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Cases Noted

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CASES NOTED

BANKRUPTCY—UNCLAIMED DIVIDENDS—DISTRIBUTION TO CREDITORS WHO HAVE NOT BEEN PAID IN FULL

S was adjudicated bankrupt in 1901. A final dividend of about 7% was declared on allowable claims. Dividend checks totaling approximately $1,500 were never presented for payment. Section 66 of the Bankruptcy Act [1] provides that unclaimed dividends shall be distributed to creditors whose claims have not been paid in full. *P* was such a creditor and sued to recover the fund for itself and all others in this class who might join in the proceeding and establish their rights. Notice by publication was given but no other creditor appeared. The District Court's order directed the Treasurer of the United States to turn over 7% of the fund to *P* and that the balance of the fund be retained for the benefit of the other proved creditors of the bankrupt to await applications by them for payment of their pro rata shares of said balance.[2] *Held,* that *P* is entitled to the whole fund since he is the only creditor proved to have an interest in the fund. (Judge Frank, dissenting). *In the matter of Searles,* 119 N. Y. L. J. 38 (C. C. A. 2d, Feb. 18, 1948).

The precise issue involved in the instant case, whether unclaimed dividends should be held for pro rata distribution to all proved creditors or only to those who join in the proceedings for distribution, is one of first impression in a circuit court of appeals. Several district court cases have held that the fund should go only to those creditors who have become parties to the proceedings.[3]

Section 66 of the Bankruptcy Act does not specifically answer this issue.[4] Judge Leibell in the *Raabe* case, concluded that the intention of the statute was "to effect a liquidation of those unclaimed funds . . . to the diligent creditors whose claims have not been paid in full. This intention would be defeated if it were necessary to wait upon the intervention of all creditors."[5]

In 1935, the same circuit court deciding the principal case considered Section 66 of the Bankruptcy Act, on another point but observed that it "does

1. 11 U. S. C. A. § 106(b) (1937), "Dividends remaining unclaimed for one year shall . . . be distributed to the creditors whose claims have been allowed but not paid in full. . . ." This is not a statute of limitation since distribution and not lapse of time tolls creditor's right to unclaimed dividends. *In re* Gubelman, 79 F. 2d 976 (C. C. A. 2d 1935). *Accord, In re* Van Schaick, 69 F. Supp. 764, 766 (S. D. N. Y. 1946).

2. *In re* Searles, 68 F. Supp. 678 (E. D. N. Y. 1946).

3. *In re* Bishop, 72 F. Supp. 199 (D. N. J. 1947); *In re* Raabe, Glissman & Co., 71 F. Supp. 678 (S. D. N. Y. 1947); *In re* MacMasters, 60 F. Supp. 733 (S. D. N. Y. 1945).

4. *In re* Searles, 68 F. Supp. 678, 680 (E. D. N. Y. 1946), "Moreover, Congress has not seen fit to provide even any suggestion as to the mechanics of the distribution to be made, except that the Court shall make it."

5. *In re* Raabe, Glissman & Co., 71 F. Supp. 678, 681 (S. D. N. Y. 1947).

not declare on whose motion dividends are to be distributed. . . . [P]erhaps the court can distribute *sua sponte;* perhaps a single creditor may move for itself and for all others; but, since distribution will ordinarily involve substantial clerical work, practically it is not likely that anyone will get his share who does not move." [6]

In the instant case, *P* complied with all the statutory requirements.[7] Judge Frank [8] disagreed with the majority as to the sufficiency of the notice. He suggested that notice should have been sent to "all creditors whose claims had been allowed, at their last-known address. . . ." [9] And while the court might order notice by publication it should do so only "where personal service . . . is not practicable." [10] Although the statute is not clear as to the type of notice to be given, Section 66(a) of the Bankruptcy Act does give an indication of Congressional intent. It directs that "Dividends . . . which remain unclaimed for sixty days after the final dividend has been declared and distributed shall be paid into the court of bankruptcy; and at the same time the trustee shall file with the clerk *a list of the names and post-office addresses,* as far as known, of the persons entitled thereto, showing the respective amounts payable to them." [Italics added] This act was amended in 1938 to include the provision requiring the trustee to file the list of names and addresses, which is evidence of Congressional intent that notice by personal service be given.

It is admitted that in the instant case this provision requiring the filing of names and addresses was added 31 years after *S* was adjudicated bankrupt and the money paid into court. However, it is submitted that *P* should have been required to show that notice by personal service was impossible. Judge Swan's answer to the effect that the sufficiency of the notice was not questioned in the district court, is inadequate, because those creditors who might have had an interest were not present to contest the sufficiency of the notice by publication, nor under these circumstances could there be a waiver of notice by personal service.

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6. *In re* Gubelman, 79 F. 2d 976, 977 (C. C. A. 2d 1935).

7. 28 U. S. C. A. § 852 (1928), "Any person . . . entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to claimant. . . ."

8. *In the matter* of Searles, 119 N. Y. L. J. 38 (C. C. A. 2d 1948).

9. *Ibid.* Apparently Judge Frank is relying on the language of 11 U. S. C. A. § 94(b) (1937), as he refers to § 94(d) as limiting the power to order notice by publication only to the courts.

10. *Supra,* note 8; 11 U. S. C. A. § 94(d) (1937) is relied upon.

CONSTITUTIONAL LAW—PROHIBITION OF PRACTICE OF NATUROPATHY AS A SEPARATE BRANCH OF THE HEALING ARTS

A Tennessee statute [1] prohibited the practice of naturopathy [2] and repealed an act [3] which provided for the licensing of naturopaths. Several naturopaths filed a representative suit to determine the constitutionality of the act. The Chancellor upheld the repeal of the licensing provisions but declared that portion prohibiting the practice of naturopathy an unwarranted abuse of the police power. On appeal, *held,* that the statute must be treated as one imposing additional qualifications upon persons already in the practice and was therefore a valid exercise of the police power. *Davis v. Beeler,* 207 S. W. 2d 343 (Tenn. 1948).

At common law any one might practice medicine in any of its branches—the right being subject to liability for lack of skill and the power of the government to prevent practice by incompetents.[4] The healer's right to practice his profession has been called a mere privilege,[5] a franchise,[6] a valuable right,[7] and a property right.[8] The protection afforded the right does not seem to depend on the "label" nor is it limited to physicians and surgeons.[9] There is, however, no inherent right to practice the healing arts[10]—nor does the issuance of a license confer a contractual [11] or a vested [12] right. It confers a

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1. Tenn. Pub. Acts 1947, c. 2, §§ 1, 2.

2. Naturopathy has been defined as "A drugless way of treating disease by the use of light, air, water, heat and massage." MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 352 (1942).

By statute it has been defined as "the prevention, diagnosis, and treatment of human injuries, ailments, and diseases by the use of such physical forces, as air, light, water, vibration, heat, electricity, hydrotherapy, psychotherapy, dietetics [*sic*], or massage, and the administrations of botanical and biological drugs, but shall not include the administration of narcotics, sulfa drugs . . . or powerful physical agents, such as X-ray and radium therapy, or surgery. . . ." Tenn. Pub. Acts 1945, c. 43, § 4.

3. Tenn. Pub. Acts 1943, c. 49 as amended, Tenn. Pub. Acts 1945, c. 43.

4. State v. Borah, 51 Ariz. 318, 76 P. 2d 757 (1938); Redmond v. State, 152 Miss. 54, 118 So. 360, 366 (1928). "Originally any person might legally practice medicine or dentistry or compound medicines or the like. His fitness to do so was measured only by public estimation." Indiana State Board v. Davis, 69 Ind. App. 109, 121 N. E. 142, 148 (1917).

5. State v. Edmunds, 127 Iowa 333, 101 N. W. 431 (1904).

6. State v. Anderson, 6 Tenn. Civ. App. 1, 11 (1917).

7. Abrams v. Jones, 35 Idaho 532, 207 Pac. 724 (1922).

8. Dent v. West Virginia, 129 U. S. 114 (1889); Butcher v. Maybury, 8 F. 2d 155 (W. D. Wash. 1925); State Board of Medical Examiners v. Friedman, 150 Tenn. 152, 263 S. W. 75 (1923).

9. "A person's business, profession, or occupation is . . . 'property,' within the meaning of the constitutional provision as to due process of law. . . ." People v. Love, 289 Ill. 304, 131 N. E. 809, 811 (1921) (chiropractic).

10. Dent v. West Virginia, 129 U. S. 114 (1889); Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, 111 So. 58 (1926), *aff'd,* 274 U. S. 720 (1927).

11. "A license has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed." Rosenblatt v. California State Board of Pharmacy, 69 Cal. App. 2d 69, 158 P. 2d 199, 203 (1945) (refusal to renew assistant pharmacist's license). See Note, 8 L. R. A. (N. S.) 1272 (1907).

12. ". . . the theory that an individual has a vested right to practice dentistry is

qualified right subject to reasonable regulation under the police power.[13]

The practice of the healing arts lies completely within the police power of the states.[14] This power is exercised by the legislature and the courts are not concerned with the wisdom but with constitutional limits on its exercise. It has been said that the legislature may regulate but may not prohibit a calling unless it is inherently injurious to the public or has a tendency to become so.[15] In regulating a useful calling the legislature may prescribe such standards as it deems necessary provided they are reasonable and not discriminatory.[16] The legislature may demand educational and character qualifications prior to issuance of licenses.[17] It may require persons previously engaged in the practice to meet these standards.[18] Additional qualifications may be added [19] and an unlimited medical license or practice may be required of those desiring to practice a limited system.[20] If the licensee cannot meet these added requirements, he must give up his practice.[21]

The Tennessee court considered this statute as one requiring additional

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a rank heresy, finding no place in the philosophy of the law. Over and over again it has been exploded by this court." State *ex rel.* Brown v. McIntosh, 205 Mo. 616, 103 S. W. 1071, 1077 (1907). See Note, 8 L. R. A. (N. S.) 1272 (1907).

