illinois in the much-heralded case of *Dailey v. Parker*[10] had, in 1945, held the statute unconstitutional, rejecting the defendant's contention that the legislature, in recognition of the blackmailing propensities of persons bringing this type of action, had manifested the public policy of the state. Ignoring the seemingly obvious import of the statute in question and the avowed purpose of similar enactments in fourteen other states, the court declaimed:

> "I cannot believe that the Illinois Legislature intended to enact a law which would result in the protection of persons guilty of alienating the affections of a husband or wife, declaring the same protection to be a public policy in the interest of public welfare, and at the same time to make it unlawful for an aggrieved husband or wife to seek any redress for injury. . ."[11]

In at least two Illinois circuit court cases, motions to dismiss suits for alienation of affections and breach of contract to marry were denied on the ground that the Heart Balm Statute violated the Illinois Bill of Rights.[12] The Illinois Supreme Court had previously shown lack of sympathy toward the Act by holding three sections invalid because their subject matter was not sufficiently described by the title of the

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[10]61 F. Supp. 701 (N. D. Ill. 1945).

[11]Dailey v. Parker, 61 F. Supp. 701, 702 (N. D. Ill. 1945). See Wilder v. Reno, Atty. Gen., 43 F. Supp. 727, 728-729 (M. D. Pa. 1942). A husband, citizen of Illinois, brought an action to enjoin the Attorney General and a District Attorney of Pennsylvania from enforcing the Pennsylvania Heart Balm Statute against him in so far as it abolishes causes of action for alienation of affections and makes it a misdemeanor to file such suits. In an earlier stage of the case, 39 F. Supp. 404 (M. D. Pa. 1941), the court refused to dismiss the complaint as involving an interference by equity with the enforcement of a state penal statute. It ruled that the plaintiff could take this means of testing the constitutionality of the statute, because his remedy at law was inadequate in that filing suit for damages would subject him to the penal provisions of the statute. In the hearing on the merits, however, the injunction was denied, on the ground that the evidence failed to show that plaintiff was under any threat of prosecution by defendants or that he needed equitable intervention to avoid irreparable injury. Several adequate means of testing the constitutionality of the statute were pointed out to the plaintiff. Having so held, the court proceeded to indulge in an extended dictum to express the opinion that the statute is in fact unconstitutional, because it takes away "fundumental common law rights," violates obligations of contracts, destroys vested rights without due process of law, and is contrary to public policy. It is to be noted that all these arguments have been raised in and rejected by the various state courts which have sustained the validity of the statutes.

[12]See Dailey v. Parker, 61 F. Supp. 701 at 703 (N. D. Ill. 1945). The court quoted two lower court decisions, Cunningham v. Dorby, an action for breach of promise to marry, and Zaremba v. Skurdialis, an action for alienation of affections.

statute,[13] although in that decision the more fundamental objection sustained in the principal case was apparently not raised. Further, the Illinois statute, instead of merely abolishing the specified causes of actions, was drafted in the unfortunate form of declaring the filing of those suits to be unlawful. In another state that form of legislation has been interpreted as making it a crime to contest the constitutionality of the Act, and therefore as an infringement upon the court's power to determine the validity of legislation.[14] In that case, however, the court nullified only that one aspect of the statute, while upholding its basic purpose of abolishing the proscribed actions.

A broader study of relevant legal propositions and judicial precedents clearly demonstrates that the Illinois statute should have been sustained. It is well settled that no one has a property right or a vested interest in common law rules,[15] and legislative abolition of various other causes of action and defenses has been upheld in many states, including Illinois. A familiar example is that of a guest rider's action against the host. Under the common law there was a cause of action for damages for injuries sustained as a guest rider,[16] but that right has been successfully abolished by statute in several jurisdictions.[17] The

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[13]In People v. Mahumed, 381 Ill. 81, 44 N. E. (2d) 911 (1942), sections 3, 4, and 5 were held to be invalid as in violation of Section 13, Article IV of the Illinois Constitution which provides that no Act shall embrace more than one subject, which shall be expressed in the title. The court in the principal case has again declared the same sections invalid on the same reasoning.

[14]Sections 3 and 8 of the Indiana Act were declared unconstitutional in Pennington v. Stewart, 212 Ind. 553, 10 N. E. (2d) 619 (1937) because they denied due process of law, and equal protection of the laws. The court was of the opinion that the legislature could not enact a law, and also pass on its constitutionality. See Wilder v. Reno, Atty. Gen., 43 F. Supp. 727, 728 (M. D. Pa. 1942): "The penal provision [of the Pennsylvania Heart Balm Act] is especially obnoxious because it attempts to bar resort to the courts to test the constitutionality of the Act."

[15]Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).

[16]Munson v. Rupker, 148 N. E. 169 (Ind. App. 1925); Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915), second appeal, 198 Ala. 658, 73 So. 956. See Weber, Guest Statutes (1937) 11 U. of Cin. L. Rev. 24; Note (1936) 10 U. of Cin. L. Rev. 289.

[17]In Illinois, the guest statute has been upheld against the same constitutional objections which were used to hold the Heart Balm Act unconstitutional. Clarke v. Storchak, 384 Ill. 564, 52 N. E. (2d) 299 (1943). In Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929), 108 Conn. 371, 143 Atl. 240 (1928), abolition of the guest rider's right to recover for injury sustained in an automobile accident in Connecticut, was held to be permissive legislature in the interest of the general welfare. Accord, Shea v. Olson, 185 Wash. 143, 53 P (2d) 615 (1936); Rogers v. Brown, 129 Neb. 9, 260 N. W 794 (1935). Contra: Stewart v. Houk, 127 Ore 589, 271 Pac. 998 (1928). Oregon's guest rider statute was declared to be unconstitutional in that it took away a common law right of action against the host for damages for injuries

employer's defenses of contributory negligence, assumption of risk, and the fellow servant doctrine have all been abrogated by various legislatures.[18] And in the Illinois case of *Fenske Bros., Inc. v. Upholsterers' International Union*,[19] the Illinois Anti-Injunction Act, prohibiting the issuance of injunctions in labor disputes, was upheld against the charge of violation of the same constitutional section as was invoked in the principal case.[20] It would seem that these examples indicate that, in a proper situation, appeal to public policy and the general welfare will support legislative abrogation of causes of actions which are considered to be outmoded and unsatisfactory.

Heart Balm Statutes in the same fundamental terms as the Illinois Act have been upheld unanimously in the other states in which they have been tested in the courts. Indiana precedents are particularly in point, because that state has a constitutional provision[21] which is practically identical with the Illinois section which the Illinois court found to be violated. In the Indiana case of *Pennington v. Stewart*,[22] it was held that this provision does not affect the legislature's power to pass such marriage laws as public policy dictates. The court went on to uphold the Act on the reasoning that the right of a husband to his wife's affections is not "property" within the intention of the makers of the Constitution in respect to the due process clause. The cause of action for alienation of affections is an incident to the marriage relationship, and since the legislature has always controlled the marriage relation, it necessarily follows that the incidents thereto are also subject to legislative control.

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received to one's person, property, or reputation. However, the Oregon courts upheld a later statute modeled after the Connecticut statute, in Perozzi v. Ganiere, 149 Ore. 330, 40 P (2d) 1009 (1935).

[18]Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1919) upheld the constitutionality of the Arizona "Employer's Liability Law" as valid exercise of state's police power in promoting the general welfare.

[19]358 Ill. 239, 193 N. E. 112 (1934).

[20] Ill Const. (1870) Art. II, § 19, see note 8, supra.

[21] Ind. Const. Art. I. § 12: "All Courts shall be open; and every man, for injury done to him in his person, property, or reputation shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, without delay."

[22]212 Ind. 553, 10 N. E. (2d) 619 (1937). A suit for alienation of wife's affections brought by husband against wife's parents, was held to be within the heart balm statute, and therefore dismissed. The Indiana Heart Balm Act was upheld against the husband's contentions that it deprived him of property without due process of law and impaired obligations of contracts in violation of the Federal Constitution. The court did, however, nullify the sections of the Statute which made it a criminal offense to file a cause of action. This ruling was based on the ground that the pro-

The New York court has sustained its statute against the charge that it deprived the injured party of the remedy for enforcement of a property right which existed at common law, and that it violated the Federal constitutional prohibition against laws impairing obligations of contracts and taking property without due process of law.[23] The legislation was held to be justified under the state's power over the marriage relationship, and the United States Supreme Court was relied upon for the ruling that the marriage contract is not within the meaning of the provision of the Federal Constitution which prohibits the states from impairing obligations of contracts.[24] It was reasoned that the legislature's power over marriage is plenary, the marriage relationship being likened to a public institution.[25] The New York court readily accorded judicial sanction to the intention of the legislature, acting in the interest of the general welfare, to abolish these causes of action which had become a detriment to society rather than a benefit.

In California, the court found no difficulty in sustaining its Heart Balm Act against the objections that it abolished a common law action, that it deprived a person of his right to pursue and obtain happiness as guaranteed by the California Constitution, and that it was contrary to public policy.[26] In the case of *Thome v. Macken*,[27] an action for alienation of affections arising in Oregon was brought in California. The court in refusing to take jurisdiction of the action said:

> "This court cannot ignore what it knows to be the fact, that the abolition by the legislature of this state of causes of action for alienation of affections was a recognition of the changing social and legal status of women, and a declaration of the broad social trend of opinion that the abolition of such actions would

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vision was an infringement on the rights of the judiciary, and not of the person seeking to sue.

[23]Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815 (1936), upheld the provision of the New York Act abolishing civil actions to recover damages for breach of promise to marry. Hanfgarn v. Mark, 274 N. Y. 22, 8 N. E. (2d) 47 (1937), sustained the statute in its abolition of actions for alienation of affections and criminal conversation.

[24]Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654 (1888). The marriage contract is not a contract within the meaning of U. S. Const. Art. I, § 10.

[25]See Wade v. Kalbfleisch, 58 N. Y. 282, 284, 17 Am. Rep. 250, 252 (1874): "It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

[26]Langdon v. Sayre, 168 P (2d) 57 (Cal. App. 1946). (Statute abolishing action for breach of promise is not against public policy, because the statute is itself a declaration of public policy.)

[27]136 P (2d) 116 (Cal. App. 1943).

tend to improve public morals and serve the best interests of the people of the state.

"We therefore conclude the Section 43.5 of the Civil Code constitutes an expression of public policy, and that the courts of this state properly may decline to accept jurisdiction of causes of action for alienation of affection arising in other states."[28]

The courts of New Jersey,[29] Michigan,[30] Alabama,[31] and Pennsylvania,[32] have all passed on their Heart Balm Statutes and have found them to be constitutional.

From this review, it is apparent that Heart Balm legislation has been sustained in the various states against virtually every objection that legal counsel could muster. In its unfortunate decision to the contrary, the Illinois court did not recite one authority for its holding on the main issue, and it quite obviously ignored persuasive precedents from other jurisdictions, notably that of the sister state of Indiana, which has a very similar constitutional provision and statute. The desirable policy behind the statutes and the ability of the statutes to effectuate this policy, which have been recognized and endorsed by the legislatures in fourteen other states and by the seven other state courts which have passed on the question, were either ignored or denied. The references to the tendency of the Act to protect the sinful and violate "all sense of justice" seem to indicate that the Illinois court saw fit to pass on the wisdom of the legislature's actions rather than on the legal

[28]Thome v. Macken, 136 P. (2d) 116, 120 (Cal. App. 1943). See United States v. Trans-Missouri Freight Association, 166 U. S. 290, 340, 17 S. Ct. 540, 559, 41 L. ed. 1007 (1896); "The public policy of the government is to be found in its statute, and, when they have not directly spoken, then in the decisions of the courts but when the law making power speaks upon a particular subject... public policy in such a case is what the statute enacts." 12 Am. Jur. 688.

[29]Bunten v. Bunten, 15 N. J. Misc. 532, 192 Atl. 727, 730 (1937): "Never were the words, 'this is a good bill and ought to pass' more properly spoken by a member of the Legislature than in the case of this measure. It was a good bill, is a splendid law, and I hold it to be constitutional."

[30]Bean v. McFarland, 280 Mich. 129, 273 N. W. 332 (1937). An Act abolishing criminal conversation is not unconstitutional because it takes away a common law action, inasmuch as a provision in the Michigan Constitution expressly provides that the common law will remain in force until altered or repealed by the legislature.

[31]Young v. Young, 236 Ala. 627, 184 So. 187 (1938). The Alabama Heart Balm Statute was held to be constitutional on the ground that it was for the benefit of the general welfare.

[32]The Pennsylvania Heart Balm Act was upheld in A. B. v. C. D., 36 F. Supp. 85 (E. D. Pa. 1940), affirmed and opinion adopted in 123 F (2d) 1017 (C. C. A. 3d, 1941), cert. denied, 314 U. S. 691, 62 S. Ct. 361, 82 L. ed. 552 (1941). The Act was also held to be constitutional in McMullen v. Nanah, 49 D and C 516.

validity. It appears that the court insists on viewing heart balm suits as brought only by morally righteous parties, and is ignoring the actual existence of the social evil which the legislature has found being perpetuated through the use of these remedies. Thus, the decision in the principal case appears to be indefensible in authority, policy or reason. Though it may give impetus to a new round of attempts to invalidate the statutes in other jurisdictions, there seems little likelihood that the other courts will be persuaded to adopt the view of the Illinois tribunal.

CLARK W TOOLE, JR.

EMINENT DOMAIN—RIGHT OF ABUTTING OWNER TO COMPENSATION FOR USE OF ROADWAY FOR PURPOSE OTHER THAN TRAVEL. [Ohio]

The recent Ohio case of *Hofius v. Carnegie-Illinois Steel Corporation*[1] presents a typical situation posing the problem of whether the owner of land abutting a public road is entitled to compensation for the use of the roadway by some public or private agency for a purpose other than travel. It would seem that the first point for inquiry in these cases would be whether the public acquired the fee when the land was taken for a roadway, so as to extinguish the abutting owner's private interest in and control over the use of the land.[2] Instead of determining this issue by reference to the terms of the grant or condemnation decree by which the public originally received its rights, however, the courts make a practice of merely assuming or stating summarily that the public takes only an easement of way for rural roads, the fee remaining in the abutting owners.[3] The further issue is then whether the particular new use proposed will create an additional burden on the abutting owner's fee beyond that involved in the original easement of way. At this point the cases present sharp inconsistencies, both in the results reached and the reasons given therefor. This condition is demonstrated by the experience of the Ohio Supreme Court which, with the decision of the principal case has reversed itself twice in a period of twenty-one years.[4]

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[1]67 N. E. (2d) 429 (Ohio 1946).

[2]Even where the court finds the fee vested in the public, the land owner may still object if the original public purpose of the condemnation has been interfered with by the new use, or his private property rights in the abutting land have been invaded by the additional burden. Street Railway Company v. Cumminsville, 14 Ohio St. 523 (1863). See Hobbs v. Long Distance Tel. Co., 147 Ala. 393, 41 So. 1003 (1906).

[3]See note 7, infra.

[4]Ohio Bell Tel. Co. v. Watson Co., 112 Ohio St. 385, 147 N. E. 907 (1925) held

In the *Hofius* case the owner of land abutting a roadway sued to enjoin a public service corporation and a village from constructing a water main in the roadbed until additional compensation should be paid. The lower courts denied the injunction on the authority of a 1931 Ohio case[5] which had ruled that a water main in a roadbed was not an additional servitude upon the abutting owner's fee. The State Supreme Court, however, in a 4 to 2 decision, overruled that precedent and reinstated a 1925 decision,[6] holding that the public acquired only an easement for travel in land condemned for a rural highway, the fee remaining in the abutting land owner, and that the installation of water pipes in the roadbed constitutes a new burden on the fee for which the owner must be compensated. The fee ownership issue was resolved by applying an established general rule that the public's interest is an easement, rather than on the specific facts as to the public's original acquisition of the land in question.[7] And the conclusion that the new use created an additional burden was based, without sustaining reasoning, on a precedent involving a telephone line.

Although the result reached by the Ohio court has strong support in the decisions of other states,[8] not all of the courts have adopted the same conclusion concerning additional servitudes on streets and highways;[9] and, as in Ohio, within the states themselves there is noticeable

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the erection of a telephone line along a country highway to be an additional burden on the abutting owner's fee interest. Without referring to this case, the court in Smith v. Board of Commissioners of Summit County, 123 Ohio St. 362, 175 N. E. 590 (1931) held that construction of a water main in the roadway was not an additional burden on the abutter's fee. The Hofius case has now reinstated the authority of the Watson case as controlling and has expressly overruled the Smith case, though the latter decision could have been distinguished.

[5]Smith v. Board of Commissioners of Summit County, 123 Ohio St. 362, 175 N. E. 590 (1931).

[6]Ohio Bell Tel. Co. v. Watson Co., 112 Ohio St. 385, 147 N. E. 907 (1925).

[7]Ohio Bell Tel. Co. v. Watson Co., 112 Ohio St. 385, 147 N. E. 907 (1925) provided the specific authority for the theory that the public acquires only an easement. The older cases relied on by the Watson case are no more helpful in explaining the source of this rule, since they, too, merely state the same proposition without any accompanying reasons. Railroad Co. v. Williams, 35 Ohio St. 168 (1878; McClelland v. Miller, 28 Ohio St. 488 (1876); Street Railway Company v. Cumminsville, 14 Ohio St. 523 (1863); Crawford v. Village of Delaware, 7 Ohio St. 460 (1857; Bingham v. Doane, 9 Ohio 165 (1839).

[8]Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066 (1890) (gas pipes); Ward v. Triple State Natural Gas & Oil Co., 115 Ky. 723, 74 S. W. 709 (1903) (gas main); Baltimore County Water & Electric Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439 (1907) (water main); Bloomfield & Rochester Natural Gas-Light Company v. Calkins, 62 N. Y. 386 (1875) (gas lines); Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105 (1886) (water pipes).

[9]Bishop v. North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925 (1897) (water

uncertainty as to what new uses are burdens requiring additional compensation.[10]

The courts which hold such installations as telegraph and telephone lines, sewer pipes, or gas and water mains to be additional servitudes frequently reason that since at the time the land was originally condemned for public use the parties did not contemplate the new use now proposed for the highway, the interest required for that use was not taken from the owner.[11] Other cases put some emphasis on the point that the new use is desired more for some private advantage than for the benefit of the general public or those abutting owners whose land is being subjected to the burden.[12] In this regard, one court adopts this criterion:

> "Is he [the corporation or individual seeking to use the highway for such purposes] serving the public, or carrying his wares, in his contrivance, which he is setting up on the public highway under the guise that it is a part of the public easement."[13]

Still other courts give as the reason for allowing compensation the fact that these permanent installations put in the roadbeds will cause the easement to ripen into legal title by adverse possession,[14] or, at the

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pipes); Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7 (1883) (telegraph lines); Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 P. (2d) 642 (1936) (oil lines); Hardman v. Cabot, 60 W Va. 664, 55 S. E. 756 (1906) (water main).

[10]Maryland: Chesapeake & Potomac Tel. Co. v. McKenzie, 74 Md. 36, 21 Atl. 690 (1891) (telephone pole in sidewalk inside city a burden); Baltimore County Water & Electric Co. v. Dubreuil, 105 Md. 424, 66 Atl. 439 (1907) (water pipes in roadbed not a burden). Minnesota: Gustafson v. Hamm, 56 Minn. 334, 57 N. W 1054 (1894) (railway on street a burden); Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N. W 111 (1895) (telephone poles on highway not a burden). For numerous other cases on this issue, see 3 Tiffany, Real Property (3d ed. 1939) § 926.

