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Recent Cases

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RECENT CASES

BILLS AND NOTES—FICTITIOUS PAYEE KNOWN ONLY TO FRAUDULENT EMPLOYEE OF DRAWER—NEGOTIABLE INSTRUMENTS LAW v. FICTITIOUS PAYEE ACT

Plaintiff alleges that it had a bank account with defendant bank; that plaintiff's agent supplied plaintiff with the names of 32 non-existing persons, falsely representing said names to be those of actual persons for whom loans were approved; that plaintiff drew checks on defendant payable to these non-existing persons, and delivered them to said agent; that said agent thereupon forged the indorsements of the payees, indorsed his own name and cashed the checks. Plaintiff brings this action to recover the aggregate amount of the checks from the drawee bank. From the judgment of the trial court sustaining a general demurrer, plaintiff excepts. *Held,* judgment affirmed. Under the Recommended Fictitious Payee Act [1] the checks were payable to bearer, and title thereto passed to defendant bank. *Citizens Loan & Security Co. v. Trust Co. of Ga.,* 53 S. E. 2d 179 (Ga. App. 1949).

Under the Uniform Negotiable Instruments Law [2] an instrument payable to bearer is negotiated by delivery alone.[3] Thus, a drawee bank which pays a check made out to bearer receives valid title to said check, and any forged indorsements thereon would be immaterial so far as the passing of title is concerned.[4] A check made payable to the order of a specific person, however, is negotiated only by the valid indorsement of the payee, completed by delivery.[5] Thus where the payee's indorsement is forged and the check is subsequently paid by the drawee bank the bank may not debit the account of the drawer. Such indorsement, being a forgery, would not pass valid title to the check.[6]

The distinction between an order instrument and an instrument payable to bearer is of paramount importance in situations involving a fictitious payee. Such a situation frequently arises by reason of the fraud of an employee, who furnishes a name to his employer, alleging that the employer is indebted to

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1. GA. CODE ANN. § 14-209 (Supp. 1947) [amendment to NEGOTIABLE INSTRUMENTS LAW § 9(3)].
2. The N. I. L. has been adopted, with occasional changes, in every American jurisdiction.
3. NEGOTIABLE INSTRUMENTS LAW § 30.
4. Instant case, 53 S. E. 2d at 180; BRITTON, BILLS AND NOTES 663 (1943).
5. NEGOTIABLE INSTRUMENTS LAW § 30.
6. "It is well settled that the obligation of a bank to its depositor is to pay his checks, up to the amount of his deposit, according to his direction, and if that direction is to pay to a person named, or to his order, the bank must ascertain at its peril the identity of the person named as payee or the genuineness of the indorsement if the check is presented by an alleged indorsee." U. S. Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N. E. 825, 826, 74 A. L. R. 811, 814 (1931).

the named party, thus inducing the employer to draw a check payable to the order of this alleged creditor and then forges an indorsement, cashes the check and appropriates the money to his own use. If the check is declared to be an order instrument, the drawee bank may not debit the drawer's account, since the forgery prevents title from passing. If, on the other hand, such an instrument is deemed to be a bearer instrument, the drawer may not recover from the drawee, who has received full title to the instrument.

The Negotiable Instruments Law declares that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." [7] Under this rule the person who actually signs the check must know that the payee is a fictitious or non-existing person.[8] The knowledge or intention of the fraudulent employee will not be imputed to his employer.[9] Thus in the hypothetical fraudulent employee case the instrument, under the Negotiable Instruments Law, is held not to be a bearer instrument due to the fact that the "person making it so payable" (the employer) did not know that the payee was a non-existing person. The drawee bank, therefore, not having received title to the instrument, must suffer the loss, as between the drawer and the drawee. In order to prevent the loss from falling on the drawee in those cases where the fraud originates with the drawer's own servant or agent, the American Bankers Association has recommended that section 9(3) of the Negotiable Instruments Law be amended to read ". . . and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee." [10]

This recommendation has been adopted by statute in ten states,[11] with the result that the employer in those jurisdictions must now bear all losses in this respect brought about by his own employees, rather than put this loss on an innocent drawee. This would appear to be a much fairer solution to the problem, and the Recommended Act is worthy of consideration by the legislatures of those jurisdictions still adhering to the rule set forth in the Negotiable Instruments Law.[12]

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7. NEGOTIABLE INSTRUMENTS LAW § 9(3).

8. Mueller & Martin v. Liberty Ins. Bank, 187 Ky. 44, 218 S. W. 465 (1920).

9. "It is well settled that the rule that notice to the agent is notice to the principal does not apply where the agent is engaged in a scheme to defraud the principal." American Sash & Door Co. v. Commerce Trust Co., 25 S. W. 2d 545, 548 (Mo. App. 1930); *accord*, Los Angeles Invest. Co. v. Home Sav. Bank, 180 Cal. 601, 182 Pac. 293 (1919); U. S. Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N. E. 825 (1931).

10. BRITTON, BILLS AND NOTES 710 (1943).

10. BRITTON, BILLS AND NOTES 710 (1943). In U. S. Guarantee Co. v. Hamilton Nat. Bank, 223 S. W. 2d 519 (Tenn. 1949), the court reached this result under the N. I. L. by holding the drawer negligent.

11. CAL. CIV. CODE § 3090 (Supp. 1945); GA. CODE ANN. § 14-209 (Supp. 1947); IDAHO CODE ANN. § 26-109 (1932); ILL. ANN. STAT., c. 98, § 29 (1935); LA. GEN. STAT. ANN. § 798 (Supp. 1949); MASS. ANN. LAWS, c. 107, § 31 (1947); MO. REV. STAT. ANN. § 3025 (Cum. Supp. 1948) ("who supplies or causes to be inserted the name of such payee"); MONT. REV. CODES ANN. § 8416 (1935); N. M. STAT. ANN. § 53-109 (Supp. 1947); WIS. STAT. § 116.13 (1947).

12. The draftsmen of the proposed Uniform Commercial Code have also recognized the injustice wrought by this harsh rule embodied in the N. I. L. As a result they have pro-

CONSTITUTIONAL LAW—AMENDMENT AND REVISION—POWER TO CALL CONSTITUTIONAL CONVENTION LIMITED TO CONSIDERATION OF SPECIFIC TOPICS

Action was brought under the Tennessee Declaratory Judgment Act [1] by the Secretary of State against the Attorney General to have determined the validity of an act of the legislature, which provided for the holding of a popular election to determine whether a convention should be called for the purpose of amending certain specified sections of the state constitution.[2] *Held,* the act is constitutional. *Cummings v. Beeler,* 223 S. W. 2d 913 (Tenn., 1949).

The Tennessee constitution provides two alternative methods for the amendment thereof,[3] one of which is by the calling of a constitutional convention.[4] The language in regard to this method is that "the legislature shall have the right . . . to submit to the people the question of calling a convention to alter, reform or abolish this constitution. . . ." Thus the people, by adopting the constitution, have reserved to themselves the power of amending it,[5] and have granted to the legislature the power of setting in motion the machinery by which amendments may be framed and adopted.[6] Clearly the legislature has no power in itself to amend the constitution or to call a convention for that purpose.[7] It is merely the agency by which the question is formulated

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posed the following provision: "(1) With respect to a holder in due course or a person paying the instrument in good faith an indorsement is effective when made in the name of the specified payee by any of the following persons, or their agents or confederates: (a) an imposter who through the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederates in the name of the payee; (b) a person signing as or on behalf of a drawer who intends the payee to have no interest in the instrument; (c) an agent or employee of the drawer who has supplied him with the name of the payee intending the latter to have no such interest." UNIFORM COMMERCIAL CODE § 3-404 (May, 1949 Draft).

"The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the innocent holder in due course or drawee." *Id.* at 336.

1. TENN. CODE ANN. §§ 8835-47 (Williams 1934).

2. Tenn. Laws, 1949, c. 49. The Attorney General had previously declared in an official opinion that the proposed act would be unconstitutional [Opinion of Attorney General to Constitutional Revision Commission, May 16, 1946 (published in pamphlet form under title "Right of the Legislature to Call a Limited Constitutional Convention")]. The Secretary of State, while disagreeing with him, wanted the court to sanction the act before he authorized the expenditure of money for the holding of an election. The court in the instant case held that this presented a justiciable issue.

3. TENN. CONST. Art. XI, § 3.

4. The other method, popularly known as the "amendment route," provides that amendments must be passed by a majority of both houses, then by a two-thirds vote of the next succeeding general assembly, then by a majority of electors voting for representatives. The legislature may not propose amendments by this method oftener than once in six years.

5. The people have the unlimited power of amending their state constitution, subject only to the restrictions imposed by the Constitution of the United States. Staples v. Gilmer, 183 Va. 613, 33 S. E. 2d 49, 158 A. L. R. 495 (1945); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 88-89 (8th ed. 1927).

6. See Dodd, *State Constitutional Conventions and State Legislative Power,* 2 VAND. L. REV. 27, 33 (1948).

7. See instant case, 223 S. W. 2d at 923; State *ex rel.* M'Cready v. Hunt, 20 S. C. Law

and submitted to the people for their consideration.[8]

The reservation of the right to "alter, reform or abolish" in the Tennessee constitution is phrased in the alternative—*i.e.,* the right to amend[9] *or* the right to abolish. Did the people intend to reserve to themselves the right to decide which of these alternatives should be exercised, or did they intend to reserve merely the right to call a convention which alone would have the power to choose between these alternatives? The legislature has indicated that its interpretation is that the people have reserved the right to decide. This interpretation is supported by language to be found in another part of the constitution,[10] where it is declared that the *people* shall have the right to "alter, reform, or abolish the government in such manner as they may think proper." [11] Any doubt as to the meaning of the language of the constitution should be resolved in favor of the validity of the legislative act which proposes a limited convention.[12]

Presumably no one would question the validity of a convention, called into being under such a constitutional provision, with general powers—*i.e.,* with power to amend any part of the constitution that it chooses, or to abolish it and form a new one. Moreover, there seems to be no real doubt as to the validity of a legislative enactment which gave to the people directly the choice of deciding by vote (1) whether a convention should be called, and (2) if so, whether the convention should have authority to exercise general powers or should be limited to a consideration of certain topics. The controversial question is whether a legislative act is valid which itself proposes such limits upon the powers of the convention and submits to the people only the question whether a convention so limited shall be called.

The Tennessee Supreme Court has not passed upon this question before. Of the cases in other jurisdictions, *Staples v. Gilmer*[13] is most nearly parallel to the instant case. The Virginia constitution provided that the legislature might submit to the people the question whether there should be "a convention to revise the Constitution and amend the same." [14] The Virginia Court of Appeals held that this section authorized the legislature to submit to vote whether a convention with limited powers would be called. A like result has

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(2 Hill) 1 (1834); 11 AM. JUR., *Const. Law* § 26 (1937); see Sims, *The Limited Constitutional Convention in Tennessee,* 21 TENN. L. REV. 1, 6-7 (1949). But see JAMESON, CONSTITUTIONAL CONVENTIONS § 121 (4th ed. 1887).

8. *In re* Opinion to the Governor, 55 R. I. 98, 178 Atl. 433, 452 (1935); 6 R. C. L., *Const. Law* § 17 (1915).

9. The words "alter" and "reform" taken together mean "amend." See REPORT OF CONSTITUTION REVISION COMMISSION 38 (1946) ("The Frierson Report").

10. Art. I, § 1.

11. See MCCLURE, STATE CONSTITUTION-MAKING 355-56 (1916).

12. See instant case, 223 S. W. 2d at 921; Staples v. Gilmer, 183 Va. 613, 33 S. E. 2d 49, 158 A. L. R. 495 (1945). But see Gooch, *The Recent Limited Constitutional Convention in Virginia,* 31 VA. L. REV. 708 (1945).

13. 183 Va. 613, 33 S. E. 2d 49, 158 A. L. R. 495 (1945).

14. VA. CONST. Art. XV, § 197.

been reached in states whose constitutions contained no provisions for conventions.[15]

The question of the enforceability of the restriction remains. Suppose a convention with limited powers should nevertheless propose amendments which it was not authorized to consider or should propose a completely new constitution, and these provisions should be submitted to and ratified by the people. On principle, the new provisions should be upheld as valid; for the people, by whose authority the powers of the convention were limited in the first place, would be deemed to have assented to the convention's assumption of previously unauthorized powers. But the initial restrictions on the powers of the convention could be seasonably enforced by the institution of proceedings to enjoin the submission of the new provisions to the people.[16] In such a case the convention would have no authority to submit them to the people, and the unlawful attempt to do so could be enjoined before the people voted. In case of a limited convention whose adoptions were not required to be submitted to the people for approval, any adoptions outside the designated authority would clearly be invalid.[17]

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DENIAL OF LICENSE TO SHIP MILK HELD INVALID

Petitioner, a Massachusetts corporation engaged in the interstate shipment of milk from New York producers to Boston consumers, sought an additional license for a milk receiving depot in New York. Under a state statute,[1] the New York commissioner refused to issue the license, finding that the extra depot would effect destructive competition in a marketing area already adequately served and would create a scarcity of milk in the local area. The denial was upheld by the state court,[2] and petitioner obtained

15. Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1833); Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563 (1873); *In re* Opinion to the Governor, 55 R. I. 56, 178 Atl. 433 (1935). See Note, 158 A. L. R. 512 (1945). If a constitution provides that the legislature may submit to the people the question of calling a constitutional convention and does not prohibit the calling of a convention with limited powers, the issue is brought to the same basis as if there were no constitutional provision. Dodd, *State Constitutional Conventions and State Legislative Power,* 2 VAND. L. REV. 27, 31-32 (1948). At an earlier date, Mr. Dodd's position was not as clear. See DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS 72-80 (1910).

16. Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563 (1873).

17. State v. American Sugar Refining Co., 137 La. 407, 68 So. 742 (1915).

1. "No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant . . . unless the commissioner is satisfied . . . that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. . . ." N. Y. AGRICULTURE AND MARKETS LAW § 258-c.

2. 297 N. Y. 209, 78 N. E. 2d 476 (1948).

certiorari. *Held* (5-4),[3] the statute as applied violates the Federal Constitution by curtailing or burdening interstate commerce in the promotion of the state's own economic advantages, and it is not authorized by federal milk control legislation.[4] *Hood & Sons, Inc. v. Du Mond,* 69 Sup. Ct. 657 (1949).

Chief Justice Marshall in *Gibbons v. Ogden*[5] suggested that the Commerce Clause may prohibit by implication all state regulation of interstate commerce, and that the federal power is exclusive. In the *License Cases*[6] Chief Justice Taney declared that the Commerce Clause itself prohibited nothing, being a mere grant of power to Congress, and that the states were free to regulate commerce until precluded by Congressional action. The Court subsequently modified Taney's view in *Cooley v. Board of Port Wardens,*[7] stating in effect that the subject matter of interstate commerce is two-fold in nature: (1) that which is national in character and hence demands uniform regulation if there is to be regulation; (2) that which involves a legitimate local need, permitting diversity of treatment by a local regulation conforming with federal legislation. State regulation would be upheld only where interstate commerce of the latter type is concerned. The basic principles of the *Cooley* case have been obscured in many court decisions;[8] nevertheless, they suggest the function the Court must perform today in harmonizing conflicting interests of the states and the Federal Government.

The question arises, how does the Court approach this balancing-of-interests, and what are the factors to be considered and weighed in determining a state statute's validity? Precedent indicates that the Court first appraises a local interest to ascertain whether the true purpose of a statute is to effectuate a legitimate local need, such as the promotion of health,[9] of safety,[10] or the prevention of fraud.[11] Then it seeks to accommodate the state's effort to deal with this legitimate local interest, if it exists, with expressions of national policy as embodied in federal statutes,[12] if any, and

3. Majority opinion by Jackson, J.; dissents by Frankfurter, J. (Rutledge, J., concurring), and Black, J. (Murphy, J., concurring).
4. 50 STAT. 246 (1937), 7 U. S. C. A. § 601 (1939).
5. 9 Wheat. 1, 6 L. Ed. 23 (U. S. 1824).
6. 5 How. 504, 12 L. Ed. 256 (U. S. 1847).
7. 12 How. 299, 13 L. Ed. 996 (U. S. 1851); see Bikle, *The Silence of Congress,* 41 HARV. L. REV. 200 (1927).
8. *See* Southern Pacific Co. v. Arizona, 325 U. S. 761, 768-69, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945) (excellent discussion of the problem of federal-state commerce power); United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, 547-49, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944); Dowling, *Interstate Commerce and State Power,* 27 VA. L. REV. 1 (1940).
9. *E.g.,* Clason v. Indiana, 306 U. S. 439, 59 Sup. Ct. 609, 83 L. Ed. 858 (1939); Smith v. St. Louis & S. W. Ry., 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847 (1901).
10. South Carolina State Highway Dep't v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (1938); Hicklin v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. Ed. 247 (1933).
11. Robertson v. California, 328 U. S. 440, 66 Sup. Ct. 1160, 90 L. Ed. 1366 (1946).
12. Robertson v. California, *supra* note 11; Kentucky Whip & Collar Co. v. Illinois Central R. R., 299 U. S. 334, 57 Sup. Ct. 277, 81 L. Ed. 270 (1937); Whitfield v. Ohio, 297 U. S. 431, 56 Sup. Ct. 532, 80 L. Ed. 778 (1936).

with the policy of free trade contained in the Commerce Clause itself as revealed by prior decisions interpreting the Clause. By and large the cases support the rule that if a valid local need exists where uniformity of regulation is not essential in advancing the national interest,[13] and the state regulatory scheme neither conflicts with any federal statutes nor seeks to advance local interests at the expense of other states,[14] then the state statute will be upheld even though its administration materially obstructs, impedes, or even prohibits the flow of interstate commerce into or out of the state.[15]

As it did in the principal case, the Court must often resolve the question of how far the national policy of free trade among the states may be sacrificed to promote a state policy,[16] and it has generally struck down attempts by a state to prohibit or limit the exportation of its natural resources,[17] or to limit the right to conduct interstate commerce within its borders.[18] Moreover, the Court has consistently held that a state may neither prevent privately owned articles of trade from being sold in interstate commerce because of local needs[19] nor accord its citizens a preferred right to purchase.[20] The rule

13. Morgan v. Virginia, 328 U. S. 373, 66 Sup. Ct. 1050, 90 L. Ed. 1317 (1946) (uniformity necessary); Edwards v. California, 314 U. S. 160, 62 Sup. Ct. 164, 86 L. Ed. 119 (1941); Kelly v. Washington, 302 U. S. 1, 58 Sup. Ct. 87, 82 L. Ed. 3 (1937) (uniformity not essential); Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 Sup. Ct. 525, 69 L. Ed. 982 (1925); *cf.* Southern Pacific Co. v. Arizona, 325 U. S. 761, 768-69, 65 Sup. Ct. 1515, 89 L. Ed. 1915 (1945).

14. Toomer v. Witsell, 334 U. S. 385, 68 Sup. Ct. 1156, 92 L. Ed. 1460 (1948); California v. Thompson, 313 U. S. 109, 61 Sup. Ct. 930, 85 L. Ed. 1219 (1941) (upholding state requirement of license and bond); Maurer v. Hamilton, 309 U. S. 598, 60 Sup. Ct. 726, 84 L. Ed. 969 (1940); H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 59 Sup. Ct. 438, 83 L. Ed. 500 (1939).

15. Union Brokerage Co. v. Jensen, 322 U. S. 202, 64 Sup. Ct. 967, 88 L. Ed. 1227 (1944) (state statute requiring foreign corporation to obtain certificate to do business in state as a condition of suing in state courts); Terminal Railroad Ass'n v. Brotherhood of R. R. Trainmen, 318 U. S. 1, 63 Sup. Ct. 420, 87 L. Ed. 571 (1943) (state requirement that caboose cars be provided for switchmen); Parker v. Brown, 317 U. S. 341, 63 Sup. Ct. 307, 87 L. Ed. 315 (1943) (California regulation of marketing of locally produced raisins, 95% of which were shipped interstate); Milk Control Board v. Eisenberg, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752 (1939) (state requirement that milk dealers obtain license, file bond and pay minimum prices to farmers upheld as only incidentally affecting interstate commerce); Slight v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835 (1915); Detweiler v. Welch, 46 F. 2d 71 (D. Idaho 1930), *aff'd*, 46 F. 2d 75, 73 A. L. R. 1440 (9th Cir. 1930); Fallon, *The Commerce Clause from the Schechter Case Through the 1944-45 Term*, 19 TEMP. L. Q. 421 (1946); Bikle, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927).

16. ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 103 (1949).

17. Pennsylvania v. West Virginia, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300 (1923); Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738 (1912); Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716 (1911); Rosenson, *The Power of a State over Its Natural Resources*, 17 TULANE L. REV. 256 (1942).

18. Hale v. Bimco Trading, Inc., 306 U. S. 375, 59 Sup. Ct. 526, 83 L. Ed. 771 (1939); Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286 (1925) (true purpose of statute was to reduce competition); Bush & Sons Co. v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326, 69 L. Ed. 627 (1925); Lemke v. Farmers Grain Co., 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458 (1922). *But cf.* Bradley v. Public Utilities Commission, 289 U. S. 92, 53 Sup. Ct. 577, 77 L. Ed. 1053 (1933).

19. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 Sup. Ct. 1, 73 L. Ed. 147 (1928).