13. ". . . there is no right to practice medicine which is not subordinate to the police power of the States. . . ." Lambert v. Yellowley, 272 U. S. 581, 596 (1926). Hawker v. New York, 170 U. S. 189 (1898); Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809 (1898); Sears, *Legal Control of Medical Practices: Validity and Methods,* 44 MICH. L. REV. 689 (1946).

14. Lambert v. Yellowley, 272 U. S. 581 (1926); Mann v. Board of Medical Examiners of the State, 187 P. 2d 1 (Cal. 1947).

15. Adams v. Tanner, 244 U. S. 590 (1917) (ordinary calling); State v. Armstrong, 38 Idaho 493, 225 Pac. 491 (1923) (chiropody). *But see* State v. Waldram, 64 Utah 406, 231 Pac. 431, 432 (1924) ("The Legislature has the power to prohibit the practice of chiropractics.").

16. "It is only when they [requirements] have no relation to such calling or profession, or are unattainable by . . . reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." Dent v. West Virginia, 129 U. S. 114, 122 (1889). Butcher v. Maybury, 8 F. 2d 155 (W. D. Wash. 1925); People v. Witte, 315 Ill. 282, 146 N. E. 178 (1924).

17. Hawker v. New York, 170 U. S. 189 (1898); Dent v. West Virginia, 129 U. S. 114 (1889).

18. Collins v. Texas, 223 U. S. 288 (1912).

19. Reetz v. Michigan, 188 U. S. 505 (1903); Hawker v. New York, 170 U. S. 189 (1898); Gray v. Connecticut, 159 U. S. 74 (1895); Rosenblatt v. California State Board of Pharmacy, 69 Cal. App. 2d 69, 158 P. 2d 199 (1945); State v. Hovorka, 100 Minn. 249, 110 N. W. 870 (1907).

20. Crane v. Johnson, 242 U. S. 339 (1917) (exemption of faith healers not discriminatory as to other drugless healers); Polhemus v. American Medical Ass'n., 145 F. 2d 357 (C. C. A. 10th 1944) (not unreasonable to fail to include naturopaths in coverage of "Grandfather Clause" of Basic Science Law which entitled practitioners to Basic Science certificate without examination); Ellestad v. Swayze, 15 Wash. 2d 281, 130 P. 2d 349 (1942); see Notes, 16 A. L. R. 709 (1922), 37 A. L. R. 680 (1925). *Contra:* State v. Armstrong, 38 Idaho 493, 225 Pac. 491 (1923) (to require a chiropodist to obtain the education and license of a physician and surgeon, an osteopath, or a chiropractor is unreasonable); Norman v. Hastings, unreported Memorandum Opinion, Supreme Court of Tennessee, Dec. 20, 1920 (to require chiropractors to study and be examined in subjects which they have no occasion to apply is unreasonable).

21. Rosenblatt v. California State Board of Pharmacy, 69 Cal. App. 2d 69, 158 P. 2d 199 (1945); State *ex rel.* Week v. Wisconsin State Board of Examiners, 30 N. W. 2d 187 (Wis. 1947).

qualifications of naturopaths already in the practice. The complainants contended that the enactment could not be construed as regulatory and that it expressly prohibited the practice of naturopathy by *all* persons within the state.[22] The court said that the statute must be considered with other legislation regulating the healing arts.[23] When so considered, it is apparent that the methods used by naturopaths may still be used by physicians and osteopaths—and may be used by complainants when they meet the added qualifications reasonably deemed necessary by the legislature. So interpreted, the statute is unobjectionable.

CONSTITUTIONAL LAW—UN-AMERICAN ACTIVITIES COMMITTEE HELD VALID EXERCISE OF CONGRESSIONAL POWER

The House of Representatives created the Committee on Un-American Activities and authorized it to conduct investigations of "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda . . . , and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." [1] Defendant was summoned before this committee and appeared but refused to be sworn or to answer any questions whatever. He was convicted under a federal statute [2] for his refusal and appeals to this court on the ground (among others) that any investigation by the committee as now authorized would necessarily involve private affairs and hence be unconstitutional. *Held,* that the investigation

22. "That hereafter it shall be unlawful for any person, whether heretofore licenred [*sic*] or not under the provisions of Chapter 49, Public Acts of 1943, as amended, to practice in this State Naturopathy as defined in said Acts or otherwise." Tenn. Pub. Acts 1947, c. 2, § 2.

The complainants contended this was outright prohibition. They emphasized "any person." Brief for Appellees, pp. 31-32. They also contended that the requirement that they qualify as physicians or osteopaths was unreasonable, relying on Norman v. Hastings, unreported Memorandum Opinion, Supreme Court of Tennessee, Dec. 20, 1920. Brief for Appellees, pp. 47-49. This case was in point and was quoted in full in the Chancellor's decree. Record, p. 74. But the court in the instant case did not mention the unreported opinion. The fact that a case was unreported greatly weakens its weight as authority since the court's practice is never to refer to such opinions unless compelled to do so by counsel. Ford v. State, 184 Tenn. 443, 454, 201 S. W. 2d 539, 544 (1945); Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 443, 205 S. W. 128, 130 (1918).

23. "The present statute discloses an effort on the part of the Legislature to regulate one phase of the healing arts and should be construed in pari materia with other statutes upon this subject." 207 S. W. 2d at 346.

Statutes forming a system or scheme should be construed so as to make it uniform and all acts in pari materia should be construed together. State v. Allman, 167 Tenn. 240, 68 S. W. 2d 478 (1934).

1. 60 STAT. 812, 828 (1946).

2. REV. STAT. § 102 (1878), as amended, 52 Stat. 942 (1838), 2 U. S. C. A. § 192 (Supp. 1947).

by the committee is a constitutional exercise of the Congressional power. (Clark, J. dissenting). *United States v. Josephson,* 165 F. 2d 82 (C. C. A. 2d 1947), *cert. denied,* 92 L. Ed. 425 (1948).

The legislative investigation is an institution of ancient origin and this power has been recognized by state courts as being very broad.[3] The power of Congress to appoint committees for this purpose in appropriate situations is unchallenged, the controversial question being the limits of the investigation. It has long been established that Congress may order investigations to "aid it in legislating," [4] and the recent expressions of this view are to the effect that the inquiry need only be "germane to some matter concerning which the house conducting the investigation has power to act (whether such action be enactment of statutes or something else)." [5] There has arisen a substantial body of authority upholding the power to investigate business transactions and public affairs in situations where the possibility of legislation was very remote.[6] On analysis, it seems that courts are in reality using the test of whether the subject is one of public concern and allowing the investigation for publicity purposes rather than in aid of legislation. However, the decisions still render lip service to the prospective legislation test. Another factor to be considered is the volume of older decisions denying the power to investigate private matters.[7] While these cases have been generally distinguished, as in the instant case, they have not been expressly overruled and are still available to invalidate investigations which are found by the courts to involve "private rights."

Both majority and dissenting opinions in the instant case recognize the precedents listed above, but they differ as to their application to the facts present here. The majority says, "Surely, matters which potentially affect the very survival of our Government are by no means the purely personal concern of any one. And investigations into such matters are inquiries relating

3. Sheppard v. Bryant, 191 Mass. 591, 78 N. E. 394 (1906); Burnham v. Morrissey, 14 Gray 226 (Mass. 1859); State v. Brewster, 89 N. J. L. 658, 99 Atl. 338 (1916); Briggs v. Mackellar, 2 Abb. Pr. 30 (N. Y. 1855); *Ex parte* Parker, 74 S. C. 466, 55 S. E. 122 (1906). "Prior to 1880 no state decision denies or curtails the exercise of such a power; instead, it received the explicit sanction . . ." Landis, *Constitutional Limitations on the Congressional Power of Investigation,* 40 HARV. L. REV. 153, 167 (1926).

4. United States v. Norris, 300 U. S. 564 (1937); McGrain v. Daugherty, 273 U. S. 135 (1927).

5. Seymour v. United States, 77 F. 2d 577, 580 (C. C. A. 8th 1935); Townsend v. United States, 95 F. 2d 352 (App. D. C. 1938); United States v. Bryan, 72 F. Supp. 58 (D. C. 1947) (upholding constitutionality of the Un-American Activities Committee).

6. Jurney v. MacCracken, 294 U. S. 125 (1935); United States v. Louisville & Nashville Ry. Co., 236 U. S. 318 (1915); *In re* Chapman, 166 U. S. 661, 668 (1897); Oklahoma Press Pub. Co. v. Walling, 147 F. 2d 658 (C. C. A. 10th 1945), *aff'd,* 327 U. S. 186 (1946); Mississippi Road Supply Co. v. Walling, 136 F. 2d 391 (C. C. A. 5th 1943); United States v. Creech, 21 F. Supp. 439 (D. C. 1937); United States v. Groves, 18 F. Supp. 3 (W. D. Pa. 1937).

