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Notes and Comments

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NOTES AND COMMENTS

Administrative Law—Carriers—the Interstate Commerce Commission's Authority to Approve Tolerance Regulations—Their Effectiveness

In 1947 shell egg carload freight constituted 0.072 per cent of the value of the total carload traffic handled by the railroads that year; but in the same year 1.91 per cent of all claim payments made by the railroads on carload traffic was for damaged eggs![1]

The existence of this condition caused the Interstate Commerce Commission in 1948, on its own motion, to institute proceedings to investigate the transportation of shell eggs in order that it might make findings and prescribe reasonable regulations for the shipments of eggs via railroads.[2] At the hearings testimony was taken as to the damage to eggs caused by inherent weaknesses in eggshell structure,[3] the components of damage claims submitted to the railroads,[4] the geographical areas in which the greatest damage claims arose,[5] and the methods used in packing and loading eggs.[6] At the close of the hearings the Commission adopted regulations[7] to allow the damage to 5% of the eggs packed

[1] Special Regulations, Eggs, 284 I. C. C. 377, 399 (1952). In 1941 claims against railroads for damage to eggs throughout the country amounted to approximately $110,000. In 1947 the claims amounted to $2,338,462.

[2] 284 I. C. C. 377 (1952). One hundred thirty-one railroads participated in the proceedings. The proceedings, begun in 1948, were not concluded until 1952.

[3] *Id.* at 383-384. Undetected weaknesses in the shell structure are known as "checks" and "blind checks." "Checks" are small cracks which do not penetrate below the shell membrane, and which are difficult to discern by ordinary sight inspection. "Blind checks" are small cracks in the shell which occurred prior to the laying of the eggs and over which a calcium deposit has formed, making it impossible to discern the cracks without "candling" the eggs. When these weak-shelled eggs are packed and shipped they are naturally liable to give under even light strain.

[4] Special Regulations, Eggs, 284 I. C. C. 377, 399 (1952). "Many elements other than the actual value of the eggs enter into a damage claim. For instance, such claims include the loss incident to the damage, the labor charges and the materials used in reconditioning the cases, and the warehouse charges covering the extra expense of handling the cases containing damaged eggs."

[5] *Id.* at 396-400. The largest volume of claims arose in the New York City area.

[6] Special Regulations, Eggs, 284 I. C. C. 377, 390 (1952). The packaging and loading procedure had been of concern to the Commission previously, 52 I. C. C. 47 (1919). The railroads have conducted "extensive research" relative to loss and damage claims to shell eggs. Buffing materials of rubber and excelsior pads were utilized to minimize shock. Apparently many of these experiments were unsuccessful, and no practical method was discovered whereby occurrence of damage could be reduced.

[7] *Id.* at 407-408. The following schedule was proposed by the railroads during the hearings:

"Section 6.—On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 4% of the contents of the packages containing damaged eggs. Where

at points other than railheads to go uncompensated, and the damage to 3% of the eggs packed at railheads to go uncompensated. An exception was made when the shipper supplied the carrier with a certificate from a bona fide inspector, either state or federal, indicating the amount of damaged eggs delivered to the carriers in each shipment. In such cases the shipper could recover all damage shown to be in excess of that recorded on the certificate, minus a deduction of 1%.[8] From this, it is patent that the five and three per cent tolerance allowances were intended to offset damage estimated to have occurred prior to the shipment of eggs.

Subsequently, suit was brought to have the order of the Interstate Commerce Commission effectuating the tolerance regulations set aside and enjoined.[9] Taking a long range view of the situation, the district court found the Commission's rules to be reasonable.[10] In so doing, the court pointed to the tremendous economic interests concerned,[11] the difficulties extant in evolving a method whereby those interests could be balanced,[12] and the Commission's responsibility to foster sound economic conditions in transportation.[13]

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damage exceeds 4%, claims shall be for all damage in excess of 4% if investigation develops carrier liability.

"Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 3%, the percentage of actual damage as shown on such certificates, plus 1% shall be used in lieu of 4% specified in this Section.

"Section 7.—On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 6% of the contents of the packages containing damaged eggs. Where damage exceeds 6% claims shall be allowed in excess of 6%, if investigation develops carrier liability."

[8] *Id.* at 402-403.

[9] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846 (D. C. Utah 1954).

[10] *Id.* at 864.

[11] *Id.* at 850. "Where such an immense volume of traffic, running into thousands of cars and millions of cases of eggs, . . . and such tremendous freight charges and damage claim payments, running into millions of dollars, . . . are involved, the economic stability of carriers and the maintenance of an adequate national system of railroads, were [*sic*] substantially affected."

[12] *Id.* at 851. "The problem of claims against railroads for damage to egg shipments had been before the railroads and the Commission for many years and never satisfactorily solved. It is extremely difficult of solution. It constitutes a part of the whole problem of the rate structure, which courts many times have held requires the experience and judgment of the Commission.

"The Commission could not expect the railroads to continue to take these losses. That was uneconomic to the point of being injurious to the national railroad transportation system . . . .

". . . . "Rate increases were not the remedy. That would have imposed a greater cost upon the shippers throughout the nation than the present regulation. That would have been more unjust for it would penalize some shippers for the benefit of others. That would not have benefited the shippers of eggs. That would tend to cause the railroads to lose all of the business."

[13] *Id.* at 850.

Complainants[14] appealed to the Supreme Court of the United States,[15] attacking the regulations on six grounds.[16] The Court considered only the appellants' contention that the Commission's findings did not support the conclusion that tolerance regulations placed no limitation on the carrier's liability. On the grounds that the Commission had not shown that the tolerance did not in part consist of damage caused by the carrier, the Supreme Court reversed the decision of the district court.

A crucial point raised by the appellants in the hearings below[17] was not considered by the majority of the Court. Did the Interstate Commerce Commission have the power to promulgate tolerance regulations, or is it precluded from so doing by § 20(11) of the Interstate Commerce Act?[18]

The answer to this question depends upon: (1) the scope of the Commission's power to require and to determine that rates and services established by the common carriers are reasonable, and whether the making of tolerance regulations is a part of this power; (2) the limitation that § 20(11)[19] imposes on the Commission's power to determine

[14] The complainants were: Utah Poultry & Farmers Cooperative; Armour & Co. (Intervenor); Swift & Co. (Intervenor); United States Department of Agriculture.

[15] Secretary of Agriculture v. United States, 350 U. S. 162 (1956).

[16] The bases for attack were: "(1) *the Commission has no jurisdiction over damage claims and hence no power to prescribe regulations governing their disposition;* (2) tolerances based on averages necessarily embrace a forbidden limitation of liability since, by definition, some shipments will contain less than the 'average' damage, resulting in those cases in the carrier being relieved of its full liability; (3) the railroads are liable for in-transit damage even though 'unavoidable'; (4) the averages found by the Commission are not supported by the evidence; (5) the approval of uniform nation-wide tolerances was unreasonable in light of the wide differences in the egg-damage experience of consignees located in different areas of the country; and (6) the conclusion that the tolerances do not limit liability is not supported by the Commission's findings." [Emphasis added.] *Id.* at 165.

[17] This point was raised in the hearing in the District Court, Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846 (D. C. Utah 1954), and in the Commission hearings, Special Regulations, Eggs, 284 I. C. C. 377, 401 (1952).

[18] Secretary of Agriculture v. United States, 350 U. S. 162, 176 (1956) (Dissenting opinion).

[19] For the purposes of this note, the pertinent part of 24 STAT. 385 (1887), as amended, 49 U. S. C. § 20(11) (1953) is as follows:

"Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation, . . . or . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such com-

the reasonableness of rates and services; and (3) the procedure for determining the common law liability of carriers and the exemptions therefrom.

Power to Regulate Rates

Congress amended the Interstate Commerce Act[20] by the Hepburn Amendment of 1906.[21] By that amendment, under § 15,[22] Congress gave the Interstate Commerce Commission the power to establish and enforce "just and reasonable" charges for services "rendered or to be rendered" in the transportation of persons and property.[23] Although the immediate aim of the amendment was to eliminate unfair practices by railroads against the shippers,[24] it was also intended to insure the carriers a reasonable return for their services.[25] Necessarily, the Com-

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mon carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void. . . ."

[20] 24 STAT. 384 (1887). [21] 34 STAT. 589 (1906).

[22] For the purpose of this note the pertinent part of 24 STAT. 384 (1887), as amended, 49 U. S. C. § 15 (1953) is as follows:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property . . . , or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case. . . ."

[23] 40 CONG. REC. 2230 (1906). "We have declared in virtue of our powers, "That all charges for any service rendered or to be rendered in the transportation of persons or property or in connection therewith shall be just and reasonable."

[24] 40 CONG. REC. 2224 (1906). "The immediate and most pressing need, so far as legislation is concerned, is the enactment into law of some scheme to secure to the agents of the Government such supervision and regulation of the rates charged by the railroads of the country engaged in interstate traffic as shall summarily and effectively prevent the imposition of unjust or unreasonable rates."

[25] 40 CONG. REC. 2234 (1906). "The corporation . . . is bound to render the best service consistent with security of the capital embarked in it, and security of capital includes the right to employ it at a profit. If the community is entitled to the best service consistent with the safety of capital, the just rate to each individual must be the actual cost of the service rendered to him plus a reasonable profit to the company. There can be no other rate consistent with justice, as a moment's reflection will show. . . . All who use a railroad can not have their goods transported for less than the actual cost. If they did, in a very short space of time the railway would be bankrupt and could not transport any goods at all, because it has no source of revenue except the rates which it charges to the people who use its facilities."

mission's power had to be one of a flexible nature to enable the Commission to deal with the conditions affecting both carriers and shippers.[26] Therefore, all the components that affect the rates and thereby the economy of carriers is of concern to the Commission in the exercise of its expert discretion in determining the reasonableness of rates. Indeed, the Supreme Court has refused to take jurisdiction to determine the components of rate charges where to do so would effect a readjustment of the carrier's rate schedule. This the Court held was a matter for primary determination by the Commission.[27]

Unquestionably, habitual damage to a commodity which must be compensated by the carrier affects the over-all cost of the transportation of that commodity regardless of the causes of such damage.[28] In the case of eggs, this cannot be absorbed through rate increases.[29] Tolerance regulations offer one solution whereby adjustments for the habitual breakage of eggs can be made without requiring over-all rate charges.

A tolerance is a margin of damage which must be exceeded before a claim may be made for additional damage.[30] Tolerances were originally allowed by the Commission to account for a difference in weights of coal[31] and grain [32] at points of origin and at destination estimated to be caused by moisture evaporation,[33] and variances in outdoor railway scales.[34] They were first applied to "current receipt" shell eggs in

[26] Board of Trade of Kansas City v. United States, 314 U. S. 534, 546 (1942). "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." Freas, *Problems in Ratemaking,* 23 I. C. C. PRACTITIONERS' JOURNAL, 552 (March, 1956). ". . . Ratemaking has been referred to as a pragmatic business. By this is meant, no doubt, that in a rate structure the individual considerations are so balanced and interdependent that a manipulation of a part calls for a consideration of the whole, and that the proper functioning of the whole depends upon the adequacy of the parts. . . ."

[27] Armour & Co. v. Alton R. R., 312 U. S. 195 (1941); See also Note 2, following 49 U. S. C. A. § 15 (1929).

[28] LOCKLIN, ECONOMICS OF TRANSPORTATION 143 (4th ed. 1954). "[D]ifferences in rates may be explained on two grounds. First, there are differences in the cost of service. Some articles are more expensive to transport than others—some require more expensive types of equipment; some require special facilities of one sort or another; some require expedited service; some are more bulky than others, and hence the cost, per unit of weight, is greater than when the weight-density is greater. *Differences in liability and risk also make differences in the cost of service.*" [Emphasis added.]

[29] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846, 851 (D. C. Utah 1954); See LOCKLIN, ECONOMICS OF TRANSPORTATION 154 (4th ed. 1954). Probably one reason a higher rate could not be charged for eggs is that the value of the eggs at the market price could not stand the higher rate.

[30] Northwestern Tariff & Service Bureau, Inc. v. Chicago, Milwaukee & St. Paul Ry., 47 I. C. C. 549 (1917).

[31] *Ibid. In Re* Weighing of Freight, 28 I. C. C. 7 (1913).

[32] A. B. Crouch Grain Co. v. Atchison Topeka & Santa Fe Ry., 41 I. C. C. 717 (1916).

[33] *In Re* Weighing of Freight, 28 I. C. C. 7 (1913).

[34] Weight Tolerance Rule, 192 I. C. C. 71 (1933).

1919.[35] A tolerance allowance was first attacked as "limiting the liability of carriers in violation of § 20(11)" in a Commission hearing in 1916.[36] At that time, as in the lower court hearing of the principal case,[37] the Commission defended the tolerance regulations on the grounds that the "limitation was not against losses caused by the carrier, but rather against liability for losses due to the inherent nature of the commodities themselves, and attributable to no human agency."[38] Therefore, it contended, the regulation did not violate § 20(11) of the Interstate Commerce Act. Such an argument is justified by the necessity for making some type of rate adjustment for habitual shrinkage or breakage which affect the transportation cost of grain, coal and eggs. Nevertheless, there is a possible argument that the Interstate Commerce Commission inadvertently may have come through the back door to a violation of § 20(11) of the Interstate Commerce Act.

The Limitations in § 20(11)

The Carmack[39] and Cummins[40] amendments to § 20(11)[41] were passed during the early part of this century. The first was intended to establish uniformity of obligation and liability among carriers. The second was intended to insure the shipper full recovery for the value of his goods transported by the carrier in the event of damage.

Prior to the Carmack amendment:

> ". . . [T]he Federal courts sitting in various States were following the local rule, a carrier being held liable in one court when

[35] National Poultry, Butter & Egg Ass'n v. New York Cent. R. R., 52 I. C. C. 47 (1919).

[36] A. B. Crouch Grain Co. v. Atchison, Topeka & Santa Fe Ry., 41 I. C. C. 717, 717-718 (1916).

[37] Utah Poultry & Farmers Coop. v. United States, 119 F. Supp. 846, 849 (D. C. Utah 1954).

[38] A. B. Crouch Grain Co. v. Atchison, Topeka & Santa Fe Ry., 41 I. C. C. 717 (1916).

[39] 34 STAT. 593 (1906). The Carmack Amendment read as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such propety may pass and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *Provided*, that nothing in this section shall deprive the holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

[40] 38 STAT. 1196 (1915).

[41] 24 STAT. 386 (1887), as amended, 49 U. S. C. § 20(11) (1953). See note 19 *supra*.

> under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity. . . ."[42]

The Carmack Amendment, however, had unforeseen effects upon the common law liability of carriers. In *Adams Express Co. v. Croninger*[43] the Supreme Court construed the act to permit a carrier to limit a shipper's recovery for damages to the value of the property stated on the bill of lading. Under this construction, a carrier could file with the Commission two rates, one to cover commodities shipped at an agreed value, and a second and higher rate to cover unlimited carrier liability.[44] In some instances while two rates were allowed, only the first rate was incorporated into the tariff schedules published under the auspices of the Commission. If this was the case, the second rate was agreed upon by the individual carrier and shipper when the shipper did not elect to ship under the "agreed" value and its corresponding published rate.[45] Since the second rate was not always supervised by the Commission, there were abuses. In some instances the second rate was so exhorbitant that the shipper was obliged to accept the lower rate and the corresponding lower valuation of his goods to stay in business.[46]

The Cummins Amendment was passed in 1915 to reinstate the liability of the carrier as it had been prior to 1915.[47] To the earlier act the

[42] Adams Express Co. v. Croninger, 226 U. S. 491, 505 (1913).
[43] 226 U. S. 491 (1913).
[44] *In Re* The Cummins Amendment, 33 I. C. C. 683 (1915).
[45] *Id.* at 686-687.
[46] 51 CONG. REC. 9624 (1914). Such a situation existed in the case of livestock: "All the railroads at this time have rates dependent on value in the shipment of live stock. The value is determined by the declaration of the shipper. . . . If the shipper wants full value, and the value is not beyond the ordinary or common value of registered or pure-bred stock, he must pay 10 per cent or 15 per cent or 25 per cent more than the rate upon an ordinary live-stock shipment. That rate as applied to the ordinary case is prohibitive; the shipper cannot pay it and do business for, of course, the amount of it is absurdly high. It is based only on the idea that the higher rate is necessary to compensate the railway company for the increased risk; but it is greatly more than that in all the cases I have examined. . . . The live-stock shipments that are made under the rule established by the railroad companies, and which we seek to overturn here, I suppose, constitute 90 per cent of all the shipments that would be affected by this rule."
[47] *Id.* at 9621. "In this bill we have tried to restore to the shippers of this country not all, but a measure, of the rights which they possessed and which they exercised prior to the passage of the Carmack amendment, which inadvertently destroyed those rights. Therefore we provided that the railroad company should be liable to

Cummins Amendment added: "[S]hall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recovery therefrom, whether such receipt or bill of lading has been issued or not, *for the full, actual loss, damage, or injury to such property caused by it.* [Emphasis added.] Thus, the import of the act was to save the shipper from the risk which he had been previously forced to take in accepting the lower rate, and to prevent carriers from limiting their liability.

This amendment was passed by Congress while it was charged with indignation over the repercussions of the decision in the *Croninger* case. At that time there appears to have been no consideration of the effect that § 20(11) would have on the other sections of the Interstate Commerce Act, the Hepburn Amendment, and the rate making power of the Commission. It is, therefore, submitted that Congress did not intend to undermine the Commission's power to determine the fair cost of transportation.

Nevertheless, the amendment did amount to a fiat by Congress to the Commission prohibiting it, in the course of its general rate making power, from limiting the liability of carriers, in any manner inconsistent with the act. The Commission could no longer approve schedules whereby the individual shipper would be obliged to contract away his common law right to recover the full value of his goods.

However, Congress intended the exemptions which were inherent in the common law rule of the liability of carriers to be part of the law.[48] The carrier was not to be "an insurer against the act of God, or the public enemy, the unprecedented storm or anything of the kind."[49] The last, it is submitted, includes damage "for breakage unavoidable in the nature of things."[50] But can the Interstate Commerce Commission make

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the lawful holder of the receipt or any other person to the full actual loss, damage or injury caused by it." See also Notes, 20 MICH. L. REV. 765 (1920); 1 NEW YORK LAW REV. 108 (1924); 12 VA. L. REV. 235 (1925).

[48] *In Re* The Cummins Amendment, 33 I. C. C. 682, 695 (1915). ". . . A carrier, after the Cummins amendment goes into effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not cause."

[49] 51 CONG. REC. 9621 (1914).

[50] Secretary of Agriculture v. United States, 350 U. S. 162, 173 (1956). ". . . [T]he Cummins Amendment to the Interstate Commerce Act, § 20(11), does not constitute an affirmative congressional formulation of a carrier's liability for damage to goods transported by it. The legal import of that Amendment is to bar the Interstate Commerce Commission from legalizing the tariffs limiting the common-law liability of a carrier for such damage. The common law, in imposing liability,

tolerance regulations of uniform effectiveness on the premise that the allowances take care of damage caused by the inherent nature of the goods?

The solution to this problem lies in the procedure for determining that shrinkage and breakage is loss caused by the natural propensity of the goods.

Determination of Common Law Liability

At common law a carrier is in the nature of an insurer.[51] The carrier is exempted from liability only when the loss results from acts of God, the public enemy, the inherent vice of the goods, or the default of the shipper.[52]

After the shipper has established his case by proving that the property was in good condition when received, and in damaged condition when delivered, the carrier must bring the case within one of the excepted causes.[53] In the case of eggs the carrier must show that the damage was occasioned by inherent defects in the eggs.[54] The same rule applies where the shipper has shown loss in transit of grain or coal.[55] Thus each case must stand on its own facts as to whether loss was caused by the inherent vice of the goods. No court is bound to allow any percentage of damage to go uncompensated if it finds that the damage was caused by the carrier. In addition, the courts vary in their determination as to what constitutes causes beyond the control of the carrier. For instance, while one carrier has been held liable for damage to eggs frozen in transit,[56] another was not liable for onions similarly damaged.[57]

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dispensed with proof by a shipper of a carrier's negligence in causing the damage. But for breakage unavoidable in the nature of things—whether nature be operating within a thing or from without, it is equally an 'inherent vice'—there would be no liability since the common law did not impose a liability unrelated to the carrier's conduct."

[51] Beale, *The Carrier's Liability: Its History*, 11 HARV. L. REV. 158 (1897).

[52] Joseph Toker Co., Inc. v. Lehigh Valley R. R., 12 N. J. 608, 97 A. 2d 598, 599 (1953).

[53] Annot., 53 A. L. R. 997 (1928).

[54] Mitchell v. The United States Express Co., 46 Iowa 214 (1877).

[55] In the following cases the carrier clearly had the burden of establishing that loss was caused by the inherent defect of the commodity. Joseph Toker Co. Inc. v. Lehigh Valley R. R., 12 N. J. 608, 97 A. 2d 598 (1953) (the defendant failed to prove that weight loss was due to the natural evaporation of moisture from coal during transit); Smith v. Louisville & N. R. R., 202 Iowa 292, 209 N. W. 465 (1926) (the defendant had the burden of establishing that loss was caused by the evaporation of moisture from coal and was therefor loss caused by a natural propensity); National Elevator Co. v. Great Northern Ry., 137 Minn. 217, 163 N. W. 164 (1917) (defendant had the burden of establishing that the loss of weight from grain was due to the evaporation of moisture). In the following cases evaporation of moisture was judicially recognized as a "natural propensity" causing loss: Nye Schrader-Fowler Co. v. Chicago & N. W. R. R., 106 Neb. 149, 182 N. W. 967 (1921); Shellaberger Elevator Co. v. Illinois Central R. R., 212 Ill. App. 1 (1917). In the following case evaporation of moisture causing loss of weight in wheat was recognized as a "natural propensity" by statute: Cardwell v. Union Pacific R. R., 90 Kan. 707, 136 Pac. 244 (1913).

[56] Akerly v. Railway Express Agency, 96 N. H. 396, 77 A. 2d 856 (1951).

[57] Close v. Missouri Pac. R. R., — La. App. —, 191 So. 596 (1936).

These decisions of the courts are beyond the control of the Interstate Commerce Commission because under § 9[58] of the Interstate Commerce Act the jurisdiction of the Commission over claims is confined to claims arising from violations of the Act.[59] Thus any regulations regarding the "inherent nature" of the commodities that the Commission may make are at best only guides for the discretion of the courts.[60] Under these circumstances the tolerance regulations have no legal effect and the attempts of the Commission to adjust the economic unbalance created by habitual shrinkage or breakage are ineffectual if shippers do not continue to accept claim settlements based on the tolerance regulations.[61]

Admittedly, the above reasoning has its logic. However, it is submitted that to deny effect to tolerance regulations because the Commission has no jurisdiction over claims arising out of the carrier's common law liability is basically unsound. The Commission does have jurisdiction to determine what service is to be offered for what rate. The extent of breakage or other loss which as a matter of experience is chargeable to the nature of the goods is an inherent part of determining the cost of

[58] 24 STAT. 382 (1887), as amended, 49 U. S. C. § 9 (1953) is in part as follows: "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter *may* either *make complaint to the commission* as hereinafter provided for, or *may bring suit* in his or their own behalf *for* the recovery of the *damages for which such common carrier may be liable under the provisions of this chapter. . . .*" [Emphasis added.]

[59] Van Patten v. Chicago, M. & St. P. Ry., 81 Fed. 545, 546 (C. C. Iowa 1897).

[60] An example of the attitudes that courts may take regarding tolerances is conveyed by the following: Joseph Toker Co., Inc., v. Lehigh Valley R. R., 12 N. J. 608, 615, 97 A. 2d 598, 602 (1953). In reference to a tolerance regulation for the shrinkage of the weight of coal the court said: "The tolerance related solely to freight charges within the jurisdiction and control of the Interstate Commerce Commission and had no relation to loss claims beyond the jurisdiction and control of the Commission. It is not disputed that the Commission has no authority and does not purport to exercise authority over civil claims for the recovery of the value of property lost in transit. . . . The shipper's right to assert such claim against the initial carrier where, as here, there has been an interstate shipment is expressly provided for in the Carmack Amendment which provides not only that the initial carrier shall be liable but also that, apart from exceptions not material here, there shall be no limitation of liability for the full actual loss. *Neither the carrier nor the commission could lawfully provide that liability to shipper for loss of coal in transit shall not accrue until the loss exceeds 1½% of coal shipped.*" [Emphasis added.] Shellaberger Elevator Co. v. Illinois Central R. R., 212 Ill. App. 1, 6 (1917). In reference to an allowance for shrinkage of the weight of corn the court said: "The liability of a carrier for loss or damages to an interstate shipment is governed by the federal law and all State statutes . . . are thereby superseded. . . . The only loss or damage the appellant is liable for under the Carmack Amendment is the loss or damage caused by it, and *shrinkage would not come within that rule unless the proof should show the shrinkage was caused by it.*" [Emphasis added.]

[61] Probably the greatest number of claims are settled outside of the courts. For this reason, if most shippers and carriers continued to adhere to the tolerance regulations when settling their claims, the Commission's purpose would be accomplished. That is, the economic adjustment what the Commission intended would operate in the larger number of cases. However, quaere whether shippers will continue to allow adjustments on the basis of tolerances if the Commission cannot legally enforce the regulations, and the courts will do no more than use them as guides, and in some instances will not recognize them at all as in the *Toker* case, 12 N. J. 608, 97 A. 2d 598 (1953).

transportation. The complexity of the economic factors involved in the tolerance problem calls for solution by the expert body.

Since tolerance regulations seem to be reasonable measures for adjusting losses caused by commodities which are by their nature inevitably damaged in transportation, it may be desirable to make express provisions for such regulations. The obvious solution is to amend § 20(11) of the Interstate Commerce Act so as to give the Commission the power either (1) to construe the meaning of "inherent vice" so that it will have uniform application in the courts in suits for loss or damage, or (2) as suggested by one writer,[62] to amend the act so as to allow the "Commission to provide tolerances when reasonably justified." The latter would seem to be the better solution as it would best cover the complex economic factors involved and allow the Commission greater discretion in striking a balance between the interests of the shippers and carriers.

HARRIET D. HOLT.

Appellate Jurisdiction of the United States Supreme Court over State Courts

In the recent case of *Naim v. Naim*,[1] the United States Supreme Court dismissed an appeal from the Supreme Court of Virginia because the federal question was not presented in "clean-cut and concrete form."[2]

The facts of the case were not in dispute. Suit was brought by appellee, a white woman duly domiciled in Virginia. The appellant was a non-resident Chinese. The parties left Virginia, married in North Carolina, and returned immediately to Virginia. There they cohabited as man and wife in direct contravention of the Virginia miscegenation law which forbade their marriage.[3] Both conceded that they left Virginia to marry for the purpose of evading this law. At the instigation of the wife, the marriage was annulled by the Circuit Court of the City of Portsmouth, and an appeal to the Supreme Court of Virginia was based on the sole ground that the Virginia miscegenation statute was unconstitutional because it contravened the due process and equal protection clause of the Fourteenth Amendment. The Supreme Court of Virginia affirmed the decision of the lower court, expressly holding that the Virginia statute in question was not repugnant to the federal constitution.[4] On appeal to the Supreme Court of the United States, the

[62] 103 PENN. L. REV. 113, 115 (1954).

[1] 197 Va. 80, 90 S. E. 2d 749 (1956); *vacated and remanded* 350 U. S. 891 (1956); *reaff'd* 197 Va. 734, 90 S. E. 2d 849 (1956); *appeal dismissed* 350 U. S. 985 (1956).

[2] Naim v. Naim, 350 U. S. 891 (1956).

[3] VA. CODE § 20-54 (1950). The Virginia miscegenation statute declares a marriage between a white person and a person of any other race a nullity.

[4] Naim v. Naim, 197 Va. 80, 90 S. E. 2d 749 (1956).

judgment of the Virginia Supreme Court was vacated and the case remanded to the Virginia Supreme Court to be returned to the Circuit Court of the City of Portsmouth in order for the latter court to make further findings of fact so that the case might present a constitutional issue in "clean-cut and concrete form."[5] On remand, the Virginia Supreme Court rendered a further opinion[6] in which it declared that there was no procedure for sending a cause back to the circuit court with directions to rehear the case, gather additional evidence, and render a new decision. It declared that the issues presented had been decided and that the previous judgment annulling the marriage was again affirmed. In a second appeal to the United States Supreme Court,[7] it ruled that the decision of the Supreme Court of Virginia in response to its original order left the case devoid of a properly presented federal question and consequently the case was dismissed. Apparently, therefore, the initial decision of the Virginia Supreme Court constitutes a valid and binding adjudication of the issues *of this case.*

Appellate jurisdiction of the United States Supreme Court over state courts is derived from the United States Constitution, Art. III, §§1, 2; which provides: "The judicial Power shall extend to all Cases and Controversies arising under the Constitution, the Laws of the United States, and the Treaties made . . . under their authority. . . . In all other Cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added.) This provision has been the basis for much controversy because it does not expressly provide *from what courts* the Supreme Court may exercise appellate jurisdiction. From 1815 to 1859, the Commonwealth of Virginia in two cases—*Martin v. Hunter's Lessee,*[8] *Cohens v. Virginia*[9]—and the State of Wisconsin in one case—*Ableman v. Boothe*[10]—directly challenged the authority of the Supreme Court to review their decisions. With the opinion of Chief Justice Marshall in the *Hunter* case as the keystone, these cases apparently settled the matter by holding that "the appellate power of the United States does extend to cases pending in the state courts; and the . . . judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, . . . is supported by the letter and spirit of the Constitution."[11] Today the problem is not whether the Supreme Court of the United States has appellate jurisdiction over state

[5] Naim v. Naim, *supra* note 2.
[6] Naim v. Naim, 197 Va. 734, 90 S. E. 2d 849 (1956).
[7] Naim v. Naim, 350 U. S. 985 (1956).
[8] 1 Wheat. 304 (U. S. 1815).
[9] 6 Wheat. 264 (U. S. 1821).
[10] 21 How. 506 (U. S. 1859).
[11] Martin v. Hunter's Lessee, 1 Wheat. 304, 314 (U. S. 1815).

decisions involving federal questions, but rather the extent to which this power has been limited.

There are three sources of limitations of the Supreme Court's appellate jurisdiction over federal questions arising in state courts. They are: (1) Express limitations in the Constitution—Constitutional limitations are, primarily, (a) the necessity for a case or controversy,[12] and (b) the case or controversy must involve the exercise of judicial power.[13] Thus the Court cannot decide moot,[14] academic,[15] or political questions.[16]
(2) Statutory limitations—Congressional regulations for the exercise of appellate jurisdiction are set out in 28 U. S. C. A. § 1257.[17] From this statute, the Supreme Court has formulated five well established rules: (a) There must be a final judgment or decree[18] (b) from the highest court of the state in which a decision could be had.[19] (c) There must be a federal question raised and the question must be substantial.[20] (d) The federal question to be reviewed must be properly raised and preserved in the state courts.[21] (e) There can be no review if the case can be decided on an independent state ground.[22]
(3) Self-imposed limitations—The Supreme Court has formulated several self-imposed limitations to control its own docket. These rules are with but one exception outlined in *Ashwander v. Tennessee Valley Authority*[23] and have been approved in many subsequent cases.[24] Briefly

[12] Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 (1936).
[13] Cohens v. Virginia, *supra* note 9.
[14] Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206 (1937).
[15] Colgrove v. Green, 328 U. S. 549 (1945).
[16] *Ex parte* Peru, 318 U. S. 578 (1942).
[17] "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised by the United States.
[18] Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 (1944); Republic Natural Gas Co. v. Alabama, 334 U. S. 62 (1947).
[19] Pope v. United States, 323 U. S. 1 (1944); Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206 (1937).
[20] Patterson v. Stranolind Oil and Gas Co., 305 U. S. 376 (1939); Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206 (1937); Parker v. Duffy, 342 U. S. 33 (1951).
[21] Osborne v. Clark, 204 U. S. 565 (1906); Flournoy v. Wiener, 321 U. S. 253 (1943); Rice v. Olson, 324 U. S. 786 (1944).
[22] United States v. Petrillo, 332 U. S. 1 (1951); Wilson v. Cook, 327 U. S. 474 (1945).
[23] 297 U. S. 288, 346-48 (1935)
[24] For example, see Carter v. Carter Coal Co., 298 U. S. 328 (1935); Republic Natural Gas Co. v. Alabama, 334 U. S. 62 (1947); Rescue Army v. Municipal Court, 331 U. S. 549 (1946).

enumerated, the rules are: The Court will not (a) pass upon the constitutionality of legislation in a friendly, non-adversary proceeding; (b) decide a constitutional question unless it is absolutely necessary to a decision of the case; (c) formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied; (d) pass upon a constitutional question presented by the record if there is another ground the case can be decided upon; (e) pass upon the validity of a statute upon complaint of one who has failed to show injury by its operation; and (f) pass upon the validity of a statute at the instance of one who has availed himself of its benefits. (g) When the validity of an act of Congress is drawn into question, and even if serious doubt of constitutionality is raised, the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. (h) *Rescue Army v. Municipal Court*[25] added a new self-imposed rule which is probably the key to the *Naim* case—the court may refuse to entertain jurisdiction in a constitutional case even on appeal if it considers the record inadequate for a decision of the constitutional issues. The Court has a broad discretion to determine what is "adequate."

At first blush, the *Naim* case appears to be another instance of Supreme Court recognition of a state court evasion of a Supreme Court mandate.[26] This seems to be true particularly in view of the fact that there is no apparent defect in the record of the prerequisites enumerated above and that the Supreme Court was not without remedy in such a situation. There are at least two ways it could have contravened the decision of the Supreme Court of Virginia. First, it might have used the same device used in *Martin v. Hunter's Lessee*,[27] *i.e.*, it could have by-passed the Supreme Court of Virginia and remanded the case directly to the Circuit Court of Portsmouth. This was done in the *Martin* case to avoid further friction with the Virginia Supreme Court. Second, the Supreme Court of the United States could have recalled the mandate and decided the case on the facts before it. Since it chose to do neither, the court evidently did not wish to decide the question involved at this time and refrained from doing so by apparently exercising its discretion as to what constitutes an adequate record. This it could do by applying

[25] 331 U. S. 549 (1946).

[26] State courts have at times asserted their independence by an evasion of Supreme Court mandates and the Supreme Court has recognized the legality of such evasion in certain instances. In Davis v. Packard, 8 Pet. 312 (U. S. 1834), the United States Supreme Court permitted its mandate to be avoided by the New York Court when the latter court declared that under state law the appellate court's jurisdiction did not permit a reversal of the trial court for a factual error not appearing on the record. See generally, note, *State Court Evasion of Supreme Court Mandates*, 56 YALE L. J. 574 (1947).

[27] 1 Wheat. 304 (U. S. 1815).

the well established doctrine[28] which permits the taking of jurisdiction in the first instance in order to determine jurisdiction. The refusal of the Virginia Court to make a further finding of fact left the Supreme Court in the position to dismiss the case for lack of a federal question since, theoretically, it never had one before it. This would be only a reaffirmance of the doctrine invoked in the *Rescue Army* case and not a recognition of an evasion of its mandate. It should be noted that such a disposition of the case would not prejudice the constitutional questions involved from being raised again in a subsequent case.

TED G. WEST.

Bills and Notes—Holder in Due Course—Finance Companies

In an era characterized by a phenomenal upward surge of retail installment purchasing,[1] the comparative serenity of appellate litigation in the field of negotiable instruments has been consistently interrupted by cases arising out of financial credit arrangements. Such arrangements consist of informal agreements, usually of long standing, between dealers and finance companies whereby the latter purchases commercial paper arising out of a sale to the consumer. The finance company usually supplies the blank forms for notes and conditional sales contracts as well as supervises, to varying degrees, the terms of credit. The question is thus presented: Do such credit arrangements cause the finance company to become an active participator in the sale to the consumer so as to preclude it from being a holder in due course of the transferred paper?

Notwithstanding the fact that the Negotiable Instruments Law sets out precise standards[2] for the determination of this question, several jurisdictions have judicially effected other criteria which, upon application to these credit arrangements, have denied the finance company the protection afforded a holder in due course.[3] In a recent case of first

[28] "Whether the statutory requirements (for appellate review) have been met is itself a federal question." Honeyman v. Hanan, 300 U. S. 14, 16 (1936).

[1] Installment credit reached an estimated total of $1,593,000,000 for the year ending March 31, 1955. This figure represents credit extended only for the purchase of consumer goods secured by the items purchased, title being held either by the retail outlets or financial institutions. 39 CONSUMER FINANCE NEWS no. 12, p. 31 (1955).

[2] N. I. L. § 52: "A holder in due course is a holder who has taken the instrument under the following conditions: . . . (3) that he took it in good faith for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

N. I. L. § 56: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

[3] Such results are reached on the basis that when the finance company and dealer engage in preconceived credit arrangements, the company, which is better able to bear the risk of loss than the hard pressed consumer, has become a party to the original transaction and is subject to defenses available against the dealer. See

impression,[4] North Carolina was placed in accord with these jurisdictions.

In that decision, Roofing Co. negotiated to Mortgage Corp. Customer's note secured by a deed of trust. Customer, alleging fraud by Roofing Co., brought an action for cancellation of the note and deed of trust. The issue of fraud having shifted the burden of proof to the holder,[5] Mortgage Corp. introduced evidence showing that it had furnished the forms for the note and deed of trust, on the back of which appeared its name; that it had purchased similar notes over a course of dealing with Roofiing Co. without previous defenses being asserted; that the note was payable at its offices and the deed of trust named one of its officials as trustee; that it had no actual notice of any defenses Customer might have, but took the instruments in reliance on their ostensible regularity. The court held that such evidence was sufficient to support a jury finding that Mortgage Corp. could not be a holder in due course and was thus subject to defenses of Customer. In so holding, the court completely shunned the test of actual notice or bad faith and relied instead on the active role played by Mortgage Corp. in the transaction between Roofing Co. and Customer.[6]

A survey of recent case law and existing statutes reveals that the area

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Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S. W. 2d 260 (1940) (finance company supplied forms on which there was printed an assignment to the company; transfer made immediately following the sale); Commercial Credit Corp. v. Orange County Machine Works, 34 Cal. 2d 766, 214 P. 2d 819 (1950) (finance company supplied forms; twice consulted as to the dealer-purchaser transaction); Mutual Finance Co. v. Martin, 63 So. 2d 649 (Fla. 1953) (finance company supplied forms; its name in bold print on the instruments; company's office designated as place of payment); General Motors Acceptance Corp. v. Daigle, 72 So. 2d 319 (La. 1954) (finance company furnished forms, financed sale; instruments made payable at company's office). The *Daigle* case is discussed in Note, 53 MICH L. REV. 877 (1955).

In addition to the cases based on close participation, several courts have adopted an agency theory, whereby the finance company, as a consequence of the credit arrangement, is deemed to be the principal of the retailer and thus knowledge of the dealer is imputed to the company. Palmer v. Associate Discount Corp., 124 F. 2d 225 (D. C. Cir. 1941); Buffalo Industrial Bank v. De Marzio, 162 Misc. 742, 296 N. Y. Supp. 783 (City Ct. Buffalo 1937), *rev'd on other grounds*, 6 N. Y. S. 2d 568 (Sup. Ct. 1937). For a discussion of these cases, see Note, 33 N. C. L. REV. 608 (1955).

[4] Whitfield v. Carolina Housing & Mortgage Corp., 243 N. C. 658, 92 S. E. 2d 78 (1956).

[5] N. I. L. § 59: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

[6] Note, 33 N. C. L. REV. 608, 613 (1955); where the writer points out that "(N)othing but uncertainty can arise out of an encroachment upon these statutory provisions [the Negotiable Instruments Law] by judicial decision." He further comments that to undermine the position of the finance company's status as a holder in due course, when no actual knowledge or bad faith has been shown, would seriously curtail the outlet for the sale of commercial paper arising out of installment purchasing and "limit the accessibility of this market to the public." See also in this connection Note, 39 MINN. L. REV. 775, 776 (1955).

upon which the North Carolina Supreme Court has so freshly trod is in utter conflict.

In *Public Loan Corp. of Little Rock v. Terrell*,[7] an Arkansas case, buyer purchased an appliance from retailer, executing a note secured by a conditional sales contract. On the same day, retailer assigned the note and contract to finance company, which had prepared blank notes and contract forms used in the transaction. There was no evidence of actual notice or bad faith. In an action to collect on the note, buyer raised the defense of failure of consideration, the appliance being wholly defective. The court held that the defense was not tenable, since plaintiff was a holder in due course. It stated that evidence of preparing forms and taking an assignment immediately after the sale fell short of establishing actual participation; that there being no evidence of actual notice or bad faith, finance company was not precluded from being a bona fide purchaser.

It should be noticed that only some years before, this same Arkansas court held in *Commercial Credit Co. v. Childs*[8] that the finance company was not a holder in due course because it had *prepared forms* on which there was a written assignment to the company and the transfer of the note and contract *was on the same day as the sale*.[9] The *Terrell* case neither cites nor mentions the *Childs* case.

In *Clark v. Associated Discount Corp.*,[10] the Georgia court stated that merely because a note is made on a form furnished by the finance company and made payable at its offices, and the company makes inquiries as to the purchaser's credit standing does not, without more, subject the transferee to notice of any infirmity of the instrument or defect in the title.[11]

This decision should be compared with *Mutual Finance Co. v. Martin*,[12] where the Florida court held that plaintiff finance company could not be a holder in due course on ostensibly the same set of facts.

[7] 224 Ark. 616, 275 S. W. 2d 435 (1955).
[8] 199 Ark. 1073, 137 S. W. 2d 260 (1940).
[9] Also contrast with the *Terrell* case Schuck v. Murdock Acceptance Corp., 220 Ark. 56, 247 S. W. 2d 1 (1952), where the court held that the participation of the finance company in the credit arrangement was such as to prevent it from becoming a holder in due course.
[10] 92 Ga. App. 583, 89 S. E. 2d 208 (1955).
[11] See also Aid Investment & Discount, Inc. v. Younkin, 66 Ohio L. Abs. 514, 188 N. E. 2d 183 (1951), where the evidence disclosed that upon the face of the instrument, in bold type, appeared "Payable at the Office of Aid Investment & Discount, Inc." and on the reverse side appeared the plaintiff's name. The court held that this fact would not alone support the conclusion that plaintiff is not a holder in due course. "It is a custom of long standing for banking institutions to provide notes for their customers on the face of which is printed in large type 'payable at designated bank.' To hold that this in and of itself is proof that the bank is jointly interested with the payee of a note would not be a reasonable deduction; nor would the fact alone that an endorsee of a note makes inquiry as to the transaction wherein the note was given and the financial ability of the maker to pay establish any joint relationship. . . ." *Id.*, at 518, 188 N. E. 2d at 187.
[12] 63 So. 2d 649 (Fla. 1953).

Moreover, only one year after the *Martin* case was decided, a federal court sitting in the same state held that evidence showing that the finance company furnished forms to the dealer and that such forms contained an advertisement of the company was not sufficient to constitute that degree of participation necessary to render the finance company subject to defenses.[13]

There is, however, support in recent cases for the North Carolina position. In *United States v. Klatt*,[14] defendant's note was assigned to a bank before maturity, which it in turn assigned to the plaintiff after maturity. Plaintiff contended that it was immune from defenses since it derived its title from a holder in due course.[15] There was evidence that the bank supplied the forms used in the dealer-purchaser transaction together with a borrower's completion certificate required by legislation.[16] Although the court could have held the bank not a holder in due course because it was charged with notice that the purchaser's name had been forged on the certificate, it found that:

> ". . . the relationship between the payee named in the instrument in suit and the bank, as to the entire transaction giving rise to the instrument was such that the bank must be considered in effect a party to the transaction between named payee-dealer and the defendant."[17]

The use of the close participation criteria on such meager evidence undoubtedly invites criticism. But what is even more startling than the result reached is the fact that here, a bank, rather than a finance company, was held not to be a bona fide purchaser because of an "active" role played in the credit arrangement.[18] Certainly banks do not engage in the financing of consumer goods to that degree practiced by financing companies. But even in those cases where banks do so engage, the transaction is probably an isolated one, not a part of a preconceived credit arrangement which anticipates the continual flow of commercial paper. Seemingly it would follow that courts would scrutinize commer-

[13] Citizens & Southern National Bank v. Stepp, 126 F. Supp. 744 (N. D. Fla. 1954).

[14] 135 F. Supp. 648 (S. D. Cal. 1955).

[15] N. I. L. § 58: "But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter."

[16] The loan being applied for under the National Housing Act, the borrower was required by statute to fill out a borrower's completion certificate evidencing the title of the chattel securing the loan.

[17] United States v. Klatt, 135 F. Supp. 648, 650 (S. D. Cal. 1955).