20. See note 17 *supra.*

which seems to be emerging from these decisions is that, in the absence of any federal legislation, a state may not promote its own economic welfare to the detriment of other states unless it equally sustains the burden of its own regulation or prohibition, notwithstanding the fact that a legitimate local need may exist over which national uniformity of treatment is not deemed essential.[21]

During the past several years, there has been an expansion of control over commerce by state[22] and Federal Governments.[23] This increase in the area of concurrent authority has produced overlapping, hence friction. Some writers feel that the Court has apparently chosen to favor the National Government, as evidenced by a past trend of judicial intolerance of state interference in fields which are in some degree under federal control,[24] and that the powers of the states have become permissive rather than residual;[25] however, "should experience show that effective controls [over commerce] are more likely to be achieved by some degree of decentralization, it is almost certain that more and more local policies involving some burden on interstate commerce will secure the Court's approval."[26] The principal case does not seem to deter state action short of limits previously set forth, but is a mere reiteration of the Court's dislike of state-erected economic barriers hampering the free and unfettered flow of commerce among the several states.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—LEGISLATIVE CONTROL OVER ADMISSION TO THE BAR

Applicant sought admission to the Idaho bar under provisions of statute making it mandatory upon the supreme court to admit applicants of good moral character who have been graduated from the University of Idaho School of Law. *Held,* the statute is unconstitutional as an attempt by the legislature to exercise judicial power. *Application of Kaufman,* 206 P. 2d 528 (Idaho 1949).

Control over the bar, including admissions thereto, is almost universally asserted to some degree by both the judiciary and the legislature. One of the chief points of divergence in these conflicting assertions is over the power to

21. Milk Control Board v. Eisenberg, 306 U. S. 346, 59 Sup. Ct. 528, 83 L. Ed. 752 (1939); Baldwin v. Seelig, 294 U. S. 511, 55 Sup. Ct. 497, 79 L. Ed. 1032, 101 A. L. R. 55 (1935) (N. Y. restrictions on local sale of milk imported from Vermont designed in practical effect to exclude it, held invalid); Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835 (1915) (Florida prohibition against interstate shipment of citrus fruit unfit to eat upheld).

22. California v. Thompson, 313 U. S. 109, 61 Sup. Ct. 930, 85 L. Ed. 1219 (1941) overruling, Di Santo v. Pennsylvania, 273 U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 524 (1927).

23. U. S. v. Darby, 312 U. S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).

24. Note, 60 HARV. L. REV. 262 (1946).

25. Ganoe, *The Roosevelt Court and the Commerce Clause,* 24 ORE. L. REV. 71 (1945).

26. ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 106 (1949).

prescribe requirements for admission to the bar. The legislative claim to the power is said historically to be supported by the facts that Parliament passed regulatory legislation, and that the courts accepted that legislation.[1] The opposing claim of the judiciary takes support from the facts that the judges have exercised power in this regard in addition to that which was purportedly granted by acts of Parliament,[2] and that the power of constitutional American legislatures is not coextensive with that of the English Parliament.[3]

The principle of separation of powers gives rise to the constitutional aspect of the problem, and the question becomes one of determining whether the power to control the bar is within the grant of judicial power. Those courts which answer affirmatively state or imply that the power to control the bar goes to the heart of the ability of courts to carry out their function as courts;[4] that attorneys are officers of the court and owe a duty to that court in addition to the duty owed the client;[5] and that by reason and precedent the power to control the bar is in the courts.[6] These courts say that since courts at the time of establishment of state constitutions were normally exercising the control here contended for, that power is to be implied as inherent in the general grant of judicial power.[7]

In addition to those few cases suggesting that legislatures have plenary power in the field,[8] practically all cases on the general question affirm that the legislatures have a valid claim to some degree of control over the bar. It has frequently been stated that legislatures may, in the exercise of police power, enact reasonable standards for admission,[9] provide for disbarment upon conviction of crime or for other reasonable cause,[10] and provide machinery for the

1. *In re* Cooper, 22 N. Y. 67 (1860); *In re* Applicants for License to Practice Law, 143 N. C. 1, 55 S. E. 635, 638, 10 L. R. A. (N. S.) 228, 10 Ann. Cas. 187 (1906). *But see* People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 162 N. E. 487, 490, 60 A. L. R. 851 (1928).

2. *In re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899) (leading decision in agreement with the principal case); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932).

3. State v. Cannon, *supra* note 2; 1 COOLEY, CONSTITUTIONAL LIMITATIONS 173 (8th ed. 1927).

4. *In re* Opinion of the Justices, 279 Mass. 607, 180 N. E. 725, 727 (1932).

5. *Ex parte* Garland, 4 Wall. 333, 378, 18 L. Ed. 366 (U. S. 1867); *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899); *In re* Cooper, 22 N. Y. 67 (1860); People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 (1928); *In re* Bledsoe, 186 Okla. 264, 97 P. 2d 556 (1939). "[I]n the United States the doctrine has been announced and reiterated almost without dissent, that the members of the bar are officers of the court; amenable to it as their superior." Dowling, *The Inherent Power of the Judiciary,* 21 A. B. A. J. 635, 638 (1935).

6. *In re* Day, 181 Ill. 73, 34 N. E. 646 (1899); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932). For an interesting series of articles by Charles A. Beardsley and Amos C. Miller on the subject of inherent power of the judiciary, see 19 A. B. A. J. 509, 616, 728 (1933); 20 A. B. A. J. 26, 124 (1934).

7. *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899); Ralston v. Turner, 141 Neb. 556, 4 N. W. 2d 302, 144 A. L. R. 138 (1942); *In re* Bledsoe, 186 Okla. 264, 97 P. 2d 556 (1939).

8. *In re* Cooper, 22 N. Y. 67 (1860); *In re* Applicants for License to Practice Law, 143 N. C. 1, 55 S. E. 635 (1906).

9. *In re* Opinion of the Justices, 279 Mass. 607, 180 N. E. 725, 727 (1932); *In re* Day, 181 Ill. 73, 54 N. E. 646, 652 (1899); State v. Cannon, 206 Wis. 374, 240 N. W. 441, 450 (1932).

10. "[T]he power of the legislature to protect the public against persons unfit to practice law and to pass laws for that purpose has never been denied." *In re* Day, 181 Ill. 73, 54 N. E. 646, 652, 50 L. R. A. 519 (1899).

examination of applicants for admission.[11] The essence of these holdings is that protection of the public is a legitimate object for such legislation, and it will be upheld and given effect by the courts except where it tends to hamper or frustrate the courts in the discharge of their primary function.[12]

The view that control over the bar is primarily within the judicial power is supported by policy considerations. The courts are most intimately concerned with and bear a peculiar responsibility for maintaining a high order of justice. It is possible to discharge these obligations only with the assistance of a capable, honest bar. The standards for admission and for active participation are peculiarly susceptible to determination by that department with which the bar works. In the exercise of such power, other state courts might well consider the establishment of machinery similar to that of the Nebraska Court in integrating the state bar under its own power.[13]

CONTRACTS—RECITED CASH CONSIDERATION—EFFECT OF NON-PAYMENT

Defendant made a written contract with plaintiffs, agreeing not to enter into a competitive business for five years. The contract recited that plaintiff paid a cash consideration of $10, but in fact it was never paid. Plaintiffs now seek to enjoin violation of the contract, and defendant pleads a lack of consideration. *Held,* judgment granting temporary injunction affirmed. "The fact that a recited cash consideration was not actually paid does not invalidate such contract. It creates an obligation to pay that sum, which can be enforced by the other party." *Nelson v. Woods,* 53 S. E. 2d 227 (Ga. 1949).

At the early common law, a recital of consideration in a sealed instrument estopped a party thereto from denying the existence of such consideration.[1] Several courts have reached a similar conclusion with respect to recitals of consideration in unsealed written agreements; they have done so by the ap-

11. *In re* Opinion of the Justices, 279 Mass. 607, 180 N. E. 725 (1932).

12. Brydonjack v. State Bar, 208 Cal. 439, 281 Pac. 1018 (1929); *In re* Edwards, 45 Idaho 676, 266 Pac. 665 (1928); People v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); Hanson v. Gratton, 84 Kan. 843, 115 Pac. 646 (1911); *Ex parte* Steckler, 179 La. 410, 154 So. 41 (1934); *In re* Richards, 333 Mo. 907, 63 S. W. 2d 672 (1933); Ralston v. Turner, 141 Neb. 556, 4 N. W. 2d 302 (1942); *In re* Platz, 42 Utah 439, 132 Pac. 390 (1913); *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918); Integration of Bar Case, 244 Wis. 8, 11 N. W. 2d 604 (1943). "Submission by the courts to such regulations need not be viewed as an abdication of power, but as showing the willingness of the judiciary to recognize and follow statutory regulations that do not put an unreasonable restraint on the exercise of the power." State Board v. Phelan, 43 Wyo. 481, 5 P. 2d 263, 265 (1931); Lee, *The Constitutional Power of the Courts over Admission to the Bar,* 13 HARV. L. REV. 233 (1899); Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar,* 19 ST. LOUIS L. REV. 163 (1934).

13. *In re* Integration of the Nebraska State Bar Association, 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151 (1937).

1. WILLISTON, CONTRACTS § 115A (Rev. ed. 1936).

plication of one or a combination of three theories, (1) estoppel, (2) waiver and (3) implied bilateral contract. The estoppel theory apparently stems from an early decision of the United States Supreme Court.[2] Under it, a promisor, having acknowledged the receipt of the consideration in a written contract, is estopped to deny it for the purpose of showing his own promise unenforceable.[3] The waiver theory is to the effect that the recital of consideration in a written contract is sufficient to bind the promisor, who may waive actual payment.[4] Under this theory, the waiver of payment would prevent the promisor from making a subsequent attack upon the contract for the lack of consideration. The instant case follows the implied bilateral contract theory. Courts holding to this view say that the recital of a cash consideration as paid implies a promise to pay that consideration.[5] Such a construction makes the contract bilateral, the consideration then being a promise to pay rather than actual payment. As a corollary to this doctrine, the courts have said that the party who acknowledged receipt of the cash consideration might maintain an action to enforce its payment.[6]

In contrast to all three views is a group of cases represented by *Kay v. Spencer*,[7] decided by the Wyoming Supreme Court in 1923. That case involved a real estate option contract which recited a cash consideration of $1. It was admitted on trial that this consideration had not been paid. The court held that the promisor was not estopped to show a lack of consideration[8] and that no promise to pay the recited sum could be implied unless it was shown that this was the intention of the parties.[9] In so holding, the court was

2. Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326 (U. S. 1844). This case actually presents a combination of the estoppel and implied bilateral contract theories. The Court said, "The guarantor acknowledged the receipt of one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it." *Id.* at 452. From this language it will be seen that the promisor is estopped to deny the receipt, not for all purposes, but only for the purpose of upsetting the contract.

3. *E.g.*, Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164 (1889); McPherson v. Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723 (1898); *see* Bethea v. McCullough, 195 Ala. 480, 70 So. 680, 683 (1915).

4. *E.g.*, Seyferth v. Groves, 217 Ill. 483, 75 N. E. 522 (1905).

5. *E.g.*, Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326 (U. S. 1844); Southern Bell Tel. & Tel. Co. v. Harris, 117 Ga. 1001, 44 S. E. 885 (1903); *see* Bethea v. McCullough, 195 Ala. 480, 70 So. 680, 683 (1915).

6. See note 5 *supra*.

7. 29 Wyo. 382, 213 Pac. 571, 27 A. L. R. 1122 (1923). Cases reaching a similar result include Morrison v. Johnson, 148 Minn. 343, 181 N. W. 945 (1921); Stigler v. Jaap, 83 Miss. 351, 35 So. 948 (1904); Von Knuth v. Ryan, 107 Neb. 351, 186 N. W. 81 (1921); Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767 (1889).

8. "The acknowledgement of the receipt of $1, a mere statement of fact known by both parties to be untrue, gained no sanctity by reason of being stated in writing, and could be disproved [citing cases]." *Id.* at 574.

9. "[I]t is further admitted that there was no consideration whatever for the option, unless we may imply a promise by plaintiff to pay the $1. This we think we cannot do. The option is not signed by plaintiff, and on its face purports to state a unilateral contract as it would have been if the consideration had been paid. To convert this into a bilateral contract whereby the plaintiff promised to pay a dollar in consideration of defendant's promise to hold her offer open we think we should have some evidence that that was intended by the parties." *Id.* at 574.

in complete agreement with the position of the *Restatement of Contracts*[10] and of Williston.[11] Estoppel, as applied to this type of case, may not go beyond the limits of the parol evidence rule,[12] which precludes the parties to a written contract from attempting to show that the agreement was other than that expressed in writing. The parol evidence rule applies only to recitals of promises or present transfers and discharges, not to mere recitals of existing fact of a past transfer or discharge.[13] Estoppel in the usual sense cannot apply to cases like the instant case, since the promisee cannot reasonably rely upon a recital of fact, although written, which he knows to be untrue.[14]

The courts of Georgia have consistently applied the rule of the present case;[15] they have spoken, not in terms of estoppel, but in terms of an implied promise raised by the recital of consideration. Under such a view, evidence that the "promise" has not been fulfilled is immaterial to the question of consideration. Although courts in general will go far to imply a bilateral contract where there is doubt as to the intention of the parties,[16] the present holding may be subject to serious question,[17] since no "other circumstances" appear to warrant such an intention, and since the words of the written contract itself clearly purport to describe a unilateral contract, fully performed on one side at the moment it comes into being. In such a contract, performance alone constitutes consideration. The logical view would seem to be, therefore, that the promisor may introduce evidence to prove a lack of the recited performance; if he succeeds in this proof, his promise is without consideration, and unenforceable.

CONTRACTS—STATUTE OF FRAUDS—LETTERHEAD AS A SIGNATURE

Defendant made a written offer to plaintiff, a broker, to procure the sale of defendant's hotel and furnishings on a commission basis. A carbon copy of the offer was typed on defendant's letterhead stationery but was not signed by hand. The paper set forth the full terms of the sale, including the amount of

10. §§ 82, 243, 244 (1932).
11. 1 WILLISTON, CONTRACTS § 115B n. 13 (Rev. ed. 1936). Concerning the waiver theory, Williston says: "To admit that consideration may be waived is to say that the rule of law requiring consideration can be changed if the parties object to it."
12. For a discussion of the history of the parol evidence rule, and its relation to the sealed instrument concept, see 9 WIGMORE, EVIDENCE § 2426 (3rd ed. 1940).
13. 1 WILLISTON, CONTRACTS § 115B (Rev. ed. 1936).
14. BIGELOW, ESTOPPEL 681, 682 (6th ed. 1913). "The person, further, who claims the benefit of this estoppel must show that he was ignorant of the truth in regard to the representation. . . ."
15. *E.g.*, Mattox v. West, 194 Ga. 310, 21 S. E. 2d 428 (1942); Southern Bell Tel. & Tel. Co. v. Harris, 117 Ga. 1001, 44 S. E. 885 (1903); Nathans v. Arkwright, 66 Ga. 179 (1880).
16. 1 WILLISTON, CONTRACTS § 60 (Rev. ed. 1936).
17. For a criticism of a similar holding, see 79 U. PA. L. REV. 1139 (1931).

the broker's commission. After the sale was consummated as a result of plaintiff's efforts, defendant refused to pay the commission; and plaintiff brought an action for his commission, claiming that the writing satisfied the Statute of Frauds, and that the letterhead was a signature within the meaning of the statute. *Held* (6-1), that plaintiff cannot recover on the sale of the realty, since it was not shown that defendant intended to adopt the letterhead as a signature so as to satisfy the Statute of Frauds. *Marks v. Walter G. McCarty Corp.*, 205 P. 2d 1025 (Cal. 1949).

Statutes of Frauds usually require for the enforcement of a contract relating to the sale of land that there be a written promise, contract, note, or memorandum, signed,[1] or subscribed [2] by the party to be charged or by his agent. Courts and writers agree that it is not necessary that the memorandum be signed in handwriting,[3] but that the party may sign by initial,[4] special mark,[5] rubber stamp or typewriter,[6] or by a printed signature at the bottom, in the body, or at the top [7] of the writing. American courts require that the writing be stamped or initialled with intent to sign or that the letterhead be used for the purpose of authenticating the writing;[8] a "printed name in such a heading will be treated as a signature, if the setting of the occasion gives fair warrant that it was so intended or adopted. . . ." [9] English courts, while giving lip service to the requirement that there be an intent to sign, have applied it more liberally, holding in one case that the statute was satisfied by a name printed on the outside of a book in which the names of purchasers at an auction were written by the owner-auctioneer.[10]

For a letterhead to be a sufficient signature within the Statute of Frauds the instrument itself must support the inference that the party intended to adopt the letterhead as a signature.[11] The type of writing from which the inference is most readily drawn is an order blank bearing the letterhead of the seller and used in accordance with business practices. The form of the order blank indicates its proposed use to embody a contract; and the filling in of the form

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1. TENN. CODE ANN. § 7831 (Williams 1934).
2. CAL. CIV. CODE § 1624 (1941); CAL. CODE CIV. PROC. ANN. § 1973 (1946).
3. BROWN, STATUTE OF FRAUDS § 356 (3d ed. 1870); 2 WILLISTON, CONTRACTS § 585 (Rev. ed. 1936); RESTATEMENT, CONTRACTS § 210 (1932); 37 C. J. S., *Statute of Frauds* § 204 (1943); AM. JUR., *Statute of Frauds* §§ 377, 378 (1943); Note, 112 A. L. R. 927 (1938).
4. Burns v. Barrow, 196 Iowa 1048, 196 N. W. 62 (1923).
5. Stephens v. Perkins, 209 Ky. 651, 273 S. W. 545 (1925).
6. Landeker v. Bank, 71 Misc. 517, 130 N. Y. Supp. 780 (Sup. Ct. 1911).
7. Drury v. Young, 58 Md. 546 (1882); Pearlburg v. Levisohn, 112 Misc. 95, 182 N. Y. Supp. 615 (Sup. Ct. 1920) (letterhead).
8. Lezinsky Co. v. Hoffman, 111 Misc. 415, 181 N. Y. Supp. 732 (Sup. Ct. 1920); Kaufman v. Adalman, 186 Md. 639, 47 A. 2d 755 (1946).
9. Mesibov, Glinert & Levy v. Cohen Bros. Mfg. Co., 245 N. Y. 305, 157 N. E. 148, 149 (1927).
10. Cohen v. Roche, [1927] 1 K. B. 169 (1926), 26 COL. L. REV. 1039.
11. Lee v. Vaughan's Feed Store, 101 Ark. 68, 141 S. W. 496 (1911) (alternative ground).

by the seller indicates an intent to authenticate the agreement.[12] If the instrument furnishes no basis for the inference of an intent to authenticate the writing, such intent cannot be shown by parol.[13] The dissenting judge in the instant case, however, was of the opinion that parol evidence is inadmissible only when the form or wording of the instrument mitigates against the inference.[14] In a New York case,[15] defendant prepared a self-addressed letter, which plaintiff signed, whereby plaintiff agreed to buy some of defendant's corporate stock. Although it was shown by parol that defendant agreed to sell, that the letter was written by defendant, and that there was a clear intent to authenticate the agreement, at least to the extent of binding plaintiff, it was held that the address was not a signature. Nothing in the instrument itself indicated *defendant's* intent to authenticate the agreement.

Even in view of California's holding that "subscribed" is synonymous with "signed," [16] a decision in the instant case that the instrument was subscribed by defendant would carry the interpretation of the signature requirement further from the wording of the Statute of Frauds than any American court has yet carried it. But the decision has the harsh effect of completely denying plaintiff any recovery of commission for the sale of the realty, since California holds that when the Statute of Frauds is not complied with, there can be no recovery in quasi-contract for the value of services rendered.[17] The most natural decision would have been that the memorandum was not necessary, since the California Statute of Frauds requires a memorandum of only those agreements "authorizing or employing an agent or a broker to purchase or sell real estate. . . ." [18] Plaintiff here, according to the common meaning of the words, was neither authorized nor employed to sell real estate, as he was not authorized to pass title nor was he under a legal duty to procure a purchaser.

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12. Cohen v. Wolgel, 107 Misc. 505, 176 N. Y. Supp. 764 (Sup. Ct. 1919); *cf.* Dorian Holding & Trading Corp. v. Brunswick Terminal & Ry. Securities Co., 230 App. Div. 514, 245 N. Y. Supp. 410 (1st Dep't 1930).

13. For example, when the wording of the instrument shows that the defendant could not have intended to adopt the letterhead as a signature, Little v. Union Oil Co., 238 Pac. 1066 (Cal. App. 1925); Kaufman v. Adalman, 186 Md. 639, 47 A. 2d 755 (1946), the instrument furnishes no basis for the inference and the intent cannot be shown by parol. *Cf.* McNear v. Petroleum Export Corp., 208 Cal. 162, 280 Pac. 684 (1929).

14. The dissent cited *McNear v. Petroleum Export Corp., supra* note 13, as an example. In that case, a telegram sent by an agent of defendant said, "Smith of Petroleum Export says will fill order . . . will sign contracts . . . probably today." *Held,* there was no basis for an inference that *Smith of Petroleum Export* was adopted as a signature.

15. Dorian Holding & Trading Corp. v. Brunswick Terminal & Ry. Securities Co., 230 App. Div. 514, 245 N. Y. Supp. 410 (1st Dep't 1930).

16. California Canneries Co. v. Scantena, 117 Cal. 447, 49 Pac. 462 (1897); see also Berryman v. Childs, 98 Neb. 450, 153 N. W. 486 (1915). *Contra:* Commercial Credit Corp. v. Marden, 155 Ore. 29, 62 P. 2d 573, 112 A. L. R. 931 (1936).

17. White v. Hirschman, 54 Cal. App. 2d 573, 129 P. 2d 430 (1942).

18. CAL. CIV. CODE § 1624 (1941); CAL. CODE CIV. PROC. ANN. § 1973 (1946).

CRIMINAL PROCEDURE—COMMUNICATION BETWEEN JUDGE AND JURY —EFFECT OF INQUIRY AS TO PRONOUNCED MAJORITY

After deliberating more than twelve hours, in a trial for conspiracy against the United States, the jury returned stating inability to reach agreement. The judge asked whether there was a pronounced majority in agreement. The foreman replied, "There is a majority, very much." After being urged to reach an agreement, the jury deliberated several hours, returning verdicts of conviction. *Held,* the inquiry as to a pronounced majority constitutes coercion of the jury and is reversible error. *United States v. Samuel Dunkel & Co.,* 173 F. 2d 506 (2d Cir. 1949).