7. Sinclair v. United States, 279 U. S. 263, 294 (1929); *In re* Chapman, 166 U. S. 661, 668 (1897); Kilbourn v. Thompson, 103 U. S. 168, 190 (1880); *In re* Pacific Ry. Commission, 32 Fed. 241, 250 (C. C. N. D. Cal. 1887).

to the personal affairs of private individuals only to the extent that those individuals are a part of the Government as a whole." [8] But the dissent feels, "A doctrine that the lesser legislative power always justifies the exercise of the greater investigative power, including control over opinion, will lead to strange analogies indeed! . . . Clearly it makes the power to investigate limitless." [9] This controversy goes at once to the heart of the issue and, granting either premise, the result reached in the respective opinions is inevitable in the light of the established precedents.

In addition to the principal issue the dissenting judge feels that the resolution is too vague, so that this prosecution comes within the principle of such cases as *Lanzetta v. New Jersey*,[10] which holds that when a criminal statute is so vague as not to provide an intelligible standard of conduct, the statute violates the due process clause of the Constitution. While the point is avoided in the majority opinion by denying defendant's right to question vagueness due to his refusal to answer *any* questions, the issue was squarely met in *United States v. Bryan*,[11] where the district court expressly stated that the cases cited by Judge Clark are strictly confined to penal statutes and do not apply to resolutions of this nature or to the statutes enforcing them.[12]

The dissent also attacks the constitutionality of the resolution on the ground that the committee has been conducting a "witch hunt." [13] However, this contention would appear to be immaterial to the question of constitutionality as there seems to be a presumption in favor of the legislative purpose behind a Congressional committee's action.[14]

CRIMINAL LAW—EVIDENCE—ADMISSION OF CONFESSION

A confectionery store was robbed and its owner was shot and killed. Five days later petitioner, a fifteen year old Negro boy, was arrested and accused of having acted as lookout while two other youths committed the crime. His treatment at police headquarters following arrest is the subject of direct contradiction, but it is agreed that after being questioned for five hours, beginning at midnight, he signed a confession. Afterwards he was held incommunicado for three days and both his mother and a lawyer retained by her were denied admission to see him. Petitioner was not taken before a

8. United States v. Josephson, 165 F. 2d 82, 89 (C. C. A. 2d 1947).
9. *Id.* at 98.
10. 306 U. S. 451 (1939); Herndon v. Lowry, 301 U. S. 242 (1937).
11. 72 F. Supp. 58 (D. C. 1947).
12. *Id.* at 63.
13. For a criticism of the manner in which the Committee is conducted see, Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193 (1947).
14. McGrain v. Daugherty, 273 U. S. 135 (1927); Townsend v. United States, 95 F. 2d 352 (App. D. C. 1938); United States v. Bryan, 72 F. Supp. 58 (D. C. 1947).

magistrate and formally charged with a crime until three days after his confession. The trial court allowed the confession to be admitted as evidence and found petitioner guilty of murder in the first degree. The Court of Appeals of Ohio sustained the conviction [1] over the objection that the admission of the confession by the trial court violated the Fourteenth Amendment of the Constitution.[2] The state supreme court dismissed the appeal, being of the opinion that no debatable constitutional question was presented.[3] On hearing by the United States Supreme Court on a writ of certiorari, *held,* that the confession was not made voluntarily and its admission was a violation of the due process clause of the Fourteenth Amendment. (Chief Justice Vinson, Justices Jackson, Reed, and Burton, dissenting.) *Haley v. State,* 68 Sup. Ct. 302 (1948).

The fact that a trial court has ruled that a confession was voluntarily made does not preclude the United States Supreme Court from independently determining the question.[4] If the Court finds that the confession was admitted under circumstances offensive to the requirements of due process it may set the conviction aside.[5] It has been held previously that the determination of the triers of fact should be accepted "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process." [6] The Court in the *Lisenba* case [7] was reluctant to set aside the findings of two courts and a jury. In the instant case three courts and a jury held that the confession made by petitioner was voluntary, and both the court of appeals and the supreme court of the state held that there was no violation of the Fourteenth Amendment.[8] As stated by Mr. Justice Burton in the dissenting opinion, the Court "is not justified in making such a determination of 'the callous attitude of the police' of Canton as thereby to override not only the sworn testimony of the state's public officials but also the conclusions of the triers of fact." [9] The police acted wrongly in questioning petitioner for five hours without a break, and in holding him incommunicado for three days. These were two separate and distinct acts. The Court should concern itself only with the facts surrounding the making of the confession in determining whether or not it was voluntarily made.[10] Apparently the Court has used its power to shape the rules of evidence

1. State v. Lowder, 79 Ohio App. 237, 72 N. E. 2d 785 (1946).
2. U. S. CONST. AMEND. XIV.
3. State v. Haley, 147 Ohio St. 340, 70 N. E. 2d 905 (1947).
4. Ashcraft v. Tennessee, 322 U. S. 143 (1944); Ward v. Texas, 316 U. S. 547 (1942); Chambers v. Florida, 309 U. S. 227 (1940).
5. Brown v. Mississippi, 297 U. S. 278 (1936).
6. Lisenba v. California, 314 U. S. 219, 238 (1941).
7. *Ibid.*
8. U. S. CONST. AMEND. XIV.
9. Haley v. State, 68 Sup. Ct. 302, 313 (1948).
10. United States v. Mitchell, 322 U. S. 65 (1944).

as an indirect mode of disciplining the misconduct of the officers—a use which has been discouraged.[11]

Certainly an accused should not be subjected to third degree practices.[12] Still, the primary duty of law enforcement officers is the defense of the community. It is submitted that reasoning by the courts similar to the majority opinion in the instant case might go far to protect the accused individual but will leave officers in the dark as to their rights to question a suspect; a right which has been recognized previously by this Court.[13] Mr. Justice Douglas concludes the majority opinion with the following sentence: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." [14] What right this leaves an officer to question a suspect is merely conjectural.

CRIMINAL LAW—NEGATIVE ACTS—DUTY OF PARENT TO PROTECT CHILD

The defendant appealed from a conviction for the unlawful killing of her illegitimate three year old daughter and was found guilty of "murder without malice." [1] The child was living in the same house with the defendant and Fred Kenner (it was not stated whether Kenner was the father of the child or the husband of the defendant). The death of the child resulted from brutal whippings administered by Kenner. There was no evidence that the defendant was aiding or had agreed to the whippings. *Held,* reversed, that mere presence alone, in the absence of agreement to the offense, is not sufficient to constitute one a principal in the criminal act. *Moffitt v. State,* 207 S. W. 2d 384 (Tex. 1948).

The court stated that "evidently the conviction must be based on Art. 69 P. C." [2] which reads as follows: "Any person who advises or agrees to the commission of an offense and who is present when the same is committed is a principal whether he aids or not in the illegal act."

If this is the only basis for conviction, the instant case seems correct in

11. *Id.* at 70.
12. McCormick, *Some Problems and Developments in the Admissibility of Confessions,* 24 TEXAS L. REV. 239, 244 (1946). "They [third degree practices] constitute a betrayal and a mockery of those principles of respect for the worth of the individual citizen upon which our religious ideas, our constitution, and our philosophy of government rest."
13. Lyons v. Oklahoma, 322 U. S. 596, 601 (1944).
14. Haley v. State, 68 Sup. Ct. 302, 304 (1948).

1. The statute dealing with manslaughter has been repealed in Texas. And by statute, voluntary homicide, committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, is murder without malice. TEX. PENAL CODE, Art. 1257c (Vernon 1936).
2. TEX. CODE OF CRIM. PROC., Art. 69 (Vernon 1925).

its holdings, as there are numerous cases holding that mere presence will not make one a party to a crime.[3] But there may have been another basis for conviction. In certain instances the law imposes upon a special class of persons a duty of a positive character,[4] and one may incur criminal liability for failure to perform that duty.[5] This duty may exist because of the legal relations of the parties.[6] Apart from statutory requirements the common law imposes on a father or mother the duty to provide food, shelter, and necessary medical treatment [7] for a child who is too young to care for itself. A husband has a duty to support his wife and rescue her from perilous situations in which she is helpless.[8] The criminal law also punishes for the failure to perform a duty, resulting in the death of the person to whom the duty is owed, if the duty arises from (1) an express provision of the statute [9] (2) a factual situation,[10] or (3) a contract.[11]

This legal duty for positive action does not require the impossible.[12] There is no criminal liability based upon negative acts unless the person having the duty has the capacity and the ability to perform the legal duty. However, the inability to do one thing may give rise to a legal duty to do another.[13]

Where a person, who has a legal duty to act and has the ability to perform, willfully neglects to act and such failure results in the death of the person to whom the duty is owed, the person owing the duty is guilty of unlawful homicide.[14] If he maliciously refrained from performance, he would be guilty of murder;[15] otherwise, it would be manslaughter.[16] If the failure to act was due to negligence, it would be involuntary manslaughter, provided

3. Hicks v. United States, 150 U. S. 442, 37 L. Ed. 1137 (1893); Brooks v. State, 128 Ga. 261, 57 S. E. 483 (1907); People v. Cione, 293 Ill. 321, 127 N. E. 646 (1920).

4. Pallis v. State, 123 Ala. 12, 26 So. 339 (1899); Westrup v. Commonwealth, 123 Ky. 95, 93 S. W. 646 (1906); State v. Barnes, 141 Tenn. 469, 212 S. W. 100 (1919).

5. United States v. Knowles, 26 Fed. Cas. 800, (1864). Death of a human being as the immediate result of the omission, by another, to perform a plain legal or contract duty makes the latter guilty of felonious homicide. See Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659 (1937), for a detailed treatment of the subject.