[18] See also Public National Bank & Trust Co. v. Fernadez, 121 N. Y. S. 2d 721 (Mun. Ct. N. Y. C. 1952), where the court, in denying plaintiff's motion for summary judgment, echoed the holding of the *De Marzio* case, cited note 3 *supra*, and stated that the dealer could be found to be a mere agent of the plaintiff bank.

cial transactions between banks and dealers less acutely and be guided, not by judicially created standards, but rather by the presence of actual notice or bad faith.[19]

In addition to the formula established by some courts in settling such controversies, several states have adopted legislation which virtually precludes the finance company or bank from becoming a holder in due course.[20] In essence, the fiat of these provisions is that all notes given in credit transactions and secured by a conditional sale (or chattel mortgage) shall state upon their face that they are so secured, and that no transferee of such notes shall be immune from the defenses available by the maker against the payee.[21] Since the vast majority of the cases under consideration involve credit financing by means of promissory notes secured by the retention of title of the item purchased, these statutes obviously undermine the security of the finance company's position.

The law thus remains unsettled. However, the position taken by the courts in the *Terrell* and *Clark* decisions in utilizing the standards as incorporated in the Negotiable Instruments Law is encouraging. Certainly the innocent consumer should not be subjected to the unscrupulous activities which might arise from a dealer-finance company partnership. But in such cases of close participation, recourse may be had to the elastic provisions of section 56 and if such participation renders the finance company incapable of taking the commercial paper in good faith, it will be denied the holder in due course status.

The protection of the consumer must be balanced against encouragement of credit sales essential to the maintenance of national prosperity. It is a policy conflict that cannot be arbitrarily settled; rather, there must be flexibility. It is submitted that neither the judicially created criteria of close participation, which categorically denounces the credit arrangement whether there is bad faith or not, nor the above mentioned statutes, which arbitrarily exclude an important segment of the economy from protection, affords this flexibility; that the result expressed in the *Terrell*

[19] Compare with this observation the excerpt from an address by Owen L. Coon, banker and finance company executive, concerning finance companies as opposed to banks as appropriate financing agencies for installment selling: "You must understand that the dealer is, to a great extent, a partner of the finance company. The relationship in paper form may be that of debtor and creditor. Regardless of that however, the finance company is, in many ways, the partner of the dealer and must always so remain. Bankers, on the other hand, must always shun relationships that in theory as well as in practice have possibilities of turning out to be partnerships." 23 AMERICAN J. OF INS. No. 2, 18, 20 (1946).

[20] ILL. REV. STAT. c. 95, § 26 (1953); MD. CODE ANN. art. 83, § 134 (FLACK 1951); PA. STAT. ANN. tit. 69, § 615G (PURDON, Supp. 1954).

[21] It is interesting to note that the Pennsylvania and Maryland statutes do not set out the consequences of not complying with the provisions. Only the Illinois statute states that if these provisions are not met, the chattel mortgage securing the notes "shall be absolutely void."

and *Clark* decisions should be seriously considered in the determination of future conflicts arising in this area.

WILLIAM E. ZUCKERMAN.

Conflict of Laws—Workmen's Compensation—Application of Full Faith and Credit to Statutes and Awards

Shortly after the introduction of the first workmen's compensation statutes,[1] the courts faced the problem of their application where an employee had been hired in one state and was injured in a sister state. Prior to 1932 each state decided whether the situation permitted the application of her own act.[2] The claimant, suing in the *locus delicti,* usually succeeded in invoking the application of its statute.[3] In some instances, however, certain restrictive statutory provisions prevented the state of the injury from applying her act[4] and the employee had to resort to suit in the state where his contract had been made.[5] In these cases suit had to be brought in the state of the contract in order to obtain the benefit of that state's act, as the state of the injury considered the cause of action created by the foreign act to be so interwoven with the remedy that it felt compelled not to enforce it.[6] Occasionally, the requirements

[1] Wisconsin's workmen's compensation act was the first to take effect (1911). SOMERS, WORKMEN'S COMPENSATION 32 (1954). The New York statute was the first to be declared constitutional by the United States Supreme Court. N. Y. Central Railroad Co. v. White, 243 U. S. 188 (1917).

[2] LARSON, WORKMEN'S COMPENSATION LAW § 86.20 (1954).

[3] Ocean Accident & Guarantee Corp. v. Ind. Comm'n, 32 Ariz. 275, 257 Pac. 644 (1927); Farr v. Babcock Lumber & Land Co., 182 N. C. 725, 109 S. E. 833 (1921); Interstate Power Co. v. Ind. Comm'n, 203 Wis. 466, 234 N. W. 889 (1931). However, where the statute of the place of the injury is of the contractual type, the courts have refused to apply their acts to injuries within the state, if the hiring had been elsewhere. Hall v. Ind. Comm'n, 77 Colo. 338, 235 Pac. 1073 (1925); Barnhart v. American Concrete Steel Co., 227 N. Y. 531, 125 N. E. 675 (1925).

Bagnel v. Springfield Sand & Tile Co., 144 F. 2d 65 (1st Cir. 1944), *cert. denied* 323 U. S. 735 (1944) seems to be the first case in which a court permitted recovery for an injury in the forum (Massachusetts) though all other incidents of employment were elsewhere (New York). But it is now well established that the state in which the injury occurred may give an award. Carroll v. Lanza, 349 U. S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U. S. 493 (1939).

[4] 2 LARSON, WORKMEN'S COMPENSATION LAW § 87.14 (1952).

[5] Grinnel v. Wilkinson, 39 R. I. 447, 98 Atl. 103 (1916); Gooding v. Ott, 77 W. Va. 487, 87 S. E. 862 (1916).

The United States Supreme Court has held that the state of the contract may give an award. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U. S. 532 (1935). Twelve states confer coverage regardless of where the injury occurred if the contract was made in the state; Nevada requires also that the employee is in regular employment in the state; California and Michigan require that the employee also be in residence there. Other states permit recovery only if more than two factors coincide; *e.g.,* N. C. GEN. STAT. § 97-36 (1950): "If the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State."

[6] In Mosely v. Empire Gas & Fuel Co., 313 Mo. 225, 281 S. W. 762 (1925), the claimant could not proceed in the Missouri court under the Kansas Work-

in both statutes have been such as to preclude the employee from invoking the application of the statute of either state;[7] however, the prevailing view was that he could apply for relief in both states.[8] Today, certain states permit their acts to be applied even if the contract is made and the injury is sustained elsewhere because an employer-employee relationship exists,[9] or because the employer's business is localized in the state.[10]

The first constitutional limitation upon the freedom of the states in determining the applicability of their own acts came in 1932 when *Bradford Electric Light Co. v. Clapper*[11] was decided. Suit had been brought in New Hampshire under its workmen's compensation act by the administratrix of the deceased employee. His residence, as well as his employer's place of business were in Vermont whose law made the remedy provided by it exclusive[12] of all other remedies and liabilities between the employer and employee, regardless of where the injury or death occurred. The employer availed himself of the Vermont act in defense to this suit. The Supreme Court held that the creation of the employment relation between the decedent and his company under the law of Vermont required New Hampshire's recognition of the obligation created under the Vermont law and that it be given full faith and credit[13] in the New Hampshire courts.[14] Furthermore, the Court found the interest of New

men's Compensation Act. He was remitted to the agency which Kansas had set up to administer its law. There is, however, no obstacle to enforcement if the compensation laws of a state are court administered. Thus, the Louisiana compensation act was enforced by the Mississippi court in Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930).

[7] House v. State Industrial Acc. Comm'n, 167 Ore. 257, 117 P. 2d 611 (1941).

[8] Ohio v. Chattanooga Boiler & Tank Co., 289 U. S. 439 (1933).

[9] Cudahy Packing Co. v. Parramore, 263 U. S. 418 (1923). Regular employment within the state is often sufficient to permit recovery. A few states (Delaware, Pennsylvania, and Maryland) also require that the employer's business be within the state. 2 LARSON, WORKMEN'S COMPENSATION LAW § 87 (1952). The United States Supreme Court held in Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469 (1947) that the District of Columbia had a substantial interest in the employer-employee relationship and permitted a recovery in the District for an injury sustained in Virginia.

[10] Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N. W. 977 (1929); State *ex. rel.* Chambers v. District Court, 139 Minn. 205, 166 N. W. 185 (1918).

But no state statute permits recovery solely on the basis of residence. Horovitz, *Reviews of Leading Current Cases,* 16 NACCA L. J. 38 (1955). An act limiting recovery to residents was held unconstitutional in Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed,* 255 U. S. 445 (1921).

[11] 286 U. S. 145 (1932); 11 N. C. L. REV. 116 (1933).

[12] The operation of many workmen's compensation acts is exclusive of all other remedies and liabilities between the employer and the employee with regard to the injury sustained, unless the act or an agreement between the parties provide otherwise. Jenkins v. American Enka Corp., 95 F. 2d 755 (4th Cir. 1938).

[13] The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U. S. CONST. art. IV, § 1. A statute is a "public act" within the meaning of the Full Faith and Credit Clause. Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 360 (1914).

[14] "It was clearly the purpose of the Vermont Act to preclude any recovery by

Hampshire in this litigation to be only casual[15] and her public policy not affected by this decision.[16]

The following year, *Ohio v. Chattanooga Boiler and Tank Co.*[17] reached the Supreme Court. The employer and employee had accepted the Tennessee workmen's compensation act which applied to injuries elsewhere than in the state if the contract of employment was made in Tennessee. An award had been made in Ohio under the Ohio statute, and the State of Ohio sought to recover from the employer in Tennessee. The employer claimed that the award should have been made under the Tennessee act and that making an award under the Ohio act failed to give full faith and credit to the Tennessee law. The Supreme Court rejected this defense and held that the *Clapper* case did not require the application of full faith and credit where the state statute did not provide an exclusive remedy between employer and employee.

In *Alaska Packers Association v. Industrial Accident Commission,*[18] the Supreme Court modified the formal approach of the *Clapper* and *Ohio* cases under the Full Faith and Credit Clause and permitted the state which had the greater interest to apply her act. Here the contract had been entered into in California and the parties had provided for the exclusive application of the Alaska workmen's compensation act. The employee was injured in Alaska and, on his return to California, brought suit there under the California law. In defense, the employer contended that the full faith and credit required to be given to the Alaska act barred the application of California's statute. The Supreme Court held that California could apply its act since it had a greater interest in this litigation than Alaska. The Court evidently anticipated that the injured employee, an indigent Mexican, would have become a public charge if the suit had not been allowed.

This decision created a second exception to the application of the Full Faith and Credit Clause: That an act which purports to provide an exclusive remedy to an employee injured in the course of his employment no longer controls if the state in which the suit is brought is substantially concerned with the result of the proceedings.

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proceedings brought in another state for injuries received in the course of a Vermont employment." 286 U. S. 145, 153 (1932).

[15] In the light of subsequent decisions of the Supreme Court and the criticism which has been made because recovery under the New Hampshire act had been denied, it should be noted that the Supreme Court made this qualification: "We have no occasion to consider whether if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under the New Hampshire law." 286 U. S. at 163.

[16] "[The courts] do not close their doors unless help would violate some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." Cardozo, J., in Loucks v. Standard Oil Co., 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918).

[17] 289 U. S. 439 (1933).

[18] 294 U. S. 532 (1935).

Similar reasons prevailed in *Pacific Employers Insurance Co. v. Industrial Accident Commission.*[19] The claimant had been hired in Massachusetts whose workmen's compensation law provided the exclusive remedy regardless of where the injury occurred. Here, too, suit was brought in California, the *locus injuriae,* under the California statute. Again the Supreme Court held that the Full Faith and Credit Clause did not require the application of the foreign exclusive statute and permitted California to apply "the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee."[20] It would have been obnoxious to California's public policy to require that the parties seek their remedy in Massachusetts.

Finally, *Carroll v. Lanza*[21] seems to leave little doubt that the forum need not give full faith and credit to the act of a sister state in determining its right to apply its own. Carroll entered into a Missouri employment contract with Hogan, a sub-contractor, who had contracted with Lanza for work to be performed in Arkansas. Carroll was injured on the job and brought suit in Arkansas against Lanza for common-law damages. The Supreme Court rejected Lanza's defense based on the exclusive Missouri statute and held that Arkansas had a sufficient interest to safeguard non-resident employees within the state.[22] Since the claimant had been removed to a Missouri hospital immediately after the injury, the court seemed to hold that the occurrence of the injury in Arkansas alone was sufficient grounds for the employee to seek a remedy under Arkansas laws: "Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have caused no burden on her or on her institutions."[23] Thus, with this decision the United States Supreme Court seems to have come full circle since the *Clapper* case.[24]

[19] 306 U. S. 493 (1939).

[20] *Id.* at 501.

[21] 349 U. S. 408 (1955).

[22] Discussing the exclusive remedy provided by the Missouri statute, the Supreme Court said: "Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she pleases *within* her borders. Once that policy is extended into other States, different considerations come into play. . . . We do not think the Full Faith and Credit Clause demands *that* subserviency from the State of the injury." (Emphasis added.) 349 U. S. at 413-414.

[23] 349 U. S. at 413.

[24] Justice Frankfurter, dissenting in Carroll v. Lanza, stated: "To make the interest of Arkansas prevail over the interest of Missouri on the basis of the Full Faith and Credit Clause would require that *Clapper* be explicitly overruled and that, in the area of workmen's compensation law, the place of injury be decisive. . . . It should not be cast aside on the presupposition that full faith and credit need not be given to a sister-state workmen's compensation statute if the law of the forum happens to be more favorable to the claimant." 349 U. S. at 421-422. However, the late Professor Beale would have been pleased with this turn of events: "It is greatly to be hoped for that the decision in the Clapper case will not stand; so opposed is it to authority and to the well-established rule of jurisdiction." 2 BEALE, CONFLICT OF LAWS 1326 (1935).

While the employee is free to make his choice of law, once he has made that choice he may be barred from asserting any further rights. The Full Faith and Credit Clause is still a major consideration where successive awards are being sought.

In 1943, the United States Supreme Court decided *Magnolia Petroleum Co. v. Hunt*.[25] The petitioner had been employed in Louisiana and had suffered an injury while on his job in Texas. He applied for compensation there, not knowing at the time that Louisiana could give him greater benefits. The Texas Accident Board made an award. He then sought additional compensation in Louisiana. The Supreme Court denied the second recovery. It based its decision on the Texas workmen's compensation act which provided that once an award had been made elsewhere, a second recovery could not be had in Texas.[26] The Court interpreted this to mean also that once an award was had in Texas it was "final"[27] and required that it be given full faith and credit in all other states.

This decision was opposed to many well-considered state court opinions which had permitted a second recovery and had given full faith and credit to a prior award by crediting the employer with an amount equal thereto.[28] Some courts had allowed full recovery in both states on the theory that the employer had paid for insurance policies in each,[29] even if the total of the sums received by the employee was greater than the total permissible under their own acts.[30] Following the *Magnolia Petroleum Co.* case many state courts continued to permit a second recovery.[31]

[25] 320 U. S. 430 (1943), *rehearing denied*, 321 U. S. 801 (1943).

[26] The section of the Texas statute which was relied on by the majority provides that an employee who is injured outside of the state cannot recover under the Texas Act if "he has elected to pursue his remedy and recover in the state where such injury occurred." TEX. REV. CIV. STAT. art. 8306 § 19 (1936).

[27] "The Texas award had the force and effect of a judgment of a court of that state and is res judicata there." 320 U. S. 430, 443 (1943).

[28] McLaughlin's Case, 274 Mass. 217, 174 N. E. 338 (1931); Price v. Horton Motor Lines, 201 S. C. 484, 23 S. E. 2d 744 (1942); Salvation Army v. Industrial Comm'n, 219 Wis. 343, 263 N. W. 349 (1935); RESTATEMENT, CONFLICT OF LAWS § 403, prior to the 1947 amendment. *But cf.* DeGray v. Miller Bros. Const. Co., 106 Vt. 259, 173 Atl. 556 (1934).

[29] "Recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance." Rounsaville v. Central R. R. Co., 87 N. J. L. 371, 374, 94 Atl. 392, 393 (1915) (dictum).

[30] Shelby Mfg. Co. v. Harris, — Ind. App. —, 44 N. E. 2d 315 (1942).

[31] Cline v. Byrne Doors, 324 Mich. 540, 37 N. W. 2d 630 (1949) granted compensation in Michigan following a recovery of medical payments in Florida; Loudenslager v. Gorum, 355 Mo. 181, 195 S. W. 2d 498 (1946) permitted an award under the Missouri act after Arkansas had denied a recovery; see also Industrial Indemnity Exchange v. Industrial Acc. Comm'n, 80 Cal. App. 2d 480, 182 P. 2d 309 (1947); Cook v. Minneapolis Bridge Constr. Co., 231 Minn. 433, 43 N. W. 2d 792 (1950).

"Sufficient faith and credit are given to the first award when its entire amount is deducted from the second award, and furthermore, the framers of the Constitu-

In *Industrial Commission of Wisconsin v. McCartin*,[32] Illinois, the state of the contract, had made an award for an injury sustained by the claimant in Wisconsin after a settlement between the employer and employee which provided that it did not affect any rights that the employee wanted to exercise elsewhere. The employee then applied to Wisconsin for a second award. The Wisconsin Supreme Court denied the application,[33] basing its decision on the *Magnolia Petroleum Co.* case. The United States Supreme Court reversed, stating that the Illinois act, unlike the Texas act in the *Magnolia* case, did not preclude an additional award in another state: "If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer . . . the Magnolia Petroleum Co. case would be controlling here."[34]

Thus, the *McCartin* case seems to have limited the application of the Full Faith and Credit Clause in actions for a second award to cases where a prior award is "final" according to the express wording of the first state's workmen's compensation statute.

The "finality" of an award was also considered by the Supreme Court in *Carroll v. Lanza*.[35] The injured employee had received a number of weekly payments under Missouri's workmen's compensation act, but no formal award had been made. The payments were not final as they had not been adjudicated. The Missouri act, unlike the Texas act in the *Magnolia* case, did not deny a second recovery elsewhere. The Supreme Court held that the employee was not precluded from maintaining a second action in Arkansas, where he had been injured, and affirmed a recovery there.

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tion little dreamed that the full faith and credit clause would be applied to a theory of work-injury liability unknown in their day." HOROVITZ, WORKMEN'S COMPENSATION 42 (1948). *But cf.* Butler v. Lee Bros. Trucking Contractors, 206 Ark. 884, 178 S. W. 2d 58 (1944); Overcash v. Yellow Transit Co., 352 Mo. 993, 180 S. W. 2d 678 (1944).

[32] 330 U. S. 622 (1947).

[33] McCartin v. Ind. Comm'n, 248 Wis. 570, 22 N. W. 2d 522 (1946).

[34] *Id.* at 626. The import of the Texas statute and the Illinois act is similar: "The employees . . . shall have no right of action against their employer . . . for damages for personal injuries . . . but such employees . . . shall look for compensation solely to the association. . . ." TEX. REV. CIV. STAT. art. 8306 § 3 (1936). The Illinois act provides that "no common law or statutory right to recover damages for injury or death sustained by an employee . . . other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act." ILL. ANN. STAT. c. 48 § 143 (1931). Neither act expressly provides that an award made in either Texas or Illinois is a bar to a second award elsewhere. The writer submits that the Supreme Court properly could have relied on TEX. REV. CIV. STAT. art. 8306 § 3 to reach a different result in the *Magnolia Petroleum Co.* case.

Professor Larson believes that since the majority of workmen's compensation laws resemble the Illinois act, the decisions in the *McCartin* case can be taken to mean that successive awards are now sanctioned. 2 LARSON, WORKMEN'S COMPENSATION LAW § 85.20 (1952).

[35] 349 U. S. 408 (1955).

In reaching this decision the Supreme Court used language which suggests a different interpretation of the meaning of "finality" in the *Magnolia Petroleum Co.* case. The Court, discussing the finality of the Missouri award in the present (*Lanza*) case, stated that the award which Texas had made in the *Magnolia* case had been final; but that the award made here was not final because, under Missouri law, payment had been voluntary and no adjudication between the employer and the employee had been sought. This distinction seems to refer to the *Magnolia Petroleum Co.* decision as having been based on an award given the finality of a judgment, instead of finality expressly contained in the governing statute on which the Court had previously distinguished the *McCartin* case. If the Supreme Court will abide by the *Lanza* interpretation of the *Magnolia* case, final (i.e. judgment) awards will have to be given full faith and credit in subsequent proceedings, and further recoveries will be barred.[36]

Recently, the New Jersey Supreme Court had the opportunity to determine the "finality" of a New York award.[37] The employee had been injured in New Jersey and applied to New York, which granted a final (judgment) award. He then sought a second recovery in New Jersey. The New Jersey Court denied a second award; pointing to the *Magnolia Petrolem Co.* case, it stated that the "clear purpose of the Full Faith and Credit Clause . . . [is] that a litigation once pursued to *judgment* shall be conclusive of the rights of the parties. . . ."[38] (Emphasis added.) It seems that the New Jersey Court recognized the *Magnolia* case as standing for judgment-type finality in addition to statutory finality which it had not found in the New York act.[39]

Apparently the New Jersey Court realized the harsh effect which would be produced by its interpretation of the *Magnolia* case. Its decision went on to say that full faith and credit need not be given in those cases where the prior award made in the other state "is *so much less*

[36] RESTATEMENT, CONFLICT OF LAWS § 403 (Supp. 1949) reads: "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, *unless the Act where the award was made was designed to preclude the recovery of an award under any other Act,* but the amount paid on a prior award in another state will be credited on the second award." (Emphasis added.) The italicized phrase was inserted after the Supreme Court decided *Magnolia Petroleum Co. v. Hunt* and *Industrial Commission of Wisconsin v. McCartin*. It interprets the *Magnolia* case as requiring statutory finality to bar a second award. See also Donaldson, *Conflict of Compensation Laws,* 23 INSURANCE COUNSEL JOURNAL 110 (1956). On the other hand, at least two courts seem to have interpreted the *Magnolia Petroleum Co.* case as standing for finality of judgment. Cline v. Byrne Doors, 324 Mich. 540, 37 N. W. 2d 630 (1949); Baduski v. Gumpert Co., 277 App. Div. 591, 102 N. Y. S. 2d 297 (1951).

[37] Buccheri v. Montgomery Ward & Co., 19 N. J. 594, 118 A. 2d 21 (1955).

[38] *Id.* at 604, 118 A. 2d at 27.

[39] The New Jersey Supreme Court referred to "statutory finality" as "exclusiveness"; it may thereby have left the impression that the New York workmen's compensation act to which it had reference is "not exclusive." 19 N. J. at 604, 118 A. 2d at 27.

than an award that could be allowed here that it can be reasonably said that such an award is in conflict with the policy of our act. . . ."[40] (Emphasis added.) While this limitation on full faith and credit may be ineffective between states which provide similar awards, it may be of value where great differences exist.[41]

Under the United States Supreme Court decisions the employee's rights to a second award is now uncertain. If the *Magnolia* case and the discussion of finality in the *Lanza* case may be relied on as requiring *judgment-type* finality, the injured applicant will be barred from a second award unless payments made by his employer were of a voluntary nature, the state court permits the exception indicated by the New Jersey Court. On the other hand, if *Magnolia Petroleum Co. v. Hunt* and *Industrial Commission of Wisconsin v. McCartin* may be relied on as requiring full faith and credit to be given a prior award only where it is final according to the express wording of the *statute,* a second recovery may be had in most cases.[42]

The enactment of workmen's compensation statutes provided for allocation of costs to the employer for the compelling social reason that accidents are an inevitable hazard of industry. Their main objectives are adequate benefits, elimination of wasteful litigation, and certainty of payment.[43] Prompt indemnity for wages lost[44] as a result of injury should be the employer's immediate concern. He should not permit an "unholy race between uninformed workers and compensation wise car-

[40] 19 N. J. at 605, 118 A. 2d at 28.

[41] The plaintiff had received $25.60 for time lost under the New York statute which does not provide for compensation after the injured returns to work if his earning power has not been diminished. N. Y. WORKMEN'S COMPENSATION LAW, § 15, s. 3v (1946). The State of New Jersey, however, awards compensation based upon the extent of the disability regardless of diminution of earning capacity. N. J. REV. STAT. 34: 15-12c (1940). To how much more compensation would the plaintiff have to prove himself entitled in the second state in this and similar situations to come within the exception announced by the New Jersey Supreme Court?

The New Jersey Supreme Court will have an opportunity to review his decision. The instant case is pending on a petition for rehearing. Letter from Robert Scherling, Newark, N. J., Attorney for the plaintiff, to the writer, May 1, 1956.

[42] The writer believes that an exception would be encountered only if the injured employee received his first award in Maryland. Gasch v. Britton, 202 F. 2d 356 (C. C. A. D. C. 1953).

N. C. GEN. STAT. § 97-36 (1950) provides that "if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article." Therefore, an injured employee who received an award in State *X* and meets the jurisdictional requirements of the North Carolina act may recover an additional amount in North Carolina, but not more than the difference between the maximum amount provided by its statutes and the amount he received in the former state.

[43] SOMERS, WORKMEN'S COMPENSATION 27 (1954).

[44] Cash benefits replace little more than one third of the wage-loss in the average case. Bogusch, *Reports and Notes from Everywhere,* 16 NACCA L. J. 460 (1955).

riers to see who creates an award first"[44] if the employee is eligible for compensation in more than one state. Rather, employers and courts should provide protection[45] within the framework of the laws when dealing with redress for industrial injuries. Any other attitude would not be consonant with the spirit in which the compensation statutes were enacted.[46]

PETER H. GERNS.

Constitutional Law—Contempt—Court's Jurisdiction over the Religious Upbringing of Children

The recent Iowa case of *Lynch v. Uhlenhopp*[1] presents a situation which probably has never arisen before. A divorce decree had been entered in a previous suit under which the wife had obtained custody of the six-year-old child of the marriage. The parents had agreed by stipulation, written and signed, that the "child shall be reared in the Roman Catholic religion," and the court's decree embodied the exact terms of this stipulation. Several months after the decree was entered, the petitioner (wife) began taking the child to Protestant Sunday school and since that time has been rearing the child in the Protestant faith. It seems that the father protested to the mother about this matter shortly after he learned about it, and brought the present proceedings to enforce the terms of the custody decree. In this proceeding the father did not seek and the district court did not order a transfer of the child's custody to him. The district court held that the decree was binding upon the mother so long as it remained unvacated and unmodified, adjudged her in contempt, but suspended passing sentence upon her in order to afford her an opportunity to purge herself by filing an affidavit to the effect "that she is rearing the child in the Catholic faith." Writ of certiorari was granted and execution of the order has been stayed pending completion of the hearing to review the order.

The main question presented on appeal will be whether the court

[44] In some cases the insurance carrier can create an award in the state whose laws are more favorable to the employer before the employee takes steps to protect himself. HOROVITZ, WORKMEN'S COMPENSATION 41 (1948); therefore, the result of the *Magnolia Petroleum Co.* case may tempt an employer to shop for the state with the smallest award. Cheatham, *Res Judicata and the Full Faith and Credit Clause—Magnolia Petroleum Co. v. Hunt,* 44 COLUM. L. R. 330, 345 (1944). ...

[45] An award of compensation by the Arkansas commission to a Texas employee for injuries sustained in Arkansas, on petition filed by the employer *without the knowledge of the employee,* did not bar a second award under the Texas act. Standard Acc. Ins. Co. v. Skidmore, — Tex. Civ. App. —, 222 S. W. 2d 344 (1949).

[46] "Under our statute the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises." Bausman, J., in Stertz v. Ind. Ins. Comm'n, 91 Wash. 588, 606, 158 Pac. 256, 363 (1916).

[1] — Iowa —, — N. W. 2d — (1956). Now on appeal from the District Court of Wright County, Iowa.

awarding custody of the child had jurisdiction to enter into its decree provision respecting the child's religion. The fact of the court's jurisdiction will determine whether the court's decree can be collaterally attacked.[2] As no cases in which the jurisdictional question is raised have been found, a review of some of the cases in which the religious upbringing of children has been considered should be helpful in predicting the outcome of this case on appeal.

In attacking the validity of decrees, violation of which has been punished by contempt, courts classify decrees as (1) erroneous or irregular and (2) void. As to the first type, erroneous or irregular decrees, where the court has jurisdiction over the subject matter and the parties the rule is stated as follows:

> "[T]he fact that such order or decree, violation or disobedience of which is made the basis of the contempt charge, is erroneous or irregular or improvidently rendered, does not justify the defendant in failing to abide by its terms, and his conduct in failing to do so may be punished as for contempt despite the error or irregularity. It is almost unanimously agreed that if the defendant desires to attack the order or the decree as erroneous, he must do so, not by disregarding or violating it and then setting the error up as a defense to a charge of contempt, but by a direct attack thereon by appeal or a motion to set it aside. He must obey it so long as it is in effect and until it is dissolved by the court issuing it, or reversed on appeal by the appellate court."[3]

Under the second type, where the mandate, order, judgment, or decree is void or issued by a court without jurisdiction, disobedience of such order or decree is not contempt. Further, if the court has no jurisdiction to make the order, no waiver can cut off the rights of the party to attack its validity.[4]

In view of these general rules, it seems that if the court awarding custody of the child had jurisdiction to incorporate into its decree provision as to the religious training of the child the present appeal is a collateral attack on the decree and therefore invalid. This would be true even though the appellate court should find the decree irregular or erroneous. On the other hand, if the appellate court should find that the

[2] A brief filed by the American Jewish Congress as amicus curiae raises the question of whether the action of the district court is in violation of the freedom of religion clauses in the Iowa Constitution and the Federal Constitution. IOWA CONST. art. I, § 3; U. S. CONST. amend. I. Each provides that the General Assembly and Congress, respectively, "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

[3] Annot., 12 A. L. R. 2d 1059, 1107 (1950); Burtch v. Zeuch, 200 Iowa 49, 202 N. W. 542 (1925); 17 C. J. S., *Contempt* § 14 (1939).

[4] 17 C. J. S., *Contempt* § 14 (1939); State v. Morrow, 57 Ohio App. 30, 11 N. E. 2d 273 (1937).

district court had no jurisdiction to make provision in the decree fixing the child's religious training, then the decree, or at least that part of the decree, is void and subject to collateral attack upon an appeal from the judgment of contempt.

The recent case of *Martin v. Martin*[5] presents facts somewhat similar to the facts in the *Lynch* case. Involved was an antenuptial agreement between the father and mother that all children of their union were to be brought up in the Roman Catholic faith. The wife, contrary to her agreement and her husband's desires, sent the child, who had been baptized a Catholic, to a Christian Science Sunday school at an early age. Several years later the father brought an annulment action, and the wife prevailed on her counterclaim for a separation. The wife got custody of the child, and the judgment provided that the child be brought up in the Roman Catholic religion in accordance with the antenuptial agreement of the parties. Later, the wife asked that the judgment be modified so that the boy might be permitted to attend the public schools and receive instruction in the Christian Science religion. The Supreme Court of Kings County ordered the modification of the judgment, and this was affirmed by the Appellate Division of the Supreme Court.[6] On appeal the Court of Appeals in a per curiam opinion held that the modification was justified.[7] The majority found that the evidence supported the conclusion that the modification was for the child's best interests and welfare. The dissent took the position that "this sort of antenuptial agreement is enforceable like any other, unless and until its enforcement is shown to be harmful to the child. 'Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country.' Weinberger v. Van Hessen, 260 N. Y. 294, 298, 183 N. E. 429, 431 (1932). Particularly must this be so when the agreement has been confirmed by, and written into a judgment."[8]

A similar situation arose in the case of *Goldman v. Hicks*,[9] in which a separation agreement was incorporated into and made a part of a subsequent divorce decree. The decree provided that the custody of the daughter was to be in the mother for six months and the father for six months of each year. Subsequently the mother married a man whose religion differed from that of the father, and the father filed a bill in equity in which he sought the exclusive custody and control of his daughter. He contended that the subsequent marriage of the mother to a man of the Jewish religion created a condition which rendered her unfit or unsuitable for the care and custody of her child. The lower court granted

[5] 308 N. Y. 136, 123 N. E. 2d 812 (1954).
[6] 283 App. Div. 721, 127 N. Y. S. 2d 851 (2d Dep't 1954).
[7] 308 N. Y. 136, 123 N. E. 2d 812 (1954).
[8] *Ibid.*
[9] 241 Ala. 80, 1 So. 2d 18 (1941).

the relief prayed for, but the Supreme Court of Alabama reversed. The court was of the opinion that the agreement of the parties with reference to the custody of the daughter would best preserve the interest and welfare of the child. However, the court said that "in custody proceedings it is a well established rule in Alabama that the best interest and welfare of the child or children be the controlling and paramount inquiry. . . . Any agreement in reference thereto is not controlling."[10]

In *Donahue v. Donahue*[11] the custody of minor children was awarded to the mother following divorce, and the mother decided to rear the children in accordance with her religious faith, which differed from that of their father. The father applied to the court for an order requiring that the boy be reared in the Christian Science religion and the girl in Catholicism, or at least that they be reared in some Christian faith. The court declined to interfere with the religious training of the children, saying, "no end of difficulties would arise if judges sought to proscribe the selection of a religious faith made by a parent having custody. . . . Intervention in matters of religion is a perilous adventure upon which the judiciary should be loathe to embark."[12]

Brewer v. Cary[13] was an action for specific performance of an antenuptial contract pertaining to the religious training of infant children. The court held that the agreement was not binding and could not be specifically enforced in equity.

> "[T]he right of custody as guardian, whether natural or by appointment of law, carries with it, as one of the incidents involved, the right as well as the duty to direct its [the child's] training, its education, religious and secular . . . these are of the very essence of the appointment of guardians, and lie at the foundation of the right of custody itself; . . . no court will interfere directly in directing such matters, save when convinced that the welfare of the child demands it; . . . when the question of its welfare turns on the direction of its training and upbringing in one belief or another, our courts, save as controlled by statute, have no power; . . . to do so would be a determination by the courts as to differ-

[10] *Ibid.*

[11] 142 N. J. Eq. 701, 61 A. 2d 243 (1948).

[12] *Id.* at 703, 61 A. 2d at 245. *Accord, In re* Flynn, 87 N. J. Eq. 413, 423, 100 Atl. 861, 864 (Ch. 1917); People *ex rel.* Sisson v. Sisson, 271 N. Y. 285, 2 N. E. 2d 660 (1936); *Ex parte* Kananack, 272 App. Div. 783, 69 N. Y. S. 2d 889 (2d Dep't 1947), in which the court held that it would not take the question of the child's religious traning into its own hands, short of circumstances amounting to unfitness on the part of the custodian. The reluctance of the courts to inject themselves into so personal and controversial an area is understandable. *Contra,* Commonwealth *ex rel.* Stack v. Stack, 141 Pa. Super. 147, 15 A. 2d 76 (1940).

[13] 148 Mo. App. 193, 127 S. W. 685 (1910).

ences in religious belief, which is incompatible with religious freedom."[14]

It should be noted that the cases discussed above are not appeals from contempt proceedings. Each case is of a different type from the *Lynch* case. However, from these cases and others one can get an idea of how courts feel about making any decisions as to the religious training of children. Writers on this subject seem to agree that, generally speaking, the questions respecting the child's religion will be settled by the award of the right of custody.[15]

It seems clear that the general opinion of the authorities is that the court should not take over the religious training of the children, except in cases where it is for the children's interest and welfare to do so.[16] In none of the cases discussed above has a court explicitly stated that courts have no constitutional jurisdiction to enter into its decree an agreement of the parents as to the religious training of the children of the marriage. True, some cases have denied enforcement of these agreements and modified some of the provisions of the agreements, but not on the ground that the court had no jurisdiction to enforce such agreements.

In the *Lynch* case the court did not of its own accord make the decision as to what religion was best for the child. The parties themselves did that by an agreement made at the time they were married. The court merely entered into its decree the apparent wishes of the parents. No doubt it appeared to the court that such an arrangement as to the child's religion was in the best interest and welfare of the child at that time.

It is submitted that if the wife, at some date after the decree was entered, had made a motion to modify such decree so that she be permitted

[14] 148 Mo. App. 193, ——. 127 S. W. 685, 692 (1910); Hernandez v. Thomas, 51 Fla. 522, 39 So. 641 (1905), where the court held such agreements against public policy, unenforceable and not binding upon the parties; Smith v. Smith, 340 Ill. App. 636, 92 N. E. 2d 358 (1950). *But see* Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920) which involved the surviving non-Catholic parent who had signed an antenuptial promise. While the court declined to take the child from the custody of a paternal grandmother to whom the surviving father had entrusted it, it referred to the antenuptial promise as a "commendable compromise between two natural guardians, who, under the statutes of the state, had equal authority." The agreement was held merely persuasive upon the father, not binding. *Contra,* Weinberger v. Van Hessen, 260 N. Y. 294, 183 N. E. 429 (1932); Ramon v. Ramon, 34 N. Y. S. 2d 100 (N. Y. Dom. Rel. Ct. 1942).

[15] Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMPORARY PROBLEMS 721, 732 (1944); Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. REV. 469, 499 (1916). In Boerger v. Boerger, 26 N. J. Super. 90, 97 A. 2d 419 (1953) the court said "there is much to be said for the view that all other things being equal, the determining factor should be custody. The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare."

[16] See Prince v. Massachusetts, 321 U. S. 158, 167 (1943) and Pierce v. Society of Sisters, 268 U. S. 510, 534 (1925) in which cases the state intervened to protect the child's interest and welfare.

to rear the child in the Protestant religion on the ground that she found it difficult to rear him in a religion different from her own, and that this would be in the best interest and welfare of the child, this court might possibly have done what the court did in the *Martin* case. The fact of the mother's custody makes this result even more likely. On the other hand, the court could do what was done in the *Goldman* case and continue to enforce the agreement of the parties on the ground that it is in the best interest of the child to continue rearing him as a Catholic. If the mother had taken the action suggested above, whichever way the court held, its decision would necessarily be based upon what it found to be in the best interest and welfare of the child, and not upon the fact that the parents had previously reached a particular agreement in the matter.

It seems that Mrs. Lynch has taken the wrong step in openly violating the decree of the court without first seeking a modification. Under the cases discussed the courts have taken jurisdiction to enter decrees regarding the religious upbringing of children where the best interest of the child required it. As the court in the principal case has exercised jurisdiction under similar circumstances, Mrs. Lynch's appeal amounts to no more than an attempted collateral attack on the decree.[17]

MAITLAND GUY FREED.

Constitutional Law—Estoppel to Raise the Constitutional Question

In *Convent of the Sisters of Saint Joseph v. Winston-Salem*[1] the North Carolina Supreme Court enunciated the doctrine that a party may be estopped to assert a statute's unconstitutionality through some prior conduct on his part. In that case the Convent of Saint Joseph sought a declaration of rights under the zoning ordinances of Winston-Salem and

[17] Howat v. Kansas, 258 U. S. 181 (1921) in which the Court said at page 189: "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." See also State v. Baldwin, 57 Iowa 266 (1881) which held that in injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.

[1] 243 N. C. 316, 90 S. E. 2d 879 (1956). The plaintiff acquired a large private estate in a residential area of Winston-Salem zoned against all but residences, churches, and public schools. Through a special-use permit, permission was obtained by plaintiff from the city, over objections from residents, to create a private Catholic school on the estate. After the school was established, the plaintiff applied to the zoning board for modification of the permit to allow for the conversion of a garage into a chemistry laboratory, which conversion necessitated structural alterations. The modification was denied and plaintiff was held estopped to assert the unconstitutionality of the zoning ordinances under which the original permit was granted.

a special-use permit issued pursuant to the ordinances. Because the plaintiff had applied for and had been granted a special-use permit to convert a private estate into a church elementary school, it had employed the statute and enjoyed its benefits. The plaintiff was therefore estopped later to attack the ordinance's constitutionality when subsequently refused a modification of the permit to structurally change the exterior of the buildings.

The doctrine of estoppel to assert the unconstitutionality of laws and legal proceedings has long been recognized by American courts;[2] it operates upon the basis of waiver, either express or implied, of the right to challenge constitutionality. Such waiver of a statutory or constitutional right is permissible where no public policy or morals are involved.[3] In view of these principles, an examination of the application of the estoppel doctrine to situations where the right to challenge constitutionality has been waived would be useful. This also necessarily implies an examination of what constitutes waiver.

The two most generally recognized criteria giving rise to the estoppel are the invocation or employment of a statute and the receipt of benefits under a statute. One who employs a statute to his own use may later be estopped to assert its unconstitutionality because the courts will not allow one both to utilize and assail a statute at the same time.[4] Invoking the statute impliedly waives a defect in its constitutionality.[5] Similarly, the acceptance of or participation in benefits from a statute may also create the estoppel.[6] In the leading case, *Daniels v. Tearney*,[7] the United

[2] Notes, 34 COL. L. REV. 1495 (1934); 48 HARV. L. REV. 988 (1935).

[3] In Sovereign Camp, W. O. W., v. Smith, 7 F. Supp. 569, 570 (M.D. Ala. 1934) the court stated, "A party may waive a rule of law or statute or even a constitutional provision enacted for his benefit or protection, where it is conclusively a matter of private right, and no consideration of public policy or morals is involved, and, having once done so, he cannot subsequently invoke its protection."

[4] Booth Fisheries Co. v. Industrial Commission of Wisconsin, 271 U. S. 208 (1926); Hurley v. Commission of Fisheries of Virginia, 257 U. S. 223 (1921); Nuckolls v. United States, 76 F. 2d 357 (10th Cir. 1935); Slick v. Hamaker, 28 F. 2d 103 (8th Cir. 1928).

In Shepard v. Barron, 194 U. S. 553 (1903), after the plaintiffs had inaugurated proceedings under an Ohio statute providing for local improvements, presented a petition for improvements, allowed a contract to be let, changed the plans as the work progressed, periodically recognized the justice of assessments, and signed a statement to induce the purchase of the county improvement bonds, they were estopped from asserting the act's unconstitutionality even though it had been so declared in another proceeding.

But cf. O'Brien v. Wheelock, 184 U. S. 450 (1901), where the construction of a levee along the Mississippi River was not within the authority of the Illinois statute. Some, including the plaintiff, petitioned for the levee and helped organize the assessment district. There was no estoppel to contest the statute's authorization of assessment. The statute had been held unconstituional in a previous litigation.

[5] There will be no waiver of a constitutional right when a statute is void ab initio. St. Paul Trust & Savings Bank v. American Clearing Co., 291 Fed. 212, 229 (S. D. Fla. 1923).

[6] Daniels v. Tearney, 102 U. S. 415 (1880); Rowekamp v. Mercantile-Commerce Bank & Trust Co., 72 F. 2d 852 (8th Cir. 1934); Federal Savings & Loan Cor-

States Supreme Court held: "It is well settled as a general proposition . . . that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation . . . aver its unconstitutionality. . . ."

One method of utilization of a statute which will erect the estoppel is found when a legislative enactment provides a remedy and procedure for ajudicating a right, which if violated, would create a distinct cause of action in itself. Employing the statutory remedy and procedure rather than the non-statutory common law remedy is held to concede the validity of the statute.[8] The one estopped has the privilege of ignoring or assuming the invalidity of the statute and proceeding at law as if the statutory remedy were non-existant. In *Electric Company v. Dow*,[9] a New Hampshire statute created a procedure for land owners to recover damages suffered due to the flooding of property by mill dams. When the defendant proceeded under the terms of the statute, he was estopped later to assert that the statutory method of assessing damages was unconstitutional. The court held that the "act confers a privilege which the plaintiff in error was at liberty to exercise or not as it thought fit."

Some difficulty in determining a course of conduct is experienced when a party finds that if he chooses to proceed upon the assumption that the statute is unconstitutional he courts a heavy penalty or loss of rights granted by the statute, and if he invokes the statute he will be estopped later to contest it. Here the risk rests upon the litigant.[10] However, certain exceptions to the operation of the estoppel doctrine exist.

Where the penalty established by the statute for non-compliance is so great that the statute is invoked through duress, the United States

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poration v. Grand Forks Building & Loan Ass'n, 85 F. Supp. 248 (N. E. D. N. D. 1949); United States v. McIntosh, 2 F. Supp. 244 (E. D. Vir. 1932), *cert. denied*, 293 U. S. 586 (1934).

[7] 102 U. S. 415 (1880) *supra* note 6. The convention of Virginia enacted an ordinance providing that no sale be made under a deed of trust without the consent of the parties if the debtor put up a bond and security for payment of the debt. The ordinance was passed in 1861 to protect debtors against whom there was an execution in the hands of an officer. The defendants made their bond and otherwise complied with the statute; the debt remaining unpaid when the ordinance expired, suit on the bond was brought. Defendants claimed the bond was void and the statute unconstitutional. Held, defendants were estopped to plead unconstitutionality.

[8] Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581 (1887). Plaintiff utilized an Act of Congress to recover the value of land taken by the United States. The court, in answer to the plaintiff's later assault on the statute's constitutionality, said: "The plaintiff, by adopting that mode, has assented to the taking of its property by the Government for public use, and has agreed to submit the determination of compensation to the tribunal named by Congress." *Id.* at 599.

[9] 166 U. S. 489 (1897). The statute provided that if either party elected, the court would direct the issue to a jury to assess damages and judgment would be rendered on the verdict of the jury with 50% added to the damages to make a final judgment. The plaintiff in error contended that the method of assessing damages was repugnant to the federal Constitution.

[10] Wall v. Parrott Silver & Copper Co., 244 U. S. 407 (1917); Great Falls Manufacturing Company v. The Attorney General, 134 U. S. 581 (1888).