When juries reach an agreement in criminal cases, it not only prevents loss of time and the expense of a new trial but also attains benefits of a more intangible nature to criminal law administration. Mistrials tend to reduce public confidence in the judicial process in general.[1] At ancient common law it was considered entirely proper, even necessary, that a jury be coerced to a verdict. They were kept without food, drink, light or heat until reaching a unanimous decision.[2] But, realizing that a coerced verdict is little better than no verdict, courts began to discharge hopelessly deadlocked juries.[3] The rule today is that in communicating with the jury the court must not be coercive.[4] Some courts appear almost supersensitive to any communication by the judge to the jury.[5]

This development has not rendered it any less desirable to have juries reconsider if there is any chance of reaching agreement;[6] and knowledge of proportionate division, without reference to guilt or innocence, is of material benefit in helping a court decide whether to discharge the jury or whether there should be further deliberation.[7] It was an inquiry as to this division that was held reversible error in the instant case.

The court followed, albeit reluctantly, the authority of *Brasfield v. United*

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1. Sullenger, *Popular Attitudes toward the Administration of Criminal Justice,* 20 J. CRIM. L. & CRIMINOLOGY 500, 505 (1930); Note, 13 J. CRIM. L. & CRIMINOLOGY 298 (1922).
2. 3 Bl. COMM. * 375; THOMPSON AND MERRIAM, JURIES § 310 (1882).
3. *See* People v. Sheldon, 156 N. Y. 268, 275, 50 N. E. 840, 842 (1898).
4. Kesley v. United States, 47 F. 2d 453, 85 A. L. R. 1418 (5th Cir. 1931); Wissel v. United States, 22 F. 2d 468 (2d Cir. 1927).
5. Stewart v. United States, 300 Fed. 769, 786 (8th Cir. 1924); Lagrone v. State, 84 Tex. Crim. App. 609, 615, 209 S. W. 411, 415 (1919). *But see* United States v. Olweiss, 138 F. 2d 798, 801 (2d Cir. 1943), *cert. denied,* 321 U. S. 744 (1944) (where Learned Hand, J., commenting on the trial judge's remarks that the question was simple and should be easily decided and that the jury had additional time to decide if it desired, said, "A jury which felt itself coerced by such language would have lacked all independence of mind; would have been no better than a sounding board for any judicial whisper.")
6. Allis v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91 (1894); State v. Seals, 135 La. 602, 65 So. 756 (1914).
7. 76 U. OF PA. L. REV. 622 (1928).

States,[8] where the Supreme Court ordered a reversal of conviction because the trial judge inquired as to the numerical division of the jury; he was told that it was nine to three, without indication of the number for or against conviction. The inquiry itself was held ground for reversal. The reason advanced for this rule is that the procedure serves no useful purpose and may be coercive when followed by a charge directed at the minority.[9] Yet such a charge, made without inquiry as to the proportion of the division, urging jurors to re-examine their conclusions in light of the majority view, has been held not necessarily coervice in and of itself.[10] A more realistic reason for the rule against inquiry might be found in the Court's desire to establish a uniform and settled rule of practice.

The instant case presents an extension of the *Brasfield* rule. The court, hesitating to distinguish between inquiry as to numerical division and inquiry as to the existence of a majority, said, "If the fault is in directing . . . the Allen charge [11] toward a . . . small minority . . . the possibilities of coercion seem the same . . ." [12] It is difficult to see where the approved *Allen* charge, which is directed at a supposed minority, is any more coercive when there is a known minority. And furthermore there seems to be no sound distinction between the holding of the instant case where the judge asked whether there was a division, and those cases which hold that there is no coercion where the judge inadvertently learns of the numerical division.[13]

Most of the states which have considered the question hold that, although it is not to be commended, the practice of inquiring as to the division of the jury is not reversible error per se.[14] It seems that only Pennsylvania follows the federal rule.[15] Since knowledge of a division is often helpful to the trial judge in determining the advisability of discharging the jury, it would seem to

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8. 272 U. S. 448, 47 Sup. Ct. 135, 71 L. Ed. 345 (1926), *reversing* 8 F. 2d 472 (9th Cir. 1925); noted in 27 COL. L. REV. 756 (1927).

9. *See* Burton v. United States, 196 U. S. 283, 307, 25 Sup. Ct. 243, 49 L. Ed. 482 (1905).

10. Allen v. United States, 164 U. S. 492, 501, 17 Sup. Ct. 154, 41 L. Ed. 528 (1896); United States v. Allis, 73 Fed. 165, 182 (E. D. Kan. 1893), *aff'd*, 155 U. S. 117 (1894); Commonwealth v. Tuey, 8 Cush. 1 (Mass. 1851).

11. The "Allen Charge" is a charge to the minority of a divided jury to reconsider. See Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528 (1896).

12. 173 F. 2d at 510. "[L]egally it would be undesirable further to add to the uncertainties of criminal law administration by such over-refined distinctions." *Ibid.*

13. Bowen v. United States, 153 F. 2d 747 (8th Cir. 1946), *cert. denied*, 328 U. S. 835 (1945) (statement by foreman that jury was deadlocked eleven to one); State v. Doan, 225 Minn. 193, 30 N. W. 2d 539 (1947) (foreman stated that seven jurors voted guilty and five not guilty); Commonwealth v. Long, 118 Pa. Super. 357, 179 Atl. 806 (1935) (when asked whether they agreed, jury foreman said, "[W]e stand eleven to one for conviction.")

14. People v. Talkington, 8 Cal. App. 2d 75, 47 P. 2d 368 (1935) (reversible error only if court asks numerical division with reference to guilt or innocence); People v. Cohn, 205 P. 2d 72 (Cal. App. 1949); State v. Gillam, 230 Iowa 1287, 300 N. W. 567 (1941); Dutton v. State, 75 Okla. Cr. 375, 131 P. 2d 777 (1942); Mead v. Richland Center, 237 Wis. 537, 297 N. W. 419 (1941); Note, 85 A. L. R. 1420, 1450 (1933).

15. Commonwealth v. Anthony, 91 Pa. Super. 518 (1927), 76 U. OF PA. L. REV. 622 (1928).

be the better rule to reverse the trial court for inquiry as to the division only if there is proof of actual coercion.[16]

CRIMINAL PROCEDURE—CONSTITUTIONAL RIGHT TO PUBLIC TRIAL—POWER OF COURT TO ORDER COURTROOM CLEARED OF SPECTATORS

Defendant was charged with violation of the Mann Act. At the trial, a large audience, including a number of young girls, crowded the courtroom. Over defendant's objection, the judge ordered the courtroom cleared of all spectators except defendant, counsel, witnesses and members of the press, giving directions to re-admit anyone connected with the case whom the defendant desired to have re-admitted. Defendant was convicted and appealed, claiming that the exclusion order was violative of her right to a public trial.[1] *Held,* that the defendant was denied her constitutional right by the general exclusion order and that the error was not cured by the limited offer of re-admittance. *United States v. Kobli,* 172 F. 2d 919 (3d Cir. 1949).

The Federal Constitution and the constitutions of most of the states have provisions guaranteeing public trials to persons accused of crime.[2] There has been much disagreement, however, as to what constitutes a "public" trial.[3] Since the word "public" is an indefinite descriptive, the courts have had to interpret the requirement in light of the benefits sought to be achieved. Among these benefits are: (1) public scrutiny of the courts, restraining any tendency to use them as instruments for persecution;[4] (2) increased truthfulness of

16. Quong Duck v. United States, 293 Fed. 563 (9th Cir. 1923); Eady v. State, 168 Ark. 731, 271 S. W. 338 (1925); Montgomery v. State, 19 Okla. Cr. 224, 199 Pac. 222 (1921); 41 HARV. L. REV. 797 (1928).

1. There were four defendants but only defendant Kobli objected to the exclusion order. Defendant Sorrentino subsequently appealed on the ground that the right to a public trial could not be waived, but the court of appeals affirmed the conviction. United States v. Sorrentino, 175 F. 2d 721 (3d Cir. 1949). The United States Supreme Court has granted certiorari in this case, 18 U. S. L. WEEK 3133 (Oct. 25, 1949), and the Court will thus for the first time be faced with the issue of whether the right may be waived. It is generally held that the right to a public trial may be waived, Keddington v. State, 19 Ariz. 457, 172 Pac. 273, L. R. A. 1918D 1093 (1918); People v. Stanley, 33 Cal. App. 624, 166 Pac. 596 (1917); Dutton v. State, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C 89 (1914). But it might be argued that the requirement is a part of the frame of government as well as a right of the defendant and should not be capable of being waived. Note, 49 COL. L. REV. 110, 118 (1949). *Cf.* Patton v. United States, 281 U. S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263 (1930) (waiver of jury trial sustained but indication that since a public interest is involved the judge and counsel for both sides must intelligently pass on the waiver).

2. U. S. CONST. AMEND. VI. The constitutions of 41 states specifically provide for a public trial and in at least four others the guarantee is provided by statute. Note, 49 COL. L. REV. 110 n. 2 (1949).

3. Radin, *The Right to a Public Trial,* 6 TEMP. L. Q. 381 (1932); Note, 49 COL. L. REV. 110 (1949). Cases on this subject are collected in Note, 156 A. L. R. 265 (1945).

4. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re* Oliver, 333 U. S. 257, 270, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948). *But see* Radin, *The Right to a Public Trial,* 6 TEMP. L. Q. 381, 394 (1932).

witnesses who would be more reluctant to testify falsely before the public, some of whom might know the true facts;[5] and (3) opportunity for witnesses unknown to the parties to volunteer evidence when the need becomes apparent at the trial.[6]

It is evident, however, that there are certain practical considerations which make admittance of all who present themselves either impossible or very undesirable; the courts have, therefore, had to decide what exclusions may be reasonably made without prejudice to the rights of the accused. Thus it is generally held that some spectators may be excluded to prevent overcrowding of the courtroom,[7] that disorderly spectators may be evicted,[8] and that children may be excluded from trials involving salacious facts.[9] These exclusions of certain classes of spectators for specific reasons are upheld on the ground that the requirement of a public trial is a reasonable requirement and is met if some members of the public are allowed to remain although others have been excluded for valid reasons.[10]

Many courts have attempted to exclude the entire public, except certain specific classes of persons, from trials involving salacious facts, on the ground that public morals would thereby be protected. These attempts have met with varying success on appeal. Some courts have held such exclusions to be constitutional since the exclusion was for a valid reason and some members of the public, such as members of the family, bar or press, were allowed to remain.[11] Other courts, including the court in the instant case, hold that any such exclusion of the general public from a criminal trial is unconstitutional.[12]

Although the last mentioned courts seem to base their holdings on a distinction between a specific exclusion of certain classes of spectators and a

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5. 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

6. *See* Tanksley v. United States, 145 F. 2d 58, 59, 156 A. L. R. 257 (9th Cir. 1944); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).

7. *E.g.*, Wendling v. Commonwealth, 143 Ky. 587, 137 S. W. 205 (1911). Other cases on this point are collected in Note, 156 A. L. R. 265, 286-89 (1945).

8. *E.g.*, Lide v. State, 133 Ala. 43, 31 So. 953 (1902). For other cases see Note, 156 A. L. R. 265, 281-84 (1945).

9. *See, e.g.*, Beauchamp v. Cahill, 297 Ky. 505, 180 S. W. 2d 423, 424 (1944).

10. Most courts agree that at least some spectators other than the parties to the controversy, counsel, officers of the court, and jurors must be allowed admittance. People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894); Neal v. State, 192 P. 2d 294 (Okla. 1948); State v. Jordan, 57 Utah 612, 196 Pac. 565 (1921). *But cf.* Grimmett v. State, 22 Tex. Crim. App. 36, 2 S. W. 631, 58 Am. Rep. 630 (1886).

11. Keddington v. State, 19 Ariz. 457, 172 Pac. 273, L. R. A. 1918D 1093 (1918) (everyone excluded except those concerned with the case, and anyone the parties desired admitted); People v. Stanley, 33 Cal. App. 624, 166 Pac. 596 (1917) (those whom defendant might deem beneficial to his cause admitted); Robertson v. State, 64 Fla. 437, 60 So. 118 (1912) (all persons directly interested in the case admitted); State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487 (1909) (all concerned with case and anyone the parties desired admitted).

12. Tanksley v. United States, 145 F. 2d 58, 156 A. L. R. 257 (9th Cir. 1944); Davis v. United States, 247 Fed. 394, L. R. A. 1918C 1164 (8th Cir. 1917); Hull v. State, 232 Ala. 281, 167 So. 553 (1936); People v. Yeager, 113 Mich. 228, 71 N. W. 491 (1897); State v. Keeler, 52 Mont. 205, 156 Pac. 1080, L. R. A. 1916E 472, Ann. Cas. 1917E 619 (1916). For other cases see Note, 156 A. L. R. 265, 269-81 (1944).

general exclusion with specific groups allowed to remain, too much weight should not be given such a technical distinction. Perhaps the controlling factor is a feeling of the courts, as expressed by dictum in the instant case,[13] that the mere fact that salacious material will be presented is not sufficient reason for excluding the general adult public, in view of the benefits which might reasonably result from their presence. Evidence that the courts do not consistently distinguish between a general and a specific exclusion is found in the fact that all courts agree that the general public may be excluded during the testimony of a young child whose testimony might be hindered by the presence of a large number of people.[14] If the general public may be excluded from a part of the trial, with provision made for certain designated groups to remain, may not a similar general exclusion throughout the whole of a trial be sustained if supported by adequate reasons? [15] For example, it is very doubtful that the instant court, or any other, would hold such an exclusion order unconstitutional in a case which necessitated presentation of evidence the indiscriminate disclosure of which might imperil national security.[16]

ESTATES—DISABILITY OF LIFE TENANT TO PURCHASE TAX TITLE TO EXCLUSION OF REMAINDERMAN—EFFECT OF DEED GIVEN BY FORMER LIFE TENANT AS IMPOSING DISABILITY

L held an estate *pur autre vie* in certain realty, of which *R* was the remainderman.[1] *L* failed to pay the taxes; and the property was purchased by *X* at tax sale in 1939, a tax deed being executed in 1942, when the exemption period had expired. In 1945 *L* purported to convey the fee to the property by warranty deed to *P*. Later *P* acquired a quitclaim deed from *X*. This is an action by *P* to quiet title, with a cross action by *R* for the same relief. *Held*, that the effect of *P's* purchase from *X* was a redemption from the tax sale;

13. "[W]hatever may have been the view in an earlier and more formally modest age, we think that the franker and more realistic attitude of the present day toward matters of sex precludes a determination that all members of the public, the mature and experienced as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the ground of public morals." 172 F. 2d at 923.

14. *E.g.*, Hogan v. State, 191 Ark. 437, 86 S. W. 2d 931 (1935). See Note, 156 A. L. R. 265, 289-91 (1945). *Cf.* Grimmett v. State, 22 Tex. Crim. App. 36, 2 S. W. 631, 58 Am. Rep. 630 (1886) (so many disorderly spectators that the judge could not distinguish the orderly from the disorderly).

15. Whatever the scope of the limitation it should apply equally to all parts of the trial as well as to the whole. *See* United States v. Sorrentino, 175 F. 2d 721, 722 (3d Cir. 1949).

16. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949); Note, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements*, 61 HARV. L. REV. 468, 485 (1948).

1. The original owner had devised a life estate to *B*, remainder to *B's* issue. *R* is the sole issue by *B*. *L* is the grantee named in a warranty deed executed by *B*, who is still alive.

P has a life estate *pur autre vie* and *D* has the remainder. *Zaring v. Lomax*, 206 P. 2d 706 (N. M. 1949).

In New Mexico the effect of a tax title is to extinguish all interests which existed by virtue of deeds executed prior to the date of the tax sale.[2] By the statutes of New Mexico,[3] as in a substantial number of states, a tax sale is of an estate in fee simple, the proceeding for sale being against the land and not against any individual.[4]

The court in the instant case adopts the universal rule that it is the life tenant's duty to pay the ordinary taxes in the absence of any agreement or controlling equity to the contrary.[5] When a life tenant neglects this duty and allows the land to be sold for taxes, the courts hold that any subsequent acquisition of the tax title by the life tenant is in effect a redemption from the tax sale and inures to the benefit of the whole estate.[6] It is manifest that the life tenant should not benefit from his own negligent or fraudulent breach of duty toward the remaindermen.[7]

A few cases indicate that, even when the life tenant is not under a duty to pay taxes, circumstances may give rise to a fiduciary relationship which prevents his asserting the tax title against the remainderman.[8] Collusion between the life tenant and the purchaser of the tax title has been held to constitute the purchase a redemption for the benefit of the whole estate.[9]

In the instant case no fraud or collusion was alleged or proved; nor did the court suggest that *P* stood in a fiduciary relationship to *R*, the remainder-

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2. "[T]he effect of the tax deed was to vest in appellee a new and paramount title in fee simple, good against the world, except the state and the United States." Alamogordo Improvement Co. v. Hennessee, 40 N. M. 162, 56 P. 2d 1127, 1129 (1936).

3. N. M. STAT. ANN. §§ 76-708, 76-717 (1941).

4. See Note, 75 A. L. R. 416 (1931); 4 TIFFANY, REAL PROPERTY § 1248 (3d ed., Jones, 1939); 33 AM. JUR., *Life Estates* § 441 (1941).

5. *E.g.*, Medford v. Mathis, 176 Miss. 188, 168 So. 607 (1936); Duffley v. McCaskey, 345 Mo. 550, 134 S. W. 2d 62 (1939); see Notes, 17 A. L. R. 1384 (1922), 94 A. L. R. 311 (1935), 126 A. L. R. 862 (1940); 1 RESTATEMENT, PROPERTY §§ 129, 130 (1936); 3 SIMES, FUTURE INTERESTS § 631 (1936); 1 TIFFANY, REAL PROPERTY § 63 (3d ed., Jones, 1939).

6. *E.g.*, Pruit v. Holly, 73 Ala. 369 (1852); Thayer v. Shorey, 287 Mass. 76, 191 N. E. 435 (1934); *see* Christopher v. Chadwick, 223 Ala. 260, 135 So. 454, 455 (1931); Rich v. Allen, 226 Iowa 1304, 286 N. W. 434, 436 (1939); Notes, 17 A. L. R. 1384 (1922), 94 A. L. R. 311 (1935), 126 A. L. R. 862 (1940); 1 RESTATEMENT, PROPERTY § 149 (1936); 1 TIFFANY, REAL PROPERTY § 68 (3d ed., Jones, 1939); 2 VAND. L. REV. 470 (1949).

7. "To hold otherwise would be to open wide the door to gross frauds and abuses, for, while a remainderman may protect his interest in expectancy by making payment of taxes, he has the right to rely upon payment being made by the life tenant, and he may, therefore, as against such tenant, give himself no concern during the continuance of the life estate." Crawford v. Meis, 123 Iowa 610, 99 N. W. 186, 188 (1904).

8. Defreese v. Lake, 109 Mich. 415, 67 N. W. 505 (1896) (second life tenant, whose term was to follow another life estate, as provided by will, bought tax title during life of first life tenant; held that if jury should find that he accepted under the devise, he cannot assert tax title against the remaindermen); *see* Bullock v. Peoples Bank, 351 Mo. 587, 173 S. W. 753, 759 (1943).

9. First Congregational Church v. Terry, 130 Iowa 513, 107 N. W. 305 (1906) (conclusive presumption where life tenant's wife acquires tax title); Turner v. Edwards, 207 Minn. 455, 292 N. W. 257 (1940).

man. But the court assumed that *P* was a successor to the life estate of *L*, even though *L* did not convey to *P* until three years after his right of redemption had expired. Therefore, when the court described *P* as "one who, except for the tax title, would own a life estate," [10] it breathed life into a conveyance which at the time of its execution was a nullity. For, by the court's own theory of tax titles, *L's* life estate had been extinguished by the state's issuance of tax title to *X* three years before *L's* conveyance to *P*.[11] Since this conveyance was void, *P* received no estate thereby and was therefore under no duty to pay taxes at the time he purchased the tax title from *X*. The court conceded that *X*, the purchaser at the tax sale, "could have quieted his title as against the holder of the life estate and remainderman, or could have sold it to a stranger to the title who could have done so." [12] But the court assumed that *P* was not such a stranger to the title because of the purported deed to *P* by *L*, the former life tenant. This assumption appears to be altogether unwarranted in view of the court's theory of tax titles.[13]

EVIDENCE—BASTARDY PROCEEDINGS—ADMISSIBILITY OF TESTIMONY OF SPOUSES AS TO NONACCESS

Bastardy proceeding against defendant by a married woman living apart from her husband. Plaintiff and her husband separated in January, 1946, but continued to live in the same neighborhood, and the husband frequently visited his wife's home. Plaintiff gave birth to a child in December, 1946, and she subsequently brought this action against defendant to have him declared the father of the child. She testified that she had had intercourse with defendant on numerous occasions from October, 1945 to March, 1946. Both plaintiff and her husband testified as to absence of sexual relations between them since the time of their separation; theirs was the only evidence to this effect. From a judgment for plaintiff, defendant appeals. *Held,* affirmed; the common law disability of husband and wife to testify as to nonaccess has been removed in California by statute.[1] *Cinders v. Lewis,* 208 P. 2d 687 (Cal. App. 1949).

The doctrine of the common law which renders husband and wife incompetent to testify to nonaccess where such testimony would result in bastard-

10. 206 P. 2d at 708.
11. Alamogordo Improvement Co. v. Hennessee, 40 N. M. 162, 56 P. 2d 1127 (1936).
12. 206 P. 2d at 708.
13. An acceptance of a conveyance from a former life tenant by one who has previously acquired tax title will not weaken the tax title. Jinkiaway v. Ford, 93 Kan. 797, 145 Pac. 885 (1915); Carson v. Fulbright, 80 Kan. 624, 103 Pac. 139 (1909).