6. Lewis v. State, 72 Ga. 164 (1883) (D owed a duty to an orphan left in her care). State v. Smith, 65 Me. 257 (1876) (A husband is charged by law with the duty of rendering his wife proper support); State v. Staples, 126 Minn. 396, 148 N. W. 283 (1914); Regina v. Conde, 10 Cox C. C. 547 (1867).

7. Lewis v. State, 72 Ga. 164 (1883); Gibson v. Commonwealth, 106 Ky. 360, 50 S. W. 532 (1899); Stehr v. State, 92 Neb. 755, 139 N. W. 676 (1913).

8. Territory v. Manton, 8 Mont. 95, 19 Pac. 387 (1888).

9. CAL. PENAL CODE § 270 (Deering 1941).

10. People v. Fowler, 178 Cal. 657, 174 Pac. 892 (1918); Stehr v. State, 96 Neb. 755, 139 N. W. 676 (1913); State v. Hopkins, 147 Wash. 198, 265 Pac. 481 (1928); Regina v. Instan, 17 Cox C. C. 602 (1893).

11. State v. Benton, 38 Del. 1, 187 Atl. 609 (1936).

12. Territory v. Manton, 8 Mont. 95, 19 Pac. 387 (1888); State v. Noakes, 70 Vt. 247, 40 Atl. 249 (1897).

13. Stehr v. State, 96 Neb. 755, 139 N. W. 676 (1913) (duty of parent to apply to public authorities for relief).

14. United States v. Knowles, 26 Fed. Cas. 800 (1864).

15. Lewis v. State, 72 Ga. 164 (1883); State v. Barnes, 141 Tenn. 469, 212 S. W. 100 (1919).

16. See Note, 10 A. L. R. 1138 (1921).

such failure amounted to criminal negligence.[17] Otherwise it would be no crime.

The question of whether or not a parent is under a legal duty to go to the aid of his helpless child who is being violently attacked by a stranger or by the other parent does not seem to have been answered by any court in this country. However, in *Rex v. Russell,*[18] An Australian case decided in 1933, a father, who stood by and watched the mother drown their two children, was convicted of manslaughter. In view of existing law on the duty of the parent to protect the child, this decision seems legally sound.

If such a legal duty exists, then it becomes important to know why the defendant, in the instant case, did not attempt to save her child. Perhaps she was terrified and reasonably feared that her own safety would be jeopardized by any interference. On the other hand, a mere word from her might have stopped the attack. Assuming that the defendant could have done nothing at this particular time, Kenner's previous conduct may have been such as would have put the defendant on notice that the child's life was in danger. Then would not the defendant have been under a legal duty to remove the child from such danger or to apply to public authorities for help? If it can be found as a matter of fact that the defendant could have saved her child but willfully did not, or was guilty of criminal negligence in not doing so, she would be guilty of felonious homicide, not as one who aided or abetted, but as one who contributed to the death by her act of omission.

EQUITY—INTERPLEADER—LACK OF POSSESSION OF GOODS INVOLVED

Complainant, operator of a storage warehouse, had held goods for more than five years pending agreement between rival claimants, a Mr. and Mrs. Keller, as to the ownership. While awaiting instructions as to disposition, complainant was faced with a replevin suit instituted by *D,* who claimed under an assignment from Mrs. Keller. By virtue of this action the sheriff seized the chattels, removed them from the complainant's warehouse and delivered them to *D,* who executed a replevin bond. Mr. Keller then brought suit against complainant, *D,* the sheriff and the surety on the replevin bond to recover damages for non-delivery of the chattels to him. Complainant then filed a bill of interpleader against *D,* Mr. Keller, the sheriff and the surety, prayed that the legal actions against it be restrained, that *D* be enjoined from disposing of the property, and that complainant be discharged of all liability. *Held,* for complainant. Although it did not have possession of the chattels,

17. State v. Benton, 38 Del. 1, 187 Atl. 609 (1936).
18. Rex v. Russell, 1933 Vict. L. R. 59 (1933). Noted in 40 W. VA. L. Q. 387 (1934), 9 WIS. L. REV. 424 (1934); HARV. L. REV. 531 (1934).

being a stakeholder without interest in the property, complainant was entitled to protection from vexatious litigation by the rival claimants. *C. F. Duke Storage Warehouse, Inc. v. Keller,* 55 A. 2d 901 (Ch. Ct. N. J. 1947).

The right of interpleader arises where there are adverse claimants to a debt, fund or thing owed by or in possession of a third person,[1] who admits a debt or claims no interest in the property involved;[2] who is uncertain to whom he owes a duty, and where no adequate relief from multiplicity of actions has been provided at law.[3] The exercise of this right is ringed with certain requirements. By the apparent weight of authority, one of these requirements is that if the claimants are seeking a specific property the complainant in interpleader must be in possession or control of the fund or thing, with power to perform a decree concerning it.[4] This requirement has been interpreted by many courts to mean: "The plaintiff must . . . bring or pay, or offer to bring or pay, the entire thing, fund, or money in controversy into court. . . ." [5] An omission to do this has been held, by some courts, sufficient to render the bill demurrable,[6] defeat a request for an injunction [7] or prevent the making of an order in the cause.[8] The wisdom in such a rule lies in the fact that, otherwise, bills of interpleader might result in abuse of the proceedings, as where money is involved and this requirement is not enforced.[9] However, it has been held that this rule does not prevent relief by way of interpleader where complainant has paid over money under a claim of right to which he was bound to submit.[10] This exception has been sustained in favor of a garnishee who was compelled to pay over money to a sheriff.[11]

1. Finkel v. Affom Holding Corporation, 46 N. Y. S. 2d 378 (Sup. Ct. 1944); Connecticut General Life Ins. Co. v. Yaw, 53 F. 2d 684 (W. D. N. Y. 1931); Bankers' Life Co. v. Waters, 39 Ohio App. 343, 177 N. E. 530 (1930); 30 AM. JUR., Interpleader § 8; 48 C. J. S., Interpleader § 2.

2. Connecticut General Life Ins. Co. v. Yaw, 53 F. 2d 684 (W. D. N. Y. 1931); Connecticut Mut. Life Ins. Co. v. Tucker, 23 R. I. 1, 49 Atl. 26 (1901); 30 AM. JUR., Interpleader § 10.

3. 4 POMEROY, EQUITY JURISPRUDENCE § 1320 (5th ed. 1941); WALSH, EQUITY § 119 (1930); 30 AM. JUR., Interpleader § 12.

In Wall v. Wall, 181 S. W. 2d 817 (Ct. Civ. App. Tex. 1944), legal procedure under a garnishment statute was thought substantially equivalent to equitable interpleader, which therefore was found inapplicable. Often, however, it is held that the applicability of equitable interpleader is not affected by the existence of a statutory legal equivalent, the latter being considered merely a concurrent remedy. But this is beyond the scope of this note. See, 4 POMEROY, EQUITY JURISPRUDENCE § 1329 (5th ed. 1941).

4. Mandon v. Rugg, 132 N. J. Eq. 538, 29 A. 2d 315 (1942); Nathan v. Bernstein, 252 App. Div. 497, 299 N. Y. Supp. 733 (Sup. Ct. 1937); Parker v. Parker, 42 N. H. 78 (1860); Shaw v. Coster, 8 Paige's Chanc. 339, 35 Am. Dec. 690, 702 (N. Y. 1840); 48 C. J. S., Interpleader § 9.

5. 4 POMEROY, EQUITY JURISPRUDENCE 920, § 1328 (5th ed. 1941).

6. *Ibid.*

7. Bliss v. French, 76 N. W. 73 (Sup. Ct. Mich. 1898).

8. 2 DANIELL, CHANCERY PRACTICE 1318 (8th ed. 1914).

9. Home Ins. Co. v. Caulk, 86 Md. 385, 38 Atl. 901 (1897); STORY, EQUITY PLEADING § 291 (10th ed. 1892).

10. Nash v. Smith, 6 Conn. 421 (1827); 48 C. J. S., Interpleader § 10.

11. Webster v. McDaniel, 2 Del. Ch. 297 (1862).

Under the facts in the instant case it appears that the court, although following a small minority of decisions, has reached a correct and just conclusion. As the court pointed out, the possession of the property, although out of the hands of the complainant, is under the control of the court through its order, issued at an earlier hearing, restraining *D* from disposing of it; and although complainant still owes a duty to the true owner, such duty has been suspended, the property seized under the replevin suit being in control of the court which is to determine ownership thereof. A further factor in support of the present decision is the presence of a New Jersey statute [12] which provides, "If more than one person claim the title or possession of the goods, the warehouseman may, . . . require all known claimants to interplead." The court has interpreted this statute liberally in holding that under its provisions a warehouseman need not been in actual possession of the goods in order to support a bill of interpleader. This interpretation possibly might be questioned on the ground that it oversteps the real legislative intent. However, it is submitted that under the particular circumstances the court reached the correct result, inasmuch as the dangers which gave rise to the rule requiring a complainant to bring, or offer to bring, the property in controversy into court are not likely to be involved.

FAMILY LAW—CHILD DENIED ACTION FOR ALIENATION OF HIS MOTHER'S AFFECTIONS

The complaint alleged that for many years the plaintiff had lived happily with his mother and that the defendant had alienated her affections, causing plaintiff to be forced out of the home. Also, it was shown that plaintiff's mother and father were divorced and that custody of the plaintiff was with the mother. Defendant demurred to the complaint on the ground that there was no such cause of action. *Held,* that the demurrer should be sustained. *Taylor v. Keefe,* 56 A. 2d 768 (Conn. 1947).