Supreme Court has waived the invocation. This occurred in *Union Pacific Railroad Company v. Public Service Commission of Missouri*,[11] where the state exacted an exorbitant fee for a certificate of authority to issue bonds pursuant to a statute which threatened heavy penalties and blacklisting if the certificate were not obtained. The court held that application for a certificate and payment of the fee under protest were made under duress and did not waive the right to challenge the statute's constitutionality. The same result has been reached in regard to federal acts.[12] This brings out the well-established rule that to create the estoppel the invocation of the statute must be voluntary.[13]

Another area of exception from the operation of the estoppel doctrine appears in the field of foreign corporations. A foreign corporation, by seeking and obtaining permission to do business in a state, does not thereby become estopped from objecting to any provision in the state statutes which is in conflict with the United States Constitution.[14] Accepting a license does not impose an obligation to respect any provision of the statute granting it that is repugnant to the Constitution.[15] A desire to maintain freedom of interstate commerce as well as a recognition that citizens of one state have a constitutional right to engage in business in another state give support to this rule.[16]

A less frequent exception to the operation of the estoppel doctrine is seen when only one section of a statute which has been invoked is attacked. When that section can be severed from the rest of the act without invalidating the entire statute a party may attack it, although estopped as to other portions of the statute.[17] This is particularly true in cases of statutory amendment.[18]

[11] 248 U. S. 67 (1918).

[12] Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W. D. Ky. 1934). Coal companies acquiescing in and operating under the Bituminous Coal Code, formulated under the National Industrial Recovery Act, were not estopped to contest its constitutionality; the companies operated under threat of dire penalties, blacklisting, and boycotts for noncompliance.

[13] Abie State Bank v. Bryan, 282 U. S. 765 (1931); Booth Fisheries Co. v. Industrial Commission of Wisconsin, 271 U. S. 208 (1926), in regard to attacks upon Workmen's Compensation Acts by employers who previously elected to obtain the benefits of such acts.

[14] Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927); Hanover Fire Ins. Co. v. Carr, 272 U. S. 494 (1926).

[15] Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1927); W. W. Cargill Co. v. Minnesota *ex rel* Railroad & W. Com., 180 U. S. 452 (1901).

But cf. Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125 (1922); *In re* Standard Oak Veneer Co., 173 Fed. 103 (E. D. Tenn. 1909).

When the United States places conditions upon its consent to be sued, a party may not, in suit brought on that consent, contest the constitutionality of the conditions; the bar of estoppel will operate in such a case. Upchurch Packing Co. v. United States, 151 F. 2d 983 (5th Cir. 1945), *cert. denied*, 327 U. S. 803 (1946).

[16] Moredock v. Kirby, 118 Fed. 180 (W. D. Ky. 1902).

[17] Where the act itself carries a separability provision, an attack upon one section will not invalidate the entire act. Securities & Exchange Commission v. Torr, 15 F. Supp. 315 (S. D. N. Y. 1936); Mojave River Irr. Dist. v. Superior Court of California, 202 Cal. 717, 262 Pac. 724 (1928).

[18] Thompson v. Consolidated Gas Utilities Corporation, 300 U. S. 55 (1937).

Although courts are in conflict as to whether a prior invocation of a statute raises a permanent estoppel,[19] it has been held in at least one case that when changed circumstances reveal that the estoppel, although validly invoked in a previous situation, would be violative of due process in the present instance, the estoppel is erased.[20]

The estoppel operates even when there has been a prior, separate adjudication that the statute assailed is unconstitutional. As a general rule such a prior adjudication will not relieve the party estopped.[21]

The early view in this country was that a state court's adjudication of the estoppel question was not reviewable by a federal court; this was true in every case where there were two grounds upon which to base the state court decision, one federal, and one non-federal.[22] Because the vast majority of estoppel cases fit this description, there was almost no federal review. The early cases held that the estoppel was not a federal question and relied upon the non-federal ground as sufficient basis for the state court determination.[23] This attitude of the United States Supreme Court gave the state court decisions a peculiar strength. But, as state courts abused this power of final decision, the federal courts gradually changed

[19] For cases holding that the bar by estoppel is permanent see Wall v. Parrott Silver & Copper Co., 244 U. S. 407 (1917), and Great Falls Manufacturing Company v. The Attorney General, 124 U. S. 581 (1888).

For a case holding that the bar may not be a permanent one see Buck v. Kuyendall, 267 U. S. 307 (1924).

[20] Abie State Bank v. Bryan, 282 U. S. 765, 776 (1931). State banks, after failing to have the state bank guaranty law declared unconstitutional, endeavored to conduct business pursuant to the law; they were not precluded for all time to assert the law's unconstitutionality. The operation of the law was vastly different from what was expected upon its enactment.

[21] In Daniels v. Tearney, 102 U. S. 415 (188), the court had this to say: "It is well settled as a general proposition . . . that where a party has availed himself for his benefit of an unconstitutional law, he cannot . . . aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principal of estoppel applies with full force and effect."

See Shepard v. Barron, 194 U. S. 553 (1903), *supra* note 4, and St. Louis Malleable Casting Co. v. Pendergast Construction Co., 260 U. S. 469, 472 (1923).

[22] Eustis v. Bolles, 150 U. S. 361 (1893). The court held that accepting a dividend on a negotiable note in composition proceedings under state insolvency laws waived the right to enforce a debt after the debtor's discharge. The court then cited Johnson v. Risk, 137 U. S. 300, 307 (1890), wherein that court said: ". . . where, in action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court."

[23] Pierce v. Somerset Railway, 171 U. S. 641, 648 (1898). "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one." Rutland R. R. Co. v. Central Vermont R. R. Co., 159 U. S. 630 (1895).

their attitude[24] until today they feel a duty to review state court decisions invoking the estoppel.[25]

Although the maxim that one must exhaust his administrative remedies before being heard at law will estop many actions, there will be no estoppel when the unconstitutionality of the statute under which an administrative commission or agency operates is asserted. There are two reasons for allowing a party to proceed directly in court; the inadequacy of administrative relief[26] and the inability of the administrative board to pass upon the constitutionality of the statute which created it.[27]

Two situations exist wherein the estoppel takes the form of res judicata: (1) when a party acquiesces in a court order; an order, though not a final decree, has the effect of res judicata when the parties, by inactivity and acquiescence, have accepted it as disposing of the controversy. The leading case is *City of Trinidad et al. v. Madrid et al.*[28] wherein the court denied the plaintiff's bill to enjoin the city's creating a paving district and levying a special assessment, but continued the case for the sole purpose of allowing plaintiffs to object to the sufficiency of any hearing on assessment. After two years, during which time the improvements were completed and the city let contracts and issued bonds, the plaintiffs attacked the validity of the ordinance; their acquiescence in the court's decision was held to estop such an attack.[29] (2) A failure to appeal from an adverse ruling of an administrative body, thus inducing

[24] Apparently the change in attitude came with state court abuse of the estoppel. In Union Pacific R. R. Co. v. Public Service Commission of Missouri, 248 U. S. 67 (1918), the court, declaring its policy to review the state court's decision, said: "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in the case of failure to accept it, and then to declare the acceptance voluntary. . . ."

Also, possible confiscatory legislation being validly construed by state courts via the estoppel doctrine helped bring this change in attitude about. Abie State Bank v. Bryan, 282 U. S. 765 (1931).

[25] Union Pacific R. R. Co. v. Public Service Commission of Missouri, *supra* note 24; Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157 (1917).

[26] Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 773 (1947). The United States Supreme Court, in a case involving the Renegotiation Acts, held that: "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

[27] An administrative board to which a complaint might appeal has no authority to pass on constitutional questions. Hillsborough Tp. v. Cromwell, 326 U. S. 620, 625 (1946).

[28] 80 Colo. App. 210, 250 Pac. 158 (1926).

[29] Railroad Commission v. Shell Oil Co., 165 S. W. 2d 502 (Tex. Civ. App. 1942). The court, while finding that suit was not barred, held ". . . that unreasonable delay in appealing which causes the opposite party to act, to his injury, might give rise to a question of estoppel." This would intimate that failure to appeal would raise the estoppel to contest constitutionality only when such failure causes the opposite party to act to his injury. City of Huntsville v. Mayes, 271 S. W. 162 (Tex. Civ. App. 1925); Vesser v. Nashville, 190 N. C. 265, 126 S. E. 593 (1925).

action in the other party, creates an estoppel by res judicata to a later attack upon the constitutionality of the statute under which the disputed ruling was promulgated.[30]

A major cause for utilization of the estoppel doctrine is laches, or the failure to act at a necessary time.[31] Failure to object while another acts under a statute, with your knowledge, to his detriment will estop one to assert the unconstitutionality of that statute.[32] Laches on the part of one's predecessors may also create the estoppel.[33] Only a few cases require a party to change his position as a requisite to pleading the estoppel.[34]

The failure to assert a constitutional right at the proper time may estop a later attack upon the constitutionality of court proceedings.[35] Ordinarily, the failure to raise a constitutional right during trial amounts to a waiver thereof, unless due to ignorance or duress, and an appeal

[30] White v. Glenn, 138 S. W. 2d 914 (Tex. Civ. App. 1940); *In re* Pierce's Estate, 28 Cal. App. 2d 8, 81 P. 2d 1037 (1938). Petitioners, as trustees of a missing heir, waited two and one half years to object to the making of a court order; they were estopped to attack the order. Grant v. Birmingham, 210 Ala. App. 239, 97 So. 731 (1923). Statutory estoppel precluded collateral attack on an assessment proceeding.

[31] Failure to appear at an administrative hearing afforded pursuant to statute will estop one later to assert the unconstitutionality of matters relevant to that hearing. Milheim v. Moffat Tunnel Improvement Dist., 262 U. S. 710 (1923).

In Bradley v. Richmond, 227 U. S. 477 (1913), parties failing to appear to be heard on classification given by an ordinance providing for licensing occupations cannot claim he has been unjustly discriminated against because he was so classified as to subject his business to a higher license tax than that required of others in the same business.

Failure to contest proposed legislation within the time expressly afforded by statute waives the right to later assert its unconstitutionality when adopted. City of Enid *ex rel* Versluis v. Robinson, 39 F. Supp. 923 (W. D. Okla. 1941).

[32] Pierce v. Somerset Ry., 171 U. S. 641 (1898). The defendant company defaulted on its bonds and the majority of bondholders, under statute, reorganized, completed the railway line and issued more bonds; two years later the trustees holding a mortgage securing the original bond issue sued to foreclose and the court held: "Their long acquiescence, without objection, coupled with the changed conditions and the relations resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation." *Id.* at 647.

[33] Bostwick v. Baldwin Drainage Dist., 152 F. 2d 1 (5th Cir. 1945).

[34] Los Angeles v. Los Angeles City Water Co., 177 U. S. 558 (1900). In a dispute over water rates the court said that ". . . there was no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel . . . ," thus intimating that perhaps such change of position might be a prerequisite for invoking the estoppel.

In Women's Kansas City St. Andrew Soc. v. Kansas City, 58 F. 2d 593, 606 (8th Cir. 1932), the plaintiff was not estopped to plead unconstitutionality because it had received no benefit from the contested statute, "and, secondly, there has been no change whatever in the position of the city because of the plaintiff's action."

[35] Cantrell v. City of Caruthersville, 128 F. Supp. 637 (E. D. Mo. 1955). Landowners had brought seven suits in the state courts involving the same dispute and never raised the constitutional objection that the city had denied them equal protection of the laws; the right to raise the constitutional question on appeal in a federal court was waived.

based upon abrogation of constitutional rights may be permanently estopped;[36] this is true of criminal as well as civil actions.[37]

From this review of the operation of the doctrine of estoppel to assert unconstitutionality it is apparent that it is an equitable instrument, the importance of which can best be expressed by a realization that a constitutionally guaranteed right may be permanently lost through a failure to act or by imprudent action at a critical time.

DUNCAN IAN MACCALMAN.

Constitutional Law—Rule of Exclusion—Federal Injunction against Federal Officer from Testifying in State Criminal Prosecution

In what will undoubtedly prove to be a landmark decision in the law of search and seizure, the United States Supreme Court in a recent case, *Rea v. United States*,[1] held by a five to four margin, that the equitable power of the federal courts should extend to give relief under the following circumstances: Petitioner had been indicted in a federal district court for the unlawful acquisition of marihuana in violation of federal law.[2] A federal agent had obtained the evidence under a search warrant invalid under Rule 41(c) of the Federal Rules of Criminal Procedure—this rule states the necessary requisites for a valid federal search warrant. Petitioner made a motion to suppress the evidence. The motion was granted and the indictment was dismissed. Thereafter, the agent instigated a state criminal action charging the petitioner with possesion of marihuana in violation of New Mexico law.[3] While awaiting trial in the state court the petitioner filed a motion in the same federal court to enjoin the federal agent from testifying in the state action with respect to the narcotics obtained by him as a result of the invalid search warrant. The district court denied the relief and the court of appeals affirmed.[4] On writ of certiorari the United States Supreme Court reversed.

[36] Yakus v. United States, 321 U. S. 414 (1944); Sanderlin v. Smyth, 138 F. 2d 729 (4th Cir. 1943).

The constitutional right to move for the return of property illegally seized and to object to evidence obtained may be impaired, if not lost, when not seasonably asserted. United States v. Napela, 28 F. 2d 898 (N. D. N. Y. 1928).

The court has discretionary power and authority over the waiver. United States *ex rel* Athanosopoulos v. Reid, 110 F. Supp. 200 (D. C. Cir. 1953).

In Cameron v. McDonald, 216 N. C. 712, 6 S. E. 497 (1940), the court said, "A defendant may waive a constitutional as well as a statutory right, and this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." State v. Dunn, 159 N. C. 470, 74 S. E. 1014 (1912).

[37] Carruthers v. Reed. 102 F. 2d 933 (8th Cir. 1939).

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[1] 350 U. S. 214 (1956).

[2] Marihuana Tax Act, 50 STAT. 554 (1937), 26 U. S. C. § 2593(a) (1952).

[3] N. M. STAT. ANN. § 71-636 (1941).

[4] Rea v. United States, 218 F. 2d 237 (10th Cir., 1954), *cert. granted*, 348 U. S. 958 (1955).

The court of appeals held that the prohibition against the use of such evidence is limited to federal trials and is applicable there only when it was unlawfully obtained by federal officers. The court assumed, without deciding, that the district court under its general equity power had the authority to render the injunction, but as there was no abuse of discretion, it should refuse to intervene and disrupt the delicate relationship between the federal equitable power and the state judiciary in state criminal proceedings.

The Supreme Court, however, considered the problem from a different approach. The majority,[5] speaking through Douglas, J., stated that it was simply a case concerning "our supervisory powers over federal law enforcement agencies,"[6] and that the district court was "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law."[7] The Supreme Court stated further: "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. . . . The power of the federal courts extends to policing those requirements and making certain that they are observed. . . . To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."[8]

Although the court stated that "we put all the constitutional questions to one side,"[9] reference to the constitutional background of the law of search and seizure will provide a setting into which to place the principal case.

The Fourth Amendment[10] to the Federal Constitution commands that the right of the people to be secure in their homes, houses, papers, and effects against unreasonable searches and seizures shall not be violated. However, as is true of most constitutional provisions on individual rights, there is no suggestion in the Constitution itself as to the method of enforcement of this abstract right.[11] So, although the Constitution prohibits unreasonable searches and seizures, it does not expressly bar the admissibility of such unlawfully obtained evidence in criminal proceedings.[12] Even though a search is unquestionably "unreasonable" and

[5] Justices Douglas, Frankfurter, Black, Reed and Clark.
[6] Rea v. United States, 350 U. S. 214, 217 (1956).
[7] *Id.* at 216.
[8] *Id.* at 217.
[9] *Id.* at 216.
[10] "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. CONST. Amend. IV.
[11] "Bills of Rights may be replete with promise of public beneficence, but they remain curiously silent about how such promises are to be fulfilled." ZURCHER, CONSTITUTIONAL TRENDS SINCE WORLD WAR II. 5 (1951).
[12] Shinyu Nero v. United States, 148 F. 2d 696, 699 (5th Cir., 1945), *cert. denied*, 326 U. S. 720 (1945) (dictum); WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

therefore prohibited by the Constitution, nothing in the Constitution says what the consequences shall be. And just as the matter of what constitutes "unreasonable" search is left to judicial decision,[13] so the consequences of such search when it does occur are left to judicial decision, in the absence of legislative enactment.

In the federal courts, however, this evidence is excluded by virtue of the now famous "exclusionary rule" which had its birth in 1914 in the case of *Weeks v. United States*.[14] The essence of the rule is that evidence obtained by federal officers in contravention of the defendant's Fourth Amendment right is inadmissible in federal criminal proceedings. And Justice Black has said ". . . the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. . . ."[15] The soundness of the position that the suppression of evidence obtained as a result of an illegal search and seizure is not a command of the Constitution is confirmed by the number of state courts which do not exclude the evidence despite the similarity of the state and federal constitutions.[16]

[13] "What is a reasonable search is not to be determined by any fixed formula . . . and, regrettably, in our discipline we have no ready lit mus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." Minton, J., United States v. Rabinowitz, 339 U. S. 56, 63 (1950), citing Go-Bart Importing Co. v. United States, 282 U. S. 344, 357 (1930).

"The test of reasonableness cannot be stated in rigid and absolute terms." Harris v. United States, 331 U. S. 145, 160 (1947).

[14] 232 U. S. 383 (1941). However, in an earlier case, Boyd v. United States, 116 U. S. 616 (1886), the Supreme Court held that compulsory production of private books and papers is "compelling [the accused] to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-635. Then eighteen years later, the Supreme Court returned to the old rule, when it held in Adams v. New York, 192 U. S. 585 (1904), that private papers were not rendered inadmissible though seized illegally. Ten years after the *Adams* decision came *Weeks* which reaffirmed the doctrine in *Boyd,* by holding, in a federal prosecution, where federal officers have obtained private documents by illegal search and seizure, that it is a violation of the constitutional rights of the defendants to introduce them into evidence.

Thus, it is more accurate to say that the rule of exclusion did not become finalized until the *Weeks* decision.

[15] Wolf v. Colorado, 338 U. S. 25, 39-40 (1949) (concurring opinion). This led the late Justice Rutledge to say in the dissenting opinion in the same case that the Amendment without the exclusionary mandate "reduces the Fourth Amendment to a form of words." He cites Justice Holmes in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920).

[16] Every state has in its constitution a provision similar to the Fourth Amendment. For a complete list of the states and their respective constitutional provisions, see, Note 35 CORNELL L. Q. 625, n. 9 (1950).

However, language similar to that found in People v. Defore, 242 N. Y. 13, 24, 150 N. E. 585, 588 (1926) can be found in decisions of many state courts: "We may not subject society to these dangers until the legislature has spoken with a clearer voice."

On the other hand, some state decisions do speak of the exclusion as though forced on them by their constitutions, *e.g.* People v. Stein, 265 Mich. 610, 251 N. W. 788 (1933).

Note that the rule is only applicable to federal officers as the recipients of the illegally seized evidence. Such evidence procured by state officers acting independently of federal authorities is admissible in federal courts.[17] Also, state courts have held that evidence unlawfully seized by federal officers may be admitted in state prosecutions if not contrary to state law.[18]

The constitutional provision is broad enough in terms to cover searches and seizures by any person whomsoever. Nevertheless, the Supreme Court has declined to apply its exclusionary rule to obviously unlawful searches by private persons.[19]

Furthermore, in *Wolf v. Colorado,*[20] a six to three decision, the exact holding was that in a prosecution in "a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[21] However, the Fourteenth Amendment[22] does subject the power of a state over life, liberty, and property to the requirements of due process of law. In 1937 Justice Cardoza, speaking for the United States Supreme Court in *Palko v. Connecticut,*[23] held that this requirement of due process made applicable to the states only such guarantees of the Bill of Rights as are "implicit in the concept of ordered liberty." And Justice Frankfurter concluded in the *Wolf* case that the freedom protected by the Fourth Amendment

[17] In Burdeau v. McDowell, 256 U. S. 465, 475 (1921), it was stated that "The Fourth Amendment's origin and history . . . show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ." So, it follows that (state) police officers became mere private individuals under the Burdeau v. McDowell notion and evidence they seized illegally became usable in federal courts. "The restrictions of the Fourth and Fifth Amendments of the Federal Constitution apply only to Federal officers. The like restrictions in the State Constitutions apply only to State officers." State v. Rebasti, 306 Mo. 336, 347, 267 S. W. 858, 861 (1924). However, in Gambino v. United States, 275 U. S. 310 (1927) it was held that evidence obtained through wrongful search and seizure by state officers who are co-operating with federal officials must be excluded in prosecutions before the federal courts. Hence, there arose the necessity of proving lack of co-operation among the state and federal officials before such evidence could be introduced in federal courts.

[18] Commonwealth v. Colpo (1930), 98 Pa. Super 460, *cert. denied,* 282 U. S. 863 (1930).

[19] See, Note, Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities, 51 COL. L. REV. 128 (1951). Also, for a complete collection of state and federal cases, see 8 WIGMORE, EVIDENCE §§ 2183 and 2184 (3d ed. 1940).

[20] 338 U. S. 25 (1949). Defendant, a doctor, was convicted of conspiring with others to commit abortions. Police officers illegally searched defendant's office and procured appointment books. Interrogation of patients followed and objection was made to the introduction of the evidence as in violation of defendant's rights under the Fourteenth Amendment. Upon writ of certiorari to the state court, the United States Supreme Court affirmed the state court's conviction.

[21] *Id.* at 33.

[22] ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. CONST. Amend. XIV § I.

[23] 302 U. S. 319, 324 (1937).

falls within the above definition of Justice Cardoza. He states that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the state through the Due Process Clause."[24] Thus, the Fourth Amendment is a limitation on state as well as federal action.

However, the decision in the *Wolf* case was not implemented by the rule of exclusion as enunciated in the *Weeks* case and employed by the federal courts. On the other hand, Justice Frankfurter stated that excluding the evidence is not the *only* means of protecting the right embodied in the Fourth Amendment, and that the "ways of enforcing such a basic right raised questions of a different order."[25] Exclusion of illegally obtained evidence is only one of several means of protecting the right.[26] By the *Wolf* case the Supreme Court demonstrated its unwillingness to condemn states' reliance on *other* means as falling below minimal standards of "due process of law" in order to protect the right. Therefore, Justice Frankfurter concluded that "due process of law" does not command the court or the states to exclude illegally obtained evidence in state prosecutions for state crimes.

Justice Frankfurter seemed to imply in the *Wolf* case that legislation by Congress might possibly negate the *Weeks* doctrine. Congress has not as yet undertaken such legislation. Until this is done, or until the *Weeks* case is overruled, neither of which appears to be likely, the exclusionary rule will continue to be what some writers refer to as "judicial legislation" because the question as to whether the Fourth Amendment is a command to the courts to exclude the illegally seized evidence will never be directly in issue.

In the appendix to the *Wolf* case, sixteen states are listed as following the federal rule of exclusion. In a recent law review article it is stated that subsequent to the *Wolf* decision two more states have adopted the rule.[27] North Carolina is one of a few states which has made the rule statutory.[28]

[24] Wolf v. Colorado, 338 U. S. 25, 27-28 (1949).

[25] *Id.* at 28.

[26] For example, the state may dismiss the offending officer or prosecute him in a criminal proceeding, and the federal government may prosecute the offending officer under the Civil Rights Section of the United States Criminal Code. The victim of an illegal search may, also, have an action for damages in tort against the searching officer. Recently, a large verdict was sustained in a suit based in part on illegal searches by state officers in Bucher v. Krause, 200 F. 2d 576 (7th Cir. 1952), *cert. denied,* 345 U. S. 997 (1953) (Jurisdiction based on diversity of citizenship).

See in this connection, Wolf v. Colorado, 338 U. S. 25, 30-32, n. 1 (1949), 18 U. S. C. §§ 241 and 242 (1952).

[27] Waite, *Judges and the Crime Burden,* 54 MICH. L. REV. 169 (1955)—Delaware, see Richards v. Delaware, 45 Del. 573, 77 A. 2d 199 (1950), and California, see People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[28] Prior to 1937 North Carolina was not a proponent of the exclusionary rule.

The next case to be considered in this complicated and confused area of the law is *Stefenelli v. Minard.*[29] This case was decided in 1951. The plaintiffs, who were about to be convicted of bookmaking with the aid of certain incriminating evidence which the state of New Jersey had admittedly obtained through unlawful search and seizure, relied on the dictum of Justice Frankfurter in the *Wolf* case to the effect that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. They petitioned the federal district court in equity for suppression of this evidence under the Civil Rights Act.[30] By New Jersey law such evidence is admissible.[31] The petition was dismissed, the court of appeals affirmed, and the Supreme Court granted certiorari and rendered an opinion without deciding whether the complaint stated a cause of action.[32] The Supreme Court, Justice Frankfurter delivering the opinion, stated that federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence when claimed to have been secured by unlawful search and seizure. And, although the Court adhered to the dictum

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An unsuccessful attempt in that year to change the then existing law was made by the legislature. That statute had to do with the method of issuing search warrants and had a clause to the effect that no facts obtained by reason of a search warrant failing to meet the statutory standard could be used as evidence in a trial of any action. The court in State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938), ruled that the statute did not mention evidence seized with no warrant at all. Therefore, such evidence was admissible. However, in 1951 an amendment was passed which states that no facts discovered as evidence obtained without a legal search warrant in the course of any search under conditions requiring the issuance of such warrant shall be competent as evidence. N. C. GEN. STAT. § 15-27 (1953). For a discussion of this provision see, Note, 32 N. C. L. REV. 114 (1953); Note, 30 N. C. L. REV. 421 (1952); *A Survey of Statutory Changes in North Carolina in 1951,* 29 N. C. L. REV. 396 (1951). It should be noted that in the Appendix to Wolf v. Colorado, note 22 *supra,* North Carolina is listed as rejecting the rule. That was, however, prior to the above mentioned amendment.

Two other states have *legislation* excluding evidence obtained by illegal search and seizure. MD. ANN. CODE art. 35, §§ 5, 5A (1951); TEX. CODE CRIM. PROC. art. 727a (1941).

[29] 342 U. S. 117 (1951).

[30] "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." R. S. § 1979 (1875), 42 U. S. C. § 1983 (1948).

[31] State v. Black, 5 N. J. Misc. 48, 135 A. 685 (1926).

[32] "This act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning . . . however, the Court's 'lodestar of adjudication has been that the statute' should be construed so as to respect the proper balance between the States and the federal government in law enforcement. . . . Discretionary refusal to exercise equitable power under the Act to interfere with State criminial proscution is one of the devices we have sanctioned for preserving this balance." Stefenelli v. Minard, 342 U. S. 117, 121-122 (1951).

of the *Wolf* case, upon which the petitioners based their case, they again refused to extend the remedy of exclusion to the states. "At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey Courts. Such a conviction, we have held would not deprive them of due process of law." (Citing the *Wolf* case.)[33]

So stood the law until the *Rea* decision. The constitutional necessity of excluding unreasonably seized evidence from the trial of one whose Fourth Amendment rights have been violated continues to be one of the major areas of dispute in this important segment of the law. The arguments upholding the rule and those attacking it have become clearly defined. A chief reason usually set forth in favor of excluding illegally obtained evidence is that such an exclusion, by removing the effect of the evidence in court, deters the law enforcement officers from future illegal searches and seizures.[34] The proponents of the rule also assert that any other method of upholding the constitutional right is inadequate.[35] Still another reason used in support of the rule is that to use the product of the illegally seized evidence would be to lower the dignity of the courts which are sworn to uphold the law.[36]

Some opponents of the exclusionary rule refer to it as "judicial suppression of the truth."[37] They point to the fact that its effect is to suppress incriminating evidence, which allows the guilty to go free. Taking issue with the proponents of the rule, they argue that there are other effective sanctions to protect the right of those illegally searched.[38] It is often asserted that it is the function of the legislature, rather than the courts, to provide sanctions against illegal seizure.[39]

Thus far, the United States Supreme Court has refused to force the exclusionary rule upon the states by interpreting the Fourteenth Amendment to require the exclusion of evidence seized in contravention of the Fourth Amendment. This is true although there seem to be implications

[33] *Id.* at 122.

[34] 58 YALE L. J. 144, 152 (1948).

[35] For example, in considering a tort action against the offending official as one means of enforcing the right, Mr. Justice Murphy in a dissenting opinion in Wolf v. Colorado, *supra* note 22 at 43, said: "A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home . . . the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar."

[36] See Olmstead v. United States, 277 U. S. 438, 470 (1928).

[37] See generally: Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955). The author is a strong opponent of the rule of exclusion. He places the blame in part on the judges. "They deliberately restrict police efficiency in the discovery of criminals. They exempt from punishment many criminals who are discovered and whose guilt is evident." *Id.* at 169.

[38] See People v. Defore, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926); Wolf v. Colorado, 338 U. S. 25, 30 (1949).

[39] Roberts v. People, 78 Colo. 555, 559-560, 243 Pac. 544, 545 (1926).

to the contrary in the recent case of *Irvine v. California.*[40] But, whatever its implications, that case still leaves the adoption of the rule to the discretion of the states as does the principal case under consideration.

The problem which disturbs the dissent in the principal case, however, is the majority's proposition that the court has "supervisory powers over federal law enforcement agencies"[41] and that it rests its holding upon that basis. At first blush this seems to be a dangerous encroachment by the judiciary upon the executive branch of the government, which violates our traditional concepts of a division of power among the three governmental branches. Justice Harlan, writing the dissenting opinion,[42] sees no abuse of discretion in withholding the relief requested, and feels that, in accommodating state and federal interests in criminal law enforcement, the Supreme Court's past policy of allowing the state to be left free to follow the federal exclusionary rule should not be disturbed. The dissent found no basis on which to reconcile the *Wolf* and *Stefenelli* decisions with the majority holding.

It is submitted, however, that there is both a sound legal and logical basis for the majority decision. There is more fact than illusion to the holding that the court is not disturbing the "delicate balance between federal and state judicial systems" in this particular case. Although the effect of the injunction, as the dissent notes,[43] is to stultify the proceedings in the state court, there is, in fact, no injunction against either the state officials or the state proceedings. If the state is able to procure other evidence it is still left free to make its case out against the petitioner by means of its own process. It is still free to invoke its rule which permits the introduction of its evidence obtained in contravention of the petitioner's Fourth Amendment rights.[44] The *Wolf* case allows this. To withhold the injunction in the principal case would be to hark back to the quaint little game played between state and federal officials during the prohibition days, wherein federal officers got their convictions in

[40] 347 U. S. 128 (1954). This case was decided by a divided court, also. The majority, Justices Jackson, Warren, Reed and Minton, state that now that the *Wolf* doctrine is known to the states, they may wish to reconsider their rules of evidence, but, that it would be an unwarranted use of federal power to upset state convictions before the states have had adequate opportunity to adopt or reject the exclusionary rule. Then Justice Clark, in a concurring opinion in the *Irvine* case states that had he been on the court when the *Wolf* case was decided, he would have applied the federal exclusionary rule; but he concurs simply because the *Wolf* case is now the law. He also states: "Perhaps strict adherence to the tenor of that decision [Wolf v. Colorado] may produce needed converts for its extinction." *Id.* at 138.

[41] Rea v. United States, 350 U. S. 214, 217 (1956).

[42] Concurred in by Justices Reed, Burton, and Minton.

[43] ". . . the state's case against petitioner appears to depend wholly on the evidence in question; the injunction will operate quite as effectively, albeit indirectly, to stultify the state prosecution as if it had been issued directly against New Mexico or its officials." Rea v. United States at 219.

[44] State v. Dillon, 34 N. M. 366, 281 P. 474 (1929).

state courts for state crimes because the evidence they had seized illegally was inadmissible in the federal courts by reason of the exclusionary rule.

To deny the injunction in the principal case and allow the federal officer to testify as to the illegally seized evidence would be to hold that the act of an officer is lawful, not on account of the character of the act, but on account of the particular court in which it is called in question. Should the federal officer be able to bring his defendant to a state court, and there have his lawless disregard of his official duty appraised as a meritorious performance? The United States Supreme Court answers this question in the negative.

The rationale of *McNabb v. United States*[45] can support the court's alleged "supervisory powers over federal law enforcement agencies."[46] Although that decision was based on a prosecution in the federal courts, the gravamen of the holding was that the federal court should not condone any flagrant disregard of Acts of Congress which set forth the duties of the federal law enforcement officers. The obligation of the federal agent is to obey the rule. And in the words of the majority in the principal case: "That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."[47]

This interesting question presents itself. What would be the result if the Supreme Court granted certiorari to a case similar in all respects to the principal one—except that no action is brought to enjoin the federal officer from testifying in a state court as to evidence procured as a result of an unreasonable search and seizure? Upon authority of the *Wolf* decision it seems that there could be an affirmance, since in the *Wolf* case the narrow holding was that in a "state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[48] No distinction is made there between state or federal officers. Yet, according to the result of the case under consideration the federal court will enjoin a federal officer from testifying in a state prosecution as to evidence obtained in contravention of the Fourth Amendment. In other words, the outcome of future litigation concerning the admission in a state criminal proceeding of evidence illegally obtained by federal officers would seem to depend upon whether the state criminal prosecution was concluded before

[45] 318 U. S. 332 (1943). Here, conviction of the defendants for the murder of a federal internal revenue officer, upheld by the court of appeals, was reversed by the Supreme Court. The basis for reversal was that evidence was obtained by subjecting defendants to questioning while being held in custody without a hearing before a United States Commissioner or judicial officer, as required by law. No constitutional question was involved.

[46] See note 6 *supra*.

[47] Rea v. United States, 350 U. S. 214, 218 (1956).

[48] Wolf v. Colorado, 338 U. S. 25, 33 (1949).

the federal injunction could be issued. The dissent in the principal case questions the wisdom of a decision which might present such a dilemma. There appears to be merit to this argument.

On the other hand, the Supreme Court could conceivably depart from its holding in the *Wolf* and *Stefenelli* cases and say that the requirements of due process under the Fourteenth Amendment can only be met by *excluding* the illegally seized evidence in a state prosecution. Of course, in order to do so, the Supreme Court must first decide that excluding the evidence is not simply a federal rule of evidence, but a *command* of the Fourth Amendment to be enforced through the Fourteenth Amendment.

Essentially, of course, the problem in the case under consideration remains the same. It is the exclusionary rule. The United States Supreme Court contrived the rule. By way of dictum, the majority of the court consider it simply a federal rule of evidence.[49] The minority, on the other hand, deem it to be a command of the Fourth Amendment.[50] However, the court is unanimous in its desire to exclude the illegally seized evidence in federal prosecutions. By enjoining the federal agent in the principal case from testifying, they were able in an indirect manner to force the rule upon the state of New Mexico as it appears that the state's case cannot be made out without the evidence and testimony enjoined. Therefore, the rule of exclusion lies in the background in the principal case just as conspicuously as it lay in the foreground in the *Wolf* and *Stefenelli* decisions. The dissent conceded the power of the court to issue the injunction. Undoubtedly they possessed it.

Those who think it more important that criminals be convicted than that persons be secure in their privacy will look with disapproval upon the principal decision; those who think that already we suffer too much invasion of privacy will look with favor upon the granting of this injunction. It is hoped that the influence of the latter group will prevail.

JULIUS J. WADE, JR.

[49] "And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own." Wolf v. Colorado, 338 U. S. 25, 33 (1949).

[50] "I also reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment . . . Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment. . . ." Dissenting opinion in Wolf v. Colorado, 338 U. S. 25, 48 (1949).

Corporations—Corporate Entity—Solely Owned Corporations

The concept of the corporate "entity" is accepted generally as the rationale for keeping the corporate rights and liabilities separate from the rights and liabilities of the shareholders.[1] There is authority to the effect that this "separateness" exists even where the corporation has met the statutory requirement for incorporators and directors by the use of "dummy" shareholders.[2] Further, except in Kentucky[3] (at least in this century), it has been held consistently that the acquisition of all the stock by a single shareholder does not *per se* destroy, suspend or impair the corporate entity.[4]

[1] BALLENTINE, CORPORATIONS, § 118 (1946); Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations,* 18 LAW AND CONTEMPORARY PROBLEMS 473 (1953); Latty, *The Corporate Entity as a Solvent of Legal Problems,* 34 MICH. L. REV. 597 (1936); Machen, *Corporate Personality,* 24 HARV. L. REV. 347 (1911).

See also: Ballantine, *Separate Entity of Parent and Subsidiary Corporations,* 14 CALIF. L. REV. 12 (1925); Ballantine, *Disregarding the Corporate Entity as a Regulatory Process,* 31 CALIF. L. REV. 426 (1942); Canfield, *Scope of Corporate Entity Theory,* 17 COL. L. REV. 128 (1917); Radin, *The Endless Problem of Corporate Personality,* 32 COL. L. REV. 643 (1932); Wormser, *Piercing the Veil of Corporate Entity,* 12 COL. L. REV. 496 (1912); Note, *Disregarding Corporate Entity in One-Man Company,* 13 CALIF. L. REV. 235 (1925).

[2] Irving Co. v. Bond, 74 Fed. 849, 852 (1896); Salomon v. A. Salomon & Co., L. R. (1897) A. C. 22; *cf.* Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342 (1899); Jackson v. Hooper, 76 N. J. Eq. 592, 75 Atl. 568 (1910).

However, the presumption is that the single shares outstanding in directors are beneficially owned by the principal stockholder or their existence is disregarded as immaterial. This "beneficial ownership" is then used as the basis for the disregard of the corporate entity where equity requires. Meizlisch v. San Francisco Wool Sorting Co., 213 Cal. 668, 3 P. 2d 310 (1931); Montgomery v. Central Nat. Bank & Trust Co., 267 Mich. 142, 255 N. W. 274 (1934); Hanson Sheep Co. v. Farmers' and Traders' State Bank, 53 Mont. 324, 163 Pac. 1115 (1917); Stony Brook Lumber Co. v. Blackman, 286 Pa. 305, 133 Atl. 556 (1926); Marchman v. McCoy Hotel Operating Co., 21 S. W. 2d 552 (Texas Civ. App. 1929); Western Securities Co. v. Spiro, 62 Utah 623, 221 Pac. 856 (1923); Newton v. Tracy Loan and Trust Co., 88 Utah 547, 40 P. 2d 204 (1935); Roberts v. Hinton Land Co., 45 Wash. 464, 88 Pac. 946 (1907).

See also: Fuller, *The Incorporated Individual; A Study of the One-Man Corporation,* 51 HARV. L. REV. 1373, 1375 (1938); Masten, *"One Man Companies" and Their Controlling Shareholders,* 14 CANADIAN BAR REV. 663 (1936); ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES, § 4.06 (1949).

[3] Ownership of all the stock by one person results in "suspension" (but not dissolution) of the corporation until the incoming of new members, Russell Lumber & Supply Co. v. First Nat. Bank of Russell, 262 Ky. 388, 90 S. W. 2d 272 (1936).

See also: Hawley Coal Co. v. Bruce, 252 Ky. 455, 67 S. W. 2d 703 (1934); Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531 (1893).

Cases in accord with the "suspension" or "abeyance" concept, but *not* in this century are: Bank of Gadsen v. Winchester, 119 Ala. 168, 24 So. 351 (1898); Swift v. Smith, 65 Md. 428, 5 Atl. 534 (1886). *Cf.* Russell v. McLellan, 14 Pick. 70 (Mass. 1833).

See further: WORMSER, THE DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS, at 78 (1927).

[4] Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, 17 P. 2d 709 (1932); Dunham v. Natural Bridge Ranch Co., 115 Mont. 579, 147 P. 2d 902 (1944); Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221 (1903); Tilley v. Coykendall, 172 N. Y. 587, 65 N. E. 574 (1902); Commonwealth v. Sunbury Converting Works, 286 Pa. 545, 134 Atl. 438 (1926); Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884).

However, since the existence of the separate entity is a statutory privilege, it has been confined judicially to legitimate uses. For example, the corporate entity cannot be used to defeat public convenience, justify wrong, protect fraud, or defend crime.[5] Further, corporateness will be set aside whenever it is asserted for a purpose inconsistent with the policy of the law for which the concept of corporate entity was developed.[6] This power to "disregard the corporate entity" is, therefore, a discretionary or equitable power, used to obtain a just result according to the circumstances of the case and the conflicting rights and liabilities of the parties.[7]

It is true that corporations owned by a single shareholder have been

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In the last case, the sole shareholder was not permitted to pass title to property held in the corporate name, since "the shareholders are not the private and joint owners of its [the corporation's] property." The court also said: ". . . the owner of all the capital stock of a corporation does not own its property, or any of it, and does not himself become the corporation as a natural person, to own its property and do business in his own name."

The fact that one corporation owns all the capital stock of another corporation and that members of the board of directors of both companies are the same is not sufficient to render parent corporation liable for contracts of its subsidiary, in absence of additional circumstances showing fraud, actual or constructive, or agency. Whitehurst v. FCX Fruit & Vegetable Service, 224 N. C. 628, 32 S. E. 2d 34 (1944). (Judgment for plaintiff was upheld on the agency theory.)

Sole shareholder cannot sue individually for a wrong to the corporation, Green v. Victor Talking Machine Co., 24 F. 2d 378, *cert. denied* 278 U. S. 602 (1928).

[5] Mosher v. Salt River Valley Ass'n, 39 Ariz. 567, 8 P. 2d 1077 (1932) (corporation held the "alter ego of the defendant"); Mosher v. Lee, 32 Ariz. 560, 261 Pac. 35 (1927) (incorporated partners); Rice v. Sanger Bros., 27 Ariz. 15, 229 Pac. 397 (1924) (to defraud creditors by illegal act); Security Bank & Trust Co. v. Warren Light & Water Co., 170 Ark. 50, 278 S. W. 643 (1925); Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334 (1905) (fraud); Noble v. Burnett Co., 208 Mass. 75, 94 N. E. 289 (1911); Brassman, Inc. v. Mosson, 127 Misc. 282, 215 N. Y. S. 766 (1926) (president issued corporate check); Arnold v. Phillips, 117 F. 2d 497 (5th Cir. 1941) *cert. denied* 313 U. S. 583 (1941) (inadequate capital); U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (1905); *In re* Muncie Pulp Co., 139 Fed. 546 (1905) (to defraud creditors); Pepper v. Litton, 308 U. S. 295 (1939); Linn and Lane Timber Co. v. U. S., 236 U. S. 574 (1915) (fraud in obtaining government land).

[6] Davis v. Alexander, 269 U. S. 114, 117 (1925) (dominant company held for injuries due to negligence of subsidiary company); United States v. Reading Co., 253 U. S. 26 (1919); Chicago, M. & St. P. R. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U. S. 490 (1917) (for purpose of rate regulation); U. S. v. Lehigh Valley R. Co., 220 U. S. 257 (1911).

Cardozo, J., in Berkey v. Third Ave. Ry. Co., 244 N. Y. 84, 155 N. E. 58 (1926), stated the surrender of limited liability would be made "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld." (However, there the dominant shareholder was held not liable for torts of subsidiary.)

See also: WORMSER, THE DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS, at 83, 84 (1927): "Corporate entity will not be ignored at law or equity simply because the number of shareholders is few or even one, unless the circumstances are such as would warrant the same disregard of the entity were there ten thousand shareholders."

See further: Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 LAW AND CONTEMPORARY PROBLEMS 473, 475 (1953).

[7] For a thorough development of this fluid concept, see Cataldo, *op. cit. supra* note 6, at 480.

brought under close scrutiny by the courts,[8] ever ready to apply the above equitable criteria. But it is rare that such corporations have been deemed automatically invalid on the ground that the number of shareholders has fallen below a certain prescribed minimum number.[9] However, that the North Carolina Supreme Court *will* apply this automatic criterion was made clear in the recent case of *Park Terrace, Inc. v. Phoenix Indemnity Company,*[10] which was before the court on a rehearing of the same case reported two years prior.[11]

In the first *Terrace* case, the facts were set out as follows: Terrace, Inc., all the common stock of which was owned by *A, B, C,* and *D,* contracted for the construction of an apartment house with Builders, Inc., some of the stock of which was owned also by *A, B, C,* and *D.* Subsequently, these four shareholders sold all the shares of common stock of Terrace, Inc., to McLean, an individual. As part of the consideration for the transaction, McLean signed a contract releasing *A, B, C, D* and Builders, Inc., from liability for defective construction. Two years and ten months later, Terrace, Inc., brought an action for damages for breach of construction contract by Builders, Inc., against the surety on the performance bond. Builders, Inc. was made a party defendant. The defendants alleged: (1) that the construction was in accordance with specifications; (2) that the release, signed by McLean, was a bar to recovery by Terrace, Inc.; and (3) that when McLean signed the agreement, he was acting as agent for Terrace, Inc., and in its behalf, therefore Terrace, Inc., was bound by his contract.

The Supreme Court affirmed an order to strike allegations (2) and (3) from the answer and to deny making McLean a party defendant. BARNHILL, C. J., said: ". . . the refusal of the court to make McLean a party defendant was well advised. The purchase of outstanding common stock from the then owners thereof was by McLean as an individual. He signed the so-called release as an individual. Hence, these defendants may not be permitted to try any action they may have against McLean in this suit."[12] The majority decision then rested on the issue of agency, holding that the contract signed by McLean was not the contract of the corporation.[13] Thus, the corporate entity was regarded as a

[8] Pepper v. Litton, 308 U. S. 295, 313 (1939); Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 599 (1920); Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 590 (1875).

