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CASE COMMENTS

CONSTITUTIONAL LAW—EFFECT OF GRANT OF DETERMINABLE FEE WITH POSSIBILITY OF REVERTER AS MEANS OF IMPOSING RACIAL RESTRICTIONS ON LAND. [North Carolina]

Since the turn of the century racial restrictive covenants in deeds had been used widely without serious opposition from the courts, until the United States Supreme Court in Shelley v. Kraemer\(^3\) held such covenants unenforceable by court action. It has been estimated that in 1948, when this ruling was handed down, there were more than 200 cases on the dockets of state appellate courts involving privately imposed racial restrictions on real estate,\(^2\) and the Supreme Court's decision naturally produced intense speculation as to methods of avoiding its effect. Generally, however, subsequent attempts to circumvent the "judicial enforcement" doctrine laid down in the Shelley case have met with indifferent success in the courts. It is therefore significant that one recent effort to impose racial restrictions in a deed to real estate without invoking "state action" in enforcement has been sustained by the North Carolina Supreme Court in the case of Charlotte Park and Recreation Commission v. Barringer.\(^3\)

Though the United States Supreme Court, in a series of cases beginning in 1917, determined with finality that legislation imposing racial restrictions on the sale and use of real estate is repugnant to the Fourteenth Amendment,\(^4\) there were only a few decisions prior to 1948 in which the effectiveness of private restrictions of this nature was denied.\(^5\) The ancient common law policy in favor of the free alienability of land was invoked against the covenants only sparing-

\(^{1}\) 334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948).
\(^{2}\) Heard, Race and Residence: The Current Status of Racial Restrictive Covenants (1948) 1 Baylor L. Rev. 20.
\(^{3}\) 242 N. C. 311, 88 S. E. (2d) 114 (1955).
\(^{4}\) Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149 (1917) (city ordinance making it unlawful for a Negro to occupy a house in a block where the majority of residents were white held violation of due process); Richmond v. Deans, 281 U. S. 704, 50 S. Ct. 497, 74 L. ed. 1128 (1930); Harman v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L. ed. 831 (1927) (memoranda decisions decided on the authority of Buchanan v. Warley).
\(^{5}\) For a digested coverage of state court decisions on racial restrictions on real estate prior to Shelley v. Kraemer, see McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5.
ly, and other objections to their validity rarely met with success. Over half a century before Shelley v. Kraemer, at a time when very few courts had been faced with questions of racial restrictions, a judge of a federal district court in California, in holding void a privately imposed covenant restricting real estate against occupancy by Chinese, declared prophetically: "It would be a very narrow construction of the [Fourteenth] constitutional amendment... to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract which the courts may enforce... Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other." However, this foreshadowing of the Shelley case doctrine went unheeded; subsequent decisions in both state and federal courts either ignored or distinguished it. During

4In a few states restrictions which directly forbade the sale or transfer of the land were held invalid as unlawful restraints on alienation. Los Angeles Investment Co. v. Gary, 181 Cal. 689, 186 Pac. 596, 9 A. L. R. 115 (1919); Porter v. Barrett, 233 Mich. 373, 206 N. W. 532, 42 A. L. R. 1267 (1925); White v. White, 108 W. Va. 128, 150 S. E. 531, 66 A. L. R. 518 (1929). But courts in the same states, when faced with covenants forbidding the use or occupancy of the land by certain racial groups, held them to be valid. Burkhart v. Lofton, 63 Cal. App. (2d) 230, 146 P. (2d) 720 (1944); Schulte v. Starks, 238 Mich. 102, 213 N. W. 102 (1927).

Some courts recognized that changed social conditions and population changes in the immediate neighborhood in which the restricted property was located might provide sufficient reason for denying enforcement. Hundley v. Gorewit, 132 F. (2d) 23 (C. A. D. C. 1942); Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932) (held a racial restriction in the form of a condition subsequent to be ineffective because of changed conditions in the neighborhood); Pickel v. McCawley, 329 Mo. 166, 44 S. W. (2d) 857 (1931) (granted removal of a racial restrictive covenant for the same reason). But more often courts, even those recognizing the existence of a "changed conditions" doctrine, found it not applicable to the case being considered. E.g., Grady v. Garland, 89 F. (2d) 817 (C. A. D. C. 1937); Stone v. Jones, 66 Cal. App. (2d) 264, 152 P. (2d) 19 (1944); Dooley v. Savannah Bank & Trust Co., 199 Ga. 523, 34 S. E. (2d) 522 (1945); Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529 (1938); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918).

General "public policy" considerations were also rarely invoked against racial restrictions on real estate. "The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or of personal belief that the consequences would be for the general good." Burkhart v. Lofton, 63 Cal. App. (2d) 230, 146 P. (2d) 720, 725 (1944). Cf. concurring opinion in Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260, 267 (1944); Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330, 38 A. L. R. 1180 (1922).


The case was rarely cited by the courts. In Doherty v. Rice, 240 Wis. 389, 3 N. W. (2d) 724 (1942) the court assumed that it had been overruled by Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. ed. 969 (1926). Constitutional objections
this era, the United States Supreme Court formally considered the question of individual contractual restrictions only in the case of *Corrigan v. Buckley*,11 and there it was actually decided only that the covenants themselves, being the product of purely individual action, could not be struck down as unconstitutional. The question of the state action involved in judicial enforcement of such covenants was not properly raised by the pleadings.

Inasmuch as the law on this subject was widely regarded as completely settled,12 the *Shelley* case seemed to introduce an abrupt departure in holding that it is a denial of "equal protection" under the Fourteenth Amendment for a state court to grant specific performance or injunctive relief to enforce a restrictive covenant among property owners designed to prevent the use or occupancy of the property by members of certain racial groups.13 The decision did not overrule *Corrigan v. Buckley*,14 but limited it to its narrowest interpretation—i.e., that agreements between private individuals are not, *per se*, subject to attack under the Fourteenth Amendment.15 In determining


14However, most commentators on the subject voiced their opposition. For a collection of citations to such comment as of 1948, see Barnett, *Race-Restrictive Covenants Restricted* (1948) 28 Ore. L. Rev. 1, n. 1. For one of the rare comments supporting the constitutional validity of such restrictions, see Note (1947) 45 Mich. L. Rev. 733, 741: "State action cannot properly be conceived of as extending beyond its conscious policy and the policy in these facts ends with the enforcement of contractual undertakings...."


17"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment." 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. ed. 1161, 1180 (1948). Cf. *Civil Rights Cases*, 109 U. S. 5; 3 S. Ct. 18, 27 L. ed. 835 (1883).
that "judicial enforcement" of these covenants is "state action" and therefore within the purview of the Amendment, Chief Justice Vinson, speaking for a unanimous Court, declared: "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."16

Subsequent to this holding, state courts have uniformly refused to grant equitable relief to enforce racial restrictive covenants.17 However, continuing effort to find a way to avoid the force of the Shelley decision and to effectuate the intent of the convenanting parties was reflected in decisions soon handed down in two states. In 1949 the Missouri court, interpreting the Shelley case as precluding only equitable relief, held that a damages action for breach of a racial restrictive covenant could be constitutionally maintained.18 In 1951 the Oklahoma court arrived at the same result on the theory that there could be no racial discrimination involved in a damages action where both parties to the covenant are white.19

But the availability of the damages remedy was short lived. In 1952 the California court, in an exhaustive opinion in Barrows v. Jackson,20 decided that to grant damages on a restrictive covenant was an indirect enforcement of the covenant itself and hence forbidden under the rule of Shelley v. Kraemer. The United States Supreme Court, with Chief Justice Vinson vigorously dissenting, affirmed the California decision, reasoning that "This court will not permit or
require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this court would deny California the right to enforce in equity..."21

With both legal and equitable relief to enforce racial restrictive covenants having been adjudged unconstitutional by the United States Supreme Court, Charlotte Park and Recreation Commission v. Barringer22 came before the North Carolina Supreme Court for review. The case arose out of a transaction originating in 1929, when defendant Barringer conveyed as a gift to plaintiff Park Commission, a municipal corporation, a parcel of land to become part of a park area. The deed provided that the property was to be "used and maintained for park, playground and/or recreational purposes, for use by the white race only," and further it was stated that if the property were not so used, "the lands hereby conveyed shall revert in fee simple to the said [grantor], his heirs or assigns..."23 A park was established and a golf course constructed therein, which was open only to members of the white race. In 1951 a group of Negroes, asserting that their constitutional rights were being infringed by their being barred from the public park, petitioned to be allowed to use the golf course. Plaintiff, stating that it "does not desire to deprive any of its citizens of their legal rights, nor.., to lose by reverter any of the properties entrusted to it," initiated this action for a declaratory judgment "to obtain a judicial determination of the effect of allowing Negroes to use the golf course...."24 The trial court held that "the admission of Negroes to play golf will cause the reverter provisions in said deeds immediately to become operative, and title to revert."25

21Barrows v. Jackson, 346 U. S. 249, 258, 73 S. Ct. 1031, 1036, 97 L. ed. 1586, 1596 (1953). Chief Justice Vinson in his dissent pointed out that no "non-Caucasian" was before the court; that in fact the only non-Caucasians involved in any way were already in undisputed possession of the property. He concluded: "...I cannot see how respondent can avail herself of the Fourteenth Amendment rights of total strangers..." 346 U. S. 249, 269, 73 S. Ct. 1031, 1041, 97 L. ed. 1586, 1602 (1953).


23"...provided, however, that before said lands, in any such event, shall revert... and as a condition precedent to the reversion... the said [grantor], his heirs or assigns, shall pay unto the party of the second part or its successors the sum of thirty-five hundred dollars ($3500)." 242 N. C. 311, 88 S. E. (2d) 114, 117 (1955) [italics supplied].

2442 N. C. 311, 88 S. E. (2d) 114, 118 (1955). The Park Commission joined as defendants this grantor as well as the grantors in two other similar deeds, and also the Negroes who had petitioned to be allowed to use the golf course located in the park.

The North Carolina Supreme Court has recently unanimously affirmed the decision. After reviewing some of the cases and authorities on the general subject of fees subject to forfeiture provisions, the court decided that the Barringer deed, beyond doubt, had created in the grantee Park Commission a "base" or "determinable" fee with a possibility of reverter remaining in the grantor. Then, in a few lines, the constitutional issue of the case was resolved: "It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations." The court pointed out that the making of the conveyance with this provision could not of itself be illegal, and concluded: "If Negroes use the... Golf Course, the determinable fee conveyed to plaintiff by Barringer... automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer...." Therefore, "The operation of this reversion provision is not by any judicial enforcement of the State Courts of North Carolina, and Shelley v. Kraemer has no application. We do not see how any rights of appellants under the Fourteenth Amendment... are violated."

It would seem that one of the most immediate effects of this decision is to place the Charlotte Park Commission in an untenable position. In view of the rule of the recent United States Supreme Court decision prohibiting the barring of Negroes from public parks in Georgia and Maryland, the Park Commission, being a municipal corporation, presumably cannot constitutionally continue to operate the park on a segregated basis; but the principal decision will cause

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27The grantor must, of course, pay the sum stipulated in the deed. The court did not consider the possibility that this proviso might be construed as nullifying the reverter provision and creating merely an option to repurchase which might be void under the Rule Against Perpetuities. Restatement, Property (1944) § 394, comment c.

28424 N. C. 311, 88 S. E. (2d) 114, 122 (1955) [italics supplied].

the land to be lost to the Park Commission if it operates the park on an integrated basis. And since the deed contained a provision for reverter if the land should cease to be used for "recreational purposes," apparently plaintiff cannot even close the park or put the land to some other use without risking loss of the property. Thus, the reversion of the property back to the grantor seems to be inevitable.30

However, the decision may have consequences much more far reaching than the settling of the specific controversy before the court, for it suggests a method by which private parties may readily circumvent the rule of Shelley v. Kraemer.31 It must be noted that this pronouncement was made in the form of a declaratory judgment, which has by its inherent nature no coercive effect on the parties.32 Therefore, it might be contended that the position taken by the North Carolina court here does not constitute any state action to enforce the discriminatory provision in the deed, particularly since it does not necessarily indicate that the court would act on behalf of the grantor if he were seeking court help in regaining possession of the land after a breach of the condition by the grantee causing the fee to revert. This limited interpretation of the decision finds some support in the fact that nowhere in the opinion is there the least mention of the obvious problem which would confront the grantor if the grantee refused to surrender possession voluntarily after the violation of the racial restriction. If, then, the North Carolina court intended to decide only that such a reverter provision is effective insofar as the parties to the deed willingly abide by it, there can probably be no legitimate quarrel with the holding. The Shelley case recognized the same effectiveness in racial restrictive covenants. As yet, the Fourteenth Amendment has never been extended to include purely individual conduct.33 However, such an interpretation would make the decision of only slight legal significance, either to the parties actually now in-

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30 "The defendant Barringer is ready, able and willing to pay the sum of $3,500...." 242 N. C. 311, 88 S. E. (2d) 114, 118 (1955).

31 It was not entirely unforeseen that this method of circumvention might be utilized. "Whether or not the courts could, under the constitutional principle announced in the Shelley Case, give effect to a limitation upon the estate or title granted, if such limitation precluded transfer to persons of stated race or nationality, presents an interesting problem." Note (1949) 3 A. L. R. (2d) 465, 473 [italics original]. Other possible methods of avoiding the Shelley doctrine are pointed out in Note (1953) 32 N. C. L. Rev. 106.

32 "...it may be remarked that in form it [declaratory judgment] differs in no essential respect from any other action; except that the prayer for relief does not seek execution or performance from the defendant or opposing party." Bor- chard, Declaratory Judgments (2d ed. 1941) 25. Declaratory judgments are authorized by statute in North Carolina. 1A N. C. Gen. Stat. (Michie, 1953) § 1-253.

33 Note 15, supra.
involved or to parties subsequently becoming involved in similar controversies. 34

It seems more likely that the North Carolina court intended to hold that once the event on which a possibility of reverter depends has occurred, the fee vests fully in the grantor, and, a fortiori, in any subsequent action by or against the grantor, his standing will be the same as that of any other legal owner of a fee. Thus, if he became the plaintiff in an action of ejectment, his right to the possession of the land would be based simply on his title to it, which title would have vested in him prior to his bringing ejectment and purely as a result of the deed itself, and not as a result of any court action. If this is the meaning of the decision, and if it is allowed to stand, then the way is open, by a simple exercise of draftsmanship, to give constitutional validity to a racial restriction embodied in a deed to real estate and thus completely to avoid the effect of the Shelley decision.

It cannot be denied that the analysis of the nature of a possibility of reverter in the Barringer decision has a firm basis in property law. 35 It has long been settled in North Carolina and elsewhere that a grantor of a fee simple may, by proper words in his deed, reserve to himself a possibility of reverter, the possibility to materialize and the reversion to vest automatically upon the happening of a stipulated event, without any action either by the grantor or by a court. 36 The provision for reverter which is characteristic of a determinable fee is a definite limitation upon the duration of the estate granted; it sets a positive point beyond which that estate cannot endure; the grantor has, in a sense, retained in himself a part of the totality of his original ownership. As such, it differs from its near relative, the fee upon condition subsequent, which never determines until some affirmative action is taken by the grantor, and thus may endure indefinitely even after breach of the condition. If the grantee of a fee upon condition subsequent breaches the condition, there arises in the grantor a “right of re-entry” or “power of termination” which normally he must exercise in a court action if the estate is to be terminated. 37 Thus the “ju-

34 Even so interpreted, the decision might present a constitutional issue. Since presumably a municipal corporation can no longer constitutionally operate a segregated park (note 29, supra.), is it unconstitutional for a municipal corporation even to become a party to a deed embodying a racial restriction? In other words, is the North Carolina court justified in regarding the Park Commission as an “individual”? 35 But see note 27, supra.

36 Hall v. Turner, 110 N. C. 292, 14 S. E. 791 (1892); and authorities cited in note 26, supra.


While it is true that there is general agreement that a limitation in the form of
dicial enforcement” doctrine of the Shelley case more clearly applies to a racial restriction in the form of a condition subsequent than a similar restriction in the form of a reverter provision. The concept of a reverter provision is different also from that of a covenant such as that involved in the Shelley case. A covenant of that sort is a servitude imposed on the estate; if it is breached, the covenantee may seek legal or equitable relief, but the estate of the covenantor does not terminate by reason of the breach alone. The servitude imposed by a covenant may be regarded as becoming a part of the land, but it cannot accurately be regarded as limiting or defining the estate itself. A covenantee-grantor of a fee simple does not retain in himself any part of his original ownership; he grants all that he has.38

That it was the technical nature of a reverter provision which underlay the conclusion reached by the North Carolina court in the Barringer case is indicated by the language and authority included in the opinion. In describing the Barringer deed and the estate thereby granted, the court constantly and, it seems, pointedly emphasized that the provisions in the deed were limitations, not merely conditions or covenants.39 And later in the opinion the estate-like nature of the grantor’s possibility of reverter was stressed.40 The court obviously

a reverter provision may validly be imposed on a fee simple in favor of the grantor, it cannot be said that all of the case law relating to the subject is crystal clear. Courts often confuse reverter provisions and conditions subsequent. 19 Am. Jur. 590. Language construed in one case to be a reverter provision may in another be construed as a condition subsequent, a covenant, or merely an expression of desire. Note (1951) 15 A. L. R. (2d) 976, 981 (dealing particularly with property conveyed to be used as a park.)

Several eminent authorities have argued that since the statute Quia Emptores, determinable fees have become absolute fees. This argument is set forth and supported in Gray, The Rule Against Perpetuities (4th ed. 1942) §§ 31 et seq., where, however, it is pointed out that the possibility of reverter is widely recognized and is not subject to the Rule Against Perpetuities. Gray’s view is criticized in Powell, Determinable Fees (1923) 23 Col. L. Rev. 207. It has been suggested that both conditions subsequent and possibilities of reverter be abolished: Goldstein, Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land (1940) 54 Harv. L. Rev. 248.


39"Barringer by clear and express words in his deed limited...the estate granted. It seems plain that his intention, as expressed in his deed, was that plaintiff should have the land as long as it was not used in breach of the limitations of the grant, and, if such limitations, or any of them, were broken, the estate should automatically revert to the grantor by virtue of the limitations of the deed. In our opinion, Barringer conveyed to plaintiff a fee determinable upon special limitations.” 242 N. C. 311, 88 S. E. (2d) 114, 122 (1955).

40"...to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process...” 114 N. C. 311, 88 S. E. (2d) 114, 123 (1955).
regarded the limitations placed on the estate by Barringer as a legitimate part of the "right to alienate" which is an "inherent element of ownership," and not as mere contractual restrictions.

Thus the North Carolina decision does gain some support from traditional common law property concepts. However, the conclusion can just as well be reached that the "limitation" on the estate is, in reality, nothing more nor less than the old familiar racial restriction, differing from the proscribed racial covenant only in that it is accompanied by a stringent forfeiture provision imposed to encourage compliance. Should the restriction be violated and the grantee refuse to surrender possession voluntarily, it would of course be necessary for the grantor to obtain court help to regain possession, and it seems likely that the United States Supreme Court would classify that court help as "state action" to enforce a racial restriction. In view of the policy behind the Shelley case, the subsequent extension of the rule of that decision in Barrows v. Jackson, and the present judicial attitude towards civil rights in general and racial discrimination in particular, it is difficult to believe that a rule such as that announced in the Barringer case will long be permitted to stand.

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42 N. C. 311, 88 S. E. (2d) 114, 123 (1955). To a court wishing, for any reason, to invalidate a possibility of reverter, certain logical difficulties may arise. Note 40, supra. "What happens to the estate of the grantee? . . . In the case of the grant with a condition subsequent, once the divesting contingency has been removed, the estate of the grantee has become indefeasible. It has not been enlarged, because he had originally received the entire interest, subject, however, to the risk of losing it. . . . But to invalidate the possibility of reverter implies the enlargement of the grantee's estate. At the time of the conveyance, he received something less that what the grantor had. Judicial fiat gives him the rest." But the author concluded as to such reasoning: "Its principal ingredient, however, is a heavy dose of nonsense." Goldstein, Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land (1940) 54 Harv. L. Rev. 248, 274 [italics supplied]. A condition subsequent thus seems easier to invalidate than a possibility of reverter. Cf. Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932). In Clifton v. Puente, 218 S. W. (2d) 272 (Tex. Civ. App. 1948) the court, when faced with a provision similar to that in the Barringer case, followed Shelley v. Kraemer and made no attempt to distinguish between reverter provisions and other types of racial restrictions. The case is criticized in Note (1949) 28 Tex. L. Rev. 110 and analyzed in Groves, Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases (1950) 45 Ill. L. Rev. 614, 621.

43 "State action" under the Fourteenth Amendment is discussed and defined in Dorsey v. Styesvant Town Corporation, 290 N. Y. 512, 87 N. E. (2d) 541 (1940), cert. den, 339 U. S. 981, 70 S. Ct. 1019, 94 L. ed. 1385 (1950), noted (1948) 61 Harv. L. Rev. 344, 349.

Fluoridation of public water supplies for the prevention of dental caries has caused bitter controversies in the field of public health during the present decade. The constitutional validity of municipal ordinances providing for fluoridation has been litigated in the courts with the same vehemence as has been displayed in arguing the safety and efficacy of the measures before legislative bodies and in scientific journals. Though a number of different constitutional issues have been raised, perhaps the most serious objection is that the treatment of the public water supply interferes with freedom of religion as advocated by certain religious groups who oppose "medication."

In Kraus v. Cleveland, one of the latest of the water fluoridation cases, the Ohio Supreme Court was called upon to strike a balance between the religious freedom of individuals and the authority of the city to promote the public health. After holding the required public hearings, the city of Cleveland adopted resolutions and ordinances providing for the fluoridation of the public water supply for the purpose of preventing dental caries. Plaintiff brought a taxpayer's action to enjoin expenditures of money by defendant city for such a purpose. The contention was made that the ordinances were unconstitutional because

1Dental caries is, perhaps, the most widespread disease in existence, yet it has commonly been accepted by the public as one of the incidents of life. Rhyne & Mullin, Fluoridation of Municipal Water Supply—A Review of the Scientific and Legal Aspects (1952) 38. This may be due, in part, to its common incidence in every walk of life for countless generations. The remains of extremely early cliff-dwelling Indians on display at Mesa Verde National Park show very definite evidence of many severe cases.


3This comment does not include discussion of the objection that the measure is "class legislation," raised and met in Kraus v. Cleveland, 116 N. E. (2d) 779 (Ohio Cir. Ct. 1953), aff'd 121 N. E. (2d) 311 (Ohio App. 1954), noted (1954) 7 Ala. L. Rev. 145; (1955) 5 Cath. U. L. Rev. 110, and in Chapman v. Shreveport, 225 La. 859, 74 S. (2d) 142 (1954). The Ontario Court of Appeals invalidated a municipal bylaw providing for fluoridation, on the ground that legislation delegating powers to municipalities did not include "the power to prescribe medicinally for the health of its inhabitants," that function being lodged in other governmental agencies. See Toronto Globe and Mail, Mar. 20, 1956, p. 1.

his personal liberties were violated in that he was being subjected to compulsory medical experimentation which, in turn, violated his religious freedom. It was also urged that dental caries is a matter for private, not public, treatment and prevention. The trial court, after discussing the importance of healthy children to the entire community, held that the ordinance does not infringe upon freedom of religion, and that fluoridation is a question for the legislature, whose decision would not be overturned in the absence of a palpable abuse of discretion. After an affirmance in the intermediate court, plaintiff brought his case to the Supreme Court of Ohio which also affirmed the judgment below. This court rejected the contention that, to be valid under the police power, the subject matter of the health ordinance had to relate to a contagious or infectious disease creating an imminent and overriding necessity. In its view, the regulation need only be shown to bear a reasonable relationship to the general health of the community. It was also held that, while theoretically the same protection against dental caries can be obtained by private dental treatment, this possibility does not create an alternative which precludes the exercise of the police power because, in fact, there are insufficient private health facilities to provide this safeguard for the children of the community. The Supreme Court of Ohio agreed with the lower courts' conclusions that the question is essentially one for the legislature, and that the existence of differences of opinion as to the safety and efficacy of fluoridation does not create a justicable question, absent a palpable abuse of discretion.

The limits of police power when it encroaches upon areas of personal freedom are not clearly defined. The courts, however, recognize that "the health of the people is the first law," and that "the welfare of the many is superior to that of the few." Indeed, in Jacobson v. Massachusetts, the Supreme Court of the United States declared: "We are not prepared to hold it to be an element in the liberty secured

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6The opinion of the trial court discussed the various views on the safety and efficacy of these methods in reaching the ends sought to be attained. Kraus v. Cleveland, 116 N. E. (2d) 779 (Ohio Cir. Ct. 1953). City of Cleveland ordinances provided for one part of fluoride per million parts of water. This is a safe degree of concentration. Rhyne & Mullin, Fluoridation of Municipal Water Supply—A Review of the Scientific and Legal Aspects (1952) 9.

Kraus v. Cleveland, 121 N. E. (2d) 311 (Ohio App. 1954).


It is significant that at the time of Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 558, 49 L. ed. 643 (1905), the acceptance of vaccination as a safe and effective preventive of smallpox was far from being universal in the medical profession.

State ex rel Milhoof v. Board of Education 76 Ohio St. 297, 81 N. E. 568, 570 (1907).
by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported by the authority of the State."

In determining whether public health measures violate religious freedom, the courts take into consideration two concepts inherent in the doctrine of religious freedom. The first is an absolute freedom to believe as one wishes; this cannot be abridged. State control of the mind being especially repugnant to a democratic society, the right to entertain religious beliefs must be beyond the reach of police power. The second of the concepts included in the doctrine of religious freedom is the right to act pursuant to that belief, which right is subject to some control by the state. Though the Supreme Court of the United States, in the case of Board of Education v. Barnette, ruled that the individual's religious freedom was infringed by a school board requirement that all students in the public schools should give an oral salute to the flag of the United States daily as a condition of attendance, Justices Black and Douglas, in their joint concurring opinion, observed: "No well ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."
In the field of public health, courts first stated that in order for the health measure to prevail, the evil against which protection is sought for the public must be imminently dangerous, creating an overriding necessity. Plaintiff in the principal case seized upon this as the proper test of the validity of the regulation, but the Ohio court properly refused to apply such a stringent standard. Rather, it has been more accurately observed that the police power "includes anything which is reasonable and necessary to secure the peace, safety, health, morals, and the best interests of the public." "[T]he test can only be when that which the Legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health...has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." The Ohio court, in applying substantially this rule in the principal case, has adopted the proper approach despite early language that there must be an overriding necessity. This requirement was satisfied in the earlier cases when the public health services were chiefly concerned with combating diseases that actually were infectious, contagious, and dread.