1. CAL. CIV. CODE § 195 (1941); CAL. CODE CIV. PROC. §§ 1962, 1963 (1941). *Cf. In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919), holding that a wife may testify to nonaccess under statute providing, "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses . . . ." CAL. CODE CIV. PROC. § 1879 (1941).

izing a child born in wedlock originated in a dictum of Lord Mansfield.[2] However, spouses may testify to any other fact relevant to the issues (*e.g.*, adultery of the wife; impotency of the husband), and nonaccess itself may be proved by the testimony of other witnesses. It is remarkable that the dictum of one jurist could have achieved the result which this statement did, yet in America, as well as in England, this dictum was accepted without question as the law.[3]

Prior to the introduction into the law of this well-known "rule," there had been no restrictions upon the spouses' testimony on the basis of "decency," "morality" or "policy." Under the early common law, there was a conclusive presumption of the legitimacy of a child born in wedlock; therefore, testimony by the spouses as to nonaccess would have been immaterial.[4] Later this ancient doctrine was repudiated, and it became possible to attack the legitimacy of a child born in wedlock.[5] From the time this doctrine was repudiated until Lord Mansfield's famous utterance, the competency of witnesses in such proceedings was governed by the same rules applicable to all other cases.[6]

Lord Mansfield's rule is not based on any disqualification for interest.[7] Neither is it based on any presumption of legitimacy.[8] Rather, it is a "rule founded in decency, morality, and policy." [9] It is not quite clear why this doctrine should exclude the spouses' testimony as to absence of intercourse and yet permit the husband to testify to other facts concerning the wife's infidelity, and the wife herself to testify to the fact that she has been living in adultery; nevertheless the latter testimony is unquestionably admissible.[10] Is the former more indecent than the latter? Courts have said it is immoral to allow parents to bastardize their issue.[11] Yet these same courts, while forbidding parents

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2. "But it is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." Goodright d. Stevens v. Moss, Cowp. 591,594, 98 Eng. Rep. 1257, 1258 (K. B. 1777).

3. Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); Harward v. Harward, 173 Md. 339, 196 Atl. 318 (1938); Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654 (1880); Cross v. Cross, 3 Paige 139, 23 Am. Dec. 778 (N. Y. 1832); Notes, 60 A. L. R. 380 (1929), 89 A. L. R. 911 (1934).

4. Regina v. Murrey, 1 Salk. 122, 91 Eng. Rep. 115 (K. B. 1706); 9 WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

5. Pendrell v. Pendrell, 2 Stra. 925, 93 Eng. Rep. 945 (K. B. 1732); St. Andrews v. St. Brides, Sess. Cas. K. B. 35, 93 Eng. Rep. 35 (1717); 9 WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

6. Rex v. Reading, Cas. t. H. 79, 95 Eng. Rep. 49 (K. B. 1734) (wife competent to testify as to nonaccess, but because of interest her unsupported testimony insufficient to bastardize child).

7. Disqualification of husband and wife to testify for or against each other was abolished by statute in England in 1853. 16 & 17 VICT. c. 83. However, Lord Mansfield's rule is still recognized as law. Russell v. Russell, [1924] A. C. 687.

8. The conclusive presumption of legitimacy of a child born in wedlock had been forsaken in England long before Lord Mansfield's time. See note 5 *supra*.

9. Goodright d. Stevens v. Moss, Cowp. 591, 594, 98 Eng. Rep. 1257, 1258 (K. B. 1777).

10. *E.g.*, Cross v. Cross, 3 Paige 139, 23 Am. Dec. 778 (N. Y. 1832); 7 WIGMORE, EVIDENCE § 2064 (3d ed. 1940).

11. "That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it." Tioga County v. SouthCreek Twp., 75 Pa. 433, 437 (1874).

to testify to nonaccess, will allow them to testify that there was no marriage,[12] or that the child was born before marriage,[13] or will even permit their hearsay declarations concerning illegitimacy to be used after death.[14]

The courts which follow Lord Mansfield's rule attempt to justify their position on the ground that it "lessens the number of public charges which would have to be cared for and supported by the public, . . . works for the peace and quiet of the family, [and] works for the peace of the community and society generally." [15] This rule, it is said, "most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any Court of law." [16] These arguments are very ably answered by the Supreme Court of Mississippi in the case of *Moore v. Smith.*[17] There it is pointed out that the fact that the public may have to support an illegitimate child does not "justify the exclusion of evidence bearing on legitimacy *vel non* of the child, that is otherwise admissible and comes from the best source." [18] According to this court the matrimonial relation and peace of the family are not invaded, but rather protected, by the admission of such evidence. "To hold otherwise would protect an unfaithful wife, and her paramour, both of whom had grossly violated the matrimonial relation; would close the mouth of the injured husband, and force him to remain tied to an unfaithful wife, and to acknowledge and support a child which is not, in fact, his." [19]

In recent years, the rule has been much criticized by both courts and writers.[20] At least one court has rejected this rule on principles of justice.[21] A number of other courts have seized upon various statutory provisions as a means of changing the rule.[22] The court in the principal case makes use of a statute which provides that, "The presumption of legitimacy can be disputed

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12. Allen v. Hall, 5 N. C. (2 Nott & McC.) 114 (1819).
13. Goodright d. Stevens v. Moss, Cowp. 591, 98 Eng. Rep. 1257 (K. B. 1777).
14. "Were [the husband and wife] in life, then, their declarations would not be admissible in evidence, to bastardize their issue. But being dead, they are competent testimony." Wright v. Hicks, 15 Ga. 160, 172 (1854).
15. *In re* Wright's Estate, 237 Mich. 375, 211 N. W. 746, 748 (1927).
16. *See* Poulett Peerage Case, [1903] A. C. 395, 399.
17. 178 Miss. 383, 172 So. 317 (1937).
18. 172 So. at 321.
19. *Id.* at 320.
20. Lynch v. Rosenberger, 121 Kan. 601, 249 Pac. 682 (1926); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); Adams v. Adams, 102 Vt. 318, 148 Atl. 287 (1930); 7 WIGMORE, EVIDENCE §§ 2063, 2064 (3d ed. 1940); Hooper, *Can Parents Give Evidence to Bastardize Their Issue?*, 26 L. Q. REV. 47 (1910); Bell, *Competency of a Husband and Wife to Testify as to Nonaccess,* 21 TEMP. L. Q. 217 (1948); Note, 25 MARQ. L. REV. 148 (1941).
21. Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937).
22. Cullison v. Dile, 347 Ill. 23, 179 N. E. 93 (1931) (mother competent witness on trial of every issue of bastardy); Evans v. State, 165 Ind. 369, 74 N. E. 244 (1905) (woman in bastardy proceeding competent to testify to all necessary elements); Commonwealth v. Rosenblatt, 219 Mass. 197, 106 N. E. 852 (1914) (husband and wife competent to testify against each other as to all relevant matters); State v. Soyka, 181 Minn. 533, 233 N. W. 300 (1930) (all persons of sufficient understanding competent to testify in all actions or proceedings); *cf. In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919) (discussed *supra* note 1).

only by the husband and wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact." [23] In most states there are statutes of some nature which might be used for this purpose, and the means for abolishing the Mansfield doctrine are therefore at hand. Despite this possible technique, however, a majority of courts still adhere to the old rule;[24] and a statute expressly providing that husband and wife might testify to nonaccess would be highly desirable.[25]

FEDERAL JURISDICTION—DOMESTIC RELATIONS—JURISDICTION OF FEDERAL COURTS OVER SEPARATE MAINTENANCE ACTIONS

Plaintiff, a domiciliary of Iowa, brought an action in an Iowa state court for legal separation and separate maintenance against defendant, who was domiciled in Montana. Defendant moved the cause to the federal district court. Plaintiff, without controverting defendant's allegation that the amount in controversy exceeded $3,000, sought to have her action remanded to the state court. *Held,* that by judicial exception the federal courts are excluded from jurisdiction over suits for separate maintenance. *Garberson v. Garberson,* 82 F. Supp. 706 (N. D. Iowa 1949).

Jurisdiction of the federal courts is defined by the Federal Constitution and statutes.[1] Under the statutes the original jurisdiction of the federal district courts extends to "all civil actions" in which diversity of citizenship and jurisdictional amount are present.[2] However, an exception to the exercise of federal jurisdiction has been recognized in cases involving domestic relations. This exception is based upon dictum used by the Supreme Court in *Barber v. Barber*: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo,* or to one from bed and board." [3]

That this disclaimer created an exception to federal jurisdiction has never been questioned.[4] Dictum from In re *Burrus,*[5] to the effect that "the whole

23. CAL. CIV. CODE § 195 (1941). Similar statutes exist in several states: MONT. REV. CODE ANN. § 5832 (1935); N. D. REV. CODE § 14.0903 (1943); S. D. CODE § 14.0302 (1939). Montana has held that this provision abrogates the common law rule, *In re* Wray, 93 Mont. 525, 19 P. 2d 1051 (1933).

24. Kennedy v. State, 117 Ark. 113, 173 S. W. 842 (1915); Harward v. Harward, 173 Md. 339, 196 Atl. 318, (1938); People v. Dykeman, 229 App. Div. 251, 241 N. Y. Supp. 343 (2d Dep't 1940). For a discussion of the effect of such statutes see 7 AM. JUR., *Bastards,* § 23; Notes, 60 A. L. R. 380 (1929), 89 A. L. R. 911 (1934).

25. Such a statute exists in New York City. "If the mother is married both she and her husband may testify to nonaccess." N. Y. CITY CRIM. COURTS ACT § 67.

1. U. S. CONST. Art. III, § 2; 28 U. S. C. § 41 (1948).

2. 28 U. S. C. § 1332 (1948).

3. 21 How. 582, 584, 16 L. Ed. 226 (U. S. 1858).

4. ROSE, FEDERAL JURISDICTION AND PROCEDURE § 189 (5th ed. 1938); LONG, DOMESTIC RELATIONS § 271 n. 13 (3d ed. 1923).

5. 136 U. S. 586, 593, 66 Sup. Ct. 850, 34 L. Ed. 500 (1890); see also Williams

subject of domestic relations" belongs to the laws of the states exclusively, has been cited with the *Barber v. Barber* disclaimer to indicate an extension of the exception.[6] The instant case cites In re *Burrus* as extending the exception to suits for custody of children,[7] although the court in the *Burrus* case specified that such a holding was not necessary to the decision.[8] *De La Rama v. De La Rama,*[9] holding that the general rule does not apply to the jurisdiction of territorial courts or to the appellate jurisdiction of the Supreme Court over them, indicated that the *Barber v. Barber* disclaimer simply means that divorce and alimony cases cannot ordinarily meet the jurisdictional requirements of diversity and amount. The reasoning of the *De La Rama* case has not been applied by the courts in succeeding decisions. *Albanese v. Richter,*[10] for example, held that diversity of citizenship and jurisdictional amount do not give federal courts jurisdiction over a suit by an illegitimate child against his putative father for support. And in *Popovici v. Agler* [11] the Supreme Court construed the Constitution [12] and statutes [13] giving original and exclusive jurisdiction over "all suits" against consuls to federal courts, as not intending to give federal courts jurisdiction over a suit for divorce and alimony against a Roumanian consul stationed in Ohio.

The court treats the instant case as one of first impression on the question of federal jurisdiction over separate maintenance suits in which all statutory requirements for jurisdiction are present.[14] In reliance upon the dictum in *Barber v. Barber,*[15] it holds that such suits fall within the judicial exception to federal jurisdiction in diversity cases.

No reasoned grounds for the exception are presented in *Barber v. Barber* itself, and in subsequent cases the courts have been surprisingly inarticulate as to the basis for the rule. In none of them is any attempt made to distinguish domestic relations cases from other cases arising under state laws but subject to federal jurisdiction under diversity statutes. The only real reason for the

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v. North Carolina, 325 U. S. 226, 232, 65 Sup. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1944); Hastings v. Douglass, 249 Fed. 378, 381 (N. D. W. Va. 1918).

6. Popovici v. Agler, 280 U. S. 379, 383, 50 Sup. Ct. 154, 74 L. Ed. 489 (1930); McCarty v. Hollis, 120 F. 2d 540, 542 (10th Cir. 1941); Calhoun v. Lange, 40 F. Supp. 264, 265 (D. Md. 1941); Popovici v. Popovici, 30 F. 2d 185 (N. D. Ohio 1927). See the principal case, 82 F. Supp. at 709.

7. 82 F. Supp. at 709.

8. 136 U. S. 586, 596, 66 Sup. Ct. 850, 34 L. Ed. 500 (1890).

9. 201 U. S. 303, 26 Sup. Ct. 485, 50 L. Ed. 765 (1906); *cf.* Sims v. Sims, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115 (1899). *Compare* Barnet v. United States, 82 F. 2d (9th Cir. 1936), *cert. denied,* 299 U. S. 546 (1936), *with* McCarty v. Hollis, 120 F. 2d 540 (10th Cir. 1941).

10. 161 F. 2d 688 (3d Cir. 1947), 48 COL. L. REV. 154 (1948).

11. 280 U. S. 379, 50 Sup. Ct. 154, 74 L. Ed. 489 (1930), 24 ILL. L. REV. 898 (1930), 28 MICH. L. REV. 591 (1930); *cf.* Popovici v. Popovici, 30 F. 2d 185 (N. D. Ohio 1927).

12. U. S. CONST. Art. III, § 2.

13. 36 STAT. 1093 (1911), 28 U. S. C. A. § 41 (1940); 36 STAT. 1168 (1911), 28 U. S. C. A. § 371 (1940).

14. *But cf.* Johnson v. Johnson, 13 Fed. 193 (C. C. S. D. N. Y. 1882).

15. 21 How. 582, 584, 16 L. Ed. 226 (U. S. 1858).

exception would seem to be that the federal courts as a matter of policy should not entertain domestic relations cases. The marriage contract is *sui generis.* The state has a peculiar interest in it [16] and in the welfare of children, to whom the state bears the relation of *parens patriae.*[17] Even though in diversity cases the federal district courts are "in effect, only another court of the State," [18] nevertheless it may be argued that the state should have exclusive jurisdiction of domestic relations cases by reason of its peculiar interest in the relationships involved. A positive statement to this effect by the Supreme Court would be of assistance to the lower courts and to lawyers confronted with the jurisdiction question in domestic relations cases.

FIXTURES—DETERMINABLE FEE FOR SCHOOL PURPOSES—OWNERSHIP OF SCHOOL BUILDINGS WHEN LAND REVERTS

In 1869 land was quitclaimed to certain school trustees with a provision that it was to revert to the grantor and his heirs when no longer used for school purposes. Buildings were constructed and until 1945 a school was maintained upon the premises. Susequently the heirs and devisees of the grantor, claiming the lands and buildings by reverter, sought to enjoin the removal or sale of the buildings. *Held* (5-2), the buildings did not revert, although the land did. *Low v. Blakeney,* 403 Ill. 156, 85 N. E. 2d 741 (1949).

According to the law of fixtures, any improvements affixed to the land become a part thereof.[1] Thus buildings are presumed to be a part of the realty.[2] But the exceptions to the rule and the varying degrees of application of the rule are as important as the rule itself. Agreements permitting removal are binding as between the parties,[3] although the maxim is strictly enforced to protect third persons.[4] Clear exceptions are made as to fixtures installed for the purposes of trade and manufacturing,[5] to a lesser extent for agricultural fixtures,[6]

16. 1 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE § 322 (Supp. 1945).
17. Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507 (1910); Risting v. Sparboe, 179 Iowa 1133, 162 N. W. 592, L. R. A. 1917E 318 (1917); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937 (1925).
18. Woods v. Interstate Realty Co., 69 Sup. Ct. 1235, 1237 (U. S. 1949).

1. *E.g.,* Van Ness v. Pacard, 2 Pet. 137, 143, 7 L. Ed. 374 (U. S. 1829); TYLER, LAW OF FIXTURES 76 (1885).
2. Bond Investment Co. v. Blakely, 83 Cal. App. 696, 257 Pac. 189 (1927); Gibbs v. Estey, 81 Mass. 587 (1860); 1 REEVES, REAL PROPERTY § 23 (1909); TYLER, LAW OF FIXTURES 77 (1885).
3. Yater v. Mullen, 24 Ind. 277 (1865); Barnes v. Hosmer, 196 Mass. 323, 82 N. E. 27 (1907); 21 MINN. L. REV. 855 (1937).
4. McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21 (1892).
5. *E.g.,* Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374 (U. S. 1829); Biallas v. March, 305 Mich. 401, 9 N. W. 2d 655 (1943); Cameron v. Oakland County Gas and Oil Co., 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936); 32 CORNELL L. Q. 445 (1947); 19 CORNELL L. Q. 311 (1934). *But cf.* Trabue Pittman Corp. v. Los Angeles County, 29 Cal. 2d 385, 175 P. 2d 512 (1946) (tax purposes).
6. *In re* Shelar, 21 F. 2d 136 (W. D. Pa. 1927). *But cf.* Klocke v. Troske, 57 N. D. 404, 222 N. W. 262 (1928). See BROWN, PERSONAL PROPERTY § 146 (1936); Note, 107 A. L. R. 1153, 1164 (1936).

and to still lesser, but growing, extent for domestic and ornamental fixtures.[7]

In a leading case it was held that appropriateness to the use of the realty, method of annexation, and intention of the one making the annexation are the decisive factors as to whether improvements are fixtures.[8] But later cases indicate that the former factors are merely evidence of the intention, that the intention is the paramount consideration, and that the courts seek an objective, not a secret, intent.[9] Important considerations in determining intention are the custom and usage of the area and a policy for encouraging certain groups to make full use of the land by allowing the removal of improvements, such as trade fixtures.[10]

There is conflict in the cases as to whether school buildings revert with the land in the absence of express agreement. On the basis of the general rule of fixtures some cases hold that the buildings go to the reversioner with the land.[11] Others, like the principal case, hold that ownership of the buildings remains with the school district. Of these, one held that the school building was a trade fixture;[12] two based their decisions on a lack of authority of the school officials to accept a deed providing for the reversion of school buildings.[13] While the conclusion that the buildings should not revert appears to be sound, it is sometimes arrived at by questionable reasoning. In the principal case, the

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7. De Charette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S. W. 1054 (1927). *But see* Harris v. Harris, 174 S. W. 2d 996, 999 (Tex. Civ. App. 1943). See BROWN, PERSONAL PROPERTY § 147 (1936); 2 TIFFANY, REAL PROPERTY § 618 (3d ed., Jones, 1939).

8. Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634 (1853).

9. National Bank v. Wells-Jackson Corp., 358 Ill. 356, 193 N. E. 215, 98 A. L. R. 618 (1934); Cornell College v. Crain, 211 Iowa 1343, 235 N. W. 731 (1931); Morris v. French, 106 Mass. 326 (1871); Frost v. Schinkel, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381 (1931); Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634 (1853); National Bank v. North, 160 Pa. 303, 28 Atl. 694 (1894). See Note, 77 A. L. R. 1400 (1932); 36 C. J. S., FIXTURES §§ 2b, 2f (1943); TYLER, LAW OF FIXTURES 115 (1885); 19 CORNELL L. Q. 311 (1934); 21 MINN. L. REV. 855 (1937); 12 AUST. L. J. 384 (1939).

10. Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374 (U. S. 1829); Cameron v. Oakland County Gas and Oil Co., 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936); 36 C. J. S., FIXTURES § 2b (1943); BROWN, PERSONAL PROPERTY § 143 (1936); 2 TIFFANY, REAL PROPERTY § 618 (3d ed., Jones, 1939); 1 REEVES, REAL PROPERTY § 16 (1909); 1 WASHBURN, REAL PROPERTY § 5 (6th ed., Wurts, 1902).

11. Williams v. Kirby School District, 207 Ark. 458, 181 S. W. 2d 488 (1944); New Hebron School District v. Sutton, 151 Miss. 475, 118 So. 303 (1928). *Cf.* Allemannia Fire Ins. Co. v. Winding Gulf Collieries, 60 F. Supp. 65 (S. D. W. Va. 1945), *rev'd*, 152 F. 2d 382 (4th Cir. 1945), *cert. denied*, 328 U. S. 844 (1945) (fire insurance proceeds on school buildings held to go to reversioner as part of land—reversed on separate ground that insurance policy made proceeds payable to school board with no ruling as to whether the building would revert). Compare the judicial treatment of a Kentucky statute providing that school officials should get title to land in fee simple, and that any reversionary interest should not deprive the school of improvements. In Board of Education v. Littrell, 173 Ky. 78, 190 S. W. 465 (1907), it was held that under a deed executed prior to the statute, refusal to allow the buildings to revert would constitute an impairment of contract. In Webster County Board of Education v. Gentry, 233 Ky. 35, 24 S. W. 2d 910 (1930), the provision in the statute as to improvements was held to be intended only for prior deeds and not applicable to subsequent deeds, therefore allowing the reversion of buildings. This was followed in Webster County Board of Edueation v. Wynn, 303 Ky. 110, 196 S. W. 2d 983 (1946).

12. May v. Board of Education, 12 Ohio App. 456 (1920).

13. Rose v. Board of Directors of School District No. 94, 162 Kan. 720, 179 P. 2d 181 (1947); Schwing v. McClure, 120 Ohio St. 335, 166 N. E. 230 (1929).

majority bases its decision on: (1) a statute which was held to vest title to school lands and buildings separately, although in the same trustees;[14] (2) a misapplication of the rule that trustees have no power to make gifts; [15] and (3) the language of the deed, from which the court infers an intention that the buildings should not revert.[16]

While a school building may not be a trade fixture, a definite analogy can be drawn between the two as to the application of the law of fixtures. Public policy in the United States clearly seeks to encourage the fullest use of all school facilities, and experience shows that schools and school buildings are frequently re-located to serve the demands of a shifting population.[17] In the absence of specific contractual provisions to the contrary, therefore, a public policy to encourage the full use of school lands and a recognition of the frequency of school re-location—the basic reasons for the analogous doctrine of trade fixtures—amply warrant a holding that school buildings do not revert with the land.