In Pepper v. Litton, the District Court said: ". . . In all the experience of law, there has never been a more prolific breeder of fraud than the one-man corporation."

[9] See note 3 *supra.*

[10] 243 N. C. 595, 91 S. E. 2d 584 (1956).

[11] Park Terrace, Inc. v. Phoenix Indemnity Co., 241 N. C. 473, 85 S. E. 2d 677 (1955).

[12] *Id.* at 477. 85 S. E. 2d at 679.

[13] *Id.* at 478. 85 S. E. 2d at 679. The modern weight of authority supports the holding that contracts of a sole shareholder *will* bind the corporation, although made without the authority of a board of directors. The reason for this rule is that the

legal fact even though the majority opinion was closed with the query: "Since McLean has acquired all the stock of the plaintiff, is it now a corporation? This question is not presented by the record."[14]

A well reasoned dissent by BOBBITT, J., however, indicated that the *substance* of the action was not the agency issue, but ". . . whether McLean can maintain under the guise of a corporation suit an action for his benefit as sole owner of the plaintiff's common stock."[15] The dissent went on to say: ". . . courts and textwriters have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results."[16]

The import of this dissent was adopted in the second *Terrace* case. BARNHILL, C. J., again writing for the majority of the court, held that McLean was, in fact, the necessary party *plaintiff*.[17] In so holding, the court stated the rule that when one person acquires all the stock of a corporation, automatically the corporation becomes dormant or inactive and can no longer act as a corporation.[18] Thus, the court has adopted the view that a one-man[19] corporation is invalid *per se* for all purposes except to hold legal title of the property for the use and benefit of the single stockholder who becomes seized of the beneficial title to the property. Spelled out further, the import of the decision is that the court will apply the equitable criteria when the corporation has met the requisite number of three shareholders; and will apply the automatic criterion below that number.

The ramifications of such a holding are apparent. For example: (1) Is the income of the corporation to be considered the income of the shareholder, thereby making the shareholder taxable on the income without the benefit of corporate deductions or the corporate rates? (2) If the corporation can *hold* title to the property for the use and benefit of the shareholder, could it *transfer* the same property. And what would be the present status of property already transferred by a wholly-owned corporation? (3) Are all the debts of the corporation to be considered

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sole shareholder is the only person beneficially interested aside from corporate creditors. See 5 FLETCHER, CYC. OF CORPORATIONS, § 2099, at 442 (perm. ed. 1952). See also BALLANTINE, CORPORATIONS, § 126, at 296 (1946).

[14] *Ibid.*

[15] *Id.* at 479-80. 85 S. E. 2d at 681.

[16] *Id.* at 481. 85 S. E. 2d at 682. By so stating this proposition, Justice Bobbitt placed before the court the very crux of the equitable criteria.

[17] Note that Bobbitt, J., and Johnson, J., concur in the *result* of the case.

[18] 243 N. C. 595, 597, 91 S. E. 2d 586, 587 (1956). The reason for this rule of form was stated to be: ". . . the concept that a corporation is a combination of three or more persons who may operate as a legal entity when chartered so to do threads its way through the cited and practically every other section of our law on corporations. General Statutes, ch. 55. *No lesser number will suffice.*" (Emphasis added.)

[19] *Ibid.* This statement indicates clearly that the same result would obtain in a two-man corporation since this, also, is below the "statutory" minimum.

as debts of the single shareholder? If so, what are the rights of corporate creditors against the individual?

In the light of these complexities, it would seem the proper response of a single shareholder to take immediate curative action by transferring shares to nominal shareholders in order to comply with the requisite for three shareholders. However, for past transactions, this course of action is dubious, at most, in view of dictum in the principal case, to the effect that ". . . it must be understood that if McLean became the *sole beneficial owner* of the assets of the corporation by virtue of the fact he acquired all the stock, *he could not later, and cannot now,* evade the consequences of his act by merely transferring some of the stock to third parties so as to comply with the statute."[20] (Emphasis added.)

Read literally, this dictum would cause legitimate concern for every corporation now beneficially owned by a single shareholder, in that curative action would be impossible once the status had been attained. However, if the language used can be construed to apply to the specific act of McLean and to the circumstances of this case, it will be possible to effect remedial transfer of shares in other situations and avoid troublesome future problems. Of course, even the latter interpretation does not indicate a solution to transactions already having occurred. At best, the language used by the court leaves this retroactive aspect very unsettled and in need of clarification and immediate remedy.

Apparently, the assembly, in passing the new Business Corporation Act,[21] contemplated the situation presented by the principal case. Section 55-8 of this Act states: "Corporate existence is not impaired by the acquisition of all the shares by one person."[22] Further, in section 55-53(e), the Act states: "Except in the case of watered shares, shareholders shall be subject to no assessment or liability thereon other than that arising from the unpaid balance, if any, of the agreed consideration, even if all the shares are owned by one person." However, this Act, if allowed to stand as passed by the 1955 legislature, will not become effective until 1 July, 1957. Accordingly, the need is still urgent for present judicial or legislative remedy.

As to the equitable power of the court to meet situations of this nature, this also has been embodied in the new Business Corporation Act in section 55-53(h), which states: "Nothing in this section shall limit any liability that a shareholder may incur on general principles of law or equity arising from the creation or maintenance of an inadequately

[20] 243 N. C. 595, 599, 91 S. E. 2d 586, 588 (1956).

[21] N. C. GEN. STAT., CH. 55 (Supp. 1955).

[22] The theory of permitting a corporate existence to remain unimpaired when owned by a single shareholder is inconsistent with a requirement for three incorporators. N. C. GEN. STAT. § 55-6 (Supp. 1955). If the law has the former policy there is no need for the latter.

capitalized incorporated enterprise or other abuse of the privilege of achieving limited liability by incorporation."

The equitable criteria has been an adequate test for the existence or non-existence of the corporate entity in any conceivable combination of rights and liabilities of the parties. Therefore, it seems illogical that the court would feel the need of establishing a rule of automatic invalidity. Because of this implication, however, it is clear that the *Terrace* case will have a disturbing impact on the law of this area until a judicial or legislative remedy is presented.

FRANKLIN A. SNYDER.

Criminal Law—Entrapment in North Carolina

It has been said[1] that the first reported instance of a defense of entrapment is to be found in the decision by the Great Lawgiver, overruling that ancient plea tendered by Eve in Paradise, "The serpent beguiled me and I did eat."[2]

The earliest reported pleas in North Carolina of temptation by others, appear in the cases of *Dodd v. Hamilton*[3] and *State v. Jernagan*[4] in 1817, and since that time the defense has often been interposed in the North Carolina courts. Perhaps the most enlightening approach to a presentation of the position of the North Carolina court on the doctrine of entrapment is an examination of the cases against a background of the subject generally.

The classic, and most frequently cited definition of entrapment is that of Mr. Justice Roberts, in *Sorrells v. United States*.[5] "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have done so except for the trickery, persuasion, or fraud of the officer."[6]

The basis for the doctrine of entrapment seems to be ethical rather than legal considerations.[7] The judicial approach to the problem does not lay stress upon any feeling of solicitude for the accused or try to strike a balance between the equities of the government and those of the accused. Rather, it seems to stem from a realization by the courts that the law is mechanistic in that it does not consider the ability of the offender to resist temptation. As Professor Sayre declared: "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between

[1] Bernstein, *In Re Eve*. 65 N. J. L. J. 273 (1942).
[2] Genesis 3:13.
[3] 4 N. C. 31 (1817).
[4] 4 N. C. 44 (1817).
[5] 287 U. S. 435 (1932).
[6] *Id.* at 440.
[7] Anderson, *Some Aspects of Entrapment*, 13 BROOKLYN L. REV. 187, 188 (1942); Note, 2 So. CALIF. L. REV. 283 (1929).

doing right and doing wrong and choosing freely to do wrong."[8] Thus the dictates of justice oppose conviction or punishment where the guilty intention is synthetically created by the government for the purpose of obtaining a conviction. The authorities agree that the true foundation of the doctrine is public policy.[9] However, the courts, by traditional modes of thinking, have attempted to place the doctrine in the category of a recognized principle of law, with a resulting diversity of theories as to why it excuses the criminal act.[10] These theories lend little assistance in determining the applicability of the doctrine in a given situation.

Under the federal view of entrapment, as defined in the *Sorrells* case and subsequent cases, the defense consists of two elements: (1) the origin of the criminal intent in the mind of the officer and (2) the inducement of the defendant by the officer.[11] These elements are closely related. The fact that no inducement was used by the officer is evidence that the criminal intent originated in the mind of the defendant, and the fact that such inducement was used is evidence that the criminal intent originated in the mind of the officer.[12] The scope of the activities by law enforcement officers which will constitute inducement, seems to vary with different crimes.[13] The distinction which is drawn by the courts in determining what constitutes improper conduct by the law officer is that between furnishing inducement and furnishing opportunity. The fact that the officer merely furnished the defendant an opportunity to commit the crime;[14] that is, did nothing to overcome the defendant's shrinking reluctance,[15] resorted to normal coaxing of a liquor purchaser,[16] displayed the common symptoms of a drug addict,[17] or sub-

[8] SAYRE, INTRODUCTION TO CASES ON CRIMINAL LAW. (2 ed. 1937).

[9] Sorrells v. United States, 287 U. S. 435 (1932); People v. Barkoll, 36 Cal. App. 25, 171 Pac. 440 (1918); Falden v. Commonwealth, 167 Va. 549, 187 S. E. 329 (1936); Anderson, *op. cit. supra* note 7.

[10] Sorrels v. United States, *supra* note 5 presents a marked example of this. The majority decision held that the element vitiating criminal liability was an implied exception in the statute creating the offense, based upon the premise that the legislature intended that the statute should apply to a person acting on his own volition. Three of the Justices, speaking through Mr. Justice Roberts, denied this rationale, saying, "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court." 287 U. S. 435, 443 (1932).

[11] Butts v. United States, 273 Fed. 35 (8th cir. 1921); Peterson v. United States, 255 Fed. 433 (9th cir. 1919); "The doctrine is that an otherwise innocent defendant who has been persuaded by government agents to break the law cannot be convicted." See Note, 46 HARV. L. REV. 848 (1932).

[12] Newman v. United States, 299 Fed. 128 (4th cir. 1924); "The present tendency is to look to the conduct of the officer as the criterion to determine where the design originated." 20 KY. L. REV. 246 (1930).

[13] United States v. Washington, 20 F. 2d 160 (D. C. Neb.) (1927). "The scope of activities permitted an officer differs in different crimes, due consideration being given to the repugnancy of the offense and the difficulty of procuring evidence."; note 28, COLUM. L. REV. 1067 (1928); See also 44 HARV. L. REV. 109 (1930).

[14] State v. Litosy, 52 Wash. 87, 100 Pac. 170. (1909); Robinson v. United States, 32 F. 2d 505 (8th Cir. 1928; note 2, So. CALIF. L. REV. 283 (1929).

[15] Scriber v. United States, 4 F. 2d 97 (6th Cir. 1925).

[16] United States v. Wray, 9 F. 2d 429. (N. D. Ga.) (1925).

[17] *Ibid.*

jected the defendant to no more than ordinary temptation to which he was likely to be subjected in the discharge of his duties[18] is not enough. On the other hand, the defense has been held available where the officer had resorted to pleas of desperate illness,[19] or persistent coaxing,[20] or threats,[21] or any conduct of enticement, beguilment, suggestion, procurement, or aiding that goes beyond the mere offering of opportunity.[22] The inquiry is confined for the most part, to the conduct of the officer.[23]

Some courts have made the validity of the defense of entrapment turn upon the existence of a reasonable belief on the part of the officer that the accused was, or was about to be, engaged in the commission of a crime.[24] Although this criterion would seem highly significant in determining the reprehensibility of the officer's conduct, it seems incorrect as a test for entrapment. It has been pointed out[25] that, if the criminal intent originates in the mind of the defendant, he should not be excused because the officer had no reasonable grounds to suspect him, and if the criminal intent originated in the mind of the officer and he induced the defendant to commit the crime, the defendant should be excused even though the officer had reasonable grounds to suspect him. Some cases have rejected this reasonable belief test.[26] In *Sorrells v. United States*,[27] however, it is held that the evidence showing reasonable suspicion, while not serving to rebut the defense of entrapment, is admissible upon the question of criminal intent, thus opening the door to prior offenses upon a plea of entrapment. Some courts assert that the degree of persuasion permitted depends upon the degree of reasonableness of the officer's suspicion.[28] Whatever the stated rule may be, the offender's predisposition to commit the same or similar offenses would seem to be an important factor in answering the ultimate question: In whose mind did the offense originate?

Most jurisdictions announce the same standards for determining when the defense of entrapment is available to a defendant as the federal courts do; that is, an inquiry into the conduct of the officer to determine

[18] Scriber v. United States, *supra* note 15.
[19] Echols v. United States, 235 Fed. 862 (S. D. Tex.) (1918); United States v. Wray, *supra* note 16.
[20] Peterson v. United States, 255 Fed. 443 (9th Cir. 1919).
[21] Capuano v. United States, 9 F. 2d (1st Cir. 1925); United States v. Lynch, 25 6 Fed. 983. (S. D. N. Y.) (1918).
[22] United States v. Washington, *supra* note 13.
[23] *Ibid.*
[24] Goldman v. United States, 220 Fed. 57 (6th Cir. 1915); United States v. Elnan Mfg. Co., 271 Fed. 353 (D. C. Colo.) (1920); See note, 46 HARV. L. REV. 848 (1932).
[25] Hitchler, *Entrapment as a Defense in Criminal Cases*, 42 DICK. L. REV. 195, 201 (1937).
[26] Newman v. United States, 299 Fed. 128 (4th Cir. 1924); United States v. Washington, *supra* note 13.
[27] 287 U. S. 435. (1932)
[28] Scriber v. United States, 4 F. 2d 97 (6th Cir. 1925).

in whose mind the offense originated.[29] Since public policy is the true foundation of the doctrine, which is a variable quantity depending on the magnitude of the offense, and the difficulty of detecting offenders, among other considerations, it is not surprising that courts reach different results while announcing the same standards. The decision in each case, it has been said, depends on its own circumstances,[30] and "must be determined by the scope of the law considered in the light of what may fairly be demed to be its object."[31]

The North Carolina Supreme Court states its position as in accord with this majority rule.[32] The first reported case in which the defense of entrapment by law enforcement officers was interposed, appears to be *State v. Smith*.[33] The defendant, convicted of retailing whiskey contrary to the statute, contended that because his conviction had been obtained from evidence obtained by police officers furnishing money and employing one to buy it from defendant, that he was a victim of "connivance." There was no suggestion of inducement. The court, in rejecting the defense, stated that the wrongful acts of officers will not be imputed to the state so as to excuse the defendant from criminal liability for what he does. .The court stated,[34] "It is not the motive of the buyer, but the conduct of the seller which is to be considered." The court characterized the defendant as a "live tiger," who for all his cunning, has bolted the officer's trap and now complains that the law of the jungle has been violated.[35] Because of the use of such meaningless generalities, North Carolina has been cited[36] as being in accord with Tennessee and New York, which reject the defense altogether.[37]

Although there is language in two earlier cases indicating that the North Carolina Supreme Court would recognize the defense in an appropriate case,[38] it remained for *State v. Love*[39] to enunciate North Caro-

[29] See Annots. 18 A. L. R. 146 (1922); 66 A. L. R. 473 (1930); 86 A. L. R. 263 (1933).

[30] United States v. Washington, 20 F. 2d 160 (D. C. Neb.) (1927).

[31] Sorrells v. United States, 287 U. S. 435, 440 (1932).

[32] State v. Love, 229 N. C. 99, 47 S. E. 2d 712. (1948); State v. Jackson, 243 N. C. 216, 90 S. E. 2d 507 (1956).

[33] 152 N. C. 798, 67 S. E. 508 (1910).

[34] *Id.* at 800, 67 S. E. 509 (1910).

[35] The defense counsel, in reply to this, contended that his client was a donkey, not a tiger.

[36] Heywood, *Defense of Entrapment*, 21 BAR ASS. KAN. JOURNAL 28 (1932).

[37] See also State v. Hopkins, 154 N. C. 622, 624, 70 S. E. 394, 394 (1911) in which the court appeared to reject the doctrine entirely, saying:

"The methods adopted by the policeman to catch the defendant have been criticized; but it must be remembered that the ways of "blockaders" are devious and their trade is generally plied underground." However much the defendant, when caught, may criticize the methods used to catch him, it has been held that the transaction is, so far as defendant is concerned, a violation of the law. . . ."

[38] In State v. Salisbury Ice Co., 166 N. C. 366, rehearing, 166 N. C. 403 81 S.E. 737 (1914), the court, on entertaining a petition for newly discovered evidence, recognized that there is a difference between cases in which the offender does not

lina's position on entrapment. In that case, a State Bureau of Investigation agent attempted to purchase whiskey from defendant, a person suspected of liquor violations. Without further inducement, defendant sold the officer whiskey and later was convicted on the officer's testimony. In rejecting the defendant's plea of entrapment the court recognized that trickery, persuasion or fraud, which induces the defendant to violate the law, would be a valid defense, but that mere initiation, instigation, invitation, or exposure to temptation by the enforcement officers is not enough, quoting the definition of entrapment given by Mr. Justice Roberts in the *Sorrell* case. The court then rendered a backhand slap at the law enforcement officers by saying:[40]

> "The State questions whether the appellant's approach to this position does not more properly challenge the wisdom and fairness of the proceeding rather than its validity; presenting a moral rather than a judicial problem, which, albeit debatable, must yield to judicially approved practice. . . ."
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> ". . . considerations of the purity and fairness of the courts and the agencies created for the administration of justice gravely challenge the propriety of a procedure wherein officers of the state envisage, plan and instigate the commission of a crime on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice, for which the defendant is in reality punished."

The court felt the contentions of the defense are judicially out voted, though not out argued. This case is cited with approval in two recent North Carolina cases[41] and seems to be the present North Carolina attitude.

When it is considered that the very heart of the doctrine of entrapment is public policy, a preservation of the purity and fairness of the court's processes, it is difficult to reconcile the court's severe rebuke of

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act under his own volition and those in which a trap is set to catch one contemplating crime, but found the defense inapplicable here because the alleged "entrapment" was not by a government agent. The defendant had contended that the victim in a false pretense prosecution was not deceived, since he bought the goods in an effort to entrap the defendant. The court felt that the necessary element of deception of the victim was satisfied when the "victim" exchanged his money for the goods.

In State v. Godwin, 227 N. C. 449, 41 S. E. 2d 74 (1946), the court, in reversing what was tantamount to a directed verdict for the State in a prosecution for illegal sale of whiskey, observed that the prosecution's case depended upon a "broken reed" because of the "persistent entreaty and duplicity" of the expectant purchaser, saying that under such circumstances the defendant deserved the benefit of a reasonable doubt as to the credibility of such witnesses.

[39] 229 N. C. 99, 47 S. E. 2d 712 (1948).

[40] *Id.* at 103, 47 S. E. 2d 715 (1948).

[41] State v. Burnette, 242 N. C. 164, 87 S. E. 2d 191 (1955); State v. Jackson, 243 N. C. 216, 90 S. E. 2d 507 (1956).

the fairness of the methods used in this case, feeling they present a moral rather than a judicial problem. The standards set for defining the defense are products of moral considerations entirely. If the officer's conduct exceeded the bounds of propriety by doing more than merely offering an opportunity to one predisposed to commit crime, then the defense is available, as the court recognizes. On the other hand, if the officer trapped a suspected law violator by the violator's own facile compliance, unaided by abnormal temptation, it is difficult to see legal or ethical objections unless it is felt that law officers should be hard working and intelligent, but not clever.[42]

The defense as defined by Justice Roberts, and the problems heretofore discussed relate to what probably may be called the Simon-pure doctrine of entrapment. While this somewhat narrow definition of the defense is probably entirely accurate,[43] the cases dealing with the doctrine have labeled as "entrapment" a variety of pleas which are unrelated to charges of enticement or procurement by officers of the law.[44]

It is generally recognized that a person, suspecting that a crime is contemplated against his person or property may wait passively and allow matters to go on, and even furnish the most complete opportunity for its commission in order to apprehend the criminal.[45] If, however, he takes any affirmative action to aid or encourage the would-be criminal, if his conduct is active rather than passive, it is said that the victim has given his consent.[46] The cases often state that the defense of entrapment is available to the defendant.[47] Authorities have held that "entrapment" is a defense where (1) action by an officer has eliminated a physical condition which is an essential element of the crime charged,[48] or (2) where the victim in company with an officer, has consented to a crime to be

[42] *Contra,* note, 16 Mo. L. REV. 165 (1933), in which it is suggested that such action by officers should incriminate them to the extent of the person thus entrapped. WHARTON, CRIMINAL LAW § 231 (9th ed. 1948) explains that the essential element of dolus, or malicious determination to violate the law, is wanting in their cases and thus the crime cannot be imputed to them.

[43] See note, 2 So. CALIF. L. REV. 283 (1929).

[44] Coe, *The Doctrine of Entrapment,* 23 OKLA. BAR JOURNAL 2275 (1952). The author suggests that the term "entrapment" is a misnomer, for it is not the entrapping of criminals which the law frowns on, but rather the seduction of the innocent by its officers.

[45] State v. Hughes, 208 N. C. 542, 181 S. E. 737 (1935); State v. Salisbury Ice Co., 166 N. C. 366, 81 S. E. 737 (1914); People v. Smith, 25, Ill. 185, 95 N. E. 1041 (1911); 22 C. J. S. *Criminal Law,* § 42. (1940).

[46] State v. Adams, 115 N. C. 775, 20 S. E. 722 (1894). The victim, having knowledge of an intended theft by defendant, allowed his servant to approach defendant and advise defendant now was the time for the theft; State v. Goffney, 157 N. C. 624 73 S. E. 162 (1911): State v. Nelson, 232 N. C. 602, 61 S. E. 2d 626 (1950); Topolewski v. State, 130 Wis. 244, 109 N. W. 1037 (1915).

[47] Cases cited notes 45 and 46 *supra.*

[48] State v. Shouquette, 250 Okla. Cr. 169, 219 Pac. 727 (1923); *E.g.:* in burglary when the breaking is done by the officer, Love v. People, 160 Ill. 501, 43 N. E. 710 (1896).

committed against his person or property, when lack of consent is an essential element of the offense charged,[49] and even where the conduct of the victim, or his authorized agent, acting alone, can be said to amount to a consent, and lack of consent is an essential of the offense.[50] Logically, it seems these situations would require no affirmative plea of entrapment,[51] since the essence of the defendant's contention is: "I did not commit the substantive offense. The prosecution cannot satisfy all the elements of the crime." Some writers have dogmatically asserted this class of cases to be distinguishable from entrapment, and declare courts which do not recognize this are confused.[52] Other writers have attempted to distinguish between consent which vitiates criminal liability when lack of consent is an element and consent which constitutes the defense of entrapment.[53] When it is realized, however, that consent given only for purposes of trapping the criminal is, nevertheless, sufficient consent to vitiate criminal liability,[54] nice distinctions vanish. However, to state blandly that these cases in which the victim plans to trap the criminal, raising the issue of the victim's consent, are unrelated to entrapment is to ignore the cases. Rather, it seems that the "entrapping" methods used by the victim serve to answer the question: was consent given?

A recent North Carolina case, *State v. Burnette*[55] dealt with the question of consent of the victim in entrapment pleas, and reviewed the North Carolina cases. The defendant was convicted of an assault with intent to commit rape. The evidence disclosed that the prosecutrix received repeated calls from an unidentified man who threatened to satisfy his passion on her person at all events. She reluctantly agreed to a proposal by law enforcement officers to meet the defendant with officers concealed in the back of her car. On the third attempt to keep a prearranged rendezvous with the defendant, the prosecutrix admitted him to her car in response to his request. When the defendant was admitted to the car he "lunged" at the prosecutrix, who screamed, and the concealed law enforcement officer arrested the defendant. The court held

[49] State v. Nelson, 232 N. C. 602, 61 S. E. 2d 626 (1950); Connor v. People, 18 Colo. 273, 33 Pac. 159, (1893); Woo Wai v. United States, 223 Fed. 412 (9th cir. 1915).

[50] People v. Mills, 178 N. Y. 274, 70 N. E. 786 (1904).

[51] There is a conflict of authority as to whether the defense must be (1) introduced under a plea of not guilty and determined as a question of fact by the jury, or (2) is a matter for determination by the court at any time in whatever manner the question may be raised. The first rule is based on the theory that defendant is not guilty; the second rule is based on the theory that although defendant is guilty, public policy requires his acquittal. Butts v. United States, 273 Fed. 35 (8th Cir. 1921); United States v. Healey, 202 Fed. 349 (D. C. Mont. 1920).

[52] Anderson, *op. cit. supra* note 7.

[53] Heywood, *op. cit. supra*, note 36.

[54] State v. Goffney, 157 N. C. 624, 73 S. E. 162 (1911); State v. Adams, *supra* note 45.

[55] 242 N. C. 164, 85 S. E. 2d 744 (1955).

that the prosecutrix did not consent to an assault, and that the defense of entrapment need not have been submitted to the jury.

In a somewhat similar case, *State v. Nelson,*[56] the court had reached an opposite result. In that case, the prosecutrix received a call from the defendant in response to an advertisement for work she had inserted in the newspaper. Prosecutrix communicated with officers who advised her to meet the defendant, promising to follow in another car. The reasons for these precautions do not appear. At the meeting the defendant proceeded to continually place his hand upon prosecutrix's leg, over her protests, and was arrested by law officers when he stopped his car. In reversing defendant's conviction of assault, the court stated that the acts of the prosecutrix amounted to a consent to an assault for purposes of prosecution.

In the *Burnette* case, the court distinguished this case by stating,[57] "in the *Nelson* case there was no evidence that the prosecutrix knew that a crime was contemplated against her person. . . ." At first blush, it appears anomalous that one who knows of a contemplated crime against her person, goes to meet the defendant and is held not to have consented to the assault, whereas one who, has no reason to suspect an assault, meets the defendant and is assaulted, is said to have consented to the act. Moreover, since the offense in both cases involved assault in which the appearance of consent is relevant in determining the defendant's intent, it might be contended that there was more of an appearance of consent when the prosecutrix made three efforts to meet the defendant at an isolated place at night after being advised of defendant's purpose, than in the *Nelson* case in which the prosecutrix met defendant in broad daylight with the avowed purpose of discussing a job. In the *Burnette* case there can be little doubt as to defendant's intent to commit rape, at the time of the telephone call. Nevertheless, it seems that an objective test of consent, viewing prosecutrix's acts as they must have looked to the defendant, could raise doubts as to whether such intent existed at the time of his meeting with prosecutrix.

Considered on an over-all basis, the fact situations in the two cases seem to justify their results. Thus although the court speaks of entrapment in a case in which the issue is consent of the victim, the distinction drawn by the court serves to emphasize the nature of the consent test and its relation to the defense of entrapment. The court looks to the reasonableness and propriety of the victim's conduct in determining if consent was given in a manner analogous to the true entrapment cases, which inquire into the conduct of the officer in determining in whose mind the offense originated. Thus in the *Burnette* case, the prosecutrix's

[56] 232 N. C. 602, 61 S. E. 2d 626 (1950).
[57] 242 N. C. 164, 167, 87 S. E. 2d 191, 193 (1955).

justification in wanting the defendant identified weighed heavily in the court's determination of the consent issue, whereas in the *Nelson* case the prosecutrix appeared to be a volunteer in the plan to apprehend the defendant.

An unfortunate by-product of treating the issue of consent of the victim as an entrapment defense is illustrated by the charge of the trial judge in the *Burnette* case. The judge charged the jury, on the defense of entrapment, in substance, that if the prosecutrix aided, encouraged or consented to an assault upon her by defendant for the purpose of apprehending defendant in the commission of the assault, *pursuant to an intent not originating with defendant,* defendant would not be guilty. The court found the charge to be without error. This seems incorrect. While the origin of the criminal intent in the mind of the victim should be decisive of the issue of whether consent was given, the converse of that proposition is not necessarily true. As the court recognized in an earlier case,[58] if the act of the victim amounts to a consent, it is immaterial whether the criminal intent originated in the mind of the accused. Other cases have recognized this.[59] Construing the charge as a whole, it does not seem that the defendant was prejudiced; but the difficulty experienced by the trial court from entwining two separate defenses seems inevitable because of our Supreme Court's view of "entrapment" as involving improper conduct of officers of the law and consent of the victim in offenses in which lack of consent is an element.

In another recent case, *State v. Jackson,*[60] the defendant, convicted of uttering a worthless check in violation of GS 14-107, contended that the payee, by trickery, persuasion and fraud had induced him to write the check. The defendant contended that the payee promised not to present the check for payment, and that his purpose was to prosecute the defendant. The court rejected this defense, quoting from *Polski v. United States*:[61] "The very heart of the doctrine of entrapment is that the government itself has brought about the crime."[62] The court adopted the federal view of entrapment in cases in which the offense charged is a crime regardless of the consent of any one, stating that, since uttering a worthless check is a crime regardles of the consent of anyone, the defense of entrapment must be predicated upon acts of officers of the government. The court, however, perpetuated the entwining of separate defenses by reiterating its statement in the *Love* case: "The Federal conception of entrapment is not necessarily binding upon us, for the

[58] State v. Adams, *supra* note 46.
[59] Speiden v. State, 3 Tex. App. 156 (1921); Topolewski v. State, 130 Wis. 244, 109 N. W. 1037 (1923).
[60] 243 N. C. 216, 90 S. E. 2d 507 (1956).
[61] 33 F. 2d 686 (8th Cir. 1929).
[62] 243 N. C. 216, 219, 90 S. E. 2d 507, 509 (1956).

question is much broader than the cited application in the Sorrells case."[63]

It seems desirable that the North Carolina court distinguish between the doctrine of entrapment as defined in the federal courts, and the defense of consent of the victim in prosecutions involving offenses to which such consent is a defense. While the two defenses tend naturally to overlap in factual settings, it should be remembered that they are entirely distinct defenses: the one, admiting commission of the offense but pleading entrapment by officers of the government, a plea whose foundation is public policy; and the other, a plea of not guilty by virtue of the fact that the conduct of the victim robbed the act of an essential element of criminality.

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Eminent Domain—Just Compensation—Hydro-Electric Dam Sites

In the past when the government has taken private property for public purposes or allowed one of its agencies to do so, the "just compensation" guaranteed to the private owner by the Fifth Amendment to the United States Constitution[1] has meant that the owner would receive the full and perfect equivalent of the property in money or money's worth.[2] Theoretically, the owner is to be put in as good a position pecuniarily as he would have been had his property not been taken.[3] In arriving at this "equivalent" the courts have sought to determine the full and perfect market value of the property at the time it was taken.[4] This has involved a consideration of the best and most profitable use to which the property was adaptable and likely to be used in the reasonably near future,[5] not

[63] *Ibid.*

[1] U. S. CONST. amend. V, ". . . nor shall private property be taken for public use without just compensation."

[2] Olsen v. United States, 292 U. S. 246, 255 (1946); Jacobs v. United States, 290 U. S. 13, 17 (1933); Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 304 (1923); North Carolina v. Sunrest Lumber Co., 199 N. C. 199, 154 S. E. 2d 123 (1930).

[3] Olson v. United States, *supra* note 2; United States v. Miller, 317 U. S. 369, 373 (1924); Seaboard Air Line Ry. Co. v. United States, *supra* note 2.

[4] United States *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 275 (1943); United States v. Miller, *supra* note 3, at 374; Carolina & Yadkin R. R. v. Armfield, 167 N. C. 464, 83 S. E. 809 (1914); Creighton v. Water Commissioner, 143 N. C. 171, 55 S. E. 511 (1906).

[5] United States *ex rel.* T. V. A. v. Powelson, *supra* note 4, at 276; McCandless v. United States, 298 U. S. 347 (1935); Olson v. United States, 292 U. S. 246, 255 (1933); Brooks-Scanlon Corp. v. United States, 265 U. S. 106 (1924); United States v. Seufert Bros. Co., 78 Fed. 520 (C. C. D. Ore. 1897); Young v. Harrison, 17 Ga. 30 (1855); Alloway v. Nashville, 78 Tenn. 510 (1890); Sargent v. Merrimac, 196 Mass. 171 (1907); Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N. W. 394 (1937); Raymond v. The King, 16 Can. Exch. 1, 29 D. L. R. 574 (1916), *aff'd*, 59 Can. S. C. 682, 49 D. L. R. 689 (1918); *In re* Gough & The Asportia, Silloth, & District Water Board, L. R. 1904, 1 K. B. 417; Note, 34 IOWA L. REV. 695 (1949); 18 AM. JUR., Eminent Domain, §§ 244, 245 (1938).

just at the time of the taking.[6] This is, however, just an element and not the measure of damages and is to be considered as it would affect value in a transaction between private parties,[7] *i.e.*, as in a transaction between a well informed and willing seller and an equally well informed and willing buyer.[8] The fact that the property could be so used only in combination with other property does not exclude this element from consideration provided there be a reasonable possibility of such combination.[9] In the case of hydro-electric sites, the latter factor has been applied somewhat more strictly than in other cases, and it has been necessary that there be a reasonable possibility of combination without the use of eminent domain.[10]

However, since the United States Supreme Court decided *Grand River Dam Authority v. Grand Hydro Corp.*,[11] there has been some doubt as to whether this general rule would apply in eminent domain proceedings instituted by the federal government under act of Congress or by an agency or licensee of the federal government under the Federal Power Act.[12] There, Grand Hydro, a private corporation, had been granted a franchise by the State of Oklahoma for the development of water power on the Grand River and had acquired considerable property which it planned to incorporate into the project. Subsequently the state legislature created the Grand River Dam Authority, a governmental corporate agency having the power of eminent domain, to develop and sell water power and electric energy in the Grand River Basin. The Authority then received a license from the Federal Power Commission

[6] Olson v. United States, *supra* note 5, at 258; San Diego Land & Town Co. v. Neal, 78 Cal. 63, 20 Pac. 372 (1898); see generally, JAHR, EMINENT DOMAIN—VALUATION AND PROCEDURE, § 78 (1953).

[7] Olson v. United States, 292 U. S. 246, 257 (1933); New York v. Sage, 239 U. S. 57 (1915); Boston Chamber of Commerce v. Boston, 217 U. S. 189 (1910); Moulton v. Newburyport Water Co., 137 Mass. 163 (1884); In Boston Chamber of Commerce v. Boston, *supra*, at 195, Mr. Justice Holmes said, ". . . [A]nd the question is, what has the owner lost? Not, What has the taker gained?"

[8] Olson v. United States, *supra* note 7, at 257; United States v. Miller, 317 U. S. 369, 374 (1942); Nantahala Power & Light Co. v. Moss, 220 N. C. 200, 205, 17 S. E. 2d 10, 13 (1941); 18 AM. JUR., *Eminent Domain*, § 242 (1938).

[9] United States *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 275 (1943); McCandless v. United States, 298 U. S. 342, 348 (1935); Olson v. United States, 292 U. S. 246, 256 (1935); New York v. Sage, 239 U. S. 57, 61 (1915); Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195 (1909).

[10] United States *ex rel.* T. V. A. v. Powelson, *supra* note 11, at 276; See also, Olson v. United States, 292 U. S. 246 (1933); North Kansas Development Co. v. Chicago B. & Q. R. Co., 147 F. 2d 161 (8th Cir. 1945), *cert. denied*, 325 U. S. 867 (1945); Boetger v. United States, 143 F. 2d 391 (1st Cir. 1944), *cert. denied*, 323 U. S. 772 (1944); United States v. Boston C. C. & N. Y. Canal Co., 271 Fed. 877 (1st Cir. 1921); ANNOT., 124 A. L. R. 955 (1937); Notes, 35 HARV. L. REV. 76 (1921); 44 YALE L. J. 1095 (1935).

[11] 335 U. S. 359 (1948), *affirming*, 200 Okl. 157, 201 P. 2d 225 (1947).

[12] 49 STAT. 838, 16 U. S. C. § 791 (1935). For history see Wheeler, *The Federal Power Commission As An Agency of Congress*, 14 GEO. WASH. L. REV. 1 (1945); Lea, *The Federal Power Commission as an Agency of Congress*, 14 GEO. WASH. L. REV. 5 (1945); Pinchot, *The Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945).

granting to it the sole right to develop water power on the Grand River. Thereafter, Grand Hydro assigned its property to the Authority with a stipulation that the value should be determined as though the assignment had not been made. The parties were unable to agree on the value of the property and the Authority filed action to condemn the property. The Supreme Court of Oklahoma, with two dissents, held that even though the Authority had been licensed by the Federal Power Commission and had been granted an exclusive right to build the project by the State of Oklahoma, it could not take private property without just compensation, and the court felt that just compensation included the special adaptability of the property for development as a hydro-electric dam site.[13] On appeal the United States Supreme Court in a five to four decision affirmed the decision of the Supreme Court of Oklahoma and held that the Federal Power Act had not so far affected the value of property as a prospective site for hydro-electric development as to exclude the state law of damages in a state proceeding. The court expressly pointed out, however, that (1) no reference was made in the petition for condemnation to possible rights under the Federal Power Act and (2) the Federal Power Act merely attached certain conditions to the use of the land as a power site.[14] Finally, the court stated that it would ". . . express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act."[15]

Writers commenting on *Grand River Dam Authority v. Grand Hydro Corp.*[16] and two decisions from the ninth circuit, *Continental Land Co. v. United States*[17] and *Washington Water Power Co. v. United States,*[18] have indicated that the special adaptability of property for hydro-electric dam site construction would not and should not be considered as an element of "just compensation" where the taking happened to be by the federal government or its licensee. In each of the above mentioned cases the federal government took private property with the intention of using it for hydro-electric development, and compensation on the basis of its special adaptability was denied. In neither of these cases, however, was there a reasonable possibility that private power interests would have been able to combine the necessary land without using the power of eminent domain,[19] and the circuit court employed this factor

[13] 200 Okl. 157, 201 P. 2d 225 (1947).
[14] Note, 27 N. C. L. REV. 359 (1949).
[15] 335 U. S. at 373.
[16] Notes, 62 HARV. L. REV. 694 (1949); 34 IOWA L. REV. 695 (1949); 27 N. C. L. REV. 359 (1949).
[17] 88 F. 2d 104 (9th Cir. 1937).
[18] 135 F. 2d 541 (9th Cir. 1943), *cert. denied,* 320 U. S. 747 (1943).
[19] In Washington Water Power Co. v. United States, 88 F. 2d 104 (9th Cir. 1937), any private power project would have flooded lands belonging to the federal government.

to exclude the element of special adaptability from consideration. But, in addition, the court stated in each of these cases that a private owner has no compensable interest in the prospective use of water power where the federal government has exercised its superior right.

The issue was presented to the United States Supreme Court recently in *United States v. Twin City Power Company.*[20] The Twin City Power Companies [21] between 1901 and 1911 had acquired substantially all the property along the Savannah River necessary for the construction of a hydro-electric project with a dam at Price's Island which was very suitable for that purpose.[22] Congress, upon the recommendation of the Secretary of War, granted its approval in six acts passed between 1901 and 1919. In 1926 the Federal Power Commission granted Twin City Power Co. a preliminary permit for the development. From 1928 until 1932 the Savannah Electric Co. held a federal license to build at Clark's Island and to incorporate the Twin City property into the larger project. During this period other private companies showed interest in the property. Finally Congress, in the Flood Contral Act of 1944,[23] authorized the construction of the project by the federal government using public funds, and the Savannah Electric Co. was denied a license by the Federal Power Commission.[24]

Mr. Justice Douglas, writing for a majority of five,[25] elaborated upon his dissenting opinion in *Grand River Dam Authority v. Grand Hydro Co.* and determined that the adaptability of this property for such development would not be allowed as an element in determining compensation.[26] In doing so he overturned two circuit court decisions which

[20] 350 U. S. 222 (1956).

[21] Twin City Power Co., a South Carolina corporation, and Twin City Power Co. of Georgia, a wholly owned subsidiary of the former.

[22] "Twin City's 4,700 acres would include all except about 170 acres of land and rights necessary for the location of a dam, plant, and reservoir basin with a 60-foot head of water at Price's Island. A 60-foot head at that point with a 5-foot surcharge would require about 400 additional acres instead of 170, a 70-foot head with a 5-foot surcharge, 1,250 acres, and an 80-foot head with a 5-foot surcharge, 2,800 acres. The Twin City land was not only available but essential for such development in the vicinity of Price's Island." 350 U. S. 222, 231 n. 2.

[23] Flood Control Act of 1944, c. 665, § 10, 58 STAT. 887, 894 (approving the Savannah River Basin Project for flood control and other purposes as recommended by the Chief of Engineers in H. R. Doc. No. 657, 78th Cong., and the construction of the Clark Hill Reservoir on the Savannah River at an estimated cost of $35,300,000.00).

[24] See Savannah River Electric Co. v. Federal Power Commission, 164 F. 2d 408 (4th Cir. 1947), affirming the refusal of the license on the ground that Congress had declared its intent to exclude private development.

[25] Mr. Justice Burton, joined by Justices Frankfurter, Minton, and Harlan, dissented.

[26] 335 U. S. 359, 375 (1948). By passing the Federal Power Act, Congress asserted the exclusive dominion and control of the public over this water power and intended to defeat the claims of private parties. It was felt that the majority opinion gave to the private parties compensation for something in which they had no interest.

had determined that Twin City Power Co. should be allowed to recover this element of value.[27]

Seemingly, the line of reasoning adopted by the majority in the principal case is that the federal government, under the commerce power granted Congress in the Constitution,[28] has a dominant interest[29] in the flow of a navigable stream which may, in the discretion of Congress, be exerted to the exclusion of any conflicting or competing riparian interests, state or private.[30] By passing the Flood Control Act of 1944,[31] reasoned the court, Congress expressly exercised this dominant power and thereby deprived riparian owners of any interest in the power potential of the stream. This claim of the owners, further states the court, is a claim for a special value inherent in their land due to its proximity to a navigable stream and compensation is, in effect, sought for an interest in the flow of the stream which they could not own and from which they had been expressly excluded by Congress.

In this opinion Mr. Justice Douglas cites *Chandler-Dunbar Co. v. United States*[32] as the controlling case and quotes extensively from a portion of that decision relating to a claim for compensation for certain dams, dykes, and forbrays which had been used in the claimant's lock-canal system and incidentally to produce electricity, and which the Secretary of War had determined to constitute hindrances to the development of the navigation potential of the Niagara River by the federal government. Also, there is a reference to a portion of the decision relating to certain riparian property which had possible value as factory sites with the factories to be supplied with electricity from the excess water power.

However, the majority in the principal case ignored another portion of *Chandler-Dunbar Co. v. United States* which was relied upon by the two circuit courts and by the dissenters, and which is perhaps more

[27] United States v. Twin City Power Co., 215 F. 2d 592 (14th Cir. 1954) and United States v. Twin City Power Co. of Georgia, 221 F. 2d 299 (5th Cir. 1955).

[28] U. S. CONST., art. I, § 8, "The Congress shall have the power . . . (3) To regulate commerce. . . ."; United States v. Appalachian Electric Power Co., 311 U. S. 377 (1940), (The power of the United States over its waters which are capable of interstate commerce arises from the Commerce Clause of the Constitution. The power to regulate commerce necessarily includes the power to regulate navigation. United States v. Applachian Electric Power Co., *supra,* at 405.)

[29] Federal Power Commission v. Niagara Mohawk Power Co., 347 U. S. 239, 249 (1954); United States v. Commodore Park, Inc., 324 U. S. 386, 391 (1945), (dominant servitude); United States v. Gerlach Livestock Co., 239 U. S. 725, 736 (1950), (superior navigation easement): *Accord,* United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 312 U. S. 592 (1941); United States v. Cress, 343 U. S. 316 (1916); United States v. Willow River Power Co., 329 U. S. 499 (1913); and St. Anthony Falls Water Power Co. v. St. Paul Water Commission, 168 U. S. 349 (1897).

[30] See note 28 *supra.*

[31] See note 23 *supra.*

[32] 229 U. S. 53 (1913). "Ownership in a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of ownership is inconceivable." *Id.* at 69.

directly analogous. Chandler-Dunbar Co. also owned certain fast land which it had set aside for further canal and lock development and which was the only property in the vicinity suitable for that purpose. The court affirmed the decision of the lower court allowing compensation based upon this element of special adaptability, basing the decision upon the general rule of damages in spite of the fact that the special value of the property necessarily arose from and involved a use of waters from the river.[33]

Although there is undoubtedly a logical basis for the theory propounded by Justice Douglas, there is a basis in justice as well as logic for the contrary argument expressed by Mr. Justice Burton in the dissenting opinion and by Chief Judges Parker and Hutchenson of the fourth and fifth circuits respectively. This argument is, in essence, that the dominant interest of the government is limited to the bed of the stream as defined by the high water mark. The adjacent landowner, it is true, does not own the water power value in the current of the stream, but neither does the government have any servitude over the adjacent fast land. The Supreme Court itself has pointed out that the Federal Power Act does not abolish private riparian rights vested under state laws[34] and that these rights remain unimpaired until the federal government elects to exercise its rights.[35] The land is as necessary as the water for any such development and, until Congress passed the Flood Control Act of 1944, the necessity and adaptability of the property for the project would have been a determinative factor as to value in any negotiations between private parties. Thus, when the federal government takes property which, as here, has been privately combined expressly for the purpose for which it was taken and is specially adaptable and absolutely necessary for that purpose, this special value must be allowed as an element of compensation.[36] Otherwise the government is extending its navigation servitude above the high water mark and fastening it upon the fast land and is violating the constitutional mandate that the compensation be just.

