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# RECENT CASES

## AUTOMOBILES—FAMILY PURPOSE DOCTRINE—AUTOMOBILE OWNED BY OTHER THAN HEAD OF FAMILY

A minor son, driving his mother's automobile with her permission, negligently caused damage to plaintiff's automobile. Sued by the plaintiff under the "family purpose" doctrine, the mother denied liability on the ground that her husband, who was the head of the family, owned and maintained another automobile for family purposes. *Held*, the automobile comes within the family purpose doctrine, and the mother, as owner, is liable for the negligent acts of her son while driving her automobile, even though she is not the head of the family. *Hill v. Smith*, 222 S.W.2d 207 (Tenn. App. E.S. 1949).

There has been much discussion in legal circles of the so-called "family purpose" doctrine, which has been adopted by a sizeable proportion of the states; and though rejected by a slight majority of jurisdictions, the doctrine nevertheless has a firm foothold in American law.<sup>1</sup> Having its origin in the situation brought about by the common and ever increasing use of the family automobile, the doctrine has been developed as an extension of the principles of agency, and is designed to impose tort liability on the owner of the car, who often is the only financially responsible member of the family.<sup>2</sup> The usual expression of the rule, the agency rationale, is simply that the head of the family, in furnishing a car for the pleasure and convenience of his family, thereby makes the pleasure of the family his business; and while the car is being used for this purpose, the agency relationship exists. Thus the rules of *respondeat superior* are held to apply.<sup>3</sup>

A majority of the courts, however, do not regard this reasoning as convincing.<sup>4</sup> They hold that this situation does not come within the well-settled

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1. For a general discussion of the subject, see BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* §§ 3111-31 (Perm. ed. 1935); MICHIE, *THE LAW OF AUTOMOBILES IN TENNESSEE* §§ 147-52 (1947); 5 *AM. JUR.*, *Automobiles* §§ 365-72 (1936); 60 *C.J.S.*, *Motor Vehicles* § 433 (1949); PROSSER, *TORTS* 500-04 (1941). See Notes, 16 *NOTRE DAME LAW*. 394 (1941), 14 *TEXAS L. REV.* 234 (1936).

2. Note, however, that the availability and increasingly common use of the "omnibus clause" in the standard automobile liability insurance policy has acted to provide such financial responsibility, giving the benefits of the insurance to anyone driving the car with the owner's consent. See 2 COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 1175c-1 (Supp. 1945). See Note, 160 *A.L.R.* 1195 (1946).

3. *E.g.*, *Benton v. Regeser*, 20 *Ariz.* 273, 179 *Pac.* 966 (1919); *Hutchins v. Haffner*, 63 *Colo.* 365, 167 *Pac.* 966, *L.R.A.* 1918A 1008 (1917); *Griffin v. Russell*, 144 *Ga.* 275, 87 *S.E.* 10, *L.R.A.* 1916F 216, *Ann. Cas.* 1917D 994 (1915); *King v. Smythe*, 140 *Tenn.* 217, 204 *S.W.* 296, *L.R.A.* 1918F 293 (1918). See *Lashbrook v. Patten*, 62 *Ky.* 317 (1864), where the rationale of the doctrine was applied to a son's driving his father's carriage.

4. *E.g.*, *Parker v. Wilson*, 179 *Ala.* 361, 60 *So.* 150, 43 *L.R.A.* (N.S.) 87 (1912); *Norton v. Hall*, 149 *Ark.* 428, 232 *S.W.* 934, 19 *A.L.R.* 384 (1921); *Smith v. Callahan*, 34 *Del.* (4 *Harr.*) 129, 144 *Atl.* 46, 64 *A.L.R.* 830 (1928); *Halverson v. Blosser*, 101

principles of agency, and that such an attempt to hold the owner of the car is more properly the business of the legislature than the courts.<sup>5</sup> Several states, recognizing the need for this social policy, have by statute imposed liability upon the owner of an automobile for the negligence of the driver, whether a member of the family or not,<sup>6</sup> and one state, Florida, considers the automobile a dangerous instrumentality, thus achieving the same result.<sup>7</sup>

When the facts are restricted to the customary family situation, where the father owns and maintains the automobile for the use of his family, the doctrine achieves its desired policy effect and is simply and easily applied. But, resting as it does on a somewhat dubious extension of the law of agency, difficulty is encountered in situations where its application becomes at best a question of policy, necessarily involving inconsistencies. Several interesting problems may arise to test the application of the doctrine, where the agency rationale seems to break down, as for example, what cars are included by the term "family car,"<sup>8</sup> what persons are considered members of the family,<sup>9</sup> what constitutes permissive use of the automobile,<sup>10</sup> as well as the instant problem.