As medical science has progressed to make protection feasible against less severe afflictions, the stricter test of overriding necessity fell into disuse. Moreover, the courts appear to be especially reluctant to strike down state action designed to protect the welfare of children, even though the objection urged is interference with religious freedom. Thus, in numerous decisions, courts have applied the more flexible "rational basis" test for determining the validity of "police" regulation in overriding religious objections to such measures as com-

17For typical language to this effect see, Blue v. Beach, 155 Ind. 121, 56 N. E. 89 at 91 (1900).

18State Board of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, 1021 (1912). The police power of a state may be said to embrace, "at least, such reasonable regulations established directly by legislative enactment as will protect public health and public safety," Jacobson v. Massachusetts, 197 U. S. 11, 25, 25 S. Ct. 358, 361, 25 S. Ct. 358, 361, 64 L. ed. 643, 649 (1905), citing Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23 (1824) and other early cases.

pulsory vaccination against smallpox,\textsuperscript{20} and compulsory chest X-rays as a condition to entering a state university.\textsuperscript{21} Similar public health measures have been sustained on the same test, where no religious freedom question was raised, in cases involving the taking of land for a sanitary land fill,\textsuperscript{22} the prohibition of the sale of oleomargarine,\textsuperscript{23} municipal burial restrictions,\textsuperscript{24} and compulsory sewage purification.\textsuperscript{25} Surprisingly enough, chlorination of water to prevent typhoid has only once been called into question, in which case the constitutionality of chlorination was sustained.\textsuperscript{26}

Rejecting assertions to the contrary, the courts have held that a city is under no duty to supply water free from fluoride.\textsuperscript{27} This is readily apparent from the fact that if fluoride exists naturally in the water supply, the city is under no duty to remove it.\textsuperscript{28} Indeed, the city is under no constitutional compulsion to provide water at all but may do so if empowered by its citizens.\textsuperscript{29} Having voted to have water supplied by the city, the citizens may vote to have it supplied on condition that it contain fluoride, so long as the city is not thereby caused to breach its duty\textsuperscript{30} that the supplied water be potable, palatable, and not injurious.\textsuperscript{31} No instance has been disclosed in which harmful effects have resulted to anyone so long as the proper amount of fluoride is contained in the water; rather, the overwhelming weight


\textsuperscript{21}State ex rel. Holcomb v. Armstrong, 39 Wash. (2d) 259, 239 P. (2d) 545 (1952).

\textsuperscript{22}Bowes v. Aberdeen, 58 Wash. 535, 109 Pac. 369 (1910).


\textsuperscript{24}Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 S. Ct. 301, 54 L. ed. 515 (1914).

\textsuperscript{25}State Board of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019 (1912).

\textsuperscript{26}In Commonwealth v. Town of Hudson, 315 Mass. 335, 52 N. E. (2d) 366 (1943), the court held that the State could constitutionally require the city to chlorinate its water, thus assuming, without deciding, that chlorination itself is constitutional.


\textsuperscript{28}Chapman v. Shreveport, 225 La. 859, 74 S. (2d) 142 (1954); Dietz, Fluoridation and Domestic Water Supplies in California (1952) 4 Hastings L. J. 1.

\textsuperscript{29}Dietz, Fluoridation and Domestic Water Supplies in California (1952) 4 Hastings L. J. 1.

\textsuperscript{30}Dowell v. Tulsa, 273 P. (2d) 859 (Okla. 1954).

\textsuperscript{31}See cases cited in note 27, supra. Also see 56 Am. Jur., Waterworks §§ 56, 74-76.
of medical opinion is that there would be highly beneficial results to an important and substantial portion of the community. Thus, despite any popular differences of opinion, scientific evidence strongly supports the conclusion that fluoridation does bear a reasonable relationship to the general health of the public.

The courts should not be deterred by the fact that dental caries has never before been a subject of regulation. Current recognition of the right to regulate for this purpose does not mean that there has been an extension of the police power, but rather that, though the subject has always been appropriate for protection, new scientific discoveries have but recently provided the methods to exercise that protection. What once was endured can now be prevented; and as science grows and provides the methods, defenses can be thrown up against even more diseases that plague mankind.

The Ohio decision seems sound also in rejecting plaintiff’s contention that the availability of private dental treatment to provide the desired fluoridation makes action by public authority in the field improper. In point on this question is Weaver v. Palmer Bros. Co., an action to enjoin an official of Pennsylvania from enforcing against a manufacturer of bedding a state law prohibiting the use of “shoddy” in making of bedding. The legislation was defended on the ground that it was designed to protect public health by preventing materials harboring disease germs from being placed in the hands of persons who might become diseased through contact with quilts containing shoddy. However, the fact was undisputed that this danger to health could be eliminated by appropriate sterilization techniques at low cost. Because there was some public interest in having these articles manufactured, and because the same health protection intended by the statute could be accomplished privately by the manufacturer through sterilization, the Supreme Court of the United States found that the legislature had acted arbitrarily in prohibiting all use of shoddy, and had thereby transgressed the limits of the police power. Plaintiff in

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3“Shoddy” was defined by the Court as any material which has been spun into yarn, knit or woven into fabric, and subsequently been cut up, torn up, broken up, or ground up.
the *Kraus* case\(^{36}\) attempted to relate this limitation on the police power to the public fluoridation measure by arguing that several alternate means were available. These possibilities include having a dentist apply fluoride externally to the teeth, purchasing bottled water to which fluoride has been added, and supplying treated water only in school drinking fountains. However, it is probable that none of these courses of action is actually feasible because of the practical difficulties and the excessive cost of these methods. By fluoridation of the entire public water supply by governmental action, the desired benefits can be obtained at a cost of only 5 to 14 cents per person per year\(^{37}\) but the expense to private individuals of furnishing their own treatment would be so great as to be beyond the means of most people. There being no feasible substitute for carrying on the health improvement program by private action, the principle of the *Weaver* case does not apply to prohibit public action. At this point, the matter becomes one of legislative discretion as to whether the benefits to be derived are of sufficient importance to justify governmental action. Whatever course the legislature chooses to follow, its action is not subject to disallowance by the courts unless there has been a palpable abuse of discretion.

The various objections raised against the constitutionality of fluoridation ordinances have been successfully met. The result will doubtless be a benefit to society in that the children of today, the leaders of tomorrow, will be less troubled by dental caries than their ancestors. This step forward has been accomplished without expansion of the police power to an extent that unduly infringes upon personal freedom. Yet those who still object are not without recourse; but their "appeal must be made to the legislature or the ballot-box, not to the judiciary."\(^{38}\)

GEORGE S. WILSON, III

**DOMESTIC RELATIONS—RIGHT OF WIFE TO ALIMONY AFTER EX PARTE DIVORCE BY HUSBAND. [Federal]**

The stamp of approval placed on the migratory ex parte divorce\(^1\) in 1942 by the United States Supreme Court gave vitality to a problem which had been, for the most part, dormant until that date. In

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\(^{37}\) *Rhynie & Mullin, Fluoridation of Municipal Water Supplies—A Review of the Scientific and Legal Aspects* (1952) 27, 47.


\(^1\) Ex parte divorce is one obtained by one spouse in proceedings in which the court does not have personal jurisdiction over the defendant spouse.
the famous first *Williams* case the Supreme Court of the United States held that the Full Faith and Credit Clause of the Federal Constitution requires that a divorce granted by a state in which one of the parties has a bona fide domicile must be recognized in every other state. The due process of law requirement of the Fourteenth Amendment is satisfied by giving the absent spouse notice of the divorce proceedings by publication in a newspaper. Thus, a married person may be divorced without ever having received actual notice of the proceedings, and a woman may find herself no longer a “wife” without ever having had an opportunity to present a claim for alimony to any court.

Even when a wife does have actual notice of the husband's foreign divorce proceedings, she is faced with the problem of deciding whether or not to defend the action. Although she may seek to defend and contest the bona fide of her husband's domicile in the state where he brings the action, if she loses she is barred from raising the question again by the doctrine that res judicata applies to jurisdictional questions. If she defends, presents a claim for alimony, and loses on the claim, res judicata will similarly bar her from again raising that issue in any court. Still, if she fails to contest the divorce during the proceedings, she may never have another opportunity to present her alimony claim. On the other hand, by not participating in the foreign proceedings, she may, at a later date and in a more favorable forum, question the validity of the husband’s divorce decree on the ground of his lack of domiciliary status within the jurisdiction granting the decree. If she can establish that her husband was not a bona fide domiciliary of the divorcing state, then the decree is not entitled to extra-territorial recognition. The result is that, at least outside the

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4 *Sherrer v. Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. ed. 1429 (1948). Also, *Coe v. Coe*, 334 U. S. 378, 68 S. Ct. 1094, 92 L. ed. 1451 (1948) (party in whose favor a divorce was rendered is also barred from later raising the jurisdictional question, since he had appeared in the divorce proceedings).
5 *Lynn v. Lynn*, 302 N. Y. 193, 97 N. E. (2d) 748 (1951); 17 Am. Jur. 580. In *Coe v. Coe*, 334 U. S. 378, 68 S. Ct. 1094, 92 L. ed. 1451 (1948) it was held that the wife’s appearance gave the Nevada court jurisdiction to adjudicate the issue of alimony even though the claim was not asserted. The Court said that the absence of an alimony claim during divorce proceedings is equal to denial of the same and such claim cannot be raised later in any court.
7 See note 6, supra.
decreeing state, she remains a "wife," and whatever right to alimony she may have had prior to the ex parte divorce is unimpaired.

The problem of a "wife's" right to alimony after an ex parte divorce was again raised in the recent case of Hopson v. Hopson. Here Tasanilla Hopson, the husband, deserted his wife, Delores, shortly after their marriage. Upon her refusal to divorce him, he instituted divorce proceedings in Florida while she was living in a Maryland suburb of Washington, D.C. She neither appeared nor otherwise participated in the Florida proceedings in which her husband obtained a final ex parte divorce decree based on constructive service. The decree provided for support of their child but made no provision for alimony for the wife. Twelve days after the decree became final, Tasanilla remarried in Kentucky, from which marriage a child has been born. A month after the Florida decree was entered he returned to the District of Columbia, and there Delores brought suit for maintenance for herself and support for her child. Upon trial, the court found that Tasanilla did not have a bona fide intent to establish a domicile in Florida. For this reason the Florida court was without jurisdiction to render the decree, which was therefore not entitled to full faith and credit in the District of Columbia. From this ruling Tasanilla appealed to the Court of Appeals for the District of Columbia on the primary ground that the lower court erred in refusing to accord full faith and credit to his Florida decree. The Court of Appeals, presented with this question, re-examined the entire relationship of alimony to ex parte divorce.

The Supreme Court of the United States, in Estin v. Estin decided in 1948, held that where the wife had obtained a court support order before the husband obtained an ex parte divorce, the question of survival of an alimony claim is a matter to be answered by each individual forum according to its own local rules of public policy. In affirming the decision of the New York Court of Appeals that the husband must provide financial support even after divorce, the Supreme Court actually gave the stamp of constitutional approval to the doctrine of "divisible divorce"—that is, under the Full Faith

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9The terms "maintenance" and "alimony" will be used interchangeably in this comment to mean any form of financial support as an incident of an existing or dissolved marital relationship.
9a334 U.S. 541, 68 S. Ct. 1213, 92 L. ed. 1561 (1948).
9"Divisible divorce" means that under the U. S. Const. Art. IV, §1 (the Full Faith and Credit Clause) a divorce may be recognized to dissolve the marital status yet ineffective to terminate certain personal rights such as the wife's and child's right to support. Although the language is relatively new, identical results
and Credit Clause of the Constitution, a divorce may be effective to
dissolve the marriage relationship yet "ineffective on the issue of
alimony." The Court reasoned that Mr. Estin's ex parte Nevada
divorce decree, though valid to terminate the marital status, could
not destroy the "property right" which Mrs. Estin had obtained by
virtue of her prior maintenance judgment.

The question of whether or not a wife's unadjudicated alimony
claim will survive an ex parte divorce decree was left open by the
United States Supreme Court, because in the Estin case the claim had
been reduced to judgment before the ex parte Nevada divorce decree
was rendered. The question was first presented in the District of
Columbia in the case of Meredith v. Meredith in 1953. Here Mr.
Meredith obtained an ex parte divorce in Texas while his wife's
maintenance counter-claim to his earlier divorce action in the District
of Columbia was still pending. In denying Mrs. Meredith's alimony
claim, the Court of Appeals for the District of Columbia, relying on
the Estin decision, held that the local law of the District of Columbia
was governed by its alimony statute calling for the existence of
"husband" and "wife" status at the time of decreeing alimony. This
status had been destroyed by Mr. Meredith's Texas decree. Refer-
ting to these requirements, the court declared that "no interpreta-
tion, however liberal, can eliminate those essential prerequisites." Although the decision was that Mrs. Meredith's claim did not survive
the divorce, still the court fully recognized that it was constitutionally
possible under the Full Faith and Credit Clause that such a claim
could survive. In support of this contention of the Meredith case, the
reasoning of the United States Supreme Court in the Estin case was
extended, the Court of Appeals observing in a footnote that such
reasoning would seem to be equally applicable to an original grant

were reached by the United States Supreme Court in Barber v. Barber, 21 How. 582, 16 L. ed. 226 (1859). For an excellent discussion of "divisible divorce" see Morris, Divisible Divorce (1951) 64 Harv. L. Rev. 1289.


134 F. (2d) 64 (C. A. D. C., 1953).

14D. C. Code (1951) § 16-415: "Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the court, on application of the wife, pendente lite and permanently, may decree that he shall pay her, periodically, such sums as would be allowed to her as pendente lite or permanent alimony in case of divorce for the maintenance of herself and the minor children, if any, committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to the payment of permanent alimony." Quoted in Hopson v. Hopson, 221 F. (2d) 839, 842, n. 3 (C. A. D. C., 1955).

15204 F. (2d) 64, 67 (C. A. D. C., 1953).
of maintenance after divorce. With that remark, the court actually laid the foundation upon which it later built the Hopson decision.

This was the state of the law in the District of Columbia when Mrs. Hopson brought her action after her husband had obtained his ex parte Florida decree. Because of the deference owed to "the proceedings of a sister state . . .", the Court of Appeals declined to attack the Florida decree, saying: "... the result of the attack might well be to stigmatize unnecessarily a subsequent marriage and the children born thereof." Instead, the court completely redeclared local law in the District of Columbia on the matter of alimony after divorce and held that Mrs. Hopson's claim had survived the divorce. The earlier decision in Meredith v. Meredith, was disposed of with the observation that, "On reconsideration we now conclude that we went too far in fixing this blanket rule, since circumstances may exist in a particular case . . . where allowance of maintenance after such divorce would serve, rather than contravene public policy." New meaning was given to the alimony statute by the holding that the statute was merely a specific authorization to enter an alimony decree rather than an express limitation on a court's general equitable powers to do so. As its only authority for holding that Mrs. Hopson's unadjudicated alimony claim survived the ex parte Florida divorce, the court invoked and relied upon the statement which it had appended in a footnote to the Meredith case. There it had been indicated that the reasoning on the "divisible divorce" concept by the United States Supreme Court in the Estin case would seem to be equally applicable to the Hopson situation—that is, where the wife's claim has not been adjudicated in her favor prior to husband's divorce. The majority took the view that Mrs. Hopson's right to alimony was a personal right which, under the "divisibility" doctrine, is not terminated with the dissolution of the marital status.

\[16^{204}\] F. (2d) 64, 66, n. 3 (C. A. D. C., 1953): "While the Estin decision involved merely the enforcement of a maintenance order entered prior to the foreign divorce, its reasoning would seem to be equally applicable to an original grant of maintenance after the divorce. Either may be done consistently with the full faith and credit clause."


\[19\] The trial court, after finding Mr. Hopson's Florida divorce invalid, entered judgment in favor of Mrs. Hopson for maintenance for herself and support of the child. The Court of Appeals also decided in Mrs. Hopson's favor, but on the ground that her alimony claim survived divorce, whether valid or not. The appellate court therefore reversed and remanded, assigning as error the trial court's unnecessary examination of the validity of the Florida decree.

\[18\] See note 16, supra.
The Hopson dissent argued that the finding of the lower court not only could but should have been affirmed in the light of the then existing local policy within the District of Columbia, contending that the principles of law, settled by precedent cases, should have been followed. Speaking through Chief Judge Stephens, the minority argued that "It is elementary that if in the jurisdiction of a given court the principles of law appropriate for the decision of a case before the court are already known, whether through statutes or reported cases, it is the duty of the court to decide the case by the application of those principles."\(^2\) It should be pointed out that the Hopson dissent also relied on the Estin case, but in the restrictive sense of attacking the authorities cited by the majority, on the ground that in that case the United States Supreme Court had said absolutely nothing about the wife's alimony claim which "had not ripened into adjudication in her favor prior to the entry of the foreign decree of divorce in favor of the husband."\(^2\) This view that the rule of the Estin decision should not be extended beyond its exact fact situation finds support in several jurisdictions.\(^2\)

The question of a wife's claim for alimony surviving an ex parte divorce has received conflicting treatment throughout the states, the result turning on local rules of policy, statutes, and statutory interpretation.\(^2\) Certainly no better picture of this conflict can be found than in studying the Hopson decision on the one extreme and the Vermont

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\(^2\)See 221 F. (2d) 839, 856 (C. A. D. C., 1955).

\(^2\)See 221 F. (2d) 839, 852 (C. A. D. C., 1955).

\(^2\)In New York, where the Estin decision was rendered, the courts have refused to go beyond that rule to allow alimony in the absence of a maintenance decree rendered prior to the ex parte divorce. Harris v. Harris, 279 App. Div. 542, 110 N. Y. S. (2d) 824 (1952); Adler v. Adler, 192 Misc. 953, 81 N. Y. S. (2d) 797 (1948). Unadjudicated alimony claims were denied in: Calhoun v. Calhoun, 70 Cal. App. (2d) 233, 160 P. (2d) 923 (1945); Commonwealth v. Petrosky, 168 Pa. Super. 232, 77 A. (2d) 647 (1951); Atkins v. Atkins, 386 Ill. 345, 54 N. E. (2d) 488 (1944), principally on the ground that full faith and credit requires the termination of a wife's right to further maintenance along with the termination of the marital status.

\(^2\)Alimony based on unadjudicated claim was allowed after ex parte divorce in Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921) and Searles v. Searles, 140 Minn. 382, 168 N. W. 133 (1918), on the ground that an ex parte divorce is "in rem" rather than "in personam" therefore the decree only operates to destroy the res, the marital status, and not the personal right to alimony. Alimony was considered a "property" right which is not destroyed by ex parte divorce in Gray v. Gray, 61 F. Supp. 967 (E. D. Mich. 1945). The Ohio court construed the term "wife" in its alimony statute to designate the person rather than the actual existing marital relation. Thus, the husband's ex parte divorce did not deprive the former wife of alimony in Cox v. Cox, 19 Ohio St. 502 (1869). For cases in which alimony, based on an unadjudicated claim, was denied, see note 23, supra.
rule on the other. In *Loeb v. Loeb*, under facts almost identical with the *Hopson* case, the Vermont Supreme Court very recently denied the wife's claim on the ground that alimony is but an incident of the marriage relationship, the dissolution of which not only terminates the right of the wife to receive, but also the duty of the husband to provide, further financial support. The view was taken that since the marital status constitutes the very basis of an action for alimony or separate maintenance, the wife must assert her claim for alimony before the husband's divorce proceedings are concluded or forever be barred from raising the question. This decision follows the classical idea that marriage is an indivisible entity rather than a bundle of rights and duties, part of which may be terminated by divorce while the others survive. In view of this conflict on the matter of alimony after divorce, and the lingering reluctance of the courts to effect the necessary changes in local policy to provide the helpless wife with the relief to which she is justly entitled, it is submitted that the more desirable solution is to be found in legislation allowing alimony after divorce.

Statutory solution of this problem has followed several patterns. The most desirable pattern seems to be that adopted by New York in its recently enacted statute, recommended and drafted by the Law Revision Commission of that State. This statute has been tested and

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2114 A. (2d) 518 (Vt. 1955) For cases in accord with *Loeb v. Loeb*, see note 23, supra.


23Statutes on this subject have followed three general patterns. The first merely permits alimony to be granted to a "wife," which provision may be construed to deny alimony, as in the Meredith case, 204 F. (2d) 64 (C. A. D. C., 1953), and also to allow alimony as in the Hopson case. The second type of statute authorizes a spouse to bring a divorce action on the ground that the other spouse has obtained a divorce in another state. This type exists only in Michigan, 3 Mich. Comp. Laws (1948) § 552.6 (6) and in Florida, 5 Fla. Stat. Ann. (1954) § 65.04 (8). The Michigan statute has held not to violate the Full Faith and Credit Clause in *Albaugh v. Albaugh*, 320 Mich. 16, 30 N. W. (2d) 415 (1948). In *Keener v. Keener*, 152 Fla. 13, 11 S. (2d) 180 (1942) it was held that the Florida statute did not violate Full Faith and Credit Clause. The third and most satisfactory type of statute covering this problem has been adopted in New Jersey and New York, whereby alimony after divorce is authorized. The New Jersey statute, 2 N. J. Rev. Stat. (1950) c. 50 § 37, was held to entitle a former wife to alimony in *Staedler v. Staedler*, 6 N. J. 380, 78 A. (2d) 896 (1951); *Payne v. Payne*, 2 N. J. Super. 270, 63 A. (2d) 549 (1948). The New York statute, N. Y. Civ. Prac. Act (1954) § 1170-b, has also been relied on for granting alimony after ex parte divorce. *Vanderbilt v. Vanderbilt*, 207 Misc. 291, 138 N. Y. S. (2d) 222 (1955).

24See N. Y. Law Revision Commission Report (1943) Recommendation and Studies, 463, 468, 471, for a complete study of this subject and also the recommended legislation which has now been enacted by the New York Legislature:
found to solve the problem which had troubled the New York courts ever since the Estin case was decided.\textsuperscript{29}

Although legislative treatment of the problem seems desirable, it is perhaps not necessary. After the Hopson decision, the Court of Appeals for the District of Columbia ordered a rehearing in the Meredith case, and reversed its earlier decision.\textsuperscript{30} In the rehearing opinion, the majority of the court declared: "In Hopson v. Hopson we merely applied the principles of the Supreme Court cases above referred to. We must do the same here. It follows that the Texas decree, even though valid as to the marital status of the Merediths and the consortium rights of both spouses, could not destroy Mrs. Meredith's right to claim maintenance, a financial right. Her claim to maintenance was filed in the District of Columbia in an action in which the court here had jurisdiction over the husband because he had brought the action. The Texas court had no jurisdiction over the wife and so could not deprive her of this financial right. It was therefore error for the District Court to dismiss the claim to maintenance as moot because of the Texas decree."\textsuperscript{31} This language seems to indicate that an ex parte divorce decree is invalid to the extent that it purports to cut off a wife's right to alimony in a proceeding in which the court does not have personal jurisdiction over her. If this be so, another jurisdiction giving recognition to such an invalid decree as valid would also violate the Fourteenth Amendment, since the Supreme Court has ruled that due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process.\textsuperscript{32} Under this view, the first Meredith decision violated the Due Process Clause, and the result in the Hopson case is the only one that can be reached consistent with due process of law.

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N. Y. Civ. Prac. Act (1954) § 1170-(b). The commission determined that such legislation was necessary to protect a wife whose right to support would be cut off, in the absence of a maintenance decree, by a husband's ex parte divorce obtained in another state. In order to avoid discrimination against foreign divorces, as warned against by Justice Frankfurter in his dissent in the Estin case, the statute is made applicable whether the ex parte divorce is obtained in a foreign court or in a New York court.

\textsuperscript{29}The New York Statute, tested in Vanderbilt v. Vanderbilt, 207 Misc. 291, 138 N. Y. S. (2d) 222 (1955), changed the New York law by permitting an unadjudicated alimony claim to survive an ex parte divorce. For New York cases prior to this statute, see Note (1953) 28 A. L. R. (2d) 1410.

\textsuperscript{30}Meredith v. Meredith, 226 F. (2d) 257 (C. A. D. C., 1955), reversing on rehearing 204 F. (2d) 64 (C. A. D. C., 1953).

\textsuperscript{31}226 F. (2d) 257, 259 (C. A. D. C., 1955).

\textsuperscript{32}Griffin v. Griffin, 327 U. S. 220 at 229, 66 S. Ct. 556 at 560, 90 L. ed. 635 at 640 (1946).
EQUITY—RIGHT TO SPECIFIC PERFORMANCE DECREES TO ENFORCE CONTRACT TO MANUFACTURE CHATTEL. [Virginia]

The trend toward fusion of legal and equitable procedure, though not equivalent to a complete merger of the two branches of jurisprudence, has had the effect of removing the historic conflict between law and equity courts, thus allowing the latter to expand their jurisdiction to controversies in which equitable remedies were not previously available. The expansion of the scope of specific performance is an excellent example. Although it cannot be said that the availability of this form of relief has been extended to the point of being an alternative remedy for breach of contract to be invoked purely at the election of the injured party, yet the recent Virginia case of *Thompson v. Commonwealth,*\(^1\) indicates that that ideal, recognized by Story over one hundred years ago,\(^2\) is coming appreciably nearer.