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[33] Accord, United States v. Kansas City Life Insurance Co., 339 U. S. 799 (1949); McGovern v. City of New York, 229 U. S. 363 (1913); Shoemaker v. United States, 147 U. S. 282 (1892); Boom Co. v. Patterson, 98 U. S. 403 (1878); Young v. Harrison, 17 Ga. 30 (1855); Alloway v. Nashville, 88 Tenn. 510 (1890); Sargent v. Inhabitants of Merrimac, 196 Mass. 171, 81 N. E. 970 (1907); Gearhart v. Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891 (1902); *In re* Gough & Asportia, Silloth, and District Water Board, L. R. 1904, 1 K. B. 417.

[34] Federal Power Commission v. Niagara Power Corp. 347 U. S. 239 (1954); *cf.* Henry Ford and Sons, Inc. v. Little Falls Fiber Co., 280 U. S. 369 (1929), (Where a licensee of the Federal Power Commission impaired private riparian rights, the court said that even though these rights are not immune from destruction, the present legislation does not purport to authorize the Federal Power Commission to impair such rights, recognized by state law, without just compensation.).

[35] See note 34 *supra*. Compare Monongahela Navigation Co. v. United States, 148 U. S. 312, 330 (1892).

[36] See Monongahela Navigation Co. v. United States, 148 U. S. 312 (1892).

Equity—Specific Performance of Chattel Contracts

Historically, courts of equity refused to grant specific performance of contracts for the sale of personal property on the theory that money damages would enable the plaintiff to purchase other property of like kind and quality.[1] This approach did not arise from any difference between personal and real property, but from the theory that equity will not interfere where there is an adequate remedy at law for damages.[2] But, upon a showing that the particular chattel had some special value to the owner over and above any pecuniary estimate, such as a *pretium affectionis*,[3] that the chattel was unique, rare, and incapable of being reproduced by damages,[4] or that it was not readily purchasable in the market,[5] these courts granted specific performance on the ground that the remedy at law was inadequate.[6]

Certainly, this inflexible approach was the most characteristic feature of the early equity courts in this area, and many think it still exists today.[7] The attitude of the Virginia court[8] in a recent case, however, stands in sharp contrast to this view. That court in granting specific performance stated:

> "Indeed, the modern disposition is to 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."[9]

[1] 2 POMEROY, EQUITABLE REMEDIES § 748 (2nd ed. 1919).

[2] Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 13, 199 P. 2d 481, 483 (1948).

[3] Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102 (1904); Omaha Lumber Co. v. Co-operative Inv. Co., 55 Colo. 271, 133 Pac. 1112 (1913); Steinway & Sons v. Massey, 198 Ky. 265, 248 S. W. 884 (1923); Kacurek v. Matychowiak, 185 S. W. 740 (Mo. 1916); Chabert v. Robert & Co., Inc., 273 App. Div. 237, 76 N. Y. S. 2d 400 (1948); McMartin v. McMartin, 59 N. Y. S. 2d 449 (1946); Titus v. Empire Mink Corp., 17 N. Y. S. 2d 909 (1939); Butler v. Wright, 186 N. Y. 259, 261-62, 78 N. E. 1002, 1003 (1906); Welch v. Chippewa Sales Co., 252 Wis. 766, 31 N. W. 2d 170 (1948). 4 POMEROY, EQUITY JURISPRUDENCE § 1402 (4th ed. 1919).

[4] Southern Iron & Equipment Co. v. Vaughan, 201 Ala. 356, 78 So. 212 (1918); Koeling v. Bank of Sullivan, 220 S. W. 2d 794 (Mo. App. 1949); Spoor-Thompson Mach. Co. v. Bennett Film Laboratories, 105 N. J. Eq. 108, 147 Atl. 202 (1929).

[5] Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072 (1913) *aff'd* 177 Cal. 493, 171 Pac. 90 (1918); Carolee v. Handelis, 103 Ga. 299, 29 S. E. 935 (1898); Cochrane v. Szpakowski, 355 Pa. 357, 49 A. 2d 692 (1946); Strause v. Berger, 220 Pa. 267, 270, 69 Atl. 818, 819 (1908); Shunney v. R. I. Hospital Trust Co., 80 R. I. 370, 96 A. 2d 828 (1953); Behnke v. Bede Shipping Co., 1927 1 K. B. 649.

[6] 4 POMEROY, EQUITY JURISPRUDENCE § 1401 (4th ed. 1919).

[7] Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 199 P. 2d 481 (1948); Koelling v. Bank of Sullivan, 220 S. W. 2d 794 (Mo. 1949); Chabert v. Robert & Co., 273 App. Div. 237, 76 N. Y. S. 2d 400 (1948); Cochrane v. Szpakowski, 355 Pa. 357, 49 A. 2d 692 (1946); Shunney v. R. I. Hospital Trust Co., 80 R. I. 370, 96 A. 2d 828 (1953); Welch v. Chippewa Sales Co., 252 Wis. 766, 31 N. W. 2d 170 (1948).

[8] Thompson v. Commonwealth of Virginia, 197 Va. 208, 89 S. E. 2d 64 (1955).

[9] *Id.* at —, 89 S. E. 2d at 67.

Against this background an examination of some of the cases to discover whether courts have maintained their early inflexible approach, or have grown in flexibility so as to adjust the remedy of specific performance to the needs of the particular facts of each case seems worthwhile.

Machinery

Spoor-Thompson Machine Co. v. Bennett Film Laboratories,[10] a New Jersey case, demonstrates that the view denying specific performance of chattel contracts is yet very much alive. Plaintiff sought, under a contract with the defendant, to compel the delivery of certain film-developing machines. A preliminary injunction to prevent sale to others was denied; the court said that specific performance could not be granted except in cases where damages at law would be inadequate, as in the case of heirlooms and other articles[11] which are incapable of being replaced and are prized for their associations rather than their intrinsic value. The fact, important in industry, that the machines could not be secured from others except after a long period of time, and at considerable expense, was not regarded as justification for the action of a court of equity.

Other cases, however, show that some courts have responded to the needs of businesses.[12] In a recent Virginia case,[13] the state entered into a contract with defendant for the construction and delivery of two spare voting recorder units and two vote counters. The defendant failed to deliver them, and the state instituted proceedings for specific performance of the contract, alleging that the machines could not be obtained from anyone other than the defendant. The court awarded the relief sought, saying that specific performance, while not the usual remedy, will be granted where necessary to do complete justice between the parties. Even though there was evidence that the machines could be built by a first-class mechanic, the court said that the burden of securing such construction should be on the defendant rather than on the plaintiff.[14]

An earlier case from Massachusetts[15] was cited with approval by the Virginia court.[16] There, defendant refused to furnish the plaintiff

[10] 105 N. J. Eq. 108, 147 Atl. 202 (1929).

[11] This class includes articles of such great rarity and value as paintings, statues, antiques, furniture, and jewelry. 4 POMEROY, EQUITY JURISPRUDENCE § 1402 (5th ed. 1941).

[12] Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co., 163 U. S. 564 (1896); Board of Comm'rs of Mattamuskeet Drainage District v. A. V. Wills & Sons, 236 Fed. 362 (E. D. N. C. 1916); Johnson v. Brooks, 93 N. Y. 337 (1883), followed in Reo Stores v. Kent Stores, 118 N. Y. S. 2d 281 (1952).

[13] Thompson v. Commonwealth of Virginia, 197 Va. 208, 89 S. E. 2d 64 (1955).

[14] *Id.* at —, 89 S. E. 2d at 68.

[15] Adams v. Messenger, 147 Mass. 185, 17 N. E. 491 (1888).

[16] Thompson v. Commonwealth of Virginia, 197 Va. 208, —, 89 S. E. 2d 64, 68 (1955).

with certain injectors for steam boilers, as agreed. The court granted specific performance saying:

> "Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility of the labor of doing that which the defendant agreed to do."[17]

To reflect the true attitude of these courts it is not enough to observe that factors other than the peculiar nature of the chattel itself are considered in determining the appropriateness of specific performance as a remedy. It should also be noted that in both cases in carrying out the decree, possible supervision by the court of personal services involving skill, labor, and judgment would be required. Further, in the Virginia case,[18] it seems significant that the court might have granted relief on the theory that the product was unique and unavailable in the market.

Commodities

The realistic approach taken by the Virginia and Massachusetts courts[19] is not confined to the area of machinery. For example, where plaintiff sought equitable aid in enforcing defendant's contract to sell and deliver all his lead-silver ores, concentrates, or slimes to the plaintiff, the Federal District Court of Oregon[20] said:

> "It can no longer be maintained that a suit will not lie for specific preformance of a contract respecting personalty. The underlying thought touching such a suit is whether the suitor has a plain, speedy, adequate and complete remedy at law. If he has, he cannot have specific performance."[21]

This result does not rest on the uniqueness of the chattel, but enables the court to recognize plaintiff's business needs. However, many courts still adhere to the proposition that specific performance will not be granted unless the commodity concerned has some peculiar, unique, or special character which cannot be measured in damages.[22]

[17] Adams v. Messenger, 147 Mass. 185, 189, 17 N. E. 491, 495 (1888).
[18] Thompson v. Commonwealth of Virginia, 197 Va. 208, 89 S. E. 2d 64 (1955).
[19] Adams v. Messenger, 147 Mass. 185, 17 N. E. 491 (1888); Thompson v. Commonwealth of Virginia, 197 Va. 208, 89 S. E. 2d 64 (1955).
[20] American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 248 Fed. 172 (Ore. 1918).
[21] *Id.* at 182.
[22] Southern Iron & Equipment Co. v. Vaughan, 201 Ala. 356, 78 So. 212 (1918) (iron rails); Fraser v. Cohen, 159 Fla. 253, 31 So. 2d 463 (1947) (bananas); Steinway & Sons v. Massey, 198 Ky. 265, 248 S. W. 884 (1923) (piano); Chabert v. Robert & Co., Inc., 273 App. Div. 237, 76 N. Y. S. 2d 400 (1948) (containers for oil); Titus v. Empire Mink Corp., 17 N. Y. S. 2d (1939) (mink).

Denial of relief because the product is not unique but is obtainable in the open market does not consider the delay or risk which may be incurred in obtaining such goods. It, in effect, forces the plaintiff to sell his contract rights for money damages, while enabling the defendant wrongdoer, at his option, to perform or pay money damages.[23] These factors are important and the policy requiring consideration of them seems sounder.

Stocks and Bonds

The settled rule in this country and in England seems to be that contracts for public securities such as government stocks and bonds, will not be specifically enforced, because they can usually be obtained in the market.[24] But in England, contracts for the sale of railway and other business corporation shares will be specifically enforced,[25] while in this country, the weight of authority denies such relief unless it is shown that similar shares are not available in the open market.[26] The reason for this difference probably results from the difficulty experienced in the transferring of stocks and bonds in England as contrasted with the relative ease of such transfer in this country.[27]

However, even in this country specific performance is granted where there is a showing that the stock is of a peculiar or special value to the plaintiff; that it is not of easily ascertainable value; that it is unavailable in the market;[28] or that the stock is needed to enable the purchaser to obtain control of the corporation.[29]

[23] 2 STORY, EQUITY JURISPRUDENCE § 994 (14th ed. 1918).

[24] 4 POMEROY, EQUITY JURISPRUDENCE § 1402 (5th ed. 1941).

[25] Shaw v. Fisher, 2 De G. & S. 11, 64 Eng. Reprint 5 (1848). See generally 22 A. L. R. 1037, supplemented by 130 A. L. R. 923.

[26] General Securities Corp. v. Welton, 223 Ala. 299, 135 So. 329 (1931); Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623 (1914); Rimes v. Rimes, 152 Ga. 721, 111 S. E. 34 (1922); Fitzgibbons v. White, 296 Mass. 468, 6 N. E. 429 (1937); Richardson v. Lamb, 253 Mich. 659, 235 N. W. 817 (1931); Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P. 2d 952 (1933).

[27] This difficulty in transferring stocks in England is because the English companies are usually joint-stock associations whose powers are derived from and regulated by articles of association or deeds of settlement. These articles and deeds often restrict or make the methods of transfer cumbersome. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 18 (3rd ed. 1926).

[28] Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623 (1914); Baruch v. W. B. Haggerty, Inc., 137 Fla. 499, 188 So. 797 (1939); Rimes v. Rimes, 152 Ga. 721, 111 S. E. 34 (1922); Smurr v. Komer, 301 Ill. 179, 133 N. E. 715 (1921); Talamini v. Rosa, 257 Ky. 228, 77 S. W. 2d 627 (1934); Goodhue v. State Street Trust Co., 267 Mass. 28, 165 N. E. 701 (1929); Richardson v. Lamb, 253 Mich. 659, 235 N. W. 817 (1931); Model Clothing House v. Dickinson, 146 Minn. 367, 178 N. W. 957 (1920); *In re* Rosenthal's Estate, 335 Pa. 49, 6 A.2d 858 (1939); Florence Printing Co. v. Parnell, 178 S. C. 119, 182 S. E. 313 (1935).

[29] Henry L. Doherty & Co. v. Rice, 186 Fed. 204 (N. D. Ala. 1910); Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566 (1905); Johnson v. Johnson, 87 Colo. 207, 286 Pac. 109 (1930); Francis v. Medill, 16 Del. Ch. 129, 141 Atl. 697 (1928); Schmidt v. Pritchard, 135 Iowa 240, 112 N. W. 801 (1907); Nason v. Barrett, 140 Minn. 366, 168 N. W. 581 (1918); Hirschman v. Casey, 121 Neb. 471, 237 N. W. 584 (1931); *In re* Rosenthal's Estate, 335 Pa. 49, 6 A. 2d 585 (1939); Bumgardner v. Leavitt, 35 W. Va. 194, 13 S. E. 67 (1891).

Thus, it appears that equity courts in this country have almost universally adopted the "unique theory" in determining the inadequacy of the remedy at law with respect to stocks and bonds. However, this seems to result in no injustice between the parties in most cases. Whether the courts would liberalize this view and hold the legal remedy inadequate where changes in business conditions affect the availability and price of the stock at the time of the action at law, or whether they have adopted an inflexible rule in this area is not clear. The latter seems more probable. But at least one case supports the first view. In a fairly late California case,[30] the court quoted with approval the following statement:

> "Indeed, it has been thought, that on contracts for stock a bill ought now to be maintainable generally in equity for a specific delivery thereof, upon the ground that a Court of Law cannot give the property, but can only give a remedy in damages, the beneficial effect of which depends upon the personal responsibility of the party."[31]

Patents and Patent Rights

The availability of specific performance in this area is based on the theory that the patent is of some peculiar and special value to the plaintiff and cannot be readily obtained in the market.[32] As this class of chattels is unique itself in that the vendor has a legal monopoly, the adoption of a more liberal policy is not necessary for specific performance to be obtained even in the most conservative courts. Even so, one court has expressly based relief upon such a liberal policy.[33]

Licenses

This class of chattel can also be said to be unique in itself, as it is not ordinarily obtainable in the market, but through the actions of third persons, over whom the court has no control.[34] The Indiana court in *Marion Trucking Co. v. Harwood Trucking, Inc.*[35] said:

> "There is no question but that the right to operate a particular part of an interstate transportation system is a unique property

[30] Karabek v. Weaver Aircraft Corp., 65 Cal. App. 2d 32, 149 P. 2d 876 (1944).
[31] *Id.* at 39, 149 P. 2d at 880. The statement quoted is that of Justice Story in 2 STORY, EQUITY JURISPRUDENCE § 994 (14th ed. 1918).
[32] E. F. Drew & Co., Inc. v. Reinhard, 170 F. 2d 679 (2d Cir. 1948); Goodyear Tire & Rubber Co. of Akron, Ohio v. Miller, 22 F. 2d 353 (9th Cir. 1927); Mississippi Glass Co. v. Franzer, 143 Fed. 501 (3d Cir. 1906); McFarland v. Stanton Mfg. Co., 53 N. J. Eq. 649, 33 Atl. 962 (1896); Whitcomb v. Whitcomb, 85 Vt. 76, 81 Atl. 97 (1911); Fuller & Johnson Mfg. Co. v. Bartlett, 68 Wis. 73, 31 N. W. 747 (1887). See also, 2 STORY, EQUITY JURISPRUDENCE § 996 (14th ed. 1918).
[33] No-Leak-O Piston Ring Co. v. Chandlee, 289 Fed. 526 (D. C. Cir. 1923).
[34] Watson Bros. Transp. Co. v. Jaffa, 143 F. 2d 340 (8th Cir. 1944); McLean v. Keith, 236 N. C. 59, 72 S. E. 2d 44 (1952); Lennon v. Habit, 216 N. C. 141, 4 S. E. 2d 339 (1939). See also, L. R. A. 1918E 597, 619-621.
[35] — Ind. App. —, 116 N. E. 2d 636 (1954).

> interest which cannot be obtained or transferred without Interstate Commerce Commission approval. Also, by way of comparison, it is obvious and axiomatic that the right to transport commodities for hire over any particular land route is as unique in character as the unique value which attaches to any particular piece of real estate and cannot be duplicated."[36]

New Jersey[37] disagrees with the granting of specific performance of contracts relating to licenses. This is due partially to its view that specific performance is an extraordinary remedy of equity and partially to the idea in that state that a license is in no sense property.[38]

Although most courts would provide equitable relief in this area, the existence of more sympathetic courts is evidenced by the fact that specific performance has been granted even where it becomes necessary for the court to supervise a business. A federal court in New York[39] specifically enforced a contract which provided for delivery to plaintiff of certain licenses and leases which were preparatory to the installation of certain machines. The court said:

> "[P]rotracted supervision of a business *should not* be assumed, but it is not true that it *cannot* be assumed. Everything depends on how insistently the justice of the case demands the court's assumption of difficult, unfamiliar, and contentious business problems. The tendency of the times is to take on harder and longer jobs."[40]

Businesses

Ordinarily specific performance will be granted for the sale of a business[41] unless the contract involved is for the sale of the "good-will" only, in which case, equity will not award relief.[42] The reason for the normal result is that ordinarily a similar business and location is unavailable in the market, and therefore, the plaintiff cannot be compensated in damages.[43] It has been held, however, that the mere fact that the contract involves a business does not, as a matter of right, permit the decree.[44]

[36] *Id.* at —, 116 N. E. 2d at 641.

[37] Rawlins v. Trevethan, 139 N. J. Eq. 226, 50 A. 2d 852 (1947); Mannion v. Greenbrook Hotel, Inc., 138 N. J. Eq. 518, 48 A. 2d 888 (1946); Navack v. Krauz, 138 N. J. Eq. 241, 47 A. 2d 586 (1946); Lachow v. Alper, 130 N. J. Eq. 588, 23 A. 2d 595 (1942); Walsh v. Bradley, 121 N. J. Eq. 359, 190 Atl. 88 (1937).

[38] Voight v. Board of Excise Comm'rs of City of Newark, 59 N. J. L. 358, 36 Atl. 686 (1896).

[39] Kerns-Gorsuch Co. v. Hartford-Fairmont Co., 1 F. 2d 318 (S. D. N. Y. 1921).

[40] *Id.* at 319-320.

[41] 49 AM. JUR., *Specific Performance* § 128 (1943).

[42] Zeigler v. Sentzer, 8 Gill & Johnson (Md.) 150, 29 Am. Dec. 534 (1836).

[43] Chamber of Commerce v. Barton, 195 Ark. 274, 112 S. W. 2d 619 (1937); Carolee v. Handelis, 103 Ga. 299, 29 S. E. 935 (1898); Brady v. Yost, 6 Idaho 273, 55 Pac. 542 (1898); Butler v. Wright, 186 N. Y. 259, 78 N. E. 1002 (1906); Cochrane v. Szpakowski, 355 Pa. 357, 49 A. 2d 692 (1946).

[44] Campbell v. Stetes, 300 Ky. 745, 190 S. W. 2d 347 (1945).

For instance, one court seems to require, before specific performance can be granted, that the contract must relate to that species of property which has a sentimental, peculiar, or unique value, such as heirlooms, portraits, furniture or antiques.[45] But opposed to this extreme position is that adopted by a court in New York[46] that the jurisdiction of equity to grant specific performance is no longer to be doubted in cases where compensation in damages will not furnish a complete and satisfactory remedy.

Building and Construction Contracts

Generally, it has been thought that specific performance of these contracts could not be decreed, because the decree would call for supervision by the court extending over a long period of time, or calling for a knowledge of technical matters which neither the court nor its officers could be expected to possess.[47] Also, it has been said that the remedy at law is ordinarily adequate compensation for the refusal to perform, because the plaintiff can have the work done by another and recover the increased costs as damages from the defendant.[48]

The English courts have established four exceptions to this rule, and in these cases specific performance will be granted; (1) where the agreement to build is defined and certain; (2) where the defendant has contracted to build on his own land and the plaintiff has a material interest therein; (3) where the defendant has agreed to build on land acquired by conveyance from the plaintiff; and (4) where there has been a part performance, and the defendant is enjoying the benefits.[49]

These exceptions have been recognized by some of the American courts, where, by reason of such circumstances, the remedy at law would be deemed to be inadequate.[50] Where public interest and convenience are at stake, courts of equity will go much further in either granting or denying specific performance, if such is in furtherance of the public interest, than they ordinarily would in cases of purely private interests.[51]

[45] *Id.* at 748, 190 S. W. 2d at 349.

[46] Johnson v. Brooks, 93 N. Y. 337 (1883), followed in Reo Stores v. Kent Stores, 118 N. Y. S. 2d (1952).

[47] Texas & P. R. Co. v. Marshall, 136 U. S. 393 (1889); Leonard v. Board of Directors of Plum Bayou Levee Dist., 79 Ark. 42, 94 S. W. 922 (1906); Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146 (1899); Bomer v. Canaday, 79 Miss. 222, 30 So. 638 (1901); Ward v. Newbold, 115 Md. 689, 81 Atl. 793 (1911); Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 253 Pa. 457, 98 Atl. 652 (1916). See also, 9 AM. JUR., *Building and Construction Contracts* § 124 (1943).

[48] London Bucket Co., Inc. v. Stewart, 314 Ky. 832, 237 S. W. 2d 509 (1951).

[49] 4 POMEROY, EQUITY JURISPRUDENCE § 1402 (5th ed. 1941).

[50] Herzog v. Atchison, T. & S. F. R. Co., 153 Cal. 496, 95 Pac. 898 (1908); Taylor v. Florida East Coast R. R., 54 Fla. 635, 45 So. 574 (1907); Jones v. Parker, 163 Mass. 564, 40 N. E. 1044 (1895); Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430 (1874); McCarter v. Armstrong, 32 S. C. 203, 10 S. E. 953 (1890).

[51] Virginia Ry. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor, 300 U. S. 515 (1932); Wheeling Traction Co. v. Board of Comm'rs of Belmont County, Ohio, 248 Fed. 205 (6th Cir. 1918);

The idea that the courts should not undertake supervision of construction work has been dispelled somewhat by the decision in *Board of Commissioners of Mattamuskeet Drainage District v. A. V. Wills & Sons*,[52] where the court adopted the following statement made by Chief Justice Fuller in *Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*:[53]

> "But it is objected that equity will not decree specific performance of a contract requiring continuous acts, involving skill, judgment, and technical knowledge. . . . We do not think so. . . . It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them."[54]

In this area a change in policy by the courts to respond to demands for equitable relief is apparent. First, exceptions were made to a hard and fast rule by which the courts refused to undertake supervisory duties. Then, doubt was cast on the force of the rule itself by courts who, realizing a need for expanding equitable remedies, undertook supervision of complicated transactions.

Uniform Sales Act

This act, which has been patterned after the English Sale of Goods Act,[55] has been adopted in about three-fourths of the jurisdictions in this country.[56] Section 68 of the Act reads as follows:

> "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of Equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just."

The author of this section, Professor Williston, stated in his treatise on Sales:

> "Courts of Equity have very closely restricted their jurisdiction in regard to contracts for the sale of personal property. It would sometimes promote justice if the courts were somewhat

Edison Illuminating Co. v. Eastern Pennsylvania Power Co., 253 Pa. 457, 98 Atl. 652 (1916).

[52] 236 Fed. 362 (E. D. N. C. 1916). [53] 163 U. S. 564, 600 (1896).

[54] Board of Comm'rs of Mattamuskeet Drainage District v. A. V. Wills & Sons, 236 Fed. 362, 380 (E. D. N. C. 1916).

[55] 56 & 57 VICT. 52 c. 71 (1893). [56] Note, 27 GEO. L. J. 793 (1939).

more ready to allow specific performance of contracts to sell goods in cases where for any reason damages did not seem adequate. This section of the act will perhaps dispose courts to enlarge somewhat the number of cases where specific performance is allowed."[57]

It appears that very few courts that have considered the Act have shared the views of Professor Williston. The courts have treated the section in three different ways:[58] (1) by granting specific performance in reliance upon the Act, even though it would have been granted without the aid of the Act;[59] (2) by granting specific performance under the Act, where it would not have been granted had it not been for the Act;[60] (3) by treating the Act as having made no change in the existing law.[61] Even though there are three different interpretations of the effect of the Act, it is no longer an important factor, as few courts have even mentioned it when faced with the question of specific performance of contracts in reference to personal property.[62] This Act, if liberally interpreted, should have been construed as it was written, that being, to enlarge the scope of specific performance.

Conclusion

The adequacy test, for the most part, remains a stumbling block to specific performance of chattel contracts. However, some courts have developed a more flexible approach[63] which emphasizes the needs of the parties rather than strictly adhering to the historical approach with its few exceptions. Much of the necessity for such a test has been lost through the fusion of law and equity under the codes, and today, the needs of modern business relations call for a more flexible rule.

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[57] 3 WILLISTON, SALES § 601 (2d ed. 1924).

[58] It is to be noted that Michigan appears in all three categories.

[59] Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 Atl. 378 (1929); Krause v. Hoffman, 239 Mich. 348, 214 N. W. 146 (1927); Diamond Lumber Co. v. Anderson, 216 Mich. 71, 184 N. W. 557 (1921).

[60] Michigan Sugar Co. v. Falkenhagen, 243 Mich. 698, 220 N. W. 760 (1928); Hughbanks v. Browning, 9 Ohio App. 114 (1917); Pittenger Equipment Co. v. Timber Structures, Inc., 189 Ore. 1, 217 P. 2d 770 (1950).

[61] G. C. Outten Grain Co. v. Grace, 239 Ill. App. 284 (1925); Tales v. Duplex Power Co., 202 Mich. 224, 168 N. W. 495 (1918).

[62] Masterson, *Specific Performance of Contracts to Deliver Specific and Ascertained Goods Under the English Sale of Goods Act and the American Sales Act*, LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY, 793 (1939).

[63] Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co., 163 U. S. 564 (1896); No-Leak-O Piston Ring Co. v. Chandlee, 289 Fed. 526 (D. C. Cir. 1923); American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 248 Fed. 172 (Ore. 1918); Karabek v. Weaver Aircraft Corp., 64 Cal. App. 2d 32, 149 P. 2d 876 (1944); Adams v. Messenger, 147 Mass. 185, 17 N. E. 491 (1888); Thompson v. Commonwealth of Virginia, 197 Va. 208, 89 S. E. 2d 64 (1955).

Estate Taxation—The Doctrine of Recriprocal Trusts

The doctrine of reciprocal trusts in the federal tax field had its humble beginning in 1940 when *Lehman v. Commissioner*[1] was decided[2] The doctrine rests upon the principle that "a person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust was created by another."[3] Thus, *A* creates a trust for the life benefit of *B* with remainders over and *B* creates a trust for the life benefit of *A* with remainders over.[4] These trusts would escape estate tax burdens entirely but for the "reciprocal" or "crossed" trusts doctrine, which looks to the substance of the transaction and thereby regards *A* as the grantor of the trust of which *B* was the nominal grantor.

Various provisions or powers may be crossed by the settlors: powers to alter, amend, revoke or terminate;[5] powers of appointment;[6] life estates;[7] and reversionary interests.[8] Crossing of any of these provisions may give rise to estate taxation if the trust would be included in the estate of a settlor who reserved those powers to himself[9] and if, in fact, the trusts are found to be reciprocal.

In order for the doctrine to apply, there must be an express finding that the trusts were in "consideration" of each other, which means the giving of a quid pro quo.[10] The term "consideration" has given the courts much difficuty. The predominant view seems to be that circum-

[1] 109 F. 2d 99 (2d Cir. 1940), *cert. denied* 310 U. S. 637 (1940).

[2] New Jersey had used the doctrine in 1932. *In re* Perry's Estate, 111 N. J. Eq. 176, 162 A. 146 (1932).

[3] Lehman v. Commissioner, 109 F. 2d 99, 100 (2d Cir. 1940), *cert. denied* 310 U. S. 637 (1940). See Marks, *The Switching of Settlors in Inter Vivos Trusts,* 26 TAXES 622 (1948) for a criticism of the doctrine.

[4] Reciprocity may exist in a series of trusts benefiting three or four settlors. See *In re* Jones' Estate, 350 Pa. 120, 38 A. 2d 30 (1944) and Commissioner v. Warner, 127 F. 2d 913 (9th Cir. 1942).

[5] 68A STAT. 383, 26 U. S. C. 2038 (1954). See Lehman v. Commissioner, 109 F. 2d 99 (2d Cir. 1940), *cert. denied* 310 U. S. 636 (1940); Hanauer's Estate v. Commissioner, 149 F. 2d 857 (2d Cir. 1945), *cert. denied* 326 U. S. 770 (1945); Newberry's Estate v. Commissioner, 201 F. 2d 874 (3d Cir. 1953); Commissioner v. Dravo, 119 F. 2d 97 (3d Cir. 1941). See also Colonial Trust Co. v. Commissioner, 111 F. 2d 740 (2d Cir. 1940).

[6] 68A STAT. 385, 26 U. S. C. 2041 (1954). See Fish v. Commissioner, 45 B. T. A. 120 (1941). See also Estate of Sinclaire v. Commissioner, 13 T. C. 742 (1942).

[7] 68A STAT. 382, 26 U. S. C. 2036 (1954). See Orvis v. Higgins, 180 F. 2d 537 (2d Cir. 1950), *cert. denied,* 340 U. S. 810 (1951); Cole's Estate v. Commissioner, 140 F. 2d 635 (8th Cir. 1944); McLain v. Jarecki, 126 F. Supp. 621 (N. D. Ill. 1955) (contingent life estates); Eckhardt v. Commissioner, 5 T. C. 673 (1945).

[8] 68A STAT. 382, 26 U. S. C. 2037 (1954). See Estate of Hill v. Commissioner, 23 T. C. No. 77 (1954).

[9] See Tobin v. Commissioner, 183 F. 2d 919 (5th Cir. 1950) (income tax), where *H* and *W* set up two trusts, the income of each was to be paid to the other spouse as the advisory committee should direct. See also Commissioner v. Dravo, 119 F. 2d 97 (3d Cir. 1941), where the corpus was to be advanced.

[10] Hanauer's Estate v. Commissioner, 149 F. 2d 857 (2d Cir. 1945), *cert. denied* 326 U. S. 770 (1945).

stances showing concert of action or interdependence will support the finding of consideration.[11] Opposed to this authority stands the Third Circuit which insists that the powers be bargained for and exchanged.[12] Although the commissioner's determination that the trusts were in consideration of each other is presumptively correct, the circuit courts have disagreed as to what kind of and how much evidence is needed to rebut this presumption.[13]

Various factors are weighed in making the necessary finding that one trust was in "consideration" of the other. In *Hanauer's Estate v. Commissioner*[14] the Second Circuit held that the simultaneous execution of the trust plus the wife's mental attitude of leaving investment matters in the hands of her husband were sufficient to support the Tax Court's finding that the trusts were made in consideration of each other. *Estate of Carrie S. Newberry*[15] also upheld the commissioner's determination where the trusts were created "after frequent consultations by decedent's husband with his financial advisors, and by the decedent and her husband with their attorney, and after discussions between themselves" even though the technical provisions and the form were determined by the lawyer.

It is particularly difficult to rebut the presumption of a tacit agreement or concert of action when the res of each trust is similar in amount, the beneficial interests are identical and the trusts are executed within a short time of each other.[16] In *Orvis v. Higgins*[17] the evidence showed that the trusts were created within six days of each other, that the two settlors consulted the same attorney within thirteen days of each other, but that neither settlor was present at the execution of the other's trust. Although all the evidence tended to show in a negative manner that neither trustor knew of the other's intention, the court held that it was error for the Tax Court to find no reciprocity since the clear inference from the facts was that there must have been a concert of action.

In those cases where the commissioner has been upheld, the courts have indicated that the presence of other motives does not affect the situation. For example, where the trusts expressed the motive of keeping the stock within the family, the court found this to be unimportant

[11] *Ibid.*
[12] Newberry's Estate v. Commissioner, 201 F. 2d 873 (3d Cir. 1953).
[13] McLain v. Jarecki, 126 F. Supp. 621 (N. D. Ill. 1955).
[14] 149 F. 2d 857 (2d Cir. 1945), *cert. denied* 326 U. S. 770 (1945).
[15] 1947 P-H T. C. Mem. Dec. 387, *aff'd per curiam* 172 F. 2d 220 (3d Cir. 1949).
[16] Estate of John H. Eckhardt, 5 T. C. 673 (1945). But see Estate of Lindsay v. Commissioner, 2 T. C. 174 (1943), where it was said that these factors were not conclusive that the trusts were interdependent and in consideration of each other. See also Wiebolt v. Commissioner, 5 T. C. 946 (1945) (income tax).
[17] 180 F. 2d 537 (2d Cir. 1950), *cert. denied* 340 U. S. 810 (1950).

as the grantors could have carried out this motive by giving the stock to their children without reserving crossed income provisions.[18]

Unfortunately all is not bread and gravy for the government, especially in the Third Circuit which has limited the *Lehman* doctrine to an *actual* consideration test.[19] Another court, following the position of the Third Circuit, has said: "If a person other than the nominal settlor is to be treated as the actual settlor for tax purposes he must have paid something of value to the nominal settlor."[20] When the court looks for an actual bargain and exchange of powers, mutual love and affection for the settlors' children is not regarded as legal consideration so as to bring the trusts within the scope of the reciprocity doctrine.[21]

Furthermore, when the actual consideration test is applied, the existence of other motives plays an important part in the determination of a case. The Third Circuit said that *W*'s motive of assuring *H* of independent wealth had a bearing on intentions with respect to unity of purpose, interdependence and consideration or lack of it and the court held that such a motive was one of the factors showing that the trusts were not reciprocal.[22] In *Newberry's Estate v. Commissioner*[23] the motive behind the creation of the trusts was to protect the children from improvident marriages. *H*'s trust was suggested by his brother and after making his decision, *H* discussed his trust with *W* as both handled the family's affairs. *W*, in creating a similar trust, told the attorney that if such an arrangement was good enough for *H*, it was good enough for her. Although the trusts contained identical securities and were executed at the same time, the court held that the reciprocal trust doctrine did not apply even though each time *H* added to his trust *W* did the same. Great stress was laid on the testimony of *H* that he would have created his trust regardless of whether *W* decided on a similar course.

[18] Cole's Estate v. Commissioner, 140 F. 2d 636 (8th Cir. 1944). See also Orvis v. Higgins, note 17 *supra*.

[19] See *In re* Leuder's Estate, 164 F. 2d 128 (3d Cir. 1947), which quotes with approval RESTATEMENT, CONTRACTS § 75 (1932): "Consideration for a promise is (a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise bargained for and given in exchange for the promise."

[20] McLain v. Jarecki, 126 F. Supp. 621, 625 (N. D. Ill. 1955).

[21] See McLain v. Jarecki, note 20 *supra* and *In re* Leuder's Estate, 164 F. 2d 128 (3d Cir. 1947).

[22] See Estate of Ruxton, 20 T. C. 487 (1953), where *H*, fearing that he would lose all of his property from a pending lawsuit, set up a trust which gave a life estate to his daughter and a contingent life estate to his wife with remainders over. On the same day *W* set up a trust giving *H* a life estate with remainders over. The court found that the only concert of action between *H* and *W* occurred in the final stages of the transaction. The court was further influenced by the fact that there was no quid pro quo in that, according to the court, if the trusts were uncrossed and each settlor regarded as the grantor of the trust of which he was the beneficiary, they would be placed in an untenable position in regard to the giving of quid pro quo to induce the action of the other.

[23] 201 F. 2d 874 (3d Cir. 1953).

Another important factor in the determination of a particular case is illustrated in *Estate of Lindsay v. Commissioner*[24] where *W* had told her son, who prepared the trusts, not to tell *H* that she was creating a trust similar to the one which he was creating. The court was satisfied that there was no tacit agreement or understanding between the settlors. The fact that the amounts were almost similar was explained by the testimony of the son that he suggested the amount of the res for *W*'s trust.

Thus, where the *actual* consideration test is applied, the taxpayer has more readily maintained the burden of proof that the trusts were not in consideration of each other.[25]

If the court holds that the trusts are reciprocal, the problem arises as to the amount includible in the estates. When the trusts are of unequal size, the general rule is that both trusts are taxable but only to the extent of the smaller trust.[26] When an addition is made to one of the trusts which have been found reciprocal and the addition makes the amounts of the two trusts equal, all is included even though the addition is made years after the trust was originally created unless surrounding circumstances and evidence show that the addition was a separate gift.[27]

It is submitted that the *actual* consideration test is a poor one. If a court has to find an act or promise bargained for and given in exchange for another act or promise,[28] many transfers of a testamentary nature will escape taxation. It is obvious that motives should not be an escape device because if the taxpayers want "to keep the stock in the family"[29] or "to protect their children from improvident marriages"[30] they could accomplish the same resput by making a gift in trust to their children without reserving crossed powers such as life estates which under 2036 of the Code are testamentary dispositions.

[24] 2 T. C. 174 (1943). See also Newberry's Estate v. Commissioner, 201 F. 2d 874 (3d Cir. 1953) and Estate of Ruxton, note 22 *supra*.

[25] See Estate of Arnold Resch v. Commissioner, 20 T. C. 171 (1953), where two months before *W* set up a trust for the benefit of *H*, *H* had given her $100,000 worth of bonds which became the corpus. No conditions were attached to the gift. *W* had requested a bank to help her invest the bonds and a trust was suggested. *W* talked this over with *H* and secured his cooperation before creating the trust that the bank had suggested. It was held that these facts did not warrant a finding that she was acting in concert with *H* so as to make him the settlor. See also Welch v. Commissioner, 8 T. C. 1139 (1947) (income tax).

[26] See *e.g.*, Estate of Oliver, 1944 P-H T. C. Mem. Dec. 138; Estate of Frederick S. Fish, 45 B. T. A. 120 (1941). See Estate of Carolyn Peck Boardman, 20 T. C. 871 (1953), where the settlor of the smaller trust died. Under Rule 50 his estate was taxed by multiplying the value of the cross trust at his death by the following fraction: the value of the property at the time transferred by the decedent *over* the value of the property at the time transferred by the other settlor. See Note, 38 A. L. R. 2d 522, 527 (1954).

[27] Estate of Carolyn Peck Boardman, 20 T. C. 871 (1953) (four years).

[28] This test was used in *In re* Leuder's Estate, 164 F. 2d 128 (3d Cir. 1947).

[29] See Cole's Estate v. Commissioner, 140 F. 2d 636 (8th Cir. 1944).

[30] Newberry's Estate v. Commissioner, 201 F. 2d 874 (3d Cir. 1953).

Unless the transactions are taxed in the donors' estates, the use of reciprocal trusts allows a taxpayer to rid his estate of assets at gift tax rates and at the same time receive valuable lifetime economic powers in return.[31] This coupled with the fact that he has, at the same time, given identical economic benefits to a member of his family, who also escapes estate taxation, should justify remedial legislation.[32]

The Third Circuit has recognized that the *actual* consideration test applied in that court is substantially different from the so-called *inferred* consideration test. It has suggested that the situation could be cured by legislation which would treat these transfers as a single joint transaction and thereby regard each of the settlors as a pro tanto transferor of the res over which he has control.[33] It is submitted that this statutory solution would be an equitable one in that the inherent nature of the normal family relationship is one of interdependence and concert of action.[34]

HERBERT S. FALK, JR.

Gift and Inheritance Taxation of Community Property by Common Law States

Generally, when a transfer of property occurs by gift or upon the death of an individual, its taxability depends upon the policy within the taxing jurisdiction and upon the extent of the interest transferred. Granting that the problem of determining the extent of the interest transferred is often a difficult one, it becomes more complex when community property is transferred by a husband to his wife due to the prior interest of the wife which must be taken into account. It is a novel situation when this problem arises within a common law jurisdiction, and several recent decisions merit analysis.

The problem, as it relates to gift taxation, recently confronted the Virginia Supreme Court of Appeals in *Commonwealth v. Terjen.*[1] A

[31] See Phillips v. Gnichtel, 27 F. 2d 662 (3d Cir. 1928), *cert. denied* 278 U. S. 636 (1929), where the taxpayer argued that reciprocal trusts which were in contemplation of death should be treated as a bona fide sale. See also Estate of Scholler v. Commissioner, 44 B. T. A. 235 (1940).

[32] See Technical Changes Act of 1949, 63 STAT. 893 § 6 (1949), where Congress impliedly approved the "judicial fiction" of the *Lehman* case by allowing, for a limited time, a tax free rescission of reciprocal trusts.

[33] Newberry's Estate v. Commissioner, 201 F. 2d 874, 878 (3d Cir. 1953). It would seem that the legislation would be more equitable if it established a conclusive presumption of consideration when the trusts with crossed powers are created by members of one family within two years of each other. If the second trust is established more than two years after the first, the commissioner should be required to prove that each trust was in consideration of the other. Thus, the taxpayers would have a certain amount of freedom in disposing of their property.

[34] See in general Notes, 42 CALIF. L. REV. 151 (1954) and 38 A. L. R. 2d 522 (1954).

[1] — Va. —, 90 S. E. 2d 801 (1956).

husband and wife, while domiciled in California, acquired a substantial amount of community personal property under the laws of California.[2] After moving to Virginia, they used a portion of the community funds to pay for a home located in Virginia, title to which was taken in the name of the wife. The Virginia Department of Taxation assessed the husband with a gift tax based upon the full value of the property.[3] The husband contested this assessment on the theory that his wife had a one-half vested interest in the community funds; that this interest was not divested by their change of domicile; and that therefore he should be assessed only for the transfer of his one-half interest in the property. It was held that the husband was taxable for the full value of the property. While the court agreed that the character of community property is not affected by a change of domicile,[4] it took the position that a wife does not have a vested interest in community property under the laws of California, and that this transfer of community funds from the husband to his wife constituted a gift of the full value of the property.[5]

In contrast to this Virginia decision is a 1954 opinion of the Attorney General of North Carolina,[6] in which an opposite conclusion was reached upon identical facts. A husband and wife moved from California to North Carolina, purchased a home in North Carolina with community funds, and placed the title in the name of the wife. The Attorney General stated that the husband thereby made a gift of one-half of the purchase price of the home and thus was liable for a gift tax[7] only on that one-half value. This result was founded on the theory that in California the interests of the husband and wife in community property are "pres-

[2] Sections 162 and 163 of the California Civil Code define separate property of each sponse as "All property owned by the [spouse] before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues, and profits thereof. . . ." CAL. CIVIL CODE ANN. (West 1954). Section 164 then defines community property as "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state. . . ." *Ibid.*

[3] For applicable gift tax statutes, see VA. CODE ANN. §§ 58-218, 58-219, and 58-223 (1950).

[4] The general rule is that "a change of domicile from a state where the community property law prevails to a common law state does not affect the community character of property previously acquired. The law of the state to which the parties remove will regulate their future conduct and acquisitions, but the removal will not alter the rights of either to property then in possession, the title to which had vested under the community property law." 11 AM. JUR., *Community Property* § 16 (1937). See also 92 A. L. R. 1352 (1934).

[5] See the discussion of the court, Commonwealth v. Terjen, — Va. —, 90 S. E. 2d 801, 802-804 (1956).

[6] Op. N. C. Atty. Gen., C C H INH., EST. & GIFT TAX REP. ¶ 18,156 (February 23, 1954).

[7] For applicable gift tax statutes, see N. C. GEN. STAT. §§ 105-188 through 105-191 (1950).

ent, existing and equal,"[8] and that the wife's interest is a "present vested right."[9]

As it relates to inheritance taxation, this problem was recently considered in an opinion of the Attorney General of Maryland[10] and in a decision of the Supreme Court of Montana.[11]

The Maryland opinion involved community property acquired by the husband and wife while domiciled in Texas.[12] They moved to Maryland, where the husband later died leaving all his property (after a few specific bequests) to his surviving wife. Based on the conclusion that the wife has a present vested interest in one-half of Texas community property,[13] the Attorney General was of the opinion that (1) community property acquired in Texas, the character of which had never changed, should be taxed[14] only on the one-half interest of the husband passing to the wife; (2) property acquired in Maryland with community funds, title to which was in the husband alone, should be taxed at its full value;[15] and (3) property acquired in Maryland, to which there is no evidence of record title, should be taxed at one-half value if purchased with community funds.[16]

In the Montana case, *In re Hunter's Estate*,[17] the husband and wife acquired community property while domiciled in California. Although they never left that state, the husband purchased in his name with community funds both personal and real property located in Montana. The

[8] Op. N. C. Atty. Gen., *supra* note 6, at 90,209.