At the common law a husband was given an action for loss of the consortium [1] of his wife due to the alienation of her affections by a third person. Based on a variety of reasons, this action was denied to the wife.[2] However,

12. REV. STAT. 57: 1-20, N. J. S. A. (1937).

1. "'Consortium' means the 'companionship or society of the wife,' 'the conjugal society arising by virtue of the marriage contract,' 'the duties and obligations which by marriage both husband and wife take upon themselves toward each other in sickness and health,' and includes 'conjugal affection, society and assistance.'" Harris v. Kunkel, 227 Wis. 435, 278 N. W. 868, 869 (1938); Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923).

2. Crocker v. Crocker, 98 Fed. 702 (C. C. D. Mass. 1899) (applying Massachusetts law); Doe v. Roe, 82 Me. 503, 20 Atl. 83 (1890); Hodge v. Wetzler, 69 N. J. L. 490,

with the passage of the married women's acts, most courts extended the action to the wife.[3] This extension was a logical recognition of the wife's right to consortium and the removal of her disability to sue. A more recent development in this field has been the passage by several states of statutes abolishing the so-called "heart balm actions" of alienation of affections, breach of promise, seduction and criminal conversation.[4] These statutes evidence the disfavor in which courts and the general public have long held the actions. In most states the action for alienation of affections is still recognized and consortium is considered the gist of it, though often the courts do not expressly so state.[5]

The question presented in the instant case is whether children have an interest in the family relationship which will support a similar action for damages. There is no apparent theoretical reason why such an interest should not be recognized. Two recent cases have held that the deprivation of the love, affection and support of a parent is an injury for which the child can recover.[6] On the other hand, the present case, supported by a New York decision,[7] points out the dangers and practical difficulties of recognizing this right.[8] Also, it should be noted that both of the cases allowing the remedy were decided under Illinois law and the supreme court of that state has expressed approval of the action for alienation of affections in an opinion holding the statute abolishing "heart balm actions" to be unconstitutional on technical grounds.[9]

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55 Atl. 49 (Sup. Ct. 1903); Smith v. Smith, 98 Tenn. 101, 38 S. W. 439 (1897) (holds action exists but is held in abeyance during coverture); Duffies v. Duffies. 76 Wis. 374, 45 N. W. 522 (1890).

3. Fleming v. Fisk, 87 F. 2d 747 (App. D. C. 1936); Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Betser v. Betser, 186 Ill. 537, 58 N. E. 249 (1900); Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389 (1891); Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784 (1897); Clow v. Chapman, 125 Mo. 101, 28 S. W. 328 (1894); Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. 884 (1898).

4. Twelve states have abolished the action. KEEZER, MARRIAGE AND DIVORCE § 191 (3d ed., Morland, 1946).

5. Boland v. Stanley, 88 Ark. 562, 115 S. W. 163 (1909); Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869 (1920); Riggs v. Smith, 52 Idaho 43, 11 P. 2d 358 (1932); Bigaouette v. Paulet, 134 Mass. 123 (1883); Jenness v. Simpson, 84 Vt. 127, 78 Atl. 886 (1911).

6. Daily v. Parker, 152 F. 2d 174 (C. C. A. 7th 1945); Johnson v. Luhman, 330 Ill. App. 598, 71 N. E. 2d 810 (1947).

7. Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. S. 912 (Sup. Ct. 1934).

8. The court in the instant case says, "Among the difficulties . . . are (1) possibility of a multiplicity of suits; (2) possibility of extortionary litigation by virtue of the relative tenuousness of the child's relationship; (3) inability to define the point at which the child's right would cease, inasmuch as the status itself hypothesizes mutability, for although a spouse is, barring extraordinary circumstances, always a spouse, the very nature of childhood implies an eventual change to adulthood; and (4) the inability of a jury adequately to cope with the question of damages, particularly because damages thus assessed are apt to overlap, in view of the number and different ages of the children." Taylor v. Keefe, 56 A. 2d 768, 770 (Conn. 1947).

9. Heck v. Schupp, 394 Ill. 296, 68 N. E. 2d 464, 466 (1946) (In a dictum the court says, "the act under consideration here tends to put a premium on the violation of moral law. . . . Moreover, as to criminal conversation and alienation of affections, these involve the rights which all members of the family have a right to protect.")

In addition the court expressed doubts as to the constitutionality of such a statute in any event. Thus it is seen that the two cases upholding the action were decided under the law of a state whose supreme court has given approval to the policy behind it, while the cases denying the action are in keeping with current disapproval of such actions.

OIL AND GAS—INTEREST OF LESSEE UNDER OIL AND GAS LEASE CONDITIONED ON DOING OF SPECIFIED ACTS IS NOT ONE IN WHICH DOWER IS ALLOWED

An oil and gas lease provided that "all oil and gas in and under" a described tract of land was conveyed but did not specify the duration of the property interest transferred. The lease did provide for drilling of wells within specified periods and for forfeiture if this drilling were not done. A royalty was reserved. In an action by the lessee's widow for assignment of dower, *held,* that the lessee's interest was not an estate in fee simple in which a widow could have a dower interest.[1] *Van Camp v. Evans,* 206 S. W. 2d 38 (Ky. 1947).

As noticed in the instant case, there is no agreement among the courts concerning the interest of the lessee under an oil and gas lease. At least two jurisdictions [2] hold that, in the absence of an expression of intention to the contrary, a gas and oil lease is a conveyance of an estate in the oil and gas in place. A much larger number of the oil-producing states [3] have held that, in the absence of a contrary intention, such a lease gives the right to enter the land and take the oil and gas therefrom, thus, in reality, creating a profit à prendre. The Kentucky court appears to prefer the former of these views.[4] However it has frequently recognized that leases of oil and gas can create profits.[5] In the instant case the court restated its general construction of oil and gas leases as conveyances of estates but found that the provision requiring acts of exploitation made impossible such a construction of this particular instrument.

1. Kentucky Statutes provide for dower in lands in which the husband was seized of a fee simple estate. KY. REV. STAT. § 392.020 (1943).

2. Texas and Mississippi. Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290 (1923); Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So. 2d 282 (1941); Pace v. State *ex. rel.* Rice, 191 Miss, 780, 4 So. 2d 270 (1941).

3. Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788 (1935); Rich v. Doneghey, 71 Okla. 204, 177 Pac. 86 (1918); Phillips v. Springfield Crude Oil Co., 76 Kan. 783, 92 Pac. 1119 (1907).

4. Trimble v. Ky. River Coal Corp., 235 Ky. 301, 31 S. W. 2d 367 (1930); Gray-Mellon Oil Co. v. Fairchild, 219 Ky. 143, 292 S. W. 743 (1927); Wolfe County v. Beckett, 127 Ky. 252, 105 S. W. 447 (1907).

5. Hurst v. Paken Oil Company, 287 Ky. 257, 152 S. W. 2d 981 (1941); Williams' Adm'r v. Union Bank and Trust Co., 283 Ky. 644, 143 S. W. 2d 297 (1940); Swiss Oil Corp. v. Hupp, 253 Ky. 542, 69 S. W. 2d 1037 (1934).

In the case under discussion the real issue was the effect of these provisions calling for periodic acts of exploitation. If such provisions left the lessee with an estate but reduced the estate to one less than a fee, or resulted in the creation of a profit, no dower was possible.[6] The court reached the conclusion that the interest was not one in which dower would be given, but failed to characterize the interest created. As dower is allotted in estates in fee simple determinable or in estates in fee simple on condition subsequent,[7] the court apparently concluded that the lease under construction created either an estate smaller than a fee or a profit. It can hardly be assumed that the court overruled the cases allowing dower in determinable and defeasible fees when there was no discussion of this point in the opinion.

In a state such as Kentucky, which admits the possibility of the creation of an estate in fee by an oil and gas lease, it would seem that a limitation or a condition in such a lease would have the same effect on the estate created as in any other conveyance of real estate, that is, make it determinable or defeasible. And this has been the accepted position.[8] If the added provisions in the instant case leave the property interest an estate in fee, it would appear to be a determinable or defeasible fee simple, especially in the light of the Kentucky statute providing that conveyances in land shall be deemed estates in fee simple or such other estate as grantor had the power to dispose of, unless a different purpose appears by "express words or necessary inference." [9] If it is held that the provisions result in the changing of the interest from an estate to a profit, the case seems out of line with existing authority.

PUBLIC UTILITIES—MUNICIPAL CORPORATIONS—EXTRATERRITORIAL CONTROL OF STREET RAILWAYS

The Tennessee Railroad and Public Utilities Commission granted *X* Coach Corporation certificates of convenience and necessity empowering it to operate motor busses from a point two and one-half miles outside to a point

6. *See* Trimble v. Ky. River Coal Corp., 235 Ky. 301, 31 S. W. 2d 367, 372 (1930), where the court, by way of dicta, stated that a widow in Kentucky was entitled to dower in an incorporeal hereditament. However, this statement cites as authority the case of Stevens' Heirs v. Stevens, 33 Ky. (3 Dana) 371 (1835), and this latter case, speaking of a ferry, reads "incorporated" hereditament, rather than "incorporeal" hereditament and thus was apparently a case under the earlier Kentucky law to the effect that stocks in real estate corporations, turn-pike companies, and similar incorporated enterprises were real estate.