[11]Consumers' Gas & Trust Co. v. Huntsinger, 14 Ind App. 156, 42 N. E. 640 (1896); Sanitary District of Chicago v. Commonwealth Edison Co., 357 Ill. 255, 192 N. E. 248 (1934); Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 107 (1886): "Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities when the land was appropriated for the purpose of a public road." 3 Tiffany, Real Property (3d 1939) § 926; Notes (1929) 77 U. of Pa. L. Rev. 793, (1930) 79 U. of Pa. L. Rev. 98.

[12]Paine's Guardian v. Calor Oil & Gas Co., 133 Ky. 614, 103 S. W 309 (1907); Bloomfield & Rochester Natural Gas-Light Company v. Richardson, 63 Barb. 473 (N. Y. 1872); 3 Tiffany, Real Property (3d ed. 1939) § 603.

[13]Paine's Guardian v. Calor Oil & Gas Co., 133 Ky. 614, 103 S. W 309, 310 (1907).

[14]See Hardman v. Cabot, 60 W. Va. 664, 669, 55 S. E. 756, 758 (1906). Eels v. American Tel. & Tel. Co., 143 N. Y. 133, 138-9, 38 N. E. 202, 203-4 (1894) suggests this reasoning by the emphasis placed on the fact that the telegraph company would " permanently appropriate to its own special, continuous, and exclusive use " a portion of the land in the public easement.

least, will exclude the owner from using the land for similar installations to serve his own purpose.[15]

A further point on which courts often rely heavily in decisions favoring the land owner is that a distinction exists between the quantity of interest vested in the public when it takes land for a city street and for a rural highway. In the former instance the land owner surrenders the fee while in the latter he retains it, the public taking only an easement of way.[16] However, the acceptance of this distinction should serve no other purpose in the controversies involving roads than to afford a basis for distinguishing the cases which have refused additional compensation to owners of land abutting city streets. No affirmative support for granting payment to rural abutters can be drawn from merely contrasting the public's rights in land taken for use in municipalities.[17]

On the other hand, a number of courts, while recognizing that the fee remains with the abutting owners, hold that other uses of the roadbed besides the mere right of travel may be made without placing so great a burden on the fee as to require further compensation. These courts reject the idea that there is a distinction between rural highways and city streets in this respect,[18] inasmuch as the legislature has

[15]Paine's Calor Oil & Gas Co., 133 Ky. 614, 103 S. W. 309, 310 (1907): "It is perpetual occupancy; not to the exclusion, or even hinderance, of the public, it may be true, but, nevertheless, it is taking possession of the land to the exclusion to that extent of the owner and all others for any purpose whatsoever."

[16]3 Tiffany, Real Property (3d ed. 1939) 599: "A city street is a highway, but a distinction is frequently asserted between such a highway and an ordinary rural highway, it being said that, while in the latter case the public has merely a right of passage in individual members of the public, power in the municipal authorities to change the surface, to cut down trees, place sewers and pipes beneath the bed of the street, and in effect to exclude the owner of the land from any use thereof other than that of passage common to all individuals."; Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066 (1890); Ohio Bell Telephone Co. v. Watson Co., 112 Ohio St. 385, 147 N. E. 907 (1925); McDevitt v. Peoples Natural Gas Co., 160 Pa. St. 367, 28 Atl. 948 (1894); 2 Dillon, Municipal Corporations (4th ed. 1890) § 705 (a). The Ohio Court in the principal case accepted this distinction, and proved its existence by pointing out an 1800 statute which vests the fee to streets in the municipality in trust for the designated public use; but the court failed to give any corresponding statutory authority for holding that the easement only goes to the public in a rural road condemnation.

[17]In the principal case, the Ohio court gave so much attention to this distinction as to imply that it was, in itself, a sufficient justification for allowing the rural abutter to recover. Sustaining this inference is the fact the majority opinion failed to advance any affirmative reason why the public might not use its easement privilege for the construction of a water main without further compensation to the abutter.

[18]Hobbs v. Long Distance Tel. Co., 147 Ala. 393, 41 So. 1003 (1906); Smith v.

the power to authorize the new use placed in the rural highway as well as in the city street, and the land is taken for the use of the public in both cases.[19] The contention that such installations will ripen into legal title by adverse possession has been refuted on the ground that since the public is exercising the privilege, the title would not be affected by such possession.[20] The further argument is advanced that the use of the highway for the purpose of installing the various public utilities was necessarily contemplated by the parties in their original agreement when the public first acquired its interest.[21] This contemplation is imputed from the natural development of urban utilities in areas which were formerly rural.[22] The point is frequently stressed that the interest the public acquires in the rights of way for roads taken under eminent domain powers should be as broad and flexible as the public's various needs may require.[23] This position seems logical since it is very probable that the land owner is paid full value when the land is first taken, whether it is said that the public takes only an easement for travel or the complete fee. The compensation is set at a time when the land owner is obviously being fully deprived of the use of the land for all practical purposes, and when the appearances are

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Board of Commissioners of Summit County, 123 Ohio St. 362, 175 N. E. 590 (1931); Hardman v. Cabot, 60 W Va. 664, 55 S. E. 756 (1906).

[19]Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7 (1883); Street Railway Company v. Cumminsville, 14 Ohio St. 523 (1863); Hardman v. Cabot, 60 W Va. 664, 667, 55 S. E. 756, 757 (1906). "The Legislature, in expressly authorizing the use of highways, under permission of the county courts, by corporations engaged in the service of the public, for the location and operation of their gas pipes, has declared that such use is proper."

[20]Hardman v. Cabot, 60 W Va. 664, 55 S. E. 756 (1906).

[21]Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112 (1895); Hardman v. Cabot, 60 W Va. 664, 55 S. E. 756 (1906). See Note (1930) 79 U. of Pa. L. Rev. 98 where it is said that the courts are actually refusing additional compensation on the basis of public policy.

[22]Hobbs v. Long Distance Tel. Co., 147 Ala. 393, 41 So. 1003 (1906); Nazworthy v. Illinois Oil Co., 176 Okla. 37, 54 Pac. (2d) 642, 644 (1936): " the rights of the owner of lands in rural communities over and along which highways are established must yield to the needs of the public generally with the expansion and growth of civilization as new methods and means of travel, transportation of persons, commodities, etc., .are devised, developed, and expanded, notwithstanding that the use is more onerous than were the means and methods in use at the time the highway was laid out "

[23]McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171 (1904); Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112, 114 (1895); "When land is taken for a highway, all uses of the land directly or incidentally conducive to the enjoyment of the public easement which the necessity and convenience of the public require, either then or in the future, are paid for, wherever the highway may be."

definitely that the taking is permanent in character. A jury or court evaluating the owner's loss is not likely to give much regard to legal niceties as to the exact interest being condemned.

These irreconcilable conflicts of opinion among courts demonstrate the urgent need for some more encompassing declaration of the rights of the public and the abutting owners than can be achieved through judicial determinations in individual cases. Litigation cumbersomely settles only one specific issue at a time,[24] and until all possible uses of the roadway have been considered by the courts, neither the abutters nor prospective new users of the roadway can know what their rights will prove to be.

The most obvious and effective manner of settling these issues, as to land which may hereafter be taken for public roadways, is for the legislatures to revise present condemnation statutes to provide clearly that the state's admitted power to take the fee[25] from the owner shall be unequivocally exercised. The Ohio law affords a typical example of the ambiguity of many statutes in regard to what interest shall be taken by the public. It declares that "the Director of Highways may acquire property for highway purposes,"[26] and that he "shall appropriate such property as he may deem needed for [road] purposes."[27] Such legislation has the merit of allowing flexibility in making condemnations, but is a source of much uncertainty and litigation because it leads to ambiguity as to just what interest is condemned in each particular case.[28] If the statutes directed that the fee be taken, or at least that the

[24]In Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951 (1898) only the issue of telephone poles was decided, and then in Kincaid v. Indianapolis Natural as Co., 124 Ind. 577, 24 N. E. 1066 (1890) the court was called upon to determine the same question with respect to gas pipes. The courts seldom make their decision cover a class of servitudes, but instead decide the question in its most narrow limits on the particular use involved. Callen v. Columbus Edison Electric Light Co., 66 Ohio St. 166, 64 N. E. 141 (1902).

[25]1 Tiffany, Real Property (3d ed. 1939) § 33.

[26]Ohio Code (Baldwin's Throckmorton 1940) § 1192.

[27]Ohio Code (Baldwin's Throckmorton 1940) § 1210. See also W Va. Code Ann. (Michie 1943) § 5362; 1 Mass. Gen. Laws (1932) c. 79, § 3 is similarly ambiguous: "Upon the recording of an order of taking title to the fee of the property taken or to such other interest therein as has been designated in such order shall vest in the body politic... "

[28]4 Tiffany, Real Property (3d ed. 1939) 682: "Whether there is an appropriation of the ownership of the land is usually a question of the construction of the statute under which the land is condemned, in connection with any constitutional restrictions upon the power. There is usually a presumption that the ownership, or .. 'fee,' does not pass, and, unless the statute explicitly authorizes the taking of a fee, or this is necessary for the particular use, it is ordinarily considered that a right of user only is taken...."

fee shall be presumed to be taken in the absence of an express statement to the contrary in the condemnation decree,[29] then abutting owners would clearly be deprived of any basis for a claim to further compensation for subsequent new uses of the roadway.

The failure of the present statutes to include such terms may be explained by the fact that at the early dates at which many of them were originally enacted the various modern uses for which roadways are employed were not anticipated, and a mere easement for travel seemed to meet the needs of the public. Furthermore, the possibility that the fee would revert to the abutter if a rural dirt roadway of the nineteenth type should be abandoned was of some value, for the land could often be readily readapted to agricultural purposes.[30] However, modern extension of public utilities services to country areas has introduced new uses for roadways, and the advent of the automobile has raised the necessity for deeply graded and hard surfaced rural highways. Thus, the reversionary fee interest is of very little worth to the abutting land owners, and the outright condemnation of the fee would cause little, if any, extra loss to the owner, and so require little extra compensation. this would be well worth paying to obtain the full use of the condemned land for any public purpose that might later develop.

Even without statutory revisions, the condemning authority has a right to take the fee in the property, and if a positive exercise of this right were made on each occasion when road sites are taken from private owners, the desired result would be achieved. Later claims for additional compensation for new uses could be defeated by showing that the compensation decree had deprived the former owner of all his interest in the land.[31]

If the suggested statutory and administrative reforms are effected, many controversies will still continue to come up under seizures of land already made under the present ambiguous statutes and equivo-

[29]Va. Code Ann. (Michie 1942) § 4369 provides commendable clarity: " the title to the part of the land and to the other property taken for which such compensation is allowed, shall be absolutely vested in the company, ["company" includes highway commission] in fee simple, except also, in the case of any other company where, if the notice of the application to the court shall so specify or describe, and the petition shall so pray the interest or estate as shall be so specified or described and prayed for, shall be vested." Fla. Stat. (1941) § 341. 23 specifically directs that the fee shall be taken.

[30]These factors may also explain the origin and survival of the city street-rural road distinction, which may have had a valid practical basis a century ago, but which now seems to have lost much of its force because the nature of the use and construction of rural roadways had been transformed within the last generation.

[31]3 Tiffany, Real Property (3d ed. 1939) 605-606.

cal decrees, and the courts will still have to make the ultimate decision of whether the abutter shall receive extra compensation for each desired new use of the roadway. The preferable answer seems to be that of the courts which, in disagreement with the principal case, hold that even though the fee remains in the abutting owner, standard public service uses of the road areas, either above or below the surface, do not constitute additional burdens on the private owner's interests. Rather, they are justified on the theory that the public acquires an interest in the right of way for roads taken under eminent domain powers which is as broad and flexible as the public's various needs may require.[32]

GLENN R. TOOTHMAN, JR.

EVIDENCE—WEIGHT TO BE GIVEN BLOOD TEST EVIDENCE IN PATERNITY PROCEEDINGS. [California]

The case of *Berry v. Chaplin*[1] attracted nation-wide attention in 1946 primarily because it involved a famous Hollywood personality and a fact situation made to order for sensational news reporting. However, the court's decision on the major legal point of the case has again brought into sharp focus a problem which will continue to cause controversy in legal circles long after the public has forgotten the incident in Charlie Chaplin's life. In denying his paternity of a child born to Joan Berry, Chaplin introduced evidence concerning the results of blood tests made of Joan Berry, Chaplin and the child. These tests proved that from a medical standpoint Chaplin could not possibly be the father of the child. The only other evidence introduced was in the form of Joan Berry's own testimony (corroborated in one particular by a butler) and Chaplin's denial. The trial court submitted the question of Chaplin's paternity to a jury which found for Miss Berry. On appeal to the District Court, Chaplin's counsel pointed out numerous discrepancies in Miss Berry's testimony and contended that the lower court erred in not treating the blood tests as conclusive evidence of non-paternity. The District Court, however, upheld the decision, mainly because it was bound by the ruling of the California Supreme Court in the controversial case of *Arais v. Kalensnikoff*.[2]

[32]See notes 22 and 23, supra.

[1]169 P. (2d) 442 (Cal. App. 1946).

[2]20 Cal. (2d) 428, 74 P. (2d) 1043 (1937). In this action the defendant was a man 70 years old, who according to his wife's testimony and his own, had been impotent for a number of years. Blood tests excluded him as the father of the child. Yet, on the basis of testimony given by plaintiff and her witnesses, the jury found defendant

The unfortunate results reached in cases like *Berry v. Chaplin* in which judicial decisions are contrary to established medical facts flow from the same basic source, which has been termed the "cultural lag" problem.[3] In a critical chorus the theoretical writers have voiced the urgent plea that the legal profession keep pace with advancements in medical science and not lag behind in recognizing established medical truths. The law's tardiness occurs not so much in connection with the *admission* of scientific evidence as in the failure to accord adequate *value* to it. Courts have admitted evidence in regard to ballistics, fingerprinting, X-rays, sound moving pictures, photographs, phonographs and dictaphones.[4] In regard to blood tests, as with other forms of scientific tests, the trouble does not lie in refusal to admit them in

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to be the father, and this finding was not set aside by the trial or appellate courts.

In his opinion in the Chaplin case Justice Wilson admitted that Miss Berry's testimony was in part "unique" and "extraordinary" and that the Arais case had been the "subject of discussion and criticism in law reviews and other legal publications" but that "it remains the law of this state until modified or overruled by the court that rendered the opinion." 169 P (2d) 442, 451 (Cal. App. 1946). Justice McComb, in a concurring opinion stated that he, too, felt bound by the Arais case, though he believed the California Supreme Court to be in error. He further quoted Schatkin's "Disputed Paternity Proceedings" (1944) 135, where the Arais case is called a "striking miscarriage of justice."

[3]Weiner, Judicial Notice of the Landsteiner Blood Groupings (1937) 97 N. Y. L. J. 3184; Kitchin, Blood-Group Evidence in Bastardy Cases (1937) 84 L. J. 304; Flacks, The Forensic Value of Blood Tests in Evidence: A Review (1937) 23 A. B. A. J. 472; Blood Tests for Nonpaternity (1937) 109 J. Am. Med. Ass'n 1929. See Britt, Blood-Grouping Tests and More "Cultural Lag" (1938) 22 Minn. L. Rev. 836, 841 for further references.

[4]Galton, Blood-Grouping Tests and Their Relationship to the Law (1938) 17 Ore. L. Rev. 177, 178. In State v. Casey, 108 Ore. 386, 213 Pac. 771 (1923), a prosecution for murder, the evidence of an expert that the bullets found in deceased's body had been fired from a revolver such as defendant possessed was held to be competent. In State v. Smith, 128 Ore. 515, 273 Pac. 323 (1929), for the purpose of giving increased punishment, fingerprints were admitted to identify accused as a person previously convicted of a felony. In De Forge v. New York, N. H. and H. R.R., 178 Mass. 59, 59 N. E. 669 (1901), an action for damages arising from a foot injury, X-rays were held to be admissible, if properly verified, to show the extent of the injury. In People v. Hayes, 21 Cal. App. (2d) 320, 71 P (2d) 321 (1937), a prosecution for manslaughter, sound moving pictures of defendant making a voluntary confession to a police officer were held admissible. In State v. Clark, 99 Ore. 629, 196 Pac. 360 (1921), a manslaughter prosecution, photographs of the locality where body of deceased was found were held to be admissible. In Boyne City, G. & A. R. Co. v. Anderson, 146 Mich. 328, 109 N. W 429 (1906), a condemnation proceeding, phonograph records of the sound made by the operation of trains in the vicinity of defendant's hotel were admitted. In Kilpatrick v. Kilpatrick, 123 Conn. 218, 193 Atl. 765 (1937), a divorce proceeding, dictaphone discs which recorded a pertinent conversation between husband and one of the wife's witnesses were admitted.

evidence but rather in a dogged determination to give them no greater weight than any other type of evidence.[5]

That such recognized scientific blood tests should be treated with more respect becomes apparent after even a cursory glance through pertinent material, although their legal use is necessarily limited to decisive negative proof in certain instances. The tests are based on the now universally accepted fact that when blood groups or types of the mother and child are known, the blood of the putative father must fall within certain definite groups or types. It is at once apparent that the tests cannot be used affirmatively to prove parentage but only negatively. For example, if the blood of the mother is group "B," and that of the child is "A" and that of the alleged father is "O," then since the father's blood bears none of the characteristics of that of the child, he is eliminated as the father. But if the blood had been "A," it would not follow that he *is* the father of the child since there are countless men whose blood group is "A." Decisive indications of non-paternity, however, have long been recognized in medical circles and are discussed thoroughly by Professor Wigmore, who says that "in the case of certain progeny-types this negative proof amounting to conclusive demonstration of *non-paternity* is feasible."[6]

In *Berry v. Chaplin,* Chaplin's blood group was "O," Joan Berry's was "A" and the child's was "B." Under Professor Wigmore's analysis, and indeed under all accepted medical standards, Chaplin could not have fathered Carol Ann Berry. On this particular point it has been said: "A thorough examination of the medical data available since 1910 discloses such an unusual unanimity of opinion among all leading pathologists, physicians and medical professors that to the lay reader their assertions become fact."[7]

Some years ago, however, it became apparent that the legal profession demanded more proof, and so a Medico-Legal Committee was appointed by the American Medical Association to investigate the matter. After conducting thousands of tests the Committee made a detailed report in 1938.[8] Out of 10,000 families examined there were no exceptions to the law of heredity concerned in the *Chaplin* case (von

[5]See cases cited in notes 1, 2, 18, 21, 22, and legal periodical writings cited in note 16.

[6]1 Wigmore, Evidence (3d ed. 1940) § 165b, p. 619.

[7]Flacks, The Forensic Value of Blood Tests in Evidence: A Review (1937) 23 A. B. A. J. 472.

[8]Report of the Committee an Medicolegal Blood Grouping Tests (1937) 108 A. M. A. 2138.

Dungern and Hirszfeld law) Out of 7000 families examined there were no exceptions to the Landsteiner-Levine law. Out of 4000 families examined only one exception to Bernstein's law was found. The Committée therefore recommended the use of the two first-mentioned laws "without reservation" and recommended that the Bernstein law be used to indicate a "high probability, bordering on certainty." Though little more in the way of scientific assurances could be desired, the handling of these cases by courts of this country has largely nullified the effect of such evidence.