[9] *Ibid.* The Attorney General also states: "Had the title been taken in the name of the hubsand the transaction would have been a gift of one-half the original price by the wife to the husband, unless the circumstances were such as to give rise to a presumption that the property was to be held in trust for the wife." *Ibid.* As an example of such a resulting trust, see Depas v. Mayo, 11 Mo. 314 (1848), where, after a divorce, the wife had the court impose a trust as to one-half of property which had ben purchased in the husband's name with community funds.

[10] Op. Md. Atty. Gen., C C H INH. EST. & GIFT TAX REP. ¶ 18,385 (May 27, 1955).

[11] *In re* Hunter's Estate 125 Mont. 315, 236 P. 2d 94 (1951).

[12] Community property in Texas is defined as "All property acquired by either the husband or wife during marriage, except that which is the separate property of either. . . ." TEX. CIVIL STAT. ANN. art. 4619, § 1 (Vernon 1951).

[13] In Texas the rights of the husband and wife are considered equal, and each is considered as having a vested beneficial interest in the community. When legal title is in the husband, the wife's interest is equitable but vested. Davis v. Davis, 186 S. W. 775 (Tex. Civ. App. 1916); Burnham v. Hardy Oil Co., 108 Tex. 555, 195 S. W. 1139 (1917).

[14] For the applicable inheritance tax statutes, see MD. CODE ANN. art. 81, §§ 148, 150 (1951).

[15] The Attorney General thought that, as a practical matter, the Register of Wills should not be required to look beyond record title to determine the ownership of such property. Op. Md. Atty. Gen., C C H INH. EST. & GIFT TAX REP. ¶ 18,385 at 90,728-90,729 (May 27, 1955).

[16] "This conclusion is supported by those opinions in which an implied exemption from the inheritance tax was allowed by reason of the fact that an adequate consideration was paid by the recipient of the property for his interest." *Id.* at 90,729.

[17] 125 Mont. 315, 236 P. 2d 94 (1951).

husband died in California, leaving all the Montana property to his wife. The Montana court imposed an inheritance tax[18] on the full value of the property on the theory that the privileges of the wife in California community property were not yet those of ownership as to give the wife a vested interest sufficient "to overcome the presumption that title is where the record puts it."[19]

Thus, it is seen from a discussion of decisions in four states that their determination of the extent of interest transferred depended primarily upon whether the wife had a "vested interest" in one-half of the community property. Each decision assumed that if the wife had such an interest only the husband's half could be made the subject of a "transfer," and in order to determine the nature of her interest each looked to the laws of the state where the property was originally acquired. Furthermore, each decision seems to have hinged its tax results on whether the mere *label* of "vested" had been affixed, without analyzing the property rights of the wife to determine whether, regardless of the label, a sufficient interest nevertheless did pass beneficially to her as a result of the transfer.[20] And in determining whether or not such label had been attached to the interest of the wife in California North Carolina differed from Virginia and Montana.

The first question arises in connection with the dispute whether or not the wife's interest in California has been labeled as "vested." To determine which decision or decisions stated the correct view it will be necessary to look at California law.

Prior to 1927, it was clearly established that the wife's interest had never been regarded as a "vested" interest.[21] Because of this, in 1926

[18] For the applicable inheritance tax statute, see MONT. REV. CODE § 91-4401 (1947).

[19] *In re* Hunter's Estate, 125 Mont. 315, 324, 236 P. 2d 94, 99 (1951).

[20] This is not to say that the decisions ignored the rights of the wife in their discussions. Actually, the Virginia, Maryland and Montana decisions discussed many aspects of the rights of the wife in community property. But due to their concern over whether the community property state had merely designated the wife's interest as "vested," the decisions left the impression that what was important in determining the extent of the wife's interest was not the extent of her substantive rights but whether such rights had ever been labeled as "vested." From the nature of their discussions, it is very likely that, even if the wife had no property rights whatsoever in California community property, Virginia and Montana would nevertheless have taxed the transfers only at one-half value, if they could have determined that California courts had ever labeled the interest of the wife as "vested."

[21] As early as 1860, it was established that the wife's interest in California community property was a "mere expectancy, like the interest which an heir may possess in the property of his ancestor." Van Maren v. Johnson, 15 Cal. 308, 312 (1860). In 1896, the Supreme Court of California said that the wife had no right or title of any kind in the property, and had at most a "possible interest in whatever remains upon dissolution of the community otherwise than by her own death." *In re* Burdick, 112 Cal. 387, 393, 44 Pac. 734, 735 (1896). Twelve years later, in 1908, the court held that since the wife, upon the death of the husband, takes a one-half interest as heir, her interest is subject to inheritance taxes. Estate of

the United States Supreme Court ruled that the husband and wife in California could not submit separate returns in reporting income from community property for federal income tax purposes.[22] At the next session of the California legislature, in 1927, a statute was passed defining the interests of the husband and wife as "present, existing and equal . . . under the management and control of the husband. . . .";[23] and in 1931, the United States Supreme Court interpreted this statute to indicate that the wife now had a "vested" interest in the community property, and could file a separate return for her interest in community income.[24]

The fact remains, however, that the California legislature did not use the label "vested" in defining the wife's interest in the 1927 statute. The question of whether that result was intended by implication has never been presented to the Supreme Court of California, though in 1941 that court, by way of *dictum,* stated that "section 161a of the Civil Code does not change the nature of the wife's interest to a vested one. . . ."[25] And

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Moffitt, 153 Cal. 359, 95 Pac. 653 (1908). This decision was overturned by the legislature, however, in 1917, when a statute was passed exempting the wife's interest from such taxation. CAL. STAT. 1917, p. 881. The statute today is CAL. REVENUE AND TAXATION CODE ANN. § 13551(b) (Deering 1952). This latter statute reads: "Upon the death of the husband: . . . (b) The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part." Interpreting this statute in 1926, the court stated that it did not operate to create a "vested" interest in the wife, but that nevertheless she did now possess more interest than an ordinary heir. Stewart v. Stewart, 199 Cal. 318, 340, 342, 249 Pac. 197, 206, 207 (1926). Other rights which the wife had acquired at the time of this decision were the right to join in conveyances of real property for periods longer than one year, the right to secure a division of the community property without dissolving the marital relation when she had cause for divorce, and the right to dispose of one-half of the community property by will. However, the California courts had not labeled her bundle of rights as "vested." See Simmons, *The Interest of a Wife in California Community Property,* 22 CALIF. L. REV. 404, 407, 409-410 (1934).

[22] United States v. Robbins, 269 U. S. 315 (1926).

[23] CAL. CIVIL CODE ANN. § 161a (West 1954). This section further states: "This section shall be construed as defining the respective interests and rights of husband and wife in community property."

[24] United States v. Malcolm, 282 U. S. 792 (1931). This privilege had already been extended to the community property states of Washington, Arizona, Texas and Louisiana. Poe v. Seaborn, 282 U. S. 101 (1930); Goodall v. Kock, 282 U. S. 118 (1930); Hopkins v. Bacon, 282 U. S. 122 (1930); Bender v. Pfaff, 282 U. S. 127 (1930). It should be noted that the federal courts also recognized the wife's interest as "vested" after the 1927 California statute in the field of estate taxation. As to property acquired prior to 1927, the entire value of the community property was includible in the estate of the decedent who acquired the property. Rule v. United States, 63 F. Supp. 351 (Ct. Cl. 1945); Sampson v. Welch, 23 F. Supp. 271 (S. D. Cal. 1938). But as to property acquired after 1927, community property was includible in the estate of the decedent only to the extent of one-half of its value, if under the law of the state the wife had a vested interest in her half. Lang v. Commissioner, 304 U. S. 264 (1938); Rickenberg v. Commissioner, 177 F. 2d 114 (9th Cir. 1949).

[25] Grolemund v. Cafferata, 17 Cal. 2d 679, 686, 111 P. 2d 641, 644 (1941). This statement was important to the decision, however, since the court actually held that the community property was liable for the husband's debts. *Id.* at 689, 111 P. 2d at 646.

intermediate appellate courts in California have interpreted the statute in the same manner.[26]

Thus, it appears that the Virginia and Montana decisions arrived at the correct conclusion as to the nature of the wife's interest in California, as interpreted by the California legislature and courts.[27]

Therefore, putting the North Carolina decision aside, the other decisions (Virginia, Montana and Maryland) show this distinction: since the wife's interest in California has not been labeled as "vested," the full value of the property transferred to the wife was taxed by Virginia and Montana, but since the wife's interest in Texas has been so labeled,[28] only the value of the husband's one-half interest passing to the wife was taxed by Maryland. In view of the differing tax consequences in those decisions, the second and more important question arises: Is the label "vested" a valid criterion for determining the extent of the interest transferred? To answer this question it is necessary to compare the substantive rights of the wife in each state involved in the decisions, California and Texas.

For purposes of clarification, in comparing the substantive rights of the wife in each state, it will be helpful to consider first their similarities. In each state the wife has the right to dispose of her one-half interest by will,[29] the right to take one-half of the community property free of inheritance taxes when the husband predeceases her,[30] and the right to a distribution of the community property upon divorce.[31] She does not

[26] The intermediate appellate court interpretations were made incident to holdings that community property cannot be attached by a trustee in bankruptcy for the benefit of the wife's judgment creditors, Smedberg v. Bevilockway, 10 Cal. App. 2d 578, 46 P. 2d 820 (1935), nor applied by a judgment of the court to satisfy a married daughter's liability for support of her mother, Grace v. Carpenter, 42 Cal. App. 2d 301, 108 P. 2d 701 (1941).

[27] There is a division of opinion among law review writers as to the intention of the legislature in passing the 1927 statute. One has significantly pointed out that her local rights and remedies remain the same, Cahn, *Federal Taxation and Private Law*, 44 COLUM. L. REV. 669, 676 (1944), and the most recent writer is of the opinion that perhaps the legislature intended only to permit the husband and wife to file separate federal income tax returns without overturning previous statements of the courts as to the nature of her interest, Marsh, *California Family Law—A Review*, 42 CALIF. L. REV. 368, 373-374 (1954). See also: Hooker, *Nature of Wife's Interest in Community Property in California*, 15 CALIF. L. REV. 302 (1927); Horne, *Community Property—A Functional Approach*, 24 So. CALIF. L. REV. 42 (1950); Kirkwood, *The Ownership of Community Property in California*, 7 So. CALIF. L. REV. 1 (1933); Simmons, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404 (1934); Recent Legislation, 16 CALIF. L. REV. 63, 68 (1927); 23 So. CALIF. L. REV. 237 (1950).

[28] See note 13 *supra*.

[29] CAL. PROBATE CODE ANN. § 201 (1956); Cook v. Spivey, 174 S. W. 2d 634 (Tex. Civ. App. 1943).

[30] CAL. REVENUE AND TAXATION CODE ANN. § 15301 (Deering 1952); Jones v. State, 5 S. W. 2d 973 (Tex. Comm. App. 1928).

[31] CAL. CIVIL CODE ANN. § 146 (West 1954); TEX. CIVIL STAT. ANN. art. 4638 (Vernon 1951).

have the right to alienate, to encumber, or to manage or control her interest during coverture.[32] Only the husband has these rights.[33]

On the other hand, the interest of the wife in each state are slightly dissimilar in several respects. In California the wife must join in conveyances of community property for a period of more than one year.[34] In Texas the wife is not required to join in conveyances, and the husband may convey in fraud of her interest, but his separate estate may become liable to the community for her loss.[35] In California the wife's interest is not liable for tort judgments against the wife, whereas in Texas it has been held to be so liable.[36] In Texas if the husband disappears for more than one year, the wife by petition to the courts can obtain all the rights which her husband exercised over the community property.[37] This privilege does not seem to exist in California, though perhaps somewhat the same result is reached in the latter state when the wife obtains a division of the property upon legal separation from the husband.[38] Lastly, by recent constitutional amendment, the husband and wife in Texas may voluntarily partition the community property and hold their interests separately thereafter.[39] There is no express constitutional or statutory authority for such a partion in California, but the husband and wife may contract between themselves to hold their property separately.[40]

Thus, it is seen that though Texas and California differ in labeling the wife's interest, the rights of the wife in both states are substantially the same, and that the variance in labeling could not be founded upon any substantial differences between basic substantive rights of the wife in each state. Furthermore, the reliance in the decisions upon the label of "vested" does not seem to justify the differing consequences, and it would therefore seem reasonable to conclude that the label is meaningless

[32] CAL. CIVIL CODE ANN. §§ 172 and 172a (West 1954); TEX. CIVIL STAT. ANN. arts. 4619 and 4621 (Vernon 1951). Under article 4619, it would seem that the Texas wife cannot sell her interest, since only the husband is given a power of disposal during coverture, and under article 4621 the community property is not liable for debts or damage resulting from contracts of the wife; however, such property is stated to be liable for necessaries furnished the wife or children. In California, under section 174 of the Civil Code, the husband is liable for necessaries furnished the wife or children.

[33] *Ibid.*

[34] CAL. CIVIL CODE ANN. §§ 172 and 172a (West 1954).

[35] Graves v. Guaranty Bond State Bank, 161 S. W. 2d 118 (Tex. Civ. App. 1942); Rudasill v. Rudasill, 219 S. W. 843 (Tex. Civ. App. 1920).

[36] CAL. CIVIL CODE ANN. § 167 (West 1954); Patterson v. Frazer, 93 S. W. 146 (Tex. Civ. App. 1906).

[37] TEX. CIVIL STAT. ANN. art. 4619 (Vernon 1951).

[38] CAL. CIVIL CODE ANN. § 146 (West 1954).

[39] TEX. CONST. art. 16, § 15 (Vernon 1955). See also TEX. CIVIL STAT. ANN. art. 4624a (Vernon 1951).

[40] See CAL. CIVIL CODE ANN. § 159 (West 1954): "A husband and wife cannot, by any contract with each other, alter their legal relations, *except as to property.* . . ." (Emphasis added.) See Essick v. United States, 88 F. Supp. 23 (S. D. Cal. 1949), where the husband and wife agreed to hold community property as tenants in common.

as a criterion for determining the extent of the interest transferred when community property passes from a husband to his wife by gift or upon his death.

It is evident from the rights of the wife detailed above that when a husband transfers community property to his wife, she then for the first time receives certain important property rights in her one-half interest. Whether the transfer of those rights is so insignificant as not to warrant taxation of course depends largely upon individual state taxing policy.[41] However, before the tax consequences are resolved, the extent of the interest transferred should be determined and brought into a proper perspective with the taxing policy. It is submitted that common law states, when confronted with the problem of taxing transfers of community property from a husband to his wife, can more realistically accomplish this determination by analyzing the actual substantive rights possessed by the wife before and after the transfer—and not by relying upon the sometimes vague and meaningless label of "vested."

J. THOMAS MANN.

Real Property—Conveyances between Spouses—Creation and Dissolution of Estates by the Entirety

In North Carolina, a married woman can make a valid conveyance to her husband of her real property[1] only if the instrument of conveyance contains a certificate by the certifying officer of his findings of facts and conclusions as to whether the deed is unreasonable or injurious to her.[2] The certificate is based on a private examination of the wife.[3]

[41] New York, for example, has a specific estate tax statute (similar to the federal statute in effect from 1942 to 1948) in regard to community property. It states that the gross estate of a decedent shall include property "held as community property by the decedent and surviving spouse under the law of any state . . . or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services rendered by the surviving spouse or derived originally from such compensation or from the separate property of the surviving spouse. In no case shall such interest included . . . be less than the value of the community property as was subject to the decendent's power of testamentary disposition." N. Y. TAX LAW § 249-r (5-a). Where all the community property passes to the wife upon the husband's death, it has been held, under this statute, that the entire amount of property was includible in the husband's gross estate. *In re* Walk's Estate, 192 N. Y. Misc. 237, 79 N. Y. S. 2d 645 (Surr. Ct. 1948).

[1] N. C. CONST. art. X, § 6. "The real and personal property of any female in this State . . . may be devised and bequeathed, and, with the written consent of her husband, conveyed by her as if she were unmarried." See also Perry v. Stancil, 237 N. C. 442, 75 S. E. 2d 512 (1953) (The wife conveyed her separate estate to her husband without his written consent. The court held that art. X, § 6 of the Constitution did not apply to the conveyance to the husband. The provision applies only to conveyances to third parties.)

[2] N. C. GEN. STAT. § 52-12(b) (1955).

[3] N. C. GEN. STAT. § 52-12(a) (1955).

In a recent case,[4] a wife owned two tracts of land in fee. By deed, she and her husband conveyed the property to a third party. No certificate by the certifying officer that the instrument was not unreasonable or injurious to her was annexed to the deed. Later the same day, both tracts were conveyed by the third party to the wife and husband in form sufficient to create a tenancy by the entirety. It was held that the deed from the wife to the the third party was void for failure to comply with the provisions of G. S. 52-12.[5] The court said that the wife could not do indirectly, by such non-compliance, what she could not do directly; therefore, the attempt to create the tenancy by the entirety in the wife's property was unsuccessful.

The requirements in North Carolina for the creation of tenancies by the entirety by conveyance between the spouses are not clear. At common law, when a married man wanted to create a tenancy by the entirety in himself and his wife with his solely owned property, it was necessary for him to convey to an intermediate third party who immediately conveyed the property to the husband and wife as tenants by the entirety.[6] This transaction was required to make present the five unities of time, title, interest, possession and person necessary to create the tenancy.[7] The anachronism of conveying through a straw man to create a tenancy by the entirety in property owned by one of the spouses has not been repudiated in North Carolina.

The jurisdictions that recognize tenancy by the entirety[8] are in sharp disagreement as to the validity of such a tenancy created by a *direct* conveyance from one spouse to both. One line of authority follows the common law precedent.[9] In these jurisdictions a direct conveyance is invalid because the common law unities of time and title necessary to

[4] Davis v. Vaughn, 243 N. C. 486, 91 S. E. 2d 165 (1956). *Cf.* McCullen v. Durham, 229 N. C. 418, 50 S. E. 2d 511 (1948) (Wife's property was conveyed by the wife, with her husband's joinder, to a third person. Seven months later the property was conveyed by the third person to the husband. The deed from the wife contained no certificate that it was not unreasonable or injurious to her. The court held that the transaction was not void because it clearly appeared that the first deed was not made "with any view to accomplishing an indirect conveyance of the [wife's] property to her husband.")

[5] At the time the deed in question was executed, the statute did not provide for a private examination of the wife. N. C. Sess. Laws 1945, c. 73, § 19, as amended by N. C. Sess. Laws 1947, c. 111 and N. C. Sess. Laws 1951, c. 1006, § 2.

[6] 4 POWELL ON REAL PROPERTY 659 (1954).

[7] *Id.* at 653.

[8] Tenancy by the entirety has importance in only twenty-one states. It has been eliminated or is absent in the remainder of the states. *Id.* at 655.

[9] Edge v. Barrow, 316 Mass. 104, 55 N. E. 2d 5 (1944); Ames v. Chandler, 265 Mass. 428, 164 N. E. 616 (1929); Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617 (1911); Stone v. Culver, 286 Mich. 263, 282 N. W. 142 (1938) (Tenancy by the entirety was not created, but because the wife used her old name as grantor and her new name as grantee, the court held that her heirs were estopped to assert that the tenancy had not been created.); Richardson v. Richardson, 111 Vt. 140, 11 A. 2d 227 (1940).

create the tenancy by the entirety are lacking.[10] Thus, it is held that the very nature of the tenancy makes it necessary to convey through an intermediary.

A growing minority,[11] led by New York,[12] has taken a different and more liberal approach to the problem. The theory that a direct conveyance is invalid because the unities of time and title are lacking has been displaced by the theory that the spouse is not conveying the property to himself, as such, and to his wife, but to a legal entity composed of the husband and wife.[13] Therefore, the conveyance to the intermediate straw man is not necessary.

The North Carolina Supreme Court has not directly faced this problem. However, there is a basis for the adoption of the New York rule, at least if the property was originally owned by the husband. Our court has long held that a tenancy by the entirety is vested in one person—the "husband and wife."[14] Since the objection to a direct conveyance is that the husband, in a sense, is conveying the property to himself, the separate entity concept of "husband and wife" would render nugatory such an objection. The husband would not be conveying the property to himself, but to a recognized separate entity—"husband and wife."

The same reasoning should apply if the property is originally owned by the wife. The New York rule that a tenancy by the entirety may be created by a direct conveyance by the husband or wife to themselves of property owned by one of them is logical and reasonable. The refusal by a court to give credence to such a transaction "would be a judicial conveyance of the property contrary to the owner's expressed intention."[15] The direct conveyance would require the execution and recordation of a single deed, while a conveyance through a straw man would require the execution and recordation of two separate deeds.[16] Nevertheless, there is considerable doubt that a conveyance by the wife to herself and her husband would create a tenancy by the entirety in North Carolina. Our court has not directly passed upon the problem, but it has held that an attempted conveyance by a third party to the husband and

[10] "In the attempt to create an estate by entirety, in the case under consideration, neither the unity of time nor title was observed. The estate was not created by one and the same act, neither did it vest in them at one and the same time." Pegg v. Pegg, 165 Mich. 228, 230, 130 N. W. 617, 618 (1911).

[11] Ebrite v. Brookhyser, 219 Ark. 676, 244 S. W. 2d 625 (1951); Herr v. Herr, 13 N. J. 79, 98 A. 2d 55 (1953); Boehringer v. Schmid, 254 N. Y. 355, 173 N. E. 220 (1930); *In re* Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915).

[12] The leading case is *In re* Klatzyl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915), explained in Boehringer v. Schmid, 254 N. Y. 355, 173 N. E. 220 (1930).

[13] *Ibid.*

[14] Davis v. Bass, 188 N. C. 200, 204, 124 S. E. 566, 568 (1924). Stacy, J., in listing some of the properties and incidents of tenancy by the entirety stated: "In the eyes of the law an estate by the entirety is vested in one person—the husband and wife."

[15] 2 TIFFANY, REAL PROPERTY 225 (1939).

[16] N. C. GEN. STAT. § 47-18 (1950).

wife as tenants by the entirety will be considered a conveyance to the wife alone when she has furnished all of the consideration.[17] Thus, an estate by the entirety, with rights of survivorship, can be created only if the husband is jointly entitled to the property as well as jointly named in the deed.[18] The basis for the distinction is that a married woman is presumed to have acted under the coercion of her husband.[19]

Another problem arises when a husband and wife own the property as tenants by the entirety and one of them wants to convey his interest to the other. Such a conveyance is valid in several jurisdictions.[20] The position of the North Carolina Supreme Court on this is at least partially clear. If the conveyance is made by the husband of his interest in the estate by the entirety, he will be estopped upon the death of his wife to claim the property by survivorship and the property will go to the heirs or devisees of the wife.[21] By the use of the doctrine of estoppel, the court has found it unnecessary to determine whether the deed is valid as a conveyance.[22] No North Carolina authority concerning similar conveyances by the wife has been found.[23]

These problems could be solved most effectively by the passage of a remedial statute. Such a statute is proposed as follows:

> Conveyances between spouses; creation and dissolution of estates by the entirety.
>
> (1) A conveyance from a husband or wife to the other of an undivided one-half interest in real property, by which the grantor retains a like undivided one-half interest, vests the title to the real property in the husband and wife as tenants by the entirety, provided words are used indicating an intention to create an estate by the entirety.
>
> (2) A conveyance from a husband or wife to the other of the

[17] Ingram v. Easley, 227 N. C. 442, 42 S. E. 2d 624 (1947); Carter v. Oxendine, 193 N. C. 478, 137 S. E. 424 (1927).

[18] Davis v. Vaughn, 243 N. C. 486, 91 S. E. 2d 165 (1956); Ingram v. Easley, 227 N. C. 442, 42 S. E. 2d 624 (1947); Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910 (1908).

[19] Carter v. Oxendine, 193 N. C. 478, 137 S. E. 424 (1927); Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910 (1908). If the husband conveys land to his wife, it is presumed that it is a gift to the wife. Shue v. Shue, 241 N. C. 65, 84 S. E. 2d 302 (1954); Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. 2d 418 (1945) (The presumption is one of fact and is rebuttable.); Rudasill v. Cabaniss, 225 N. C. 87, 33 S. E. 2d 475 (1945).

[20] Hunt v. Covington, 145 Fla. 706, 200 So. 76 (1941); Enyeart v. Kepler, 118 Ind. 34, 20 N. E. 539 (1889).

[21] Keel v. Bailey, 224 N. C. 447, 31 S. E. 2d 362 (1944); Willis v. Willis, 203 N. C. 517, 166 S. E. 398 (1932); Capps v. Massey, 199 N. C. 196, 154 S. E. 52 (1930).

[22] Cases cited note 19 *supra*.

[23] See Elson v. Elson, 245 Mich. 205, 222 N. W. 176 (1928), where a conveyance by a wife to her husband of her interest in property held by them as tenants by the entirety was held a release of the wife's interest in the property.

grantor's interest in real property held by them as tenants by the entirety dissolves the estate and vests the complete title in the grantee.[24]

FRANK J. HOLROYD, JR.

Torts—Carriers—Termination of the Carrier-Passenger Relationship

The high degree of care a common carrier owes to its passenger[1] necessarily terminates when the carrier-passenger relationship ceases to exist. Hence it has become incumbent upon courts to fashion standards against which facts may be tested in order to ascertain the existence or non-existence of a carrier-passenger relationship.

Journey's End

Whether a carrier-passenger relationship has terminated often depends upon the type of common carrier involved and upon the physical place of the journey's end. If the passenger is discharged at a railroad carrier's station, the general rule is that the relation of carrier and passenger continues until the passenger has had a reasonable time and opportunity to leave the carrier's premises.[2] The same rule applies when the passenger alights at a bus station[3] or at an airline terminal.[4] The

[24] Based on OR. REV. STAT. § 108.090 (1953).

[1] For a note on the degree of care a common carrier owes to its passenger, see Note, 17 N. C. L. REV. 453 (1939).

[2] Emerson v. Carolina Casualty Ins. Co., 206 F. 2d 13 (8th Cir. 1953); Young v. Baldwin, 82 F. 2d 841 (8th Cir. 1936); MacGregor v. Pacific Electric Ry., 6 Cal. 2d 596, 59 P. 2d 123 (1936); Georgia & F. Ry. v. Thigpen, 141 Ga. 90, 80 S. E. 626 (1913); Sink v. Grand Trunk Western Ry., 227 Mich. 21, 198 N. W. 238 (1924); Galehouse v. Minneapolis, St. P. & S. Ste. M. Ry., 22 N. D. 615, 135 N. W. 189 (1912); Wessman v. Boston & M. R. R., 22 N. H. 475, 152 Atl. 476 (1930); Fagan v. Atlantic Coast Line R. R., 220 N. Y. 301, 115 N. E. 704 (1917); Layne v. Chesapeake & Ohio Ry., 68 W. Va. 213 69 S. E. 700 (1910). See, Pinson v. Kansas City Southern Ry., 37 F. 2d 652 (5th Cir. 1930). Relation of passenger-carrier continued until plaintiff leaving train had a reasonable opportunity to see about baggage and find means of getting to destination. See also, Fulghum v. Atlantic Coast Line R. R., 158 N. C. 555, 74 S. E. 584 (1912). Train passenger alighted in daylight at a flag station. A conductor helped her off and placed her safely on the ground alongside the railroad track about 60 feet north of a railroad crossing. Plaintiff, in making her way to the crossing, was injured when she stepped on a wet crosstie. Carrier's motion to nonsuit was affirmed on the basis of plaintiff's contributory negligence but Clark, C. J., dissenting, stated that the plaintiff was still a passenger since she had not left the carrier's premises.

[3] Crown Coach Co. v. Whitaker, 208 Ark. 535, 186 S. W. 940 (1945); Southeastern Greyhound Corp. v. Graham, 69 Ga. App. 621, 26 S. E. 2d 371 (1943).

[4] Delta Air Lines, Inc. v. Millirons, 87 Ga. App., 334, 73 S. E. 2d 598 (1952); *cf.*, Crowell v. Eastern Air Lines, Inc., 240 N. C. 20, 81 S. E. 2d 178 (1954). Although the airport was leased by the city of Charlotte to the air carrier (a common arrangement between municipalities and air carriers) the carrier was held liable for injuries to one of its passengers who fell in a passageway furnished for boarding the airplane of the carrier. *Accord,* Horelick v. Pennsylvania R. R., 13 N. J. 349, 99 A. 2d 652 (1953).

rule is based on the fact that the carrier exercises complete control over its premises.[5]

In cases where common carriers discharge passengers upon ground not under the control or supervision of the carrier there is a distinct conflict of authority as to the obligation of the carrier after the passenger has left the conveyance. The weight of authority supports the view that the relation of carrier and passenger ordinarily ends when the passenger safely steps from the carrier's conveyance to the street.[6] This theory is grounded on the premise that the carrier, not having control over the highway or street, is not responsible for safe passage from the street to the sidewalk.[7] The minority view favors the rule that the relationship of carrier and passenger continues until the passenger has had a reasonable opportunity to reach a place of safety.[8]

The North Carolina rule applicable to common carriers who discharge passengers upon ground not under the carrier's control has had an interesting judicial history. In a recent decision,[9] the court stated the rule thusly:

[5] Emerson v. Carolina Casualty Ins. Co., 206 F. 2d 13 (8th Cir. 1953); Southeastern Greyhound Corp. v. Graham, 69 Ga. App. 621, 26 S. E. 2d 371 (1943).

[6] McAlpine v. Los Angeles Ry., 67 Cal. App. 2d 486, 154 P. 2d 911 (1945); Denver City Tramway Co. v. Hills, 50 Colo. 328, 116 Pac. 125 (1911); Sims v. Chicago Transit Authority, 4 Ill. 2d 60, 122 N. E. 2d 221 (1954); Ferguson v. Kansas City Public Service Co., 159 Kan. 520, 156 P. 2d 869 (1945); Oddy v. West End Street Ry., 178 Mass. 341, 59 N. E. 1026 (1901); Mercier v. Union Street Ry., 230 Mass. 397, 119 N. E. 764 (1918); Kieger v. St. Paul City Ry., 216 Minn. 38, 11 N. W. 2d 757 (1943); Smuzynski v. East St. Louis Ry., 230 Mo. App. 1095, 93 S. W. 2d 1058 (1936); Wilson v. Berlin Street Ry., 84 N. H. 285, 149 Atl. 602 (1930); Hudak v. Penn-Ohio Coach Lines Co., 73 Ohio App. 409, 57 N. E. 2d 93 (1943); Burke v. United Electric Ry., 79 R. I. 50, 83 A. 2d 88 (1951); Street Ry. v. Boddy, 105 Tenn. 669 (1900); San Antonio Public Service Co. v. Turpin, 153 S. W. 2d 343 (Tex. Civ. App. 1941); Wullbrant v. City of Seattle, 196 Wash. 645, 84 P. 2d 123 (1938); Welsh v. Spokane & I. E. R. R., 91 Wash. 260, 157 Pac. 679 (1916).

[7] Creamer v. West End Street Ry., 156 Mass. 321 (1892); Hudak v. Penn-Ohio Coach Lines Co., 73 Ohio App. 409, 57 N. E. 2d 93 (1943); San Antonio Public Service Co. v. Turpin, 153 S. W. 2d 343 (Tex. Civ. App. 1941).

[8] Louisville Ry. v. Allen, 246 S. W. 2d 443 (Ky. App. 1951); Beahan v. St. Louis Public Service Co., 213 S. W. 2d 253 (St. Louis Ct. of App. 1948); Jacobson v. Omaha & Council Bluffs Street Ry., 109 Neb. 356, 191 N. W. 327 (1922); German v. Muskingum Valley Transit Co., 94 N. E. 2d 52 (Ohio Com. Pl. 1951); Trail v. Tulsa Street Ry., 97 Okla. 19, 222 Pac. 950 (1924); Houston Transit Co. v. McQuade, 223 S. W. 2d 64 (Tex. Civ. App. 1949); Wittkower v. Dallas Ry. & Terminal Co., 291 S. W. 619 (Tex. Civ. App. 1934); Tri-State Coach Corp. v. Stidham, 191 Va. 790, 62 S. E. 2d 894 (1951); Culpeper National Bank v. Tidewater Improvement Co., 119 Va. 136, 89 S. E. 118 (1916); Zalewski v. Milwaukee Electric Ry. & Light Co., 219 Wis. 541, 263 N. W. 577 (1936); Will v. Milwaukee Electric Ry. & Light Co., 169 Wis. 38, 171 N. W. 658 (1919). *But cf.* Cavazos v. Geronimo Bus Lines, 56 N. M. 624, 247 P. 2d 865 (1952). Carrier-passenger relationship continues until the passenger is safely discharged from the conveyance in a place in which he may safely remain.

[9] Harris v. Atlantic Greyhound Corp., 243 N. C. 346, 90 S. E. 2d 710 (1956). The facts, as supported by a jury verdict for the plaintiff, showed that the place where plaintiff attempted to alight from a bus at night was at or near the north end of a parapet, not far from an intersection; and that, as he stepped off the bus onto the shoulder of the highway, his foot struck something soft and he was precipitated some ten feet onto the rock bed of a stream and knocked unconscious.

> "The carrier's legal duty to its passenger continues until such time as it affords its passenger an opportunity to alight safely from its conveyance to a place of safety."[10]

Three North Carolina cases were cited by the court in support of this standard.[11] All three were rendered by bare court majorities.[12]

The problem was first seriously considered by the North Carolina court in *Wood v. North Carolina Public Service Corp.*,[13] where plaintiff, a streetcar passenger, while alighting at a regular stopping place, "had just stepped off the car and hadn't taken a single step" when she was struck by an automobile. The majority opinion recognized that there was a conflict of authority as to the obligation of the carrier after the passenger has left the car, but chose to uphold a judgment for the plaintiff on the theory that the carrier breached its duty to protect its passenger from and warn her of danger as well as to see that she alighted in safety.[14] It was not until four years later, when the court decided *Loggins v. Southern Pacific Utilities Co.*,[15] that we find a determined effort on the part of the court to fashion a local standard from the conflict of authority it again recognized. The facts of the *Loggins* case disclose that plaintiff's intestate, his nine-year-old son, left a streetcar with his father to transfer to another car. As the father reached the sidewalk he asked his son about their lunchbasket. The boy, who was still in the street just a few feet from the curbing, instantly turned, reentered the streetcar, got the basket and ". . . just as he got off the car and got one step," an automobile ran over him. On trial, defendant carrier's motion to nonsuit was allowed. In sending the case back for a new trial the court announced this rule for street car carriers:

> "We think a fair statement of the rule would be to say that a passenger, on alighting from a streetcar at the end of his journey, loses his status as a passenger when he has stepped from the car to

[10] *Id.* at 350, 90 S. E. 2d at 713.

[11] White v. Chappell, 219 N. C. 652, 14 S. E. 2d 843 (1941); Loggins v. Southern Pacific Utilities Co., 181 N. C. 221, 106 S. E. 822 (1921); Wood v. North Carolina Public Service Corp., 174 N. C. 697, 94 S. E. 459 (1917).

[12] The *Wood* case was a 3-2 decision with a dissenting opinion expressing the view that the carrier-passenger relationship should be terminated when the passenger on a street car alights upon the street from the car. The *Loggins* case was also a 3-2 split in which the dissenting justices recorded no opinion. In the *White* case the court divided 4-3 with the dissenters taking the position that the carrier breached its duty in failing to warn an alighting passenger (a young child) of the known danger from an approaching automobile.

[13] 174 N. C. 697, 94 S. E. 459 (1917).

[14] The court seemed to base its decision on the fact that the carrier failed to warn its passenger of the danger of impending traffic hazards more than on the "landing in safety" theory. The North Carolina court later repudiated this idea as a duty of the carrier in White v. Chappell, 219 N. C. 652, 14 S. E. 2d 843 (1941). *Accord*, Beeson v. Tri-State Transit Co., 146 F. 2d 754 (5th Cir. 1945); Mississippi City Lines, Inc. v. Bullock, 194 Miss. 630, 13 So. 2d 34 (1943).

[15] 181 N. C. 221, 106 S. E. 822 (1921).

> a place of safety on a street or on a highway. The question should not be made to depend entirely upon the number of steps which the passenger may take on leaving the car, but rather upon the circumstances and conditions under which he alights. He is entitled to be discharged in a proper manner and at a time and place reasonably safe for that purpose."[16]

It should also be noted that in the *Loggins* case the court was aided in its decision by the fact that plaintiff's intestate was a transfer passenger.[17]

White v. Chappell[18] was the first North Carolina case on this point to involve a bus carrier. There, plaintiff's intestate, an eight-year-old boy, accompanied by his mother, got off the bus on the side of the road, went around to the back of the bus and when he attempted to dart across the highway was struck and killed by a passing automobile. In ruling that defendant carrier's motion for a nonsuit should have been granted, the court, referring to the *Loggins* case, stated that:

> ". . . the ruling there that the duty of the carrier to an alighting passenger extends not only to 'a safe landing' but to 'a landing in safety' is the limit to which any of the courts have carried the principle,[19] even where the passenger alights on the traveled portion of the street or highway."[20]

Thus it seems that the North Carolina rule is a modification of the minority view in this respect: the minority rule allows the passenger time to reach a safe place after alighting from the carrier before the relation is severed; the North Carolina rule calls for "a landing in safety,"[21] defined as the condition in which the passenger finds himself immediately after alighting. This, too, might involve an element of time; but, obtaining an immediate place of safety is manifestly different from moving to a place of safety. Hence it appears that the North Carolina rule will not be extended to designate a person with the name of "passenger" when, upon reaching his destination, he has passed through the "landing in safety" phase. Furthermore, it is now quite clear that the "landing

[16] *Id.* at 225, 106 S. E. at 823.

[17] This factor was recognized in the majority opinion which quoted favorably from an earlier transfer case, Clark v. Durham Traction Co., 138 N. C. 77, 50 S. E. 518 (1905). There the court said: "A person in transferring from one car to the other is still a passenger, the transfer being but a part of the trip, for the whole of which the company agrees to convey in safety."

[18] 219 N. C. 652, 14 S. E. 2d 843 (1941).

[19] Obviously the court was not thinking of the prevailing minority view supported by cases cited in note 8 *supra*. See also, Birmingham Ry., Light & Power Co. v. O'Brien, 185 Ala. 617, 64 So. 343 (1914).

[20] 219 N. C. 652, 660, 14 S. E. 2d 843, 848 (1941).

[21] In the *Loggins* case the court stressed the difference between a safe landing and a landing in safety. The former has reference to the act of the passenger in stepping from the car to the street; the latter to the condition in which he finds himself immediately after accomplishing this act.

in safety" rule, initially adopted for streetcar carriers, will likewise receive equal judicial sanction in cases involving bus carriers.[22]

There have been a few cases where the carrier-passenger relationship has been considered when the carrier was a taxicab. As a rule, the rider usually loses his status as passenger when he opens the door and leaves the conveyance;[23] however, if the passenger has not paid his fare, the carrier-passenger relationship may continue even after the rider walks away from the cab.[24]

If the passenger remains on the carrier after the carrier has reached the passenger's destination, some cases hold that the passenger's status continues until the passenger has had a reasonable time to leave the conveyance.[25] Thirty minute has been held not to be a reasonable time.[26]

Temporary Departures

From a review of the cases involving temporary departures from the original carrier the general rule seems to be that a passenger does not lose his character as such by merely temporarily alighting at an intermediate station, with the express or implied consent of the carrier, for any reasonable or lawful purpose[27] such as eating breakfast,[28] exercising on the platform,[29] talking with acquaintances,[30] meeting someone on business,[31] getting off the conveyance to let another passenger on,[32] sending a telegram,[33] visiting a rest room[34] or even for the purpose of satisfying an aroused curiosity.[35] On the other hand the relationship has been deemed to have been severed where the passenger left the carrier's station temporarily to talk to a person on a country road[36] or where the

[22] The rule adopted by the North Carolina court was first announced in the *Loggins* case (street car) and followed in the *White* (bus) and *Harris* (bus) cases.
[23] Barringer v. Employer's Mutual Liability Insurance Co., 62 So. 2d 173 (La. App. 1952); White v. Alleghany Cab Co., 29 N. Y. S. 2d 272 (Sup. Ct. 1941).
[24] Tarman v. Southard, 205 F. 2d 705 (D. C. Cir. 1953); Dayton v. Yellow Cab Co., 193 P. 2d 959 (Cal. App. 1948). Both of these cases were situations where the cab driver assaulted the passenger as a result of a dispute over the price of the fare.
[25] Delta Air Lines, Inc. v. Millirons, 87 Ga. App. 334, 73 S. E. 2d 598 (1952); Valdosta Street Ry. v. Fenn, 11 Ga. App. 586, 75 S. E. 984 (1912); Turner v. Wabash Ry., 211 S. W. 101 (Mo. App. 1919).
[26] Duval v. Inland Navigation Co., 90 Wash. 149, 155 Pac. 768 (1916).
[27] Delta Air Corp. v. Porter, 70 Ga. App. 152, 27 S. E. 2d 758 (1943); Wallace v. Norfolk Southern R. R., 174 N. C. 171, 93 S. E. 731 (1917).
[28] Louisville & N. R. R. v. McCue, 216 Ala. 616, 114 So. 218 (1927).
[29] Sellers v. Southern Pacific Co., 33 Cal. App. 701, 166 Pac. 599 (1917).
[30] Arkansas C. R. R. v. Bennett, 82 Ark. 393, 102 S. W. 198 (1907).
[31] Wallace v. Norfolk Southern R. R., 174 N. C. 171, 93 S. E. 731 (1917).
[32] Ross v. Atlantic Greyhound Corp., 223 N. C. 239, 25 S. E. 2d 852 (1943).
[33] Alabama G. S. Ry. v. Coggins, 88 Fed. 455 (5th Cir. 1898).
[34] Murray v. Cedar Rapids City Lines, Inc., 48 N. W. 2d 256 (Iowa 1951); Wilson v. Pan-American Bus Lines, Inc., 217 N. C. 586, 9 S. E. 2d 1 (1940); Goodman v. Queen City Lines, Inc., 208 N. C. 323, 180 S. E. 661 (1935).
[35] Chicago, M & St. P. Ry. v. Harrelson, 14 F. 2d 893 (8th Cir. 1926).
[36] Palmer v. Willamette Valley Southern Ry., 88 Ore. 322, 171 Pac. 1169 (1918).

passenger does not return in time to board the conveyance before departure.[37]

Transfers

In the cases involving transfer passengers, that is, where the passenger leaves the original carrier to board another carrier in order to complete his journey, the courts are fairly evenly divided on the question of whether a passenger retains his status as such while effectuating the transfer.[38]

In the North Carolina case of *Patterson v. Duke Power Co.*,[39] plaintiff, with a transfer ticket in his hand, knocked on the door of the urban bus he was transferring to and as the bus moved off without letting the plaintiff on, the plaintiff was thrown backwards and injured. Holding that defendant carrier's motion for nonsuit should have been upheld, the court concluded that:

> ". . . sound reason compels the conclusion that ordinarily a passenger who has obtained a transfer and has safely alighted from one bus with the intent to transfer to another is not a passenger while traveling on the public street for the purpose of making the transfer so as to impose upon the carrier the duty to protect him against the hazards of the street."[40]

The court distinguished the *Patterson* case from *Clark v. Durham Traction Co.*[41] on the ground that in the *Clark* case, plaintiff, having left the original carrier, had put his foot on the step of the second carrier's conveyance—implying that the carrier-passenger relationship had been restored. Whereas in the *Patterson* case the door of the conveyance closed as the plaintiff approached, giving clear notice that the bus was taking on no more passengers, and no actual effort was made to get aboard.[42] Thus it appears that the North Carolina court will require, in transfer cases, some act by the transferring party to reestablish his "passenger"

[37] Tuder v. Oregon Short Line R. R., 135 Minn. 294, 160 N. W. 785 (1917).

[38] That he does: Damm v. East Penn Transportation Co., 120 Pa. Supp. 381, 182 Atl. 720 (1936); Keator v. Scranton Traction Co., 191 Pa. St. 102 (1899). That he does not: McAlpine v. Los Angeles Ry., 67 Cal. App. 2d 486, 154 P. 2d 911 (1945); Pugh v. City of Monroe, 6 So. 2d 83 (La. App. 1942); O'Connor v. Larrabee, 267 Wis. 185, 64 N. W. 2d 815 (1954). See also, South Plains Coaches v. Box, 111 S. W. 2d 1151 (Tex. Civ. App. 1938). When bus broke down, the passenger, on request of bus driver, continued part of the journey in a truck driven by a person not employed by the bus company. It was held that the plaintiff did not cease to be a passenger of the bus company by so doing.

[39] 226 N. C. 22, 36 S. E. 2d 713 (1945).

[40] *Id.* at 26, 36 S. E. 2d at 715.

[41] 138 N. C. 77, 50 S. E. 518 (1905).

[42] The court also stated that plaintiff's desire to get aboard was not communicated to the driver at a time when it could be done in safety or while the bus was open for the reception of passengers.

status before it will hold the carrier responsible for the duties imposed by reason of the carrier-passenger relationship.