INCOME TAX—FAMILY PARTNERSHIPS—REQUIREMENTS FOR VALIDITY

One member of a cattle-raising partnership, being ready to retire, agreed to sell his part of the herd to the other member, on condition that the latter would sell an undivided one-half interest in the herd to the purchaser's four sons at the same price. On this basis, a new partnership was formed between the purchaser and his sons, the sons' contribution being a personal note for their full share. The note was paid partly by gifts from the father and partly from the proceeds of the business. One son lived on the ranch, and for two years had been employed as foreman of the old partnership. He continued in this capacity for the new partnership until entering the Army.

14. ILL. STAT. ANN., c. 122, § 4-21 (Smith-Hurd, 1946).

15. "It also shows that the grantor received $50 for one acre of land, which at the time was a substantial consideration. These facts alone rebut any actual intention that the reverter clause should include any buildings, because to so infer would be to imply a right to make a gift, wholly beyond the power of school trustees." 85 N. E. 2d at 744.

16. The deed provided that "the said one acre of land hereby conveyed shall revert . . . ." and the court concluded that the land alone and not the buildings were intended, 85 N. E. 2d at 744.

17. See a report of the National Commission on School District Reorganization, published by the National Education Association of the United States, as YOUR SCHOOL DISTRICT (1948). The total number of schools in state school systems in this country in 1943-44 was 198,878. *Id.* at 265. Studies of population shifts between 1940 and 1944 show that many rural counties lost as much as one-third of their populations during that period. *Id.* at 26. Between 1905 and 1917, there were some twenty consolidations of schools in Illinois, the state where the principal case arose. *Id.* at 155.

Some indication of the seriousness of the problem of moving school buildings when the population shifts is found in Seattle, Washington, where portable buildings have been used for the past thirty years. Huggard, *Seattle's Transportable Schools,* 119 AMERICAN SCHOOL BOARD JOURNAL 33-36 (Aug., 1949); *Schoolrooms to Come and Go with Children,* 105 ARCHITECTURAL RECORD 128-29 (Mar. 1949). To prevent over-crowding at one school while having unused rooms at another, as a result of population shifts, Milwaukee, Wisconsin, is using portable rooms. Bruhnke, *Portable Rooms for New Schools,* 68 SCHOOL EXECUTIVE 20 (June, 1949).

Another son entered the Army immediately upon leaving school and rendered no services; the other sons, who were students, worked on the ranch during the summer. The Tax Court held that the entire partnership income for the tax period involved was taxable to the father, stating that since the sons had not contributed either (1) vital services or (2) capital originating with them, no valid partnership was formed. *Held,* that the tests used by the Tax Court are merely circumstances to be taken into consideration in deciding whether a bona fide partnership existed. Cause remanded to the Tax Court for the determination of whether a partnership did in fact exist. *Commissioner of Internal Revenue v. Culbertson,* 69 Sup. Ct. 1210 (1949).

In the principal opinion Mr. Chief Justice Vinson declared that the Tax Court had misconstrued the cases of *Commissioner v. Tower* [1] and *Lusthaus v. Commissioner,* [2] in making the two so-called tests of partnership for income-tax purposes the sole determining factor. Actually, the question is whether "considering all the facts . . . the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." [3]

Prior to this reconsideration of the *Tower* and *Lusthaus* cases there was widespread misconstruction of these decisions, the special "tests" there laid down being considered decisive of income-tax liability.[4] Actually the Supreme Court in the *Tower* case, relying upon *Cox v. Hickman,*[5] the leading case on partnerships for commercial purposes, had stated that the test for the existence of a partnership was the same for income tax purposes as that applied generally in other fields of the law.[6] Thus the family partnership has the same status as any other partnership for income tax purposes, if in fact a partnership exists.[7]

Family partnership cases, where funds are traceable directly or indirectly to one member of the partnership, primarily involve factual disputes, and the main question "is always whether the transaction under scrutiny is in reality what it appears to be in form." [8] It is in this setting that the actual intention of the parties is of such great importance. This intent is discovered by its

1. 327 U. S. 280, 66 Sup. Ct. 532, 90 L. Ed. 670, 164 A. L. R. 1135 (1946).
2. 327 U. S. 293, 66 Sup. Ct. 539, 90 L. Ed. 679 (1946).
3. 69 Sup. Ct. at 1214.
4. See, *e.g.,* Hougland v. Commissioner, 166 F. 2d 815 (6th Cir. 1948); Weizer v. Commissioner, 165 F. 2d 772 (6th Cir. 1948); Fletcher v. Commissioner, 164 F. 2d 182 (2d Cir. 1947); Walsh v. Shaughnessy, 77 F. Supp. 577 (N. D. N. Y. 1948). For general discussions of the *Tower* and *Lusthaus* cases, see Jones, *Family Partnerships—Their Creation and Validity,* 25 TAXES 252 (1947); Works, *Taxation of Family Partnerships and Family Corporations,* 19 ROCKY MT. L. REV. 209 (1947).
5. 8 H. L. Cas. 268 (1860).
6. 327 U. S. 280, 287, 66 Sup. Ct. 532, 90 L. Ed. 670 (1946).
7. "But courts, recognizing the possibility of bed chamber arrangements or the unlikelihood that a husband and wife traded at arm's-length with one another, may refuse to be content with the form and inquire into the essentials of the transaction." PAUL, SELECTED STUDIES IN FEDERAL TAXATION 295 (Second Series 1938).
8. Johnson v. Commissioner, 86 F. 2d 710, 712 (2d Cir. 1936).

manifestation in the other facts and circumstances of the case, and "the facts are naturally viewed by the court through the spectacles of the taxpayer's motives." [9] For this reason it is impossible to predict with any degree of certainty the outcome of a particular case, for the Tax Court may reach opposite conclusions in two cases with very similar objective facts.[10]

To say that tax avoidance cannot be part of the intent would be to deny a recognized right of every taxpayer to decrease or altogether avoid his taxes by means which the law permits.[11] But such a motive will tend to color the other facts and circumstances.

The necessity of finding the subjective intent is not unique with family partnerships. It is frequently determinative in gift, estate and income tax litigation.[12] Nor is it limited to the field of taxation.[13] But mere statement of intention in a partnership agreement and strict compliance with a statute of formation or reorganization are not sufficient proof of actual intention.[14]

There are, however, certain basic indicia of an actual partnership. A partnership is generally defined as a contract between two or more persons to unite their property and services in lawful business and to share the profits and losses in stated proportions.[15] From this definition, then, it becomes apparent that capital and services are vital elements to be considered in determining whether a partnership really exists. For that reason these factors were stressed in the *Tower* and *Lusthaus* cases.

The ultimate question in the family partnership cases is whether the donee actually owns the interest which he appears to own. Usually a wife and children do not have capital of their own to invest in a partnership, and this is frequently obtained by gift from the husband or father. If the gift is made in fact, the capital then invested "originates" with the donee.[16] The

9. PAUL, SELECTED STUDIES IN FEDERAL TAXATION, 294 (Second Series 1938).

10. *E.g.*, John Kelley Co. v. Commissioner, 326 U. S. 521, 66 Sup. Ct. 299, 90 L. Ed. 278 (1946) (two corporations issued interest-bearing debentures to stockholders; Tax Court held that interest payments were deductible as interest for one corporation, but were in reality dividends and not deductible by the other corporation; affirmed).

11. Gregory v. Helvering, 293 U. S. 465, 469, 55 Sup. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355 (1934); Lawton v. Commissioner, 164 F. 2d 380, 385 (6th Cir. 1947).

12. Allen v. Trust Co. of Georgia, 326 U. S. 630, 66 Sup. Ct. 389, 90 L. Ed. 367 (1946); United States v. Wells, 283 U. S. 102, 117, 51 Sup. Ct. 446, 75 L. Ed. 867 (1931); Lawton v. Commissioner, 164 F. 2d 380 (6th Cir. 1947).

13. Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690 (1889) (question of bona fide intention or mere pretense of changing citizenship controlled whether federal court had jurisdiction in diversity of citizenship case); Higgins v. Lessig, 49 Ill. App. 459 (1893) (judgment for acceptor of reward reversed on basis that offeror did not have bona fide intent that he should be bound).

14. Helvering v. Gregory, 69 F. 2d 809 (2d Cir. 1934), *aff'd*, 293 U. S. 465 (1935). In this case an attempt was made to pay profits to a shareholder of a corporation without her being subjected to the income tax. A reorganization statute was rigidly followed; a new corporation was formed and then dissolved, the profits being paid to shareholder as liquidation dividends. It was held that the purpose of the transaction, and not conformity to the statute, must determine the taxability of the shares.

15. Ward v. Thompson, 22 How. 330, 333, 16 L. Ed. 249 (U. S. 1859); CRANE, PARTNERSHIP § 4 (1938); 40 AM. JUR., *Partnership* § 32 (1942); 47 C. J., *Partnership* § 1 (1929).

16. Lawton v. Commissioner, 164 F. 2d 380 (6th Cir. 1947).

question is whether a bona fide gift was made. Did the donor relinquish all control? Was the donee free to dispose of the property in any manner? Was there a private understanding between the parties?

Lack of a formal agreement, failure to record one if made, actual limitation or lack of voice in management by the donee, continued domination and control by the donor, as well as legal and moral strings retained on the "donated" property, are some of the indications of invalidity [17] and put a heavy burden on the taxpayer to prove the actuality of the partnership.

Once the existence or non-existence of a bona fide partnership is determined, there is no problem as to the applicable tax law. It is well established that the purpose of revenue laws is to tax the income to the owner of the property,[18] or (if a partnership is found) to the respective owners.[19]

The 1948 Revenue Act,[20] allowing the splitting of income between spouses, makes the family partnership question largely an academic one as between husband and wife. But it is still important as between other members of the family.[21] As a result of the instant case, the courts will probably be more lenient in their determinations of the validity of family partnerships, and bona fide family partnerships will continue to be effective for tax as well as other objectives.

INSURANCE—DEATH BY "ACCIDENTAL MEANS"— AGGRESSOR IN FAMILY FIGHT ACCIDENTALLY KILLED BY WIFE

The insured, in the course of a family quarrel, struck his wife on the head with a bottle and chased her into the house. She picked up a revolver, believed by both to be unloaded, and unintentionally discharged it, killing the insured. Action was brought by the wife on a policy providing for recovery for death caused by "accidental means." *Held,* recovery allowed, since the insured did not reasonably anticipate that his acts would result in death or serious bodily injury.[1] *Akins v. Illinois Bankers Life Assurance Co.,* 203 P. 2d 180 (Kan. 1949).

17. Elrod, *Husband and Wife or "Family" Partnerships,* 20 IND. L. J. 65, 75-79 (1944).

18. Helvering v. Horst, 311 U. S. 112, 61 Sup. Ct. 144, 85 L. Ed. 75, 131 A. L. R. 655 (1940); Burnet v. Leininger, 285 U. S. 136, 52 Sup. Ct. 345, 76 L. Ed. 665 (1932); Corliss v. Bowers, 281 U. S. 376, 50 Sup. Ct. 336, 74 L. Ed. 916 (1930).

19. Blair v. Commissioner, 300 U. S. 5, 57 Sup. Ct. 330, 81 L. Ed. 165 (1937).

20. 62 STAT. 110 (1948), 26 U. S. C. A. § 301 (Supp. 1948).

21. For relative advantages of family partnership over other types of enterprise, see McClain, *Family Partnership v. Corporation—Income Tax Aspects,* 2 VAND. L. REV. 231 (1949).

1. Trial by jury was waived and the trial judge found as a question of fact that the insured did not reasonably anticipate death or serious bodily injury as a result of his aggression. The finding, by stipulation, was based upon the record of a criminal prosecution in which the present plaintiff was acquitted of second degree murder.

..Many courts have sought to distinguish between "accidental injury" and "injury by accidental means," [2] but a growing number of courts have realized that the terms are probably synonymous in the minds of the policy-purchasing public and have declined to recognize any distinction.[3] This view gives effect to the purchaser's intention and makes for greater uniformity in the holdings of the courts.[4] For a result to be unexpected, unforeseen and accidental there must be something unexpected in the chain of causation, something accidental in the means.[5] It seems that a good definition of "injury by accidental means" is that given by the court in the instant case: "a happening by chance and without intention, which happening is unforeseen, unexpected and unusual at the time it occurs." [6] Courts frequently say that the effect is by accidental means unless it is the natural and probable consequence of the insured's act. But the word "probable" has an entirely different meaning from that given to it in the law of negligence.[7] Here, it means a consequence so likely (so probable) as almost to have been intended—intended, that is, in the sense that one is held to intend a consequence substantially certain to be produced by the act. Intent to do the act is not controlling so long as the result is not intended in the sense just explained.[8]

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2. "[I]t is not enough to warrant recovery that the insured's death may be unusual, unexpected, or unforeseen and in such sense accidental, but that on the contrary it must be made to appear that the means (or cause) producing death were unusual, unexpected, or unforeseen and thus accidental." Camp v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 165 S. W. 2d 277, 280 (Mo. App. 1942); *see* Pledger v. Business Men's Acc. Ass'n of Texas, 197 S. W. 889, 890 (Tex. Civ. App. 1917).

3. Mangol v. Metropolitan Life Ins. Co., 103 F. 2d 14 (7th Cir. 1939); Bukata v. Metropolitan Life Ins. Co., 145 Kan. 858, 67 P. 2d 607 (1937); Konschak v. Equitable Life Assur. Soc., 186 Minn. 423, 243 N. W. 691 (1932); Mansbacher v. Prudential Ins. Co. of America, 273 N. Y. 140, 7 N. E. 2d 18, 111 A. L. R. 618 (1937); Provident Life & Acc. Ins. Co. v. Green, 172 Okla. 591, 46 P. 2d 372 (1935); Ocean Acc. & Guarantee Corp. v. Glover, 165 Va. 283, 182 S. E. 221 (1935). See other cases collected in Note, 13 ROCKY MT. L. REV. 145, 148-49 (1941).

4. "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." Cardozo, J., dissenting, in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, 499, 54 Sup. Ct. 461, 78 L. Ed. 934, 90 A. L. R. 1382 (1933); Notes, 13 TEMP. L. Q. 125, 130-31 (1938), 25 VA. L. REV. 710, 714-15 (1939).

5. Thus the injury may be by accidental means, although it results from an intentional act. For instance, there may be a slip or mishap in doing the act. National Life & Acc. Ins. Co. v. Singleton, 193 Ala. 84, 69 So. 80 (1915) (insured cut himself while shaving and infection resulted). Or there may be ignorance of an existing factor or condition which causes injury. Newsoms v. Commercial Casualty Ins. Co., 147 Va. 471, 137 S. E. 456 (1927) (insured died from food poisoning).

6. 203 P. 2d at 182.

7. The word "probable" as used in the law of negligence does not mean more likely than not, but rather not unlikely, or such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee; an appreciable risk that some harm would happen. Gedeon v. East Ohio Gas Co., 128 Ohio St. 335, 190 N. E. 924, 927 (1934).

8. "[A]n effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted [that every man must be held to intend the natural and probable consequences of his deeds] is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design,

Where the injury or death of the insured results from acts of another person it is obvious that the same rule should apply. Regardless of whether the act of the other person was intentional or unintentional the injury or death of the insured is by "accidental means" as to the insured [9] unless he should have expected injury or death as the very likely consequence of his own acts.[10]

Is the death of an aggressor in a fight, resulting either from self-defense or inadvertence on the part of the person attacked, such a happening as should reasonably be foreseen and expected? A few courts seem to hold as a matter of law that it is; but most of these cases involved a felonious attack with a deadly weapon by the insured, so that the attack invited and justified death or serious injury inflicted in self-defense.[11] Where, as in this case, the attack was not of so deadly a nature, it would seem to be properly a question of fact as to whether the insured should have expected death or serious bodily injury as the probable result of his aggression.[12]

It will not bar recovery that the insured is negligent in his acts, since it is his negligence to a large extent which he intended to insure against.[13] The act must be such that the insured is charged with knowledge that death or serious injury normally follows. Nor does the mere fact that the act was illegal relieve the insurer.[14] It is true that some illegal acts entail a high degree of

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cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means." Western Commercial Traveler's Ass'n v. Smith, 85 Fed. 401, 405 (8th Cir. 1898).

9. "[T]he provision of the policy insuring against the results of bodily injuries sustained by accidental means applies to the acts and conduct of the insured himself, and not to the acts, conduct, or intention of plaintiff as the one inflicting the fatal injury." Podesta v. Metropolitan Life Ins. Co., 150 S. W. 2d 596, 598 (Mo. App. 1941). Thus in the instant case it is immaterial whether the plaintiff shot the insured intentionally or not.

10. 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 486 (1941); 6 COOLEY, BRIEFS ON INSURANCE 5246 (2d ed. 1928); VANCE, INSURANCE § 258 (2d ed. 1930); 29 AM. JUR., *Insurance* § 972 (1940); 45 C. J. S., *Insurance* § 788 (1946).

11. Price v. Business Men's Assur. Co. of America, 188 Ark. 637, 67 S. W. 2d 186 (1934) (attack with gun); Campbell v. Metropolitan Casualty Ins. Co., 176 So. 233 (La. App. 1937) (attack with knife); Robinson v. Benefit Ass'n of Railway Employees, 183 S. W. 2d 407 (Mo. App. 1944) (attack with knife); Podesta v. Metropolitan Life Ins. Co., 150 S. W. 2d 596 (Mo. App. 1941) (attack with razor; no recovery even though wife shot insured unintentionally); Clay v. State Ins. Co., 174 N. C. 642, 94 S. E. 289, L. R. A. 1918B 508 (1917) (attack with gun); Meister v. General Acc. Corp., 92 Ore. 96, 179 Pac. 913, 4 A. L. R. 718 (1919) (attack with gun).

12. Gilman v. New York Life Ins. Co., 190 Ark 379, 79 S. W. 2d 78, 97 A. L. R. 755 (1935) (grabbed shirt); Hutton v. States Acc. Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E 127, ANN. CAS. 1916C 577 (1915) (attack with fist, leg broken); Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209 47 Am. St. Rep. 638 (1894) (push); Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873 (1897) (advance with no weapon).

13. 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 531 (1941); 6 COOLEY, BRIEFS ON INSURANCE 5238 (2d ed. 1928); VANCE, INSURANCE § 266 (2d ed. 1930).

14. *See* Zurich General Accident & Liability Ins. Co. v. Flickinger, 33 F. 2d 853, 856 (4th Cir. 1929). In a recent case the insured began an unprovoked assault upon his wife. His 16-year-old son, displaying a gun, ordered him to desist, and when the insured advanced on the son, he shot and killed the insured. The death was held not to have been by accidental means on the grounds that death should have been expected to result from the criminal conduct of the insured. Kalahan v. Prudential Ins. Co., 84 N. Y. S. 2d 433 (Sup. Ct. 1948), 35 VA. L. REV. 376 (1949). It is submitted that the criminal nature of the insured's acts should not have been controlling, since one entirely free from fault should

danger,[15] but many others do not involve such risk.[16] There seems to be no reason why the same test should not be applied whether the act is lawful or not, in the absence of some provision of the policy to the contrary.

JUDGMENTS—CHANGES IN JUDGES DURING TERM OF COURT—POWER OF SUCCESSOR OVER JUDGMENT RENDERED BY PREDECESSOR

Consolidated causes of action were tried before the circuit judge without a jury, and upon conclusion were taken under advisement. The judge announced his findings in open court and signed them on the day before a newly elected circuit judge came into office. This change in office occurred in the middle of the term. During the same term motions were made to the new judge to vacate the judgment of his predecessor and to grant a new trial. A temporary writ of prohibition was secured to prevent him from vacating and annulling the judgment. *Held* (3-2), temporary writ made permanent; under Indiana Supreme Court Rules [1] the preceding judge alone might properly rule on a motion for a new trial, and the acts of the succeeding judge were void, *State* ex rel. *Harp v. Vanderburgh Circuit Court,* 85 N. E. 2d 254 (Ind. 1949).

The court is manifestly distinct from the judge [2] and a change of individual judges does not change the court.[3] By statute or constitutional authority a person qualified by law may exercise the judicial function of the court as a judge *pro tempore* [4] when the regular judge is sick, absent, or otherwise disqualified.[5] The general rule that all courts of record have the inherent power

expect death to result from an advance on oue holding a gun who obviously intended to use it.

15. Metropolitan Life Ins. Co. v. Anglin, 66 Ga. App. 660, 19 S. E. 2d 171 (1942) (robbery); McGuire v. Metropolitan Life Ins. Co., 164 Tenn. 32, 46 S. W. 2d 53 (1932) (robbery).

16. "It is a violation of law to drive an automobile at a greater rate of speed than prescribed by statute; but no one would contend, in the absence of special provision in the policy, that the beneficiary of one killed while speeding could not recover thereunder." Zurich General Accident & Liability Ins. Co. v. Flickinger, 33 F. 2d 853, 856 (4th Cir. 1929).

1. "The judge who presides at the trial of a cause shall, if available, rule on a motion for a new trial, if one is filed, and shall sign all bills of exceptions, if such are requested. The unavailability of any such trial judge shall be determined by a court order made by the judge then presiding in such court." *Rules of the Supreme Court,* Rule 1-9 in 1 IND. ANN. STAT. 363 *et seq.* (Burns 1933).

2. *E.g.,* Whitlock v. Wade, 117 Iowa 153, 90 N. W. 587, 588 (1902); Marsden v. Harlocker, 48 Ore. 90, 85 Pac. 328 (1906).

3. Hedrick v. Hedrick, 28 Ind. 291, 293 (1867) (court remains identical for all judicial purposes); Edwards v. Tracy, 2 Mont. 22, 24 (1873) (whatever act might be legally done and performed by judge who tried cause may be done by successor, since legally they are the same individual); Conway v. Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940 (1896); see 30 AM. JUR., *Judges* § 38 (1940).