The first time the question arose in an American court of last resort was in 1933,[9] before the American Medical Association's report was made public. In this case the blood group theories were rejected as not being unquestioned scientific facts and the lower court was upheld in refusing to take cognizance of them. Four years later came the case of *Arais v. Kalensnikoff*[10] with a fact situation closely resembling that of *Berry v. Chaplin*. The California court approached the case with two apparently conflicting mandates, both applicable from the established law of the state. First, a statute provided that "no evidence is by law made conclusive or unanswerable unless so declared by this code."[11] On the other hand the rule of *William Simpson Construction Co. v. Industrial Accident Commission*,[12] and the line of cases following it,[13] declared that " whenever the subject under consideration is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue."[14] This seeming conflict was resolved by the court by the questionable reasoning that, as used in the *William Simpson Co.* decision, the word "conclusive" did not mean "true" but only indicated that such evidence could not be contradicted

[9]State v. Damm, 62 S. D. 123, 252 N.W 7 (1933). In refusing to order the parties to submit to blood tests the court gave as its reason the fact, that even if available, the tests would be of no value as scientific evidence.

[10]10 Cal. (2d) 428, 74 P (2d) 1043 (1937).

[11]Cal. Code of Civ. Proc. (Deering, 1941) § 1978.

[12]74 Cal. App. 239, 240 Pac. 58 (1925).

[13]General Accident Fire and Life Assur. Corp. v. Industrial Accident Commission, 105 Cal. App. 705, 288 Pac. 692 (1930); Hartford Accident and Indemnity Co. v. Industrial Commission of Arizona, 38 Ariz. 307, 299 Pac. 1026 (1931); Thomason v. Hethcock, 7 Cal. App. (2d) 634, 46 P (2d) 832 (1935).

[14]74 Cal. App. 239, 240 Pac. 58, 59 (1925). When the scientific facts are well known, axiomatic or matters of common knowledge, courts will judicially notice them and thereby give them proper weight. State v. Hostetter, 340 Mo. 1155, 104 S. W (2d) 671 (1937); Lickfett v. Jorgenson, 179 Minn. 321, 229 N. W 138 (1930); Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919).

by the testimony of a non-expert witness.[15] Certainly this was a surprising interpretation of a term long employed in legal language; and the ruling is unsatisfactory also because it seems that any evidence tending to prove paternity would necessarily be contradictory of expert testimony based on the negative results of blood tests, and therefore not admissible from non-expert witnesses. Having thus disposed of this troublesome precedent, however, the court had merely to point out that since the Code said nothing as to the conclusiveness of blood tests, there was no authority for holding the evidence of non-paternity in this case as conclusive.

This decision immediately stirred up a storm of disapproval in the form of law review articles and critiques in bar association publications.[16] But no matter how persuasive were these protesting voices, the courts, without legal precedents on which to rely, were not willing to accept the responsibility of making the tests indisputable evidence. Ohio had the best opportunity, and in 1938 in *State v. Wright*[17] an enlightened trial court took a brave plunge into the dangerous waters of unprecedented action. An expert witness had testified that the defendant could not be the father of the child, but the jury found to the contrary. The trial judge set aside the verdict and granted the defendant a new trial. In approving this action the District Court said that "if, as testified by the expert, this science of blood grouping has been so developed and has proved so accurate that it is not only admissible but to very high value, the woman who has been promiscuous in her relations can no longer make her selection of the male to be charged and secure a verdict against him through the natural sympathy aroused in a jury."[18]

The following year in *State v. Slovak*[19] another Ohio District Court had the same issue before it but retrogressed to an alarming degree. It cited the report of the Medico-Legal Committee[20] but pounced on the one exception cited in that report as being indicative of the fact

[15]Arais v. Kalensnikoff, 10 Cal. (2d) 428, 74 P. (2d) 1043, 1047 (1937).

[16]Maguire, A Survey of Blood Group Decisions and Legislation in the American Law of Evidence (1943) 16 So. Calif. L. Rev. 161; Notes (1938) 11 So. Calif. L. Rev. 524; (1939) 53 Harv. L. Rev.285; (1938) 26 Calif. L. Rev. 456; (1938) 26 Geo. L. J. 771; (1938) 24 Va. L. Rev. 682. Also 8 Kan. Bar Ass'n J. 479.

[17]59 Ohio App. 191, 17 N. E. (2d) 428 (1938). This case was reversed on appeal but on a different and technical point. 135 Ohio St. 187, 20 N. E. (2d) 229 (1939).

[18]59 Ohio App. 191, 17 N. E. (2d) 428, 431 (1938).

[19]63 Ohio App. 16, 24 N. E. (2d) 962 (1939).

[20] Report of the Committee on Medicolegal Blood Grouping Tests (1937) 108 A. M. A. 2138.

that no particular weight could be attached to the tests. It also suggested that the tests may not have been made on a sufficient variety of people, and declared darkly that few facts of science in any field are absolutely beyond question.[21] The additional objection was raised that reliability of these tests is conditioned on the skill and honesty of the tester; but a ready answer to this point is that the court has power to engage its own expert to conduct the tests.

When in 1944 the Supreme Court of Ohio finally passed on the matter, a liberally inclined District Court, which had reversed a trial court verdict as contrary to blood-test evidence, was itself reversed on the ground that blood-test evidence was only to be admitted and considered by the jury for whatever weight it might have.[22]

In New York a lower court has taken the position that blood-test evidence of non-paternity is sufficient to overcome the strong presumption of legitimacy which attaches when a child is born in wedlock,[23] but this ruling was apparently not tested in the Court of Appeals.

Perhaps the most encouraging note of all was sounded by a federal court in *Beach v. Beach*.[24] The question at issue was whether the parties could be required to submit to blood tests under authority of federal rules of procedure,[25] but the court in giving an affirmative answer, used this language: "The value of blood grouping tests as proof of non-paternity is well known. On this point it is enough to cite the report of the American Medical Association's Committee of Medicolegal Blood Grouping Tests, which shows that although such tests cannot prove paternity and cannot always disprove it, they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts."[26]

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[21]Actually the situation in State v. Slovak was one involving the Landsteiner-Levine law of heredity while the one exception occurred in a Bernstein situation. Aside from this point the judge went on to say that no tests had been made on hybrids or on people afflicted with hemophilia; but there was no allegation that either of these conditions existed in the Slovak case. Furthermore, the court argued it is not wise to go overboard in accepting these so-called scientific facts. After all, hadn't Einstein proved that objects do not fall in straight lines, thereby rendering false all judicial notice taken of a formerly accepted "fact"? Just what effect Professor Einstein's discovery actually had on any previously rendered decisions the judge failed to make clear.

[22]State v. Clarke, 144 Ohio St. 305, 58 N. E. (2d) 773 (1944).

[23]Schulze v. Schulze, 35 N. Y. S. (2d) 218 (1942).

[24]114 F. (2d) 479, 131 A. L. R. 804 (App. D. C. 1940).

[25]28 U. S. C. A. § 723c (1941), which is Rule 35(a) of the Rules of Civil Procedure.

[26]114 F. (2d) 479, 480, 131 A. L. R. 804 (App. D. C. 1940).

Thus, while the state of the law is still very unsatisfactory in this field, some hope of ultimate reform arises from a few recent decisions which are definitely pointing in the right direction, overcautious though they may be.

Even in a jurisdiction whose rule is inflexible on the point there would seem to be another way for courts to give blood test evidence more effect. It has never been questioned that a trial judge has the power to set aside a jury verdict as contrary to the evidence; and there have been numerous cases in which appellate courts have set aside verdicts, even though approved by trial judges, when the verdict is flagrantly contrary to the evidence.[27] This operation of the "manifest weight" doctrine is recognized in many jurisdictions although California seems not to be one of them. The California rule is that a verdict will not be set aside so long as there is any substantial evidence to support it.[28] But there are dicta in five California cases to the effect that a jury verdict based on testimony which controverts physical facts or which is inherently improbable or scientifically impossible will be set aside upon appeal as not supported by substantial evidence.[29] This would appear to be a suitable avenue of escape for use in cases such as *Berry v. Chaplin* where a court is put in the awkward position of having to uphold the sentimentally erroneous verdict of a jury.

Appropriate legislation is, of course, a solution to the problem but will doubtlessly be slow in coming.[30] Meanwhile, in cases where the plaintiff produces enough convincing evidence to keep a trial judge or an appellate court from applying some variation of the "manifest weight" doctrine, protection for an innocent "father" must depend on persuading the individual courts to recognize the conclusive nature of blood tests.

E. WALLER DUDLEY

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[27]Collected in 3 Am. Jur., Appeal and Error § 890, p. 451, n. 6.

[28]In re Bristol's Estate, 23 Cal. (2d) 221, 143 P. (2d) 689 (1943); In re Snowball's Estate, 157 Cal. 301, 107 Pac. 598 (1910).

[29]Boens v. Bennett, 20 Cal. App. (2d) 477, 67 P. (2d) 715 (1937); Roy v. Smith, 131 Cal. App. 148, 21 P (2d) 151 (1933); Coughlin v. Great Western Power Co., 183 Cal. 548, 191 Pac. 920 (1920); Austin v. Newton, 46 Cal. App. 493, 189 Pac. 471 (1920); Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059 (1907).

[30]There has been legislation concerning blood tests in Maine (Laws 1939, c. 259), Maryland (Laws 1941, c. 307), New Jersey (Laws 1939, c. 221), New York (Laws 1942, c. 893), Ohio (Gen. Code Ann. § 12122-1, 2), South Dakota (Code 1939, § 36.0602), Wisconsin (Stat. 1941, §§ 166.105 and 325.23) and for federal courts (supra note 25); however, these statutes only concern the propriety of ordering parties to submit to blood tests in certain instances, and do nothing in regard to giving the tests greater value when received as evidence.

MORTGAGES—VALIDITY OF MORTGAGOR'S CONVEYANCE OF EQUITY OF REDEMPTION TO MORTGAGEE AFTER DEFAULT, IN SATISFACTION OF MORTGAGE DEBT. [Nevada]

The security purpose of mortgage conveyances was recognized in early English chancery courts by establishing the mortgagor's right to redeem his land by paying the debt even after default.[1] To protect this equity of redemption as an essential element of every mortgage[2] the mortgagor is denied the capacity to make an express agreement in the mortgage, or in a collateral instrument executed at the same time, that upon failure to pay the debt on the due date his estate shall be forfeited.[3] This prohibition against clogging the equity of redemption[4] is necessary to protect the borrower from oppressive bargains forced on him by the lender, and is justified by equity's practice of avoiding forfeitures when the substantial object of the transaction can be obtained and the parties put in status quo without enforcing them.[5]

Whether a transfer, *subsequent to default,* of the equity of redemption by the mortgagor to the mortgagee in satisfaction of the mortgage indebtedness falls within the rule against clogging the equity of redemption is the question posed by the recent Nevada case of *McCall v.*

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[1]Emanuel College v. Evans, 1 Rep. Chan. 16, 21 Eng. Rep. 494 (1625).

[2]1 Glenn, Mortgages (1943) § 37; 2 Jones, Mortgages (8th ed. 1928) § 1326; 1 Minor, Real Property (2d ed. 1928) § 576; Walsh, Mortgages (1934) 122.

[3]Peugh v. Davis, 96 U. S. 332, 337, 24 L. ed. 775 (1877): "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time [that time when the mortgage is executed and delivered and the loan which it is given to secure is made], even if embodied in the mortgage." Pierce v. Robinson, Adm'r, 13 Cal. 116, 4 Pac. St. Rep. 116 (1859); Gould v. McKillip, 55 Wyo. 251, 99 P (2d) 67 (1940).

[4]As early as 1705, the expression "clogging the equity of redemption" was in use in this regard: "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." Jennings v. Ward, 2 Vern. 521, 23 Eng. Rep. 935 (1705). Common examples of such clogs on the equity of redemption which the courts have invalidated, are stipulations that the mortgagor will not redeem, Grover v. Hawthorne, 62 Ore. 77, 121 Pac. 808 (1912); or that he will not redeem for a stated period, Sheppard v. Wagner, 240 Mo. 409, 144 S. W 394 (1912); or that only certain classes of persons may redeem, Howard v. Harris, 1 Vern. 33, 23 Eng. Rep. 288 (1681). "In order to have that which is forbidden as a clog on the equity of redemption we must have this situation created, that the debtor who has mortgaged his property will not upon repayment to his creditor emerge from the transaction as free in his ownership as he was before." Wyman, The Clog on the Equity of Redemption (1908) 21 Harv. L. Rev. 459, 474.

[5]1 Minor, Real Property (2d ed. 1928) 761.

Carlson.[6] There the plaintiff, to secure a note to the defendant, had executed a mortgage on land of which he was then owner. The note became due and remained unpaid for two years, after which the plaintiff, at the request of the defendant, quitclaimed the land to him and, in consideration thereof, was released from the obligation on the note. The defendant then, as part of the same agreement, leased the land to the plaintiff with a one year option to repurchase for the amount of the former indebtedness plus interest and taxes that would accrue during the life of the option. When the option expired, the defendant gave notice of cancellation of the lease and option, and made a demand for possession. The plaintiff then brought an action in equity for an accounting of the amount due the defendant, and prayed that upon tender of such sum he be required to reconvey. The defendant filed a cross-action to quiet his title.

The Nevada court regarded the fundamental issue to be whether the quitclaim deed "was intended as an absolute conveyance in consideration and payment of the antecedent indebtedness, or whether the parties merely placed the matter in a different form, and intended the indebtedness to continue and the title conveyed. to be held by respondents merely for security, as the mortgage had been."[7] Thus, the problem was treated not as that of a mortgagee attempting to extinguish the equity of redemption by taking a conveyance from the mortgagor after default, but rather on the same basis as that of two previously unconnected parties entering an original transaction which must now be ruled either a mortgage or a deed with an option to repurchase.[8] On this view, the controversy was readily resolved in favor of the mortgagee because the parties had been explicit in their intention to make an outright conveyance with an option to repurchase, and because the debt had been expressly declared satisfied and the note returned to the debtor thus terminating any need for security.[9] Furthermore, the court thought it would have been a "futile ceremony" for the

[6]172 P (2d) 171 (Nev. 1946).

[7]McCall v. Carlson, 172 P (2d) 171, 179 (Nev. 1946).

[8]For example, Watkins v. Wallace, 206 Ky. 264, 267 S.W 183 (1924); Dean v. Smith, 53 N.D. 123, 204 N.W. 987 (1925).

[9]Cancellation of the mortgage debt and note evidencing the debt is not conclusive proof that the relation of mortgagor and mortgagee is terminated, for if the intention is to establish a disguised security relationship, the parties must create the appearance that the debt is extinguished. However, actual cancellation of the debt does strongly indicate that the transaction was one of sale rather than of security. Rogers v. Burt, 157 Ala. 91, 47 So. 226 (1908); Shaner v. Rathdrum State Bank, 29 Idaho 576, 161 Pac. 90 (1916); Dean v. Smith, 53 N.D. 123, 204 N.W 987 (1925).

parties to have cancelled one mortgage only to create another, since "there would have been nothing to be gained" by such action.[10] Therefore, the transaction was ruled to have been an absolute sale with an option to repurchase, and since the plaintiff had allowed the option to lapse without acting on it, he had no further interest in the land.

The court's reasoning is open to two questions. Its answer to the debtor's contention that the title conveyed by the quitclaim deed was intended merely as security, the same as the mortgage had been, was that the creditor had nothing to gain by such a reorganization of the security. He would not profit, it is true, if the court should ultimately hold that the second transaction resulted in merely a second, though disguised, mortgage.[11] But if he could create a successful masquerade so that the transaction would be upheld as a sale, then if the debtor failed to repay the debt under the guise of exercising the option to repurchase, the mortgagee would succeed in terminating his mortgagor's equity of redemption without any legally recognized foreclosure action. Indeed, this was the mortgagee's express aim as shown by the testimony during the trial.

Even more questionable was the court's determination to turn the case on the issue of the intention of the parties to convey the land in satisfaction of the debt, and of their freedom to contract. This approach, while appropriate in testing an original transaction which the debtor claims to have been a security agreement, seems less suitable where the court is considering a subsequent conveyance designed to terminate an admitted security relationship without the inconvenience of conventional foreclosure.[12] The question the court should have considered would seem to be whether equity will countenance such a conveyance between mortgagor and mortgagee. No amount of deliberate intention will enable the parties to incorporate a waiver of the equity of redemption in the original mortgage contract, but there is a distinct possibility that the mortgagee may evade the rule against clogging the equity of redemption by compelling the debtor to agree to a subsequent waiver as a condition precedent to getting the loan, this agreement being made before the money is advanced but not being embodied in the mortgage instrument itself. If the loan is made without

[10]McCall v. Carlson, 172 P (2d) 171, 180 (Nev. 1946).

[11]In the principal case, the Statute of Limitations had not run on the first transaction, but there would, of course, be a benefit to be derived from a second conveyance should the original mortgage be so barred.

[12]That other courts have followed the same procedure, however, see Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925).

such an agreement, that element of coercion is no longer possible. However, the superior financial resources of the lender, the mortgagor's compelling desire to find a means of keeping the property,[13] the pressure of the mortgagee's repeated warnings of the large deficiency judgment that might result from a foreclosure, and the creditor's superior knowledge of law and finance constitute advantages which remain with the lender from the time of the execution of the loan, throughout its life, and into the period of default by the borrower.

The Nevada court declared that it had no authority to interfere with a contract made between the parties so long as it was not illegal or against public policy.[14] This assertion does not meet the issue, however, because equity can rule that the mortgagee's attempt to contract for a waiver of the equity of redemption is as much against public policy when made after the mortgage is executed as when put into the original mortgage instrument itself.[15]

Transfers of the equity of redemption made by the mortgagor to the mortgagee subsequent to the mortgagor's default have been upheld by courts in numerous jurisdictions.[16] As was succinctly stated by the

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[13]The mortgagor may be persuaded to convey property worth considerably more than the mortgage debt to the mortgagee, and take a lease and option to repurchase, rather than suffer a foreclosure of the mortgage and earlier loss of the property.

[14]"Our equitable powers do not extend so far as to permit us . arbitrarily to force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed. In this regard, equity respects and upholds the fundamental right of the individual to complete freedom to contract or decline to do so, as he conceives to be for his best interests, so long as his contract is not illegal or against public policy." McCall v. Carlson, 172 P (2d) 171, 187 (Nev. 1946).

[15]"Considered in a broad way, this rule against clogging the equity of redemption is one of the many instances of the setting aside of the deliberate bargains of the parties upon the ground that they are contrary to the policy of the courts. The right of men to hold such contracts as they can get is subject to many limitations imposed for the common good. But especially when it is a case where the contract of the parties comes into real opposition with a fundamental doctrine, its fate is certain at the hands of a court vigilant to protect its own. Since it is all a matter of policy, it cannot be expected that all men will agree as to the propriety of such interference. But to the writer the doctrine against the clog on the equity of redemption seems one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commercial community." Wyman, The Clog on the Equity of Redemption (1908) 21 Harv. L. Rev. 459, 475.

[16]Peugh v. Davis, 96 U.S. 332, 24 L. ed. 775 (1877); Villa v. Rodriguez, 12 Wall. (U.S.) 323, 20 L. ed. 406 (1870); Hush v. Reaugh, 23 F. Supp. 646 (E.D. Ill. 1938); Cole v. Swift, 190 Ark. 499, 79 S.W (2d) 426 (1935); Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062 (1896); Watson v. Edwards, 105 Cal. 70, 38 Pac. 527 (1894); Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925); Cramer v. Wilson, 202 Ill. 83, 66 N.E. 869

California court: "A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract."[17] However, the courts require that the conveyance be made by a separate and distinct contract and must be bona fide,[18] and in order to determine whether a contract for the extinguishment of the equity of redemption is or is not fair and just to the mortgagor, the relation of the parties will be inquired into.[19] The rule obtains commonly that the burden rests on the mortgagee to show the fairness of the transaction and the adequacy of the price.[20] Furthermore, conveyances to the mortgagee by the mortgagor are not only to be searchingly scrutinized, but any such instruments of transfer are to be regarded as but changes in the form or character of the security, and leaving to the debtor his equity of redemption, in absence of a clear showing to the contrary by the mortgagee.[21] These precautions

(1903); Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283 (1903); Seymour v. Mackay, 126 Ill. 341, 18 N.E. 552 (1888); Davis v. Wilson, 21 N.W (2d) 553 (Iowa 1946); Koob v. Zoller, 231 Iowa 1106, 3 N.W (2d) 130 (1942); Morton Farmers' Mutual Ins. Ass'n v. Farquhar, 200 Iowa 1206, 206 N.W 123 (1925); Coster v. Arrow Building & Loan Ass'n, 184 Md. 342, 41 A. (2d) 83 (1945); Moore v. Beverlin, 186 Okla. 620, 99 P (2d) 886 (1940); Hall v. Hall, 41 S.C. 163, 19 S.E. 305 (1894); Gould v. McKillip, 55 Wyo. 251, 99 P (2d)67 (1940); 2 Jones, Mortgages (8th ed. 1928) § 878; see Notes (1931) 29 Mich. L. Rev. 757, (1937) 36 Mich. L. Rev. 111, (1897) 55 Am. St. Rep. 100, 105.