HORACE E. STACY, JR.

Torts—Doctor's Liability for "Unauthorized Operations"

While performing an authorized appendectomy on the plaintiff, defendant doctor punctured cysts on the plaintiff's left ovary and drained fluid therefrom. He is charged with assault and trespass for performing the unauthorized cyst punctures.[1] Plaintiff's testimony indicated express consent only to the removal of the appendix. Defendant's evidence did not controvert this but showed by five duly qualified medical experts that the puncture of such cysts during an appendectomy is good surgical practice performed in such situations. No emergency immediately endangering the health of the patient was shown. Plaintiff appeals from the entry of nonsuit taken after the presentation of the above evidence. The decision of the lower court was affirmed on appeal.[2]

> "In such case the consent—in absence of proof to the contrary—will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated."[3]

There seems to be no disagreement among the cases that consent in some form must be present for any operation.[4] The form that this consent takes is generally spoken of as either express consent or implied consent.

Express consent is usually found when a very broad, general assent is given to the physician wherein he is told to remedy the situation[5] or to do whatever is necessary to give relief.[6] Consent to one operation is not, however, consent to a second.[7] Nor can a surgeon, during an

[1] Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754 (1956). An allegation of negligence in the cutting of a blood vessel on the ovary resulting in phlebitis of the left leg was not urged on appeal although mentioned in the pleadings and in the trial below. [Record, p. 3.]

[2] Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754 (1956). *Cf.* RESTATEMENT, TORTS § 62, illustration 5 (1934).

[3] *Id.* at 362, 90 S. E. 2d at 759.

[4] Wells v. Van Nort, 100 Ohio St. 101, 125 N. E. 910 (1919); White v. Hirshfield, 108 Okla. 263, 236 Pac. 406 (1925); Valdey v. Percy, 35 Cal. App. 2d 485, 96 P. 2d 142 (1939); Wall v. Brim, 138 F. 2d 478 (1943).

[5] McClallen v. Adams, 36 Mass. (19 Pick) 333, 31 Am. Dec. 140 (1837); King v. Carney, 85 Okla. 62, 204 Pac. 270 (1922); Rothe v. Hull, 352 Mo. 926, 180 S. W. 2d 7 (1944).

[6] McClees v. Cohen, 158 Md. 60, 148 Atl. 124 (1930).

[7] Pratt v. Davis, 224 Ill. 300, 79 N. E. 562 (1906).

authorized operation on the plaintiff's hand, take fascia lata from the thigh even though good surgery justifies such a taking.[8] But a doctor is authorized to reopen an incision without additional authority if he believes a needle was left within the patient's body.[9] The surgeon has no defense of consent, however, when the wrong person is treated even though the patient, trusting the physician, allows him to proceed without protest.[10] If the wrong member of the body is operated on, the surgeon cannot be excused by showing permission to operate elsewhere; as where surgeon was held liable for an unauthorized tonsillectomy, and the consent was to operate on the septum of patient's nose.[11] Of course an entirely different operation cannot be performed[12] even though benefit may be shown to have resulted.[13] A specific prohibition to an operating surgeon not to remove any bone or part of a bone during a foot operation cannot be disregarded by the surgeon.[14] Nor can the sphincter muscle be cut when doctor is told specifically not to sever it.[15] Even more obvious, consent to a small operation is not consent to a larger, more serious operation.[16] As can be seen from these few examples, the express consent decision often involves a determination of the extent of the patient's permission as reasonably deduced from the patient's conduct under the circumstances or from the actual agreement of the parties.

On the other hand, most of the so-called implied consent cases arise where an emergency or unforeseen situation exists and the doctor takes certain remedial action without any consent whatsoever. The very use of the term "implied consent" is erroneous here; it is ". . . a fiction, since consent does not exist, and there is no act which indicates it. It is more accurate here . . . to say that the defendant is privileged because he is reasonably entitled to assume consent, and to act as if it had been given."[17]

[8] Franklyn v. Peabody, 249 Mich. 363, 228 N. W. 681 (1930).

[9] Higley v. Jeffrey, 44 Wyo. 37, 8 P. 2d 96 (1932).

[10] Gill v. Selling, 125 Ore. 587, 267 Pac. 812 (1928); Samuelson v. Taylor, 160 Wash. 369, 295 Pac. 113 (1931). As to inferences of assent drawn from submission, see Knowles v. Blue, 209 Ala. 27, 95 So. 481 (1923); Baxter v. Snow, 78 Utah 217, 2 P. 2d 257 (1931).

[11] Hively v. Higgs, 120 Ore. 588, 253 Pac. 363 (1927). See also, Hershey v. Peake, 115 Kan. 562, 223 Pac. 1113 (1924); Sullivan v. McGraw, 118 Mich. 39, 76 N. W. 149 (1898); Krompoltz v. Hyman, 70 Pa. Super. Ct. 581 (1919); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12 (1905).

[12] Wells v. Van Nort, 100 Ohio St., 125 N. E. 910 (1919); Maercklein v. Smith, 129 Colo. 72, 266 P. 2d 1095 (1954); see also Markart v. Zeimer, 67 Cal. App. 363, 227 Pac. 683 (1924). As in the cases in note 11 *supra*, the malpractice-negligence cases and the assault and battery cases are hard to distinguish at times. This is often important in connection with the running of the statute of limitations which may be different for the two causes of action.

[13] Church v. Adler, 350 Ill. App. 471, 113 N. E. 2d 327 (1953).

[14] Rolater v. Strain, 39 Okla. 572, 137 Pac. 96 (1913).

[15] Luzzi v. Priester, 295 S. W. 958 (Tex. Civ. App. 1927), a malpractice suit.

[16] Paulsen v. Gundersen, 218 Wis. 578, 260 N. W. 448 (1935). *Cf.* Robinson v. Crotwell, 175 Ala. 194, 57 So. 23 (1911); Zoterell v. Repp, 187 Mich. 319, 153 N. W. 692 (1915).

[17] PROSSER, TORTS § 18, p. 84 (2d ed. 1955). Also see RESTATEMENT, TORTS, Special Note § 62 at 116 (1934).

The emergency or unanticipated condition generally must endanger the patient's life or health in some immediate fashion; as where acute appendicitis which endangered the mother and child was discovered during a duly authorized operation for a tubal pregnancy.[18] With this implied consent raised by an emergency or danger to life and health and without any direct, express consent whatsoever, it has been held that a surgeon may amputate an arm which was badly injured,[19] that a more serious rupture on the right side of the groin could be remedied even though specific permission was only for the correction of the less serious left side rupture,[20] that a surgeon could operate to remove an obstruction in the urinary system which the surgeon himself had introduced thereinto,[21] and that a mangled and crushed foot could be amputated.[22] If the trier of facts denominates the situation as "emergency" this is enough to uphold defendant's verdict on appeal as to implied consent.[23]

In every case in the above paragraph which found that there was implied consent, the element of emergency or danger to life or health was present.

Other cases have used the term implied consent in a slightly different way; as where a mother's consent to an operation on her child was considered as implying consent of the child.[24] But, in the usual use of the term the consent arises from the presence of emergency or possible dire results. Most of the cases listed which denied an implied consent did so expressly because there was no emergency. It seems in one case that Justice Cardozo lists "emergency" as the only direct exception to the express consent rule.[25] A recent Kentucky case states directly that a mere endangering of the patient's life or health some time in the future is not such an emergency as would imply consent presently.[26] It will be noted that in the principal case, the testimony of the expert witnesses was that the cysts were certainly not immediately dangerous. The defendant himself testified:

> "I say they [the cysts] were dangerous. I can't say how long it would have been before she would have had to have an operation; it possibly could have been two or three months before it would have been necessary for her to have had an operation. It is pos-

[18] Barnett v. Bachrach, 34 A. 2d 626 (D. C. Mun. App. 1943); see also Sullivan v. Montgomery, 155 Misc. 448, 279 N. Y. Supp. 575 (1935).
[19] Jackovach v. Yocum, 212 Iowa 914, 237 N. W. 444 (1931).
[20] Bennan v. Parsonnett, 83 N. J. L. 20, 83 Atl. 948 (1912).
[21] Delahunt v. Finton, 244 Mich. 226, 221 N. W. 168 (1928).
[22] Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106 (1912).
[23] Barnett v. Bachrach, 34 A. 2d 626 (D. C. Mun. App. 1943).
[24] Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30 (1915).
[25] Schloendorff v. N. Y. Hospital, 211 N. Y. 125, 105 N. E. 92 (1914).
[26] Tabor v. Scobee, 254 S. W. 2d 474 (Ky. 1951).

sible if I had not done anything to this ovary or ovaries, that she might never have had to have an operation."[27]

The expert witnesses testified to the effect that "[i]t is the accepted theory to puncture them *whether they are dangerous or not.*"[28] (Emphasis added.) The customary and usual practice of surgeons was established; that surgeons usually remedy such conditions is adequately shown.[29] But no emergency or immediate danger was shown. It is submitted that the principal case goes further in "implying" consent[30] in a non-emergency, non-danger situation than any previous case.[31]

The basis of the North Carolina court's decision, then, would not seem to be any "emergency" theory. The court, rather, believes that modern medical practice with its use of anaesthesia and isolated operating rooms demands that some change be made in the former strict consent rules. It quotes extensively from *Bennan v. Parsonnet,*[32] a New Jersey case, to show the historic development of modern surgery and the need for a change in the law. The rule as quoted in the first paragraph above is then stated with a citation to three cases.[33] It is interesting to note that two of the three cases and the *Bennan* case were "emergency" or "danger to life and health" types of cases; the other case was a "voluntary submission" case.[34]

The consent raised from this non-emergency, modern medicine doctrine allows the surgeons themselves to establish the limits as to what a given operation should cover once the surgeon sees the exact internal condition after incision. Some latitude is necessary, certainly. The facts of the principal case as presented by the five experts seem to make a case for such freedom. The limits of this type of consent still have to be drawn. How far afield may the surgeon go in remedying non-emergency situations? The limiting line in emergency cases is not im-

[27] Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754 (1956), [Record, p. 30.]

[28] Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754 (1956), [Record, p. 48; also pp. 34, 38, 42 and 51.]

[29] See Russell v. Jackson, 37 Wash. 2d 66, 221 P. 2d 516 (1950), where physicians testified that if a cyst on an ovary is discovered during an operation it is common practice to remove it.

[30] It is realized that the term "implied consent" is specifically—and correctly—avoided by the North Carolina court as a "fetish," Kennedy v. Parrott, 243 N. C. 355, 361; 90 S. E. 2d 754, 758, but for uniformity's sake the term is used throughout this note.

[31] *Cf.* McGuire v. Rix, 118 Neb. 434, 225 N. W. 120 (1929) and Boydston v. Giltner, 3 Ore. 118 (1869). Although stating rather liberal rules to absolve the physician, both cases differ in their holdings from the principal case. See RESTATEMENT, TORTS §§ 54 and 62 (1934).

[32] 83 N. J. L. 20, 83 Atl. 948 (1912).

[33] King v. Carney, 85 Okla. 62, 204 Pac. 270 (1922); Baxter v. Snow, 78 Utah 217, 2 P. 2d 257 (1931); Jackovach v. Yocum, 212 Iowa 914, 237 N. W. 444 (1931).

[34] Baxter v. Snow stated, *inter alia,* that voluntary submission to a physician for diagnosis and treatment would raise a presumption of consent absent contrary evidence. See note 10 *supra.*

possible to draw since it will extend only to the affected area, but where this emergency boundary is not present some difficulty will be encountered. It remains to be seen how the court will handle an extension which is not so universally conceded by the medical experts to be the "usual practice of surgeons."

The general rule still subsists that "every human being of adult years and a sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[35] To this the North Carolina court quickly would add, however, that once the general permission is given, the doctor may operate as good surgery demands, correcting also certain other situations even if no dire emergency is present. The limiting boundaries are still to be delineated.

WILLIAM P. SKINNER, JR.

Trial Practice—Hearings for a New Trial—Right of Trial Court to Take Testimony Outside the Record and to Deny the Right of Cross Examination

In North Carolina,[1] as in many other jurisdictions,[2] the trial court has the inherent power to set aside a verdict and order a new trial.[3] Where there is no question of law or legal inference involved in a motion for a new trial, it is addressed to the sound discretion of the trial judge whose ruling, in the absence of abuse, is not reviewable on appeal.[4] This power is considered essential for the orderly administration of justice since the judge is in a position to observe the trial objectively and protect the proceedings from unfair influences which may never appear in the record.[5] Since the judge may exercise his discretion and give no reasons

[35] Schloendorff v. N. Y. Hospital, 211 N. Y. 125, 129; 105 N. E. 92, 93 (1914) (a much quoted phrase of Justice Cardozo).

[1] Bird v. Bradburn, 131 N. C. 488, 42 S. E. 936 (1902).

[2] Common law authority of a trial court to set aside a verdict and order a new trial is inherent in all courts of common law in the United States. 39 AM. JUR., *New Trial* § 4 (1942).

[3] This common law power has been partially codified in N. C. GEN. STAT. §1-207 which specifically sets out the trial courts' right to set aside a verdict and grant a new trial upon exceptions, insufficient evidence, or for excessive damages.

[4] Muse v. Muse, 234 N. C. 205, 66 S. E. 2d 689 (1951); Pruitt v. Ray, 230 N. C. 322, 52 S. E. 2d 876 (1949).

[5] Speaking of the judge's duty to set the verdict aside when he perceives that justice has not been done, the court said: "His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of twelve), but he may perceive that there has been prejudice in the community which has affected the jurrors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger—or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other instances which would not

for his decision,[6] what is encompassed in such a case is never completely known; nevertheless, if from the proceedings his actions are arbitrary and capricious he may be reversed.[7] An insight into the discretionary boundaries of a trial judge can be found in the recent case of *Williams v. Stumpf*.[8]

This case involved the issue of whether the defendant had revoked his offer to purchase the plaintiff's home before plaintiff's acceptance had been communicated. The jury found for the defendant, and the plaintiff moved to set aside the verdict and for a new trial asserting (1) errors and (2) that the verdict was contrary to the weight of the evidence—both matters of record. On the following day a hearing was held on this motion in which the court called two witnesses to the stand as witnesses of the court. The first witness was an employee of the real estate company which had undertaken to sell the house for the plaintiff, and had handled the transaction. Under questioning by the court, this witness testified that he had communicated the acceptance several days before the withdrawal. At the close of this testimony defendant's counsel requested the right to cross examine the witness. The court denied this request. "This is an action of the Court, nobody else's. I am doing this on the theory as to whether or not I decide in my discretion to set the verdict aside. It is not a part of the record, not a part of the trial. This witness wasn't on the witness stand." Counsel then stated his reasons to the court. He wanted testimony concerning the witness's numerous conversations with the plaintiff's counsel.[9] Moreover, he asserted that before the trial the witness had been unable to tell him when the communication was actually made. The judge apparently felt it was unjust to allow defendant's counsel to cross examine the witness when in all probability he would get an opportunity to do so on the new trial.

On appeal, the North Carolina Supreme Court was faced with the

furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice." Bird v. Bradburn, 131 N. C. at 489, 42 S. E. at 937 (1902).

[6] Bird v. Bradburn, 131 N. C. 488, 42 S. E. 936 (1902).

[7] "The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." Ellen Settlee v. Charlotte Electric Ry., 170 N. C. 365, 367, 86 S. E. 1050, 1050 (1915).

[8] 243 N. C. 434, 90 S. E. 2d 688 (1956).

[9] The witness had told counsel that he discussed the case with plaintiff's counsel numerous times. Counsel also pointed out that plaintiff's counsel did thousands of dollars worth of business for the witness's employer.

questions of whether or not the trial court had abused its discretion by refusing the defendant's counsel the right to cross examine the witness and by going outside the record for testimony in order to determine whether in its discretion the verdict should be set aside. The court expressed regret that the defendant had been denied the right to cross examine the witness and then said:

> "Although there is no evidence that anything improper took place during the trial, nevertheless the court has power to set aside the verdict as against the greater weight of the evidence. However, it is questionable whether the court should take additional testimony or base its decision only on that which the jury considered."

This issue on which the court is doubtful was the main ground on which the defendant based his appeal, yet the court held that such was not reversible error, giving no reasons therefor. When a trial judge is faced with the question of whether or not to set the verdict aside he enters into a difficult area. The usual sanctity that attaches to a jury verdict, the personal feelings of the presiding judge, and the rights of the parties on both sides to a fair and impartial jury trial are involved. Consequently, where a vital issue presents itself in this area it should not be ignored. It is important in this discussion, as far as the equities of the particular case are concerned, to be certain that when a trial judge exercises his discretion he rules on the motion before him. It is obvious that the trial judge's actions on the hearing in this case negate any idea that errors had been committed during the trial, and the court found none. Furthermore it is not plausible that the trial court called the witness to the stand on the basis of newly discovered evidence. There is no doubt that if the plaintiff had moved for a new trial on such ground the court would have ruled against him. Plaintiff would have had the burden of showing that the testimony offered was not cumulative, *i.e.*, merely additional evidence of same kind, to the same fact litigated, and that the testimony, if desired, could not have been secured at the trial by the exercise of proper diligence.[10] This he could not have done, since the witness was in court during the trial and was readily available. As no errors or irregularities occurred at the trial and the additional testimony does not fall in the category of newly discovered evidence, there is no doubt that the trial judge made his extrajudicial investigation in order to rule on the plaintiff's motion.

The answer to the propriety of the trial court's action in going outside the record may be found in the various formulae established to aid a court in deciding whether a verdict is contrary to the weight of the evi-

[10] Alexander v. Cedar Works, 177 N. C. 536, 98 S. E. 780 (1919).

dence. It has been said that the trial court should not disturb a verdict of the jury where the evidence is such that different minds may reasonably and fairly come to different conclusions;[11] or where if he were a juror he would have decided differently;[12] or where on the same facts he would have arrived at a different conclusion.[13] These rules contemplate on their face that the only evidence to be considered is that which was before the jury, and the majority of courts so hold when the motion is based on the record,[14] as it was in this case. To hold otherwise and allow a judge to weigh the evidence against the verdict by looking at evidence adduced before and after the verdict, is to permit him to infringe on the jury's function of determining the credibility of witnesses, weighing the testimony and finding the facts. Such invasion is not condoned.[15] The command of our constitution that jury trial ought to remain sacred and inviolate cannot be adhered to when the trial judge may set aside the decision of the jury as against the weight of probative matter legally before it by consideration of unchecked testimony never before the jury. New trials will not be granted where such action would amount to a substitution of the court's verdict for that of the jury.[16] An Okla-

[11] Jackson v. Walker, 126 Conn. 294, 10 A. 2d 763 (1940); Harvath v. Tontini, 126 Conn. 462, 11 A. 2d 846 (1940); Downes v. United Electric Ry., 80 R. I. 382, 97 A. 2d 107 (1953); Arlia v. United Electric Ry., 64 R. I. 460, 13 A. 2d 242 (1940); Viereg v. Southwestern Wisconsin Gas Co., 212 Wis. 394, 248 N. W. 775 (1933).

[12] Ellett v. Carpenter, 173 Va. 191, 3 S. E. 2d 370 (1939); Harris v. Howerton, 169 Va. 647, 194 S. E. 692 (1938).

[13] Delvin v. Piechoski, 374 Pa. 639, 99 A. 2d 346 (1953); Caroll v. City of Pittsburgh, 368 Pa. 436, 84 A. 2d 505 (1951).

[14] Vose v. Mayo, 28 F. Cas. No. 17,009, 3 Cliff 484 (C. C. Me. 1871); Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114 (1893); Dreary v. Shields, 54 Cal. App. 2d 795, 129 P. 2d 935 (1942); Norton v. Lynds, App. 24 S. W. 2d 183 (1930); Whallen's Ex'rs v. Moore, 248 Ky. 348, 58 S. W. 2d 601 (1933); Kirby v. Mafox Realty Corp., 71 N. Y. S. 2d 124, 272 App. Div. 889 (1947); Loucks v. Pierce, 341 Ill. App. 253, 93 N. E. 2d 372 (1951); Patanyi v. Davis, 336 Pa. 476, 9 A. 2d 430 (1939). The last two cases cited indicate that the error might have been cured if the outside evidence had been presented in open court with the right to cross examine. 66 C. J. S., *New Trial* § 161 (1950). Extrajudicial investigations are analogous to situations where the judge knows facts which did not appear in the record and the question arises as to whether or not such knowledge should be used to set aside the verdict. The answer is that such knowledge should not be considered. "It is a settled maxim, that a judge has a private and a judicial knowledge. But he cannot give a judgment upon his private knowledge; for he is obliged to give it according to law and what is proved. If he has a private knowledge of a fact, he may be sworn as a witness, and then the parties have an opportunity to examine and cross examine him, and to introduce explanatory or counteracting proof." Gillespie v. Doty, 160 Miss. 684, 692, 135 So. 211, 212 (1931).

[15] Rayburn v. Crocker, 31 Ala. App. 542, 19 So. 2d 554 (1944); Castleberry v. Morgan, 28 Ala. App. 20, 178 So 823 (1938). "But in exercising the power, the court should be careful not to infringe the right of trial by jury in matters which have been left to them by the law." 28 Ala. App. at —, 178 So. at 824.

[16] American Cooler Co. v. Fay & Scott, 20 F. Supp. 782 (N. D. Me. 1937); Cruz v. City of New York, 41 N. Y. S. 2d 367, affirmed, 43 N. Y. S. 2d 665, 179 Misc. 1031 (1943), appeal dismissed, 73 N. Y. S. 2d 495 (1947); Turner v. Carey, 227 S. C. 298, 87 S. E. 2d 871 (1955); Stone & Clamp, General Contractors v. Holmes, 217 S. C. 203, 60 S. E. 2d 231 (1950).

homa court expressed these views more succinctly when it said:

> "Manifestly, the determination of whether the verdict was contrary to the evidence depended solely upon the evidence; and for the court to investigate and advise itself as to the facts of the case by reference to any other source than matters of common knowledge, which it might take into consideration in weighing the evidence, was not inconformity with the analogies and fixed principles of law. On the record we quite understand the desire of the trial judge to be informed as to the facts in the case by independent investigation. But such investigation by the court as to the facts is not consonant with the right of trial by jury upon evidence introduced in open court and in the presence of parties.
>
> "There is, perhaps, little, if any, authority directly decisive of the question involved. At least we have been cited to none, but it is clear that the anologies of the law, as well as the specific basis on the motion that the 'verdict was contrary to the evidence,' require that the determination of that 'contrariety,' if it exists, should be determined from consideration of the evidence alone."[17]

Assuming that the trial judge in the *Williams* case was correct in going outside the record—and it would seem he was not—was it proper to deny counsel the right to cross examination? Where the motion for a new trial is based on evidence outside of the record, such as newly discovered evidence, perjured testimony, misconduct of jurors and other irregularities certain safeguards are required. If any merit is to be given to matters outside the record they must be supported by proof.[18] This is generally done by affidavits;[19] though this evidence may be rebutted in most jurisdictions by the use of counter affidavits.[20] The affidavits may be based on perjured testimony, or sworn to by witnesses unworthy of credit, or they may allege grounds for new trial which have no existence.[21] Counter affidavits serve to point up these defects, and by so doing, the chances of a second litigation being granted on unreliable grounds are reduced. Where witnesses have taken part in such hearing and their testimony does not amount to an affidavit for newly discovered evidence, the majority of cases have allowed their testimony to be rebutted by cross examination.[22] The Supreme Court of the state of Wash-

[17] Picket v. Chicago R. I. & P. Ry., 169 Okl. 123, 125, 36 P. 2d 284, 287 (1934).
[18] 39 AM. JUR., *New Trial* § 198 (1942).
[19] *Ibid.*
[20] Chrisco v. Yow, 153 N. C. 434, 69 S. E. 422 (1910); MCINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929); ANN. CAS. 1912 D 1303.
[21] People v. Sing Yow, 145 Cal. 1, 78 Pac. 235 (1904).
[22] Brundizi v. Lehigh Valley R. R., 212 N. Y. Supp. 250, 214 App. Div. 400 (1925); Maxlip Realty Corporation v. Loesch, 187 N. Y. Supp. 135 (1921); Magley v. Masonic Temple Assn. of Columbus, 80 Ohio App. 520, 77 N. E. 2d 98 (1947). In the *Loesch* case the plaintiff moved to set aside the verdict because of the alleged

ington has put it this way:

> "While there can be no question of the power and right of a court to allow an examination of a witness orally instead of by affidavit on the hearing of a motion for a new trial, it is nevertheless one of the most important rights relating to the production of evidence, in both civil and criminal cases, that the party against whom such witness testifies shall have the right of cross examination. . . ."[23]

This is equality and fairness to both parties, and at the same time a more complete and truthful set of facts are produced. Even if the judge in the *Williams* case was correct in going outside the record, the facts would differ from the discussion here only in that the judge called the witness and conducted the questioning. This would not be sufficient reason to deviate and discard methods of proof. The defendant should have been allowed the right of cross examination.[24] The examination conducted

misconduct of a juror. The trial court, after affidavits had been submitted, questioned the juror at a hearing before opposing counsel. The attorney for the defendant, in whose favor the verdict had been rendered, made certain objections and was promptly excluded from the court room, the judge remarking, "This is an ex parte hearing to determine whether a contempt has been committed." The supreme court felt that such action was immaterial if the hearing was held to determine whether or not the juror was guilty of misconduct, inasmuch as the defendant had no interest in the contempt proceedings. "On the other hand, if that testimony was taken for the purpose of determining the motion to set aside the verdict, the defendant was vitally interested in the hearing, and had an undoubted right to be present thereat, to object to an examination of the juror for the purpose of impeaching the verdict of the jury, and in addition had the right to question the juror himself in order to sustain that verdict." 187 N. Y. Supp. at 137.

[23] State v. Ward, 135 Wash. 482, 485, 238 Pac. 11, 12 (1925).

[24] "It is true upon petition for new trial the strict rules concerning the protection of witnesses, and the right of confrontation and cross examination are not applied, but there are legal limits to the procedure to be adopted. The judicial rules safeguarding proof in court are founded upon sound reason, and are not to be departed from without reason." Huey v. West Ossipee Mines, 81 N. H. 103, 106, 122 Atl. 334, 336 (1923). An analagous area is the right to argue the merits of a motion for a new trial. The answers have varied. It has been held error to refuse to hear argument on such a motion. Kansas Atchison R. R. v. Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71 (1898). Other jurisdictions have held that it is within the trial courts' sole discretion. Collins v. Nelson, 41 Cal. App. 2d 107, 106 P. 2d 39 (1940); Morel v. Semoniam, 103 Cal. App. 490, 284 Pac. 694 (1930); Teems v. Burel, 60 Ga. App. 826, 5 S. E. 2d 405 (1939). Sovereign Camp of Woodmen of the World v. Luthan, 59 Ind. App. 290, 107 N. E. 749 (1915). New York and Wisconsin have taken the middle position on this question and have held that there is no error to refuse to hear oral arguments where the motion is based on the record. The reason given is that the judge who has presided over the trial in many instances is completely possessed of all the facts and law, and therefore an argument would be a waste of time. Sweeney v. Mayor Etc. of New York, 17 N. Y. Supp. 797 (1892); Schuster v. State, 80 Wis. 107, 49 N. W. 30 (1891). Despite these divergent viewpoints there seems to be unanimity of opinion where the motion for new trial has been made by the court itself. Those jurisdictions which have considered this particular point have held that it was a deprivation of due process not to give the parties notice and an opportunity to be heard. "Opportunity for a litigant to present his views as to the matters instantly before the court which may affect his rights is the very foundation stone of our procedure." Hoppe

by a judge normally will not be adequate, because he has neither the strong interest nor the full knowledge that is required for effective cross examination.[25] A verdict is at stake. It is a substantial right,[26] born of evidence, that has been subjected to a system of procedural checks and balances, and its merit deliberated and judged by twelve men. The elaborate process of the law which produced it should provide the basic right of cross examination to protect it.

New trials are not favored in the eyes of the law and should not be granted in an arbitrary manner. It is felt that the methods used in the *Williams* case were not based on logic and reason and should have been considered an abuse of discretion. This case results in giving the trial court an unusual amount of control over the regulation of a hearing for a new trial. Perhaps the court feels that it is a wiser policy to give the trial court a wide latitude in such hearing and that their expressed disapproval of the proceedings in the *Williams* case would be enough to prevent its recurrence. However, it would seem that until a firmer stand has been taken on the issues involved this case establishes a dangerous precedent.

JOHN MARK TAPLEY.

Unemployment Insurance—Availability for Suitable Work—Effect of Claimant's Refusal to Work on Sabbath

Claimant, a textile worker of thirteen years' experience, became interested in the Seventh Day Adventist Church, and, as a result, became convinced that she should not work on the Sabbath, which, in the Seventh Day Adventist Church, is from sundown Friday until sundown Saturday. On at least one Sabbath, she was excused from work by her employer, but on another Friday, she stayed away from her employment without permission and was discharged for such absence. Within a week she filed a claim for benefits under the Employment Security Act. During her period of unemployment, she sought work in other mills in the area but restricted her availability to the first shift, the only shift that would not interfere with her Sabbath, and freely admitted that she would not consider employment which would require her to work on her Sabbath.

The Employment Security Commission held that the claimant was not disqualified from receiving unemployment benefits by the circumstances of her discharge, that she was able to work and that she had made

v. St. Louis Public Service Co., 361 Mo. 402, 406, 235 S. W. 2d 347, 350 (1950); Southern Arizona Freight Lines v. Jackson, 48 Ariz. 509, 63 P. 2d 193 (1936); *Re* Murray's Estate, 238 Iowa 112, 26 N. W. 2d 58 (1947); Anno., 23 A. L. R. 2d 846 (1952).

[25] 5 WIGMORE, EVIDENCE § 1368 n. 1 (3d ed. 1940).

[26] Edwards v. Hood Motor Co. 235 N. C. 269, 69 S. E. 2d 550 (1952); Bundy v. Sutton, 207 N. C. 422, 177 S. E. 420 (1934).

an active and reasonable search for work; but that, by restricting her availability to first shift employment only, she had "so limited the circumstances under which she would accept work as substantially to eliminate herself from consideration for potential job opportunities. . . ." The Commission also found that 95% of the job openings in the area were for the third shift, that textile mills normally run from Monday morning through Friday night, that new employees are normally given second and third shift work and promoted to first shift employment. Thus, the Commission held her ineligible for benefits, and this decision was affirmed by the Superior Court of Rowan County. On appeal to the North Carolina Supreme Court, held, reversed and remanded.[1] The court held that to interpret the statutes as the Commission had done would require a claimant, in order to be eligible for benefits, to be available for work "at any and all times, night and day, Sunday and week days alike," and would also render G. S. 96-13 and G. S. 96-14 inconsistent. The court concluded that the language of G. S. 96-13 does not sustain the strict interpretation applied by the Commission. The words, "available for work," as used in G. S. 96-13 mean "available for suitable work" in the same sense as the words "suitable work" are used in the cognate statute G. S. 96-14. The court held that "work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute," and that the claimant, by refusing to consider employment which would require work on her Sabbath, did not render herself unavailable for work within the meaning of the statute since such work would have been unsuitable for her.

This seems to be the first occasion on which the North Carolina Supreme Court has passed, in definite terms, on the scope and meaning of the term "available for work"—one of the requisites for eligibility for benefits under the Employment Security Act. It is certainly a case of first impression in North Carolina on a claimant's eligibility for benefits where he has, for religious reasons, placed a restriction on his availability.

A claimant's religious beliefs might affect his eligibility for unemployment benefits in several respects. These beliefs might influence the determination where the problem under consideration would be (1) voluntary leaving, where it would enter into the determination of the effect of claimant's religious beliefs on good cause, (2) refusal of work, where the religious beliefs would enter into the determination of the "suitability" of the offered work, and, (3) availability for work, where, as in the *Miller* case, religious beliefs caused the claimant to restrict her availability. This note will be limited primarily to a discussion of these three factors against the background of a brief history of unemployment insurance laws, their purpose and interpretation.

[1] *In re* Miller, 243 N. C. 509, 91 S. E. 2d 438 (1956).

North Carolina passed its Unemployment Compensation Law in 1936;[2] by 1937 all forty-eight states, the District of Columbia, Alaska and Hawaii had passed similar legislation, pursuant to the Federal Social Security Act.[3] In August, 1935, the United States Congress, by an overwhelming bipartisan vote, had passed the Social Security Act, which, by Title III and Title IX, laid the framework for the new program of unemployment insurance.[4] The federal act levied a tax on employers in industry and commerce, and, by means of a "tax offset," made it advantageous for the states to enact state laws which would pay unemployment benefits.[5] This new program of unemployment insurance was designed to be on a federal-state basis, rather than on a federal basis like the Federal Old-Age Insurance program. It contemplated federal-state cooperation, but the federal government was not to make or match payments to individuals. Its grants to the states were for the proper and efficient administration of the state unemployment laws;[6] the entire cost of administering these programs was to be financed by federal funds.[7] In this federal-state system of unemployment insurance the individual states were free to develop the program that was most adapted to the conditions of that state.[8] Since each state legislature enacted its own laws, specifying the workers to be covered, the taxes the employers would pay, the benefits to be paid, the requirements for receipt of benefits, and the organization within the state government to administer the law,[9] the laws vary greatly from state to state. However, the states generally agree as to the purpose of the unemployment insurance laws, which is said to be to provide relief[10] or protection against involuntary unemploy-

[2] N. C. GEN. STAT. § 96 (1950). *N. C. Sess. Laws* 1947, c. 598, s. 1, substituted "Employment Security Law" for "Unemployment Compensation Law." Hereafter in this note, North Carolina's Law will be referred to as the "Employment Security Law," other state laws by their titles, while the generic terms "unemployment insurance" and "unemployment compensation" will apply to both.

[3] U. S. EMPLOYMENT SERVICE, BUREAU OF EMPLOYMENT SECURITY, U. S. DEP'T OF LABOR, EMPLOYMENT SECURITY REVIEW, vol. 22, no. 8, *Twenty Years of Unemployment Insurance in the U. S. A. 1935-1955* 9 (1955). Hereafter all jurisdictions will be called "states" in accordance with the definition of state in sec. 1101 of the Social Security Act, and in sec. 1607(j) of the Federal Unemployment Tax Act.

[4] *Ibid.*

[5] *Ibid.* "The Federal Act . . . provided that when a State had an approved unemployment insurance law, its employers could credit the taxes they paid to the State against 90 per cent of the Federal Tax."

[6] DIV. OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMIN., U. S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY BULLETIN, vol. 18, no. 12, *Twenty Years of Unemployment Insurance* 3 (1955).

[7] EMPLOYMENT SECURITY REVIEW, *op. cit. supra* note 3 at 9.

[8] DIV. OF DETERMINATIONS AND HEARINGS, UNEMPLOYMENT INSURANCE SERVICE, BUREAU OF EMPLOYMENT SECURITY, U. S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS AS OF AUGUST 1954, Preface III (1954).

[9] EMPLOYMENT SECURITY REVIEW, *op. cit. supra* note 3 at 9.

[10] Mattey v. Unemp. Comp. Bd. of Rev., 164 Pa. Super. 36, 63 A. 2d 429 (1949).

ment,[11] *i.e.*, to those persons thrown out of work through no fault of their own.[12]

The Declaration of Public Policy of the North Carolina Employment Security Law (which is similar to that of many other states) provides:

> "As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows:
>
> "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."[13]

The North Carolina court has said of the purpose of the Law that "From the clear language in which the underlying purposes of the Unemployment Compensation Act are declared . . . it is to be gathered that the Legislature intended to provide a wide field of usefulness for this agency for social security and for mitigating the economic evils of unemployment."[14]

Although the roots of the unemployment compensation program lie in the Poor Laws which spoke of "sturdy beggars" and "able-bodied laborers,"[15] it is not a public assistance program nor a "dole" system where benefits are based upon need, but a type of social insurance, fi-

[11] Glover v. Simmons Co., 17 N. J. 313, 111 A. 2d 404 (1955); Krauss v. A. & M. Karagheusian, Inc., 13 N. J. 447, 100 A. 2d 277 (1953).

[12] Mohler v. Dep't of Labor, 409 Ill. 79, 97 N. E. 2d 762 (1951); Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N. W. 2d 338 (1951); Nordling v. Ford Motor Co., 231 Minn. 68, 42 N. W. 2d 576 (1950).

[13] N. C. GEN. STAT. § 96-2 (1950).

[14] Unemp. Comp. Comm. v. J. M. Willis Barber & Beauty Shop, 219 N. C. 709, 716, 15 S. E. 2d 4, 8 (1941).

[15] ALTMAN, AVAILABILITY FOR WORK 2 (1950).

nanced by the persons on whom the workers are economically dependent and providing for benefits payable without proof of need.[16] Since the program was not designed to be a public relief measure nor to "furnish a welcome sedative to those who prefer to drift more comfortably on the tides of indolence,"[17] benefits are not payable to all persons who are unemployed.[18] Mere unemployment is not enough.[19] The recepit of benefits is conditioned on compliance with the requirements and conditions prescribed by the various state statutes. Each state has certain requirements designed to limit payments to workers unemployed primarily as a result of economic causes, to delineate the risks which the laws cover,[20] to exclude from benefits those persons who are only casually, temporarily, or occasionally employed,[21] and to provide for the relief from the distress of *involuntary* unemployment for persons who are ordinarily workers and who would be workers now but for their inability to find jobs.[22] These requirements are means of ascertaining the claimant's attachment to the labor market: Is the claimant usually a worker? Has he worked for the specified period and earned a qualifying amount of wages in a type of employment covered by the laws? Does he have an honest desire to become re-employed? In short, has the claimant been a worker in the past and is he currently available for work? All states require a claimant to demonstrate his past and present labor force attachment.[23]

Past labor force attachment is uniformly tested by the requirements that a claimant must have worked in insured employment and must have earned a specified amount of wages in such employment.[24] These tests are easily administered since they require only the application of an arbitarary standard to the particular facts.

A claimant's present labor force attachment is more difficult to ascertain. All states attempt to test one's present attachment to the labor force by requiring that he be "able to work and available for work," and twenty-six states, including North Carolina, require, in addition, that he actively search for work.[25] All states also require that a claimant be

[16] Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage Loss*, 8 VAND. L. REV. 218, 223 (1955).

[17] Krauss v. A. & M. Karagheusian, 24 N. J. Super. 277, —, 94 A. 2d 339, 342 (1953).

[18] Neff v. Bd. of Rev., Bureau of Unemp. Comp., 52 Ohio Ops. 285, 67 Ohio L. Abs. 276, 117 N. E. 2d 533 (1953); Unemp. Comp. Comm. v. Tomko, 192 Va. 463, 65 S. E. 2d 524 (1951).

[19] Glover v. Simmons Co., 17 N. J. 313, 111 A. 2d 404 (1955).

[20] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 75.

[21] DIVISION OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMIN., U. S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY BULLETIN, vol. 19, no. 1, *State Unemployment Insurance Legislation 1955*, 19-20 (1956).

[22] Krauss v. A. & M. Karagheusian, Inc., 13 N. J. 447, 100 A. 2d 277. (1953).

[23] ALTMAN, *op. cit. supra* note 15 at 2. [24] *Id.* at 75.

[25] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 75; N. C. GEN. STAT. § 96-13 (1950). See Freeman, *Active Search for Work,*

free from any disqualifications under the statute.[26] The "able to work and available for work" tests have been described as positive conditions for the receipt of benefits while the disqualifications are negative expressions of conditions under which benefits may be denied to an otherwise eligible claimant.[27]

Since the normal administrative practice in North Carolina is to consider the disqualifications before passing on the eligibility of a claimant,[28] the various aspects of disqualification which might be influenced by religious beliefs will be here first considered.

Voluntary Leaving

All states, with the exception of Montana, provide for disqualification for leaving work without good cause.[29] In twenty states the good cause must be good cause connected with the work, or attributable to the employment, or involving fault on the part of the employer; in the other states good cause is not so restricted.[30] For a voluntary leaving of employment without good cause connected with the employment, North Carolina disqualifies a claimant for a period of from four to twelve weeks.[31]

Two aspects of this provision seem to cause the bulk of the litigation: (a) what constitutes voluntary leaving? and (b) what constitutes good cause?

Some courts say that "voluntary" means a free exercise of the will.[32] Other courts recognize that, although a worker freely decides to leave his job, his decision need not necessarily be voluntary.[33] "The pressure of necessity, of legal duty, or family obligations, or other overpowering circumstances, and his capitulation to them, may transform what is ostensibly voluntary unemployment into involuntary unemployment."[34]

10 OHIO ST. L. J. 181 (1949). There are other eligibility requirements, generally as follows: (1) unemployment (2) filing of a claim (3) registering for work at a public employment office and (4) serving a waiting period. See Williams, *Eligibility for Benefits,* 8 VANDER L. REV. 286 (1955).

[26] For details of the variations in state laws on disqualification, see COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 Tables 23-31 and Chapter IV generally. See Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 YALE L. J. 147 (1945); Sanders, *Disqualifications for Unemployment Insurance,* 8 VANDER. L. REV. 307 (1955).

[27] ALTMAN, *op. cit. supra* note 15 at 75.

[28] 6 CCH UNEMP. INS. REP. N. C. -8243, Employment Security Commission Statement of Policy no. 54 (1954).

[29] Montana disqualifies for any voluntary leaving—with or without good cause.

[30] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 80-84.

[31] N. C. GEN. STAT. § 96-14(a) (Supp. 1955).

[32] State v. Hix, 132 W. Va. 516, 54 S. E. 2d 198 (1949).

[33] Craig v. Bureau of Unemp. Comp., 83 Ohio App. 247, 83 N. E. 2d 628 (1948); Bliley Elec. Co. v. Unempl. Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946).

[34] Hollingsworth Tool Works v. Rev. Bd. of Ind. Emp. Sec. Div., 119 Ind. App. 191, —, 84 N. E. 2d 895, 897 (1949).

Once it has been determined that a claimant has quit his job, and that he has done so voluntarily, then it must be ascertained whether this voluntary leaving of employment was with good cause. It should be noted that the factors constituting good cause will differ in the various jurisdictions in light of the fact that 20 states require the good cause to be connected with the work.[35] It seems that personal reasons would more often constitute "good cause" in those jurisdictions where the criterion is not restricted to causes connected with the employment.

The Attorney General of North Carolina has given an interpretation of good cause for the use of the North Carolina Employment Security Commission:

> "In ascertaining whether or not an employee voluntarily left his employment, it would be justifiable to consider the mental processes, constraining or compulsive forces or objective influences, or the freedom or lack of freedom from external compulsion or necessity which led up to the claimant's leaving work, but the Commission should in every case be fully satisfied that, where an employee has left the employment, the reasons for so doing were of an impelling character, which, in the opinion of the Commission, afforded ample and complete justification for the severance of his employment. This would exclude all fictitious or feigned reasons or excuses for failure to continue in the work and would comprehend only such causes as operated directly on the employee which made, in the opinion of the Commission, his continuance in employment impossible, or attended with such circumstances as to make it unreasonably burdensome for him to continue therein."[36]

A Pennsylvania decision contains a discussion of good cause:

> ". . . 'good cause' must be so interpreted that the fundamental purpose of the legislature shall not be destroyed. Even in matters connected with his employment there must be some limit to the legally approved list of good causes for quitting employment. The quitting must be such a cause as would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the 'compensated unemployed.' . . .
>
> "An employee may contend that the character and habits of his fellow employees are distasteful to him, he may contend that the work he is engaged in (such as making of war munitions or

[35] See note 30 *supra;* See also, Kempfer, *Disqualifications for Voluntary Leaving and Misconduct,* 55 YALE L. J. 147 (1945) and Sanders, *Disqualification for Unemployment Insurance,* 8 VANDER. L. REV. 307 (1955).

[36] 6 CCH UNEMP. INS. REP. N. C. ¶ 1975.01 (1944).

alcoholic beverages) offends his religious or moral principles, or he may contend that his family objects to his working in a job in which he becomes begrimed with dirt yet these and similar reasons cannot be legally accepted as 'good cause' for leaving one's employment. . . .

"If every reason which appealed to an employee's head or heart is to be accepted as a good cause for his or her voluntarily leaving a job in a locality where there is no other work available, the Unemployment Compensation Law will become in many instances an invitation to a compensated rest."[37]

The courts are not in agreement as to what constitutes good cause.[38]

Would a claimant's religious beliefs constitute good cause for leaving employment? It seems that those states which allow personal factors to constitute good cause would be more likely to allow compensation to a claimant who quit for religious reasons than would those which require that the good cause be "good cause connected with the work or attributable to the employment, or involving fault on the part of the employer."

Apparently there have been few decisions at the state supreme court level which have discussed this particular problem. One court held that a claimant had left work voluntarily without good cause where, in spite of having been told that he could not have time off for a religious holiday because the union contract prevented using a substitute, he nevertheless took the day off.[39]

This question has been before the various state unemployment commissions. Generally, though not always, the commissions have held that a claimant who has left work for religious reasons has voluntarily severed the employment relation but with good cause and hence is not disqualified.

[37] Sun Shipbuilding and Dry Dock Co. v. Unemp. Comp. Bd. of Rev., 358 Pa. 224, 237, 56 A. 2d 254, 260 (1948).