4. *E.g.,* State *ex rel.* Hodshire v. Bingham, 218 Ind. App. 490, 33 N. E. 2d 771 (1941) By statute in Indiana a judge *pro tempore* is given the same authority as a regular judge. IND. ANN. STAT. § 4-318 (Burns 1933). See Note, 134 A. L. R. 1129 (1941).

5. Benitez v. Bank of Nova Scotia, 141 F. 2d 939 (1st Cir. 1944), *cert. denied,* 324 U. S. 859 (1945); *In re* Kent's Estate, 6 Cal. 2d 154, 57 P. 2d 901 (1936) (construing CAL. CONST. Art. VI, § 5); State *ex rel.* Spencer v. Baker, 212 Ind. 44, 7 N. E. 2d 984

to open, modify, amend or vacate their judgments during the term at which rendered was conceded at common law [6] and is followed by a majority of the states courts as well as the federal courts.[7] This inherent power applies to any proceeding in the court which is *in fieri*,[8] and the majority of courts hold all proceedings *in fieri* during the term in which they are heard.[9] It is also generally held that a succeeding judge during the same term of court may complete the unfinished business of his predecessor.[10] With respect to a motion for new trial submitted to a newly elected judge, in the absence of a statute or court rule, the better practice now seems to be to tender the typewritten stenographic records to the new judge and submit the matter to his discretion,[11] although the older cases indicate that the new trial was usually granted by the newly elected judge as a matter of course.[12]

In the instant case the court is following a minority view which is gradually diminishing. Here, a succeeding judge was prohibited from vacating the

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(1937) (citing IND. ANN. STAT. §§ 2-1411, 9-2407 (Burns 1933)); see 48 C. J. S., *Judges* § 99 (1947); 33 C. J., *Judges* § 204 n. 95 (1924).

6. *E.g.*, Livingston v. Livingston, 190 Ind. 223, 130 N. E. 122 (1921); 1 FREEMAN, JUDGMENTS 375 (5th ed. 1925).

7. Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244 (1876); Suggs v. Mutual Benefit Health & Acc. Ass'n, 115 F. 2d 80 (10th Cir. 1940); Arcoil Mfg. Co. v. American Equitable Assur. Co., 87 F. 2d 206 (3d Cir. 1936); Pate v. State, 224 Ala. 396, 14 So. 2d 251 (1943); Corwin v. Rheims, 390 Ill. 205, 61 N. E. 2d 40 (1945); Hoffman v. Hoffman, 115 Ind. App. 277, 57 N. E. 2d 591 (1944), *rehearing denied*, 115 Ind. App. 771, 58 N. E. 2d 201 (1944); Furst v. Meek, 297 Ky. 509, 180 S. W. 2d 410 (1944); Citizens Bank & Trust Co. v. Bayles, 153 Tenn. 40, 281 S. W. 932 (1926); 1 BLACK, JUDGMENTS 380 (1st ed. 1891); 1 FREEMAN, JUDGMENTS 267 (5th ed. 1925).

8. A thing is said to rest *in fieri* when it is not yet complete. For example, the records of a court were anciently held to be *in fieri*, or incomplete, until they were recorded on parchment; now they are said to be *in fieri* until the giving of judgment, after which they can be amended only during the same term. 2 BOUVIER'S LAW DICTIONARY 1520 (8th ed. 1914); 3 BL. COMM. *407.

9. *E.g.*, Durre v. Brown, 7 Ind. App. 127, 34 N. E. 577, 578 (1893); Henderson v. Dreyfus, 26 N. M. 262, 191 Pac. 455 (1920); Broadway Motor Co. v. Public Fire Ins. Co., 12 Tenn. App. 278 (M. S. 1930).

10. Hoffman v. Shuey, 223 Ky. 70, 2 S. W. 2d 1049 (1928); Peterson v. Hopson, 306 Mass. 597, 29 N. E. 2d 140 (1940). *Contra*: National Guard Training School v. State, 55 N. D. 897, 215 N. W. 476 (1927). See Notes, 132 A. L. R. 14 (1941), 58 A. L. R. 848 (1929), 54 A. L. R. 952 (1928). By statute in Indiana a judge may sign unsigned records of court proceedings held before his predecessor. IND. ANN. STAT. § 4-325 (Burns 1933). This is true of an interlocutory decree in many states. 9 B. U. L. REV. 225 (1929).

It has been held that the judge who tried the cause should pass on a motion for a new trial and certify a bill of exceptions. Ploughe v. Indianapolis Rys., 222 Ind. 125, 51 N. E. 2d 626 (1943); State *ex rel.* Hodshire v. Bingham, 218 Ind. 490, 33 N. E. 2d 771 (1941). *Contra:* People *ex rel.* Hambel v. McConnell, 155 Ill. 192, 40 N. E. 608 (1895); Commonwealth v. Gedzium, 216 Mass. 299, 159 N. E. 51 (1927); *see* State *ex rel.* Coach Co. v. Beasley, 221 Ind. 274, 47 N. E. 2d 324 (1943). See Notes, 134 A. L. R. 1129 (1941), 54 A. L. R. 952 (1928).

11. Brent v. Lilly Co., 202 Fed. 335 (W. D. Wash. 1913); Meldrum v. United States, 151 Fed. 177 (9th Cir. 1907); Frazure v. Fitzpatrick, 21 Cal. 2d 851, 136 P. 2d 566 (1943); State *ex rel.* Block Co. v. Superior Court, 221 Ind. 228, 47 N. E. 2d 139 (1943). *Contra:* McWhirter v. Bowen, 103 App. Div. 447, 92 N. Y. Supp. 1039 (1905); see also Hoffman v. Hoffman, 115 Ind. App. 277, 57 N. E. 2d 207 (1945); Note, 54 A. L. R. 952 (1928).

12. Penn. Mutual Life Ins. Co. v. Ashe, 145 Fed. 593 (6th Cir. 1906); American Cent. Ins. Co. v. Neff, 43 Kan. 457, 23 Pac. 606 (1890); Bass v. Swingley, 42 Kan. 729, 22 Pac. 714 (1889); Cocker v. Cocker, 56 Mo. 180 (1874); Woodfolk v. Tate, 25 Mo. 597 (1857); Boynton v. Crockett, 12 Okla. 57, 69 Pac. 869 (1902); Banks v. Wilson, 1 Alaska 241 (1901). See 20 R. C. L., *New Trial* § 82 (1918); Note, Ann. Cas. 1914B 1235.

judgment of his predecessor during the same term of court. This is based upon a construction of an Indiana supreme court rule,[13] which apparently was intended to apply only to a motion for a new trial and certification of bills of exceptions, the rule expressly providing that those two matters are to be ruled upon by the judge who presides at the trial.[14] There is a distinction to be drawn, however, between a motion for a new trial and a motion to vacate judgment. The former is narrower in that while it requires an intimate knowledge by the judge of the facts and evidence as presented during the trial in order to rule intelligently, it is limited to questions arising during the trial.[15] The latter is broader because it might be granted for errors appearing of record but which accrued at some stage of the proceeding either before or after the trial.[16] Since the court, as distinguished from the judge, has the inherent power to vacate the judgment during the same term,[17] it would seem to follow that the succeeding judge could also do so.[18]

Due to the unique situation prevailing when the term of court extends beyond the term of office of the presiding judge, it would seem to be the better practice to follow the established rule which recognizes the power of the courts to modify, amend or vacate their judgments during the term at which they were rendered, and accordingly allows the successor to the office to rule on a motion to vacate a judgment. It would seem that such a rule would be more conducive to the expeditious and economic handling of the business of the court.[19]

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13. See note 1 *supra;* Ploughe v. Indianapolis Rys., 222 Ind. 125, 51 N. E. 2d 626, 627 (1943); see IND. ATT'Y GEN. OPS. 152 (1943), cited in the principal case, 85 N. E. 2d at 261.

14. Ploughe v. Indianapolis Rys., 222 Ind. 125, 51 N. E. 2d 626, 627 (1943) ("the rule 1-9 doesn't extend the term of the retiring judge, but makes him in effect a special judge if he is called upon to approve a bill of exceptions or to rule upon a motion for a new trial. *It gives the retiring judge no power beyond this*") (italics supplied).

15. See SHIPMAN, COMMON LAW PLEADING §§ 335, 336, 535 (3d ed. 1923); 39 AM. JUR., *New Trial* § 2 (1942).

16. See 31 AM. JUR., *Judgments* §§ 734 *et seq.* (1940). Thus in the instant case the motion to vacate judgment was made on the ground that the preceding circuit judge had ordered the entry of judgment in the court's minute book on a day when a judge *pro tempore* was sitting. The authority of the circuit judge to make such an order would seem to be a matter which could properly be disposed of by the succeeding judge in acting upon the motion to vacate.

17. See note 9 *supra;* Carey v. District Court, 226 Iowa 717, 285 N. W. 236 (1939); McGowan v. State, 189 Miss. 450, 196 So. 222 (1940).

18. The Del-Mar-Va, 56 F. Supp. 743 (E. D. Va. 1944); Barton v. Burbank, 188 La. 997, 71 So. 134 (1916); Milam v. Young, 35 So. 2d 67 (Miss. 1948); State *ex rel.* Ruth v. Hoffman, 82 Ohio App. 266, 80 N. E. 2d 235 (1947); State v. McClain, 186 Tenn. 401, 210 S. W. 2d 680 (1948). *Contra:* National Guard Training School v. State, 55 N. D. 897, 215 N. W. 476 (1927); Henderson v. Soash, 157 S. W. 2d 161 (Tex. Civ. App. 1941). The power of vacating judgment is a power of the court and not of the judge as an individual. See note 2 *supra;* Dep't of Public Works & Bldg. v. Legg, 374 Ill. 306, 29 N. E. 2d 515 (1940) (change of judges during term does not divest court of control over its records during the term nor affect the court's power to act but merely changes the individual who exercises the court's functions); Logan v. Columbia Canning Co., 2 Alaska 557 (1905).

19. See dissenting opinion of Young, J., in the instant case, 85 N. E. 2d at 259.

NEGLIGENCE—VIOLATION OF STATUTE BY MINOR—CONFLICT OF DOCTRINE OF NEGLIGENCE PER SE AND DOCTRINE REQUIRING LOWER STANDARD OF CARE FOR MINORS

Plaintiff's 12-year-old son while riding his bicycle failed to give the signal required by statute [1] as he crossed the highway. He was struck and killed by an automobile driven by defendant's servant. Defendant appealed from a judgment for plaintiff, alleging error in the court's refusal to instruct the jury that the boy's violation of the statute was contributory negligence per se, barring recovery. *Held,* judgment affirmed; a minor from 7 to 14 who violates a statute is not contributorily negligent unless he possesses "the discretion, intelligence and sensitiveness to danger which the ordinary child possesses when he is 14 years of age." [2] *Alabama Power Co. v. Bowers,* 39 So. 2d 402 (Ala. 1949).

The desire of modern courts to protect those too young to appreciate fully the consequences of their acts is manifested in many fields,[3] of which contributory negligence is one of the most prominent.[4] Courts have consistently refused to apply the adult standards of care where the injured party was a minor.[5] By applying various other standards requiring a lesser degree of care, they have made allowance for the incapacities and indiscretions of youth.[6]

The doctrine that violation of a criminal statute is negligence (or contributory negligence) per se is supported by the great weight of authority.[7] The theoretical basis of this doctrine is that, since the reasonably prudent

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1. ALA. CODE ANN., tit. 36, § 17 (1940).
2. 39 So. 2d at 404.
3. In at least one-third of the jurisdictions, for example, including the federal courts, where a minor employed in violation of the statute is injured the defenses of contributory negligence and assumption of risks are not available to the employer. Armstrong, *Child Labor Laws and Contributory Negligence,* 20 TENN. L. REV. 360, 368 (1948). As to special consideration given minors in other fields see 1 WILLISTON, CONTRACTS §§ 226, 232 (Rev. ed. 1938) (voidability of infant's contracts); PROSSER, TORTS 618 (1941) (attractive nuisance doctrine); 1 BISHOP, CRIMINAL LAW § 368 (1923) (presumptions of minor's incapacity to commit crime).
4. See Note, 174 A. L. R. 1080 (1948).
5. Frazier v. Northern Pac. Ry., 28 F. Supp. 20 (D. C. Idaho 1939); Ross v. Russell, 48 A. 2d 403 (Me. 1946); Marion County v. Cantrell, 166 Tenn. 358, 61 S. W. 2d 477 (1933); see Shulman, *The Standard of Care Required of Children,* 37 YALE L. J. 618 (1928).
6. Dixon v. Stringer, 277 Ky. 347, 126 S. W. 2d 448 (1939) (rebuttable presumption of incapacity); McNamara v. Cohen, 184 Misc. 872, 55 N. Y. S. 2d 600 (Sup. Ct. 1944) (only such care as child's mental and physical capacity enables him to exercise); Kriens v. McMillan, 42 S. D. 285, 173 N. W. 731 (1919) (only such care as children of same age and capacity ordinarily exercise); see PROSSER, TORTS § 36 (1941); Wilderman, *The Question of an Infant's Ability to Be Guilty of Contributory Negligence,* 10 IND. L. J. 427 (1935).
7. Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925); Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543 (1889); Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920); see RESTATEMENT, TORTS §§ 286, 287; PROSSER, TORTS § 39 (1941). *But cf.* Rowley v. Cedar Rapids, 203 Iowa 1245, 212 N. W. 158 (1927) (prima facie negligence); Kenyon v. Hathaway, 274 Mass. 47, 174 N. E. 463 (1931) (evidence of negligence); Landry v. Hubert, 101 Vt. 111, 141 Atl. 593 (1928) (rebuttable presumption of negligence).

man would not violate the law, one who does violate it must necessarily be negligent.[8] This use of statutory violation as a basis of liability instead of the criterion of the reasonably prudent man results, in some instances, in imposing a kind of liability without fault.[9] Consequently, courts have recognized exceptions to the doctrine that violation of a statute is negligence per se, as in cases where the violation occurred in an emergency, despite the fact that the statute provided for no such exceptions.[10]

When an infant has violated a statute and contributed to his injury, this doctrine of negligence per se inevitably clashes with the courts' desire to protect infants. In this situation, courts are not harmonious in their opinions as to which shall prevail.[11] The majority opinion, and seemingly the better rule, is that the incapacity of the injured minor must be taken into consideration, notwithstanding the statutory violation.[12] It is extremely doubtful that the courts are desirous of substituting strict liability for the criterion of the reasonably prudent person. The exceptions adopted by the courts show their distaste for any such doctrine of strict liability, and the further exception in cases involving injured minors is far from unique.[13]

In recent years, the whole theory of contributory negligence has been subjected to greater and greater restrictions, some imposed by legislatures,[14] others by the courts themselves.[15] Thus the refusal of the courts to rule that

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8. PROSSER, TORTS 265 (1941); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 322 (1914).

9. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21, 28 (1949).

10. Giancarlo v. Karabanowski, 124 Conn. 223, 198 Atl. 752 (1938) (emergency); Bissell v. Seattle Vancouver Motor Freight, Ltd., 25 Wash. 2d 68, 168 P. 2d 390 (1946) (justifiable breach); Baldwin v. Washington Motor Coach Co., 196 Wash. 117, 82 P. 2d 131 (1938) ("technical breach"); *cf.* Cantwell v. Cremins, 247 Mo. 836, 149 S. W. 2d 343 (1941); see Morris, *supra* note 9 at 32, 33. For collection of cases recognizing exceptions to doctrine that violation of statute is negligence per se, see 27 TEXAS L. REV. 866 (1949).

11. For authority supporting the proposition that the violation of a statute by an infant is negligence per se, see Sagor v. Joseph Burnett Co., 122 Conn. 447, 190 Atl. 258 (1937); Patrican v. Garvey, 287 Mass. 62, 190 N. E. 9 (1934); Jackson v. Lomas, 60 Mont. 8, 198 Pac. 434 (1921); D'Ambrosio v. Philadelphia, 354 Pa. 403, 47 A. 2d 256 (1946). That the violation of a statute by an infant is not negligence per se, see Jones v. Strickland, 201 Ala. 138, 77 So. 562 (1917); Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 102 P. 2d 422 (1940); Locklin v. Fisher, 264 App. Div. 452, 36 N. Y. S. 2d 162 (3d Dep't 1942); Michalsky v. Gaertner, 53 Ohio App. 341, 5 N. E. 2d 181 (1935); Von Saxe v. Barnett, 125 Wash. 639, 217 Pac. 62 (1923).

12. See Note, 174 A. L. R. 1170 (1948).

13. "If a constitutional statute, properly interpreted, enacts unwise criminal responsibility, the courts may be bound to convict in accordance with the statute. But when a damage suit judge refuses to rule that breach of a criminal statute is negligence (or evidence of negligence) he is not disobeying the legislature's command, for the legislature has ordered criminal responsibility—not civil liability." Morris, *supra* note 9, at 39.

14. Several states have adopted the doctrine of comparative negligence. *E.g.*, MISS. CODE ANN. § 1454 (1942). See Mole and Wilson, *A Study of Comparative Negligence*, 17 CORNELL L. Q. 333, 604 (1932); Note, 114 A. L. R. 830 (1938). Many jurisdictions have abolished the defense of contributory negligence in certain types of situations. *E.g.*, Federal Employers Liability Act, 35 STAT. 66 (1908), 45 U. S. C. A. § 53 (1943); ALA. CODE ANN., tit. 26, § 254 (1940).

15. For a discussion of the courts' inclination to extend the doctrine of last clear chance see DeMuth, *Derogation of the Common-Law Rule of Contributory Negligence*,

a child's violation of a statute is contributory negligence per se is definitely in line with the trend of modern courts to curtail the doctrine of contributory negligence.

PLEADING—INJURIES TO PERSON AND PROPERTY FROM SAME ACCIDENT—SEPARATION OF CAUSES OF ACTION

Plaintiff suffered both personal injury and property damage in an automobile collision caused by defendant's negligence. He recovered for damages to his automobile, and then brought a separate action for personal injuries. Defendant pleaded the former judgment as a bar to recovery. *Held* (5-2), the former recovery for property damage is no bar to recovery for personal injuries. *Carter v. Hinkle,* 52 S. E. 2d 135 (Va. 1949).

The cases are in direct conflict as to how many causes of action exist when one by the same negligent act injures both the person and the property of another. A majority of American jurisdictions hold that only one cause of action results.[1] The English courts [2] and a minority of American courts [3] hold that there are two separate causes of action for which separate actions lie.

The conflict of authority seems to arise from contrary views as to the nature of a cause of action.[4] The courts which maintain that only one cause of action arises emphasize the fact that the defendant's wrongful act was single. They conclude that the cause of action is therefore single, with the several injuries merely different items of damage proceeding from the same wrong.[5] The English or minority view is that the negligent act of the defendant in itself constitutes no cause of action, but becomes an actionable wrong only because of the damage which it causes. It is said that defendant has invaded two rights of the plaintiff—personal rights and property rights—for which two distinct causes of action lie.[6]

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7 ROCKY MT. L. REV. 161 (1935); see generally, Leflar, *The Declining Defense of Contributory Negligence,* 1 ARK. L. REV. 1 (1947).

1. *E.g.,* Dearden v. Hey, 304 Mass. 659, 24 N. E. 2d 644, 127 A. L. R. 1077 (1939); King v. Chicago, M. & St. P. Ry., 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161 (1900); Elliott v. Mosgrove, 162 Ore. 540, 93 P. 2d 1070 (1939); Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 34 S. W. 2d 1059 (1931); Larzo v. Swift & Co., 129 W. Va. 436, 40 S. E. 2d 811 (1946).

2. Brunsden v. Humphrey, 14 Q. B. D. 141 (1884).

3. Clancey v. McBride, 338 Ill. 35, 169 N. E. 729 (1930); Ochs v. Public Service Ry., 81 N. J. L. 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D 255 (1911); Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176 (1902); Watson v. Texas & Pac. Ry., 8 Tex. Civ. App. 144, 27 S. W. 924 (1894).

4. For discussion on distinguishing "right," "cause," and "object" of action, see opinion of Prentice, J., in *Winchester Repeating Arms Co. v. New York, N. H. & H. R. R.* (Conn. Super. Ct. 1898), reported in STEPHENS, PLEADING 497, 500 (2d ed., Andrews, 1901).

5. Doran v. Cohen, 147 Mass. 342, 17 N. E. 647 (1888); Von Fragstein v. Windler, 2 Mo. App. 598 (1876); Mobile & Ohio R. R. v. Matthews, 115 Tenn. 172, 91 S. W. 194 (1905).

6. Brunsden v. Humphrey, 14 Q. B. D. 141, 145 (1884). The primary right and duty and the delict or wrong combined constitute the cause of action. POMEROY, CODE

The courts taking the minority view usually cite three reasons why there should be two causes of action: (1) different periods of limitation generally apply; (2) plaintiff's action for injury to his person, in the absence of statute, would abate or be lost by his death before a recovery,[7] whereas the action for injury to property survives; and (3) the plaintiff can assign his right of action for injury to his property, while he cannot assign that for injury to his person.[8]

That the two claims may be different as to periods of limitation and assignability does not seem to be a compelling argument for the minority view. If the period of limitation on one claim has elapsed, the plaintiff may still have a partial recovery in states adopting the one-cause-of-action theory.[9] In case of death, a revival of the action will be permitted in so far as it relates to property.[10] In the case of a partial assignment, suit may be brought by the assignee without joining the assignor unless the defendant objects.[11] And to compel a plaintiff who has not assigned any part of a cause of action which is partly assignable to sue for his entire demand in a single action is no greater hardship than to compel him to bring suit upon his entire demand if the whole cause of action is assignable.[12]

The majority rule finds its justification in trial convenience and the policy against multiplicity of suits. Modern codes of procedure have been streamlined by casting aside antiquated niceties of common law pleading so that the claims of parties may be disposed of in one suit.[13] To achieve this end, Judge Clark says that "cause of action" should be defined as "an aggregate of operative facts" upon which the plaintiff's suit is brought.[14] The old writ system of the common law has been abolished, and only one form of action is recognized under the codes. The complaint states the facts of the event or "transaction" out of which the plaintiff's claim arises, and specifies the remedy he seeks. A single "transaction" or unit of events that may logically be grouped together in one proceeding should constitute but one cause of action.[15] The

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REMEDIES § 347 (4th ed. 1904); Note, 12 CALIF. L. REV. 303 (1924). For criticism of the definition, see PHILLIPS, CODE PLEADING § 189 (2d ed. 1932); CLARK, CODE PLEADING 132 (2d ed. 1947).