[17]Watson v. Edwards, 105 Cal. 70, 38 Pac. 527, 529 (1894).

[18]Cole v. Swift, 190 Ark, 79 S. W (2d) 426 (1935) (conveyance set aside because the consideration was less than one-half the value of the property); Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062 (1896); Watson v. Edwards, 105 Cal. 70, 38 Pac. 527 (1894); Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552 (1888); Moore v. Beverlin, 186 Okla. 620, 99 P (2d) 886 (1940); Gould v. McKillip, 55 Wyo. 251, 99 P (2d) 67 (1940).

[19]Hush v. Reaugh, 23 F Supp. 646 (E.D. Ill. 1938) (deed from mortgagor to an assignee of a mortgage foreclosure decree set aside for fraud); Cramer v. Wilson, 202 Ill. 83, 66 N.E. 869 (1903); Cassem v. Heustis, 201 Ill. 208, 66 N.E. 283 (1903); Hall v. Hall, 41 S.C. 163, 19 S.E. 305 (1894); Note (1897) 55 Am. St. Rep. 100, 109.

[20]Villa v. Rodriguez, 12 Wall. (U.S.) 323, 20 L. ed. 406 (1870) (conveyance set aside because the mortgage debt plus interest was considerably less than the value of the property); Hush v. Reaugh, 23 F. Supp 646 (E.D. Ill. 1938); Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062 (1896); Caro v. Wollenberg, 68 Ore. 420, 136 Pac. 866 (1913); Hall v. Hall, 41 S.C. 163, 19 S.E. 305 (1894); Hudkins v. Crim, 72 W Va. 418, 78 S.E. 1043 (1913); Walsh, Mortgages (1934) 123. See 1 Glenn, Mortgages (1943) 282 wherein the author states the rule but says that the tendency is away from the requirement that the mortgagee show, affirmatively his innocence with respect to fraud or oppression. It is to be noted that only meager authority supports this statement.

[21]Davis v. Wilson, 21 N.W (2d) 553 (Iowa 1946) (mortgagee after obtaining the

reflect the court's apprehension that the mortgagor may have acted under the force of economic coercion by his lender. Professor Glenn observes: "The prevailing law of the present time, therefore, is that the transaction [the transfer of the mortgagor's equity of redemption to the mortgagee] is scrutinized, not so much for fear of fraud or oppression as to make sure that the arrangement was really subsequent to the mortgage and was not a part of the loan arrangement at the outset. This is the modern rule, despite the fact that our courts, in stating it, often relapse into the old language of 'fraud, oppression, or undue advantage.' "[22]

It is apparent that in the principal case the court did not view the transaction with a jealous regard for the rights of the mortgagor. The question of adequacy of the consideration, which was raised by the mortgagor, was summarily dealt with by saying that "while there seems to be some disparity between the amount of the indebtedness and the value of the property, the evidence at the trial as to the value was conflicting and not of a character to be entitled to much weight. There was no evidence as to *market* value, or that the property had any certain *market* value."[23] The burden of proof in this regard should have been placed squarely on the mortgagee,[24] but the court, instead of requiring the mortgagee to show the adequacy of the price, stressed the mortgagor's extended delinquency in failing to meet his installments of principal and interest, and the virtues of the lease and option to repurchase extended to him by the mortgagee. The inference that the privilege to repurchase upon payment of an amount equal to the former indebtedness plus interest and taxes is equivalent to the mortgagor's redemption rights, is of doubtful validity because under such a private contract equity's protection of the mortgagor's interest dur-

deed to the mortgaged property had conveyed to a bona fide purchaser; mortgagors were awarded a money judgment against the mortgagee for the excess in value of the farm over the amount of the mortgage debt owing to the mortgagee); Koob v. Zoller, 231 Iowa 1106, 3 N.W (2d) 130 (1942); Morton Farmers' Mutual Ins. Ass'n v. Farquhar, 200 Iowa 1206, 206 N.W 123 (1925) (conveyance by the mortgagor to the mortgagee for a nominal consideration raises a presumption that the deed is intended to be a continuation of the security and the presumption is greatly strengthened when the grantor continues in possession).

[22]1 Glenn, Mortgages (1943) 282. See Pierce v. Robinson, Adm'r, 13 Cal. 116, 4 Pac. St. Rep. 116 (1859).

[23]McCall v. Carlson, 172 P. (2d) 171, 182 (Nev. 1946). The court's mistake seems to lie not merely in accepting too little evidence as sufficient to meet the burden of proof, but also in failing even to recognize that the burden of proof should have been on the mortgagee and not the mortgagor.

[24]Supra, note 20.

ing foreclosure proceedings is lacking. The mortgagee's argument that such a settlement saves the expenses of a foreclosure is of slight merit when used to avoid an equitable action established to insure a fair return for the property. In most cases the expenses of foreclosure will be borne by the mortgagor, and in any event the benefit of possible saving does not balance the danger that the mortgagor may be forced to transfer the land for only a part of its value.

It is difficult to see how the mortgagee obtains any legitimate benefit from such a settlement which he could not obtain through a foreclosure sale.[25] If he is willing to pay the amount of the morgage debt, interest and taxes for the land, he can do so by simply bidding that amount at the sale. If no higher bid is obtained, the mortgagee gets the land and the debt is satisfied. If the land will bring more at the sale, the mortgagor is obviously entitled to the excess.

Validating the mortgagor's conveyance of his equity of redemption to the mortgagee is a retrogression toward the practice of strict foreclosure which is out of favor in most American states and entirely prohibited in some jurisdictions.[26] Strict foreclosure has been abandoned largely because of the possibility of the mortgagee's obtaining land worth more than the mortgage debt, which results in a corresponding penalty against the mortgagor. To allow the mortgagee to purchase the equity of redemption in consideration of the cancellation of the

[25]Among the various types of foreclosure proceedings, the foreclosure by action and sale is the prevailing mode of procedure in the United States. It is slower and more expensive than a foreclosure under a power of sale, but an unencumbered title is conveyed if all parties are properly joined. 1 Glenn, Mortgages (1943) § 77; Walsh, Mortgages (1934) § 67. A formal action in equity or statutory proceeding to sell the mortgaged property is equitable in its operation in that it is by public sale. The proceeds of the sale are distributed equally and impartially to the parties, preventing the mortgagee from obtaining an unfair advantage. Walsh, Mortgages (1934) § 67.

[26]Strict foreclosure has been abolished by statute in approximately ten states. The statutes prescribe the foreclosure procedure, generally by action and sale, and forbid any other. In those states in which strict foreclosure is allowed, it is generally limited to special instances. Walsh, Mortgages (1934) § 65. See also 1 Glenn, Mortgages (1943) § 67. Where it is advantageous to all parties concerned, including the mortgagor, due to the fact that the value of the property nearly approximates the amount of the mortgage debt, strict foreclosure is proper. Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237, 17 N. E. 486 (1888); Shepard v. Barrett, 84 N. J. Eq. 408, 93 Atl. 852 (1915); Bresnahan v. Bresnahan, 46 Wis. 385, 1 N.W 39 (1879). Strict foreclosure is the method used to carry out a special foreclosure against a subsequent lienor who was not joined in the original foreclosure. Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237, 17 N. E. 486 (1888); Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465 (1887); Koerner v. Willamette Iron Works, 36 Ore. 90, 58 Pac. 863 (1890).

mortgage debt raises the same chances of inequities. It is no answer to say that the mortgagor may benefit by being relieved from the expenses of foreclosure sale proceedings; the same argument would sustain a formal strict foreclosure. Furthermore, to say that the mortgagor can refuse to sell if it would be disadvantageous is to assume a freedom from economic coercion and an eqality of bargaining power that may not in fact exist.

It seems, therefore, that the courts in upholding conveyances of the equity of redemption subsequent to default are not asserting equity's traditional power as a protector of the mortgagor's rights.[27] It has been suggested that "the impecunious land owner in the toils of the money lender"[28] is an outmoded concept.[29] Yet a member of the Supreme Court of the United States has recently had occasion to declare that: "The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases .. Perhaps the most familiar is the situation of the mortgagor who under the pressure of financial distress conveys his equity of redemption to the mortgagee."[30]

Unless, as does not appear to be the case, the debtor class has reached a position of substantial equality with the creditor class in regard to bargaining power and astuteness in financial transactions, borrowers are still in need of protection by the equity courts against op-

[27]Another example of equity seeming to withdraw some of its protection for debtors may be found in cases in which an original transaction between the parties is in the form of a conveyance of land with an option to repurchase, which the grantor later claims was actually a mortgage. Earlier American authority stated that the burden was on the grantee (alleged mortgagee) to show that the transaction was a true conveyance and not a security device. Conway v. Alexander, 7 Cranch. (U.S.) 218, 3 L. ed. 321 (1812); 1 Jones, Mortgages (8th ed. 1928) § 309. It has been said that the more modern cases tend to take the view that the deed will be presumed to be a conveyance, as is indicated on its face, until the grantor proves that it was intended by the parties to be a mortgage. Hanna, Cases and Materials on Security (2d ed. 1940) 657. See Ucker v. Watson, 169 Ark. 1022, 277 S.W 536 (1925); Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1925); Drennon v. Lavender, 41 Idaho 263, 238 Pac. 532 (1925); Dean v. Smith, 53 N.D. 123, 204 N.W 987 (1925). Contra: Watkins v. Wallace, 206 Ky. 264, 267 S.W. 183 (1924).

[28]Samuel v. Jarrah Corp., L. R. [1904] A.C. 323.

[29]"If the law is fluid enough to adapt itself to changing social conditions, it should find a difference between a 17th century 'impecunious land owner in the toils of a money lender' and a modern business man seeking with eyes wide open to secure a loan on those conditions which he deems most advantageous to himself." Note (1912) 12 Col. L. Rev. 627, 629.

[30]United States v. Bethlehem Steel Corporation, 315 U. S. 289, 327, 62 S. Ct. 581, 600, 86 L. ed. 855 (1942) (Mr. Justice Frankfurter, dissenting).

pressive agreements imposed by their lenders. So long as the *possibility* of economic coercion is sufficient to cancel waivers of redemption rights attempted in the mortgage contract, waivers subsequent to the execution of the mortgage might well be nullified upon the *possibility* that they were prompted by the same inequality in bargaining power. It is not enough for the court to say, as it did in the Nevada case, that had the mortgagor secured legal advice sufficiently early, the loss now occasioned could have been avoided.[31] To protect those persons of lesser wisdom from the effects of obligations unfairly imposed upon them is one of the reasons for the existence of equity's powers. If the courts do not feel inclined to act in situations similar to that arising in the principal case, enactment of legislation requiring a foreclosure sale for the vesting of the equity of redemption in the mortgagee would be the proper solution.

WILLIAM F. PARKERSON, JR.

PERSONAL PROPERTY—FINDER'S RIGHTS AS AGAINST OWNER OF PREMISES WHERE CHATTEL IS FOUND. [Minnesota and Virginia]

Legal controversies over the rights of contesting claimants to personalty found on premises not owned by the finder present difficulties of solution arising from both the variety of legal concepts and the close questions of fact which may be involved. The results often turn on whether the property is classified as *mislaid, lost,* or *abandoned,* and this classification is frequently difficult to decide since in any given case the previous owner, his intention and the circumstances under which the goods passed out of his immediate control are all unknown.

Mislaid goods are those intentionally put aside and later forgotten.[1] The most important single fact in determining whether the property was mislaid or lost is the place where it was found,[2] since this may be

[31] " if appellant had sought, at a time sufficiently early to be effective, competent and disinterested legal advice and guidance, in connection with his transactions with respondents, he would, most likely, have been able to avoid such loss as has probably become inevitable by reason of his failure to appreciate fully the meaning, scope and limitations of his rights, and those of the respondents, in connection with said transactions, and to act accordingly." McCall v. Carlson, 172 P (2d) 171, 188 (Nev. 1946).

[1] Brown, Personal Property (1936) 25.

[2] Money found on floor of bank lobby almost certainly is lost; golf clubs in the same place would be almost as certainly mislaid; if either were found on the highway they would be called lost. A purse on a writing desk in a bank lobby is probably mislaid; a purse or small parcel on a seat of a railroad train is difficult to classify either way—while a parcel in the baggage rack would be classified as mis-

the only clue as to the manner in which it left the possession of the original owner.[3] Although writers differ as to whether the classification has any valid purpose,[4] the courts quite generally hold that if the goods are regarded as mislaid, the possession of them is not open to the first finder but is still in the original owner, and that the owner of the locus in quo is the custodian of the property for its true owner.[5] The courts have used "possession" and "custody" interchangeably with respect to the land owner's rights in such cases. Though there is a material distinction between the two terms,[6] for present purposes it is sufficient to say that no third person can, as a finder, acquire an interest in the goods,[7] whether the court treats the owner of locus in quo as the custodian or as the bailee of the property.

Lost property is that which casually and involuntarily passes out of the possession of the owner, the whereabouts of which he does not afterward know. The element of intentional deposit which is present in the case of mislaid goods is lacking in the case of lost goods.[8] The

laid, the same parcel on floor would probably be classified as lost. Aigler, Rights of Finder (1923) 21 Mich. L. Rev. 664, 668, n. 21.

[3]"While concealed goods are voluntarily placed, the very act of concealment shows that they are not placed in the protection of the owner of the property where they are hidden and so in such case he has no priority over the finder." Brown, Personal Property (1936) 25. While this appears to be a logical conclusion of the theory, no cases are cited as giving it authority.

[4]Moreland, Does the Place Where a Lost Article Is Found Determine the Rights of the Finder? (1927) 15 Ky. L. J. 225, reprinted in Fryer, Readings on Personal Property (3d ed. 1938) 343, 344. Note (1925) 9 Minn. L. Rev. 390.

[5]Kincaid v. Eaton, 98 Mass. 139, 93 Am. Dec. 142 (1867); McAvoy v. Medina, 11 Allen 548, 87 Am. Dec. 733 (Mass. 1866); Foster v. Fidelity Safe Deposit Co., 264 Mo. 89, 174 S. W. 376, L. R. A. 1916A 655 (1915); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W 878 (1902); Foulke v. N. Y. Consolidated R. R., 228 N. Y. 269, 127 N. E. 237, 9 A. L. R. 1384 (1920).

[6]Possession requires actual power over the res, ability to make use of it, and a manifested intent to control it in one's own right—an intent to exclude others from it. Brown, Personal Property (1936) 20. Custody refers to the keeping of and caring for the property of another subject to his control and direction without an adverse interest or right therein. It is usually applied to the keeping and handling of property by servants or one in immediate presence of the owner. The owner has not relinquished his intent to control the property. Two historical exceptions to the rule that physical control and intent to exclude others are sufficient for possession are the cases of the slave or servant and the person who counts money in the presence of its owner. Here any intent to exclude is exercised for benefit of owner of the chattel. Tarbox v. Tarbox, 111 Me. 374, 89 Atl. 194 (1914); 10 Words & Phrases 725; Brown, Personal Property (1936) 21; Fryer, Readings on Personal Property (3d ed. 1938) 110.

[7]See note 5, supra.

[8]Moreland, Does the Place Where a Lost Article Is Found Determine the Rights of the Finder? (1927) 15 Ky. L. J. 225, reprinted in Fryer, Readings on Personal Property (3d ed. 1938) 343, 344.

general view in the United States, though subject to exceptions, is that if the property has been classified as lost the finder prevails against everyone but a prior possessor.[9] Because the presence or absence of an intentional deposit is in many cases a difficult question of fact to determine, the distinction between mislaid and lost goods was eliminated in the case of *Sillicott v. Louisville Trust Co.* [10] where it was held that whether the bond in question had been lost or mislaid, the bank, by virtue of its control of the vault where it was found and its fiduciary relation to its customers should prevail over the finder. By this ruling, the express policy of the law to protect the original owner as far as possible was served, inasmuch as the owner would normally have a better chance of recovering the property from the landowner than from the finder.

Goods become abandoned only when the owner leaves the property free to the appropriation of the next comer, whoever he may be, without an intention to repossess it for himself.[11] Lost property and abandoned property are distinguished by the intent of the original owner with respect to the chattel. As to the former, the original owner has not given up his intent to own the article; in the latter case he has manifested such an intent.[12] This distinction is entirely separate from that

[9]Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172 (1878); Weeks V Hackett, 104 Me. 264, 71 Atl. 858 (1908); Danielson v. Roberts, 44 Ore. 108, 74 Pac. 913 (1904); Durfree v. Jones, 11 R. I. 588, 23 Am. Rep. 528, (1877). Brown, Personal Property (1936) 23. In mitigating the harshness of the American Rule the courts have imposed the following limitations and exceptions to it in favor of the land owner: Where the finder was a trespasser, Barker v. Bates, 13 Pick. 225, 23 Am. Dec. 678 (Mass. 1832); where the appropriator of abandoned oil exceeds the term of his license, Gregg v. Caldwell-Guadalupe Pick Up Station, 286 S. W 1083 (Tex. Civ. App. 1926); where bonds were found in a bank vault. Sillicott v. Louisville Trust Co., 205 Ky. 234, 265 S. W 612, 43 A. L. R. 28 (1924), and Cohen v. Manufacturer's Safe Deposit Co., 271 App. Div. 428, 65 N. Y. S. (2d) 791 (1946); where aerolites were found and claimed by one other than land owners, Goodard v. Winchell, 86 Iowa 71, 56 N. W 1124, 17 L. R. A. 788 (1892); where quartz was found that was not part of a natural deposit, Ferguson v. Ray, 44 Ore. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477 (1904); where abandoned mine refuse was deposited on land of another, Fidelity-Philadelphia Trust Co. v. Lehigh Valley Coal Co., 294 Pa. 47, 143 Atl. 474 (1928).

[10]205 Ky. 234, 265 S. W 612, 43 A. L. R. 28 (1924). Although the decision of the Sillicott case has been subjected to some criticism, it has been cited with favor by a number of courts: Norris v. Camp, 144 F. (2d) 1, 3 (C. C. A. 10th, 1944); Pyle v. Springfield Marine Bank, 330 Ill. App. 1, 70 N. E. (2d) 257, 259 (1946); Toledo Trust Co. v. Simmons, 52 Ohio App. 373, 3 N. E. (2d) 661, 663 (1935). Its use in Flax v. Monticello Realty Co., 185 Va. 474, 39 S. E. (2d) 308 (1946) adds authoritative weight to a theory of rights which puts the protection of the rights of the true owner above those of the finder. But see a criticism in Note (1947) 33 Va. L. Rev. 110.

[11]Note (1920) 8 Calif. L. Rev. 445.