The suit was brought for specific performance of a contract between the plaintiff Commonwealth and the defendants, International Roll Call Corp. and Thompson, which provided that the defendants “prepare, build, construct, and deliver” to the Commonwealth “two complete spare recorder units without cases, and two complete spare high speed vote counters; it being understood that both the recorder units and counter units are to be of the same model and type now in use in the voting systems in the Senate and House of Delegates.”\(^3\) The defendants answered that specific performance should not be decreed because the remedy at law was adequate, inasmuch as the contract was for the sale of chattels which were not unique in nature, for, while the Commonwealth “‘cannot go into the market and purchase’ the equipment,... ‘any first class machine shop, of which there are several around Richmond can build the counters and recorders, as well as the defendants can’.”\(^4\) In defense it was also contended that should specific performance be granted, “the personal attention and labor of two of your defendants” would be required for many months, thereby placing them in a position “tantamount to involuntary servitude.”\(^5\)

In view of traditional equity rules, the contentions of the defendants seemed sound. It is often stated as a general rule that equity will

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1. 197 Va. 208, 89 S. E. (2d) 64 (1955).
2. 2 Story, Equity Jurisprudence (1st ed. 1836) 25; 1 Story, Equity Jurisprudence (12th ed. 1877) 705.
not give specific performance of contracts for the sale of chattels. In reality, the rule is not based on the distinction between real and personal property, but on the ground that damages at law will usually afford a complete remedy because plaintiff can purchase the chattel from another source and, by obtaining damages from defendant, can recompense himself for any loss suffered by the failure of defendant to furnish the chattel under the contract. The buyer’s right to obtain specific enforcement of such a contract thus depends on his ability to show that the chattel is of a unique nature which makes it unobtainable elsewhere. By this means he can meet the requirement that “a clear case of the inadequacy of damages is necessary in order to obtain equitable relief” where a chattel is involved. Therefore, it would appear that the Virginia court departed from the historic requirement of uniqueness, for it granted specific performance.

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8 The remedy at law was found to be adequate in the following cases: Southern Iron & Equipment Co. v. Vaughn, 201 Ala. 356, 78 So. 212 (1918); Dunner v. Hoover, 43 Cal. App. (2d) 755, 111 P. (2d) 737 (1941); Wehen v. Lundgaard, 41 Cal. App. (2d) 610, 107 P. (2d) 491, 493 (1940); Edelen v. W. B. Samuels & Co., 126 Ky. 295, 103 S. W. 360, 362 (1907).

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9 Where the chattel has some peculiar, unique, or sentimental value to the buyer, not measurable in damages, specific performance will be granted. Downing v. Williams, 298 Ala. 551, 191 So. 221 (1939); Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329 (1912); Kann v. Wausau Abrasives Co., 81 N. H. 535, 129 Atl. 374 (1925); Summers v. Bean, 13 Grat. 401 (Va. 1859); Hubbard v. George, 81 W. Va. 538, 94 S. E. 974 (1918). But specific performance has been denied for want of uniqueness where a pecuniary value could be placed on the article. Kane v. Tuckman, 131 Fed. 609 (C. C. N. D. Iowa, 1904); Southern Iron & Equipment Co. v. Vaughn, 201 Ala. 356, 78 So. 212 (1918); Bowman v. Adams, 45 Idaho 217, 261 Pac. 699 (1927) (denying specific performance where unique but having ascertainable pecuniary value).
while conceding that the equipment which the defendants had contracted to supply could be produced by other craftsmen in the vicinity, even though it could not be immediately purchased in the market.

In considering the defendants' objection to specific performance as involving enforced personal service, the court recognized the general rule that "courts of equity will not entertain suits to enforce specifically contracts...involving skill, labor and judgment." Several reasons have been given for the refusal to enforce such contracts. Specific enforcement of close personal service contracts has been held to contemplate involuntary servitude amounting to an infringement of personal liberty in violation of the Federal Constitution. Aside from the constitutional objection, there appears to be a general public policy against such enforcement. Other objections to specific enforcement of personal service contracts are based on the long and minute supervision which might burden the court issuing such a decree, and the difficulty of compelling performance of the services to the best of the defendant's ability. These problems are especially applicable where the work requires special skill or experience, since the courts do not have a standard for measuring skill or experience. In many jurisdictions these objections would appear to be sufficiently persuasive to have prompted a refusal to en-

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25Chadwick v. Chadwick, 21 Ala. 580, 25 So. 631 (1903); H. W. Gossard Co. v. Crosby, 132 Iowa 155, 109 N. W. 483 (1906); Fitzpatrick v. Michael, 177 Md. 248, 9 A. (2d) 639 (1939). It is well established that if a contract is found to involve a continuous personal relationship it will not be enforced. Coykendall v. Jackson, 17 Cal. App. (2d) 729, 62 P. (2d) 746 (1936); Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467 (1890); Edelen v. W. B. Samuels & Co., 126 Ky. 295, 103 S. W. 360 (1907); Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638 (1917); Campbell v. Rust, 85 Va. 653, 8 S. E. 664 (1889).
27"The jurisdiction of equity will not be exercised to decree a specific performance, however inadequate may be the remedy for damages, where the contract is of such a nature that obedience of the decree cannot be compelled by the ordinary processes of the court." Leonard v. Plum Bayou Levee Dist., 79 Ark. 42, 94 S. W. 92 (1906); Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 956, 20 Atl. 467 (1890); Sword v. Aird, 306 Mich. 14, 9 N. W. (2d) 907 (1943); Connell v. Yost, 62 W. Va. 66, 57 S. E. 299 (1907).
force the contract involved in the Thompson case, since specific performance cannot be demanded as a matter of absolute right.

In spite of this strongly entrenched authority supporting the defendants’ two contentions, the Virginia court granted specific performance. As a rebuttal to the defendants’ contention that the plaintiff’s remedy at law was adequate, the court accepted the approach of Williston that the modern trend of equity should “be less technical in the application of this principle, and where a special need on the part of the plaintiff, and at least a temporary monopoly on the part of the defendant, justify its application, the remedy is allowed for breach of contracts for the sale of personal property for which damages might otherwise be adequate.” But the court in the instant case may be extending even the Williston view, by finding the chattel to be unique because it is not readily available on the open market. The remedy at law was held inadequate because “there are no other experienced manufacturers of such equipment...” from which the Commonwealth could in the ordinary course of business order the equipment. The defendants’ contention that there were several other machine shops in the vicinity capable of producing the device, though not contested, was declared not to make plaintiff’s remedy at law adequate, because plaintiff, even after receiving a damages judgment, would have to assume the burden of finding a manufacturer who could produce the device without plans or previous experience. This “responsibility and risk” should properly fall on the defendants.


This broad approach to the determination of equity jurisdiction would apparently be approved by several other courts. “In order to deny one the relief which a court of equity can give, it is not in all cases sufficient that there be a remedy at law. The remedy must be plain and adequate, and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity.” Dailey v. City of New York, 170 App. Div. 267, 156 N. Y. Supp. 124, 129 (1919), quoted as above with approval in Brummel v. Clifton Realty Co., 146 Md. 56, 125 Atl. 905, 907 (1924). The Illinois court set down a liberal view when it granted specific performance because the remedy at law might not be adequate. McMullen v. Vanzant, 73 Ill. 190 (1874). “It is worth noting that on the Continent of Europe and in Scotland specific performance is allowed without any other limitations than those which the circumstances of the case necessarily impose.” 3 Williston, Sales (Rev. ed. 1948) 328.

Having thus established, in refuting the defendants' first contention, that the production of the equipment contracted for required a substantial degree of unique skill and experience, the court tended to undermine this course of reasoning in answering the defendants' second objection to the granting of specific performance. Here, it was reasoned that the defendants would not be compelled by the decree to render such personal services in producing the equipment as would place them in involuntary servitude to the plaintiff, because the defendants may contract with some other manufacturer to build the device for them.\(^2\) However, if the job is of a nature that a substitute builder can handle it satisfactorily, it would appear that the defendants' qualifications are not special or unique;\(^3\) and if this is true, it would appear that the plaintiff could obtain another manufacturer to do the job and then would have an adequate remedy at law against the defendants in a damages action for any extra expenses incurred in procuring the desired equipment.\(^4\) The defendants' assertion that other shops in the area could do the work was accepted by the court when that fact could be used against the defendants' personal-service objection but was ignored by the court when that fact supported the defendants' lack-of-uniqueness objection.

This is not to say, however, that the result reached in the principal decision is not commendable. The defendants' personal service objection appears ill-conceived in both its aspects in the present situation. First, enforced personal service appears to be objectionable as involuntary servitude in the constitutional sense only when of a confining nature and under the direction of an employer as to details.\(^5\) Hence,

\(^{2}\)Specific performance has been denied where a substitute for the chattel was available. Le Moyne Ranch v. Agajanian, 121 Cal. App. 423, 8 P. (2d) 1055 (1932); Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 105 N. J. Eq. 108, 147 Atl. 202 (1929).

\(^{3}\)"In order to find the remedy at law adequate, it is not necessary that plaintiff be put in exactly the same position as he would have been by the performance of the contract; it is sufficient if he can be put in substantially the same condition." McClintock, Equity (2nd ed. 1948) 152. If plaintiff can obtain like goods with the damages received, the remedy at law is usually adequate. Francis v. Medill, 16 Del. Ch. 129, 141 Atl. 697 (1928); American Snuff Co. v. Walker, 175 Ky. 149, 193 S. W. 1021 (1917); Hearn v. Ruark, 148 Md. 354, 129 Atl. 366 (1923); Fox v. Fitzpatrick, 190 N. Y. 259, 82 N. E. 1103 (1907).

\(^{4}\)It has been held that the adequacy of the remedy at law, to preclude specific performance, must be as certain, complete, and efficient as specific performance. Griffin v. Oklahoma Nat. Gas Corp., 37 F. (2d) 545 (C. C. A. 10th, 1930); Brummel v. Clifton Realty Co., 146 Md. 56, 125 Atl. 905 (1924).

\(^{5}\)The objection appears most frequently in contracts for close personal service. E.g., Miller v. City of Phoenix, 51 Ariz. 254, 75 P. (2d) 1033 (1938); Ledford v. Chicago, M. St. P. & R. Co., 298 Ill. App. 298, 18 N. E. (2d) 588 (1939); Fitzpatrick v. Michael, 177 Md. 248, 9 A. (2d) 639 (1939); Safro v. Lakofsky, 184 Minn. 336,
this objection was not appropriate in the principal case because the defendants would not be required to do their work under the continuous and personal direction of the plaintiff, but would work in their own shop, using their own means, at times of their own choosing, the plaintiff having no right to interfere or supervise, but only the right to demand that the finished product be delivered within reasonable time in proper form and condition. In effect, the defendants argue that a court should never specifically enforce a contract for the manufacture and delivery of chattels. Secondly, in regard to contracts involving individual taste, skill or judgment, but no close personal relationship, the difficulty of enforcement, rather than a general policy of law against such enforcement, appears to be the main consideration, specific performance being granted if damages would be difficult to estimate.

The idea of the law allowing a contract-breaching party to refuse to perform because the non-breaching party can obtain someone else to provide for him the benefit the breaching party contracted to confer is not pleasing to the sense of justice. It would appear more sensible to permit the plaintiff to determine which remedy, damages or specific performance, would most benefit him, rather than to give the wrongdoer the choice of performing the contract or paying damages. While such an unsatisfactory procedure may once have been necessary in order that equity jurisdiction might develop alongside traditional common law concepts, it seems no longer necessary in a jurisprudence

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298 N. W. 641 (1931). These contracts are enforced, by injunction against performance of these services for others, if there is an express covenant not to so perform, but not in cases involving no peculiar talent. Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467 (1890); Safro v. Lakofsky, 184 Minn. 336, 238 N. W. 641 (1931). Such enforcement is criticized by Stevens, Involuntary Servitude by Injunction (1920) 6 Corn. L. Q. 255.

27 The courts do not appear to limit their jurisdiction in cases of this type but exercise their discretion to refuse the remedy. Tucker v. Warfield, 73 App. D. C. 278, 119 F. (2d) 12 (1941); United Fuel Gas Co. v. Swiss Oil Corp., 41 F. (2d) 4 (C. C. A. 6th, 1930); Calumet Co. v. Oil City Corp., 114 Fla. 531, 154 So. 141 (1934); Stern v. Freeport Acres Inc., 107 N. Y. S. (2d) 810 (1951). The modern approach is well stated by Walsh: "The courts now realize that superintendence by the court or its representative is unnecessary, that the court is called on merely to construe the contract and to make a decree ordering its performance accordingly, leaving to the plaintiff the privilege of raising the question thereafter as to whether or not the decree has been complied with, with undoubted power in the court to compel full performance." Walsh, Equity (1930) 328.

27 Adams v. Messenger, 147 Mass. 185, 17 N. E. 491 (1888); Svenburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Adams v. Snodgrass, 175 Va. 1, 7 S. E. (2d) 146 (1940).

251 Story, Equity Jurisprudence (18th ed. 1877) 705; Walsh, Equity (1930) 306; Note (1950) 17 U. of Chi. L. Rev. 409.

25 The historic conflict between law and equity appears to have caused many
in which the presence of both law and equity has been so thoroughly reconciled. The West Virginia Supreme Court appears to have accepted this fact in declaring that "the court is controlled by that sound and reasonable discretion, which governs itself as far as may be, by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."  

Unfortunately, the Virginia court in the Thompson case did not set down that broad a principle in reaching its reasonable and progressive result regarding the availability of the specific performance remedy. It appeared to find itself so bound by the traditional rules restricting equity's power to grant such relief that the desired result could be reached only by a strained application of those rules. Unfortunately also, the action of the Virginia court in giving recognition to traditional rules while applying them with an unusual effect in order to reach a desired result leaves to conjecture how the Virginia court will react to future requests for specific performance of contracts for the purchase or manufacture of chattels. However, the decision in the Thompson case stimulates the hope that the general trend toward enforcement of contracts for the sale of chattels will be supported in Virginia.

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of the restrictions upon equity's powers, since equity "did not establish itself without great jealousy on the part of the common law courts." Fry, Specific Performance of Contracts (2nd ed. 1884) 8. For further discussion of this point see Note (1950) 17 U. of Chi. L. Rev. 409.

This appears to be recognized by the ever increasing willingness of the courts to enforce contracts not relating to land. General Securities Corp. v. Welton, 223 Ala. 299, 135 So. 329 (1931); Sanford v. Boston Edison Co., 316 Mass. 651, 56 N. E. (2d) 1 (1944) (compiling in footnote 1 the Massachusetts cases broadening specific performances); Dahlstrom Metallic Door Co. v. Evatt Const. Co., 256 Mass. 404, 152 N. E. 715 (1926); Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 145 Atl. 378 (1929); Titus v. Empire Mink Corp., 17 N. Y. S. (2d) 909 (1939). For a discussion of additional developments in equity see Simpson, Fifty Years of American Equity (1936) 50 Harv. L. Rev. 171.


No definite trend can be found in previous Virginia decisions on points involved in the principal case. The court has granted specific performance where the public interest is evidently involved. Southern Ry. Co. v. Franklin & P. R. Co., 98 Va. 693, 32 S. E. 485 (1899). The court has dismissed the problem of judicial supervision, upon the assumption that its decrees will be obeyed. Chesapeake & O. Ry. Co. v. Williams Slate Co., 119 Va. 129, 129 S. E. 499 (1925). But it has found the remedy at law adequate in many cases. Griscom v. Childress, 183 Va. 42, 183 Va. 42, 42 S. E. (2d) 309 (1944); Walker v. Henderson, 151 Va. 913, 145 S. E. 311 (1928); Wright v. Pucket, 22 Grat. 370 (Va. 1872). It has also, on occasion, been quick to deny enforcement on the ground that a contract involved personal service, Campbell v. Rust, 85 Va. 653, 8 S. E. 664 (1889), but has shown a more liberal vein in a similar case, Grubb v. Sharkey, 90 Va. 831, 20 S. E. 784 (1894).
In a number of states legislation has been enacted in recent years to restrict or prohibit the use of a union or closed shop agreement or similar union security devices, with the stated purpose of protecting the workingman's right to a free and unhampered decision on the question of whether or not he will join a union. The need for these so called "right-to-work" statutes was explained by the North Carolina Supreme Court in the case of State v. Whitaker in 1947: "Until the beginning of the war only a relatively small minority of employees (less than 20 per cent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 per cent now contain some form of compulsion. ...With this trend, abuses of compulsory membership have become... too serious and too numerous to justify permitting present law to remain unchanged."3 The legislative remedy for this problem took the form of statutes and constitutional amendments providing that no one shall be denied an opportunity to obtain or retain employment solely because of his membership or non-membership in a labor organization.4 Most of these enactments also contained a pro-


4A closed shop agreement is one which requires membership in a union as a condition of employment. East Co. v. United Oysterman's Union, 130 N. J. Eq. 792, 21 A. (2d) 799 (1941). A union shop contract is one under which the employees of the company would be required to become members of the union as a condition of retaining employment. Wallace Corp. v. N. L. R. B., 141 F. (2d) 87 (C. C. A. 4th, 1944).

228 N. C. 352, 45 S. E. (2d) 850, 870, 871 (1947).

"No person shall be denied employment because of membership in, or affiliation with, or resignation or expulsion from a labor organization, or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization." Neb. Rev. Stat. (1952) §48-217. This provision is comprehensively typical of provisions contained within the right-to-work legislation. However, in some states, such as Arizona, where the legislature had already adopted measures to prevent coercion of employees not to join a labor organization,
vision prohibiting employers from entering into contracts or agreements obligating themselves to exclude persons from employment because they are or are not labor union members. Although union security was seriously limited by the passage of these statutes, unions have been unsuccessful in their repeated attempts to have them declared unconstitutional. The Supreme Court of the United States has rejected arguments that the legislation violates the right of freedom of speech, denies equal protection of the laws, impairs the obligation of

the right-to-work laws have been phrased as follows: "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization...." Ariz. Code Ann. (Supp. 1952) § 56-1902.

The Supreme Court of the United States, upholding the validity of the Nebraska right to work statute, has defined the effect of this legislation to be to command employers to employ workers without regard to union or non-union affiliation. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 355 U. S. 525, 69 S. Ct. 251, 93 L. ed. 212, 216 (1949).


Perhaps the basic attitude of the Court in this controversy was summed up by Justice Frankfurter when he observed in a concurring opinion: "Obviously the proper forum for mediating a clash of feeling and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this court only in disregard of the historic limits of the Constitution." American Federation of Labor v. American Sash & Door Co., 335 U. S. 538, 557, 69 S. Ct. 260, 267, 93 L. ed. 222, 233 (1949). Compare Hanson v. Union Pac. R. R., 660 Neb. 669, 71 N. W. (2d) 256 (1955), in which the Nebraska court said the right to work was a fundamental human right which is protected by the Due Process Clause of the Fifth Amendment from infringement by the federal government, such infringement being found in the Railway Labor Act, 48 Stat. 1185 (1934). 45 U. S. C. A. §§151 et seq. (1954).

"Nothing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition. Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members. ... There cannot be wrung from a constitutional right of workers to assemble to discuss improvements of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or cannot participate in union assemblies." Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 355 U. S. 525, 530, 69 S. Ct. 251, 254, 93 L. ed. 212, 217 (1949).

"In National Labor Relations Board v. Jones & Laughlin Steel Corp., 391 U. S. 1, 57 S. Ct. 615, 81 L. ed. 899, 108 A. L. R. 1552, this Court considered a challenge to the National Labor Relations Act on the ground that it applied restraints against employers but did not apply similar restraints against wrongful conduct by employees. We there pointed out ... the general rule that 'legislative authority exerted within its proper field, need not embrace all the evils within its reach.' ... We cannot say that the Arizona amendment has denied appellants equal protection of the laws."

"We are satisfied that Arizona has attempted both in the anti-yellow dog con-
contracts made prior to the enactment of the statutes, and deprives employees of liberty without due process of law.

Having been unsuccessful in their attacks on the constitutionality of the right-to-work laws, unions have used various approaches in attempts to circumvent the prohibitions of the acts and neutralize their effects. One of these was demonstrated by the recent case of Building Trades Council of Reno v. Bonito. When plaintiff was constructing several new units as additions to his motel, a business agent of the defendant labor organization attempted to persuade him to sign a contract which read as follows: "The employer agrees that when craftsmen covered by this agreement are required, the employer shall first apply to the union to supply such craftsmen. If the union shall be unable, within 48 hours, to supply such craftsmen, the employer may employ craftsmen from such other source as he may choose." Plaintiff was put on the "We Do Not Patronize List" because he refused to sign the agreement, and as a consequence when he subsequently attempted to have a sign constructed and installed at his motel, he was unable to obtain any service from local businesses. He then engaged a California firm to provide the desired sign. Upon delivery of the sign to Plaintiff’s premises, the employees of the California firm contacted defendants and were informed of the presence of the name of plaintiff's
business on a “We Do Not Patronize List.” The employees of the California firm therefore refused to make the installations and returned the sign to their place of business in California. The motel owner sued to enjoin the union from continuing to include his name on its blacklist, claiming that the Nevada right-to-work statute\(^3\) made the objective sought by the union illegal. The union argued that the statute in question did not apply because the agreement sought was not to exclude non-union labor from employment, but rather was to make the union the employment agency of the motel owner. The trial court granted an injunction which was sustained by the Supreme Court of Nevada on the reasoning that the union’s interpretation of the agreement as an agency arrangement was unrealistic and unreasonable, that the 48-hour limitation was actually a period of time during which non-union men would be prevented from obtaining employment, and that such discrimination against non-union workers would render the agreement sought a violation of the statute.

The courts have experienced considerable difficulty in ascertaining what factors should receive consideration in determining whether the specific course of conduct brought into question is in violation of a right-to-work law. Earlier cases, which were brought primarily to test the constitutionality of the statutes, typically involved contracts under which unions had expressly sought to obtain closed or union shops, and there was no need to look beyond the face of the agreement to find that it was within the prohibition imposed by the legislation.\(^4\) However, controversies soon began to arise in which the union action complained against did not so obviously contravene the statute, and the courts were required to examine the elusive factors of motive, intent, and consequence. In *Local Union No. 10 v. Graham*,\(^5\) a general contractor had obtained subcontractors to work on a construction job, some of whom hired non-union labor. After some negotiations between union representatives and the general contractor, the union began to picket the premises with signs which simply stated, “This Is

\(^2\)Sec. 2... No person shall be denied the opportunity to obtain or retain employment because of nonmembership in a labor organization, nor shall... any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuaton of employment because of nonmembership in a labor organization.

“Sec. 7... Any person injured or threatened with injury by an act declared illegal by this Act shall, notwithstanding any other provision to the contrary, be entitled to injunctive relief therefrom.” Nev. Stat. (1953) c. 1.


\(^4\)945 U. S. 192, 73 S. Ct. 585, 97 L. ed. 946 (1953).
Not a Union Job," and as a result the union laborers refused to work further. The contractor sought to enjoin the picketing as unlawful, alleging that it was for the purpose of inducing him to prevent non-union laborers from working on the job. The trial court granted the injunction on the finding that the picketing was "carried on... for aims, purposes and objectives in conflict with provisions of the Right to Work laws of the State of Virginia and, therefore, [was] illegal..." The injunction was sustained by the United States Supreme Court. In dissent, Justice Douglas emphasized the delicacy of the issue presented: "The line between permissible and unlawful picketing will... often be narrow or even tenuous. A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection." He concluded that the record before the Court showed no more than that the picketing was an attempt to advertise to union men and sympathizers that non-union men were working on the job. However, the majority of the Court was willing to accept the finding of the Virginia courts that the picketing, though appearing innocent while in progress, "was combined with conduct and circumstances occurring before and during the picketing that demonstrated a purpose on the part of [the union] that was in conflict with the Right to Work Statute." Furthermore, it was pointed out that "The immediate results of the picketing demonstrated its potential effectiveness... as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men on the project."

The Graham decision having opened the door to the examination of objectives and ultimate results, the state courts have demonstrated a wide diversity of opinion as to how far they may properly go in projecting the circumstances into the future to determine whether illegal consequences will arise from the course of conduct under question. Even before the Graham case went to the Supreme Court, the Virginia court, in upholding the validity of picketing in a very similar situation, declared: "If the peaceful publication of the facts in an effort to unionize the painters resulted in economic pressure on the [employers]... that result did not make the purpose unlawful or the picketing illegal. It cannot be said that picketing otherwise legal becomes illegal because of the possibility that as a result of it a per-

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16 345 U. S. 192, 195, 73 S. Ct. 585, 587, 97 L. ed. 946, 950 (1953) [italics supplied by Supreme Court].
son affected by it may do an unlawful act, unless the purpose of the picketing is to compel the doing of such an act.”

A federal district court, in applying the Arkansas right-to-work law, adopted an even more restrictive approach in *Ketcher v. Sheet Metal Workers*. The employer apparently argued that under the contract in question it was intended by both himself and the union that the labor employed should be restricted to union members. However, the court noted that the contract made no provision for a closed or union shop or other practice prohibited by the statute, and then asserted: “In passing upon these motions we cannot go beyond the complaint and the contract, and we can see nothing in them from which any illegality can be inferred...”

By coincidence, the same statute was involved in a decision in which the Arkansas Supreme Court took a very broad view of its power to consider possibilities of future consequences in passing on the validity of union action. In *Self v. Taylor* an employer sought an injunction against picketing which followed his refusal to enter into a collective bargaining contract with the union. The proposed contract contained no provisions for a union or closed shop nor any other term referring to practices outlawed by the right-to-work act. Though the union argued that it had no motive in negotiating the contract except to protect its members against having to work with non-union labor, the employer alleged that the union was insisting on a 60-day cancellation provision with the intention of using it to harass him with repeated contract negotiations unless he would consent to discharge two non-union employees. The court ruled that the union did not have a right to picket to obtain a contract which, though legal on its face, in the circumstances of this case was obviously designed to achieve indirectly a result which the law makes illegal. Indicating the sharp...

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2215 F. Supp. 802, 817 (E. D. Ark. 1953). The complaint charged that defendants, an international labor union and certain government contractors, disrupted employment relationships between plaintiff and his individual employees under a collective bargaining agreement and caused a breach of such agreement. It further alleged that this was done pursuant to a preconceived plan, a conspiracy, the object of which was to force the plaintiffs to abandon their rights under the contract. The contract contained a provision whereby the union would furnish at the request of the employer duly qualified workers in sufficient numbers as may be necessary properly to execute work contracted for by the employer.

23217 Ark. 953, 235 S. W. (2d) 45 (1950). The testimony included a statement by a union official to the effect that the union would not exercise its termination power if it found the employer to be on good behavior. The court interpreted...
conflict which exists on this question is the vigorous and persuasive dis-
sent. It pointed out that all the union was actually asking for was a
normal collective bargaining contract with a perfectly legal 60-day
cancellation clause, and argued that the possibility or even the proba-
bility of this legal contract being used at some later time in an effort
to secure an illegal closed shop contract does not justify its being in-
validated. "The action now being taken by the majority of this court
appears to me to be a serious and dangerous one.... It may apply in
any case where any group, or any individual, seeks to engage in law-
ful conduct which, in the minds of some or all, may create a later
opportunity for unlawful conduct. It is the motive, the hope, the un-
certain expectation that is feared, and because of the fear a lawful
act is enjoined. This is too tenuous."