In most of the states where the doctrine is recognized and where the question of the instant case has arisen, the owner of the car has been held

Kan. 683, 168 Pac. 863, L.R.A. 1918B 498 (1917); *Van Blaricom v. Dodgson*, 220 N.Y. 111, 115 N.E. 443, L.R.A. 1917F 363 (1917); *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W.2d 63, 100 A.L.R. 1014 (1935).

5. *E.g.*, "If public policy demands that the head of the family should be held liable in these circumstances, this should be accomplished, we think, by an appropriate act of the General Assembly, and not by judicial pronouncement." *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689, 693 (1938).

6. *E.g.*, CAL. VEHICLE CODE § 402 (1944); N.Y. VEHICLE AND TRAFFIC LAW § 59. See Notes, 21 MINN. L. REV. 823 (1937), 81 U. OF PA. L. REV. 60 (1932), 88 A.L.R. 174 (1934).

7. *Lynch v. Walker*, 159 Fla. 188, 31 So. 2d 268 (1947); *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629, 16 A.L.R. 255 (1920).

8. The conflict here arises most frequently where the car is used partly for business purposes and partly for family pleasure purposes. Compare *Williams v. Dickson*, 167 Wash. 229, 8 P.2d 1087 (1932) (recovery allowed), with *Eaves v. Coxe*, 203 N.C. 173, 165 S.E. 345 (1932) (recovery denied). See, *e.g.*, *Webb v. Daniel*, 261 Ky. 810, 88 S.W.2d 926 (1935) (secretly married wife owned car); *Felcyn v. Gamble*, 185 Minn. 357, 241 N.W. 37, 79 A.L.R. 1159 (1932) (motorboat); *Scates v. Sandefer*, 163 Tenn. 558, 44 S.W.2d 310 (1931) (family car used by son in job as traveling salesman); *Meinhardt v. Vaughn*, 159 Tenn. 272, 17 S.W.2d 5 (1929) (motorcycle); *Hanford v. Goehry*, 24 Wash. 2d 859, 167 P.2d 678 (1946) (automobile kept for sale substituted for family use while family car being repaired); *Ritter v. Hicks*, 102 W. Va. 541, 135 S.E. 601 (1926) (automobile kept by dealer for demonstration and sale).

9. *E.g.*, *Johnston v. Hare*, 30 Ariz. 253, 246 Pac. 546 (1926); *Smart v. Bissonette*, 106 Conn. 447, 138 Atl. 365 (1927) (trusted housekeeper); *Wolfson v. Rainey*, 51 Ga. App. 493, 180 S.E. 913 (1935) (stepdaughter); *Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947) (adult child while visiting parents); *Adkins v. Nanney*, 169 Tenn. 67, 82 S.W.2d 867 (1935) (adult self-supporting son); *Atkins v. Churchill*, 194 P.2d 364 (Wash. 1948) (daughter's escort driving car); *Schumer v. Register*, 12 Ga. App. 743, 78 S.E. 731 (1913) (same).

10. *Vaughn v. Booker*, 217 N.C. 479, 8 S.E.2d 603, 132 A.L.R. 977 (1940) (deviation from route); *Messer v. Reid*, 186 Tenn. 94, 208 S.W.2d 528 (1948) (son loaned automobile to third party); *Long v. Tomlin*, 22 Tenn. App. 607, 125 S.W.2d 171, 132 A.L.R. 988 (M.S. 1938) (car taken surreptitiously in violation of orders); *Woodfin v. Insel*, 13 Tenn. App. 493 (M.S. 1931) (special permission required for each use of automobile).