[12]Aigler, Rights of Finders (1923) 21 Mich. L. Rev. 664, 665.

between mislaid property and lost property which is based upon the physical circumstances under which the property left the keeping of the original owner. Thus, for the ownership of goods to pass through the process of abandonment there must be an act and intention of relinquishing rights in the property followed by an act and intention of the finder to assert dominion and control over the goods in his own right. The abandoned chattel is deemed to have returned to the common mass,[13] and under the "American Rule"[14] the first one to possess it "lawfully" with an intent to assert a title in it for himself becomes the owner, and his rights are prior to those of the owner of the locus in quo.[15] But under the "English Rule,"[16] which is favored by many writers,[17] the land owner will prevail because his general intent to exclude all comers from anything on his land will defeat the specific intent to acquire dominion and control necessary for the finder to perfect lawful possession and ownership.[18] Although most American courts reject this view, some limitations on the rights of finders of both lost and abandoned chattels are recognized in special circumstances.[19]

If goods originally mislaid are found before lapse of time and nonuser raise a presumption of abandonment,[20] it is apparent that the find-

[13]Aigler, Rights of Finders (1923) 21 Mich. L. Rev. 664, 665.

[14]Foster v. Fidelity Safe Deposit Co., 162 Mo. App. 165, 145 S. W 139 (1912), aff'd 264 Mo. 89, 144 S. W. 376 (1915); Graham v. Purcell, 126 App. Div. 407, 110 N. Y. Supp. 813 (1908); Wyman v. Hurlburt, 12 Ohio 81, 40 Am. Dec. 461 (1843); Gregg v. Caldwell-Guadalupe Pick-Up Station, 286 S. W 1083 (Tex. Civ. App. 1926).

[15]For an interesting example of possession without the requisite intent, see Holland v. Johnson, 22 Ga. App. 162, 95 S. E. 762 (1918).

[16]Elwes v. Brigg Gas Co., 33 Ch. Div. 562 (1886); South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44.

[17]Brown, Personal Property (1936) 23. For a criticism of cases which are the foundation of the English Rule see Goodhart, Three Cases on Possession (1928) 3 Camb. L. J. 195, reprinted in Fryer, Readings on Personal Property (3d ed. 1938) 72. For a rebuttal see Francis, Three Cases on Possession—Some Further Observations (1928) 14 St. Louis L. Rev. 11, reprinted in Fryer, Readings on Personal Property (3d ed. 1938) 85.

[18]It is submitted that the use of the word *lawfully* in the American Rule reconciles it in many respects with the English Rule. For example, under the American Rule, taking by a trespasser or one exceeding the term of his license would be unlawful and give the finder no rights. See note 9, supra. Thus, the same result would be reached as if the English Rule were applied. This reduces the question under the American Rule to whether the finder was a traspasser and if not, what were his privileges under his license. It would be difficult to argue that an implied term of the license was that the licensee could have anything he found.

[19]See note 9, supra.

[20]It must be remembered that the intent of the last owner is the fact which controls as to whether a chattel is abandoned. In determining this intent, lapse of time and non-user are the most reliable criteria. Erickson v. Sinykin, 26 N. W (2d) 172 (Minn. 1947). The circumstances and place of leaving the chattel are considered:

er cannot have a lawful possession against the owner of the locus in quo. If, after having been mislaid, the goods become presumptively abandoned, the rights of the finder and landowner depend upon whether the particular court chooses to apply the "American" or "English" rule.

Two recent cases—*Flax v. Monticello Realty Co.*[21] and *Erickson v. Sinykin*,[22] which cites and distinguishes the *Flax* case—offer an interesting comparison of the application of the law of this subject to fairly typical situations.

In the *Flax* case a maid in a hotel found a diamond brooch wrapped in tissue in the crevices of a mattress. Thinking it belonged to the present occupant, she put it on the dresser. The present occupant found it there and later turned it over to the hotel keeper asserting an interest in the diamond himself in case the true owner was not found.[23] The Virginia court ruled that the diamond was mislaid and that the occupant, who had attempted to appropriate it, acquired no possessory interest. The innkeeper was held custodian of the diamond for the true owner.

In the *Erickson* case, a painter who found a roll of old style paper money under a rug while he was engaged in painting a hotel room was induced to turn the money over to the hotel keeper by the latter's fraudulent misrepresentation that he knew the owner. The Minnesota court held that the length of time since the bills had gone out of issue and the non-user thereof indicated an abandonment, and that the painter, as first finder, could recover the money from the hotel keeper.

The cases may be distinguished on their facts on several points. First of all, in the *Flax case* the place of finding and the surrounding circumstances indicated a recent mislaying of the diamond, with no attempt at concealment. In the *Erickson* case the money was deliberate-

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Manure left in street, Hasten v. Lockwood, 37 Conn. 500 (1871); steamboat and cargo sunk for thirty years, owner not attempting to reclaim, Eads v. Brazelton, 22 Ark. 499 (1861); rebuying used seltzer bottles by the original owner, Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 S. W. 1156 (1907); mining slag thrown away, McGoon v. Ankeny, 11 Ill. 558 (1850); cf. Log Owner's Booming Co. v. Hubbell, 13 Mich. 65, 97 N. W 157 (1903) where logs had been left for thirty years on a rollaway and had become imbedded in the earth and overgrown with foliage.

[21]185 Va. 474, 39 S. E. (2d) 308 (1946).

[22]26 N. W (2d) 172 (Minn. 1947).

[23]The evidence conflicted as to whether hotel keeper agreed to act as bailee for Flax, but the court held this was immaterial since such an agreement would have been void as a breach of trust to the true owner. 185 Va. 474, 479, 39 S. E. (2d) 308, 311 (1946).

ly put where found, but the length of time elapsed and non-user supported a finding of fact that the goods had become abandoned.[24] In the *Flax* case the plaintiff-claimant was not the first finder, while in the *Erickson* case he was, and in the latter case the defendant-landowner had fraudulently induced the plaintiff to give up his possession.[25]

The *Flax* decision, strictly interpreted, proceeds on the theory that the owner of the private or semi-private place where the property was mislaid becomes the custodian of the goods with a duty to care for them and hold them for the true owner.[26] This theory of the case is partially obscured, however, by the court's answer to the plaintiff's contention that the diamond was abandoned.[27] It was said that even if the diamond had been abandoned (the facts plainly refuting such a finding), the owner of the locus in quo would still prevail, because of his intent to exclude interference with anything on the premises. This dictum follows the English line of authority as to rights to abandoned property and is plainly contrary in legal theory to the so-called American view.

In the *Erickson* case the defendant hotel keeper predicated his rights on the decision of the *Flax* case.[28] The Minnesota court distinguished that decision on the fact that in the *Flax* case the maid had been a prior finder. The Virginia court, however, had ascribed no legal effect to the prior finding of the maid, although in its opinion the court pointedly remarked that because the maid had made a prior finding and asserted no right to the diamond, the plaintiff "by mere coincidence found himself in an advantageous position to assert some sort of right [to the diamond]."[29] Thus, it appears that the Minnesota

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[24]Had there been no lapse of time to indicate an abandonment, the facts of Erickson v. Sinykin would have created a situation to which Brown's theory of concealment would have been applicable. See note 3, supra.

[25]It is submitted that this distinction was one of moral persuasion on the court, but that its legal significance was nugatory. If the hotel owner had a right to the possession, it should have made no difference how he got it from the painter. It is an interesting sidelight to note that each decision accords with one's sense of fairness.

[26]185 Va. 474, 478, 39 S. E. (2d) 308, 311 (1946).

[27]185 Va. 474, 478, 39 S. E. (2d) 308, 311 (1946). The court cites Pollack and Wrights Essays as quoted in South Staffordshire Water Works Co. v. Sharman, [1896] 2 Q. B. 44. This part of the Flax opinion is dictum but may be an indication that Virginia would follow the English Rule if a case presented itself today. It is well settled that a hotel keeper is in possession of his rooms and does not stand in a landlord-tenant relationship with his guests.

[28]26 N. W.)2d) 172, 175 (Minn. 1947).

[29]185 Va. 474, 478, 39 S. E. (2d) 308, 310 (1946). It should not affect the legal rights of the finder that he had a windfall. Every find is a windfall. It is difficult

court relied upon a tenuous distinction of the *Flax* case. If the cases are compared for what they decide, they are very obviously distinguishable on the ground that the *Flax* case dealt with mislaid goods while the *Erickson* case dealt with abandoned goods.[30]

When the dictum in each case is compared with the holding and dictum of the other, however, the two cases present legal theories of possession which no distinction of fact can reconcile. As already indicated, the Virginia court in *dictum* approved the English view that the landowner should prevail over the finder of abandoned goods, while the Minnesota court *held* to the contrary, in conformity with the American rule. On the other hand, the *Erickson* case opinion contains *dictum* that had the roll of bills been considered lost instead of abandoned, the finder would still have been awarded the property.[31] This view may not appear to conflict with the *Flax* case holding, inasmuch as the latter decision dealt with mislaid, not lost, goods. But the precedents relied upon and the language employed by the Virginia court indicated that it actually followed the comparatively new line of authority as developed in *Sillicott v. Louisville Trust Co.*,[32] to the effect that the owner of the locus in quo of private and semi-private places is a custodian for the true owner whether goods were *mislaid or lost* there. This position is clearly irreconcilable with the general rule which is reflected in the *Erickson* case dictum.[33]

The extraordinary instance is presented, therefore, of two decisions, handed down only a few months apart, readily reconcilable as to their holdings and conversely irreconcilable in their dicta. Such an occurrence gives forceful evidence of the misgivings with which litigants must approach this common type of controversy.

EDMUND D. WELLS, JR.

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to see the legal significance of this part of the Flax opinion since the case is dealt with as one involving mislaid goods.

[30]26 N. W. (2d) 172, 175 (Minn. 1947). Having passed over the main distinguishing feature of the two cases, the court in the Erickson case here distinguished the type of work each servant was engaged in. Had the plaintiff in the Flax case been the maid this distinction would have been material. But so far as the cases actually developed, the court was distinguishing the painter's rights from those of a person whose rights were not involved in the Flax case, because the maid, the original finder, left the diamond for the room occupant, who became the claimant as against the hotel keeper.

[31]26 N. W (2d) 172, 177 (Minn. 1947).

[32]205 Ky. 234, 265 S. W 612, 43 A. L. R. 28 (1924).

[33]Authority for the Erickson holding and dictum is available in Robertson v. Ellis, 58 Ore. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979 (1921), which follows the general line of American authority as to lost and abandoned goods.

SURETYSHIP—CONSIDERATION TO SUPPORT A GRATUITOUS GUARANTY PROMISE MADE SUBSEQUENT TO THE EXECUTION OF THE PRINCIPAL CONTRACT. [Washington]

The recent Washington decision of *Cowles Publishing Co. v. McMann*[1] affords a clear demonstration of how easily-stated and long-accepted rules of law still cause trouble in their specific application. Authorities agree that a gratuitous guaranty promise given at the time of making the principal contract is supported by the same consideration which supports the principal obligation;[2] the creditor's promise to the principal debtor is made in consideration both of the return promise of the debtor and of the suretyship agreement of the third party. The corollary to this rule is that a promise of guaranty made subsequently to the formation of the principal contract must have an independent consideration,[3] unless that guaranty is made as a result of a previous arrangement or understanding that the promise of the guarantor would be given.[4] In the latter situation, the creditor is regarded as having dealt with the debtor on the inducement of the third party's prospective guaranty.

The difficulty in applying these logical principles arises in the determination of what the elements of the previous arrangement must be to allow the creditor to claim that he had entered into the principal contract in reliance on the actual guaranty which is made later. In the *Cowles* case the plaintiff publishing company executed a newspaper distributor's contract with one Richard Baker. A guaranty contract form was printed at the end of the distributorship contract, and Baker had been told that he would be required to post a cash bond and to obtain guarantors. To this he agreed but did not tell plaintiff the names of the people who would be the guarantors. The plaintiff, being anxious to have its papers circulated in the area, immediately began delivering the papers to Baker for distribution. Several weeks thereafter Baker's mother-in-law and father-in-law signed the contract as guarantors.

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[1]172 P (2d) 235 (Wash. 1946).

[2]Arant, Suretyship (1931) 71; Arnold, Suretyship and Guaranty (1927) 40, 41; Brandt, Suretyship and Guaranty (1878) 8; 24 Am. Jur. 906; 38 C. J. S. 1163.

[3]Arant, Suretyship (1931) 72; Arnold, Suretyship and Guaranty (1927) 41; Brandt, Suretyship and Guaranty (1878) 10, 11; 24 Am. Jur. 906; 38 C. J. S. 1164.

[4]Brandt, Suretyship and Guaranty (1878) 8: "Where a promise that a surety or guarantor will become liable is part of the inducement on which the creditor acts in creating the original debt, this is a sufficient consideration to support the contract of the surety or guarantor who subsequently signs." 2 Daniel, Negotiable Instruments (3d ed. 1886) § 1760 (2); 6 Williston, Contracts (Rev. ed. 1938) § 1874; 24 Am. Jur. 906; 38 C. J. S. 1164.

Although they had signed a similar agreement in behalf of Baker the previous year, they insisted that they did not know anything about the present contract until it was submitted to them for their signature. Baker's account was very soon in arrears, and the plaintiff, by exercising a contractual right, terminated the contract after about eight months, at which time Baker owed $1899. Plaintiff sued the guarantors for this amount, seeking to prove the existence of a binding contract under the rule that a subsequently executed guaranty " ' is founded upon a consideration if its execution is the result of previous arrangement, the principal obligation having been induced by or created on the faith of the guaranty' "[5] Defendants pleaded lack of consideration for their guaranty on the argument that since they were not named by Baker at the time the principal contract was executed and did not know about it, plaintiff did not enter the contract on the reliance that *they,* the specific defendants, would sign later.

In a 5 to 4 decision the Supreme Court of Washington upheld the judgment of the trial court that the defendants were not liable on the surety contract. The majority, without designating the categories into which the supporting cases fitted, stated:

> "A review of the cases makes it apparent that the rule contended for by appellant has been limited in its application to situations where at the time the principal obligation is entered into: (1) The guarantor has offered or promised the debtor to guarantee the debt for him and the debtor communicates this information to the creditor who executes the principal contract in reliance thereon, (2) or the guarantor makes such promise direct to the creditor with the same result, (3) or the debtor gives the creditor an assurance that if he later deems the debt insecure he might look to a certain person, then named by the debtor, to guarantee the debt."[6]

And, in specific reference to the principal case situation, it was said:

> "The cases clearly show that the basic premise of the rule is that the creditor, in entering into the principal contract, *relied upon an existing offer or promise of the guarantor to bind himself at some future date.* There was no such offer or promise here, and thus the rule has no application."[7]

Thus, the court would require a specifically identified person to promise to bind himself at a future time.[8]

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[5]172 P (2d) 235, 237 (Wash. 1946) quoting 24 Am. Jur. 906.
[6]172 P (2d) 235, 238 (Wash. 1946).
[7]172 P (2d) 235, 238 (Wash. 1946).
[8]It seems that the court, by its limiting interpretation, has created an unfor-

The minority justices contended that these three categories are not exclusive and would hold that where the principal contract was entered into by the creditor on the faith of the debtor's promise to secure some guarantor acceptable to the creditor, this promise being incorporated into the principal contract with the contract of guaranty printed on the same instrument, the subsequent signing by the acceptable guarantor is supported by the same consideration which sustains the principal contract.

Explicit authority to establish this proposition is difficult to discover because in many of the cases imposing liability upon a surety subsequently obtained in accordance with the debtor's promise, the opinions do not state whether the promise was to procure a named party to make the guaranty or merely to get some undesignated person to serve as surety.[9] However, the rules as stated in the decisions are often broad enough to cover the latter situation,[10] and relevant propositions found in various treatises[11] are sufficiently equivocal on this exact point to be open to the same interpretation. It seems a fair inference that if the rule were accepted that a subsequent guarantor can not be held liable unless his identity was specified when the principal contract was executed, the courts would make sure to point out in the opinions that the surety who is required to pay was so identified. The fact that this matter often goes unmentioned gives reason to believe that it is not considered a crucial factor. In some opinions the language used by the courts to describe the negotiations surrounding the execution of the principal contract gives the definite impression

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tunate and apparently unnoticed inconsistency. The third category, as stated by the court, does not require that the named person must have made a promise to either the creditor or the principal debtor at the time of the execution of the contract, and the cases bear out this interpretation. But, the court has unwittingly removed all validity that it wished to attach to the third category by insisting that the rule applies *only where the creditor relied upon an existing offer of the guarantor.*

[9]For example, Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669 (1896); De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402 (1896).

[10]Samson v. Thornton, 3 Metcalf 275, 37 Am. Dec. 135 (Mass. 1841); Considine v. Gallagher, 31 Wash. 669, 72 Pac. 469 (1903); De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402 (1896).

[11]See authorities cited in note 4, supra, and see: Note (1910 27 L. R. A. (N. S.) 189, 190: "... there is much authority for the view that a contract induced by the promise of one of the parties that he will furnish a surety for the faithful performance of his contract affords sufficient consideration for the contract of suretyship when it is given, although no new consideration passes." Note (1911) 44 L. R. A. (N. S.) 481, 485: "This exception is recognized in most of the cases already cited in this note, and often the language of the court is broad enough to make a promise by the principal to procure any signer in general, rather than that some particular signer, sufficient to remove the case from the operation of the general rule."

that the debtor merely agreed to obtain some guarantor, without any individual being specified;[12] and yet, the person who later signed as surety was held liable, and the consideration given by the creditor for the principal obligation was readily accepted as sustaining the guaranty contract.[13]

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[12]Smith v. Molleson, 148 N. Y. 241, 245, 42 N. E. 669, 670 (1896). There is no indication that the surety who subsequently signed the bond was named at the time the principal contract was executed. "It was agreed between the plaintiff and the contractors that the latter should give to him a bond. . and, in pursuance of this agreement, the defendant, in behalf of the contractors, executed, under seal, and delivered, the instrument. "

Title Guaranty & Surety Co. v. Packard-Spink Co., 75 Wash. 178, 134 Pac. 812, 813 (1913). The defendant entered into a contract with the City of Seattle, requiring a bond, which was furnished by the plaintiff on the condition that defendant would indemnify it. Defendant delivered this indemnity bond signed by it and three members of the Packard family. Plaintiff was dissatisfied with the security and requested the execution of a new bond, which was furnished, with Emma S. Packard as an additional surety, about three months after the first agreement and at a time when the work was about a third completed. "It is not necessary to its validity that a written agreement to indemnify against liability under a contract be executed simultaneously with the contract indemnified. It is enough that it be executed in compliance with the agreement whether at the time of the agreement or thereafter."

De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402, 404 (1896). Plaintiff, on April 30, 1890, entered into a contract with Jordan whereby Jordan agreed to furnish materials and to build a house for plaintiff. The bond which defendant signed as surety was dated May 1st, but the evidence tended to show that it was not executed until the 8th. The facts do not disclose that any specific person was named to be surety. The language of the court seems to infer that any one who had signed would have been held liable. " it fairly appears from the testimony of appellant which is not contradicted, that it was understood and intended that a bond should be given to secure the performance of the contract. "

Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179, 180 (1814). The debtor promised the creditor that either William Bird *or* Abraham Bird (the defendant), the debtor's brothers, would sign. The note was signed subsequently by defendant who, at the time it was signed, told the creditor he did it to make him "easy," and that he would not be accountable. The court, nevertheless, held him liable: "The plaintiff parted with his land without taking a mortgage upon the faith of receiving a note so secured. Although *no evidence exists of an agreement on the part of the defendant to indorse, before the bargain was made,* yet the plaintiff had a right to presume, when the names of the purchaser's brothers were mentioned to him, that there had been an agreement between the brothers for that purpose." [Italics supplied.]