Perhaps even more tenuous was the action of the Louisiana Su-
preme Court in \textit{Piegts v. Amalgamated Meat Cutters}\cite{piegts}
enjoining picketing of an employer who refused to negotiate a contract in which
he would recognize the union as the sole bargaining agent for all of
his employees, union and non-union, in regard to wages, hours, and
working conditions. The contract made no reference whatever to re-
strictions against non-union employees, and there was no contention
that the union was attempting to use the contract to influence em-
ployment practices of the employer. Yet the court upheld the employer's
argument that the contract would be in conflict with the state right-
to-work law because a non-union worker's rights would be "abridged"
if the union acted as his agent. No explanation for this conclusion
was offered, except that "liberty of contract is a non-union man's pre-
rogative," and that the union might demand higher wages or shorter
hours for the employees when the non-union man would prefer
not to make such demands.\cite{piegts} In dissent, it was pointed out that the
union was not attempting, through the contract or otherwise, to pro-
vide that workers be required to join a union as a condition of em-
ployment, which is the evil prohibited by the statute, and that the ma-
jority's decision was clearly in violation of the positive provision of the
statute that the statute should not be applied to deny the right of

\footnote{\textit{See} 217 Ark. 953, 235 S. W. (2d) 45, 52 (1950).
\textit{81 S. (2d) 835 (La. 1955).}
\textit{81 S. (2d) 835 at 838 (La. 1955).}
employees through a union to bargain collectively with their employer.28

While right-to-work laws are productive of some beneficial results, such broad interpretations as were made in the Self and Piegs cases may cause severe injury to labor-management relations. These interpretations naturally lead to charges by the union that the statutes can be used by hostile courts to prohibit almost any union security measure. Already, it is said that in the field of state labor legislation the most bitter controversy centers about the right-to-work laws;29 and at the last two annual meetings of the Secretary of Labor's conference on state laws, resolutions have been adopted condemning such legislation.30

In the Bonito case the Nevada court made a reasonable compromise between the extreme views as to the scope of application of the statutes. Though the agreement sought by the union did not expressly provide that the employer should discriminate against non-union labor, the court felt that inquiry can properly be made as to whether the operation of the plan proposed is intended to result ultimately in such discrimination. If so, the fact that its illegality did not appear on the face of the proposed agreement should not save it. However, it seems inevitable that undue prejudice to union rights will result if a court has power to hold a presently valid agreement illegal simply because the court believes, as in the Self case, that the union may use it in the future to work discrimination. Although the United States

28See 81 S. (2d) 835, 839, 840 (La. 1955), referring to La. Rev. Stat. (Supp. 1954) tit. 23 §§881 et seq. The disregard of other sections of the same Act indicates that the court felt that the discrimination section was supreme over all existing law, or certainly supreme over other sections of this Act. Construction of the statute in this manner may lead to a constitutional issue of decided importance. If one assumes that the right to bargain collectively is a constitutionally protected right, then it would seem that a decision such as this would run afoul of the doctrine of Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 1213 (1940). This doctrine incorporates the idea that a general statute may not be construed in such a way that a constitutional right is held to be in violation of the statute. The statute has to be so narrowly drawn as to define specific conduct as constituting an immediate danger to a substantial interest of the state.

On the other hand, if one assumes that the right to bargain collectively is merely a constitutional issue having not yet been presented to the courts, it would seem that the Louisiana court should construe this statute so as not to raise that question. The Supreme Court of the United States will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter. Light v. United States, 220 U. S. 523 at 538, 31 S. Ct. 485 at 488, 55 L. ed. 570 at 575 (1911).

Supreme Court in the *Graham* case struck down a union demand which appeared innocent but was presently being used to obtain an illegal objective, that case does not seem to justify the courts in projecting developments into the future to find prospective illegal activity. Nor does it seem that the application of the provisions prohibiting discrimination against non-union labor should be made without due regard to other existent state or federal law protecting the right of unions. Foremost among these are labor's right of freedom of speech through picketing for a lawful purpose and its rights to bargain collectively with an employer through a union agent. The failure to recognize the latter right, expressly granted by state statute, led the Louisiana court into a highly vulnerable position in deciding the *Piegts* case.

Thus, a three-step inquiry would enable the courts to reach more sound results in these controversies over the application of the right-to-work laws to specific union demands: (1) Is the demand being made one which on its face contravenes the statute? (2) If not, is the end which the union is presently attempting to attain through its demands one which results in discrimination against non-union labor? (3) Even if so, is the union activity of a kind which is protected by other state or by federal law? By following this procedure, courts would be more likely to avoid reaching the extreme decisions which unduly prejudice the interests of either union labor or management.

SAMUEL L. DAVIDSON

**LABOR LAW—SCOPE OF PROHIBITION AGAINST SECONDARY BOYCOTT UNDER LABOR-MANAGEMENT RELATIONS ACT. [Federal]**

Though at least one prominent legal authority has refused to define the term "secondary boycott" because of its uncertainty and vagueness,¹ it is generally defined by the National Labor Relations Board and the courts as a "union tactic whereby a dispute with Employer A is used as a justification for putting economic pressure on Employer B."² Probably because of this vagueness and because of the significance the boy-

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¹In reference to the term "secondary boycott," the Restatement of Torts states: "That phrase has such an uncertain meaning and is so frequently applied to such diverse situations that it is not used in the Restatement of this Subject." Restatement, Torts (1939) § 801(4). See also, Frankfurter and Greene, The Labor Injunction (1930) 42, quoting Gill Engraving Co. v. Doerr, 214 Fed. 111, 118 (S. D. N. Y. 1914).

cott has received as a union tactic, legislators and judges alike have repeatedly modified the law concerning secondary boycotts. The latest legislative change on the federal level came about in 1947 with the passage of Section 8(b)(4)(A) of the Labor-Management Relations Act, which provides: "It shall be an unfair labor practice for a labor organization... to engage in, or to induce or encourage... a strike or concerted refusal in the course of their employment to use... or otherwise handle or work on any goods... where an object thereof is... forcing... any employer... to cease using... or otherwise dealing in the products of any... manufacturer, or to cease doing business with any other person." In light of the sweeping language of Section 8(b)(4)(A), it could readily be argued that even primary action would be outlawed; but with an eye to legislative intent, the N. L. R. B. quickly eliminated this

2The secondary boycott was extensively used as a successful labor union tactic in the 1880's at which time the Knights of Labor boycotted consumers who had accepted products from manufacturers deemed by the union to be unfair. This practice prevailed until the famous Danbury Hatters decision, Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301, 52 L. ed. 488 (1908), which held that the Sherman Act, 26 Stat. 209 (1890), 15 U. S. C. A. §§ 1-7 (1951), could be applied to curtail certain labor union activities, when these activities were in restraint of trade. In 1914, due in part to union resentment toward the Danbury Hatters decision, Congress passed the Clayton Act, 38 Stat. 730 (1914), 15 U. S. C. A. §§ 12-17 (1951), which was intended to limit the application of the Sherman Act in regard to labor unions. However, the intended effect of the Clayton Act was restricted in Duplex Printing Press Co. v. Deering, 245 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349, 16 A. L. R. 196 (1921), the Court construing Section 20 of the Clayton Act to be but a restatement of the law as it existed under the Sherman Act. Thus, members of machinists unions throughout the nation who were not employed by Duplex, but who were in sympathy with its employees, could not lawfully strike against customers of Duplex, since only workers directly employed by Duplex were to be protected. With the passage of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. A. §§ 101-105 (1947), the power to issue injunctions in most labor disputes was withdrawn from the federal courts. This had the practical effect of permitting most secondary boycotts which previously would have been prohibited under the regulations of the Sherman Act. When the Eightieth Congress in 1947 passed Section 8(b) of the Labor-Management Relations Act, 61 Stat. 141 (1947), 29 U. S. C. A. § 158 (1947), the secondary boycott was proscribed as an unfair labor practice. Though this section of the statute does not prohibit the secondary boycott by name, it was definitely designed for this purpose. As Senator Taft said: "The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes." 93 Cong. Rec. 6446, June 5, 1947. 61 Stat. 141 (1947), 29 U. S. C. A. § 158(b)(4)(A) (Supp. 1954).

3If the union activity occurs on the premises of the employer with whom the dispute exists it is usually held to be primary action, while if the action occurs at a place of business where strikers have no labor dispute it is held to be secondary. Newman, The Law of Labor Relations (1953) 115. The N. L. R. B. has adopted what is usually referred to as the situs doctrine in the determination of this question. For discussion on this subject, see Note (1955) 50 N. W. L. Rev. 247 at 252.
possibility in the *Pure Oil Co.* case, holding that only secondary action was intended to be prohibited. Thus, if a dispute between employees and employer results in a strike by the employees, the strike is not forbidden by this Section though it naturally terminates business between employer and his customers.

The kind of action typically covered by the statute was found in the *Howland Dry Goods Co.* case, where the N. L. R. B. held it to be an unfair practice for Local 145, desiring recognition as the bargaining representative of the employees of the Delivery Co., to picket the entrance of the Read Co., a customer of the Delivery Co., to induce the employees of the Read Co. to stop working, for the purpose of causing a cessation of business between the two firms. Similarly, it would not be lawful for a union engaged in a dispute with employer A to boycott employer B because employer B does business with employer A. However, employees of A, in dispute with their employer, are not prohibited from approaching manufacturer B with whom A does business, requesting that in furtherance of their dispute with A, B stop dealing with A. This is so since there is no attempt either to boycott B, or to influence B's employees to take part in the dispute by bringing pressure on B if B fails to cease dealing with A.

In 1951, The United States Supreme Court extended the effect of Section 8(b)(4)(A) beyond its obvious application in three *Building Trade* decisions. In each case general contractors had contracted with several subcontractors, one of whom employed non-union help, to work on certain building projects. Union workers in the employment of other subcontractors, upon realizing non-union workers were on the job, struck and picketed the premises of the respective projects, refusing to work with the non-union help.

Since undoubtedly a dispute which was in one sense primary existed between the non-union subcontractors and the picketing union, the

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7*Howland Dry Goods Co.,* 85 NLRB 1037 (1949).


9United Brotherhood of Carpenters and Joiners, 81 NLRB 802 (1949), where it was held the union action was not in violation of Section 8(b)(4)(A) even though the union employees threatened to picket the company if it did not comply with their request to stop dealing with the primary employer.

Court apparently concluded that the general contractors were neutrals in reference to this dispute and therefore were being subjected to the pressure of secondary action.\textsuperscript{11} Because normally in secondary boycotts the picketing ensues at the plant of the neutral or secondary employer, a question was raised as to whether the elements of secondary action existed in the building trade situation where picketing took place at the premises of the primary disputant, which by coincidence were also the premises of the neutral employer.\textsuperscript{12}

Moreover, the petitioning unions took further issue with the N. L. R. B.'s finding that the object of the strike was to cause a cessation of business between the general contractor and the non-union subcontractor. In the first place, the contention was advanced that the contractor and subcontractor were not "doing business" with each other because the contractor had such control over the subcontractor's work on the project as to make the latter a virtual employee of the former. Therefore, any interference which the union's activities might create in regard to the dealings between the two would not have the effect of forcing one party to cease "doing business" with the other. However, the Court ruled that the relationship between contractor and subcontractor is that of independent contractors, and that therefore they were "doing business" within the terms of Section 8 (b)(4)(A). Secondly, the unions contended that their object in striking was not to cause a business cessation but that they merely wished to unionize the job. The Supreme Court recognized the merit in the union argument but rejected it on the reasoning that in order to accomplish the ultimate objective to make the job all union, the union must necessarily force the non-union subcontractors off the job. This end could only be accomplished by a termination of the contract between the general contractor and the non-union subcontractor; and so, one of the ob-

\textsuperscript{11}"The secondary employer is the neutral employer with whom the union has no basic dispute." Tower, Secondary Boycotts: An Outline (1954) 5 Lab. L. J. 183, 185.

\textsuperscript{12}Though this point was extensively argued in two of the Courts of Appeals, Denver Building & Construction Trades Council v. N. L. R. B., 186 F. (2d) 326 (C. A. D. C. 1950), rev'd 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284 (1951); International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B., 181 F. (2d) 34 (C. A. 2nd, 1950) aff'd 341 U. S. 694, 71 S. Ct. 954, 95 L. ed. 1299 (1951), the Supreme Court evidently regarded it as insignificant. In the Denver case Justice Burton did recognize this problem, conceding that if there had been no contract between the general contractor and the non-union subcontractor the dispute might have been primary. Apart from this comment the Court remained silent on this point; however, in view of legislative intent that primary action was to be excluded from Section 8(b)(4)(A), it is obvious that the Court decided that the action in the Building Trade cases was secondary in nature.
jectives of the union employees in picketing was the termination of business between the contractors. Thus, the Court has decided that if an objective—not necessarily the sole objective—of the secondary action is to bring about a cessation of business between any employer and another person, the action is prohibited.13

This problem of objectives was raised again in the recent case of Douds v. International Longshoremen's Association, Independent,14 under conditions removed from the typical secondary boycott situation. Two longshoremen unions, the petitioning "Independent" union and the AFL-ILA, were competing for the position of bargaining representative in the Port of New York.15 Members of a local union of the Independent had gone on strike to force their employer to discharge an employee who had recently resigned from the Independent union and joined AFL-ILA. Consequently, this employee was discharged, but when the Independent local returned to work, the discharged employee set up a picket on the pier. Protesting the dismissal from employment, a truck driver's union, Local 807, affiliated with the AFL, refused to break the picket. In retaliation, Independent unions throughout the Port of New York refused to service any of the trucks operated by members of Local 807, thereby causing almost a complete tie-up of the Port.

Though the basic dispute existed between the unions, it brought about secondary repercussions, inasmuch as business ceased between the employers of the Independent longshoremen and the trucking concerns who employed members of Local 807 as drivers. The existence of this secondary effect gave rise to the contention that this type of union action, retaliatory against a rival union, fell within the unfair labor practices proscribed by Section 8(b)(4)(A). Upon this con-

13N. L. R. B. v. Denver Building & Construction Trades Council, 341 U. S. 675, 689, 71 S. Ct. 943, 952, 95 L. ed. 1284, 1295 (1951): "It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract."


15The happenings which antedate the actual labor dispute are of interest. The International Longshoremen's Association, Independent, had been preceded by a union of the same name which had been affiliated with the American Federation of Labor but was expelled in the fall of 1953, whereupon the AFL chartered the AFL-ILA in its place. In its effort to obtain certification as representative of the longshoremen in the Port, the AFL attempted to recruit members from the ranks of the Independent. On December 23 and 24 an election was held upon the petition of the AFL-ILA that it represented a majority. The Independent union won this election, but certification was withheld because of its alleged methods during the voting. During the hearing on this matter the ex parte injunction was granted. Douds v. International Longshoremen's Association, Independent, 224 F. (2d) 455 (C. A. 2nd, 1955).
tention the petitioner obtained an ex parte injunction temporarily enjoining the Independent union from further work refusals or strikes in this respect. However, the union disobeyed the court order by conducting a general strike throughout the Port of New York, and the District Court for the Southern District of New York imposed fines and sentences on the basis of a jury finding that the object of the strike was to cause the employers of the Independent union to stop dealing with the trucking concerns. Appeal was taken to the Court of Appeals for the Second Circuit where the order was reversed, on the holding that the object of the refusal of the Independent longshoremen to service trucks was to promote the cause of the Independent union in its struggle for certification as representative of the longshoremen in the Port. The termination of business between the employers involved was held to be but a consequence of the contest for representation.

The question thus arises as to whether the facts in the Building Trade cases and the Longshoremen's case are sufficiently different to warrant the finding of an unfair labor practice in the former but not in the latter. In order to find an unfair labor practice under Section 8(b)(4)(A) it seems necessary to establish: (1) a secondary action, and (2) a strike, boycott, or refusal to work where an object thereof is to cause a cessation of work between any employer and any person with whom he is doing business.

27The instructions to the trial court were “that the refusal to serve the trucks, taken independently of the strike, was unlawful, if its ‘object was to force the employer of the men working on the piers to cease doing business with trucking concerns employing 807 drivers’; or if it had the ‘object’ of forcing ‘customers of the trucking concerns employing 807 drivers to cease doing business’ with them. In that case they should convict; but if on the other hand they found that the strike was not a subterfuge to cover the refusal, they should acquit.” 224 F. (2d) 455, 458 (C. A. 2nd, 1955).

Judge Hand, delivering the opinion for the Court of Appeals, objected to these instructions on the ground that when Judge Burke left no question to the jury except whether the strike was a scheme to cover the refusal to service the trucks regardless of whether the refusal was a step in the contest for representation, the jury had to find that the union action fell within Section 8(b)(4)(A). 224 F. (2d) 455 at 459 (C. A. 2nd, 1955).

27Rabouin v. N. L. R. B., 195 F. (2d) 906 (C. A. 2nd, 1952); Di Giorgio Fruit Corp. v. N. L. R. B., 191 F. (2d) 642 (C. A. D. C. 1951) cert. denied 342 U. S. 869 72 S. Ct. 110, 96 L. ed. 653 (1951); Moore Dry Dock Co., 92 NLRB 547 (1950); Interborough News Co., 90 NLRB 2135 (1950); Shultz Refrigerated Service, Inc., 87 NLRB 502 (1949); Ryan Construction Corp., 85 NLRB 417 (1949); Pure Oil Co., 84 NLRB 315 (1949) holding only secondary action is to be proscribed. Contra: International Rice Milling Co. v. N. L. R. B., 183 F. (2d) 21, 26 (C. A. 5th, 1950) rev'd on other grounds 341 U. S. 665, 71 S. Ct. 961, 95 L. ed. 1277 (1951), in which it was said: “The statute clearly provides a remedy for the type of conduct engaged in by the union,
In neither of the Building Trade cases nor the Longshoremen's case was there a secondary boycott in the usual sense of the term, because no labor dispute over wages, hours, or working conditions existed between the primary employer and his employees, followed by the employees' union placing economic pressure on either a customer or any other person with whom the primary employer carried on business transactions. Nevertheless, the Supreme Court in the Building Trade cases decided that the type of conduct proscribed by Section 8(b)(4)(A) was involved. Consequently, though the courts declare that secondary action is necessary to bring the action under Section 8 (b)(4)(A), there appears to be a marked willingness on their part to find secondary action in order to comply with this requisite.

In view of this tendency, the Court of Appeals in the Longshoremen's case would certainly have been justified in such finding. Moreover, in N. L. R. B. v. Washington-Oregon District Council the Board found a union refusal to process shingles produced by non-union help to be secondary in nature, in spite of the fact that no prior dispute existed between the union and the producer of the non-union made shingles. This decision eliminates a distinction which might have been drawn between the Building Trades cases and the Longshoreman's case to the effect that the secondary action is not present unless a prior dispute exists either between the primary employer and the union or between the neutral and the union.

without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice."


2This can be seen by comparing Tower's definition of secondary boycott, quoted in the first paragraph of this comment, with the situation in the Building Trade cases. On the surface it would appear the Building Trade situation complies with the definition since the union in dispute with A, the non-union subcontractor, brought economic pressure on employer B through picketing; however, if the question were asked how might the union resort to primary action against the non-union subcontractor on the construction site, the fallacy in this view of the situation becomes evident. It would have been impossible for the union to conduct primary action without bringing economic pressure on the general contractor.


2Judge Hand recognized this distinction but the judgment of the district court was reversed, since the Court of Appeals felt that the decision was in error because
On the question of whether the secondary action of the union was for a prohibited objective, it has already been noted that the *Building Trade* decisions held that the cessation of business between the primary employer and the person with whom he is doing business need not be the sole objective of refusal to work by the union; rather, if an object of the strike or refusal to work is to cause a termination of business, it is proscribed by Section 8(b)(4)(A). Thus, it is not necessary for the courts to determine whether the underlying object of the union activity comes under that Section, because if an intermediate objective necessary to the attainment of the ultimate objective is to cause a cessation of business, the action becomes an unfair labor practice. In the *Longshoremen's* case it is clear that one objective of the Independent's refusal to service the trucks was to effect a discontinuance of business between employers of the Independent union workers and the trucking concerns employing drivers from Local 807. This result was desired for the obvious purpose of inducing the trucking concerns to bring pressure on their Local 807 drivers to break the picket of the discharged employee. Assuming this to be true, the union action would fall within the purview of Section 8(b)(4)(A), and the fact that the union's ultimate objective was to promote its cause in the struggle for representation among the longshoremen does not alter the situation.

Furthermore, in at least one case, *New York Shipping Association*, the Board has inferred that the problem of union objectives is practically irrelevant, stating: "... though it is plain that primary action is to be excepted from the scope of Section 8(b)(4)(A), there is nothing in the legislative history to warrant a conclusion that where secondary action is involved, Congress intended to draw a distinction between different kinds, so as to include some but not others. There is evidence, on the other hand, that Congress... intended Section 8(b)(4)(A) to condemn all action directed against or which has the effect of injuring the business of third persons not involved in the basic disagreement giving rise to the conflict."
Consequently, there appears no sound reason to warrant the conflicting results obtained in the Building Trade case and the Longshoremen's case, for in the latter sufficient evidence existed to find both secondary action and an unlawful objective as defined by the statute. On this view of the situation, the Court of Appeals has failed in the principal case to apply the secondary action prohibition to the lengths which the Supreme Court has indicated it might operate. However, it may well be that the Court of Appeals' more limited interpretation should be adopted, for otherwise the scope of Section 8(b)(4)(A) could be extended to far-reaching extremes whereby the union's basic right to strike would be greatly curtailed. This view is particularly realistic in light of the Fifth Circuit's pronouncement that even primary activities can be proscribed, and this factor seems to indicate the emphatic need for revision of Section 8(b)(4)(A). To remove the ambiguities now creating the problem of the cases under discussion, Congress should enact concise definitions of primary and secondary action, whereby the former is permitted and the latter held unlawful. Likewise any revision should specify that the object referred to in relation to the union's action means the sole or underlying purpose of the practice alleged to be unfair.

CHARLES B. GROVE, JR.

This possibility was expressed by Judge Faye in the Court of Appeals' opinion in the Denver Building Trade case: "To hold otherwise might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others." Denver Building & Construction Trades Council v. N. L. R. B., 186 F. (2d) 326, 334 (C. A. D. C. 1950) rev'd 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284 (1951). The same opinion was voiced by Justice Douglas, dissenting, with whom Justices Jackson and Reed concurred, when this case reached the Supreme Court: "If that is forbidden, the Taft-Hartley Act makes the right to strike, guaranteed by § 13, dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned." N. L. R. B. v. Denver Building & Construction Trades Council, 341 U. S. 675, 693, 71 S. Ct. 943, 95 L. ed. 1284, 1297 (1951). Accord: Douds v. International Longshoremen's Association, Independent, 224 F. (2d) 455 at 459 (C. A. 2nd, 1955). Cf., N. L. R. B. v. Business Machine Board, 24 L. Wk. 2287 (1955), where the Court of Appeals for the Second Circuit decided that a union may picket the customers of a firm under certain circumstances.

As originally drafted, Section 8 (b)(4)(A) made it an unfair labor practice to engage in a concerted refusal to perform any services when "the purpose" was to force an employer to cease doing business with any other person. S. 1126, 80th Cong., 1st Sess. After Congressional conference reports on Section 8 (b)(4)(A), the term "the purpose" was found to be too restrictive and might be interpreted to
A frequent source of litigation in the leading coal producing states in recent years has been the controversy between the owner of the surface estate and the owner of the mineral estate as to whether operations known as "strip mining" may be used to remove the coal deposits. Because the alternatives in the balance are either that the value of the surface estate will be destroyed or that the coal deposits cannot be exploited, the problem is one which affects not only the rights of the property owners who are parties to the dispute but also the interest of the public generally.

There seems to be complete agreement that when the right to strip mine has been expressly granted to or reserved for the owner of the mineral estate, the surface owner cannot prevent strip mining operations, even though the public interest may seem to be adversely affected.\(^1\) Several states have recognized the need for legislative control to ameliorate the destruction wrought by strip mining,\(^2\) yet in
the face of such regulation the reservation of stripping rights is not against public policy. In the instances in which the grant or the exception of mining rights was made without an express provision for the right to strip mine, the courts have not been consistent either in their approach to or in their solution of the problem. Illustrating the action of a court in a case in which the deed was ambiguous as to mining rights is the recent decision in United States v. Polino. In a proceeding brought by the United States, as owner of surface rights, the Federal District Court for the Northern District of West Virginia was asked for an interpretation of a clause in the deed excepting and reserving the right to mine and remove minerals from land conveyed to the government and subsequently set apart by the government as part of a national forest. Under the terms of the deed, the right to mine and remove was subject to rules and regulations prescribed by the Secretary of Agriculture, and defendant coal company, lessee of the successor in interest of the original grantor, and other individual defendants were charged with strip mining in disregard of the surface owner's rights and in violation of the provisions in the deed.

Following West Virginia law, the court held that under a proper construction of the severance deed the coal company, under its lease to mine and remove coal, did not acquire the right to do so by strip mining methods. The principal rule of construction utilized in arriving at this conclusion was that the manifest intent of the parties to the severance deed, as gathered from the surrounding circumstances and the purpose of the conveyance, governs. In applying this rule, the court proceeded to ascertain the intent of the parties by reasoning, first, that the right which was intended to be withheld was the right to mine coal by the usual methods known and accepted as common

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5The regulations provided that: (1) those claiming the right to mine under the deed of severance were required to exhibit upon demand of the "Forest Officer" in charge satisfactory written evidence of their right to do so; (2) only so much of the surface as was reasonably necessary for mining purposes could be occupied or disturbed; and (3) all reasonable and usual provisions should be made for surface support. 131 F. Supp. 772, 773 (N. D. W. Va. 1955).
practice at the time the lease was executed and in the place where the lands in question were located. Thus construed, the mining rights included deep or shaft mining only, since strip mining was not known in the area where the lands were situated at the time the severance deed was executed. Second, substantial emphasis was placed upon the knowledge of the parties as to the purpose for which government intended to use the land, which the court felt was evidenced by the language of the deed referring to forest officers and reserving to the owner of the mineral rights only that surface which was reasonably necessary to its operation. Such knowledge that the land was to be set aside for forestry purposes was thought to indicate that the parties had not contemplated that the surface would be destroyed, but rather that it should be kept intact. Under such circumstances they would not have intended to reserve the right to engage in strip mining, which by its very nature results in the complete removal and destruction of the surface.