7. Landers v. Landers, 151 Ky. 206, 151 S. W. 386 (1912); Rice v. Rice, 133 Ky. 406, 118 S. W. 270 (1909); Fry v. Scott, 11 S. W. 426 (1889).

8. Wade, *Recent Mississippi Oil and Gas Cases,* 18 MISS. L. J. 243 (1947); Blake, *The Oil and Gas Lease,* 13 So. CALIF. L. REV. 304, 393 (1940). 1 SUMMERS, OIL AND GAS § 153 (1938) discusses the Texas holding that a determinable fee is created, and lists some objections which may be made to the theory.

9. KY. REV. STAT. § 381.060 (1943).

inside the City of Kingsport. *P*, a street railway company, holding a franchise from the city, sued in chancery to set aside the proceeding of the Commission, contending that by statute the city had exclusive jurisdiction over street railway companies both inside its municipal limits, and, within a specified radius, outside such limits. The lower court upheld the contentions of *P* and declared the certificate void. *Held,* that the effect of the act divested the Commission of its jurisdiction over street railways and gave to the cities exclusive control which extended beyond the corporate limits. *City Transportation Corp., Inc. v. Pharr,* —— S. W. 2d —— (Tenn. 1948).

The general rule is that the jurisdiction of a municipality is confined to its corporate limits and affairs therein.[1] However, legislative bodies at various times have made exceptions to this general rule by conferring upon municipalities jurisdiction to control various interests in territory contiguous to the corporation. Examples of the granting of this power, and the purpose behind it, are numerous.[2] In some instances, however, the courts have refused to uphold the validity of such legislation.[3] A survey of the cases leads to the conclusion that the real test is the reasonableness of the regulation and the results which spring from it.

In the instant case the court upheld the validity of a Tennessee Statute [4] giving municipalities control of street railway transportation both inside and outside the corporate limits, the radius varying with the populaton of the city. Further, it was held that this statute granted exclusive jurisdiction to the city to the exclusion of the State Commission. In his opinion Chief Justice Neil stated: ". . . public necessity required that a single system should be under one authority. It is unthinkable that the Legislature would place the general control of a city transportation system under two conflicting jurisdictions to the utter demoralization of its operation and injury to the traveling public." [5] A search of the codes of a number of the larger states reveals only

1. City of Sedalia *ex rel.* Ferguson v. Shell Petroleum Corp., 81 F. 2d 193 (C. C. A. 8th 1936); Jones v. Hines, 157 Ala. 624, 47 So. 739 (1908); Langley v. City Council of Augusta, 118 Ga. 590, 45 S. E. 486 (1903); South Pasadena v. Los Angeles Terminal Ry. Co., 109 Cal. 315, 41 Pac. 1093 (1895); City of Elkhart v. Lipschitz, 164 Ind. 671, 74 N. E. 528 (1905); City of Argenta v. Keath, 130 Ark. 334, 197 S. W. 686 (1917). Also see 37 Am. Jur., Municipal Corporations § 122.

2. Chicago Packing and Provision Co. v. Chicago, 88 Ill. 221 (1878) (packing houses); People v. Raims, 20 Colo. 489, 39 Pac. 341 (1895) (intoxicating liquors); O'Brien v. Amerman, 112 Tex. 254, 247 S. W. 270 (1922) (harbor control); City of Little Rock v. Smith, 204 Ark. 692, 163 S. W. 2d 705 (1942) (venereal disease); State v. Rice, 158 N. C. 635, 74 S. E. 582 (1912) (sanitary purposes); Salt Lake City v. Young, 45 Utah 349, 145 Pac. 1047 (1915) (public health); White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932) (police or sanitary regulations).

3. Gulf Refining Co. v. City of Knoxville, 136 Tenn. 253, 188 S. W. 798 (1916) (privilege tax); Malone v. Williams, 118 Tenn. 390, 103 S. W. 798 (1907) (abatement of nuisances). In the *Gulf* case the court actually construed the statute so as not to raise the extraterritorial question, and thereby avoided the constitutional issue.

4. Tenn. Code § 5447.1 (Williams, Supp. 1947).

5. City Transportation Corp., Inc. v. Pharr, —— S. W. 2d —— (Tenn. 1948).

one, Illinois,[6] with a statute similar to that in question, and it does not appear that the Supreme Court of that State has had occasion to pass on the validity of that act.

Thus it would appear that not only is this a case of first impression in Tennessee, but apparently the first case of its kind in the United States wherein a court has been called upon to decide the validity of a legislative act granting a municipality exclusive extraterritorial control of its urban mass transportation system. In *Malone v. Williams,* an early Tennessee case, the court held unconstitutional a statute empowering the City Council of Memphis to regulate by ordinance sanitary building conditions up to ten miles outside the city limits, and to exercise all governmental and police powers up to two miles outside the corporate limits. If the decision of the *Malone* case[7] is accepted as the law on the question of the validity of municipal control beyond its corporate limits, then the court in the instant case has qualified that law in Tennessee. However, the instant case seems to indicate that the law has not been changed, but that the court has distinguished the *Malone* case on its peculiar facts and has indicated, though not specifically, that the test of the validity of any such extraterritorial legislation is its *reasonableness.*

It appears, however, that one important issue may have been overlooked. Did the court consider the 1945 Amendment to the Act? In quoting from the Act the court says: "'. . . and the regulation hereih provided for shall be exercised both within the municipal limits and ouside thereof within a radius of seven miles from the corporate limits into the country.'" However in 1945[8] the Legislature enacted an amendment to make the zone of extraterritorial control dependent upon the population of the municipality. In the case of Kingsport the extent of control would be one mile. Was the amendment considered, or did the court use the "seven mile" example to show that even the extreme of the radius was reasonable under the circumstances in view of the purpose of the Act? The latter is more feasible; but in either event it is improbable that the result would have been altered by this consideration alone.

It is submitted that the court has given effect to the intent of the Legislature, and if the municipality is to have control of its street railways it is essential that it be given authority to control the entire system in its metropolitan area without interference from a state administrative agency. However, it is still questionable whether it is to the manifest interest of the municipality to allow it to control its street railways *inside or outside* its corporate limits.[9]

6. ILL. STAT. c. 111-2/3, § 90e (Smith-Hurd, 1935).
7. Malone v. Williams, 118 Tenn. 390, 103 S. W. 798 (1907).
8. Public Acts Tenn. 1945, c. 97, § 1.
9. *Quaere:* How would the court deal with an attempt by two adjacent municipalities to regulate a street railway system which operated in both, or, in an area which both "controlled?"

SALES—EXCLUSION OF IMPLIED WARRANTIES BY EXPRESS DISCLAIMER

D received five coin operated music machines under a conditional sales contract. One of the machines did not operate and the others were a complete failure for the purpose intended. *D* failed to pay the installments on the machines as they became due. *P* brought an action in replevin to which *D* filed a cross-complaint alleging rescission of the contract and seeking recovery of down payment. *D* alleged a breach of implied warranty of the fitness of machines for the purpose intended. The contract contained the following provision: "This contract contains the entire agreement between the parties hereto and is not subject to cancellation and no warranties, agreements or guarantees have been made by the seller unless endorsed hereon in writing. No provision hereof shall be excluded, modified or limited except by written instrument expressly referring thereto and setting forth the provision so excluded, modified or limited." *P* contends that there was no warranty of quality of machines either express or implied. The lower court read to the jury section 15 of the Sales Act [1] relating to implied warranties. The jury was instructed that the seller must have known the particular purpose to be made of the machines and the buyer must have relied on the seller's skill or judgment to raise an implied warranty. The jury was further instructed that the defects must be of a substantial nature. The lower court gave judgment for *D*. On appeal, *held,* the statute was applicable and the court's instruction applying it as the law of the case was a correct declaration of the law. *Kanaster v. Berry,* 206 S. W. 2d 13 (Ark. 1947).

In the instant case the court did not feel that the provision in the contract necessarily excluded implied warranties arising under section 15 of the Sales Act.[2] Cases at the common law [3] and under the Sales Act [4] generally concede that implied warranties may be excluded. Also the express provisions of section 71 of the Sales Act [5] provide that obligations arising by implication of law

1. ARK. STAT. ANN. Sales § 15 p. 1174 (Supp. Pope's Digest 1944).

2. Section 15 of the UNIFORM SALES ACT is taken almost verbatim from section 14 of the English SALE OF GOODS ACT. It is stated by some that the UNIFORM SALES ACT is merely declaratory of the common law. Child's Dining Hall Co. v. Swingler, 173 Md. 490, 197 Atl. 105 (1938); Hoback v. Coca-Cola Bottling Works of Nashville 20 Tenn. App. 280, 98 S. W. 2d 113 (1936); 1 WILLISTON, SALES 440 (2d ed. 1924). In some states it has not materially modified the existing rule. Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F. 2d 63 (C. C. A. 8th 1930). In others it has widened the scope of implied warranties. Simpson v. Frank F. Pels Co., 199 App. Div. 854, 192 N. Y. Supp. 538 (1st Dep't 1922); Keenan v. Cheny & Webb, 47 R. I. 125, 131 Atl. 309 (1925).

3. Taylor v. Bullen, 5 Ex. 779 (1850); Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S. W. 576 (1917).

4. Ford Motor Co. v. Cullum, 96 F. 2d 1 (C. C. A. 5th 1938), *cert. denied,* 305 U. S. 627 (1938); Modern Home Utilities Inc. v. Garrity, 121 Conn. 651, 186 Atl. 639 (1936); Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N. W. 2d 51 (1945); see Note, 160 A. L. R. 357 (1946).