[13]Smith v. Molleson, 148 N. Y. 241, 245-6, 42 N. E. 669, 670 (1896). "Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff, and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another furnished a consideration for the bond."

Title Guaranty & Surety Co. of Scranton, Pa. v. Packard-Spink Co., 75 Wash. 178, 134 Pac. 812, 813 (1913). Quoting from Considine v. Gallagher, 31 Wash. 669, 72 Pac. 469 (1903), the court held the second guaranty binding: "The general rule

Furthermore, the majority of the Washington court was in error in assuming that the creditor must rely "... upon an existing offer or promise of the guarantor to bind himself at some future date."[14] Decisions in several jurisdictions have held the subsequent signer of the guaranty contract liable even though he did not even know, at the time the principal contract was executed, that the debtor had designated him as the prospective surety.[15] It seems obvious that in those cases the per-

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in regard to guaranty is that, if the guaranty and contract guaranteed are a part of the same transaction, the consideration for the latter supports the former . ."

De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 402, 404 (1896). After finding that it was intended that a bond was to be given, the court said: "That being so, it cannot be said that the bond was executed without consideration."

[14]172 P. (2d) 235, 238 (Wash. 1946). In view of the decisions cited in note 15, infra, there seems to be no legal requisite of a promise existing in fact at the time the principal contract is executed. Resort to a fiction—that when the promise is actually made at a later time, it relates back to the time of the execution of the principal contract— might produce an "existing promise" as a figure of speech. But this does not seem to be what the Washington court had in mind.

[15]Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008 (1903). The debtor agreed with the plaintiff that they would secure Mangrum, the defendant, to sign the note. Although the opinion does not state whether or not Mangrum knew of this promise prior to his signing without new consideration, it was held: "The execution by Mangrum, being in pursuance of the original agreement, relates back to and takes effect the same as if it had been coincident with the execution by the principal debtors."

Ailes v. Miller, 52 Ind. App. 280, 100 N. E. 475 (1913). The deceased son of defendant had received a loan from plaintiff, saying that his father would sign as surety. About six weeks after the loan was made, the son died. A few days later plaintiff saw defendant and told him what had happened. Defendant, although not compelled to sign, ratified his son's agreement when he did sign and was held liable. "But the agreement of the principal to give his father as security on the note was not consummated until the note was actually signed by appellee."

Van Houten v. Van Houten, 202 Iowa 1085, 209 N. W 293, 295 (1926). The defendant's husband was over drawn at the bank. Plaintiff, who had previously helped in such matters, went to the bank and gave notes to take up the overdraft. Defendant's husband agreed to give plaintiff his note to cover the amount and "that Edna [defendant] should sign it with him." Defendant was not present at the bank when this promise was made, although she subsequently signed the note. "The note and the agreement pursuant to which it was given on the undisputed evidence were not complete or to become effective until she signed. With her signature to the note the original arrangement became a completed contract, and the consideration for that contract and for the note supports her signature."

Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179 (1814), see note 12, supra.

Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468 (1894). The principal, without the surety's knowledge, promised the creditor that the surety would sign. The Court ruled that until the surety had signed, she was in no way bound; but, "In signing, she in fact carried out that agreement, and she must be conclusively presumed to have so intended when she signed,—to have intended to carry out any agreement with respect to her signing which the principal, who requested her to sign, had made."

McNaught v. McClaughry, 42 N. Y. 22, 24 (1870). The facts of the case do not

son named by the debtor as the one to become a surety would not have been under any liability to the creditor had the suretyship agreement not actually been executed later, because the surety did not himself make any promise to the creditor until that time.[16] Since the creditor performed no new act which created a new consideration at the time the surety did sign the guaranty, the consideration which made the surety's promise binding must have moved from the creditor when the principal contract was executed. Thus, the creditor is regarded as having entered the principal contract in return for both the debtor's present promise to perform and the designated person's prospective guaranty of performance.

There seems to be no logical or legal reason for the difference in holding liable one person who subsequently signs a guaranty agreement without any new consideration because he was named, albeit without authorization, by the principal debtor at the time the principal contract was executed, and in not holding liable another person similarly situated merely because he was *not named* by the debtor when the principal contract was executed. In both situations the debtor has agreed to procure a surety acceptable to the creditor. In neither situation did the person who later made the guaranty make any promise to the creditor at the time the creditor entered into the principal contract; nor can the creditor have any rights against either of the third persons until he actually makes the guaranty. And, in neither situa-

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indicate that the father was aware of the son's action at the time the son gave his promise that the creditor could look to his father for security. "At the time of making and delivering the note, *Abram promised and agreed with the plaintiff, that he would procure his father to sign the note as surety,* if at any time the plaintiff should desire it, or should deem himself insecure. The plaintiff accepted the note upon this agreement." [Italics supplied.] (In view of the marked similarity in the language employed, it appears that this case was the authority used by the majority for its third classification.)

Harrington v. Brown, 77 N. Y. 72, 74, 75 (1879). Medbury asked Mrs. Harrington for a loan which was refused unless Mrs. Brown would sign as surety therefor. Medbury said that Mrs. Brown would sign. It was two years before Mrs. Harrington presented the note for Mrs. Brown's signature. Even so, Mrs. Brown was held liable: "The time of signing is of no importance. It is only material to ascertain whether the payee parted with her property upon the condition that Mrs. Brown would sign the note." " . although Mrs. Brown *did not know* of the arrangement and did not sign the note until after the consideration passed from the payee to Medbury. It is enough that she signed the note at the request of the person who had given the assurance that she would do so." [Italics supplied.]

But see Tri-State Lumber & Shingle Co. v. Proctor, 233 Mo. App. 1207, 128 S. W (2d) 1116, 1121 (1939).

[16]Ailes v. Miller, 52 Ind. App. 280, 100 N. E. 475 (1913); Bowen v. Thwing, 56 Minn. 177, 57 N. W 468 (1894); Harrington v. Brown, 77 N. Y. 72 (1879).

tion does the creditor give any new consideration at the time the third persons agree to assure the principal obligation. If the creditor's original consideration serves to support the subsequent guaranty in one situation, it should have the same effect in the other. In both cases the creditor acts in consideration of a prospective promise of a third party; and the fact that this party is named in one case and not in the other should not afford any legal distinction between the cases.[17]

The courts have sometimes justified the holding of the sureties who later signed guaranties on the theory that the principal obligation was not executed until the surety signed,[18] and thus the creditor's consideration did not pass until that time and was therefore given for both the debtor's and the surety's promises. However, this seems no more than a judicial rationalization not necessarily reflecting the intention of the parties, because in several cases imposing liability on the surety performance of the principal contract had actually been started before the surety signed.[19] It is unlikely that the parties thought they were performing a contract in advance of its execution. Thus, the mere fact that in the principal case the distributorship contract was being car-

[17]It may be argued that the courts should never have seen fit to find consideration in cases where the debtor had, without authorization, named a person as available to become a surety. Since such named person made no promise to either creditor or debtor before or at the execution of the principal contract, it could logically have been ruled that no consideration passed to him then or later, when he signed as surety. Once the law recognized a binding obligation here, however, it takes very little further stretching of the concept of consideration for surety promises to justify holding the unnamed surety who later signs.

[18]Van Houten v. Van Houten, 202 Iowa 1085, 209 N. W 293, 295 (1926); Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669, 670 (1896); 6 Williston, Contracts (Rev. ed. 1938) § 1874. See the same authority for an interesting theory of novation in such situations: "Sometimes, however, it is clear that the creditor has made no condition in his bargain with the debtor, but has relied on the promise of the latter to provide a surety subsequently. Even in such a case the surety should be held. His promise is taken by way of novation in satisfaction of the principal debtor's promise to provide a surety. There is no greater difficulty in such a novation than in any case where a promisee accepts the promise of a new obligor in lieu of the promise of the previous one."

[19]Ailes v. Miller, 52 Ind. App. 280, 100 N. E. 475 (1913); Van Houten v. Van Houten, 202 Iowa 1085, 209 N. W. 293 (1926); Kneisley Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 S. W. 840 (1908); Harrington v. Brown, 77 N. Y. 72 (1879); Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669 (1896); De Mattos v. Jordan, 15 Wash. 378, 46 Pac.402 (1896); Title Guaranty & Surety Co. v. Packard-Spink Co., 75 Wash. 178, 134 Pac. 812 (1913); 40 C. J. 354: "An antecedent promise of a contractor to give a bond indemnifying against liens is a sufficient consideration for the execution of such a bond subsequent to the execution of the building contract, and either before or after the commencement of work thereunder " Note (1911) 44 L. R. A. (N. S.) 481, 485.

ried out before the defendants signed the guaranty should not control the issue as to when the creditor's consideration was passed.[20]

While the rules recited by the majority of the Washington court are amply supported by precedent and while the weight of authority may appear to sustain the decision releasing the surety, yet the court's application of the rules seems unnecessarily narrow and fails to give recognition to those decisions which have held sureties liable in comparable situations. The dissenting judges took cognizance of those precedents which would enable the courts to reach the preferable result of imposing liability on persons who execute formal guaranties on which creditors, in good faith, rely in extending credit to their principal debtors.

THOMAS O. FLEMING

SURETYSHIP—RIGHT OF SURETY ON CRIMINAL BOND TO RECOVER REIMBURSEMENT OR CONTRIBUTION. [Minnesota]

The recent decision of *Sansome v. Samuelson*,[1] a case of first impression in Minnesota, presented a question which few courts in the United States have been called upon to consider whether the right of contribution exists as between cosureties on a criminal recognizance under which the accused has failed to appear. A judgment on the bond had been entered in favor of the United States, and the present plaintiff, as one of the cosureties on the bond, had been required to satisfy the judgment in full. He then instituted this action for contribution. In the absence of direct precedents on the contribution question, the defendant relied upon the rule that public policy requires the refusal of *indemnification* of a criminal bail bond surety,[2] because to permit

[20]A further basis for holding the defendants liable in the Cowles case may be found in the fact that the principal contract and guaranty promise were printed in the same instrument. Kneisley Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 S. W 840, 844, 845 (1908): "In these circumstances the bond was a part of the contract, and the contract was a sufficient consideration for the bond, notwithstanding the bond may have been given after the execution of the contract, or even after the commencement of the work." See Klosterman v. United Electric Light & Power Co., 101 Md. 29, 60 Atl. 251, 253 (1905).

[1]24 N. W (2d) 702 (Minn. 1946).

[2]The defendant relied upon United States v. Ryder, 110 U. S. 729, 4 S. Ct. 196, 28 L. ed. 308 (1884) and United States v. Simmons, 47 Fed. 575 (S. D. N. Y. 1891) as authority. Neither of these cases considered the question of contribution between cosureties on a bail bond and the latter case relied upon the former as its strongest authority. In a later case, Leary v. United States, 224 U. S. 567, 32 S. Ct. 599, 56 L. ed. 889 (1911), strong doubt is cast upon the soundness of United States v. Ryder.

indemnification would result in the lessening of pressure on the sureties to cause the principal to appear.[3] The trial court accepted this argument as applicable by analogy and denied *contribution* to the plaintiff. On appeal, the Minnesota Supreme Court reversed this decision and ordered judgment for the plaintiff. This court adopted the view that the idemnification of such a surety is in contravention of public policy, but concluded "that the refusal to allow contribution creates an injustice which is not counterbalanced by any advantage to the public."[4] Only one precedent was cited on the point, a Washington case in which the defendant surety also relied on the denial of indemnification as reason for refusal of contribution, but in which the court rejected the analogy.[5]

As a general suretyship rule, where a surety has made payment of the debt of his principal, the law presumes such payment to have been made at the request of the principal and therefore implies a promise by the latter to idemnify the surety.[6] The basis of this implied promise is the fact that the surety's performance has discharged a debt or a duty which the principal owed to the creditor. The principal having been relieved of this liability at the expense of the person whom he has asked to undertake accessorial liability, he will be held to have bound

[3]In Consolidation Exploration & Finance Company v. Musgrave, [1900] 1 Ch. 40, the opinion states, "In Pollock on Contracts (6th ed. p. 316) the law is stated thus: 'an agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail.' Again, Leake (3rd ed. p. 626), in his valuable work on the same subject, puts it in this way: 'any contract or engagement having a tendency, however slight, to affect the administration of public justice would be illegal and void.' Among the instances he gives is 'an indemnity given by a defendant in a criminal case to his bail because in effect it deprives the public of the intended security for the conduct of the defendant.' "

[4]Sansome v. Samuelson, 24 N. W. (2d) 702, 704 (Minn. 1946).

[5]Belond v. Guy, 20 Wash. 160, 54 Pac. 995 (1898). This case stands as relatively weak authority in that it cited no cases as precedent and its opinion merely stated its conclusion without reason. The decision is also strongly influenced by a Washington statute providing that bail in criminal actions shall have and justify the same rights as in civil cases. A later Washington case, Essig v. Turner, 60 Wash. 175, 110 Pac. 998 (1910), held a contract to indemnify sureties on a bail bond not void as contrary to public policy. This decision does not even refer to Belond v. Guy. It was based upon a statute which permitted the deposit of cash as bail by the accused and upon the fact that the indemnity was furnished by third parties who had pledged their own estates. Thus, by statute the state relies upon forfeiture of the sum fixed as bail to secure the appearance of the accused and also on the assumption that those who executed the indemnity would be no less vigilant than the fewer number who were sureties.

[6]Arnold, Suretyship and Guaranty (1927) 241; Stearns, Suretyship (4th ed. 1934) 504.

himself to reimburse his surety. In the criminal bond situation, however, the surety's payment of the obligation of the bond to the state on default by the accused does not extinguish the rights of the creditor-state against the principal-accused. This distinction has been pointed out by the United States Supreme Court in *United States v. Ryder*,[7] a decision which is cited with judicial reverence by the authorities denying that the surety on a recognizance can recover idemnification as a right implied in law. In view of the distinguishable situations, the prerequisites for the legal fiction of the principal's implied promise to indemnify, which is indulged in by courts in a normal suretyship situation, are not present in criminal bail bond cases.

Other courts, still more rigorous in their denial of indemnification, have refused to allow reimbursement even where there has been an *express* indemnity agreement between the bail and the accused.[8] Various reasoning is advanced to demonstrate that the agreement is illegal because it is contrary to public policy.[9] It is declared that the bail in a criminal case becomes the jailor of the accused and is the court's custodian of the prisoner, his duty being to assure the appearance of the

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[7]110 U. S. 729, 736, 4 S. Ct. 196, 199, 28 L. ed. 308 (1884). The court stated that "The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation whilst payment by the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal at any time may be retaken and brought into court."

[8]United States v. Greene, 163 Fed. 442 (C. C. A. 4th, 1908); United States v. Simmons, 47 Fed. 575 (S. D. N. Y. 1891); Consolidated Exploration & Finance Co. v. Musgrave, [1900] 1 Ch. 37.

[9]Herman v. Jeuchner, 15 Q.-B. D. 561, 563 (1885). An action was brought to recover back money deposited with the bail to indemnify him against loss by reason of having signed a recognizance on behalf of the plaintiff. Recovery was denied because the money had never been paid and therefore there was no fulfillment of the illegal purpose, but in discussing the indemnity contract, Brett, J., said, "To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff [accused] but if money to the amount for which the surety is bound is deposited with him as indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed." See dissent, Carr v. Davis, 64 W Va. 522, 528, 63 S. E. 326, 328 (1908); Restatement Security (1941) § 210, comment b. A number of decisions have upheld such indemnity contracts without any reference to the public policy issue, which apparently was not argued. Simpson v. Roberts, 35 Ga. 180 (1866); Anderson v. Spence, 72 Ind. 315 (1880), Holker v. Hennessey, 143 Mo. 80, 44 S. W 794 (1898).

principal when required by the court. Where there is an agreement of indemnity, the surety is no longer under the pecuniary pressure to execute his responsibilities; there is even the strong likelihood that the failure of the accused to appear is contemplated.[10] The indemnified surety has also been labeled a wrongdoer in cases where the accused has fled, it being presumed that the bail has been negligent in his vigilance, thereby permitting the escape.[11] To uphold his agreement of reimbursement would therefore be against the public interest.[12]

In *United States v. Greene* it was held that the law would not imply an obligation on the part of a principal in a recognizance to indemnify his surety, "such a contract being against public policy, in that it 'gives the public the security of one person only, instead of two.' "[13] This rule was considered to operate equally as strongly to invalidate an express contract of indemnity by the accused. But where the indemnity agreement was made by a third party, a distinction was drawn on the basis that the contract being not by the accused the public retains the security of two persons, the accused and the indemnitor. Several other courts have asserted that indemnity agreements by third parties are undoubtedly valid.[14] Nevertheless, the policy against relieving the bail of the necessity, for his own protection, of procuring the appearance of the accused is contravened equally whether indemnification is derived from the accused or from a third party.[15] Further arguments advanced in denying indemnification declare that upholding indemnity in any form, in effect, allows the accused to be his own surety for his appearance. The accused thus may purchase his liberty in order to escape answering to the law.[16]

In spite of this authority for denying indemnity to a bail bond

[10]United States v. Simmons, 47 Fed. 575, 578 (S. D. N. Y. 1891).

[11]Stearns, Suretyship (4th ed. 1934) 504.

[12]According to Hayes, Contracts to Indemnify Bail In Criminal Cases (1937) 6 Fordham L. Rev. 387, 405, only one state has enacted legislation to control this problem. A Louisiana statute declares contracts to indemnify sureties on bail bonds to be void. La. Code Crim. Proc. (Dart, 1932) Art. 90.

[13]United States v. Greene, 163 Fed. 442, 443 (C. C. A. 4th, 1908).

[14]Essig v. Turner, 60 Wash. 175, 110 Pac. 998 (1910); Carr v. Davis, 64 W Va. 522, 525, 63 S. E. 326, 327 (1908) quoting with approval from Maloney v. Nelson, 12 App. Div. 545, 548, 42 N. Y. Supp. 418 (1896): "In fact, there is no case holding that a contract made by a third party to indemnify a surety upon a recognizance is illegal, but all such contracts have been sustained." All three of these decisions, however, also favored the enforcement of an indemnity agreement against the accused.

[15]See dissent, Carr v. Davis, 64 W. Va. 522, 534, 63 S. E. 326, 330 (1908).

[16]See dissent, Carr v. Davis, 64 W. Va. 522, 535, 63 S. E. 326, 331 (1908); Restatement, Security (1941) § 210 (2), and comment b.

surety, the better reasoned decisions favor indemnification.[17] No distinction is made between the surety on a civil bond and on a criminal recognizance, and the general rules of suretyship law are applied to hold the accused liable to indemnify his surety on the basis of an implied agreement.[18] In one jurisdiction where precedent had established the rule that a surety could not obtain indemnity on the theory of implied agreement, the court nevertheless declared itself free to force payment on an express agreement for indemnification.[19] In *Leary v. United States* the Supreme Court, weakening its earlier rule of the *Ryder* Case, held that an agreement whereby a surety on a criminal bail bond had undertaken the obligation on the condition that securities be deposited with a third person as indemnity, was not forbidden by public policy. Mr. Justice Holmes asserted:

> "The only matters that seem to us to need argument are questions of public policy and laches. As to the former, the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said that the bail contemplated by the revised Statutes is a common law bail, and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail is no longer the mundium, although a trace of the old relation remains in the right to arrest The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."[20]

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[17]Leary v. United States, 224 U. S. 567, 32 S. Ct. 599, 56 L. ed 889 (1911); Tischhauser v. Jarvis, 95 Cal. App. 524, 273 Pac. 66 (1928); McCormick v. Boylan, 83 Conn. 686, 78 Atl. 335 (1910); Simpson v. Roberts, 35 Ga. 180 (1866); Badolato v. Molinar, 106 N. Y. Misc. 342, 174 N. Y. Supp. 512 (1919); Maloney v. Nelson, 144 N. Y. 182, 39 N. E. 82 (1894); Moloney v. Nelson, 158 N. Y. 351, 53 N. E. 31 (1899); Exchange Trust Co. v. Mann, 131 Okla. 302, 269 Pac. 275 (1928); Fagin v. Goggin, 12 R. I. 398 (1879); Essig v. Turner, 60 Wash. 175, 110 Pac. 998 (1910); Carr v. Davis, 64 W Va. 552, 63 S. E. 326 (1908); Carr v. Sutton, 70 W Va. 417, 74 S. E. 239 (1912).