While on its facts the Polino case differs in many respects from the cases which it cites as authority, the decision and reasoning behind it are representative of the policy of strict construction which the West Virginia court has adopted when dealing with instruments upon which claims of right to strip mine are based. Proposing to give effect
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to the intention of the parties as determined by the language of the instrument and the purpose of the conveyance, in the light of surrounding circumstances, the state Supreme Court in *West Virginia-Pittsburgh Coal Co. v. Strong* and in *Oresta v. Romano Bros.* had held that under a grant of the right "to mine, dig, excavate and remove" and under a reservation of the right of "mining, excavating, shipping and removing," respectively, the parties intended that the coal should be mined and removed by the usual method then known and accepted as common practice where the lands in question were located. In neither of these cases did the facts show that strip mining was practiced at the time and in the place where the severance deed was executed.

This position is strengthened by the fact that a reservation of the right to mine, with nothing more, does not imply a right to injure or destroy the surface; such a right must have been expressed in terms that leave no doubt as to its existence. Neither does the express right to use, or to use and occupy, so much of the surface as may be reasonably necessary for mining purposes give the mineral owner the right to destroy the surface, for neither the word "use" nor the word "occupy" contemplates destruction. And even where the mineral owner has been given the right to conduct his mining operations in whatever

1129 W. Va. 832, 42 S. E. (2d) 46 (1947).
12137 W. Va. 633, 73 S. E. (2d) 622 (1952).
14Barker v. Mintz, 73 Colo. 262, 215 Pac. 534 (1923); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S. E. (2d) 46 (1947). The West Virginia court in *Oresta v. Romano Bros.* summarized this point when, construing a reservation of coal and other minerals with the right of "mining, excavating, shipping, and removing," it observed that: "...the mining rights contained in such reservation do not mean or include the right to destroy or remove the surface overlying the coal or to transport and relocate such surface from its original location above the coal, each of which situations necessarily results in substantial measure from the mining and the removal of such coal by the strip mining method. ...[T]here is a pronounced practical distinction between an injury to, or the imposition of a necessary or convenient burden upon, the surface of land containing coal in or underneath the surface, each of which may be caused by the mining and the removal of such coal through and by means of excavations, tunnels, and passageways beneath the surface...and the destruction, the removal, or the relocation in the mining and the removal of coal, of the overlying surface which necessarily results in substantial measure from the use of the presently recognized strip mining method." 137 W. Va. 633, 73 S. E. (2d) 622, 629 (1952).
manner he may decide "most convenient or economical," this right has been held not to justify arbitrary infringement upon the surface rights of the owner of the surface estate.15

The approach of the West Virginia court has been that those provision which are intended to limit, regulate or govern operations and methods which are carried out chiefly in subterranean mining do not permit the removal or relocation of the surface to allow removal of the coal as is required in strip mining.16 This view in effect is that the mining rights expressly set forth in the severance deed, by grant or reservation, are in derogation of the mining rights incident to the ownership of the minerals, rather than by way of enlargement of those rights.17

In Pennsylvania and Ohio, which are apparently the only other jurisdictions in which the issue of the principal case has reached the courts of record, the law has taken quite a different course.18 There, the solution is wrought from a combination of a liberal construction of the rights incident to the ownership of the minerals, granted or reserved by the severance deed, and a rather unusual application of the doctrine of subjacent support. The result is perhaps

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16In the opinion of the Strong case, the court stated that the mining rights involved were expressly granted and did not rest upon necessary implication as is the case where the coal is granted without an express grant of mining rights, and therefore the express terms of the granted rights served to restrict the rights conferred. 129 W. Va. 852, 42 S. E. (2d) 46 at 49 (1947). The plaintiff's argument in Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 97 A. (2d) 825, 827 (1953) that had the grantor intended to restrict the grantee to subterranean mining methods it would have been simple for him to have done so in so many words, was rejected with the statement that: "Carried to its ultimate development such an argument would mean that every contract would have to enumerate not only what is granted but also what it did not grant!"
17Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia (1951) § 144; Donley, Coal Mining Rights and Privileges in West Virginia (1949) 52 W. Va. L. Rev. 32, 39.
18Franklin v. Callicoat, 53 Ohio Op. 240, 119 N. E. (2d) 688 (Com. Pleas 1954) is the only Ohio decision found pertaining to this issue. The court summarily disposed of the question of the rights incident to the mineral grant by reference to a distinguishable case to the effect that merely because strip mining was unknown at the time the severance deed was executed, it does not follow that the mineral owner has no right to use that process or any other improved method of mining that has come into use. There is nothing further in the report which sheds light upon the position taken by this Ohio inferior court as to the right to strip mine absent express provisions. It rested its decision solely upon the issue of waiver of subjacent support, and found that from the language of the deed the surface owner did not intended to part with his right of subjacent support of the soil. Thus, this decision bears mainly upon the second phase of the Pennsylvania approach, see this comment, infra.
best exemplified by Commonwealth v. Fisher;\(^1\) in which it was established, upon facts nearly identical with those of the principal case, that the defendant had the right to mine his coal by contemporary strip mining methods, even though such mining was not anticipated by the parties at the time the deed was executed. This position adopts the liberal view that the mineral owner does not intend to waive any rights that are not enumerated in the deed of severance, but to which he is entitled as an incident of ownership of the mineral estate.\(^2\)

These incidental rights, appurtenant to the grant or reservation, have been said to be gauged by the necessities of the particular case and may therefore vary with changed conditions and circumstances.\(^3\) Thus, the mineral owner is allowed to keep pace with the progress of modern invention rather than being limited to appliances and processes existing at the time the grant or reservation was made.\(^4\) This view of the Pennsylvania court takes cognizance of the fact that mining today includes more than digging, excavating, or removing minerals from subterranean workings by the utilization of shafts, slopes, drifts or tunnels.\(^5\) Also recognized is the fact that, unless strip mining is permitted, the reservation of the right to mine, and the words used in reference to it, in many instances would be meaningless because the coal cannot be mined in any other manner.\(^6\)

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\(^{3}\) It has been contended that this view represents the common understanding of the profession in West Virginia under the doctrine of Squires v. Lafferty, 95 W. Va. 307, 121 S. E. 90 (1924) which stated that the ownership of coal carries with it certain privileges, as an incident of that ownership, without the necessity of an express grant or exception of that privilege. Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia (1951) § 144; Donley, Coal Mining Rights and Privileges in West Virginia (1949) 52 W. Va. L. Rev. 32, 39.


\(^{6}\) Even Mark Twain would readily admit that his definition of a mine as “a hole in the ground owned by a liar” would be totally inadequate to describe present day strip mine operations which number 1,643 and produce 108,699,756 net tons or 23.3% of the total bituminous coal production in the United States. Minerals Yearbook (U. S. Bureau of Mines, 1952) 16, 72.

\(^{7}\) Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A. (2d) 893 (1954). This fact did not go unnoticed in the Oresta case by Judge Fox, who, criticizing his col-
However, the Pennsylvania court concedes that if the mineral owner has a legal duty to support the surface of the land, he cannot remove and destroy the surface down to the underlying vein of coal. Therefore, although it may be decided that the owner of the mineral estate has reserved the right to strip mine, it still must be determined whether he will be permitted to exercise the right, since the reservation of the right to mine and remove coal does not confer the right to mine so as to damage the surface owner's right to subjacent support. Absent explicit language in the deed confirming the right to surface support, this decision is said to rest solely upon the facts of the particular case, which determined whether the right to support has been waived, expressly or by implication, by the surface owner.

In West Virginia, a grant or reservation of “all” the coal and the
right to remove "all" the coal, as a rule of property is \textit{per se} a waiver of the right to surface support.\textsuperscript{28} And there is some authority, outside the field of coal mining, to the effect that the surface support right is limited to subterranean mining and so does not extend to open or pit mining, of which strip mining is a form.\textsuperscript{29} Although the Pennsylvania court has not adopted any such rules as to waiver, it has consistently found in cases concerning strip mining that the right to surface support was waived either by an absolute release of the mineral owner from liability for damage to the surface or by the cumulative effect of the provisions of the severance deed.\textsuperscript{30} Even with the Pennsylvania court's faculty for finding a waiver, it probably could have found no language in the reservation in the \textit{Polino} case that would sustain a waiver of the surface owner's right to support, and so the application of the Pennsylvania approach in this instance would not have resulted in a different conclusion.\textsuperscript{31}

Though both might well have reached the same decision in the principal case, it is apparent that the courts of the two states have, under the guise of rules of construction of deeds, exerted control over a matter of economic policy. Under the circumstances of the \textit{Polino} case, when presented with the choice of stimulating the conservation


\textsuperscript{32}On the contrary, the language used in regulation number three inserted in the deed of severance (see note 5, supra) indicated that the owner expressly retained his right of support; but there is nothing in the report of the case to indicate that this issue was considered, though it was mentioned in the government's trial brief and by the decisions cited as authority. Government's Trial Brief, U. S. v. Polino, p. 10; Oresta v. Romano Bros., 137 W. Va. 633, 73 S. E. (2d) 622, 623 (1953); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 532, 42 S. E. (2d) 46, 50 (1947).
of forest lands and wildlife or of encouraging industrial development, each to the detriment of the other, the West Virginia court has chosen to serve the interest of conservation and the Pennsylvania court the interests of the mining industry. While the West Virginia court has precluded itself from restricting the use of strip mining as a matter of public policy by its decision in the *Strong* case, it is clearly accomplishing the same result through the application of the rule of thumb adopted in the principal case—that the parties intended that the coal should be mined and removed by the usual method then known and accepted as common practice where the land in question was located.

NOEL P. COPEN

**TORTS—CLASSIFICATION OF RIDER AS “GUEST” OR “PASSENGER” UNDER GUEST STATUTES. [Virginia]**

The increasing frequency of accidents in vehicular traffic during the last three decades has given rise to the contention that a gratuitous guest should not be allowed to recover damages from his accommodating host for injuries arising out of the ordinary adversities of modern traffic. This point, supplemented by a public interest in avoiding increases in liability insurance rates caused by the payment of numerous judgments (many of which may have been the result of collusion between guest and host), has led about half of the states to enact automobile guest statutes. The statutes generally provide that an injured guest who has given no consideration for his ride will not be allowed to recover damages from his host unless the latter's im-

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32 W. Va. 832, 42 S. E. (2d) 46 (1947).
33 Whatever may be the merits of this policy, its obvious danger was pointed out by Judge Fox, dissenting in West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S. E. (2d) 46, 55 (1947): "Whatever may have been in the minds of the parties to the 1904 deed, in respect to strip mining, it is not, in my opinion, a safe rule to place obstructions in the way of the business and mechanical developments of the present age. Progress and development, along any line of endeavor, are necessary to the future of our productive and commercial life. An enterprise which stands still, is, sooner or later, due for liquidation."

1 A discussion of the reasons underlying the passage of guest statutes is given in Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581 (1931); Allen, Why do Courts Coddle Insurance Companies (1927) 61 Am. L. Rev. 77; Prosser, Torts (2nd ed. 1955) 451.

2 For a collection of guest statutes, see: Notes (1936) 5 Fordham L. Rev. 183; (1932) 18 Iowa L. Rev. 78.
proper operation of the vehicle was intentional,\textsuperscript{3} reckless,\textsuperscript{4} or grossly negligent.\textsuperscript{5}

Though the general intent of this legislation is recognized, the scope of its application continues to be a point of controversy in the courts. In the recent Virginia case of \textit{Dickerson v. Miller},\textsuperscript{6} a driver was sued on behalf of a decedent who had been a waitress in a restaurant managed by defendant. On the night of the accident in which decedent was killed, defendant requested that she work past the normal working hours, telling her that if she would do so, he would take her home in his automobile. Decedent, who normally did not remain past closing time and who ordinarily secured her own transportation home, acceded to defendant's request and worked late. As she was being transported home pursuant to this arrangement, the car driven by defendant struck an electric light pole, and decedent was killed. The applicable guest statute of Virginia reads as follows: "No person transported by the owner or operator of any motor vehicle as a guest \textit{without payment for such transportation}...shall be entitled to recover damages against such owner or operator for death or injuries...unless such death or injury was caused or resulted from the gross negligence...of such owner or operator."\textsuperscript{7}

The trial court held as a matter of law that gross negligence was not shown and that decedent was not a paying passenger, and as a consequence she came within the guest statute barring recovery. The Virginia Supreme Court of Appeals reversed the judgment for defendant and remanded the case for a new trial, on the ground that a jury could reasonably have found decedent a paying passenger at the time of the accident, in which case the guest statute would not apply.

When confronted with cases of this nature in jurisdictions having a guest statute, the courts are commonly required to deal with two problems of interpretation: first, whether plaintiff was a guest or a paying passenger; and if plaintiff is found to be a guest, second, whether defendant has been guilty of that lack of care which makes him liable for injuries sustained by a guest.

In determining what factors are necessary to establish the status of the occupant of an automobile as that of a paying "passenger" rather than "guest," the courts are in accord as to some general principles to be applied. There is general agreement that to make the

\textsuperscript{3}Ore. Code Ann. (1930) § 55-1209. See Note (1936) 5 Fordham L. Rev. 183.
\textsuperscript{4}Iowa Code (1954) § 321-494.
\textsuperscript{6}196 Va. 659, 85 S. E. (2d) 275 (1955).
\textsuperscript{7}Va. Code Ann. (Michie, 1959) § 8-646.1 [italics supplied].
rider a paying passenger, the benefit conferred on the driver must be more than an incidental one such as companionship or part of a mere exchange of social courtesies. At the other extreme, it is clearly agreed that a cash payment furnished in consideration for transportation constitutes the occupant a passenger rather than a guest. Also, a person may generally be a paying passenger without actual monetary payment for the ride, it being sufficient that the rider's occupancy of the car is for the definite benefit of the owner or operator, or for the mutual benefit of the owner or operator and the occupant. Nor is it essential that the consideration pass directly from the passenger to the driver. If the latter received a direct benefit from another, the service to the rider has been held not to be gratuitous. The decisions reflect less agreement, however, in applying these principles to fact

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9 O'Neill, 28 Cal. App. 2d 651, 83 P. 2d 96 (1938); Master v. Horowitz, 237 App. Div. 237, 261 N. Y. Supp. 722 (1932), aff'd 262 N. Y. 609, 188 N. E. 86 (1933); Miller v. Ellis, 188 Va. 207, 49 S. E. (2d) 273 (1948); Brown v. Branch, 175 Va. 382, 9 S. E. (2d) 285 (1940). Also, Ackerman v. Steiner, 44 Ohio L. Abs. 600, 59 N. E. (2d) 950 (1944), in which parties who had been on a social trip together, and who were involved in an accident while plaintiff, on defendant's departure, was accompanying defendant in order to point out the correct route, were held to occupy a host-guest relationship under the Ohio guest statute. Accord, the principal case, Dickerson v. Miller, 196 Va. 659, 85 S. E. (2d) 275, 277 (1955): "The benefits, in short, must be more than gratuitous gestures of reciprocal hospitality, or social amenities, extended without thought of bargaining for transportation."


11 Payment need not be in money, and is sufficient if passenger's presence directly compensates owner in a substantial and material or business sense, as distinguished from mere social benefit or nominal or incidental contribution to expenses. Wilcox v. Keeley, 336 Mich. 237, 37 N. W. (2d) 514 (1943); Scholz v. Lever, 7 Wash. (2d) 75, 109 P. (2d) 294 (1941).

situations where the rider has furnished compensation of some sort, but the intention of the parties in regard to the compensation was not clear. This is especially true of cases in which the occupant contributes all or part of the expenses of a trip. The courts appear to consider the following factors pertinent in determining whether the compensation given constitutes consideration in such cases: the time at which the compensation was agreed upon; the nature of the trip being undertaken; and the relationship of the parties.

Except in its earlier decisions, the Virginia Supreme Court of Appeals has applied a liberal test in allowing plaintiffs to qualify as paying passengers. In *Gale v. Wilber*, decided in 1934, the court,

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\(^{13}\) It seems essential, to constitute the compensation "payment," that the agreement of the parties that compensation would be made must have been entered into before the trip was undertaken. Thus, in *Morse v. Walker*, 229 N. C. 778, 51 S. E. (2d) 496 (1949) the court held that if the jury found that a contract for the payment of gas and oil was made before the trip, this would constitute payment for transportation within the purview of the Virginia guest statute. Accord, *McMahon v. DeKraay*, 70 S. D. 180, 16 N. W. (2d) 308 (1944).

\(^{14}\) In cases turning on the nature of the trip undertaken, the courts seem agreed that the trip must have been of a business nature, or one growing out of a business relationship, as opposed to one of a purely social nature. Whitechat v. Guyette, 19 Cal. (2d) 428, 122 P. (2d) 47 (1942); *McCann v. Hoffman*, 9 Cal. (2d) 279, 70 P. (2d) 909 (1937); *Miller v. Ellis*, 188 Va. 207, 49 S. E. (2d) 273 (1948).

\(^{15}\) Courts appear disinclined to deem compensation to be payment in cases where the relationship of the parties is such that the undertaking of the trip could not reasonably be expected to be founded on a business relationship. Thus, in *Hale v. Hale*, 219 N. C. 1911, 13 S. E. (2d) 221 (1941) (applying Virginia statute), a father who contributed to the cost of gasoline used on a trip he was taking with his son was held to be a guest, the court saying the facts indicated at most a situation of reciprocal hospitality between members of the same family, and adding that doubtless the suggestion that there was a formal contract would have met the displeasure of both parties until such time as the self-interest of the plaintiff intervened. Accord, *Hasbrook v. Wingate*, 152 Ohio St. 50, 87 N. E. (2d) 87 (1949).

\(^{16}\) In this case the Virginia court for the first time expressly ruled on the question of consideration required to qualify plaintiff as a passenger, holding that there must be a contractual relation between the parties. Here, at the time of accident plaintiff was riding with defendant, her neighbor, at defendant's invitation to go with her to meet defendant's husband. The court held that this arrangement did not constitute a contractual relation between the parties. In determining the proper meaning of the term "passenger" (as opposed to "guest") the court relied on the Massachusetts cases of *Jacobson v. Stone*, 277 Mass. 323, 178 N. E. 636 (1931) and *Flynn v. Lewis*, 231 Mass. 550, 121 N. E. 493 (1919). At 165 Va. 211, 217, 175 S. E. 739, 741 (1934) the court declared: "The Massachusetts court, in our opinion, has evolved the soundest interpretation of its meaning.... In the case of Flynn v. Lewis... the defendant asked a friend to accompany his daughter to a city to help the latter purchase a coat. The friend was killed on the way. The court held that there was an absence of any contractual relation between the parties which would take the case out of the guest rule.... The appellate court affirmed the judgment, saying: "The element of any pecuniary benefit or gain to the defendant being absent, the transaction was gratuitous, under which he is liable only for gross negligence in the operation of the automobile."
recognizing the standard of varying degrees of care later declared by statute, placed strong emphasis on the requirement that the benefit be a pecuniary one, based on a contractual relationship, and relied heavily on Massachusetts cases which impliedly required the benefit to be a "consideration" within the technical meaning of that term.

Later Virginia cases, apparently retaining the pecuniary-benefit and contractual-relation requirements, have, in the course of applying these requirements to different fact situations, given some indication of what is meant by the terms "pecuniary benefit" and "contractual relation"; and in the process the court has sometimes deviated from, or at least relaxed, this requirement. Thus, cash payments by the rider have been held sufficient, even though they were not requested by the driver but rather were paid only at the insistence of the rider. Furthermore, where defendant allowed plaintiff to drive defendant's truck to test plaintiff's ability to work as a chauffeur, the benefit expected to accrue to defendant was held to prevent plaintiff from being deemed a guest. However, in some Virginia cases in which a definite benefit

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27The guest doctrine was first applied by the Virginia court to the field of automobile negligence law in Boggs v. Plybon, 157 Va. 30, 39, 160 S. E. 77, 81 (1931): "To hold that a guest who, for his own pleasure, is driving with his host, may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice." This doctrine was affirmed in Jones v. Massie, 158 Va. 121, 163 S. E. 63 (1932), and was finally adopted by statute in 1938. A discussion of the origin and growth of the doctrine in Virginia is found in Davis v. Williams, 194 Va. 541 at 544, 74 S. E. (2d) 58 at 60 (1953).

28In Brown v. Branch, 175 Va. 382, 386, 9 S. E. (2d) 285 (1940) defendant was a Sunday School superintendent who gave free transportation to plaintiff and others on a picnic, but required them to pay for their own food. Defendant derived no financial benefit from the picnic, or from the sale of food there. Plaintiff contended that he rendered services in payment for his transportation to and from the picnic in that he went with defendant to pick up other passengers and assisted in unloading the truck at the picnic grounds, and that on the return trip he held an empty ice cream freezer at defendant's request. The court said: "Therefore, since the evidence relied on fails to show that the defendant derived any pecuniary benefit from his transportation of the plaintiff, or from the latter's attendance at the picnic, and likewise fails to show the existence of any contractual relation between the parties, the lower court correctly held that the plaintiff was a gratuitous guest and not a passenger in the truck at the time of the accident." 175 Va. 382, 386, 9 S. E. (2d) 285, 287 (1940).

In Miller v. Ellis, 188 Va. 207, 49 S. E. (2d) 273 (1948) defendant told plaintiff: I have to move a stove for Mrs. K. early in the morning, and if you will help me move this stove, I will help you move your furniture and building material. Plaintiff and defendant were good friends and neighbors, and the offer to help was purely in the nature of personal assistance without expectation of personal benefit or compensation. In pursuance of this arrangement plaintiff was injured while riding in defendant's truck. The court held plaintiff a mere guest, relying heavily on Brown v. Branch supra, this note.

29Davis v. Williams, 194 Va. 541, 74 S. E. (2d) 58 (1953).
was shown to have accrued, the plaintiff has nevertheless been denied the status of paying passenger where, by reason of the nature of the trip undertaken or the relationship of the parties, the benefit was deemed to be an incidental one, or at best an exchange of social amenities.\(^{21}\)

The decision in the principal case exemplifies a trend away from the rigid requirements alluded to in the earlier decisions. For the first time the Virginia court has now expressly stated that a benefit consisting of something less than actual monetary payment will suffice,\(^{22}\) although this view has been impliedly recognized in prior cases.\(^{23}\) But the court in this decision continues to assert that the benefit to the defendant must be intended by the parties as a consideration for the transportation;\(^{24}\) however, as authority for this proposition a decision is cited in which language to that effect was used but in which, it is submitted, the holding was based upon the existence of a consideration when in fact none existed.\(^{25}\)

If it is determined that there was no consideration and if a passenger is therefore deemed to be a guest within the applicable statute, it is necessary for the court to consider the problem of what type of conduct must be shown in the host to entitle such guest to recover. The statutes vary in their terminology, ranging from "gross or wilful neg-


\(^{22}\)Dickerson v. Miller, 196 Va. 659, 662, 85 S. E. (2d) 275, 277 (1955): “Before and since the passage of our guest statute it was recognized that payment in cash was not necessary to change the status of an occupant of an automobile from guest passenger to paying passenger; services rendered or to be rendered were sufficient.”

\(^{23}\)Braxton v. Flippo, 183 Va. 839, 33 S. E. (2d) 757 (1945) (benefit accruing to defendant was expectation of employing plaintiff in his business); Garrett v. Hambuck, 162 Va. 43, 173 S. E. 535 (1934) (defendant was transporting plaintiff, his employee, to plaintiff's place of employment).

\(^{24}\)Dickerson v. Miller, 196 Va. 659, 662, 85 S. E. (2d) 275, 277 (1955). The court, citing its holding in Davis v. Williams, 194 Va. 541, 74 S. E. (2d) 58 (1953), said: "Concurrence...is general that an incidental benefit resulting to the defendant from the transaction is not sufficient to enlarge the liability from guest to passenger. The benefit to the defendant must be a consideration for the transportation."

\(^{25}\)In Davis v. Williams, 194 Va. 541, 74 S. E. (2d) 58 (1953) plaintiff for more than two years rode to school in the automobile of defendant, a fellow teacher, at the latter's invitation. Defendant made no request for payment but plaintiff at the end of each week voluntarily paid defendant an amount equal to a week's bus fare. The Virginia court, expressly stating that the benefit to the defendant must be a consideration, found a consideration on these facts. But it appears doubtful if consideration is constituted by payment to a party performing a service when such performance was not expressly or impliedly conditioned upon payment, the performing party merely acquiescing in same.
ligence” to “intentional act... heedlessness... or reckless disregard....” The Virginia Act applicable in the principal case conditions recovery by a guest upon proof that the injury was caused by the “gross negligence” of the host. Though this term is used widely in guest statutes, it has defied accurate definition by the courts. There is general agreement that the term means something more than “mere inadvertence,” but the latter term is frequently left undefined.

The more general view seems to hold that gross negligence differs from ordinary negligence not in kind, but only in the degree of attention required, gross negligence being merely an extreme departure from the ordinary standard of care. However, other courts have placed a much more severe interpretation upon the term, and have found it to signify wilfulness, saying either that it involves intent, actual or constructive, which is characteristic of criminal liability, or that it involves a lack of care which is “practically wilful” in its nature.

Between these two extremes lies the view adopted in the Virginia decisions, which usually have deemed gross negligence to exist when there is an “utter disregard of prudence, amounting to complete neglect of the safety of another...” But the language of one recent Virginia case leans more strongly toward the general view by accepting a definition which falls short of the “utter disregard of consequences.” In this latest pronouncement on the subject, the court declared: “Gross negligence ‘falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, whiles both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure’.”