5. Section 71 of the UNIFORM SALES ACT provides: "Where any right duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or

may be negatived by express agreement, course of dealings between the parties, or by custom.[6] The main problem is *how* may these implied warranties be excluded. To answer this it is necessary to examine the basis of implied warranties. Some jurisdictions feel that implied warranties arise from the intention of the parties,[7] and in these courts a liberal interpretation is given to disclaimer clauses.[8] Other courts take the position that the implied warranties arise by operation of law and are entirely independent of the particular contract.[9] In such jurisdictions, the express disclaimer is usually strictly construed.[10] This latter view seeems to be the more accepted,[11] and is the position taken by the Arkansas court in the principal case.

It is difficult to state what words will be sufficient to disclaim *all* warranties. The typical clause, as used in the instant case, that "the contract contains the entire agreement" is a subject of controversy. Some courts hold that such excludes *all* warranties,[12] while others say it does not exclude those implied by law.[13] An agreement substantially to the effect that the buyer takes the article "as is" usually is held to negative *all* warranties.[14] Generally the clause ex-

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the sales." Section 152 of the English SALE OF GOODS ACT provides: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived, or varied by express agreement. . . ."

6. W. F. Dollen & Sons v. Carl R. Miller Tractor Co., 214 Iowa 774, 241 N. W. 307 (1932); Minneapolis Threshing Mach. Co. v. Hocking, 54 N. D. 559, 209 N. W. 996 (1926); Lumbrazo v. Woodruff, 256 N. Y. 92, 175 N. E. 525 (1931); Hoover v. Utah Nursery Co., 79 Utah 12, 7 P. 2d 270 (1932). It appears that only a small number of cases have relied on this provision. See Note, 117 A. L. R. 1350, 1352 (1938). The court in the principal case did not rely on this provision.

7. Burntisland Shipbuilding Co. v. Barde Steel Product Corp., 278 Fed. 552 (D. Del. 1922); Couts v. Sperry Flour Co., 85 Cal. App. 156, 259 Pac. 108 (Dist. Ct. App. 1927).

8. See note 7 *supra*.

9. J. B. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Sterling-Midland Coal Co. v. Great Lakes Coal & C. Co., 334 Ill. 281, 165 N. E. 793 (1929); Bekkevold v. Potts, 173 Minn., 87, 216 N. W. 790 (1927); Allis-Chalmers Mfg. Co. v. Frank, 57 N. D. 295, 221 N. W. 75 (1928); VOLD, SALES 468 (1931).

10. J. B. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889 (1926); Bekkevold v. Potts, 173 Minn., 87, 216 N. W. 790 (1927); Allis-Chalmers Mfg. Co. v. Frank, 57 N. D. 295, 221 N. W. 75 (1928); VOLD, SALES 468 (1931).

11. 1 WILLISTON, SALES 475 (2d ed. 1924); VOLD, SALES 468 (1931).

12. Sterling-Midland Coal Co. v. Great Lakes Coal & C. Co., 334 Ill., 281, 165 N. E. 793 (1929); S. F. Bowser & Co. v. Birmingham, 276 Mass. 289, 177 N. E. 268 (1931); Lasher Co. v. La Berge, 125 Me. 475, 135 Atl. 31 (1926); Landes & Co. v. Fallows, 81 Utah 432 19 P. 2d 389 (1933); see Notes, 127 A. L. R. 160 (1940), 133 A. L. R. 1364 (1941).

13. Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927); Minneapolis Steel & Machinery Co. v. Casey Land Agency, 51 N. D. 832, 201 N. W. 172 (1924). Particularly under this type of disclaimer must we remember that the parol evidence rules as to warranties is closely related to the problem of disclaimers. So a court may hold that a provision that the contract contains the entire agreement may exclude oral warranties but allow implied warranties. S. F. Bowser & Co. v. McCormack, 230 App. Div. 303, 243 N. Y. Supp. 442 (4th Dep't. 1930).

14. Rosenbush v. Learned, 242 Mass. 132, 136 N. E. 341 (1922); Tankin v. Nelson-Dowling Coal Co., 82 N. H. 96, 130 Atl. 26 (1925). A clause stating that the buyer takes an article "with all faults" negatives implied warranties. Pearce v. Blackwell, 34 N. C. 49 (1851). So an agreement "to accept in its present condition" disclaims implied warranties. Washington & L. R. Co. v. Southern Iron & Equipment Co., 28 Ga. App. 684, 112 S. E. 905 (1922).

cluding "all warranties, expressed or implied" disclaims *all* warranties.[15] While it is clear that it may be done, appropriate phraseology may not be easy to find that excludes *all* warranties. It would seem advisable to state that except for written warranties, the buyer takes the goods as they are, relying not on the seller, but on his own judgment.[16] Further, it should be declared specifically that there are no other warranties, either promissory or independently imposed by law, whether based on promises, express limitations, tacit representations, descriptions, or any other ground whatever, whether statutory or otherwise.[17]

In the instant case Arkansas has joined the group of states that places a strict construction on express disclaimers. Perhaps in view of a sensed inequality between buyer and seller,[18] the tendency today is to increase the buyer's protection by increasing implied warranties and limiting disclaimers.[19] But under the present state of the law, disclaimers that are fully stated must be given effect or the courts must indulge in judicial legislation.[20] If the situation is such that the buyer needs added protection,[21] this should be done by appropriate legislation. One method of limiting disclaimers is by the use of statutory commodity controls.[22] Perhaps the real solution is suggested by the North Dakota statute that expressly provides that certain implied warranties cannot be waived.[23] One might wonder if the time is ripe for an amendment to

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15. Williams v. Bullock Tractor Co., 186 Cal. 32, 198 Pac. 780 (1921); Oldfield v. International Motor Co., 138 Md. 35. 113 Atl. 632 (1921); Kolodzcak v. Peerless Motor Co., 255 Mich. 47, 237 N. W. 41 (1931); Industrial Finance Corporation v. Wheat, 142 Miss. 536, 107 So. 382 (1926); Glasser v. Dodge Bros. Corp., 112 N. J. Eq. 11, 163 Atl. 121 (Sup. Ct. 1932).

16. VOLD, SALES 469 (1931).

17. VOLD, SALES 470 (1931). In Minneapolis Threshing Mach. Co. v. Hocking, 54 N. D. 559, 209 N. W. 996 (1926), the disclaimer read: ". . . there are no representations, agreements, obligations or conditions express or implied, statutory or otherwise, relating to the subject matter hereof, other than herein contained. . . ." In Larson v. Inland Seed Co., 143 Wash. 557, 255 Pac. 919 (1927), the disclaimer read: "Garden City Feed Mills gives no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds it sends out, and will be in no way responsible for the crop."

18. Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400, 413 (1930).

19. In Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790 (1927), it was stated the doctrine of implied warranties should be extended. VOLD, SALES 469 (1931); Note [1939] WIS. L. REV. 459.

20. See notes 3 and 4 *supra*.

21. Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400, 413 (1930). The writers point out that the standard disclaimers and other practices used by big business often leave the buyer little chance of survival.

22. Germofert Mfg. Co. v. Cathcart, 104 S. C. 125, 88 S. E. 535 (1916); Jones v. Cordele Guano Co., 94 Ga. 14, 20 S. E. 265 (1894); Note *Statutory Commodity Standards*, 31 COL. L. REV. 872 (1931).

23. N. D. REV. CODE § 51-0707 (1943), Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283 (1932); Bratberg v. Advance-Rumely Thresher Co., 61 N. D. 452, 238 N. W. 552 (1931).

the Uniform Sales Act that would allow no waiver of implied warranties in certain fields.[24]

TORTS—IMMUNITY OF CHARITABLE INSTITUTIONS— EFFECT OF LIABILITY INSURANCE

Plaintiff, five years of age, brought an action for personal injuries allegedly resulting from the negligent maintenance of an attractive nuisance by defendant, a charitable institution. Defendant denied liability because of its eleemosynary character. Plaintiff's replication alleged that defendant possessed a liability insurance policy in which the insurer agreed (1) to pay losses of defendant occasioned by its torts and (2) to refrain from invoking the defense of immunity unless requested to do so by defendant. The lower court sustained a motion to strike the replication and dismissed the suit. *Held,* judgment reversed; the replication was sufficient as a matter of law, and would rebut the defense of immunity. *Wendt v. Servite Fathers,* 76 N. E. 2d 342 (Ill. App. 1st Dist. 1947).

Charities, in many states, are still exempt either partially or completely from tort liability.[1] As indicated in the principal case, the courts justify this exemption with one or more of four theories: (1) the trust fund may not be diverted from the purpose for which it was established; (2) public policy demands that the charity remain intact and it is better for the individual to suffer loss than the charity; (3) the beneficiary of the charity impliedly waives any claim for damages; (4) the rule of the respondeat superior is not applicable to institutions not conducted for profit. The trend in recent years in states which have not actually repudiated the doctrine of immunity has been toward a qualification of it by refusing to extend it to new situations, particularly when the refusal can be rationalized with the theory used in the particular jurisdiction to support the doctrine.[2] Illustrative of such a restriction is the refusal in a few states to allow the defense of immunity when it appears that the charity owns or operates a business other than for charitable purposes, the rationalization being that the trust fund will not be depleted contrary to

24. Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods,* 25 ILL. L. REV. 400, 413 (1930).

1. PROSSER, TORTS § 108 (1941); 29 IOWA L. REV. 624 (1944); see NOTE, 14 A. L. R. 572 (1921) and supplementary annotations.