7. HARPER, TORTS § 301 (1933); McCORMICK, DAMAGES 335 (1935).

8. *See* White Sewing Machine Co. v. Morrison, 232 Mass. 387, 388, 122 N. E. 291 (1919); STEPHENS, PLEADING § 21 (2d ed., Andrews, 1901).

9. See CLARK, CODE PLEADING 489 (2d ed. 1947); 25 ILL. L. REV. 219, 221 (1930).

10. See 32 YALE L. J. 190, 191 (1922); *cf.* Reilly v. Sicilian Asphalt Co., 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176 (1902).

11. Porter v. Lane Construction Corp., 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dep't 1925), *aff'd,* 244 N. Y. 523, 155 N. E. 881 (1927); CLARK, CODE PLEADING 168-71 (2d ed. 1947).

12. See 32 YALE L. J. 190, 191 (1922).

13. The compulsory counterclaim as required by the Federal Rules of Civil Procedure is a good example of the trend of courts to avoid multiplicity of suits and to streamline trial procedure as much as practicable. FED. R. CIV. P. 13(a).

14. CLARK, CODE PLEADING 137 (2d ed. 1947); for recent authorities discussing and criticizing Clark's view, see *id.* at 141 n.175.

15. Elliott v. Mosgrove, 162 Ore. 540, 93 P. 2d 1070 (1939).

witnesses will need to testify only once. Time and money will be saved for everyone concerned. The plaintiff suffers no prejudice by bringing both claims in one action. "A rule leading to two lawsuits where one will accomplish the same results is not to be favored." [16] Of course, this concept of one "transaction" should be limited to a set of facts which a lay jury may grasp and act upon in one action. No difficulty is seen in having the jury assess two items of damage where both have arisen out of the same transaction or unit of events.

The great majority of the courts are in accord in holding that there is only one cause of action for injury to both person and property; the instant case represents a departure from the modern trend.

TORTS—AUTOMOBILE GUEST STATUTES—DEMAND TO BE RELEASED FROM CAR AS TERMINATION OF GUEST STATUS

Plaintiff accepted defendant's invitation to ride in his automobile. She discovered after the trip had begun that defendant was intoxicated and demanded to be let out. He ignored her demands. An accident occurred, due to defendant's reckless driving, and plaintiff was injured. A Washington statute [1] limits an invited guest's right of recovery to a showing of intentional injury. *Held* (6-3), judgment of dismissal affirmed; "when [plaintiff] became a guest . . . , she became such for the entire journey and did not terminate the host-guest relationship by her demands." *Akins v. Hemphill,* 207 P. 2d 195 (Wash. 1949).

At common law a driver of an automobile is under a duty to his gnest to use ordinary care in operating the car,[2] though some states have held that liability exists only for gross negligence.[3] Today a majority of states have passed statutes limiting in various degrees the common law duty and restricting the right of recovery.[4] In these states, the problem of identifying

16. CLARK, CODE PLEADING 489 (2d ed. 1947); RESTATEMENT, JUDGMENTS § 62, comments *a, e* (1942).

1. "No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator. . . ." WASH. CODE § 295-95 (Pierce 1943).

2. PROSSER, TORTS 633 (1941). The guest however "assumes the risk, not only of defects in the car or any incompetence or active misconduct of the driver which are known or obvious to him, but likewise of concealed defects which are unknown to the driver." *Ibid.*

3. Epps v. Parrish, 26 Ga. App. 399, 106 S. E. 297 (1921); Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C 264, Ann. Cas. 1918B 1088 (1917). The Washington courts followed this rule of gross negligence before the enactment of the host-guest statute in that state. Heiman v. Kloizner, 139 Wash. 655, 247 Pac. 1034 (1926).

4. These statutes employ various terms, limiting the guest's right of recovery to one or more of the following: gross negligence, willful and wanton misconduct, reck-

the relationship between the parties often arises,[5] since the statute can be invoked only if the host-guest relationship exists. The statutes themselves specifically exempt paying passengers from their scope of operation, but of course this division does not account for all possible classes of occupants.[6] For example, the occupant may be a prospective customer, a joint adventurer, an employee, a trespasser, or even an involuntary rider.[7]

Whatever relationship may exist between an occupant and the owner or driver of an automobile, that relationship is based upon specific facts. It is reasonable to suppose that if the facts changed during the course of a journey, the relationship might also change. Thus one who began a trip as a non-paying guest has been held to have terminated that relationship when he took control of the driving with the consent of the original driver.[8] Similarly, a guest has been held to have terminated the relationship when she demanded to be let out and the driver failed to comply.[9]

But under the statute as interpreted by the Washington court no change is permissible.[10] Anyone entering the guest relationship forfeits all right of control over that relationship. The process of reasoning which produced this rule is complex. The court has repeatedly maintained that the purpose of the legislature in passing the statute was to prevent collusion in host-guest cases where the host was insured.[11] Any interpretation of the words of the statute

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lessness, intoxication, and intentional injury. For collection of many of these statutes, see MALCOM, AUTOMOBILE GUEST LAW (1937); Corish, *The Automobile Guest*, 14 B. U. L. REV. 728 (1934); Hodges, *The Automobile Guest Statutes*, 12 TEXAS L. REV. 303 (1934); Weber, *Guest Statutes*, 11 U. OF CIN. L. REV. 24 (1937); Notes, 18 CORNELL L. Q. 621 (1933), 35 MICH. L. REV. 804 (1937).

5. See Notes, 82 A. L. R. 1365 (1933), 95 A. L. R. 1180 (1935) for collection of cases.

6. "Not to be a guest is not ipso facto to be a passenger for hire. Clearly, a person may be without the category of guest and yet not be within that of a passenger for hire." Smith v. Clute, 277 N. Y. 407, 14 N. E. 2d 455, 458 (1938) (interpreting a Montana guest statute).

7. See Connett v. Winget, 301 Ill. App. 533, 34 N. E. 2d 878 (1941) (prospective customer); Murphy v. Keating, 204 Minn. 269, 283 N. W. 389 (1939) (joint adventurer); Dobbs v. Sugioka, 117 Colo. 218, 185 P. 2d 784 (1947) (secretary); Garrett v. Hammack, 162 Va. 42, 173 S. E. 535 (1934) (employee); McGhee v. Birmingham News Co., 206 Ala. 487, 90 So. 492 (1921) (trespasser); Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P. 2d 478 (1935) (involuntary rider). For collection of cases, see 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW §§ 2291-96 (Perm. ed. 1946); 18 WORDS AND PHRASES 839 *et seq.* (Perm. ed. 1940).

8. Braxton v. Flippo, 183 Va. 839, 33 S. E. 2d 757 (1945). Assisting in driving is not of itself inconsistent with the guest relationship, but the facts here showed that the defendant decided to test the plaintiff's driving ability with the view of hiring him as a regular driver.

9. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S. E. 116 (1929). *But cf.* Vance v. Grohe, 223 Iowa 1109, 274 N. W. 902, 116 A. L. R. 332 (1937) (opposite holding, undoubtedly based on vagueness of the evidence rather than the actual insufficiency of a demand as a means of terminating the guest relationship).

10. This rule was first announced in Taylor v. Taug, 17 Wash. 2d 533, 136 P. 2d 176 (1943). In that case, the material facts differed from those of the principal case only in that plaintiff knew at the time the journey began that the defendant had been drinking. The discussion of assumption of risk and contributory negligence in that case, however, are not relevant to the principal case, where the court acknowledges the absence of both assumption of risk and contributory negligence.

11. Shea v. Olson, 185 Wash. 143, 53 P. 2d 615, 111 A. L. R. 998 (1936); Carufel

which would offer an opportunity for collusion would defeat the purpose of the statute. Therefore, the court reasons, the legislature in using the term "guest" must not have intended that the relationship could terminate so easily as by a mere demand of the guest that it terminate.

The Washington statute itself is harsher than the host-guest statutes of other states, in that it limits recovery to cases involving intentional wrongs.[12] But the interpretation given it by the court in the instant case is harsher still,[13] for its effect is to make practically impossible the termination of the host-guest relationship.[14]

TORTS—DAMAGE FROM BLASTING CAUSED BY CONCUSSION —IMPOSITION OF ABSOLUTE LIABILITY

Defendant conducted blasting operations in leveling a tract of land. Plaintiff brought an action of trespass for damages to his dwelling caused solely by concussion and vibration. *Held,* judgment for plaintiff affirmed;

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v. Davis, 188 Wash. 156, 61 P. 2d 1005 (1936); Parker v. Taylor, 196 Wash. 22, 81 P. 2d 806 (1938); Taylor v. Taug, 17 Wash. 2d 533, 136 P. 2d 176 (1943). But see White, *The Liability of an Automobile Driver to a Non-Paying Passenger,* 20 VA. L. REV. 326 (1934), attacking the collusion theory as a basis for upholding host-guest statutes.

12. The Washington statute is apparently the only one at present which limits recovery to intentional injury. A similar Kentucky statute was declared unconstitutional and has since been repealed. Ludwig v. Johnson, 243 Ky. 534, 49 S. W. 2d 347 (1932). Statutes in Delaware and Oregon attempting to remove all right of recovery have also been repealed after having been held unconstitutional. Coleman v. Rhodes, 35 Del. 120, 159 Atl. 649 (1932); Stewart v. Houk, 127 Ore. 589, 271 Pac. 998 (1928). For general discussion of constitutionality, see MALCOM, AUTOMOBILE GUEST LAW §§ 12-20 (1937).

13. It is worthy of note that Judge Grady, who wrote the majority opinion in the instant case, dissented strongly when the rule that a guest remains such for the entire journey was first announced in Taylor v. Taug, 17 Wash. 2d 533, 136 P. 2d 176 (1943), *supra,* note 10. In view of his discussion in that case, the language used by him in the instant case is significant: "The application of the statute and our construction of it may seem harsh and unjust. . . . Any appeal from the rigor of the statute must be addressed to its creator, the legislature, rather than to the courts." 207 P. 2d at 197.

14. Several alternative approaches to the plaintiff's right of recovery might be suggested.

(1) Suppose she had brought an action for false imprisonment. Would the Washington court have held that there was no duty on the defendant, and consequently no breach of duty, to stop the car when she requested that he do so? One who voluntarily enters a confinement knowing that he may not be released in accordance with his exact wishes cannot complain. Herd v. Weardale Steel, Coal & Coke Co., [1913] 3 K. B. 771, [1915] A. C. 67 (plaintiff went down into a mine, knowing that the hoist would not be operated again until a definite hour; recovery denied). But the relative ease of stopping an automobile can hardly be deemed equivalent to the inconvenience of operating a hoist. Even if the action were permitted, would the Washington court allow recovery for injuries sustained in the accident, as part of the damages suffered by plaintiff because of the imprisonment? *Cf.* Cieplinski v. Severn, 269 Mass. 261, 168 N. E. 722 (1929) (false imprisonment in a truck; recovery allowed for injuries sustained when plaintiff jumped from the truck).

(2) Suppose that plaintiff had brought the present action, alleging that fraud on defendant's part or her own mistake as to his sobriety rendered her consent voidable, so that her demand to be let out rendered her agreement to enter the guest relationship void *ab initio.* Would the Washington court allow recovery? *Cf.* Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P. 2d 478 (1935) (involuntary occupant held not a guest; recovery allowed upon a showing of negligence, whereas the gnest statute required willful misconduct or intoxication).

damages resulting from concussion caused by blasting may be recovered on the basis of absolute liability. *Federoff v. Harrison Const. Co.*, 362 Pa. 181, 66 A. 2d 817 (1949).

For a direct invasion of real property, the common law form of action was trespass. Since each form of action had substantially its own substantive law, and the law of trespass imposed strict liability, the courts found no difficulty in holding a blaster strictly liable for damage caused by debris being cast on the land of another.[1]

If, however, blasting damage is caused solely by concussion or vibration, the courts are in conflict as to the basis of liability. A minority of courts follow the lead of the New York Court in *Booth v. Rome, W. & O. T. R. R.*,[2] and require fault on the part of the blaster before liability will be imposed.[3] The damage is held not to involve a "technical trespass" or an invasion of the land [4] and is therefore "consequential" as distinguished from "direct." [5] Suits on consequential damage were in trespass on the case, and case required fault on the part of the defendant—either intent or negligence. This distinction between trespass and case is the technical basis for the minority rule.

This distinction has been disregarded by a majority of the courts, which hold the blaster strictly liable, even though the damage was caused solely by concussion.[6] It has been suggested that an understanding of the fundamental

1. Bessemer Coal, I. & L. Co. v. Doak, 152 Ala. 166, 44 So. 627, 12 L. R. A. (N. S.) 389 (1907); G. B. & L. Ry. v. Eagles, 9 Colo. 544, 13 Pac. 696 (1887); Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S. W. 974 (1917); Langhorn v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211 (1911); Jenkins v. Tomasello & Son, Inc., 286 Mass. 180, 189 N. E. 817 (1934); Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 (1848); Mulchanock v. Whitehall Cement Mfg. Co., 253 Pa. 262, 98 Atl. 554, L. R. A. 1917A 1015 (1916).

2. 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105 (1893).

3. Bessemer Coal, I. & L. Co. v. Doak, 152 Ala. 166, 44 So. 627, 12 L. R. A. (N. S.) 389 (1907); Rost v. Union Pac. Ry., 95 Kan. 713, 149 Pac. 679 (1915); Williams v. Codell Const. Co., 253 Ky. 166, 69 S. W. 2d 20, 92 A. L. R. 737 (1934); Dolham v. Peterson, 297 Mass. 479, 9 N. E. 2d 406 (1937); Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692 (1898); Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149 (1901). For a collection of cases see Note, 92 A. L. R. 744 (1934).

4. Against this it has been urged that "[p]hysical invasion of the property of another does not necessarily imply an actual breaking or entering of the plaintiff's close by the wrongdoer in person, or casting upon his premises any particular kind of missile or other particular thing or substance. The employment of force of any kind which, when so put in operation, extends its energy into the premises of another to their material injury, and renders them uninhabitable, is as much a physical invasion as if the wrongdoer had entered thereon in person and by overpowering strength had cast the owner into the street." Watson v. Miss. River Power Co., 174 Iowa 23, 156 N. W. 188, 191 (1916).

5. "This distinction, which has been denounced repeatedly as a marriage of legal technicality with scientific ignorance, has been rejected by many courts." PROSSER, TORTS 80 (1941). See Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 251 (1902); Louden v. Cincinnati, 90 Ohio St. 144, 106 N. E. 970, 974 (1914).

6. Colton v. Onderdonk, 60 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556 (1886); Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 39 L. R. A. 421 (1902); Watson v. Miss. River Power Co., 174 Iowa 23, 156 N. W. 188, L. R. A. 1916D 101 (1916); Longtin v. Persell, 30 Mont. 306, 76 Pac. 699, 65 L. R. A. 655 (1904); Hickey v. McCabe & Bihler, 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425 (1910); Aycock v. N. C. & St. L. Ry., 4 Tenn. App. 655 (1927); Gossett v. Southern Ry. Co., 115 Tenn. 376, 89 S. W. 737, 112 Am. St. Rep. 846, 1 L. R. A. (N. S.) 97 (1905);

principles of physics would show that there is a "technical trespass" or "invasion" in the concussion damage cases.[7]

Blasting is neither morally wrong nor socially blameworthy, and the risks created are incident to desirable social and economic activity.[8] The basic problem involved is where the burden of the risk should fall. The idea has developed that there are certain activities—including blasting—which are inherently dangerous to neighboring property, regardless of the care exercised in conducting them.[9] The trend,[10] resulting in the majority rule, has been to hold the one creating the risk as acting at his peril and responsible for any damage incurred within the scope of the risk involved.[11] The minority rule rests upon a policy designed to protect industry from an undue burden.[12]

The instant case is one of first impression in Pennsylvania. The court follows the majority view and adopts outright the position of the *Restatement of Torts*[13] and its conception of an "ultrahazardous activity."[14] This is in accord with the modern viewpoint that when it is necessary for one to perform an act which necessarily endangers the property of another, the former should bear the burden of the risk rather than the one endangered.[15]

TORTS—MENTAL INJURY DUE TO NEGLIGENCE—REQUIREMENT OF PHYSICAL INJURY

Robbie Minnis, a Negro woman, bought railroad tickets for Betty Lou Minnis, her two-year-old daughter, and Evelyn Minnis, her sister-in-law. Defendant's ticket agent negligently sold her tickets to Lebanon, Missouri, instead of Lilbourn, Missouri, the requested destination. Evelyn and Betty

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B. Schade Brewing Co. v. Chicago, M. & P. S. Ry., 79 Wash. 651, 140 Pac. 897 (1914); see Note, 92 A. L. R. 741 (1934). "For it can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." HOLMES, COMMON LAW 80 (1881).

7. PROSSER, TORTS 80 (1941).

8. HARPER, TORTS 408 (1933).

9. PROSSER, TORTS 451 (1941).

10. For discussion, drawing analogy to the development of Workmen's Compensation Acts, see ELDREDGE, MODERN TORT PROBLEMS 45 (1941).

11. For an interesting interpretation of the scope of the risk, see Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936 (1892).

12. See Note, 10 COL. L. REV. 465 (1910).

13. "Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." 3 RESTATEMENT, TORTS § 519 (1938).

14. "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." 3 RESTATEMENT, TORTS § 520 (1938).

15. See in general, Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 HARV. L. REV. 542 (1920); Notes, 10 COL. L. REV. 465 (1910), 19 MINN. L. REV. 322 (1935).

Lou got off at Lebanon, and, fearing that it was a town where Negroes were not allowed, stayed in the depot for 24 hours without food. Evelyn sued for her mental distress and hunger. Robbie, upon receiving a wire from Evelyn, suffered from anxiety, for which she sued. *Held,* judgment for plaintiffs affirmed as to Evelyn, reversed as to Robbie. *Thompson v. Minnis,* 202 P. 2d 981 (Okla. 1949).

In negligence actions, the courts have always been reluctant to award damages for mental suffering.[1] The reasons traditionally assigned are that such damages are speculative, difficult to assess,[2] and cannot be adequately proved.[3] Hence, there is a danger that the courts will be used for fraud.[4] There has been a gradual relaxation of this attitude, but the progress of the law in this direction has been slow and uncertain.[5]

Formerly, most courts required that the plaintiff should have received an actual physical impact before allowing him to recover damages for mental suffering.[6] By the present majority rule, it is sufficient that the mental injury be caused, accompanied, or followed by physical injury.[7] A few decisions have intimated that today not even this would be necessary.[8] Possibly no case among those requiring physical injury has gone further than the instant case, which holds that hunger meets this requirement.

The real reason for these limitations upon recovery for mental anguish is

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1. PROSSER, TORTS 211 (1941); Magruder, *Mental and Emotional Disturbances in the Law of Torts,* 49 HARV. L. REV. 1033, 1035 (1936).

2. *See* Lynch v. Knight, 9 H. L. Cas. 577, 598, 11 Eng. Rep. 854, 863 (1861); Mitchell v. Rochester Ry., 151 N. Y. 197, 45 N. E. 354, 355 (1896).

3. See PROSSER, TORTS 54 n. 10 (1941).

4. *See* Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S. W. 2d 21, 22 (1942). In addition, some of the early cases suggested that mental injury would never be a proximate result of negligence. This view cannot be sustained as a general proposition. *See* Orlo v. Connecticut Co., 128 Conn. 231, 21 A. 2d 402, 405 (1941); Smith, *Relation of Emotions to Injury and Disease; Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 198 (1944). Whether the injury was proximately caused by the defendant's negligence will depend upon all the circumstances. There will be cases in which the plaintiff will be unable to prove causation, to certain classes of which, generalizations may be applicable. One of such generalizations is dealt with below.

5. This is pointed out in Harper and McNeely, *A Re-examination of the Basis of Liability for Emotional Distress,* 1938 WIS. L. REV. 426, 428-30, and Magruder, *supra* note 1, at 1036.

6. Magruder, *supra* note 1 at 1036.

7. PROSSER, TORTS, 215 (1941); RESTATEMENT, TORTS § 313 (1934); Hallen, *Damages for Physical Injuries from Fright or Shock,* 19 VA. L. REV. 253, 255 (1933). Nervous shock is treated as physical injury for this purpose. 1 BEVEN, NEGLIGENCE 62 (4th ed. 1928). Many of these same courts allow recovery if there is accompanying damage to property or reputation. *See* McGee v. Yazoo & M. V. R. R., 206 La. 121, 19 So. 2d 21, 24 (1944); Mees v. Western Union Tel. Co., 55 F. 2d 691 (D. C. Fla. 1932).

8. *See* Nashville, C. & St. L. Ry. v. Campbell, 212 Ala. 27, 101 So. 615, 617 (1924) (actions *ex contractu* distinguished); Orlo v. Connecticut Co., 128 Conn. 231, 21 A. 2d 402, 405 (1941) (slight impact involved but apparently not essential to the result); Marcelli v. Teasley, 72 Ga. App. 421, 33 S. E. 2d 836, 838 (1945); Bell v. Great Northern Ry., 26 L. R. Ir. 428, 440 (1890). It has been asserted that this is now the law in England. POLLOCK, TORTS 39 (14th ed. 1939). Courts must be extremely cautious in the application of this rule, to guard against fictitious claims. *Id.* at 40; Orlo v. Connecticut Co., *supra.*

that they tend to guarantee the reality of the damages sustained.[9] There is no question but that mental suffering may be as real and as serious as physical suffering.[10] However, the danger of fictitious or imaginary claims is a serious objection to allowing damages for purely psychic injury. While psychiatry and mental diagnostics are making great progress, present courtroom procedure does not permit their most effective use.[11] A distinguished medico-legal writer has named this as the principal objection to redress for psychic injury and is frankly pessimistic as to the possibilities of overcoming it.[12]

On the other hand, it has been suggested that such a conservative attitude on the part of a court is of questionable wisdom.[13] As a matter of policy, it must be balanced against the common-law tradition that there should be a remedy for every substantial wrong. Logically, it would seem that the danger of fictitious claims for damages for mental anguish is no greater when the mental anguish stands alone than when it is accompanied by physical injury. In both instances, the proof of the mental suffering is subjective and intangible, and the award at best an estimate.[14] Moreover, the courts generally allow damages for intentionally caused mental suffering, whether accompanied by physical injury or not.[15] The answer to the problem may lie in the adaptation of courtroom procedure to the modern psychiatric technique of diagnostics.