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33 Boward v. Leftwitch, 197 Va. 227, 89 S. E. (2d) 32 (1955). In this case the driver of a truck took his eyes off the road for the purpose of shifting gears, causing him to allow the truck to run off the road and overturn, killing plaintiff’s decedent. This inattention was held insufficient as a matter of law to establish wilful or wanton negligence of the driver required to establish liability of the owner for the death of the guest rider.
Perhaps the existence of these wide divergences of opinion in the courts is explained at least in part by the fact that the foundation for the recognition of varying degrees of negligence, or of care owed, is historical rather than logical. Early in the English law of bailments it was determined that one undertaking a duty gratuitously should be held to a lesser degree of care than one undertaking an obligation for pay. This distinction between compensated and gratuitous services is recognized today in various branches of the law—e.g., as between the duty of the private driver and the common carrier, and of the ordinary host and the innkeeper. The unfortunate consequence of applying to the field of automobile negligence law the doctrine of varying degrees of negligence has been to license the ordinary negligence of the host driver. Most courts have rejected the concept of varying degrees of negligence in automobile accident cases, and it survives chiefly by statutory enactment.

The tendency of courts in guest statute jurisdictions either to make the rider a paying passenger by finding consideration where by usual legal standards none would have been deemed to exist, or to apply less severe interpretations to the “gross negligence” requirement, perhaps represents a justifiable effort to avoid the operation of the gross negligence element in the guest statutes and thereby to avoid the excusing of ordinary negligence of operators of automobiles.

MASON L. HAMPTON, JR.

TORTS—EXISTENCE OF CAUSE OF ACTION FOR DAMAGES FOR PRENATAL INJURIES SUSTAINED BEFORE CHILD BECAME VIABLE. [Georgia]

Although the legal existence and personality of an unborn child was recognized early in the history of the common law in the fields of criminal and property law, the courts until recently refused to ap-

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[3] The history of the doctrine of varying degrees of negligence, or of care owed, is discussed in: Prosser, Torts (2nd ed. 1955) § 33; Elliott, Degrees of Negligence (1933) 6 So. Cal. L. Rev. 91, 103.

[4] The doctrine was applied in Virginia prior to the enactment of the guest statute. The origin and growth of this doctrine in Virginia is traced in note 17, supra.


ply the same logical concepts to tort law so as to allow a right of recovery for prenatal injuries. Recognition of the child as a legal person before birth was regarded as a legal fiction, since, in the view of those not familiar with medical science, the infant was a part of its mother until born. Once the concept of inseparability of the infant from the person of the mother was accepted, there could be no liability for injuries to the infant, as there could be no duty of care toward someone who did not exist as a separate person. This view seems to have been first endorsed in America at the surprisingly late date of 1884 in Dietrich v. Northhampton, in which the Massachusetts court denied recovery for injuries which caused the child to be prematurely born and to die a few minutes after birth. The court noted that the recognition of the legal existence of an unborn child in other fields of law did not extend to tort law, and decided that the complete lack of precedent for a right of recovery by a child which survived the alleged tortious injuries prevented recovery for the death of the child. This decision seemed to regard the unborn infant as an integral part of the mother until after it has been born with the capacity to sustain life.

In subsequent cases, the Dietrich decision was widely relied on as precedent for denying recovery both in cases brought under the wrongful death statute, in which the child had died either before or soon after birth as a result of the alleged tort, and in cases in which the infant had survived the injuries and was suing for the alleged tort committed against it before birth. Lack of precedent for recovery was cited as a legal justification for denial of liability to a surviving infant for wrongs done him while still in his mother's womb. Later cases advanced additional reasons. Where the defendant was a common

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4Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900).


6See cases in notes 2 and 4, supra.

7Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921). Accord: Buel v. United Ry., 248 Mo. 126, 154 S. W. 71 (1919), overruled by Stegall v. Morris, 262 Mo. 1224, 258 S. W. (2d) 577, 579 (1953) wherein the court referred to the Buel case: "If inability 'to find any precedent at common law' were a good reason to deny an injured person a remedy, then, indeed, the common law would never have reached the embryo stage."
carrier, it was argued that the carrier had no contractual relationship with the "non-existent" child, but only with the mother. There was also a more practical concern over the difficulties of determining whether the injury was actually caused by the alleged negligence of the defendant, and over the resulting possibility of the successful assertion of fraudulent claims. Weight has also been given to the argument that the damages in such cases are so remote as not to be accurately ascertainable, especially in respect to the loss of the future earning capacity of a child which does not survive. In the Dietrich case, it was reasoned that there is no need for a right of action in the child because the mother would be able to recover any damages for the injury to the child which are not too "remote," as a part of her cause of action for the tort committed against her. However, this theory would allow the mother to recover only such damages for injuries to the child as could be regarded as a part of her own suffering, and would leave the child which survived such injuries with no right to recover any damages. Until relatively recent years, the American


10. Stanford v. St. Louis-S. F. Ry., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. (2d) 944 (1935). This approach has been criticised in Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678, 682 (1939): "The difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice. We are not impressed with the reasoning that a clear remedy for an injustice should be denied because the wrong is not readily susceptible of proof." In Steggall v. Morris, 363 Mo. 1224, 258 S. W. (2d) 577, 580 (1953) the court said: "Certainly, courts are not going to refuse to entertain suits for the redress of wrongs because a plaintiff would have difficulty proving his case... [or] for the reason that to afford a remedy may at times give rise to fraudulent claims."


12. Dietrich v. Northampton, 138 Mass. 14 at 17, 52 Am. Rep. 242 at 245 (1884). This viewpoint was clearly endorsed in Snow v. Allen, 227 Ala. 615, 151 So. 468, 471 (1933): "So long as the child is within the mother's womb, it is a part of the mother, and for any injury to it, while yet unborn, damages would be recoverable by the mother in a proper case.... [T]he mother... may recover, in one and the same action, damages... sustained by her, by reason of... the negligence of the physician in and about the parturition of the infant, including the death of the infant...."

13. "From the time of the injury to the time of the birth the mother suffers no physical damage merely because the child's limbs are distorted, or because its health is impaired. It, therefore, follows that the child alone suffers damage on that account; and, if the damage is held to be damnum absque injuria, the mother's
courts have been almost unanimously satisfied that these reasons justified denial of the right to recover in all such actions based on pre-natal tort injuries to the child.14

Within the last twenty years, however, significant progress has been made in breaching this unanimity of judicial opinion. This shift of position apparently has resulted from the advances in medical knowledge which conclusively demonstrate the inadequacy of the reasoning supporting non-recovery. The basic scientific inaccuracy in the legal theory of the non-existence of the child before birth has been clearly pointed out by both writers and judges.15 Further, the difficulties of proof and the chance that fraudulent claims might prevail have been diminished, though not entirely removed, by modern scientific methods of establishing the facts of the cause and extent of the injury to the unborn foetus.

Once the law began to accept the medical fact that the infant does exist separately before birth, the courts were faced with the problem of fixing the point of time at which this existence legally began. As early as 1900, a dissenting judge in the Illinois case of Allaire v. St. Luke's Hospital16 pointed out that when an infant reaches that stage in its development known as "viability"—when it thereafter could be severed from the mother prematurely and still be capable of independent existence—it is as much alive as it would be at the time of normal birth; therefore, from the time it is viable, the child should be regarded as a legal person. Although notice of this dissent was taken by several courts in the following decades, nearly half a century passed before the first decision applied the viability theory to permit a right of recovery where the infant survived the alleged negligent injury,17 or

right thereto would not be increased." Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522, 524 (1908). This case denied the right of the mother to recover for injuries to an infant which survived, except to the very narrow extent where she could show special physical pain caused her by the injury to the infant. Accord, Nugent v. Brooklyn Heights Ry., 154 App. Div. 667, 139 N. Y. Supp. 367 at 368 (1913). Both cases indicated that there was precedent, at the time of their holdings, against the the independent right of action of the child.

14Prosser, Torts (1941) 189, 190.


16See Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 640 (1900).

where it died as a result of the injury either before or after birth. A federal court led the way for American courts in 1946 by ruling that a surviving child, injured by professional malpractice before birth but after it became viable, could recover damages for his injuries. Three years later, the Minnesota Supreme Court held that the representative of a viable child born dead was able to bring a wrongful death action, on the ground that a viable child was a legal person for purposes of suit under the statute. More recently, the Illinois Supreme Court overruled the often-cited Allaire case, and held that recovery could be allowed for prenatal injuries where the viable child was born alive but died very soon thereafter.

The viability theory, while a great improvement over the earlier restrictive rule, still is open to criticism in two respects: It fails to give legal recognition to the medical fact that even before the unborn infant is capable of living separately from the mother, he is in existence as a separate person; and it attempts to set up an arbitrary and exact dividing line between recovery and non-recovery at a stage of the infant's prenatal growth which is incapable of accurate determination as to time.

An even more drastic break with common law precedent has occurred in the recent case of Porter v. Lassiter, wherein the Georgia...
Court of Appeals upheld a right of recovery for the death of an infant who, because of an injury to its mother, was born dead before it was capable of living independently from its mother. The mother suffered abdominal injuries in an auto accident when one and one-half months pregnant, and had a miscarriage three months later, allegedly caused by her earlier injury. In an action by the mother for damages for the death of the child, the trial court overruled the defendant's demurrer to the complaint, and the appellate court approved both the action and reasoning of the trial judge. The suit was based on a 1952 Georgia statute authorizing a mother to "recover for the homicide of a child," and the question presented was whether the word "child" included an unborn infant. After reviewing conflicting authorities, the court concluded that "a suit may be maintained by the mother for the loss of a child that was 'quick' in her womb at the time of the homicide. The court does not believe it necessary for the child to be 'viable' provided it was 'quick,' that is 'able to move in its mother's womb.' The question of when a child, in a given instance, is 'quick' is a question of fact for a jury to determine.

This conclusion as to the rule in Georgia was reached by reference to the criminal law of the state that "the wilful killing of an unborn child so far developed as to be ordinarily called 'quick' is considered as murder," and to *Tucker v. Howard L. Carmichael & Sons, Inc.*, in which recovery was granted for injury to an unborn child. In the *Tucker* case, however, the injury was suffered by a fully developed fetus while the mother was on the way to the hospital for a normal delivery. The birth occurred only three hours later and the child survived and sued for the injury sustained. While the decision was supportable on the theory that the child, being viable, was a separate person, the Georgia Supreme Court instead relied on criminal and property law principles, using language which clearly recognized the status of a child as a legal person as soon as it becomes quick. Relying on

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25Porter v. Lassiter, 91 Ga. App. 712, 87 S. E. (2d) 100, 103 (1955). The Georgia Supreme Court has defined "quick" to mean "so far developed as to move or stir in the mother's womb." Summerlin v. State, 150 Ga. 173, 176, 103 S. E. 461, 462 (1920).
27Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S. E. (2d) 909, 910 (1951), quoting 1 Blackstone, Commentaries (1765) 129, 130: "[Life]... begins in contemplation of law as soon as an infant is able to stir in the mother's womb." Cf. concurring opinion in Damasiewicz v. Gorsuch, 179 Md. 417, 79 A. (2d) 550 at 562 (1951), which does not agree that Blackstone was referring to "an intermediate period between conception and the period of viability, during which the
this decision, the court in the *Porter* case extended the ruling to support a right of action by the mother for the death of a child who never reached the stage of prenatal viability, but who was assumed to have been quick before being born dead, though the injury to the mother allegedly occurred long before.

This is, of course, a more liberal view than the rule which limits recovery to viable infants, for the movement by the child in the womb occurs noticeably to the mother some months before the infant reaches viability. Therefore, the rule of the principal decision makes possible the recognition of a cause of action for prenatal tort injuries which would not have given rise to liability under previous cases. However, it is still subject to some of the same criticism directed at the view allowing recovery on the viability theory. First, it creates the problem of proving whether the infant was actually quick when the injury was inflicted. Although this condition is first obvious to the mother, the child may have reached the stage of its development before the mother or a physician takes note of the fact. The more serious objection to the theory, however, is that it leads to a refusal of recovery for injuries to infants in their earliest stage of prenatal development. Even in the *Porter* case, the court, willing as it was to break with American case precedent, drew a cautious limitation by declaring that it did "not believe that a cause of action arose if the child was not 'quick' at its death." Though it seems apparent in the light of contemporary scientific knowledge, that what once was regarded as legal fiction should now be recognized as legal truth, the courts are still reluctant to consider the time of the beginning of human existence as a question to be answered by medical or biological science rather than by legal theory.

However, there is some indication that the law is moving toward an acceptance of biological fact. In California, the legislature has incorporated into its wrongful death statute a provision that "A child might be considered alive...." [The majority opinion in that case seems to agree with the interpretation given in the Tucker case. See 79 A. (2d) 550 at 559]. Cf. Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.C.D.C. 1946): "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as a human being, but as such from the moment of conception—which it is in fact." See Steggall v. Morris, 363 Mo. 1224, 258 S. W. (2d) 577, 579 (1953), and note 1, supra.

Porter v. Lassiter, 91 Ga. App. 712, 87 S. E. (2d) 100, 103 (1955). See Damasiewicz v. Gorsuch, 197 Md. 417, 79 A. (2d) 559, 559 (1951), where the court said: "In both cases [where child is viable or quick] it is alive, and in both cases there is an injury to a living human being for which the responsible party should be made liable."
conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.” The “interests” referred to have been held to include not only inheritance and property rights but also the right to compensation for personal injuries inflicted any time after conception. Even without the aid of statute, the Maryland Supreme Court, though divided in its decision, held that an infant was entitled to recover for prenatal injuries whether viable or not. While at one point in the opinion the “quick” theory was mentioned favorably, the majority of the court concluded by declaring: “… since we now know that a child does not continue until birth to be a part of its mother, it must follow that as soon as it becomes alive it has rights which it can exercise. When it becomes alive is a medical question to be determined in each case according to the facts.”

Further support for the more scientifically sound, and legally more liberal, view came from a New York appellate court in 1953 which stated in clear language that the confusing theories of existence were best settled by medical experts. By holding that a child may recover for a prenatal injury tortiously inflicted at any time after conception, the decision extended an earlier ruling of the New York Court of Appeals limiting recovery to a viable infant. The court declared: “… the underlying problem that has usually troubled the judges who have written on the subject of recovery for pre-natal injuries, has been in fixing the point of legal separability from the mother. We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.”

While this viewpoint insures the infant a right of action for any alleged tort committed on him before his birth, it must be conceded that there are still definite problems of proof of causation, where the injury occurs in the early stages of the child’s development.

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30 Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939). But the California court has refused to extend this right of recovery to include a child who was never born alive, because the statutory right is created only in the event of the child’s subsequent birth. Norman v. Murphy, 124 Cal. App. 95, 268 P. (2d) 178 (1954).
Also, the difficulty of proving the extent of damages is one which may have an adverse effect on recovery for the wrongful death of a foetus in the early stages of its growth. But as the Maryland court has pointed out, "the right to bring an action is clearly distinguishable from the ability to prove the facts. The first cannot be denied because the second may not exist." So long as it is possible for the tortfeasor to avoid redress for his wrongdoing on the grounds that a prenatal infant in any stage of its development is not such a legal person as to have a cause of action, complete justice is not yet attainable in this field of tort law.

ROBERT H. MANN, JR.

TORTS—LIABILITY FOR INJURIES CAUSED BY ACCIDENT RESULTING FROM SUDDEN INCAPACITATION OF DRIVER OF AUTOMOBILE. [West Virginia]

In Keller v. Wonn, a recent case of first impression, the West Virginia Supreme Court of Appeals has been called on to establish a rule of law for that jurisdiction regarding the liability of the driver of an automobile for injuries resulting from an accident caused by a sudden attack of illness which incapacitated the driver. The evidence indicated that an automobile owned and driven by Wonn, defendant's decedent, left the public street, came up onto the sidewalk, and pinned plaintiff to a building, severely injuring him. Testimony had established that Wonn appeared normal and in good spirits minutes before the accident but that he was unconscious at the time of the accident "or within seconds" thereafter, and that he died before reaching a hospital. His death certificate specified that the cause of death was a massive cerebral hemorrhage, and evidence indicated that it was this attack which caused him to lose control of the car.

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1 Norman v. Murphy, 124 Cal. App. (3d) 95, 268 P. (2d) 178, 180 (1954): "Considering the highly speculative nature of the pecuniary value of an unborn child [born dead], even if viable, it is apparent that practically everything that could be recovered in an action for the death of an unborn child can now be recovered by the mother in connection with her own claim for general damages."
6"... Mr. Wonn slumped out the door.... His eyes was open, he was breathing
Plaintiff, in support of his contention that the injury resulted from Wonn's act in driving "with knowledge of his physical impairment" and contrary to medical advice, introduced medical testimony which, taken together with that of defense medical witnesses, established that Wonn had long suffered from high blood pressure and mild hardening of the arteries, although there was disagreement as to the degree of Wonn's condition, and as to its alleged progressive nature. Dr. Golden testified for plaintiff that he had heard of Wonn's condition in a hospital staff conference eight years before the accident and had informed him that he "could shorten his life by excessive physical activity; he should limit himself entirely to a more or less sedentary life, should not participate in any unnecessary physical exertion, including driving an automobile." Dr. Condry, who had personally examined Wonn regularly from 1938 until shortly before the accident, testified for the defense that although Wonn's blood pressure was moderately high, it had been constant throughout the period; that he had advised Wonn only to lose weight "and live a reasonably normal life;" and that he had not forbidden him to drive an automobile. There was no evidence indicating that Wonn had ever had a stroke, fainting spell, or any other type of attack that had rendered him dizzy or unconscious.

The trial court refused defendant's request for a directed verdict, and the jury returned a verdict for plaintiff upon which judgment was entered. In reversing, the Supreme Court of Appeals adopted the rule that "where the driver of a motor vehicle suddenly becomes physically or mentally incapacitated without warning, he cannot be held liable for any injury resulting from the operation of his vehicle while he is so incapacitated but that where a prima facia case of negligence has been established by the plaintiff, the burden is upon the de-

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fendant to show the sudden illness or attack, and to further show that the illness or attack was unanticipatable and unforeseen.”

The great majority of courts passing on the question of liability of a driver suddenly incapacitated by illness have followed the rule now adopted by the West Virginia Supreme Court of Appeals. Under this approach, the defendant is not permitted to avoid liability when he fails to sustain his burden of going forward with evidence of his unconsciousness, and he is not shielded where he could or should have foreseen the attack. Although it is difficult to make generalizations as to what types of incapacitating causes will be regarded as sufficient to relieve the driver of liability, some classifications can be indicated. In cases in which drowsiness or sleep caused the accident, the rule is that a driver is not responsible for his conduct while asleep, and that when he can show he was asleep, he will avoid liability unless he should have foreseen the condition. Unfortunately for defendants, however, this is a highly foreseeable condition, and few cases have been found where defendant prevailed with such a defense. Likewise

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787 S. E. (2d) 453, 459 (V. Va. 1955) [italics supplied].


Soule v. Grimshaw, 269 Mich. 117, 253 N. W. 257 (1934); State v. Gooze, 14 N. J. L. 277, 81 A. (2d) 811 (1951) [Meniere's syndrome]; Goldman v. New York Rys. Co., 185 App. Div. 739, 172 N. Y. Supp. 737 (1919); Golembse v. Blumberg, 262 App. Div. 259, 27 N. Y. S. (2d) 692 (1948) [epilepsy]; Eleason v. Western Casualty and Surety Co., 254 Wis. 33, 34 N. W. (2d) 301 (1948) [epilepsy]. Existence of a guest statute prohibiting recovery except for willful and wanton misconduct permitted a driver to escape liability even though he had had epilepsy for several years, had suffered previous loss of consciousness, had avoided placing himself in situations where a sudden seizure might be dangerous, and had speculated to others as to the possible hazards involved in his continued driving. However, the courts of that jurisdiction require conduct which would sustain a criminal conviction in order to establish liability to a guest. Espeland v. Green, 74 S. D. 684, 54 N. W. (2d) 465 (1952).

Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785 (1925); Note (1933) 28 A. L. R. (2d) 12.

Note (1953) 28 A. L. R. (2d) 12, 42, states the rule that one cannot be held liable for his "acts" while asleep. Cases compiled within this annotation demon-
drunkenness, either as a contributing cause to sleep or as an independent cause of incapacitation leading to an accident, is foreseeable and will not shield the driver from liability for injuries caused.\(^\text{13}\)

On the other hand, the decisions indicate that heart ailments,\(^\text{14}\) epilepsy (if not previously a cause of fainting),\(^\text{15}\) and unconsciousness from menstrual sickness\(^\text{16}\) excuse the driver from liability. The fact that the driver was physically defective or ill, but still conscious, not only will not shield him from liability but is potent evidence against him. When not rendered unconscious, the driver is under a duty to stop if he cannot safely operate his automobile in such circumstances.\(^\text{17}\)

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\(^\text{13}\) Note (1953) 28 A. L. R. (2d) 12 at 56 and 64. In a case also involving claimed sudden blindness, the Louisiana court held that if plaintiff was a passenger and could or should have foreseen the drunken condition of defendant, her failure to leave the car was contributory negligence and she could not recover. Livaudais v. Black, 15 La. App. 345, 127 So. 129 (1930).


\(^\text{15}\) Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 97 S. W. (2d) 452 (1936). Although, in that case, liability was imposed on the common carrier defendant on a theory of negligent selection of its agent, the court indicated there could be no question of negligence at the time of the accident in an epilepsy situation. See discussion and cases, note 10, supra. In an assault and battery case, the condition of an epileptic driver has been likened to insanity and the rule that insanity is no defense applied. Sauer v. Sack, 34 Ga. App. 748, 131 S. E. 98 (1925). It has been argued that the problem of the instant case should be considered as similar to insanity. Slattery v. Haley [1922] 52 Ont. L. R. 95, 3 D. L. R. 156, 11 B. R. C. 1036. Insanity is not a defense to a tort action. The law imposes "upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precautions respecting the rights of others that the law demands of one in the full possession of his faculties." Williams v. Hays, 143 N. Y. 442, 447, 38 N. E. 449, 450, 26 L. R. A. 153, 156 (1894). This rule was applied when "mental obscurity" suddenly set upon a driver while he was operating his vehicle. Sforza v. Green Bus Lines, 150 Misc. 180, 268 N. Y. Supp. 446 (1934). But this rule has been adopted, because, inter alia, it is considered that it tends to provide for the insane by giving their relatives or the beneficiaries of their estates a financial interest in caring for them. In re Guardianship of Meyer, German Fire Insurance Society v. Meyer, 218 Wis. 381, 261 N. W. 211 at 213 (1933); McIntyre v. Sholty, 121 Ill. 660 at 664, 19 N. E. 293 at 240, 2 Am. St. Rep. 140 (1897); Throckmorton, Cooley on Torts (1930) § 45; Prosser, Torts (1941) 1090. This particular reason for the rule is clearly not applicable to unconsciousness and, in any event, the rule itself even while applied is invariably criticised and scrupulously limited. (See authorities cited, this footnote.)


In administering these rules, the courts have generally held, as did the West Virginia court in the instant case, that the plaintiff may establish a prima facie case such that the burden of going forward shifts to the defendant.\textsuperscript{18} When the plaintiff has shown circumstances justifying an inference of negligent conduct by the defendant, a burden is cast upon the defendant to bring forth an explanation of his conduct inconsistent with such an inference of negligence.\textsuperscript{19} In this type of case, specifically, if the defendant relies upon the defense of an incapacitating but unforeseeable sudden illness, once the plaintiff has shown an accident involving the parties, the defense must affirmatively establish that the illness occurred \textit{and} that it was not foreseeable.\textsuperscript{20}

However, since there are two distinct meanings widely attached to the term \textit{prima facie case},\textsuperscript{21} it must be noted that West Virginia holds the term to denote the point at which the party with the initial burden of proof (risk of non-persuasion) becomes entitled to go to the


\textsuperscript{19}Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 P. (2d) 553 (1934); "... the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove." 9 Wigmore, Evidence (3rd ed. 1940) 275; "... the burden of such proof, in explanation of his conduct rested upon the defendants." Driver v. Brooks, 176 Va. 317, 328, 10 S. E. (2d) 887, 892 (1940). That the use of the term "burden" is inaccurate and, in view of allied inaccuracies in procedural terminology, has been confusing is clear. Michie, The Law of Evidence in Virginia and West Virginia (1954) § 196. However, this controversy is not significant since the penalty for silence need not be a directed verdict for one's adversary. McCormick, Charges on Presumptions and Burden of Proof (1955) 5 N. C. L. Rev. 291.

\textsuperscript{20}See cases cited, noted 18, supra. As the defense had not then sustained this "burden," it was not error to deny defendant's motion for a directed verdict at the end of the plaintiff's case. Keller v. Wonn, 87 S. E. (2d) 435 at 439 (W. Va. 1955).

\textsuperscript{21}\textit{The phrase may indicate the point at which the proponent has entitled himself to a directed verdict unless his opponent comes forward with evidence. In this sense, said to be equivalent to the notion of a presumption, the proponent has fastened a duty upon his adversary. Or the phrase may indicate the point at which the proponent with the risk of non-persuasion, either normally or always the plaintiff, depending on one's resolution of another controversy in the law, has entitled himself to go to the jury. In this sense, the proponent need only have relieved himself of the duty of going forward. 9 Wigmore, Evidence (3rd ed. 1940) § 249. Obviously, the term might be properly applied in the latter sense even though the proponent has so far exceeded the point as also to satisfy the meaning of the term in the former sense. It is submitted that this is a good reason why "it is often difficult to detect which of these [meanings] is intended in the judicial passage at hand." 9 Wigmore, Evidence (3rd ed. 1940) 293. 23 Words and Phrases (Perm. ed. 1940) 543 et seq., contains an exemplary list of both usages.}
If his adversary does come forward with evidence, as the defendant did in the instant case, a jury question may be presented, or, as in the instant case, that adversary may entitle himself to a directed verdict. The justice of such a rule is that it places upon the party most able to sustain it the responsibility for bringing forth the particular facts of an occurrence. It can hardly be questioned that this is the situation in a case in which a pedestrian has been struck by an automobile, and for this reason, application of the normal requirement that the plaintiff make an affirmative showing as to each element in his cause is appropriately denied.