[18]Reynolds v. Harral, 2 Strob. 87 (S. C. 1847); Fagin v. Goggin, 12 R. I. 398 (1879).

[19]Carr v. Davis, 64 W Va. 522, 524, 63 S. E. 326 (1908): "Sometimes, often indeed, the very purpose on the part of prisoner and bail in seeking bail is to give the prisoner chance to escape . It does by no means follow, from the fact that the law raises no promise to pay, that neither will it allow an express contract of indemnity; for in case of an express contract, if such corrupt purpose were proven, it would avoid the contract." In Carr v. Sutton, 70 W Va. 417, 74 S. E. 239 (1912), recovery on the indemnity bond held valid in Carr v. Davis was denied the bail because he was found to have acted negligently in failing to procure the appearance of the accused as required. This was held to release the indemnitors under the general rule that where the creditor so acts, or fails to act when a duty to a surety requires him to act, and the act or failure to act injures the surety, the latter is released from liability.

[20]Leary v. United States, 224 U. S. 567, 575, 32 S. Ct. 599, 600, 56 L. ed. 889

Some jurisdictions have allowed indemnification in reliance on statutes which permit the deposit of cash as bail. It is asserted that under such statutes the theory of bail is altered.[21] Since the accused himself may deposit the money for his own bail, it is categorically established that, "It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It, therefore, cannot be said to be a part of the public policy of this state to insist upon personal liability of sureties; for there need not be such personal liability in any case if the accused makes a deposit of money in lieu of bail, as provided by the statute."[22]

The sounder reasoning supports the validity of indemnification whether by implied or expressed right, and whether the accused or a third party is indemnitor. Allowing indemnification from the accused puts direct pecuniary pressure on him and thus makes his default on the bond less likely. And if the indemnity is promised by third parties, their efforts to assure the accused's appearance should thereby supplement the pressure expected from the surety. Furthermore, refusal of indemnification may prevent the accused from securing bail, thus defeating another important public policy. Once the court has exercised its discretion in permitting bail, it should not indulge in an anomaly and attach to the securing of bail by the accused such onerous restrictions as is involved in the denial of indemnification.[23] When it is said that the object of bail is to assure the appearance of the accused it is too often overlooked that bail also results in and has as a purpose the release of the accused. The principal is only an accused, one merely charged with an offense against the state but not convicted; he is not

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(1911). Although the logic of Mr. Holmes is weakened in that it presents a negative argument in merely stating the other rule to be wrong, nevertheless, if the pressure to appear is wholly pecuniary, then for such pressure to be most effective it should be upon the accused himself.

[21]Badolato v. Molinar, 106 N. Y. Misc. 342, 174 N. Y. Supp. 512 (1919); Essig v. Turner, 60 Wash. 175, 110 Pac. 998 (1910). See Hayes, Contracts To Indemnify Bail In Criminal Cases (1937) 6 Fordham L. Rev. 387, 404 for the view that the whole issue of whether indemnity for the bail is valid or not should turn on what concept of bail is held in any particular jurisdiction. And see Restatement, Security (1941) § 210, comment b.

[22]Moloney v. Nelson, 158 N. Y. 351, 355, 53 N. E. 31, 32 (1899).

[23]"The law allows bail. We may say that the law favors bail as a relief from prison in cases where bail is grantable, and it would tend to defeat this merciful provision of law if we should adopt the harsh rule that a man, perhaps innocent, cannot use his property to indemnify his friend to relieve him from prison bars." Carr v. Davis, 64 W. Va. 522, 526, 63 S. E. 326, 327 (1908).

a proved criminal, but a person whose liberty while awaiting trial permits him to continue his affairs.

If it is accepted that allowing *indemnity* to the bail does not violate public policy, it then seems obvious that requiring *contribution* among cosureties on a criminal recognizance is valid. But even if the right of indemnification is denied under the rule adopted in dictum in the principal case, contribution between the cosureties should be granted. The surety's remedies of indemnification and contribution are founded on different legal bases. In the former the surety is seeking full relief against the principal on the right of an express or implied contract, whereas in contribution the relief is sought against another surety to require him to act equitably by answering for his proportionate share of the burden undertaken by the two parties. Thus, contribution is allowed where it is necessary to settle matters between the sureties equitably, no contract being needed to sustain the recovery. Since cosureties on a recognizance have undertaken the same risk, they should, under general suretyship principles, share the burden of the loss equally, unless some public policy intervenes. The Minnesota court declares that the policy objection against indemnification is not applicable in contribution cases "because if contribution is allowed both sureties know that they will be called upon for at least half the amount of the recognizance "[24] Further, it is pointed out that the purpose of motivating the sureties to strive to prevent a default by the accused might actually be defeated unless the right of contribution is sustained, because one surety might remain idle on the assumption that his cosurety is more likely to be sought for payment. Patent inequity would then be done if the diligent surety whom the state requires to pay the entire sum were to be left without recourse against the surety who did nothing to assure the appearance of the principal.

Similarly inapplicable to the contribution issue is the argument against indemnification that if it is possible to have a surety who will pay the state for the default on the recognizance and then reimburse himself by collecting indemnity, the accused can, in effect, purchase his freedom. Merely dividing the burden between two sureties will not relieve the sureties from loss from the default and will thus not deprive the public of the benefit of the pecuniary pressure on the sureties to prevent a default.

Contentions to rebut the view favoring contribution are available,

[24]Sansome v. Samuelson, 24 N. W (2d) 702, 703 (Minn. 1946).

but their practical force is questionable. It may be said that if there is a sufficiently large number of sureties on the bail bond, distribution of the loss among all of them will make the outlay of each so insignificant as to lose its coercive effect on the surety to produce the appearance of the accused. It is also argued that, although denial of contribution might in some cases allow one cosurety to feel secure in idleness because of the likelihood that the other would be called upon by the state to pay the entire sum, yet in as many instances each cosurety would be motivated to especial diligence by the knowledge that he might be the one forced to pay and be left with the whole loss.

None of these considerations seems strong enough to support a public policy against contribution which is important enough to outweigh the inequities created as between cosureties if a division of the burden is denied. And contending affirmatively for contribution is the public policy which favors the granting of freedom on bail of those accused of crimes not yet proven against them. If the right to distribute the loss of a possible default among several cosureties is not recognized, the accused may well encounter more difficulty in obtaining bail, and in extreme cases, may even be deprived of this valuable constitutional right. In the principal case, the court leaned heavily on this point in upholding the right of contribution, but failed to notice that the same consideration argues even more forcefully for the allowance of indemnification in these cases.

BERNARD LEVIN

TORTS—RESCUER'S RIGHT TO RECOVER DAMAGES FROM RESCUEE FOR INJURIES SUSTAINED. [New York]

The doctrine of contributory negligence, though firmly embedded in the law, includes an exception so well settled as to have become a rule in itself. This qualification is a reflection of the aversion to apply the general penalties of contributory negligence in the so called "rescue cases." Because of the high regard for human life, the law will not impute negligence to an effort to preserve it, and so allows a rescuer to recover, unless his acts constitute recklessness, for personal injuries sustained in an attempt to save the life of one who has been exposed to peril through the negligence of the defendant.[1]

[1]Eckert v. The Long Island Railroad Co., 43 N. Y. 502, 3 Am. Rep. 721 (1871); Corbin v. City of Philadelphia, 195 Pa. 461, 468, 45 Atl. 1070, 1072, 49 L. R. A. 715, 723 (1900) in which Justice Brown exemplified the courts' attitude toward the rescuer in saying: "A rescuer—one who, from the most unselfish motives, prompted by the

A typical case is *Eckert v. The Long Island Railroad Co.*,[2] in which plaintiff's intestate, seeing a small child on defendant's railroad track in front of a rapidly approaching train, attempted a rescue resulting in his being struck and killed. The court reasoned that the child would have been crushed by the train, and the plaintiff having seen this should have saved a life if he could do so without incurring great danger to himself. He therefore "owed a duty of important obligation to this child to rescue it from its extreme peril."[3] Thus, the conduct of the plaintiff was not wrongful, and the jury having found the defendant guilty of negligence in running its train, liability attached for the injuries to the plaintiff.

A duty on the part of defendant towards the rescuer as well as the endangered third party must be made out. The manner in which the courts establish that duty is demonstrated in *Wagner v. International Railway Co.*,[4] where it was reasoned that because rescue endeavors are within the realm of the natural and probable, the party who imperils the life of a victim is at the same time a wrong doer to his rescuer.[5] Courts may vary as to the basis of their conclusion, but whether it rests on the foreseeability of such conduct or flows from the great social benefit in preserving human life, there is agreement that injury to a rescuer is a breach of a legal duty owed by the party creating a hazard to the rescuee.[6]

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noblest impulses that can impel men to deeds of heroism, faces deadly peril—ought not to hear from the law words of condemnation of his bravery, because he rushed into danger to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This, conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land." Bohlen, Studies in the Law of Torts (1926) 568-9, n. 33: "Substantially every jurisdiction now follows Eckert v. Long Island R. R. Co. "; 20 R. C. L., Negligence § 108.

[2]43 N. Y. 502, 3 Am. Rep. 721, 723 (1871).

[3]Eckert v. The Long Island Railroad Co., 43 N. Y. 502, 505, 3 Am. Rep. 721, 723 (1871).

[4]232 N. Y. 176, 133 N. E. 437 (1921).

[5]Wagner v. International Railway Co., 232 N. Y. 176, at 180, 133 N. E. 437 (1921).

[6]General support for the rule allowing recovery in rescue attempts can be found in the many decisions from varied jurisdictions. Central Railroad v. Crosby, 74 Ga. 737, 58 Am. Rep. 463 (1885); Richards v. Kansas Electric Power Co., 126 Kan. 521, 268 Pac. 847 (1928); Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl 60, 42 L. R. A. 842 (1898); Dixon v. New York, N. H. & H. Rd. Co., 207 Mass. 126, 92 N. E. 1030 (1910); Bond v. Baltimore & O. Rd. Co., 82 W Va. 557, 96 S. E. 932, 5 A. L. R. 201 (1918); Cottrill v. Chicago, M. & St. P Ry. Co., 47 Wis. 634, 3 N. W 376, 32 Am. Rep. 796 (1879). See note 1, supra.

Controversy arises, however, as to the application of this general rule to two-party rescue situations in which the rescued individual himself is sought to be held liable for injuries to his rescuer.[7] The difficulty is traceable to a rigid adherence to the obvious proposition often recited in three-party cases that the defendant cannot be held liable unless his negligence has put the rescuee in the position of peril which induced the rescue.[8] Applied literally to the two-party situation, this would require the anomalous ruling that the defendant must be guilty of negligence toward himself. In the widely cited case of *Saylor v Parsons*,[9] the plaintiff had been working alongside the defendant who was in the act of taking down a brick wall. As the wall was being undermined by the defendant's digging, it appeared to be toppling over, and plaintiff, seeing the danger, sprang from his safe position and rescued the imperilled defendant. Recovery for the resulting injury was refused on the ground that there was no duty owed to the plaintiff and therefore could be no negligence toward him. The court stated that the love of life and the instinct of self-preservation are deemed enough to prevent such self-exposure, and such motives are the sole governing factor in matters relating to the safety of the individual's own self. In so holding the court said:

> "Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself."[10]

While recognizing the general rescue doctrine of three-party situations, the court, again citing the instinct of self-preservation, now declared

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[7]Saylor v. Parsons, 122 Iowa 679, 98 N. W 500, 64 L. R. A. 542 (1904). See Butler v. Jersey Coast News Co., 109 N. J. L. 225, 160 Atl. 659 (1932) where though the rescuer was allowed to recover from the rescuee, the court was careful to take the case from under the label of "rescue cases," on the reasoning that there was no obvious danger present in the particular rescue attempt made; Brugh v. Bigelow, 310 Mich. 74, 16 N. W (2d) 668 (1944) where the court, in allowing recovery to the rescuer relied heavily on the fact that the accident occurred on a public highway where persons are bound by law to exercise due care for the safety of others, and that defendant called out to plaintiff for aid. 38 Am. Jur., Negligence § 229.

[8]Alabama Power Co. v. Conine, 213 Ala. 228, 104 So. 535, at 537 (1925); Pierce v. United Gas Co., 161 Cal. 176, 118 Pac. 700, at 706 (1911); Saylor v. Parsons, 122 Iowa 679, 98 N. W. 500, at 502, 64 L. R. A. 542, at 545 (1904); Donahoe v. Wabash, St. L. & Pac. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594, at 598 (1884); Bracey v. Northwestern Co., 41 Mont. 338, 109 Pac. 706, at 708 (1910).

[9]122 Iowa 679, 98 N. W. 500, 64 L. R. A. 542 (1904).

[10]Saylor v. Parsons, 122 Iowa 679, 98 N. W. 500, 502, 64 L. R. A. 542, 544 (1904).

rescue acts to be of such rare occurrence as to preclude the existence of a legal duty founded on foreseeability.[11]

In the recent decision of *Carney v. Buyea*,[12] a case of first impression, the New York Appellate Division effected an outright repudiation of this distinction in rescue situations by affirming a judgment for a plaintiff rescuer against a rescuee who had placed herself in a position of peril. The defendant drove to her farm on business and parked her car in a lane leading to the barn. Later the plaintiff arrived at the scene to visit his relatives who occupied the defendant's farm. Shortly thereafter, the defendant left the barn, entered her car and backed it around so that it was left facing down an incline to the highway. The car was not put in gear nor was the emergency brake applied. The defendant left the car, walked down the incline about twenty feet directly in front of the car, and stopped to pick up some soft drink bottles. While she was so engaged, the car, without any assistance, began to move down the incline towards the defendant, who was oblivious of her peril. Plaintiff, seeing the danger, rushed to defendant's rescue, but suffered injuries for which he brought action to recover damages.

The court, in awarding judgment to the plaintiff, began by reasoning that he was a licensee on defendant's property,[13] and thereby was owed a duty of safety from the affirmative negligence of the landowner. Later in the opinion, however, it was stated that this duty could be extended to "any person in whose vicinity one exposes one's self to an undue risk of injury."[14] Defendant's act of parking her car without precautions against its moving was held to be affirmative negligence, since she was under a duty to leave it so that it could not be put into motion without the application of external force.[15] Having thus established negligence on the part of the defendant, the court applied the doctrine set out in the *Eckert* case, which involved a three-party situation, thereby exonerating plaintiff of any contributory negligence.[16] Finally, the

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[11]Saylor v. Parsons, 122 Iowa 679, 98 N. W 500, at 502, 64 L. R. A. 542, at 544 (1904).

[12]Carney v. Buyea, 271 App. Div. 338, 65 N. Y. S. (2d) 902 (1946).

[13]In view of the subsequent language of the court, see note 14, infra, it is to be hoped that the effect of this decision will not be limited to situations in which the rescue occurs on the defendant's property. The rules applied are broad enough to operate logically without regard to the situs of the injury..

[14]Carney v. Buyea, 271 App. Div. 338, 344, 65 N. Y. S. (2d) 902, 908 (1946).

[15]Latky v. Wolfe, 85 Cal. App. 332, 259 Pac. 470 (1927); Tierney v. New York Dugan Bros., 288 N. Y. 16, 41 N. E. (2d) 161 (1942).

[16]"That case [Eckert v. Long Island Railroad Co.] defined and settled the law of rescue in this state so far as the rescue of a person is concerned where such person

view of *Salyor v. Parsons*,[17] was rejected, the New York court denying the relevancy of the contention that a person cannot be negligent as to himself, and holding that the defendant was negligent towards the plaintiff in her "lack of self protective care."[18] This position obviously constitutes a direct attack on the argument that one who subjects himself to risk of injury does not thereby breach any legal duty, but merely a moral obligation to protect himself from harm. The New York court expressly recognized a legal duty in the defendant not to create an undue risk of injury to the plaintiff.[19]

Defendant's argument that she could not be charged with negligence as to herself,[20] is a self-evident proposition as long as the interests of some other person are not affected. However, its use as a grounds for denying recovery to an injured party is of no value other than as a means of clouding the issue. Although it is settled that there must be negligence on the part of the defendant in order to justify an action,[21] this negligence cannot be established in the two-party rescue cases in the same manner as in the three-party situations. In the latter cases recovery is allowed on the theory that the wrong to the rescuee is also a wrong to the rescuer.[22] But in the principal case, the action being against the rescuee, it is not contended she was wronged, and the fact that she cannot be and was not negligent as to herself is in no way a limitation on her being negligent as to the plaintiff.[23]

Lack of the element of foreseeability in the two-party rescue cases is

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has been exposed to danger and injury by the negligence of a third party. The Eckert case has become the law in most jurisdictions." Carney v. Buyea, 271 App. Div. 338, 342, 65 N. Y. S. (2d) 902, 906 (1946). See note 1, supra.

[17]122 Iowa 679, 98 N. W 500, 64 L. R. A. 542 (1904).

[18]"In parking her car as she did, the defendant endangered the safety not only of the bystanders on her farm but also the safety of herself and the probable safety of the users of the highway... May not a lack of self protective care be negligent towards any person in whose vicinity one exposes one's self to an undue risk of injury? We think so." Carney v. Buyea, 271 App. Div. 338, 344, 65 N. Y. S. (2d) 902, 908 (1946).

[19]Carney v. Buyea, 271 App. Div. 338, at 342, 65 N. Y. S. (2d) 902, at 907 (1946).

[20]Carney v. Buyea, 271 App. Div. 338, at 342, 65 N. Y. S. (2d) 902, at 907 (1946).

[21]Pittsburgh, C., C. & St. L. Ry. Co. v. Lynch, 69 Ohio St. 123, 68 N. E. 703 (1903) which states that negligence on the part of the defendant and freedom from recklessness by the plaintiff are the requisites to sustain recovery. See cases cited in note 8, supra.

[22]Wagner v. International Ry. Co., 232 N. Y. 176, 133 N. E. 437 (1921).

[23]See Bohlen, Studies in the Law of Torts (1926) 568-9, n. 33 in which it is shown that the rescuer in any case must ground his right of action on a wrong to himself and in no way derives it from a wrong to the imperiled. Thus, a rescuer is not barred by the contributory negligence of the person sought to be rescued, nor need there be any interest in the rescuee such as a husband has in the services of his wife.

also advanced as a reason for declaring a rescuee free from negligence. It is contended that the possibility of one coming to the aid of an endangered individual is not to be anticipated; that the ordinary man in undertaking a perilous enterprise does not contemplate such assistance; and that such heroic conduct, though frequent, has still not become commonplace.[24] But it is difficult to see why rescue attempts are not in fact of sufficiently common experience to be regarded as foreseeable. They are certainly "nothing abnormal,"[25] and despite the risk attached they have been deemed to be within the realm of legal foreseeability.[26] As Judge Cardozo in the *Wagner* case said:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable."[27]

There seems to be no reason why a rescuee should not be charged with foreseeability of a rescue for which the weight of authority would hold a third-party defendant responsible. Neither reason nor experience supports such a distinction, and a rescuee who has himself induced a rescue should be charged with liability for the foreseeable results of his negligence. Under general principles of tort law, it is not necessary that the defendant should have actually foreseen the possible consequences of his action; he is chargeable with liability if they were reasonably foreseeable to the ordinary prudent man.[28] Thus it has been said that "the wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."[29]

Perhaps the greatest stimulus for allowing recovery in any rescue case can be found in the utility of the rescuer's conduct. Realizing the value of life-saving attempts and recognizing the laudable elements of self-sacrifice and courage, legal opinions allowing recovery in three-party situations have been filled with praise for the rescuer.[30] It is not

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[24]Saylor v. Parsons, 122 Iowa 679, 98 N. W 500, at 502, 64 L. R. A. 542, at 545 (1904). See Brugh v. Bigelow, 310 Mich. 74, 16 N. W (2d) 668, at 671 (1944).