liable even though he was not the head of the family<sup>11</sup>—*e.g.*, the mother,<sup>12</sup> or grandmother,<sup>13</sup> or children.<sup>14</sup> Here, where the owner is not the head of the family, the element of paternal control over the family, important to the doctrine, is missing;<sup>15</sup> also, the owner lacks the father's responsibility and obligation to provide the automobile for family use.<sup>16</sup> The agency fiction, already overstretched, is noticeably weakened, and in these borderline cases the courts are not impelled to reach their holdings by any principles of agency, but are instead merely giving effect to their ideas of social policy. Thus it is difficult to define the scope of the doctrine, and once it is adopted there is no convenient or logical place to draw the line around its limits.<sup>17</sup> On this fringe, agency law does not seem sufficient to control the decisions, and no guide is left for the court except that of the broad bounds of public policy.

11. The head of the family may be liable, however, where he controls and maintains the automobile even though he does not own it. *E.g.*, *Penticost v. Massey*, 201 Ala. 261, 77 So. 675 (1918); *Gray v. Golden*, 301 Ky. 477, 192 S.W.2d 371 (1945); *Matthews v. Cheatham*, 210 N.C. 592, 188 S.E. 87 (1936). But mere legal title is not enough to impose liability; there must be some element of control or maintenance. *Smith v. Doyle*, 98 F.2d 341 (D.C. Cir. 1938); *Cewe v. Schuminski*, 182 Minn. 126, 233 N.W. 805 (1930); *Sundock v. Pittman*, 165 Tenn. 17, 52 S.W.2d 155 (1932). *But cf.* *Wyant v. Phillips*, 116 W. Va. 207, 179 S.E. 303 (1935). Where the car is owned by the matrimonial community, the community may be liable. *King v. Williams*, 188 Wash. 350, 62 P.2d 710 (1936); *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A 216 (1914). And *see* *Donn v. Kunz*, 52 Ariz. 219, 79 P.2d 965, 966-67 (1938). Tennessee holds that the doctrine is not applicable to automobiles owned by a corporation. *Keller v. Federal Bob Brannon Truck Co.*, 151 Tenn. 427, 269 S.W. 914 (1925). *But cf.* *Durso v. Cozzolino*, 128 Conn. 24, 20 A.2d 392 (1941); *Hexter v. Burgess*, 52 Ga. App. 819, 184 S.E. 769 (1936). This problem of course does not arise in states not following the doctrine. *See, e.g.*, *De Smet v. Niles*, 175 App. Div. 822, 161 N.Y.S. 566 (1st Dep't 1916). For a collection of cases on the subject, *see* Notes, 132 A.L.R. 992 (1941), 100 A.L.R. 1029 (1936), 88 A.L.R. 615 (1934), 64 A.L.R. 878 (1930).

12. Holding wife or mother liable: *Griffin v. Russell*, 144 Ga. 275, 87 S.E. 10, L.R.A. 1916F 216, Ann. Cas. 1917D 994 (1915); *Goldstein v. Jolinston*, 64 Ga. App. 31, 12 S.E.2d 92 (1940); *Smith v. Overstreet*, 258 Ky. 781, 81 S.W.2d 571 (1935); *Wyant v. Phillips*, 116 W. Va. 207, 179 S.E. 303 (1935); *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031 (1914). *But cf.* *Kennedy v. Wolf*, 221 Ky. 111, 298 S.W. 188 (1927).

13. *Rutherford v. Smith*, 284 Ky. 592, 145 S.W.2d 533 (1940). *But cf.* *Woofin v. Insel*, 13 Tenn. App. 493 (M.S. 1931).

14. *Turner v. Gackle*, 168 Minn. 514, 209 N.W. 626 (1926); *Crouse v. Lubin*, 260 Pa. 329, 103 Atl. 725 (1918). *But cf.* *White v. McCabe*, 208 N.C. 301, 180 S.E. 704 (1935); *Posey v. Krogh*, 65 N.D. 490, 259 N.W. 757 (1934); *Haley v. Litzinger*, 131 Pa. Super. 559, 200 Atl. 165 (1938).

15. "The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether." *King v. Smythe*, 140 Tenn. 217, 226, 204 S.W. 296, 298, L.R.A. 1918F 293 (1918). *See* *Watts v. Lefler*, 190 N.C. 722, 130 S.E. 630, 632 (1925).