In the instant case, proof of the plaintiff’s injury together with the testimony of eye-witnesses establishing a causal connection between that injury and the movements of Wonn’s automobile had entitled the plaintiff to go to the jury, subject to the right of the defendant to come forward with evidence and possibly discharge his burden sufficiently to entitle himself to a directed verdict. It seems that only a difference of opinion as to whether the defendant succeeded in this respect can explain the trial court judgment. Since the medical evidence indicated that cerebral hemorrhage was the cause of death, and testimony of witnesses for both sides showed that Wonn was unconscious seconds after the accident, there seems little ground for dispute that he was unconscious at and just before the time of the accident. It would ap-
pear, therefore, that the difference of opinion as to liability arose over interpretation of the foreseeability of this condition. The Supreme Court of Appeals observed that the contention that Wonn could have anticipated this calamity rested on Dr. Golden's testimony and that that testimony, properly analyzed, lent little or no support to such a conclusion. On the other hand, evidence of Dr. Condry and another doctor amply supported the contention of the defense that this attack was not foreseeable. Thus, not even the allocation to the defendant of a heavy share of the responsibility for producing evidence permitted a finding of liability.

Such results may be open to criticism as violating the principle that he who is harmed must be recompensed. This approach to the problem was considered and rejected by the leading case in the line of decisions which West Virginia has just joined. The plaintiff there unsuccessfully contended that he who put in motion a dangerous thing should be absolutely responsible for any damage it caused. Although in most jurisdictions that contention is not accepted in this type of case, a Texas appellate court apparently would impose liability upon an unconscious driver under the reasoning of a 1935 decision. Furthermore, there is considerable support outside of the courts for a system which will give more assurance of adequate compensation to automobile accident victims by (1) imposing strict liability in automobile accident cases, and (2) requiring automobile operators to provide a source of funds for the satisfaction of judgments against them. Some progress has been made in the latter respect in the form of financial responsibility legislation in force in many states and compulsory

of Petition for Rehearing 2. Plaintiff suggested that the "violent collision" may have caused Wonn's condition rather than the condition causing the collision, and contended that resolution of the question was for the jury. However, the court apparently felt that for the jury to weigh the suggestions of the evidence against this conjecture was, in Dean Prosser's phrase, like weighing seventeen pounds of sugar against half-past two in the afternoon. Prosser, Torts (1941) 291.

Keller v. Wonn 87 S. E. (2d) 453, 461 (W. Va. 1955): "A careful analysis of... [Golden's statement]... shows that Wonn was not informed that if he operated an automobile he might have a sudden attack of some kind which would result in serious consequences to himself or others."


Financial responsibility laws, in force in Kansas, New Mexico, and South Dakota, provide that the registration and driver's license of any person having an
insurance legislation in force in Massachusetts, but these laws are
criticized by the advocates of a more effective guaranty for automobile
victims. Grounds usually assigned in criticism of these types of legisla-
tion are that they are inefficient and of little aid when liability is
determined upon the basis of common law principles.

This dissatisfaction early found respectable spokesmen when the
Columbia Report recommended the establishment of a system simi-
lar to workmen's compensation for automobile accident cases. These
recommendations, while not now the law of any state, have been
enacted by the Canadian province of Saskatchewan. The Saskatch-
ewan plan in broad terms insures every citizen of the province against
automobile accident injuries, unless his conduct amounted to a crim-
inal offense, or he is unlicensed or unregistered, or he was riding on
a part of the vehicle not designed to carry a load. An exclusive state
insurance fund is used to provide compensation. Benefit levels in Sas-
katchewan have been based on earnings up to a maximum of $20 per
week with an arbitrary figure of $12.50 per week for housewives.

outstanding unsatisfied judgment growing out of an automobile accident shall be sus-
pended until the judgment is paid and proof of financial responsibility is shown
(normally by proof of insurance coverage). Safety responsibility legislation, now
in force in forty-four states, including West Virginia, differs from financial respon-
sibility legislation in that it goes into operation upon the happening of an accident.
1 W. Va. Code Ann. (Michie, 1955) c. 17D, may be considered typical of the former.

Various provisions of this repeatedly amended legislation are spread through-
out the General Laws of Massachusetts. It provides that no motor vehicle shall be
registered unless covered by a personal injury liability policy with limits of $5,000
and $10,000. The motorist or owner must pay property damage judgments up to
$1,000 on pain of suspension of his registration. Vorys, A Short Survey of Laws De-
signed To Exclude the Financially Irresponsible Driver from the Highway (1954) 15 Ohio St. L. J. 101.

It is contended that provisions of these statutes leave the injured party
remediless should the driver choose to stop driving a car, that evasion of their
provisions is relatively easy, and that at best they provide only a limited fund.
Marx, Let's Compensate—Not Litigate (1954) 50 N. D. L. Rev. 20. Other and rarer
statutory approaches to the problem also criticised by "Compensation" advocates are
impounding acts, and establishment of an unsatisfied judgment fund. Vorys, A Short
Survey of Laws Designed To Exclude the Financially Irresponsible Driver from the

Report by the Committee To Study Compensation for Automobile Acci-
dents to Columbia University Council for Research in the Social Sciences (1932). This
report, by a committee of eminent judges, legal educators and financiers, re-
mains the most comprehensive survey of the problem. The problems which the
committee noted have been massively documented in a somewhat later study,
(1956) 3 Law and Contemp. Prob. 465-610, and the statistical basis of the report
was investigated and found valid as late as 1952. James and Law, Compensation for
Auto Accident Victims: A Story of Too Little and Too Late (1952) 26 Conn. B. J. 70.
This plan and variations on it elsewhere proposed have been defended as necessary because the amounts of jury verdicts in court actions are highly speculative, delay in payment is caused by congested court calendars, the uninsured defendant is often unable to respond in damages, and automobile accidents are said to happen too quickly to make possible a reliable fault determination. The first two reasons advanced, where applicable, are a result of the failure of the bench and bar to keep the common law house in order. The third objective of the compensation advocates is met to a degree by financial responsibility legislation and to an even higher degree by compulsory insurance.

The question of the feasibility, and indeed the desirability, of determination of fault in automobile negligence actions cannot, however, be lightly answered. From the beginning of the automotive age there has been evident in tort law a trend toward strict liability in automobile cases and there is a notorious jury preference for the plaintiff which almost requires the defendant to prevail as a matter of law in order to avoid liability. However, abolition of the fault princi-

Saskatchewan law has been reported to be working very well. Grad, Recent Developments in Automobile Accident Compensation (1950) 50 Col. L. Rev. 300, 323. But see Vorys, A Short Survey of Laws Designed To Exclude the Financially Irresponsible Driver from the Highway (1954) 15 Ohio St. L. J. 101, 108.


See notes 31-33, supra. This type of legislation, it is submitted, is quite effective in dealing with the accident prone. Statistics indicate that this class of drivers causes much of the trouble. James and Dickinson, Accident Proneness and Accident Law (1950) 83 Harv. L. Rev. 769. It appears to increase the percentage of insured drivers. James, Accident Liability Reconsidered: The Impact of Liability Insurance (1948) 57 Yale L. J. 549, 562. And such an increase markedly decreases the possibility that a claimant with a valid claim will go uncompensated. James and Law, Compensation for Auto Accident Victims: A Story of Too Little and Too Late (1952) 26 Conn. B. J. 70.


"...the notorious tendency of that body [the jury] to prefer the plaintiff, especially as against the defendant suspected of carrying insurance, had made ‘tak-
ple is vigorously opposed both on philosophic and on practical grounds. A serious objection to any compensation system is the multiplicity of administrative and policy problems involved, including the probability that demagogic standards would govern determination of compensation levels and other details of any such plan. Undoubtedly imposition of such a system would increase the cost of operation of a motor vehicle, although proponents of compensation insist this is a social cost which those deriving benefit from the automobile should bear. Although no such legislation has been enacted in the United States, the insistence of its proponents and an appreciation of the trend toward social insurance in all fields commend a serious study of it to those interested in the fields of insurance or automobile law.

Should liability be imposed on behalf of the grossly negligent plaintiff who may be the author of his own harm? Will compensation for guests encourage collusive or entirely faked claims? Shall a remedy over in tort be provided? What formula is to be used for payments, especially as to infants, invalids, and the aged? What is the incentive to the successful claimant to get out of bed and stop disability payments? How can disabilities or other bases of compensation formulae be checked? Shall compensation be equal or based on earning power, capacities, and prospects? If the latter, how shall these be measured? Shall insurance be by state fund or private underwriter? If the former, how can political tinkering and expensive administration be prevented? If the latter, how can an actuarial basis for premiums be obtained? Sherman, Grounds for Opposing the Automobile Accident Compensation Plan (1936) 3 Law and Contemp. Prob. 598. It is claimed that workmen’s compensation proves that automobile compensation is workable. See authorities cited, note 30, supra. But, “the utopia of speed and simplicity sought by the legislators has eluded the injured worker, and legal representation remains indispensable.” Bear, Workmen’s Compensation and the Lawyer (1951) 51 Col. L. Rev. 965, 969. The volume of litigation, if judged by workmen’s compensation, would not be substantially decreased, Morris, Torts (1953) 353 et seq., and the cost of administration may be much higher. Conard, Workmen’s Compensation: Is It More Efficient Than Employer’s Liability? (1952) 38 A. B. A. J. 1011.

Morris, Torts (1953) 371 et seq. Morris, however, fears political assaults on economic rate-making even under the present system. The additional feature of payment levels politically determined is, however, unique to the compensation plan. See authorities cited, note 40 supra.

All figures are of course speculative in the absence of a specific plan on which to base them and would remain speculative until actuarial data was developed from experience. For a proponent’s estimate: Marx, Let’s Compensate—Not Litigate (1954) 30 N. D. L. Rev. 20, 35 (“...a premium cost no greater than the present cost of liability insurance...”). Contra: Sherman, Grounds for Opposing the Automobile Accident Compensation Plan (1936) 3 Law and Contemp. Prob. 598, 608 (“...staggering.... beyond human capacity to prognosticate... when ‘claim consciousness’ is aroused....”).

“The real fight... is just getting underway. The next decade will probably decide (1) whether you will be able to afford to own an automobile, i.e., pay the fees and taxes necessary for its registration, and (2) whether, if you do get seriously
Pending the adoption of some radical change in automobile law, however, it is submitted that in avoiding both the extreme of asking the plaintiff to produce evidence which he is ordinarily not in a position to obtain and the extreme of holding the defendant where he is not at fault, the West Virginia court has announced a sound rule.

John S. Stump

TORTS—REMEDIES OF OWNERS OF LAND NEAR AIRPORTS FOR INTERFERENCE WITH USE OF LAND CAUSED BY LOW-FLYING AIRCRAFT. [Pennsylvania]

The flights of aircraft in close proximity to the surface which occur during landings and take-offs have often been a source of damage and annoyance to the owners of property adjacent to airports. In resulting suits, the courts have been faced with the difficult task of balancing the right of the land owner to the free and undiminished use and enjoyment of his property against the public benefit derived from the flights. Consequently, the conclusions reached by the courts have been far from uniform. The problem has been made even more complex by the rapid growth of federal regulation of aviation.

Congress, in the exercise of its power to regulate foreign and interstate commerce granted by the Commerce Clause of the Federal Constitution,1 passed the Air Commerce Act of 19262 and the more comprehensive Civil Aeronautics Act of 1938.3 The later statute declared that the United States possesses and exercises “complete and exclusive national sovereignty in the air space above the United States.”4 The Act of 1938 further provided that there exists in behalf of any citizen of the United States “a public right of freedom of transit in air commerce through the navigable air space of the United States.”5 Navigable air space is defined as “air space above the minimum altitudes of flight prescribed by” the Civil Aeronautics Authority.6 The hurt...you will be circumscribed by a compensation system which limits your damages to the figures contained in a schedule.” Vorys, A Short Survey of Laws Designed To Exclude the Financially Irresponsible Driver from the Highway (1954) 15 Ohio St. L. J. 101, 109.

1U. S. Const., Art. I, § 8, cl. 3.
power to prescribe these altitudes now rests in the Civil Aeronautics Board (C. A. B.) which has provided in Section 60.17 of the Civil Air Regulations that "except where necessary for take-off and landing," no person shall operate an aircraft below certain specified altitudes. The minimum safe altitudes then prescribed are 1,000 feet above congested areas, and 500 feet over other than congested areas.

As it had previously done with the navigable waters, Congress has brought the navigable air space within the public domain. In doing so, Congress has recognized that uniformity of regulation will promote safety and stimulate domestic and foreign air commerce in this vast new highway of travel and trade, and that the federal government alone can enact and efficiently enforce such a uniform system of regulation.

Originally, the Air Commerce Act of 1926 conferred the power to prescribe minimum safe altitudes of flight upon the Secretary of Commerce. Hist. Note, 49 U. S. C. A. 555 (1951). By the Civil Aeronautics Act of 1938, this duty devolved upon the Civil Aeronautics Authority (C. A. A.), and by virtue of subsequent executive department reorganization, the authority to prescribe these altitudes now rests with the C. A. B. Transfer of Functions, 49 U. S. C. 7202 (1952).

The analogy between navigable waters and navigable air space has often been drawn by the courts. E. g., Northwest Airlines v. Minnesota, 322 U. S. 292, 64 S. Ct. 950, 88 L. ed. 1283 (1944), where Justice Jackson, concurring, declared: "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." Also, Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177, 187 (E. D. N. Y. 1950): "The parallel which plaintiff draws between the sovereignty of the Federal Government in the air space above the United States, and that over navigable waters, is true and complete."

The United States Supreme Court has long recognized that certain phases of commerce are of such a nature as to demand that their regulation be prescribed by a single authority. Cooley v. Port Wardens of Philadelphia, 12 How. 299, 3 L. ed. 996 (U. S. 1851); Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. ed. 1915 (1945); Edwards v. California, 314 U. S. 160, 62 S. Ct. 164, 86 L. ed. 119 (1941); Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752 (1939). The need for uniformity of regulation in air commerce was stressed in Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 107, 68 S. Ct. 431, 434, 92 L. ed. 568, 574 (1948), where Justice Jackson said: "Of course, air transportation, water transportation, rail transportation and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled, commerce of the past."
to regulate the field in 1926 has brought about a continuing expansion in the scope of federal regulation. Today, the federal regulatory power encompasses nearly every phase of air transit, and extends to intra-state, as well as interstate flights, since the former could affect or endanger the latter.

The conclusions that must necessarily be drawn are that Congress has pre-empted the field of regulation and control of the flight of aircraft, and that the federal government alone can regulate flights in the air space above the specified minimum safe altitudes of flight. However, the question of whether national sovereignty extends below 500 feet continued to be unsettled because of a difference of opinion among the courts as to whether the words "except where necessary for take-off and landing" in Section 60.17 of the Civil Air Regulations implies that the national power includes the right to regulate within the lower altitudes necessary for take-offs and landings.

The point was somewhat clarified by a 1954 interpretation of Section 60.17 in which the C. A. B. stated that "Navigable air space includes all of the airspace..."
above the glide path necessary for take-off and landing,"\(^{14}\) thereby indicating that the levels below 500 feet necessarily involved in these stages of flight are under national regulation. Confirming this view is a recent decision of a federal district court which invalidated an ordinance designed to protect the residents of a village from the danger created by low-flying planes from a nearby airport by prohibiting the flight of aircraft over the village at less than 1,000 feet.\(^{15}\) The court declared that the Civil Aeronautics Act of 1938 and the C.A.B. regulations established thereunder have regulated air space to such an extent as to constitute a pre-emption of the field, and that the states and their sub-divisions are thus precluded from enacting contrary or conflicting legislation.\(^{16}\) Furthermore, the contention that the air space under 1,000 feet is not navigable air space was rejected on the ground that certain areas of such air space are necessary for take-off and landing.

If it is assumed that the navigable air space over which the United States exercises complete and exclusive national sovereignty includes whatever air space is necessary for take-off and landing, there remains the question of what effect this existence of federal control has upon the rights of an individual owning property adjacent to an airport who suffers injury as a result of repeated low flights over his property which occur during landings and take-offs. This problem was recently considered by the Supreme Court of Pennsylvania in the case of *Gardner v. County of Allegheny.*\(^{17}\) The plaintiffs were owners of five tracts of land located 1,000 feet from the end of one of the three runways of the Greater Pittsburg Airport, which was owned and maintained by the County of Allegheny. The action was brought in a state court against the county and the several airlines leasing facilities at the airport.\(^{18}\) Plaintiffs alleged that during take-offs and landings, airplanes of the various airlines operating out of the airport ascend and descend along a glide path, which, as it crosses their premises, is below the floor of the navigable air space and about 15 to 30 feet above the chimneys of their houses. As a result of these low flights, sometimes

\(^{14}\) Civ. Air Reg., Interpretation 1, 19 F. R. 4602 (1954).


\(^{16}\) It should be noted that the Cedarhurst decision does not decide the rights of adjoining property owners. At the very outset of his opinion, District Judge Bruchhauser stated: "This action involves the constitutionality of an ordinance. . . . It does not affect the rights of property owners." 132 F. Supp. 871, 873 (E. D. N. Y. 1955).

\(^{17}\) 382 Pa. 88, 114 A. (2d) 491 (1955).

\(^{18}\) The defendants filed a preliminary objection, contending that the C. A. B. and the Civil Aeronautics Administrator were indispensable to the action. Although the Supreme Court of Pennsylvania ruled that these governmental authorities were not indispensable parties, it is interesting to note that they were allowed to intervene and file a brief as amici curiae.
occurring as often as eight to ten times in ten to fifteen minutes, the plaintiffs complained that they had suffered from noises and other nuisances, and that the flights constituted a real danger to the occupants of the property. These facts, the plaintiffs alleged, were (1) continuing trespasses that endangered their homes and their safety, and (2) constituted a “taking” of their properties by the county without compensation. The plaintiffs sought alternatively (1) an injunction restraining all commercial airliners from flying over their properties below the floor of the navigable air space during landing or take off, or (2) payment of the present fair market value of their respective properties, ascertained as if there were no air operations at the airport.

It was not averred in the pleadings whether the flights complained of were or were not within the air space “necessary” for take-off and landing. Consequently, this question was not not decided. However, the Pennsylvania Supreme Court did affirm the lower court’s assumption of jurisdiction and remanded for trial on the merits, ruling that state courts have the authority, which Congress has neither limited or destroyed, to enjoin trespasses to a land owner’s property arising from frequent interstate or intra-state flights below the minimum safe altitudes of flight, and that this authority includes the power to enjoin landings and take-offs below the minimum safe altitudes for such operations. Even if planes do not fly below the necessary minimum altitudes during take-offs and landings, and therefore cannot be enjoined from flying, the court concluded that the land owner may still be entitled to compensation for an easement established over his land, or for a complete taking of his property, if, as a result of the flights, the land was rendered uninhabitable. However, it was ruled that a court of equity is without jurisdiction to assess damages for such a “taking,” on the ground that the specific procedure for the condemnation of property for airdromes and landing fields provided for by the Pennsylvania statutes was exclusive.

The only difference of opinion within the court was on the question

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20Consequently, the conclusion of the court was that, “we need not and do not decide whether a State Court can enjoin flights which are within the airspace necessary for safe take-offs or landings if such flights imminently endanger plaintiff’s life or property.” 582 Pa. 88, 114 A. (2d) 491, 504 (1955).

21In Pennsylvania, when the interested parties cannot agree upon the amount of compensation to be awarded after condemnation, the court of common pleas, upon petition of the interested parties, is authorized to appoint three viewers from the county board of viewers who shall estimate and assess the damages for the property taken or destroyed. Act of May 2, 1929, P. L. 1278, Art. 7, §§ 518, 523, since reenacted in the Second Class County Code, 16 P. S., § 2608(a) et seq. Act of July 28, 1953, P. L. 723, Art. 26 §§ 2608, 2613. 16 Pa. Stat. Ann. (Purdon Perm. ed.) §§ 2151-2608, 2151-2613.
of the power of state courts to grant an injunction. The view taken by
the one dissenting justice was that "The operation of airplanes, both
interstate and intra-state, is exclusively within federal jurisdiction.
State courts possess no jurisdiction to grant injunctive relief concern-
ing minimum altitudes when landing or taking off, irrespective of
whether the flights are interstate or intra-state."21

The court's conclusion that flights over private land which are
so low and so frequent as to be a direct and immediate interference
with the enjoyment and use of the surface land amount to a "taking"
is a reiteration of the doctrine laid down by the United States Su-
preme Court in the case of United States v. Causby.22 There, a land
owner was awarded compensation for flights of military aircraft over
his property at heights as low as 83 feet above the surface, on the theory
that the United States had established an easement of flight over his
land for which compensation was due under the Fifth Amendment.23
However, compensating for a taking of property is often a wholly un-
satisfactory solution from the standpoint of the land owner, since it
necessarily involves a loss of all or part of his property. Futhermore,
as was pointed out in the Gardner case, such compensation can only
be obtained through proper eminent domain proceedings, and there-
fore would not be available as a form of relief where the flights origi-
nated from a privately owned airport, since private persons do not
possess the power of eminent domain unless specifically conferred by
statute.24

The position taken by the majority of the court in the Gardner
case is in accord with the view generally expressed by the courts in
the earlier cases that a land owner is entitled to injunctive relief where
he has shown unreasonable interference with the use and enjoyment
of his property and substantial damage caused by low-flying planes,
even if the flights occurred during take-off and landing.25 In these cases,

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23The Fifth Amendment provides that "private property" shall not "be taken
for public use, without just compensation." U. S. Const., Amend. V.
2429 C. J. S., Eminent Domain § 27.
25Swetland v. Curtiss Airports Corp., 55 F. (2d) 201 (C. C. A. 6th, 1931) (certain
operations of an airport which was not fully developed at time of trial, but which
was planned as a first class airport which would greatly interfere with enjoyment
of neighboring property when completed as contemplated, were enjoined); Vander-
slice v. Shawn, 26 Del. Ch. 225, 27 A. (2d) 87 (1942) (operators of an airport en-
joined from making, or authorizing others to make, objectionably low flights, and
from operating the airport in such a way that the low flights may reasonably be
expected to recur in its normal operation); Delta Air Corp. v. Kersey, 193 Ga.
862, 20 S. E. (2d) 245 (1942) (low flights which were imminently dangerous to life
and health of adjoining property owners held to be an enjoinable nuisance);
CASE COMMENTS

both nuisance and trespass have nearly always been alleged, and it has not always been clear which has been used by the courts as a basis for relief, but the one element present in nearly all situations is an unreasonable interference with the owner's beneficial use of his surface land. However, the growth of aviation and the accompanying expansion of federal regulation of aeronautics has brought about a necessary restriction in the right of owners of property adjacent to airports to be free from interference in the use and enjoyment of their land. The courts on several occasions have refused to grant relief on the ground that the injuries resulting from low flights were only minor inconveniences suffered by the land owner as a necessary consequence of progress in aviation. Although injunctions have readily issued against flights from, and the operation of, private airports, the courts have been more reluctant to take similar action when a public airport is involved, especially where the issuance of an injunction would result in the airport ceasing its operations. In these latter cases, the tendency of the courts has been to balance the harm which results to the land owner against the benefit which would accrue to the general public if the airport continued in operation. Several writers have taken

Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934) (injunction refused on ground that plaintiff's allegations were insufficient to show flights constituted either a trespass or nuisance); Burnham v. Beverley Airways, 311 Mass. 628, 42 N. E. (2d) 575 (1942) (flights over adjacent property at heights less than 500 feet held to be trespass justifying injunction); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385 (1930) (injunction refused because of failure to show damage to property or material discomfort resulting from low flights); Crew v. Gallagher, 358 Pa. 541, 58 A. (2d) 179 (1948) (injunction denied on ground plaintiffs failed to sustain burden of proving flights caused damage or material discomfort). See Warren Township School Dist. v. Detroit, 308 Mich. 460, 14 N. W. (2d) 134, 135 (1944) (city warned that operation of proposed airport could be enjoined as a nuisance or a continuing trespass if planes took-off and landed in close proximity to adjoining property).


From all that appears the conditions causing the low flying may be remedied, but if on the trial it should appear that it is indispensable to the public interest that the airport should continue to be operated in its present condition, it may be that the petitioners should be denied injunctive relief. Delta Air Corp. v. Kersey, 139 Ga. 862, 20 S. E. (2d) 245, 251 (1942); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934).
the view that all relief should be denied where the low flights are absolutely necessary to the operation of an airport serving a great public need.  

If, as was held in the Gardner case, the courts do possess the power to enjoin flights below the minimum safe altitudes of flight, the issuance of such an injunction would appear to be of little practical value in a fact situation similar to that in the Gardner case, since the navigable air space now extends downward along the glide angle to include whatever space is necessary for take-off and landing. Once the court had determined that the flights complained of were not within the air space necessary for take-off and landing, apparently the most that could be accomplished by the injunction would be to raise the glide angle to a height that would conform to the federal regulations, and, in all probability, the difference between the old and new glide angles would not be enough to give the land owner any appreciable relief from the harmful flights.

If it were determined that the flights are within the space "necessary," and cannot be enjoined, the land owner desiring relief may seek compensation for a "taking" through eminent domain proceedings, but this can be done only when the party proceeded against possesses the power of eminent domain. A possible alternative remedy for the injured owner would be to seek money damages through an action for tortious invasion of his property by low-flying aircraft. Although this form of relief was not sought in the Gardner case, it would appear to be more satisfactory from the standpoint of the owner than a condemnation award, even if the latter were available, since enforcement of the damages remedy would not involve the loss of property. The amount of compensation received would necessarily vary according to the extent of the harm suffered. If it should appear that the harmful flights will continue, damages could be awarded for past and prospective future invasions of the land. However, neither damages nor a condemnation award should be automatically available each time planes pass over private property at less than 500 feet in the course of take-off and landing, but only when the complaining land owner can show actual physical damage to his property or an unreasonable interference with its use.