[38] Claimant held to have had good cause for leaving employment when the leaving was for the following reasons: to take sick wife back to her home community, Hollingsworth Tool Works v. Rev. Bd., 119 Ind. App. 191, 84 N. E. 2d 895 (1949); because employer failed to pay wages promptly, Deshla Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. 2d 332 (1942); because of family obligations, Wolfson v. Unemp. Comp. Bd. of Rev., 167 Pa. Super. 588, 76 A. 2d 498 (1950); to join husband in another locality, *In re* Teicher, 154 Pa. Super. 250, 35 A. 2d 739 (1944); because minor claimant's parents insisted she accompany them to California, Western Printing and Lithographing Co. v. Industrial Comm., 260 Wis. 124, 50 N. W. 2d 410 (1951).

Claimant held not to have had good case for leaving employment when the leaving was for the following reasons: because of dissatisfaction with earnings, Dep't of Ind. Rev. v. Scott, 36 Ala. 184, 53 So. 2d 882 (1951); to get married, Moore v. Bureau of Unemp. Comp., 73 Ohio App. 362, 56 N. E. 2d 520 (1943); to join husband in another city, Stone Mfg. Co. v. S. C. Emp. Sec. Comm., 219 S. C. 239, 64 S. E. 2d 644 (1951); to care for young children, Judson Mills v. S. C. Unemp. Comp. Comm., 204 S. C. 37, 28 S. E. 2d 535 (1944); because of increase in duties, *In re* Anderson, 39 Wash. 2d 356, 235 P. 2d 303 (1951).

[39] Mee's Bakery v. Unemp. Comp. Bd. of Rev., 169 Pa. Super. 7, 82 A. 2d 68 (1951).

fied.[40] These findings by the commissions seem to be well reasoned. Religious beliefs causing the severance of employment clearly appear to be the kind of "necessitous and compelling"[41] reasons that transform voluntary unemployment into involuntary unemployment, the compensation of which is one of the basic purposes of the unemployment insurance acts.[42]

It is significant to note that although a person may be determined to have voluntarily left his employment with good cause and thus not be *disqualified,* it is possible that he may still be held ineligible for benefits because of *unavailability.* The same causes which justify a claimant in leaving employment may also prevent his being held available,[43] depending upon the extent to which his severing of the employment relation indicates an intention on his part to withdraw from the labor market.[44]

Refusal of Work

All states provide for disqualification for refusal of work; the statutes contain diverse provisions concerning the extent of the disqualification, factors to be considered in determining whether work is or is not suitable and whether the claimant has good cause for refusing it, and the provisions under which new work may be refused.[45]

States are required by the provisions of the Federal Unemployment Tax Act,[46] in order to protect labor standards, to include the so-called "Labor Standards Provision" in their Acts. These provisions are standard throughout the states, and North Carolina's provisions would seem to be typical:

> "Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied

[40] See, *e.g.,* Ben. Ser. Reports, 3963, N. Y. A (1952); 3759, N. Y. B (1952); 589, Pa. B (1950). This refers to Benefit Series Service, Unemployment Insurance, which is prepared by the Division of Determinations and Hearings, Bureau of Employment Security, U. S. Dep't of Labor. This service contains reports of significant administrative and court decisions.

[41] Bliley Elec. Co. v. Unemp. Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946); Flannick v. Unemp. Comp. Bd. of Rev., 168 Pa. Super. 606, 82 A. 2d 671 (1951). See also Horning v. Unemp. Comp. Bd. of Rev., 177 Pa. Super. 618, 112 A. 2d 405 (1955).

[42] N. C. GEN. STAT. § 96-2 (1950); see also note 11 *supra.*

[43] Hoffstot v. Unemp. Comp. Bd. of Rev., 164 Pa. Super. 43, 63 A. 2d 355 (1949).

[44] Krauss v. A. & M. Karagheusian, Inc., 13 N. J. 447, 100 A. 2d 277 (1953). An example of this would be where the claimant left his employment because of illness. In cases of this type, his ineligibility for benefits would only extend to the time when the factor causing the unavailability was abated, as contrasted with a predetermined period which would have been the case had he been held disqualified.

[45] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 88. See Menard, *Refusal of Suitable Work,* 55 YALE L. J. 134 (1945); Machuga, *Suitable Work under Unemployment Compensation Statutes,* 10 OHIO ST. L. J. 232 (1949).

[46] SOCIAL SECURITY BULLETIN, *op. cit. supra* note 6 at 3.

under this chapter to an otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."[47]

Most statutes, in addition to the labor standards provisions, contain rather standardized criteria for ascertaining the suitability of the work offered.[48] North Carolina's tests are:

"In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."[49]

Under the provisions of the statutes in forty-seven jurisdictions, a person is disqualified when he fails without good cause to apply for available and suitable work to which he is directed,[50] or to accept suitable work when proffered to him;[51] in the four remaining jurisdictions, he may be disqualified for refusal without good cause to accept an offer of employment for which he is reasonably fitted by experience and training.[52] Here again the disqualification period and factors in determining disqualification vary from state to state.[53]

[47] N. C. GEN. STAT. § 96-14(2) (Supp. 1955).

[48] New York and Delaware disqualify for refusals of work for which the claimant is reasonably fitted and Montana and Wyoming disqualify for refusal of work for which he is physically and mentally qualified.

[49] N. C. GEN. STAT. § 96-14(1) (Supp. 1955). For details in the various states see Table 26, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 90.

[50] Bigger v. Unemp. Comp. Comm., 4 Ter. [Del.] 553, 53 A. 2d 761 (1947); Muncie Foundry Div. of Borg-Warner Corp. v. Rev. Bd. of Emp. Sec. Div., 114 Ind. App. 475, 51 N. E. 2d 891 (1943); S. S. Kresge Co. v. Unemp. Comp. Comm., 349 Mo. 590, 162 S. W. 2d 838 (1942); Hanna v. Unemp. Comp. Bd. of Revi., 172 Pa. Super. 417, 94 A. 2d 178 (1953).

[51] Bigger v. Unemp. Comp. Comm., *supra* note 53; Muncie Foundry Div. of Borg-Warner Corp. v. Rev. Bd. of Emp. Sec. Div., *supra* note 53; see also Pacific Mills v. Dir. of Div. of Emp. Sec., 322 Mass. 345, 77 N. E. 2d 413 (1948).

[52] Claim of Delgado, 278 App. Div. 237, 105 N. Y. S. 2d 142 (3d Dep't 1951); Claim of Greaser, 279 App. Div. 702, 108 N. Y. S. 2d 239 (3d Dep't 1951); Claim of Crowe, 280 App. Div. 427, 113 N. Y. S. 2d 443 (3d Dep't 1952).

[53] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 90.

Religious beliefs are given effect under the provision that the commissions are to consider the "risk to claimant's morals." As one writer pointed out: "This element is frequently viewed broadly to give effect to one's moral precepts regardless of their consistency with prevailing ethical standards. . . . In order to make the work unsuitable, however, the connection between the condition pertaining to the job and the claimant's moral principles should be direct and not fanciful or nebulous."[54] In the usual case based on refusal of work for religious reasons, the religious views of the claimant are certainly not inconsistent with the current ethical standards of a sizable minority.[55] The states uniformly require the claimant to establish the sincerity of his religious beliefs; the element of good faith permeates every area of unemployment compensation, and where claimant has not acted in good faith or in furtherance of a conscientious religious belief, compensation has been denied.[56]

Recently the Ohio courts had occasion to consider, in the case of *Tary v. Board of Review,*[57] the effect of a claimant's refusal of employment for religious reasons. In this case the claimant was a conscientious member of the Seventh Day Adventist Church. When her job, which had required no Saturday work, terminated, she applied for and received unemployment benefits until she refused a job referral because it would have required her to work half-day on her Sabbath. The administrator thereupon suspended her benefits; the referee affirmed this finding; the board of review disallowed her application for further appeal.

Claimant thereupon appealed to the court of common pleas which reversed the action of the board of review; this was affirmed by the court of appeals, and, on appeal to the Supreme Court of Ohio, was once again affirmed.

The court pointed out that, when *Kut v. Albers Super Markets Inc.*[58] (an earlier Ohio decision involving religious beliefs) was decided, the Act in Ohio required the claimant to be available for work in his *usual trade or occupation,* or in any other trade or occupation for which he was *reasonably fitted.* However, by a 1949 amendment, the Act was amended to require claimant to be available for *suitable* work and to be ineligible for benefits for refusal without good cause to accept an offer of *suitable* work. It also provided that, in determining whether work was suitable, the degree of risk to claimant's morals was to be considered.

The court noted that this amendment made Ohio's statute in accord

[54] Menard, *Refusal of Suitable Work,* 55 YALE L. J. 134, 144 (1945).

[55] Usually cases based on refusal of work for religious reasons involve Orthodox Jews or Seventh Day Adventists since their Sabbath is on Saturday.

[56] See Ben. Ser. Report 9021-Mass. A (1955).

[57] 161 Ohio St. 251, 119 N. E. 2d 56 (1954); See Note, 30 NOTRE DAME LAW. 176 (1955); Note, 8 VANDER. L. REV. 519 (1955).

[58] 146 Ohio St. 522, 66 N. E. 2d 643, appeal dismissed 329 U. S. 669, rehearing denied 329 U. S. 827 (1946).

with those of other states where the provisions had been interpreted to excuse rejection of proffered employment if it would involve a violation of claimant's religious conscience and tend to offend his morals and continued: "It is our interpretation that the General Assembly intended, by the 1949 Amendment, to confer rights based upon bona fide moral convictions. Conscientious religious beliefs constitute an integral part of an individual's morals."[58a]

It seems probable that courts in other jurisdictions would reach the same result as the Ohio court did in the preceding case since forty-seven jurisdictions require acceptance of suitable work only and generally provide very similar criteria for ascertaining this suitability.[59] The commission decisions reflect a well settled rule in most jurisdictions that a conflict with a claimant's religious views renders the work unsuitable,[60] although there are decisions to the contrary.[61]

In the four states which have no suitability requirement it would seem theoretically possible that a claimant could be disqualified for the refusal of a job even if it violated his religious beliefs. There are apparently no state supreme court decisions from these states on this point but the administrative decisions do not indicate that such a result has been reached.[62]

Able to Work and Available for Work

The "able to work" requirement seems to cause no great difficulties. The variations from state to state are minor: some states require a claimant to be "physically able" or "mentally and physically able" but the effect of these variations is negligible.[63] This requisite is said to be present to distinguished unemployment insurance from workmen's compensation or health insurance.[64] "Generally speaking 'able' refers to mental attitudes and physical capabilities of claimant. . . ."[65] Normally this requirement has been leniently interpreted to allow benefits to physically disabled persons unless they are utterly incapable of working.[66]

[59] See notes 53, 54 and 55 *supra* and corresponding text.

[60] 7 Ben. Ser. no. 12, 9007-N. C. A (1944); 5 Ben. Ser. no. 10, 7643-Cal. A (1942); 10 Ben. Ser. no. 4, 11372-D. C. A (1947); 10 Ben. Ser. no. 2, 11273-Va. A (1947); 8 Ben. Ser. no. 7, 9596-Ky. A (1945); 8 Ben. Ser. no. 6, 9537-Pa. A (1945); 8 Ben. Ser. no. 9, 9851-Wash. A (1945); 9 Ben. Ser. no. 4/5, 10491-Pa. R. (1946); Ben. Ser., Report, 19609-Wisc. A (1954); Ben. Ser., Report, 5357-Ill. B (1954).

[61] 7 Ben. Ser. no. 2, 8362-Mass. A (1944); 8 Ben. Ser. no. 4, 9365-Pa. A (1945); see 11 Ben. Ser. no. 2, 12207-Minn. A (1948); 9 Ben. Ser. no. 7, 10645-Mich. A (1946); 12 Ben. Ser. no. 7, 13563-Pa. R (1949).

[62] See cases cited in note 60 *supra*.

[63] COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, *op. cit. supra* note 8 at 75.

[64] Revers v. Dir. of Div. of Emp. Sec., 323 Mass. 339, 82 N. E. 2d 1 (1948).

[65] Freeman, *Able to Work and Available for Work*, 55 YALE L. J. 123, 128 (1945).

[66] ALTMAN, *op. cit. supra* note 15 at 130.

The term "available for work" is not defined in the North Carolina Employment Security Act nor can it be defined in precise, mechanical terms which are applicable to all cases.[67] Consequently, more appeals are taken from determinations by the administrative agencies on availability than from any other type of determination under the state unemployment insurance laws.[68] Although availability depends on the facts and circumstances of each case,[69] it has generally been understood that availability is synonymous with "attachment to the labor market"[70] and that it is designed to test each claimant's attachment thereto.[71]

The satutory requirement that a claimant must be available for work is not ordinarily interpreted to require total availability under all circumstances, in view of the usual stipulation that only suitable work need be accepted and that work may be refused if good cause exists.[72] However, some jurisdictions require that the claimant be exposed to the labor market unequivocally and unrestrictedly,[73] and specify that he may not attach restrictions not customary in his occupation[74] or in the type of employment to which he is suited.[75] Thus, though it is clear that generally a claimant may impose *some* conditions or limitations on his employability without impairing his availability for work,[76] it is equally clear that he may also restrict his labor to the point of unavailability.[77] Certainly claimants may not impose restrictions which in effect destroy

[67] Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 61 N. W. 2d 526 (1953).

[68] ALTMAN, *op. cit. supra* note 15 at 4.

[69] See, *e.g.*, Dep't of Industrial Relations v. Tomlinson, 251 Ala. 144, 36 So. 2d 496 (1948); Leonard v. Unemp. Comp. Bd. of Rev., 148 Ohio St. 419, 75 N. E. 2d 567 (1947); Shannon v. Bureau of Unemp. Comp., 155 Ohio St. 53, 97 N. E. 2d 425 (1951).

[70] Altman and Lewis, *Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation*, 22 N. C. L. REV. 189, 28 MINN. L. REV. 387 (1944).

[71] See *e.g.*, Roger v. Admin. Unemp. Comp. Act, 132 Conn. 647, 46 A. 2d 844 (1946); see also Leonard v. Unemp. Comp. Bd. of Rev., *supra* note 69; Fleiszig v. Bd. of Rev. of Div. of Unemp. Comp. of Dep't of Labor, 412 Ill. 49, 104 N. E. 2d 818 (1952).

[72] Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 456, 61 N. W. 2d 526 (1953).

[73] Schettino v. Admin., 138 Conn. 253, 83 A. 2d 217 (1951); Ford Motor Co. v. App. Bd. of Mich. Unemp. Comp. Comm., 316 Mich. 468, 25 N. W. 2d 586 (1947); Walton v. Wilhelm, 120 Ind. App. 218, 91 N. E. 2d 373 (1950).

[74] Unemp. Comp. Comm. v. Tomko, 192 Va. 463, 65 S. E. 2d 524 (1951).

[75] Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 456, 61 N. W. 2d 526 (1953).

[76] Bliley Elec. Co. v. Unemp. Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946); Mee's Bakery, Inc. v. Unemp. Comp. Bd. of Rev., 162 Pa. Super. 183, 56 A. 2d 386 (1948).

[77] Leclerc v. Admin. Unemp. Comp. Act, 137 Conn. 438, 78 A. 2d 550 (1951); Jackson v. Rev. Bd. of Ind. Emp. Sec. Div., 124 Ind. App. 648, 120 N. E. 2d 413 (1954); Brown-Brockmeyer Co. v. Holmes, 152 Ohio St. 411, 89 N. E. 2d 580 (1949); Unemp. Comp. Comm. v. Tomko, 192 Va. 463, 65 S. E. 2d 524 (1951); Jacobs v. Off. of Unemp. Comp. and Placement, 27 Wash. 2d 641, 179 P. 2d 707 (1947).

the market for their services,[78] or show their unwillingness to accept work.[79] The problem is, of course, whether or not the restrictions serve to limit the work which a claimant can accept to such a degree that he is no longer genuinely attached to the labor force. It is essentially a matter of degree to ascertain to what extent a claimant can impose restrictions and on what these restrictions must be based.

The North Carolina Unemployment Compensation Commission's Statement of Policy No. 6 provides: "Whenever a claimant so limits the circumstances under which he would accept work as substantially to eliminate himself from consideration for potential job opportunities, he shall be considered unavailable for work."[80]

The courts, as a rule, have dealt harshly and critically with claimants who restrict their employability. One court has said that the laws were never intended to guarantee a claimant employment shackled with each and every condition he might impose.[81] Claimants have been held ineligible where they restricted their availability to certain hours,[82] types of work,[83] working conditions,[84] and wages,[85] to mention only a few of the more common restrictions.

Restrictions to a particular shift pose one of the most difficult problems in availability. Women have most often been the claimants who have imposed restrictions on their availability.[86] This is understandable because generally it is the woman who must remain in the home during certain hours or days to perform her domestic duties and therefore it is she who most frequently imposes conditions, particularly restrictions as to time. However, the courts have usually dealt harshly with these claimants. As one court said: "It is held in most jurisdictions which have dealt with the matter (or with analagous problems) that a female worker may not limit her availability to a certain shift or period of time because she must care for her children at other times."[87] Usually a

[78] Goings v. Riley, 98 N. H. 93, 95 A. 2d 137 (1953); Robinson v. Md. Emp. Sec. Bd., 202 Md. 515, 97 A. 2d 300 (1953).

[79] Robinson v. Md. Emp. Sec. Bd., *supra* note 78; Freeman, *Able to Work and Available for Work*, 55 YALE L. J. 123 (1945).

[80] 6 CCH UNEMP. INS. REP., N. C. ¶ 1950.11, Unemp. Comp. Comm. Statement of Policy No. 6 (1942).

[81] *In re* Krieger, 279 App. Div. 681, 107 N. Y. S. 2d 916 (3d Dep't 1951).

[82] Leclerc v. Admin., 137 Conn. 438, 78 A. 2d 550 (1951); Ford Motor Co. v. App. Bd. of Mich., Unemp. Comp. Comm., 316 Mich. 468, 25 N. W. 2d 586 (1947); Judson Mills v. S. C. Unemp. Comm., 204 S. C. 37, 28 S. E. 2d 535 (1944); Keen v. Texas Unemp. Comp. Comm., 148 S. W. 2d 211 (Texas Civ. App. 1941).

[83] Haynes v. Unemp. Comp. Comm., 353 Mo. 540, 183 S. W. 2d 77 (1944); Claim of Delgado, 278 App. Div. 237, 105 N. Y. S. 2d 142 (3d Dep't 1951); Unemp. Comp. Comm. v. Tomko, 192 Va. 463, 65 S. E. 2d 524 (1951).

[84] Unemp. Comp. Comm. v. Tomko, 192 Va. 463, 65 S. E. 2d 524 (1951).

[85] Hallahan v. Riley, 94 N. H. 48, 45 A. 2d 886 (1946). 6 CCH UNEMP. INS. REP. N. C. -8213 New Matters ¶ 1950 (1952).

[86] ALTMAN, *op. cit. supra* note 15 at 230.

[87] Tung-Sol Elec. Inc. v. Bd. of Rev., Div. of Emp. Sec., Dep't of Labor and Industry, 35 N. J. Super. 397, 114 A. 2d 285 (1955) and cases cited therein.

claimant stands a better chance of being found available when the limitation is to the first shift,[88] although there are decisions to the contrary. The North Carolina Employment Security Commission's decisions reflect the same attitude as that of the courts.[89]

In considering the effect of one's religious beliefs on availability, it should be remembered that the availability requirement is designed to test the claimant's attachment to the labor market. Therefore, if a claimant's religious-inspired restriction does not serve to take him out of the labor market, he should be held available. That was the theory of the Michigan court in the case of *Swenson v. Michigan Employment Security Commission*:[90] The claimants were Seventh Day Adventists who, prior to their lay-off, had been in the employ of two or more concerns in Battle Creek, where thousands of Seventh Day Adventists were employed on a full time basis. In their applications for unemployment benefits, they indicated that they could not, because of their religious beliefs, work from sundown Friday to sundown Saturday. The Commission held them ineligible for failure to establish their availability. The referee set aside the Commission's determination. The appeal board reversed the referee and the circuit court reversed the appeal board. On appeal to the Supreme Court of Michigan, claimants were found available for work and entitled to benefits under the Act.

The court pointed out that the claimants had neither been offered nor had they refused employment. The court distinguished the *Koski* case[91] (an earlier Michigan case involving a restriction as to time) on the facts as not involving a religious question and pointed out that the decision in the *Tary*[92] case had changed Ohio's position from that held in the *Kut* case.[93]

> The court quoted from the circuit court's opinion:
> "The law is designed to apply to all situations within its contemplation, and the Commission's attitude, if upheld, would completely exclude thousands of citizens of this state from the benefits of the Act. That could never have been the intent of the legislature; nor should we construe the Act as to accomplish that result. Furthermore, we suggest that the policy of this state in this matter has been definitely established by the legislature in the language of the statute.

[88] ALTMAN, *op. cit. supra* note 15 at 230.
[89] 6 CCH UNEMP. INS. REP. N. C. New Matters ¶ 1950; 8209 (1952); 8213 (1952); 8214 (1952); 8283 (1955); 8296 (1956); 8246 (1954).
[90] 340 Mich. 430, 65 N. W. 2d 709 (1954).
[91] Ford Motor Co. v. App. Bd. of Mich. Unemp. Comp. Comm., 316 Mich. 418, 25 N. W. 2d 586 (1947).
[92] See note 57 *supra*.
[93] Kut v. Albers Super Markets Inc., 146 Ohio St. 522, 66 N. E. 2d 643 (1946).

" 'To exclude such persons would be arbitrary discrimination when there is not sound foundation, in fact, for the distinctions and the purposes of and theory of the Act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them.' "[93a]

Another possible theory of holding a claimant who has placed a limition on his availability because of religious convictions to be available nonetheless is to decide that a claimant need be available for *suitable* work only. Once this position is reached the court can then apply the usual criteria for the determination of suitability, one of which is to consider the risk to claimant's morals, and find that the work which would violate a claimant's conscientious religious beliefs is unsuitable for him, with a consequent finding of availability. This was the theory employed by the North Carolina Supreme Court in the *Miller* case.

Only seven states by statute require that a claimant be available for *suitable* work only.[94] However, the majority view seems to be, even without such a statutory requirement, that the availability test is met when claimant is available for *suitable* work which he does not have good cause to refuse—when he is genuinely attached to the labor force.[95] Thus, as a matter of actual practice, many other states require availability for suitable work only. It would appear that by the *Miller* decision North Carolina now falls into this latter group. G. S. 96-13 contains the standard availability requirement that a claimant, in order to be eligible for benefits, must be available for work, but availability is not defined. The *Miller* case apparently gave the North Carolina Supreme Court the first occasion for applying the concept of *suitability* as found in G. S. 96-14, the section on disqualifications, to the interpretation of *availability,* a requisite for eligibility, as found in G. S. 96-13. However, early commission decisions reflect that it has long been the policy of the commission to require availability for suitable work only.[96]

This decision would seem sound in that it aligns North Carolina with

[93a] Swenson v. Michigan Employment Security Commission, 340 Mich. 430, 437, 65 N. W. 2d 709, 712 (1954). The latter paragraph was quoted from the circuit court's opinion.

[94] Arkansas, Colorado, Idaho, Kentucky, North Dakota, Ohio and Pennsylvania.

[95] Reger v. Admin., 132 Conn. 647, 46 A. 2d 844 (1946); Claim of Sapp, 75 Idaho 65, 266 P. 2d 1027 (1954); Stricklin v. Annunzio, 413 Ill. 324, 109 N. E. 2d 183 (1952); Krauss v. A. & M. Karagheusian, Inc., 13 N. J. 447, 100 A. 2d 277 (1953).

[96] 1 Ben. Ser. no. 8, 704-N. C. A (1938); 5 Ben. Ser. no. 2, 6963-N. C. A (1942). However in one case in another jurisdiction, the Board of Review was reversed by the court for requiring availability for suitable work only, in absence of express statutory authority for so doing. Brown-Brockmeyer Co. v. Bd. of Rev., Bureau of Unemp. Comp., 70 Ohio App. 370, 45 N. E. 2d 152 (1942).

the majority interpretation of *availability,* makes this provision more flexible to the needs of the workers, provides for minority claimants' free exercise of their religious and moral beliefs and affirms the policy of the Commission to require availability for suitable work only.

Had the court not applied the concept of suitability to the meaning of availability, a contrary result would probably have been reached or if the same result had been reached, it would have been an exception[97] to the general interpretations. In considering this case it is important to remember that here, unlike the *Swenson* case, *supra,* which the court cited and approved, the claimant had removed herself from 95% of the labor market by being available for first shift work only when the custom in the local labor market was to hire new employees for second and third shifts only. Ordinarily these factors would have necessitated a finding of unavailability; however, the court was not faced with this issue since their initial finding was that the work was not suitable for the claimant.[98]

Having adopted this view the court should experience no difficulty in following the *Tary* case, *supra,* if given a similar set of facts, nor should it encounter any difficulty in holding that religious reasons constitute good cause for voluntarily leaving employment.

This case constitutes a liberal interpretation of the North Carolina Employment Security Law and a realistic judicial recognition of facts which cause claimants to restrict their employability. It should enable the North Carolina courts to give the Law a broad and liberal construction to aid in "mitigating the economic evils of unemployment."[99]

THOMAS P. WALKER.

Workmen's Compensation—Death of Nightwatchman as Arising Out of and in the Course of Employment

In a proceeding under the Georgia Workmen's Compensation Act the evidence showed that a nightwatchman was murdered while drinking coffee in a drive-in 25 feet from the premises of his employer and 100 yards from the building he was required to watch. The murder occurred about 4:00 A.M., which was during the hours of his employment. The employer had not given him permission to leave the premises but had given him permission to drink coffee on the premises. Compensation was allowed on the grounds that the injury arose by accident out of and in the course of the employment.[1] This is typical of some of the

[97] ALTMAN, AVAILABILITY FOR WORK, 180 (1950).

[98] But See 12 Ben. Ser. no. 7, 13545-N. C. R (1949); 7 Ben. Ser. no. 12, 9007-N. C. A (1944).

[99] Unemp. Comp. Comm. v. J. M. Willis Barber & Beauty Shop, 219 N. C. 709, 15 S. E. 2d 4 (1941).

[1] U. S. Fidelity & Guaranty Co. v. Croft, — Ga. App. —, 91 S. E. 2d 110 (1955).

difficult cases that are presented before workmen's compensation boards throughout the country, and it illustrates the difficulty of construing the rather nebulous phrase "arising out of and in the course of the employment," which appears in the law of almost every state as a condition precedent to the right to receive compensation for injury arising by accident.[2]

From the genesis of the act as we know it today—in Germany in 1884—through the first State enactment in Wisconsin in 1911, to the time of the last state enactment in Mississippi in 1948 the underlying motive has been elimination of the burdensome common law remedies with which the industrial worker had to contend, and to bring about a quick and efficient means of recovery for their injuries. It was, therefore, evident from the beginning that acts must be liberally construed so as to effectuate their purpose.[3] However, as Professor Horovitch in his book has aptly put it, ". . . the shades of Abinger and Shaw still dictate decisions through the dogged hands of judges steeped in ancient learning. In the *minority* of courts common law principles, long outworn, are brought back to deny recovery in present-day compensation actions."[4]

It is evident that by the nature of the act and the wording of this all important phrase there can be no hard and fast rules of law, and each decision will have to rest on its particular fact situation.[5] As a consequence there has been a lack of unity among the states and even within individual states. The courts have gradually adopted general rules or standards to apply to the many and varying fact situations that arise, as in street accidents,[6] meal time accidents,[7] and accidents of traveling employees.[8]

Regardless of their type of work, employees must establish the existence of three definite requisites before being allowed recovery,[9] *i.e.*, (1) that claimant suffered a personal injury by accident; (2) that such injury

[2] HOROVITCH, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 72 (1944). The North Carolina provisions are N. C. GEN. STAT. §§ 97-2(f), 3 (1929).

[3] Guest v. Brenner Iron & Metal Co., 241 N. C. 448, 85 S. E. 2d 596 (1955); Essick v. Lexington, 232 N. C. 200, 60 S. E. 2d 106 (1950); Graham v. Wall. 220 N. C. 84, 16 S. E. 2d 691 (1941); Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591 (1930).

[4] HOROVITCH, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS viii (1944).

[5] Harden v. Thomasville Furniture Co., 199 N. C. 733, 735, 155 S. E. 728, 730 (1930).

[6] Note, 27 WASH. U. L. Q. 139 (1941); Annot., 80 A. L. R. 126 (1932).

[7] Note, 17 N. C. L. REV. 458 (1939). [8] Note, 23 N. C. L. REV. 159 (1945).

[9] Henry v. A. C. Lawrence Leather Co., 231 N. C. 477, 57 S. E. 2d 760 (1950). When the death is by violent means there is a rebuttable presumption of death by accident. McGill v. Lumberton, 215 N. C. 752, 3 S. E. 2d 324 (1939). The claimant's proof can consist of attending circumstances, as when the unexplained death is a natural and probable result of a risk of the employment. Poteete v. North State Pyrophyllite Co., 240 N. C. 561, 82 S. E. 2d 693 (1954).

arose in the course of the employment; (3) and that such injury arose out of the employment.[10]

An accident within the meaning of the act is "an unlooked for and untoward event which is not expected or designed by the injured employee."[11] An assault is an accident within this definition when it is without design on the workman's part even though intentionally caused by another.[12]

"Arising out of" and "in the course of" are not synonymous and involve two ideas and two conditions, both of which must be proved by the employee. "Arising out of" refers to the origin or cause of the accident, as springing from the work the employee is supposed to perform, while "in the course of" refers to the time, place and circumstance under which the injury by accident occurred.[13] An injury therefore can occur in the course of one's employment but not arise out of it, as when a nightwatchman is injured while washing his car on the employer's premises.[14]

The Georgia court applied these generalities in the principal case in affirming the Board's award of compensation. The court based its decision on an earlier Georgia case where it was said: "It has been held that acts of ministration by a servant unto himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, or while seeking shelter from a storm during working hours, where the employee intends to return to work after the storm passes, and numerous others, readily conceivable, performance of which while at work is reasonably necessary to his health and comfort, are incidents of his employment and acts of service therein . . . though in a sense they are personal to himself and only remotely and indirectly conducive to the object of his employment; and that an accidental injury sustained in the performance of such an act is compensable as one incurred in the course of the employment and resulting therefrom."[15] The court stated that since the

[10] Anderson v. Northwestern Motor Co., 233 N. C. 372, 64 S. E. 2d 265 (1951); Withers v. Black, 230 N. C. 428, 53 S. E. 2d 668 (1949); Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. 2d 387 (1947); Wilson v. Mooresville, 222 N. C. 283, 22 S. E. 2d 907 (1942).

[11] Gabriel v. Newton, 227 N. C. 314, 316, 42 S. E. 2d 96, 97 (1947); Brown v. Carolina Aluminum Co., 224 N. C. 766, 767, 32 S. E. 2d 320, 322 (1949). The act does not contemplate recovery for all injuries, but only those by accident arising out of and in the course of the employment. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. 2d 751 (1943).

[12] Withers v. Black, 230 N. C. 428, 53 S. E. 2d 668 (1949); Geltman v. Reliable Linen Supply Co., 128 N. J. L. 443, 25 A. 2d 894 (1942) (motorist assaulted by another motorist); Pinkerton Nat. Detective Agency v. Walker, 157 Ga. 548, 122 S. E. 202 (1924).

[13] Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S. E. 2d 410 (1954); Sweatt v. Rutherford County Board of Education, 237 N. C. 653, 75 S. E. 2d 738 (1953); Bell v. Dewey Bros., 236 N. C. 280, 72 S. E. 2d 680 (1952).

[14] Bell v. Dewey Bros., 236 N. C. 280, 72 S. E. 2d 680 (1952).

[15] Carter v. Metropolitan Life Ins. Co., 47 Ga. App. 367, 368, 170 S. E. 535, 536 (1933).

watchman did not tarry long he was still in the course of his employment; and since it is a common hazard of a nightwatchman's job that he be set upon by robbers or burglars, it arose out of the employment. A contributing factor was that the deceased could survey most of the building from where he was sitting in the drive-in.

This seems to be an extreme case in that it allows recovery by an employee whose duty is to guard his employer's property, but who has completely left the premises of his employer and is attacked by someone who, so far as appears, had no intention of trespassing on the employer's property. However, the decision is commendable from a policy viewpoint, because it broadly interprets the key words of the act and more nearly effectuates its desired purposes.[16] There was a dissent on the grounds that the watchman had abandoned his employment, that the injury was directed against the watchman for purely personal reasons, and thus, that the accident did not arise out of the employment.[17]

North Carolina apparently would not be so liberal. In *Smith v. Newman Machinery Co.*[18] almost the same situation arose with the exception that the store was *on* the employer's premises. There the court recognized the special hazard of the watchman but said: ". . . the facts in the case at bar disclose that he was not making his rounds at the time of the injury or performing any service for his employer,"[19] and denied recovery.

[16] HOROVITCH, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS vii. "The author does not argue for unlimited liability in all cases. But if some of the judges could be present in the classrooms where compensation cases are being discussed before law students or students in economics, and hear the reactions of those who will dominate the scene when we are no longer here, they would cease their attempt to fly in the face of common sense, and stop introducing narrow common-law rulings into compensation cases. They would no longer attempt to stem the tide of reasonable liberailty which the acts promised, and which should have arrived at our shores generations ago. . . . An ashman's widow cannot understand how an intelligent judge can rule that she and the five children must go on charity because her husband did not wait for the employer's truck to stop, but had jumped off when it was going three and one-half miles an hour, in order to rush or facilitate his work. To tell her it was an 'added risk' is to raise her contempt for the law." For a criticism of this work see Malone, Book Review, 23 N. C. L. REV. 173 (1945).

[17] GA. CODE ANN. § 114-102 (1920). ". . . nor shall 'injury' and 'personal injury' include injury caused by the wilfull act of a third person directed against an employee for reasons personal to such employee." The North Carolina Act does not contain this provision but the court has judicially interpreted the Act in accord with it. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728 (1930). For other cases see note 23 *infra*.

[18] 206 N. C. 97, 172 S. E. 880 (1932). This case has not been cited in a single decision since it was decided.

[19] *Id.* at 99, 172 S. E. at 881. Nightwatchmen are generally given a liberal treatment by the courts in view of their hazardous activity. As the North Carolina Court has described it, they are "within the zone of special danger." Bain v. Travora Mfg. Co., 203 N. C. 466, 468, 166 S. E. 301, 302 (1932); West v. East Coast Fertilizer Co., 201 N. C. 556, 559, 160 S. E. 765, 766 (1931). Some states require, either by legislative enactment or by judicial interpretation, that the worker be employed in a hazardous or extrahazardous occupation in order to be covered by

Generally, an assault inflicted on a workman by a third person is regarded as "accidental" within the meaning of the act.[20] Also, it meets the "arising out of" requirement when the employment is such as naturally to invite an assault, as when the employee is protecting his employer's property and the assault naturally results because of the employment and not because of something unconnected with it.[21] But if the assault is unconnected with the employment or is for other reasons personal to the employee and the assailant, it generally does not arise out of the employment.[22] In such case the employment is not the cause of the assault, though it may be the occasion thereof.[23]

The North Carolina Court has laid down the following test for determining whether an accidental injury arises out of an employment: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been forseen or expected."[24] Of course, it is in the application of this test that the court has difficulty. The decisions both by the Commission and the courts seem to be wholly inconsistent at times, as can be seen by a few pertinent examples. Recovery was denied when an employee, who was in his car ready to leave the plant,

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the act. Hoffman v. Hazelwood, 139 Or. 519, 10 P. 2d 349 (1932); Annot., 83 A. L. R. 1018, 1067 (1933) (concerning watchmen as being within the classification of hazardous duty). The North Carolina Act does not distinguish between hazardous and non-hazardous employment.

[20] Cases cited note 13 *supra*. Beem v. H. D. Lee Mercantile Co., 337 Mo. 114, 85 S. W. 2d 441 (1935); Indian Territory Illuminating Oil Co. v. Jordan, 140 Okla. 238, 283 Pac. 240 (1929).

[21] American Mut. Ins. Co. v. Smith, 54 Ga. App. 320, 187 S. E. 724 (1936) (watchman killed while making rounds); Griffin v. McLellan Stores, 1 I. C. 144 (1929), N. C. W. C. A. Ann. 41 (1955) (store walker stabbed while apprehending thief); Todd v. Eastern Furniture Mfg. Co., 147 Md. 352, 128 Atl. 42 (1925) (watchman killed by personal enemy; compensable because of nature of employment).

[22] New v. Crystal Ice & Coal Co., A-785 (Feb., 1942), N. C. W. C. A. Ann. 42 (1955) (claimant injured in fight after he had been fired or quit); Neill v. Ragland Const. Co., 216 N. C. 744, 6 S. E. 2d 491 (1940) (two watchmen in dispute over matter foreign to their employment); I. T. I. O. Co. v. Lewis, 165 Okla. 26, 24 P. 2d 647 (1932) (watchman shot for unknown reason); Tise v. Newman Machine Co., 1 I. C. 237 (1930), N. C. W. C. A. Ann. 42 (1955) (fight having no relation to employment); January-Wood Co. v. Schumacher, 231 Ky. 705, 22 S. W. 2d 117 (1929) (watchman killed by wife's paramour); Pioneer Coal Co. v. Hardesty, 77 Ind. App. 205, 133 N. E. 398 (1921) (watchman killed for personal reasons).

[23] The courts seldom apply the "but for" test as laid down in a New Jersey decision. The claimant was employed at a butcher shop and was shot in the eye by an arrow as he was burning trash in the backyard of the shop. The court said: "But for the employment, the appellant would not have been in the backyard and in the path of the arrow." Gargiulo v. Gargiulo, 24 N. J. Super. 129, 93 A. 2d 598 (1952), *aff'd*, 12 N. J. 807, 97 A. 2d 593 (1953).

[24] Withers v. Black, 230 N. C. 428, 433, 53 S. E. 2d 668, 672 (1949); Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 726, 153 S. E. 266, 269 (1930). It is not necessary that the employment be the sole cause of the injury, just so it is a contributing cause. Mississippi Products, Inc. v. Gordy. — Miss. —, 80 So. 2d 793 (1955).

got out and slipped on a fruit peeling after having been beckoned to by a watchman;[25] but was allowed when an employee slipped on oil in the street as he was going for the mail.[26] Also, recovery was denied when an employer was stabbed in the back for an unknown reason while he was working in a mill;[27] but was allowed when a nightwatchman was killed by an unknown assailant,[28] or a robber.[29]

In those cases where the accident has been brought about by means other than an assault, the test of whether it arises out of and in the course of the employment is the same as in the assault cases. There was no recovery where a nightwatchman fell asleep on a train track and was killed by a passing train;[30] where a nightwatchman was bitten by a spider while engaged in his work;[31] and where a watchman was sitting in a chair in front of defendant's garage waiting until he was to make his next round, and was struck by a wheel that ran off the axle of a passing car.[32] It was thought that in these cases causal connection was absent. But where a cemetery keeper was run over by a car as he was crossing the street to the funeral home, the risk was incidental to the employment and arose out of the employment.[33]

The fact that the employee is performing personal acts for his own benefit will not in itself bar recovery.[34] The court relied heavily on this

[25] Lockey v. Cohen, Goldman & Co., 213 N. C. 356, 359, 196 S. E. 342, 344 (1938). "When an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment." *Id.* at 359, 196 S. E. at 344.

[26] Clinton v. Shuford Nat. Bank, 9304 (Sept., 1940), N. C. W. C. A. Ann. 39 (1955). The Commission distinguished the *Lockey* case, *supra* note 25, on the grounds that it was not clear there whether or not the employee was on duty at the time of the accident.

[27] Phillips v. Highland Pk. Mfg. Co., 9129 (May, 1940), N. C. W. C. A. Ann. 42 (1955).

[28] Stanland v. Wilmington Term. Whse. Co., 2 I. C. 331 (1931), N. C. W. C. A. Ann. 42 (1955).

[29] West v. East Coast Fertilizer Co., 201 N. C. 556, 160 S. E. 765 (1931); *accord,* Malloy v. Caldwell Wingate Co., 284 App. Div. 798, 135 N. Y. S. 2d 445 (1954) (watchman found dead one story below where he usually worked); Schmitt v. Bay Ridge Hospital, 277 App. Div. 957, 99 N. Y. S. 2d 632 (1950) (watchman found dead at foot of stairs where his work might well have taken him, even though it was on a public street); Southern Cotton Oil Co. v. Bruce, 249 Ala. 675, 32 So. 2d 666 (1947) (watchman accidentally shot by young son of watchman's employer).

[30] Davis v. Elk-Dixie Furniture Corp., 3768 (Sept. 16, 1933), N. C. W. C. A. Ann. 36 (1955).

[31] Howard v. Statesville Flour Mills Co., 4869 (Nov. 3, 1934), N. C. W. C. A. Ann. 37 (1955).

[32] Bunting v. State Hwy. & P. W. Comm., 9526 (July, 1940), N. C. W. C. A. Ann. 37 (1955).

[33] Bell v. Dewey Bros., 236 N. C. 280, 72 S. E. 2d 680 (1952).

[34] Naranja Rock Co. v. Dawal Farms, Inc., 74 So. 2d 282 (Fla., 1954); Wamhoff v. Wagner Electric Corporation, 354 Mo. 711, 190 S. W. 2d 915 (1945); McCarter v. Ruby Cotton Mills, Inc., A-1405 (Dec. 28, 1942), N. C. W. C. A. Ann. 44 (1955); Keel v. Brown Paving Co., 9963 (Jan., 1941), N. C. W. C. A. Ann. 44 (1955); Clews v. Blythe Bros. Co., 8609 (April, 1939), N. C. W .C. A. Ann. 44 (1955); McKinley v. Belk's Dept. Store, 5676 (Sept., 1935), N. C. W. C. A. Ann.

principle in the present case. Usually if he has abandoned his work completely he will be unable to recover.[35] It is not necessary that the employee be in the exact spot designated by the employer; but in the cases that have arisen in North Carolina the court has been careful to say that the employee was in a place where he had a right to be.[36] It is generally stated that if the injury has no relation to or connection with the employment and is undertaken solely for the pleasure and convenience of the employee or a third person, it is not compensable.[37] However, if it is done pursuant to continued acquiescence by the employer, the result is sometimes different.[38]

North Carolina, both at Commission and court level, has held generally to the narrower view in the type of cases under consideration in this note. The principal case seems to lean toward a far broader construction of the act and on its exact facts seems to reach a desirable result. However, as was said above, the purpose of the act is not to place upon the employers the burden of absolute liability for all injuries to their employees,[39] so there must be a dividing line, and each case must be decided separately. This will naturally produce inconsistencies, and it will take time and experience to harmonize the various fact situations with the standards that are set up.

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44 (1955); *In Re* Bollman, 73 Ind. App. 46, 126 N. E. 639 (1920). *But see* Hanson v. Globe Indemnity Co., 85 Ga. App. 179, 68 S. E. 2d 179 (1951) (injury sustained during fifteen minute rest period not compensable). The courts sometimes make a distinction, which seems to be unreasonable, between injuries sustained during a definite rest period and those sustained while stopping work specifically to do certain personal acts.

[35] Vollmer v. City of Milwaukee, 254 Wis. 162, 35 N. W. 2d 304 (1948); Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. 2d 550 (1940; Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455 (1934); Pittsburgh Coal Co. of Illinois v. Industrial Commission, 323 Ill. 54, 153 N. E. 630 (1926). Compensation probably was denied in these cases because the injury was not in the course of the employment.

[36] Howell v. Standard Ice & Fuel Co., 226 N. C. 730, 40 S. E. 2d 197 (1946); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. 2d 320 (1944); Gordon v. Thomasville Repair Co., 205 N. C. 739, 172 S. E. 485 (1934).

[37] Bell v. Dewey Bros., 236 N. C. 280, 72 S. E. 2d 680 (1952); Montgomery v. Maryland Casualty Co., 39 Ga. App. 210, 146 S. E. 504 (1929); Guiliano v. Daniel O'connell's Sons, 105 Conn. 695, 136 Atl. 677 (1927); Kraft v. West Hotel Co., 193 Iowa 1288, 188 N. W. 870 (1922). But compare Puffin v. General Electric Co., 132 Conn. 279, 43 A. 2d 746 (1945), where claimant was allowed recovery for severe burns suffered as a result of lighting a cigarette and setting fire to her angora sweater while she was in the rest room on the employer's premises during her employment.

[38] Wamhoff v. Wagner Electric Corporation, 354 Mo. 711, 190 S. W. 2d 915 (1945); Annot., 161 A. L. R. 1461 (1945); Peppers v. Wiggins Drug Stores, Inc., 1 I. C. 164 (1929), N. C. W. C. A. Ann. 54 (1955); Taylor v. Hogan Milling Co., 129 Kan. 370, 282 Pac. 729 (1929).

[39] The English counterpart to the American Workmen's Compensation Acts also requires that the injury must be by accident arising out of and in the course of the employment, but there is one notable distinction. The accident is presumed, in the absence of evidence to the contrary, to have arisen out of the employment once it is proved to have been in the course of the employment. National Insurance (Industrial Injuries) Act, 1946 (c. 62) § 7(4).