[25]Prosser, Torts (1941) 361.

[26]Brugh v. Bigelow, 310 Mich. 74, 16 N. W (2d) 668, 671 (1944) in which the court affirmatively asserted that it is to be anticipated that passersby on the highway will act to relieve "known dire necessity" of persons injured in automobile accidents.

[27]Wagner v. International Ry. Co., 232 N. Y. 176, 180, 133 N. E. 437 (1921).

[28]38 Am. Jur., Negligence § 62; 45 C. J. Negligence § 483.

[29]Wagner v. International Ry. Co., 232 N. Y. 176, 180, 133 N. E. 437, 438 (1921).

[30]Donahoe v. Wabash, St. L. & Pac. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594 (1884);

clear why such commendation should not be accorded with the same magnanimity to a person who has sought to rescue the party now haled into court as defendant. Certainly the risk is as great and the life of the rescuer as dear in either case. In the *Carney* case,[31] despite the argument that "our legal system is not so constituted that a court can allow one to recover in a damage suit merely because they think he is deserving,"[32] the New York court, admittedly influenced in allowing recovery by the plaintiff's meritorious conduct, declared:

> "The rigid rules of an action at law for negligence bend before a situation where the life of a person is imperilled and without penalty to his rights permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances."[33]

Thus, the principal case has apparently eliminated the difficulty in recognizing a legal duty owing from rescuee to rescuer, thereby making recovery available to the rescuer in the two-party as well as the three-party situations. Criticism of the decision may arise on grounds of policy, due to its tendency to restrict the freedom of an individual to act as he sees fit, in that his every action might create risks to potential rescuers and consequent liability for damages. But it would seem that the utility of acts undertaken to preserve life outweighs an individual's personal right voluntarily to face hazards. The question resolves itself into a balance of policies, and the effect of the principal decision is to encourage that conduct which is everywhere recognized as the basis for recovery in the three-party rescue cases.

STANLEY E. SACKS

TORTS—LIABILITY OF CHARITABLE HOSPITAL FOR INJURIES TO PATIENT CAUSED BY NEGLIGENCE OF NURSE AND INTERNE. [New York]

At common law, liability for tortious conduct was the rule and immunity the exception. Yet, the majority of American courts have reversed this doctrine as to charitable hospitals through the invention of numerous rules and theories of immunity. These concepts, though defective in many respects, have been adhered to tenaciously, with the result that a patient in a charitable hospital is still quite generally

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Eckert v. The Long Island Railroad Co., 43 N. Y. 502, 3 Am. Rep. 721 (1871); Pennsylvania Co. v. Langendorff, 48 Ohio St. 316, 28 N. E. 172 (1891); Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715 (1900).

[31]271 App. Div. 338, 65 N. Y. S. (2d) 992 (1946).

[32]Note (1933) 13 B. U. L. Rev. 371, 374.

[33]Carney v. Buyea, 271 App. Div. 338, 342, 65 N. Y. S. (2d) 902, 907 (1946).

denied recovery for even severe injuries suffered through the clearest sort of negligent conduct of hospital employees.

This immunity has been based largely on two general rules known as the "complete immunity" rule,[1] and the "qualified immunity" or "due care in selection" rule,[2] both supported by one or more of several theories of immunity: the "trust fund" theory,[3] the "implied waiver" theory,[4] and the "public policy" theory.[5] Standing alone in opposition to the immunity doctrines is the minority "Rhode Island" rule[6] which imposes liability upon a charitable hospital for the torts of its employees just as if it were one run for profit.

The history of the liability of charitable hospitals for torts brings into bold relief two facts. First, all of the rules and theories of immunity are creatures of public policy, directed to keeping the philanthropist satisfied that his money will not be dissipated in law suits. Secondly, the majority of the decisions in that field have turned upon the relationship between hospital and patient, without regard to the relation between hospital and employee or between employee and patient.

The harsh injustice in denying damages to the injured persons and the obvious fallacies in the various theories of immunity[7] have long

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[1]See 10 Fletcher, Cyc. Corp. (Perm. ed. 1931) § 4922 (charitable hospital fully immune as to all classes of plaintiffs—patients or strangers—for torts inflicted by its employees).

[2]See 10 Fletcher, Cyc. Corp. (Perm. ed. 1931) § 4923 (charitable hospital not liable to patients for torts of its employees if latter selected with reasonable care).

[3]Introduced into this country in McDonald v. Massachusetts General Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876), the theory was founded upon dictum in the Scotch decision of Duncan v. Findlater, 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839). This dictum, to the effect that it would be a breach of trust to divert charity funds to pay damage claims, was overruled in England ten years previous to its acceptance in America.

[4]Powers v. Massachusetts Homeopathic Hosp., 109 Fed. 294 (C. C. A. 1st, 1901) (charitable hospital held immune from liability to patient injured by nurse, on ground that in accepting charity, beneficiary impliedly waives any right of action against his benefactor).

[5]The basis of this theory is that donors to charitable hospitals will be discouraged from contributing if their gifts are used to pay damages for torts rather than to provide care and treatment for indigent patients. The theory is well expressed in Jenson v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898, 899 (1910). The "public policy" theory necessarily embraces the "trust fund" and "implied waiver" theories.

[6]This rule, first announced in Glavin v. Rhode Island Hosp., 12 R. I. 411, 34 Am. Rep. 675 (1879), has found a following in a small number of American jurisdictions though repudiated by statute in Rhode Island. It is widely approved in England, the dominions and colonies. See 10 Fletcher, Cyc. Corp. (Perm. ed. 1931) § 4925.

[7]The "trust fund" theory has been severely criticized on the ground that it allows the use of hospital funds to pay damages to strangers but not to beneficiaries.

demanded reform in this field of the law. Taking the lead in a recent trend toward limitation of immunity is New York, whose law on the subject has passed through three stages of development. The first, extending to about 1925, was characterized by recognition of the right of recovery by third persons and employees of the hospital, but denial of such right to patients.[8] This is the present majority holding in the United States, in spite of its unjust discrimination.[9] The second period, roughly covering the years 1925-1935, was one of indecision as to whether the courts dared overthrow the firmly established immunity theories.[10] The last period, extending from about 1935 to the present time, has witnessed a substantial extension of the rights of the long-abused patient.[11]

During the recent war years, a noticeable number of cases allowed charity patients to recover damages when injured by hospital personnel. Indicative of this new trend was the frequency with which opinions included language to the effect that liability depends not upon the title of the employee whose negligence caused injury to the patient

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Payment to a stranger seems no less a diversion of funds from their proper purposes that if a patient were the recipient. The "implied waiver" theory has been aptly called a fiction in that it cannot justly be applied to a pay patient nor to a person who enters a hospital in an unconscious condition. The flaw in the "public policy" theory is that it does not take into consideration the fact that donors to charitable hospitals contribute for the very purpose of providing the needy with good medical care.

[8]See Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62 (1910); Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481 (1908).

[9]See McInerny v. St. Luke's Hosp. Ass'n, 122 Minn. 10, 141 N. W. 837 (1913) (charitable hospital liable for torts to its employees); Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144 (1912) (charitable institution liable to third parties for torts of its servants). But see President and Directors of Georgetown College v. Hughes, 130 F. (2d) 810, 825 (App. D. C. 1942) (criticizing the "stranger-beneficiary" distinction).

[10]Hamburger v. Cornell University, 240 N. Y. 328, 335, 148 N. E. 539, 541, 42 A. L. R. 955, 960 (1925): "The question is still open whether it [a charitable hospital] is liable to patients for the negligence of servants or administrative agents." In Stearns v. The Association of the Bar of the City of New York, 154 Misc. 71, 74, 276 N. Y. Supp. 390 (1939) the same uncertainty was expressed: "In New York the question of the liability of a charitable institution for negligence of its administrative agents is still undecided."

[11]See Sheehan v. North Country Community Hosp., 273 N. Y. 163, 165, 7 N. E. (2d) 28, 29 (1937) (holding a charitable hospital liable for injuries to a paying patient caused by the negligence of its ambulance driver): "On these facts there is squarely presented for the first time in this court the question whether a charitable institution... should be declared exempt from liability to a beneficiary for personal harm caused by the negligence of one acting as its mere servant or employee."

but upon the function which he was performing when the negligence occurred. These cases were consistent in holding the hospital liable only where its employee negligently inflicted injury in the performance of an administrative or routine act.[12]

The decision of *Necolayff v. Genesee Hospital*[13] is New York's most recent step in restricting the immunity of charitable hospitals. The plaintiff was placed by her own physician in the defendant charitable hospital as a paying patient. While she was recovering from an operation there, an interne and nurse entered her room and told her that she was to have a blood transfusion from her daughter. Though she objected and informed them that she had no daughter, they nevertheless administered the transfusion. A serious illness and temporary insanity resulted. It later appeared that the transfusion was intended for a patient of another doctor in the hospital. This doctor had left a form in the hospital office, according to custom, directing the giving of the transfusion to his patient. The interne and nurse were given the form, but went to the plaintiff's room by mistake, the source and cause of which were not shown by the record.

In holding the hospital liable for damages, the court squarely rejected the "implied waiver" doctrine, declaring that it was particularly not applicable in the case of a paying patient. It reaffirmed the "due care in selection" rule as to physicians, nurses, and other employees acting professionally, but asserted that a charitable hospital could be held liable for an injury to a patient resulting from the negligence of an employee acting in an administrative capacity even though such employee be a physician, nurse, or other person normally considered professional.[14] Such language marked the emergence of a new test of immunity in New York, a test which, viewed superficially, seems to be an "administrative-professional" test.[15] However, an examination of

[12]Ranelli v. Society of New York Hosp., 269 App. Div. 906, 56 N. Y. S. (2d) 481 (1945) (hospital liable to patient for failure of nurse to have side boards put on bed, as a result of which plaintiff fell and was injured); Bickford v. Peck Memorial Hosp., 266 App. Div. 875, 43 N. Y. S. (2d) 20 (1943) (Hospital liable for failure of servants to put side boards on patient's bed); Dillon v. Rockaway Beach Hosp., 284 N. Y. 176, 30 N. E. (2d) 373 (1940) (hospital liable for negligence of nurse in leaving on patient's bed a lamp which burned his feet).

[13]270 App. Div. 648, 61 N. Y. S. (2d) 832 (1946), affirmed without opinion, 73 N. E. (2d) 117 (N. Y. 1947).

[14]Necolayff v. Genesee Hosp., 270 App. Div. 648, 652, 61 N. Y. S. (2d) 832, 836 (1946).

[15]That a decision might turn upon such a distinction had already been demonstrated in Phillips v. Buffalo General Hosp., 239 N. Y. 188, 146 N. E. 199, 200 (1924) (orderly engaged in nursing patient held to be acting on own responsibility and not during that time a servant of hospital).

the history of the test and the reasoning of the court in the *Necolayff* case gives evidence that the decision actually turned on another ground.

The "administrative-professional" test requires a determination of the nature of the service being performed by doctors, nurses, and other hospital employees at the time a patient suffers a tort at their hands. Thus, assuming due care in the selection of personnel and equipment,[16] the hospital is immune if the negligence occurs in the performance of *professional* duties by its personnel, but there is no immunity where the tort grows out of the performance of purely *administrative* duties. This test is the outgrowth of dictum of Lord Justice Kennedy in *Hillyer v. Governors of St. Bartholomew's Hospital.*[17] In his opinion, Kennedy said that a charitable hospital is not liable for the negligent acts of its professional staff (including surgeons, physicians, and nurses) toward its patients in matters of professional care or skill, if due care was used in the selection of such staff. He emphasized that his statement was confined to matters of professional skill in which the governors of the hospital neither do nor could properly interfere by rule or supervision. Then followed the famous dictum that the hospital was legally responsible to patients for the acts of its servants in performing ministerial duties, inasmuch as the hospital should and does make regulations covering these routine acts.

Lord Kennedy's view seems to be that a hospital employee is a servant of the hospital if doing a purely routine act, but that there is no master-servant relationship when he is acting professionally. Kennedy laid down no definite tests for determining what acts are professional and what routine. His language suggested, however, that he considered as professional only those acts in which the governors do not or can not interfere by rule or supervision. The examples of routine acts which he gave were the attendance of nurses on wards, the summoning of medical aid in emergencies, and the supplying of proper food.

Though this dictum has been frequently cited and discussed, it has not always been approved. Perhaps the foremost case to take issue with the doctrine was *The Sisters of St. Joseph v. Fleming.*[18] The Supreme Court of Canada admitted the usefulness of Kennedy's doctrine in some circumstances but impliedly condemned it on the ground that there is no legal distinction per se between routine acts and those requiring professional skill. This court declared:

" . it is a safer practice, in order to determine the character

[16]The doctrine does not eliminate the "due care in selection" rule.
[17][1909] 2 K. B. 820, 9 B. R. C. 1.
[18][1938] Can. L. Rep. 172.

> of a nurse's employment at the time of a negligent act, to focus attention upon the question whether or not in point of fact the nurse during the period of time in which she was engaged on the particular work in which the negligent act occurred was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician "[19]

This "control" test clearly involves only the application of the ordinary principles of the law of master and servant or principal and agent.[20] If a nurse, for example, is found to be acting as a servant of the hospital in the scope of her employment, the hospital must answer for her torts. Conversely, the hospital is immune from liability if the nurse has passed under the control of either a doctor or the patient.

In applying the "administrative-professional" and "control" tests to the *Necolayff* case, it is important to note that the interne and nurse were considered to be acting in a professional capacity up until the time they entered the wrong room, but not thereafter.[21] A test of the status of the interne and nurse by Lord Kennedy's standards would appear to put them in an administrative category prior to entering the plaintiff's room. Receiving the written instructions of a doctor and finding one's way to the correct patient's room for the purpose of giving a transfusion hardly seems professional, but rather is comparable to the act of a nurse in attending the wards, a service declared routine by Kennedy. Moreover, it is the type of act which hospitals ordinarily govern by rules and regulations, a factor which is also indicative of administrative acts. Thus is presented the anomaly of the court saying the status of the interne and nurse was, at the beginning of their errand, professional, while the "administrative-professional" test shows it to be routine.

On the other hand, the "control" test seems to fit the pattern of reasoning in the principal case quite well. The court has said: "In giving a transfusion, the team of interne and nurse are provided by the hospital to aid the physician ordering the transfusion. If they gave such transfusion to the proper patient, they were doing it in the place of her physician, and in so doing would not act in any respect on behalf

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[19][1938] Can. L. Rep. 172, 190.

[20]See Restatement, Agency (1933) §§ 220, 229.

[21]Necolayff v. Genesee Hosp., 270 App. Div. 648, 653, 61 N. Y. S. (2d) 832, 836 (1946): "Their [interne and nurse] entrance into the wrong room caused the professional nature of their errand to cease."

of, or for, the hospital." This is a clear expression of the fact that the mission of the interne and nurse started under the control of a doctor. By the "control" test, if they had remained under his control, no liability would attach to the hospital, because they would have been servants of the doctor, not of the hospital,[22] even though the doctor was not present when the negligence occurred.[23] But violation of the doctor's written instructions by entering the wrong room, in the words of the court, "caused the professional nature of their errand to cease." Under the "control" test they were no longer professional, because their mistake had removed them from the doctor's control and made them servants of the hospital.[24]This relationship having been established, and the administration of the transfusion by the interne and nurse being negligence, the hospital is liable under the doctrine of respondeat superior.[25]

The few other courts which have allowed recovery by a patient against a charitable hospital for the torts of its employees,[26] have not usually spoken in terms of administrative and professional duties or

[22]This reasoning is in complete agreement with the prevailing New York doctrine laid down by Justice Cordozo in Schloendorff v. Society of New York Hosp., 211 N. Y. 125, 105 N. E. 92, 94, 52 L. R. A. (N. S.) 505, 509 (1914): "It is true, of nurses, as of physicians, that, in treating a patient, they are not acting as servants of the hospital . nurses are employed to carry out the orders of the physicians, to whose authority they are subject."

[23]See (1940) 18 Can. B. Rev. 776, 788 where the author, in presenting the view expressed by Masten, J. A., in Vuchar v. Trustees of Toronto General Hosp., [1937] 1 D. L. R. 298 (Ont.), says: " when the doctor prescribes a treatment in specific terms and the nurse in carrying it out is following his instructions, she is not the servant of the hospital. The doctor is himself considered as doing or supervising the work and the nurse is his skilled assistant in carrying out the details . the control of the doctor is not confined to those situations where he is actually present...."

[24]See (1940) 18 Can. B. Rev. 776, 792 where, in a discussion of the determination of whether a nurse is working for doctor or hospital, it is said: "The whole question really comes down to the basic test of what amounts in law to a transfer of control."

[25]Necolayff v. Genesee Hosp., 270 App. Div. 648, 653, 61 N. Y. S. (2d) 832, 836 (1946): "To avoid such negligence or act of misconduct would be the duty of the hospital, and yet here such negligence and misconduct were committed by the very persons whom the hospital employed for certain duties and thus gave access to the rooms and persons of patients."

[26]See Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N. W 699 (1920) (hospital liable for death of patient who jumped from window after having been left alone by negligent nurse); Welch v. Frisbie, 90 N. H. 337, 9 A. (2d) 761 (1939) (liability of hospital for negligence of its X-ray technician governed by rules of agency, including principle of respondeat superior). Sisters of The Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P (2d) 996 (1938) (hospital liable for negligence of nurse in leaving delirious patient alone, as a result of which she jumped from window and was killed).

control of employees.[27] Rather they say that the rules of immunity existing in other jurisdictions are not sound, that liability is the general rule for torts, and that, in the absence of statutes creating immunity for such hospitals, they should be liable under the rule of respondeat superior. Of couse, the proof of the master-servant relationship to establish this vicarious liability involves the same reasoning as that used in the "control"test, and liability would result under either rule or test if the negligent employee is found to be the servant of the hospital acting within the scope of the employment.[28] Furthermore, since establishment of a master-servant relationship frequently involves an inquiry into the type of work being performed, the administrative or professional aspects of the job being done by a hospital employee should become increasingly important in determining liability.

It is, as yet, too soon to judge what effect the lead taken by New York in the charitable hospital cases will have. The reasons for the immunity of these institutions having largely disappeared, and the rules of immunity having been proved very vulnerable to attack, it is believed that the New York trend may inspire other jurisdictions to adopt similar or other tests which will eliminate what has been aptly called by one court "protected negligence."[29]

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[27]Exceptions are found in City of Miami v. Oates, 152 Fla. 21, 10 So. (2d) 721 (1942) (hospital liable for negligent act of interne who was not in the exercise of professional skill); Miller v. Sisters of St. Francis, 5 Wash. (2d) 204, 105 P. (2d) 32 (1940) (failure of nurse to furnish proper equipment held administrative negligence for which hospital is liable).

[28]See Restatement, Agency (1933) § 220.

[29] Sisters of The Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 P (2d) 996, 997 (1938).