The court in the instant case denied Robbie Minnis' claim upon the ground that one person cannot recover damages for anxiety over an injury negligently inflicted upon another person.[16] This conclusion is supported by most of the decisions upon the point, although they reach it in various ways.[17] Perhaps the greatest number of cases hold that unless the distress or

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9. Homans v. Boston Elevated Ry., 180 Mass. 456, 458, 62 N. E. 737 (1902) (per Holmes, C. J.).

10. *See* McGee v. Yazoo and M. V. R. R., 206 La. 121, 19 So. 2d 21, 24 (1944).

11. Smith and Solomon, *Traumatic Neuroses in Court,* 30 VA. L. REV. 87, 109, 119 (1944).

12. "The net balance of justice in the years 1880-1944 would have been greater had redress been denied in all cases of alleged injury from psychic stimuli. Harsh criticism of conservative courts has been misdirected if we reckon in terms of administrative results." Smith, *supra* note 4, at 303.

13. Orlo v. Connecticut Co., 128 Conn. 231, 21 A. 2d 402, 405 (1941). The *Restatement of Torts* originally refused to express an opinion as to what effect the difficulty of proof would have on the administrative policy of the courts. *Caveat* to § 436(2) (1934). The recent deletion of this *Caveat,* largely on the basis of the Orlo case, indicates that the editors feel that difficulty of proof is no longer a cogent reason for denying recovery as a matter of policy. See RESTATEMENT, TORTS § 436 (Supp. 1948).

14. As to the difficulties common to both classes of cases, see Smith and Solomon, *supra* note 11 *passim.*

15. The distinction made between negligent and intentional torts in this regard is pointed out in a great many cases. *See, e.g.,* Pullman Co. v. Strang, 35 Ga. App. 59, 132 S. E. 399, 405, 406 (1926); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N. E. 2d 360, 361 (1938). See also Vold, *Tort Recovery for Intentional Infliction of Emotional Distress,* 18 NEB. L. BULL. 222-245 (1939), for a discussion of fact problems and bases of liability for intentional invasions of mental security. And see Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939).

16. 202 P. 2d at 985.

17. Some courts place it upon the alternative ground suggested in the principal case, that no physical injury verified the damage. Nuckles v. Tenn. Elec. Power Co.,

fright of the plaintiff is caused by danger of bodily injury to himself, it is not proximately caused by the defendant's negligence.[18] The reason stated in other cases is that the defendant is under no duty to anticipate injury to the plaintiff unless it can be foreseen that one so situated is likely to be physically endangered by his conduct.[19] An English court has imposed a broader liability, holding that damages for anxiety over a negligent injury to her child might be recovered by a mother who was apparently not herself endangered.[20] Although this case has since been limited in its application,[21] it may foreshadow a more liberal rule, especially where the plaintiff is the husband, wife, parent, or child of the victim of defendant's negligence.[22]

Although its reasoning is not very clear, the principal case could be an indication that physical injury is no longer a prerequisite to recovery of damages for mental suffering. On the other hand, although the point is not made by the court, the decision may perhaps be explained by the carrier-passenger relationship involved; numerous decisions hold carriers liable to passengers for breaches of duty resulting in mental suffering alone[23]—as in the case of verbal abuse by an employee of the carrier.[24] If the holding is so explained, little change from existing law is indicated.

TRADE REGULATION—CLAYTON ANTI-TRUST ACT—TEST OF LEGALITY OF "REQUIREMENTS" CONTRACTS

Defendant maintained with its independent dealers so-called "requirements" or "exclusive supply" contracts which prevented their selling products of defendant's competitors. In 1946 of all gasoline sold in seven western states, defendant had 23% of the total, 6.7% of the total being through "requirements" contracts. In that year defendant and its six leading competitors—all using "requirements" contracts—made 65.5% of the total sales in the area; neither defendant's sales nor the sales of the group as a whole had substantially increased during the past decade. In 1947 defendant made 16% of the gasoline sales in the area through "requirements" contracts cover-

155 Tenn. 611, 613, 299 S. W. 775, 776 (1927). This reasoning would not apply if the plaintiff has suffered nervous shock or other physical consequences.

18. *See* Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 336 (1905); Pacific Express Co. v. Black, 8 Tex. Civ. App. 363, 27 S. W. 830, 831 (1894); Dulieu v. White & Sons, [1901] 2 K. B. 669, 682.

19. *See* Waube v. Warrington, 216 Wis. 603, 258 N. W. 497, 498 (1935), citing with approval, Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

20. Hambrook v. Stokes Bros., [1925] 1 K. B. 141, 151 (C. A.).

21. Hay or Bourhill v. Young, [1943] A. C. 92, 100, 103, 107; *cf.* Chester v. Council of Waverly, 62 C. L. R. 1 (Aust. 1939).

22. PROSSER, TORTS 219, cases cited 218 n. 84 (1941).

23. *See* Nashville, C. & St. L. Ry. v. Campbell, 212 Ala. 27, 101 So. 615, 617 (1924); Pullman Palace-Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. 96, 98 (1894).

24. See, *e.g.*, Bleeker v. Colorado & S. Ry., 50 Colo. 140, 114 Pac. 481, 33 L. R. A. (N.S.) 386 (1911) (verbal abuse by carrier's servants); Gillespie v. Brooklyn Hts. R. R., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618 (1904) (same).

ing about 8000 outlets. Action by the United States under the Clayton Act to have the "requirements" contracts declared invalid and defendant enjoined from enforcing them. Defendant appeals an adverse judgment in the lower court. *Held* (5-4),[1] affirmed; the requirement of proving that the effect of the contracts may be to substantially lessen competition is met by proof that they foreclose competitors from a substantial number of retail dealers, and evidence of the reasonableness of the contracts in solving difficult marketing problems is immaterial. *Standard Oil Co. of California v. United States,* 69 Sup. Ct. 1051 (1949).

Under section 3 of the Clayton Act,[2] all contracts restricting the right of the buyer to purchase goods from competitors of the seller[3] are invalid if their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In earlier Supreme Court cases, the contracts involved were found to be decisively on one side or the other of the line, either clearly tending toward monopoly or clearly not calculated to substantially lessen competition.[4] In 1947 it was held in *International Salt Co. v. United States,*[5] a case involving "tying" contracts, that proof that competitors were foreclosed from a substantial portion of the market brought the contracts within the prohibition of the Clayton Act. The Court reasoned in the instant case that the rule announced in the *International Salt Co.* case should control here unless the difference between "tying" and "requirements" contracts required that the test of reasonableness be applied to the latter. And the Court found that if the test of "reasonableness" were applied, only those contracts would be unlawful which were unlawful under the older Sherman Act,[6] and that the intent of Congress in enacting the Clayton Act

1. Majority opinion by Frankfurter, J; dissents by Jackson, J. (Vinson, C. J. & Burton, J., concurring) and Douglas, J.

2. 38 STAT. 731 (1914), 15 U. S. C. A. § 14 (1946).

3. Included in this category is the "requirements" contract, in which the buyer promises to buy all of his business requirements from the seller, thereby impliedly promising not to buy from anyone else; the "output" contract, in which the seller (manufacturer) promises to sell his entire output to the buyer; and the "tying" contract, where one product is sold or leased only on condition that the buyer or lessee buy all his requirements of another product from the seller. The best example of an illegal "tying" contract is the case in which computing machines were leased only on condition that the lessee promise to buy all of the cards used in the machines from the lessor. International Business Machines Corp. v. United States, 298 U. S. 131, 56 Sup. Ct. 701, 80 L. Ed. 1085 (1936).

4. Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 61 Sup. Ct. 703, 85 L. Ed. 949 (1941); Pick Manufacturing Co. v. General Motors Corp., 299 U. S. 3, 57 Sup. Ct. 1, 81 L. Ed. 4 (1936).

5. 332 U. S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947).

6. 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. A. § 1 (1946). The common law condemned contracts which had or might have the tendency to restrain trade or to create a monopoly, on the theory that competition is the life of trade and that any general restraint of trade having the effect of stifling competition is injurious to the public. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 46 L. R. A. 122 (6th Cir. 1898); see 36 AM. JUR., *Monopolies,* §§ 5, 6 (1941). Under the common law, a contract was made illegal if it was one of a large number of contracts through which the seller exerted control over commerce, although each contract, taken alone, was lawful. Perhaps in view of this and the principle that a freely con-

was to make some contracts unlawful which would have been lawful under the Sherman Act. The Court said that after Congress specifically prohibited "requirements" contracts, it could not have intended to reinstate the same test of legality which was used under the Sherman Act. Three of the justices, in an opinion written by Mr. Justice Jackson, dissented on the ground that the Court's holding was in effect a holding that the contracts are illegal *per se*, and said that the defendant should at least have been allowed to introduce evidence showing what the probable effect of the contracts would be.[7] Mr. Justice Douglas, in a separate dissent, stated that the contracts did not suppress competition, but were necessary to promote competition, and that the holding would force defendant to buy out independent dealers, thus leading to a monopoly which the act was designed to prevent.[8]

In order to prove that the effect of the contracts "may be to substantially lessen competition," it is not necessary to show with absolute certainty that competition will actually be substantially lessened. But it is not sufficient to show that there is a mere remote possibility of that result. It is sufficient, however, to show that if all of the powers granted to the seller under a substantial number of the contracts were exercised, the illegal result would probably follow.[9] The most natural construction of the clause is that if the effect of nullifying the contracts would be to substantially increase competition, the contracts are illegal. Under the Sherman Act, "requirements" contracts which substantially lessened competition were unlawful only if they were unreasonable or economically injurious to the public.[10] Congress' intent

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tracting party should be bound by his contract unless he clearly shows it to be illegal, a bare showing of the existence of a large number of contracts which had the necessary result of foreclosing competitors from a substantial portion of the market, was not sufficient to prove illegality. The courts therefore applied tests of reasonableness of the contract as between the parties and the actual effect of the contract on public interests. The Sherman Act, in much the same language as the common law, invalidated contracts in restraint of trade, thus extending the common law rule to interstate commerce. United States v. Addyston Pipe & Steel Co., *supra;* see 36 AM. JUR., *Monopolies* § 142 (1941).

7. 69 Sup. Ct. at 1063.

8. *Id.* at 1064.

9. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 42 Sup. Ct. 360, 66 L. Ed. 653 (1922); Pearsall Butter Co. v. Federal Trade Commission, 292 Fed. 720 (7th Cir. 1923); see 36 AM. JUR., *Monopolies* § 5 (1941); Note, 4 MINN. L. REV. 287 (1920).

10. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 46 L. R. A. 122 (6th Cir. 1898). Some of the considerations in determining reasonableness are discussed by the Court in the instant case. Some of these factors are: whether the contracts are beneficial to the buyer as well as the seller; whether competition has actually flourished under the contracts or whether it has diminished; whether the length of the term of the contract conforms to the reasonable business requirements of the seller; and whether the seller is an established competitor using the contracts to maintain his strong position, or a newcomer. 69 Sup. Ct. at 1059. See also Pearsall Butter Co. v. Federal Trade Commission, 292 Fed. 720 (7th Cir. 1923); United States v. Pullman Co., 50 F. Supp. 123 (E. D. Pa. 1943). Under these tests, "tying" contracts were usually found unlawful, as they were generally beneficial to the seller only in aiding him to establish a monopoly, and were not usually beneficial to the buyer; "requirements" contracts, on the other hand, were found to be economically beneficial, in that they assured the buyer a reliable source of supply, allowed him to avoid storage risks, aided both the buyer and seller in

in enacting the Clayton Act must have been to abolish the test of reasonableness and make *all* such contracts illegal where their effect is to substantially lessen competition.[11] In other words, Congress deemed such contracts to be injurious to the public, and intended to foreclose argument on this point. If the probable result of the contracts in the instant case is to substantially lessen competition, it is difficult to understand how the fact that they are otherwise reasonable or serve a beneficial purpose could alter their probable effect.

The cases, while discussing "reasonableness," support this conclusion in their actual holdings. In *International Business Machines Corp. v. United States,*[12] the Court held that even if the contracts were necessary to protect defendant's legitimate business interests, their effect, in foreclosing competitors from 81% of the market, was to substantially lessen competition. In *Standard Fashion Co. v. Magrane-Houston Co.,*[13] "requirements" contracts were designed to protect legitimate business interests—*i.e.,* to protect clothing designs of the guild members from "style piracy." The Court found that the effect of the contracts would be to prevent customers from buying copied designs and that they would tend to create monopolies in many small towns. It is questionable whether a possible tendency to create monopolies in an unknown number of small towns is equivalent to a probable substantial lessening of competition in interstate commerce, but doubtless the control of 40% of the country's pattern sales is a foreclosure of competitors from a substantial portion of the market, with the necessary result of substantially lessening competition.

If *all* "requirements" contracts which substantially lessen competition are made unlawful by the Clayton Act, whether or not they were entered into for the protection of legitimate business interests, the reasonableness of the contracts is immaterial in determining their legality.[14] True, the Clayton

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long-term planning, and protected both of them against price fluctuations. See Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. REV. 412 (1948).

11. The Court pointed out that the Act, as it originally passed both houses of Congress, contained an unqualified prohibition of contracts which prevented a buyer from dealing in goods of a competitor of the seller; the qualification, added by conferees, was probably to assure constitutionality. 69 Sup. Ct. at 1061; 51 CONG. REC. 16317-18 (1914). It was stated in debate that the meaning of the words "where the effect may be" is "where it is possible for the effect to be." 51 CONG. REC. 16002 (1914). The qualifying clause is also used in section 7 of the Clayton Act, which forbids any corporation engaged in commerce from buying stock in another corporation where the effect of such purchase may be to substantially lessen competition between the two corporations, 38 STAT. 730 (1914), 15 U. S. C. A. § 19 (1946). The clear meaning of this section is to make purchases which would terminate any real competition illegal, whether made for legitimate business purposes or not.

12. 298 U. S. 131, 56 Sup. Ct. 701, 80 L. Ed. 1085 (1936).

13. 258 U. S. 346, 42 Sup. Ct. 360, 66 L. Ed. 653 (1922).

14. United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243 (1912). This was a case in which six defendant companies, through "output" contracts, purchased 89.55% of the coal output in the area, the individual defendants buying from 0.54% to 44% of the total output. The case is comparable to the instant case, in

Act is a criminal statute and as such should be strictly construed; but the rule requiring strict construction of a criminal statute does not require that the statute be construed out of existence, and that would be the result of determining legality of contracts under the Clayton Act by the tests used under the Sherman Act.[15]

VENUE—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRACT RESTRICTING VENUE TO PARTICULAR STATE HELD INVALID

Plaintiff, a railroad employee who had been injured, contracted with his employer to sue only in the state in which he was injured or in which he lived. *Held* (2-1),[1] the contract is unenforceable and does not preclude plaintiff's suit in any state in which the railroad is engaged in business, as provided by the Federal Employers' Liability Act.[2] *Krenger v. Pennsylvania R. R.*, 174 F. 2d 556 (2d Cir. 1949).

The agreement of the plaintiff was made in consideration of an advancement, for living expenses, against any recovery that might afterwards be had in an action against the railroad. The contract provided for waiver of a procedural advantage afforded by the Federal Employers' Liability Act. Section 5 provides that "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any *liability* created by this chapter, shall to that extent be void."[3] Section 6 provides that the employee may sue either "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."[4] The determinative question, as recognized in the leading

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which the seven leading companies controlled 65.5% of the total sales in the area. The *Reading* case arose under the Sherman Act, where the rule of reasonableness applied. The Court, in holding the contracts unlawful, said that whether a contract is unlawful may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. 226 U. S. at 370.

15. For a discussion of the instant case from the viewpoint of general economic effect, see Frank, *The United States Supreme Court: 1948-49*, 17 U. OF CHI. L. REV. 1, 111 (1949). For comments on the opinion of the district court, United States v. Standard Oil Co., 78 F. Supp. 850 (S. D. Cal. 1948), see 49 COL. L. REV. 241 (1949); 37 GEO. L. J. 95 (1948); 1 STAN. L. REV. 169 (1949).

1. Opinion by Clark, J.; concurring opinion by L. Hand, C. J.; dissent by Swan, J.

2. 45 U. S. C. A. § 56 (1943).

3. 45 U. S. C. A. § 55 (1943) (italics supplied).

4. 45 U. S. C. A. § 56 (1943). For a legislative history of FELA and proposed amendments, see 37 GEO. L. J. 43-45 (1948); 34 A. B. A. JOUR. 457 (1948). A state court may not enjoin an employee from bringing an action in any state or federal court which is given jurisdiction by the Act. Miles v. Illinois Central R. R., 315 U. S. 698, 62 Sup. Ct. 827, 86 L. Ed. 1129 (1942) (state court); Baltimore & Ohio R. R. v. Kepner, 314 U. S. 44, 62 Sup. Ct. 6, 86 L. Ed. 28 (1941) (federal court); *cf.* 28 U. S. C. A. § 1404 (1948).

decisions on the subject,[5] is whether that *liability* from which a carrier cannot exempt itself by contract (Section 5) includes the *venue* provisions of Section 6. If that liability includes the venue of Section 6, the contract of the parties will necessarily be void.

The majority opinion in the principal case treats the word "liability" as having a meaning quite different from a mere duty to pay damages. Professor Hohfeld, in his analysis which was adopted by the American Law Institute, says that "liability" serves as the correlative of "power" and the opposite of "immunity" or "exemption," and means the liability of a defendant to have a judgment rendered against him.[6] "Thus the railroad was contracting against its liability to be sued, *i.e.,* to have its legal relations changed—adversely—in any one of several jurisdictions, in order to obtain immunity from such change except under the favorable conditions of a single chosen jurisdiction." [7]

The concurring opinion is based on the general policies given recognition by Congress in the Federal Employers' Liability Act. Entirely aside from any interpretation of the meaning of the word "liability" as used in Section 5, this appears to be the better ground for holding contracts of this sort invalid.[8] Congress has shown by the broad scope of the liability imposed by Section 1 of the Act, the wide choice of venue offered by Section 6, and other liberal provisions,[9] that it favors an employee in actions against his employer and considers him as not the equal of the employer in general bargaining position.

In view of the policies expressed in the Act, along with the general hostility of courts toward any contract which deprives a litigant of access to any forum to which he is entitled by law,[10] and the lack of a proportionate

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5. Akerly v. New York Central R. R., 168 F. 2d 812 (6th Cir. 1948); Grand Trunk Western R. R. v. Boyd, 321 Mich. 693, 33 N. W. 2d 120 (1948), *cert. granted,* 69 Sup. Ct. 1166 (1949); Petersen v. Ogden Union & Depot Co., 110 Utah 573, 175 P. 2d 744 (1946).

6. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 8, 50, 58-60 (1923); Corbin, *Legal Analysis and Terminology,* 29 YALE L. J. 163, 170 (1919); 1 RESTATEMENT, PROPERTY § 3, comment *a* and Special Note (1936).

7. 174 F. 2d at 559 (italics supplied).

8. A few decisions have distinguished contracts of this kind made after the cause of action accrued from those made before any cause of action arose. Detwiler v. Lowden, 198 Minn. 185, 269 N. W. 367, 368, 107 A. L. R. 1054, 1059 (1936); Gittler v. Russian Co., 124 App. Div. 273, 108 N. Y. Supp. 793 (1908); see dissenting opinion of Miller, J., in Akerly v. New York Central R. R., 168 F. 2d 812, 815 (6th Cir. 1948); 2 RESTATEMENT, CONTRACTS § 558 (1932). But there seems to be little real ground for this distinction. If one may be allowed to make a choice of venue in the one instance, it is difficult to see why he may not choose in the other. See the principal case, 174 F. 2d at 560; Petersen v. Ogden Union Ry. & Depot Co., 110 Utah 573, 175 P. 2d 744, 745 (1946).

9. The Act has deprived the employer of the defense of assumption of risk, 45 U. S. C. A. §§ 7, 54 (1943); contributory negligence, § 53; and the fellow-servant rule, § 52.

10. Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365 (U. S. 1874); Mutual Res. Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508 (6th Cir. 1897); Johnson v. Royal Motor Car Ins. Ass'n, 226 Ill. App. 147 (1922); Blair v. National Shirt & Overalls Co., 137 Ill. App. 413 (1907); Healy v. Eastern Bldg. & Loan Ass'n, 17 Pa.

advantage gained by the contracting plaintiff,[11] it seems that the result of the principal case is sound. The case of *Grand Trunk Western R. R. v. Boyd*,[12] which reached the opposite result, is now before the Supreme Court, and a definitive ruling may be expected.*

Super. 385 (1901); *cf.* Daley v. People's Bldg. Loan & Savings Ass'n, 178 Mass. 13, 59 N. E. 452 (1902). See also 2 RESTATEMENT, CONTRACTS § 558 (1932) and state annotations thereto.

11. 174 F. 2d at 561.

12. 321 Mich. 693, 33 N. W. 2d 120 (1948), *cert. granted*, 69 Sup. Ct. 1166 (1949).

* Since the above was set up in type, the *Boyd* case was reversed by the Supreme Court in a per curiam opinion, 70 Sup. Ct. 26 (1949), reference being made to the principal case.