PHILLIPS M. DOWDING

TRUSTS—DETERMINATION OF CHARACTER OF LIFE INSURANCE TRUSTS AS INTER VIVOS OR TESTAMENTARY DISPOSITION. [Virginia]

Underlying the difference between inter vivos and testamentary trusts is the principle that the former does, and the latter does not, give the cestui a property interest in the trust corpus before the death of the settlor, pursuant to the settlor's intent.1 As a result of this distinction, an inter vivos trust need not meet the requirements of the law of wills, such as formalities of execution imposed by the Statute of Wills; but unless a sufficient interest was passed before the settlor's death, the purported trust can operate, if at all, only as a will to dispose of property at death.2

The nature of life insurance trusts is such that their validity inter vivos may be particularly questionable upon a measurement of the interest passing in praesenti. The life insurance contract is itself somewhat testamentary insofar as enjoyment of the proceeds is postponed until death of the insured and is subject to the commonly reserved right of the insured to change the beneficiary.3

The recent Virginia case of Bickers v. Shenandoah Valley National Bank4 touches upon and intermingles several of the traditional approaches to the problem of whether a sufficient interest passed before settlor's death to support an inter vivos insurance trust,5 and in addition presents an interesting factual variation from the usual insurance trust situation. In that case settlor's widow claimed a right to include

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1Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 (1895); Hines v. Louisville Trust Co., 254 S. W. (2d) 73 (Ky. 1952); Dahlke v. Dahlke, 155 Neb. 169, 51 N. W. (2d) 266 (1952); Allen v. Hendrick, 104 Ore. 202, 206 Pac. 733 (1922); In re Shapley Trusts, 353 Pa. 499, 46 A. (2d) 227, 164 A. L. R. 877 (1948); 1 Bogert, Trusts and Trustees (1951) § 103; 1 Perry, Trusts and Trustees (7th ed. 1929) § 97; 1 Scott, Trusts (1939) § 56.

2See authority cited, note 1, supra. In the final analysis, where no interest in the subject matter passes in trust before death, the trust remains incomplete prior to death for absence of a res, that being a basic element of any perfected trust. See, recognizing this fact, Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P. (2d) 653 at 655 (1954).


4Valid contracts other than life insurance contracts have been said to have a "testamentary flavor." Harlan v. Weatherly, 183 Va. 49, 31 S. E. (2d) 265, 264 (1944).


6The majority speaks only of what interest passed to the trustee whereas the dissent refers to the interest passing to the cestuis. These viewpoints might give different results in a case in which the purported trustee has considerable authority, yet is only an agent of settlor because the "cestuis" receive no interest in the "corpus."
certain insurance policy proceeds in settlor's estate for purposes of her election to take a statutory share in the estate upon renouncing provision made for her in his will. She contended that the purported inter vivos trust of the life insurance was in fact testamentary, and, failing for lack of the formality required of wills, gave rise to a resulting trust in favor of the settlor and subsequently his estate.

The trust agreement provided that: (1) Should his wife elect against his will, the insurance benefits were to be distributed in fourths to settlor's four children by a former marriage; but, (2) should she elect to take under the will, the proceeds were to go in five equal parts to the wife and the four children. In either event the defendant bank as trustee under the trust was to pay the portions of two of the children to itself as trustee for them under the will. Settlor reserved the power to revoke the trust and specified that the trustee had no rights in the policies until settlor's death except the right to hold them in safekeeping (which the trustee did from the execution of the trust agreement until settlor's death). Settlor executed a valid will on the same day as the trust instrument. That will remained in force until his death and was duly probated. It provided, after specific bequests amounting to about 8 per cent of the estate, that the wife and the four children, also cestuis of the trust, were each to receive a fifth of the residue.

The lower court upheld the trust as valid inter vivos. The Virginia Supreme Court of Appeals reversed, in a 4-3 decision, finding the trust to be testamentary and failing for want of formality. The majority of the court presented, at different lengths, four reasons for that conclusion: (1) The trust provision that the shares of cestuis be paid to the will trustee, and the striking similarity between the distribution arrangements provided under the will and the trust, were facts so integrating the trust with the will that the trust was evidently testamentary in purpose. (2) The trust instrument could have been probated had it complied with the Statute of Wills, and therefore its character was testamentary. (3) The purported trustee, having no more rights in the policies before settlor's death than to hold them in safekeeping,

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This reasoning appears to be circuitous. To be admitted to probate in Virginia, an instrument must be a will. 9 Va. Code Ann. (Michie, 1950) Art. 4. And to be a will it must be testamentary. 1 Page, Wills (3rd ed. 1941) § 44. To say that it can be probated assumes that it is testamentary. The court, in giving as a reason for its testamentary character the fact that it might have been probated absent the Statute of Wills, assumes the conclusion which it ultimately seeks.
was merely a custodian and not a trustee of a present trust.\(^\text{(4)}\) Because no plan for distributing the insurance proceeds was provided in the event settlor died intestate, the existence of a will at settlor's death was a condition precedent to the efficacy of the trust, this factor making the trust testamentary because the existence of a will is an uncertain event having only testamentary significance—that is, one having no significance independent of an intention to effectuate a disposition of property at death.\(^\text{(11)}\)

In opposing the majority result, the dissent not only undertook to demonstrate that settlor's reservation of rights and powers in this life insurance trust was insufficient to invalidate it inter vivos, but went on to define the interests actually passing to the cestuis in terms of contingent future interests. Concerning the absence of any provision in the trust agreement for the distribution of the policy proceeds should settlor die leaving no will for his widow to elect to take under or against, the dissent's conclusion was: "The trust was not in any wise dependent upon a will except with respect to the number of shares into which the proceeds from the insurance policies were to be divided."\(^\text{(12)}\)

As between the majority and dissenting opinions, the latter perhaps gives rise to questions more fundamental to insurance trust law. In

}\(^\text{197 Va. 145 at 154-47, 88 S. E. (ad) 889 at 895-97 (1955).}\)


\(^{345}\)
discussing the wife's contentions as presented on appeal, the dissent treats separately two questions which are no more than different approaches to the same basic problem. It is there said: "Appellant attacks the trusts on two grounds rather than one as stated in the majority opinion. First, she asserts that the powers reserved by Bickers make the trust testamentary in character; and second, she contends that no interest passed under the trust agreement prior to Bickers' death. In either event, she argues that the proceeds from the policies of insurance should be declared a part of Bickers' estate which passes under his will."

The essence of an inter vivos trust is the interest which must pass before the settlor dies. Some courts directly examine the nature of the interest acquired by the cestui to see if it is sufficient to support an inter vivos trust, but it appears to be more common for courts to measure the rights in, and control over, the res which were reserved by the settlor, in order to determine ultimately what interests remained to pass in trust. Aside from the merits of one or the other test, the purpose is the same, and that is to discover what property interest in the subject matter actually did change hands in support of the trust in praesenti. Thus, in discussing first "powers reserved" and then, disjunctively, the nature of the interest passing before death, the dissent decided the same question twice.
However, after an excellent presentation of the point that a life insurance trust, where the cestui's benefits and the trustee's active duties are normally postponed until settlor's death, may be valid inter vivos despite the reservation of a power to revoke at will, the dissent did not go on to define the interest which passed under the Bickers trust agreement. That interest passing to the children, who were to receive shares whether or not the widow elected against the will, was said to be an alternative contingent limitation. The interest which the widow received was a springing contingent limitation. Evidently the "contingency" was the death of the settlor; the "alternative" was that the children would get a fifth if the widow took under the will but a fourth if she did not; and the widow's interest was "springing" apparently in that her final enjoyment of it depended upon an election by her to accept the will provisions. The interests were limitations and not remainders because there was no preceding "estate" in the insurance proceeds.

Such highly technical language of future interests does not seem to be characteristic of decisions evaluating the inter vivos nature of trusts. Although future interests in personal property, even if unintrusted, are clearly recognized, a difficult question is posed when the mere naming of that interest which passed is judicially given as the basis for supporting a present trust. That question is whether a future interest in the trust fund, determined by strict analogy to estates in land, bestows certain substantial rights beneficial to the cestui and sufficient to support the trust in praesentia; or whether the future interest is merely a description of those rights arising expressly from the trust instrument in favor of the cestui, and which would support

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(1) 889, 896 (1955). Thus, indications of what the settlor retained were combined with indications of what the cestuis did not get, to support the conclusion that an insufficient interest passed for a present trust to arise.


So long as the interest passing to the children is sufficient to support the trust inter vivos, it is not strictly necessary that the wife's springing limitation alone have been sufficient to support a trust since the reservation by the settlor of the power to modify the trust by adding cestuis or by changing the shares of the original cestuis does not of itself make the trust testamentary. 4 Bogart, Trusts and Trustees (1948) § 994.

Minor, Real Property (2nd ed. 1928, Ribble) 1025.

But see, for cases bordering on this approach: Kerr v. Crane, 212 Mass. 224, 98 N. E. 789, 40 L. R. A. (N.S.) 692 (1912); Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P. (2d) 653 (1955); 1 Bogart, Trusts and Trustees (1951) 480.

American Law of Property (1952) § 4.41; 2 Farnum, Contingent Remainders and Executory Devises (5th ed. 1795) 26; Kales, Future Interests (1905) § 186 et seq.; Gray, Future Interests in Personal Property (1901) 14 Harv. L. Rev. 52.
the trust in praesenti even if they are not even collectively and formally defined. This problem may be insoluble; neither writers nor the cases seem to indicate why either the exercisable rights or the definable legal interest should be prerequisite to the other.24

On the other hand, the majority opinion, in reaching a result in the Bickers case, gave greatest emphasis to its finding that the settlor showed his intention not to create a present trust by making the operation of the trust dependent upon his leaving a will at death. The court decided that the existence of the will was a condition precedent to the efficacy of the trust and was an uncertain event within the control of the settlor.25 Such language is characteristic of cases in which the validity of an escrow transaction is questioned,26 but a crucial differ-

24Gordon v. Portland Trust Bank, 201 Ore. 648, 271 P. (2d) 653 at 656 (1954) expressly left the nature of the cestui's interest undecided and upheld an insurance trust on the basis of affirmative rights acquired by the policy beneficiary (trustee) for the benefit of the cestui. Bose v. Meury, 112 N. J. Eq. 62, 163 Atl. 276, 277 (1932) describes those rights as follows: "[The trustee's] source of title was the promise in the policies, not the trust agreement. The trust agreement is no more than a declaration of trust by the trustee of the [cestuis], and whether [the trustee] had physical possession of the policies or whether there was a stripping of interest by the 'donor,' or that the trust deed was testamentary, is wholly immaterial."

In consonance with this approach, it has been held that the rights of a beneficiary of a life policy, which are subject to the claims of his creditors, may not be divested by an assignment by the insured which does not conform to the requirements of the reserved right to change the beneficiary. Goldman v. Moses, 287 Mass. 393, 191 N. E. 873 at 874 (1934).

25Bickers v. Shenandoah Valley National Bank, 197 Va. 145 at 156, 88 S. E. (2d) 889 at 897 (1955). In this connection, the majority opinion refers to the will and the existence of the will as having no "independent significance." 197 Va. 145 at 155, 88 S. E. (2d) 889 at 897 (1955). It seems most likely that the court in the Bickers case meant by "independent significance" that the leaving of a will by settlor had no significance independent of his own continuing control over the trust. If so, this term fits in with the perhaps doubtful escrow-type argument used by the majority to show testamentary nature of the Bickers trust. However, the term "independent significance" may have been borrowed from the rule of wills law that an act to which a will refers must, in order to be non-testamentary, be one ordinarily having a significance independent of any animus attestandi. That rule, stated in Atkinson, Wills (1937) § 144, cannot have direct application to the Bickers case because it would require the assumption that the trust was a valid will, which it was not. But, in examining the act there concerned—i.e., the leaving of a will by settlor—to see if the trust itself became testamentary through dependence upon a testamentary act, the court may have wished to determine that the act of leaving a will has no independent significance, within the meaning of the wills rule. This requires the assumption that the trust depended for completion upon the act—that is, that no trust could have arisen before the settlor died testate. But that assumption is also the final conclusion because, if the trust could not be complete before settlor's death, no interest could pass prior to death, and the trust is therefore not inter vivos. See Scott, Trusts (1939) § 56.

26E.g., Deming v. Smith, 19 Cal. App. 682, 66 P. (2d) 454 at 456 (1937); Ullendoff v. Graham, 80 Fla. 845, 87 So. 50 at 52 (1920); O'Brien v. O'Brien, 285 Ill. 570,
ence between escrow and trust is that an escrow may not be revocable at will whereas a trust may be and commonly is. Thus, the rule that an escrow is defeated ipso facto where it depends upon an uncertain event within the transferor's control should not be applied to trusts.

If Bickers' failure in the principal case to provide for a disposition of the insurance proceeds in case he died intestate was anything more than an oversight, it might best be treated as an implied part of his broadly reserved power of revocation. The court's analysis readily conforms to that approach in that what is said there does not go beyond what may equally be said of the normal power of revocation. Certainly revocation is "an uncertain event within the maker's control" and, as such, needs no significance independent of the whim of the settlor. Just as the absence of revocation is a condition precedent to the cestuis' enjoyment of the benefits of any revocable trust, so might the

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121 N. E. 243 at 245 (1918); McCotley v. Binkley, 69 Ind. App. 352, 121 N. E. 847 at 849 (1919); Suter v. Suter, 278 Ky. 403, 128 S. W. (2d) 704 at 709 (1939); Eddy v. Pinder, 131 Me. 199, 159 Atl. 727 at 728 (1932); Taft v. Taft, 59 Mich. 152, 26 N. W. 426 at 426 (1886); Van Hult v. Wagner, 215 Mo. 917, 287 S. W. 1038 at 1041 (1926); McLain v. Healy, 98 Wash. 489, 168 Pac. 1 at 2 (1917).

27That a delivery in escrow may not be revocable at will: Barnes v. Spangler, 93 Colo. 254, 25 P. (2d) 732 (1933); McReynolds v. Miller, 372 Ill. 151, 22 N. E. (2d) 951 (1919); Payne v. Payne, 241 Mich. 547, 217 N. W. 756 (1928); Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427 (1877); 3 American Law of Property (1952) §§ 10.81, 12.67; 4 Tiffany, Real Property (3rd ed. 1939) § 1050. Iowa is a possible exception to this rule: Tippold v. Tippold, 112 Iowa 134, 83 N. W. 809 (1900).

28That a trust revocable at will is, unless that power is exercised, as good and effectual as if irrevocable: Helvering v. Stuart, 63 S. Ct. 140, 317 U. S. 154, 87 L. ed. 154 (1942); Russell's Ex'rs v. Passmore, 127 Va. 475, 103 S. E. 652 at 659 (1920); 4 Bogert, Trusts and Trustees (7th ed. 1949) § 104; 1 Scott, Trusts (1939) §§ 37, 57.1. "Indeed, this [right to reserve a power of revocation] was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor." Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 1091 (1895).

29If, as implied in Cohn v. Central Nat. Bank of Richmond, 191 Va. 12, 17, 50 S. E. (2d) 30, 32 (1950), a trust clearly made subject to express revocation by will would be valid inter vivos, the reservation of a power to revoke by leaving, or not leaving a will would likewise not invalidate a present trust. To place the controlling emphasis on Bickers' actual intention, as does the majority opinion, it is quite possible that Bickers merely overlooked situations contrary to his intention to leave a will. In other words, since it was obviously his intention to leave a will, he manifested no intention regarding distribution of the trust fund in its absence. That a will is inoperative until death should not mean an intention to die testate may not be clearly established for other purposes, such as for the purpose here of dispelling any suspicion that the settlor meant to control the operativeness of a trust by leaving or not leaving a will.

existence of a will in the Bickers case be a condition precedent to disbursement of the insurance proceeds, rather than to the efficacy of the trust itself. That is not to say, however, that such a power of revocation—i.e., revocation by dying intestate—could not be thought to extend the powers reserved to a point where the interest remaining to pass would be insufficient to support a trust inter vivos.\(^{30}\)

The prevailing tone of the majority opinion is established through its frequent reference to the case as being one in which the settlor's widow seeks to defeat the inter vivos trust.\(^{31}\) That fact seems to explain the weight given by the court to the similarity and integration of the trust and will in confirming its suspicion that the over-all effect of the trust was to “evade” the widow's marital rights should she renounce the will.\(^{32}\) It is not unusual for courts to consider whether

\(^{30}\)An argument might be made that revocation normally requires an affirmative act and that dying intestate, if allowed to revoke a trust, would be a passive, automatic revocation not depending upon a further act by a settlor. However tenable that point might be in another case, Bickers executed a valid will on the same day as the trust. Thus, an affirmative revocation of that will would be necessary in order to revoke the trust by dying intestate, even though a revocation of the will would not work an effective revocation of the trust until the settlor's death.

\(^{31}\)E.g., “If this instrument, ineffectual as it is without the will, were held valid as an inter vivos trust,... he will by such dependent writings, retain full control of and beneficial interest in his property until death, and at the same time successfully prevent his widow from sharing in his estate. That is what this instrument was intended to accomplish to an extent materially detrimental to the widow, and what it would accomplish if it were held valid.” 197 Va. 145, 88 S. E. (2d) 889, 896 (1955). Elsewhere the court said, in quoting Gentry v. Bailey, 6 Gratt. 594, 603, 47 Va. 846, 849 (1850): “This right, by our law, on the part of the wife, I think it clear the husband cannot defeat by any contrivance for that purpose.... [S]uch an instrument, so far as regards the distributive share of the wife, is in its nature testamentary only, and cannot affect the rights conferred upon her by law in contemplation of his dying either testate or intestate.” 197 Va. 145, 88 S. E. (2d) 890 (1955).

In stressing that this particular trust was intended to deprive the widow of her share, the court does not mention that its finding the trust to be dependent on the will actually made it less likely so to deprive her than would the ordinary revocable insurance trust. This is true because here, in the event there were no will, the trust would be inoperative, as interpreted by the Bickers opinion, with the result that the insurance proceeds would be included in settlor's estate which is subject to her election.

the marital rights of a widow are involved in a contest over the validity of an inter vivos transaction, but, as in the Bickers case, they usually do not expressly indicate that the legal standards for such transactions are influenced by that fact.\textsuperscript{33} The uncertainty of this situation may result from a conflict between what is probably a judicial desire to secure a wife's rights in her husband's property and the often-stated rule that a motive to frustrate marital claims of the wife will not render ineffectual an inter vivos trust or other transfer which has met the legal requirements pertaining thereto.\textsuperscript{34}


If the standard for testing the testamentary nature of a contract may thus depend upon who claims under what policy of the law, perhaps the law of trusts might also recognize such a variable standard. However, in any system of rules for measuring the testamentary nature of life insurance trusts, care should be taken in cases where a widow claims a statutory share in the corpus not to find one testamentary for reasons which would exist in no less degree if the life insurance contract were unintrusted. Thus it must be remembered that a widow's statutory share in life insurance proceeds is legitimately avoided merely by someone else being the named beneficiary of a policy which may have a change-of-beneficiary clause (analogous to a reserved power of revocation). Gurnett v. Mutual Life Insurance Co., 356 Ill. 612, 191 N. E. 250 (1934).

\textsuperscript{34}In Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966, 967 (1917), in which a widow claimed a trust to be testamentary, the court said: "A duty imperfectly defined by law may at times be evaded or a right imperfectly protected by law may be violated with impunity, but to say that an act, lawful under common-law rules and not prohibited by any express or implied statutory provision, is in itself a 'fraud' on the law or an 'evasion' of the law, involves a contradiction in terms... The great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed." Leonard v. Leonard, 181 Mass. 458, 462, 63 N. E. 1068, 1069, 62 Am. St. Rep. 426 [Holmes, C. J.], and cases there cited." Accord: Hatcher v. Buford, 60 Ark. 169, 29 S. W. 641 (1895); Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N. E. (2d) 736 (1940); Small v. Small, 56 Kan. 1, 42 Pac. 323 (1895); Wright v. Holmes, 100 Me. 508, 62 Atl. 597 (1905); Potter
Aside from the possibility that this conflict may be resolved by legislation, such as that passed in Pennsylvania, the solution might quite properly lie in the adoption by the courts of a more demanding legal requirement as to what interest must pass in order for an attempted inter vivos trust to be valid as against the decedent-settlor's widow. Clearly the courts, by statutory interpretation, have established a different standard of what interest must pass before settlor's death in cases involving inheritance, succession, and the estate taxes, so that property considered validly transferred away by inter vivos trust for other purposes may be subject to such taxes on settlor's estate.

Writers have distinguished the cases according to whether it is the settlor's creditors, his wife, or residuary legatees (heirs, absent a will) who claim an interest in the trust fund over that of the cestuis. Courts sometimes impliedly observe such classifications of trust cases according to claimants by reaching conflicting results where similar facts support the trust, and occasionally express comment is made on the persuasive-

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20 Pa. Stat. Ann. (Purdon, 1950) § 301.11 (gives a widow right to share in husband's revocable inter vivos trusts as if it were part of his estate provided she renounce any provision for her in his will).

By statute most states impose a tax on all transfers of property intended to take effect in possession or enjoyment at or after the death of the transferor. DuBois' Adm'r v. Shannon, 275 Ky. 516, 122 S. W. (2d) 103 at 107 (1938); Safe Deposit and Trust Co. v. Bouse, 181 Md. 351, 29 A. (2d) 906 at 910 (1943); 1 Scott, Trusts (1939) § 57.6.

"...[T]he criterion for determining whether the transfer of an interest is intended to take effect in possession or enjoyment at or after the transferor's death is whether he retains a string or tie whereby he can reclaim the transferred property or whether he has otherwise reserved an interest whose passing to others is determinable by his death." Lloyd's Estate v. Commissioner of Internal Revenue, 141 F. (2d) 758, 760 (C. C. A. 3rd, 1943). Applying this general test to inter vivos trusts: Cochran v. McLaughlin, 129 Conn. 176, 27 A. (2d) 120 (1942); Kings County Trust Co. v. Martin, 121 N. J. L. 290, 2 A. (2d) 187 (1938); In re Whittier's Estate, 256 App. Div. 377, 10 N. Y. S. (2d) 354 (1939) aff'd 282 N. Y. 613, 24 N. E. (2d) 393 (1949); In re Glosser's Estate, 355 Pa. 210, 49 A. (2d) 401 (1946).

That a different measure of the testamentary character of trusts was used for tax purposes than in other instances even before introduction of the typical inheritance tax statutes is demonstrated by two Pennsylvania cases: In re Lines' Estate, 155 Pa. 378, 25 Atl. 728 (1893) (where trust found testamentary for imposing tax); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891) (where found valid inter vivos and not part of estate subject to statutory marital rights).

71 Scott, Trusts (1939) § 57.5; Note (1951) 99 U. of Pa. L. Rev. 879. Instances in which the beneficiary's interest in unintrusted insurance requires judicial evaluation are classified according to the contesting parties in Vance, Handbook of the Law of Insurance (3rd ed. 1951) § 108.
ness of the particular statutory or public policy which would be frustrated by upholding the trust.38

A remarkable example of this conflict between cases with parallel facts is found in comparing the Bickers case with Tootle-Lacy National Bank v. Rollier.39 In the Tootle-Lacy case payment of certain intrusted proceeds of settlor's insurance was likewise to be made to the trustee of a trust to be created under his will and only then upon the following contingencies: "... (1) That Rollier [settlor] died testate; (2) that his wife, Emma E. Rollier, survived him and is living; (3) that there was a trust operating under his will; and (4) that the will has been admitted to probate..."40 The right to revoke by changing the beneficiary of the policies was reserved. No cestuis were named by the policy endorsement which served as the trust agreement. The court inferred, construing the will and inter vivos trust together, "that Rollier intended to adopt and make the terms and conditions and beneficiary of the testamentary trust applicable to the trust in the proceeds of the insurance policies..."41 That case differs from the Bickers case in the one significant aspect that the parties were reversed. In the Tootle-Lacy case, settlor's widow was cestui of the inter vivos trust and she was opposed by a legatee claiming that the express trust failed and that a resulting trust arose thereupon in favor of settlor's estate. Upon these facts, the trust was unanimously declared valid inter vivos by the Missouri Supreme Court on the ground that "the intention to create a trust in proceeds of the policies with the bank as trustee,

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38See, e.g., cases cited, note 36 supra; Newman v. Dore, 275 N. Y. 371, 9 N. E. (2d) 966 (1937) (trust held invalid inter vivos as to settlor's widow, decision as to its validity for other purposes being expressly withheld); In re Pengelly's Estate, 374 Pa. 358, 97 A. (2d) 844 (1953) (public policy of protecting widow's rights requires the resolving of doubts as to the inter vivos validity of a trust in her favor); Epperson v. Mills, 19 Tex. 65 (1857) (trust "evading" the Texas forced heirs statute applying to wills invalid whether or not it was testamentary).

39Regarding the effect upon a purported inter vivos trust of the policy underlying the statutes restricting transfers to charities by will, compare Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N. E. (2d) 627 (1958) (charitable trusts in praesenti upheld notwithstanding that it accomplished what a will could not) with Worthington's Adm'r v. Redkey, 86 Ohio St. 128, 99 N. E. 211 (1912) (holding against the trust because a trust created as scheme to circumvent statute limiting charitable devise must be completely and irrevocably separated from settlor's control). The result of a case in which creditors contest the validity of an inter vivos trust may be determined by statutes expressly preserving their rights against all transfers by decedent during his life. E.g., Thomas v. Dye, 117 N. E. (ad) 515 (Ohio App. 1953); Green v. Seaver, 59 Vt. 602, 10 Atl. 742 (1887).

341 Mo. 1029, 111 S. W. (ad) 12 (1937).

341 Mo. 1029, 111 S. W. (ad) 12, 16 (1937).

341 Mo. 1029, 111 S. W. (ad) 12, 17 (1937).
The testamentary question was ignored altogether. Apart from the theories for and against the reasoning of the Bickers case, it appears that the Virginia Supreme Court of Appeals, upon the facts there presented, followed in the spirit which it forecast in Norris v. Barbour, where it struck down an otherwise valid inter vivos trust on the ground that it was obviously a scheme to deprive settlor's widow of her marital rights. It may well be desirable to preserve for married women the benefits intended for them by the legislature. But if that desire is to cause a court to hold against the validity of a trust, such a case must be considered distinguishable from cases where marital rights are not involved. Otherwise, cases decided under pressure of the desire to protect widows, and resulting in trusts being struck down as testamentary, might seriously undermine the singular usefulness of the trust device. If the Bickers case is not so distinguished, it will indeed place Virginia, as said by the dissent, "not in the majority or minority class but in a class by [herself]."

Edward E. Ellis

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421 Mo. 1029, 111 S. W. (2d) 12, 16 (1937).
43188 Va. 723, 51 S. E. (2d) 334 (1949).
44197 Va. 145, 168, 88 S. E. (2d) 889, 904 (1955). Liberal in their view favoring the inter vivos validity of trusts are the following recent decisions from jurisdictions other than Virginia: Farkas v. Williams, 5 Ill. (2d) 417, 125 N. E. (2d) 600 (1955); In re Sheasley's Trust, 366 Pa. 316, 77 A. (2d) 448 (1951).