2. This trend is the result in part of severe criticism of the doctrine and its underlying theories by authorities and by courts both repudiating it or rejecting one theory in favor of another. Appleman, *The Tort Liability of Charitable Institutions,* 22 A. B. A. J. 48 (1936); Feezer, *The Tort Liability of Charities,* 77 U. OF PA. L. REV. 191 (1928); Zollman, *Damage Liability of Charitable Institutions,* 19 MICH. L. REV. 395 (1921); 22 VA. L. REV. 58 (1935); 48 YALE L. J. 81 (1938); 1 VAND. L. REV. 153 (1947); see especially, Rutledge, J., in Georgetown College v. Hughes, 130 F. 2d 810 (App. D. C. 1942) (exhaustive treatment of subject).

the intent of the donor if a judgment against the charity is satisfied only out of such business.[3] A similar situation is presented in the principal case, in which the question is raised whether immunity should be available to a charity which, by procuring liability insurance,[4] has provided a fund from which tort liability may be collected without impairing its trust fund.[5]

Most of the courts adjudicating this question answer in the affirmative,[6] on the ground that the basis of a charity's legal responsibility for its torts cannot be changed by the mere act of acquiring insurance. They feel that by creating liability where none existed before they would be altering the contract of the insurer.[7] His obligation can arise only after a judgment has been obtained against the charity, and since a charity is absolutely immune, no judgment can be had against it and no obligation on the part of the insurer can arise.[8]

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3. St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); Robertson v. Executive Committee of Baptist Convention, 55 Ga. App. 469, 190 S. E. 432 (1937); McMillen v. Summunduwot Lodge, 143 Kan. 502, 54 P. 2d 985 (1936); Holder v. Massachusetts Horticultural Society, 211 Mass. 370, 97 N. E. 630 (1912); Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (1937); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S. W. 510 (1918).

4. Some of the cases make a distinction between "indemnity" policies and "liability" policies, emphasizing the point that there can be no liability in the former case until there has been an actual loss by the charity. Williams' Adm'x v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S. W. 2d 753 (1928); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930).

5. The plaintiff as a rule raises the question only in states basing immunity upon the trust-fund or public-policy theories, his contention being that the trust fund will not be dissipated nor will operation of the charity be endangered by a recovery measured by the insurance. Obviously, the existence of insurance would not destroy the reasoning behind the implied-waiver or non-applicability-of-respondeat-superior theories, though the issue was unsuccessfully raised in two states. Schau v. Morgan 241 Wis. 334, 6 N. W. 2d 212 (1942) (respondeat superior); Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P. 2d 520 (1931) (waiver).

6. Stonaker v. Big Sisters Hospital, 116 Cal. App. 375, 2 P. 2d 520 (1931); Levy v. Superior Court of California, 74 Cal. App. 171, 239 Pac. 1100 (1925); Piper v. Epstein, 326 Ill. App. 400, 62 N. E. 2d 139 (1st Dist. 1945) (compare with principal case); Williams' Adm'x v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S. W. 2d 753 (1928); McKay v. Morgan Memorial Co-op Industries and Stores, 272 Mass. 121, 172 N. E. 68 (1930); Enman v. Trustees of Boston University, 270 Mass. 299, 170 N. E. 43 (1930); Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N. W. 137 (1933); Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Dille v. St. Luke's Hospital, 196 S. W. 2d 615 (Mo. 1946); Stedem v. Jewish Memorial Hospital Ass'n of Kansas City, 187 S. W. 2d 469 (Mo. App. 1945); Herndon v. Massey, 217 N. C. 610, 8 S. E. 2d 914 (1940); Emrick v. Pennsylvania R. Y.M.C.A. of Crestline, 69 Ohio App. 353, 43 N. E. 2d 733 (1942); Susman v. Y.M.C.A. of Seattle, 101 Wash. 487, 172 Pac. 554 (1918); Schau v. Morgan, 241 Wis. 334, 6 N. W. 2d 212 (1942).

7. This would seem to have validity only if the policy is one of idemnity against loss and the premium paid takes account of the low risk of legal loss by the charity. Otherwise the charity is paying for unnecessary and illusory protection. According to Appleman, these policies are almost pure "gravy" accounts, and "most of the better companies now have a provision in their policies preventing the raising of the defense of immunity except with the written consent of the insured, and this is usually reserved as a means of combatting fraudulent claims or malingering." 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4502 n. 94 (1942).

8. Other reasons assigned by courts are: (1) a trustee cannot by his acts do indirectly what he is prohibited by law from doing directly, Levy v. Superior Court

Two states following the "qualified" trust-fund theory predicate a negative answer on the reasoning that trust-fund property is not appropriated and the charity suffers no loss if liability is permitted to the extent of the insured amount.[9] It would seem that if the charity pays a full premium, regardless of whether the policy is one of "indemnity" or of "liability," courts using the trust-fund or public-policy theories could impose liability by construing the promise of the insurer to mean to save harmless against such claims as could be enforced against it if it were not a charitable institution.[10]

In analogous fields a majority of the courts have also shown some reluctance to abrogate a defendant's right to immunity solely because he carries liability insurance. Where governmental agencies purchase insurance, in the absence of a statute expressly empowering the agency to purchase it for the benefit of injured third persons,[11] the majority rule is that the immunity afforded by the law when the agency performs governmental functions is not removed by the act of acquiring the insurance.[12] A parent is generally held not liable to a minor child, nor one spouse to the other, for a personal tort, even in the

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of California, 74 Cal. App. 171, 239 Pac. 1100 (1925); (2) freedom of a charity to contract is restricted and (3) the trust fund might be dissipated through imposition of higher premium rates commensurate with the higher risk of insurer. Stedem v. Jewish Memorial Hospital Ass'n of Kansas City, 187 S. W. 2d 469 (Mo. App. 1945); *but cf.* Georgetown College v. Hughes, 130 F. 2d 810, 823 (App. D. C. 1942) ("It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums.").

9. O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P. 2d 835 (1939); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S. W. 2d 284 (1938); *cf.* McLeod v. St. Thomas Hospital, 170 Tenn. 423, 95 S. W. 2d 917 (1936); *but cf.* Knox County Tuberculosis Sanitarium v. Moss, 5 Tenn. App. 589 (1927). *See* also Lusk v. United States Fidelity and Guaranty Co., 199 So. 666, 667 (La. App. 1941). Note that Massachusetts and Mississippi follow the "qualified" trust-fund theory but did not impose liability where insurance was carried. In both states the torts were committed by the charity on property used exclusively for charitable purposes.

Though recent majority-rule cases attempt to reconcile the two positions by distinguishing between the "absolute" and "qualified" trust-fund theories [Piper v. Epstein, 326 Ill. App. 400, 62 N. E. 2d 139 (1945); Stedem v. Jewish Memorial Hospital of Kansas City, 187 S. W. 2d 469 (Mo. App. 1945)] the court in the instant case refused to concede that exemption in Illinois was "absolute."

10. 3 SCOTT, TRUSTS § 402 (1939).

11. In Taylor v. Knox County Board of Education, 292 Ky. 767, 167 S. W. 2d 700 (1942), recovery was allowed because of a statute empowering the hoard to carry insurance, the policy stipulating that insurer could not assert the defense of immunity.

12. Brooks v. Clark County, 297 Ky. 549, 180 S. W. 2d 300 (1944) (court approved of plaintiff's contention, but refused to overrule precedents); Simons v. Gregory, 120 Ky. 116, 85 S. W. 751 (1905); Kesman v. School District of Fallowfield Tp., 345 Pa. 457, 29 A. 2d 17 (1942); Bradfield v. Board of Education of Pleasants County, 36 S. E. 2d 512 (W. Va. 1945) (statute authorized board to carry insurance). By analogy to the charity cases, Tennessee has imposed liability, Rogers v. Butler, 170 Tenn. 125, 92 S. W. 2d 414 (1936); Taylor v. Cobble, 28 Tenn. App. 167, 187 S. W. 2d 648 (1945). But the logic of analogy fails where an agency without authority attempts to waive its immunity in the policy because of its governmental character; nothing prevents a charity from waving immunity. Pohland v. City of Sheboygan, 251 Wis. 20, 27 N. W. 2d 736 (1947).

event insurance is present,[13] though a few well reasoned recent cases have held otherwise.[14]

The language of the court in the principal case evidences a dissatisfaction with the immunity doctrine and a determination to restrict its application whenever possible. The value of the decision lies in the fact that it marks the first instance in which a state supposedly following the "absolute" trust-fund theory has imposed liability where insurance is carried.[15]

13. Owens v. Auto Mutual Indemnity Co., 235 Ala. 9, 177 So. 133 (1937); Rambo vs. Rambo, 195 Ark. 832, 114 S. W. 2d 468 (1938); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923) (vigorous dissent); Lasecki v. Kabara, 235 Wis. 645, 294 N. W. 33 (1940); Silverstein v. Kastner, 342 Pa. 207, 20 A. 2d 205 (1941).

14. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S. E. 2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932); *see* McKinney v. McKinney, 59 Wyo. 204, 135 P. 2d 940, 954 (1943) (concurring opinion). McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030 (1930); Note, 44 HARV. L. REV. 135 (1931).

15. The court indicated that the same result would have been reached even if the insurance had been "indemnity," not "liability," and the insured had not expressly waived immunity. Also note that the injured here was not a beneficiary of the charity, but a stranger, so that the waiver theory of immunity was inapplicable.