16. *See, e.g.*, *Bryant v. Keen*, 43 Ga. App. 251, 158 S.E. 445, 446 (1931). The father has been held not liable where there is no duty to support adult children. *McNamara v. Prather*, 277 Ky. 754, 127 S.W.2d 160 (1939); *Bradley v. Schmidt*, 223 Ky. 784, 4 S.W.2d 703, 57 A.L.R. 1100 (1928); *Adkins v. Nanney*, 169 Tenn. 67, 82 S.W.2d 867 (1935).

17. "If the son is his father's agent to amuse himself with an automobile, he must also be a like agent for his own amusement with bicycles, horses and buggies, guns, golf clubs, baseballs and bats, row boats and motor and sail boats. . . ." *Arkin v. Page*, 287 Ill. 420, 123 N.E. 30, 32, 5 A.L.R. 216 (1919).

**CONTRACTS—EFFECT OF ILLEGALITY—RECOVERY WHERE NO MORAL TURPITUDE INVOLVED AND PURPOSE OF STATUTE NOT VIOLATED**

Plaintiff and defendant entered into a partnership agreement whereby both parties were to contribute money, but the defendant was to manage the business and the plaintiff was only to keep the books. State statutes required that the proposed operations be licensed. The defendant undertook to procure the license, but actually procured a license only in his own name. After operating for sixteen months, the parties agreed to terminate the business, and the defendant orally promised to equally divide the accumulated assets. Upon his refusal plaintiff sued for dissolution and accounting. The trial court held the partnership agreement illegal because not licensed, held the parties to be *in pari delicto*, and denied relief. *Held*, reversed. When the cause of action can be predicated on a new promise arising out of an illegal contract and the rights of third parties are not involved, equitable relief will not be denied to a party to the contract. *Norwood v. Judd*, 209 P.2d 24 (Cal. App. 1949).

The maxim "He who comes into equity must come with clean hands" is fundamental to equity jurisprudence. Rigidly applied it would result in the denial of relief to any litigant seeking the active interposition of equity if he has been guilty of unconscionable conduct related to the subject matter of the suit.<sup>1</sup> However, the application of this maxim is for the discretion of the court and exceptions will arise when justice or public policy demands them. Relief has been granted for many different reasons,<sup>2</sup> and in each case the solution has involved the weighing of the policy against unjust enrichment with the policy against enforcing an illegal contract.<sup>3</sup>

When a contract is sued upon and its validity is attacked because the person contracting has not complied with the licensing statute, it is generally held that the intent of the legislature, as to whether the statute is for revenue purposes or for public protection, is controlling in determining the legality and enforceability of the contract.<sup>4</sup> If the statute expressly declares the contract

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1. See *McMullen v. Hoffman*, 174 U.S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117 (1899); *Mattox v. Mattox*, 2 Ohio 234, 15 Am. Dec. 547 (1826); 2 POMEROY, EQUITY JURISPRUDENCE §§ 397-404 (5th ed., Symons, 1941); Note, *Application of the "Clean Hands" Doctrine*, 9 TEMP. L.Q. 220 (1935); 60 HARV. L. REV. 980 (1947); 18 TEX. L. REV. 506 (1940); 50 YALE L.J. 1114 (1941). See Note, 4 A.L.R. 44 (1919).

2. *Bentley v. Tibbals*, 223 Fed. 247, 251 (2d Cir. 1915); *Miller v. Enterprise Canal & Land Co.*, 142 Cal. 208, 75 Pac. 770 (1904); *Carpenter's Union v. Citizens Committee*, 333 Ill. 225, 164 N.E. 393 (1928); *Pendleton v. Gondolf*, 85 N.J. Eq. 308, 96 Atl. 47 (1915). See Chafee, *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877, 1065 (1949); Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 TEX. L. REV. 31 (1946); Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. OF PA. L. REV. 261 (1947).

3. *Wheeling Dollar Savings and Trust Co. v. Hoffman*, 127 W. Va. 777, 35 S.E.2d 84 (1945).

4. *Miller v. Ammons*, 145 U.S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759 (1892); *Simmons v. Oatman*, 110 Kan. 44, 202 Pac. 977 (1921); *Garvin v. Gordon*, 36 N.M. 304, 14 P.2d

enforceable or unenforceable when a license is lacking then this declaration will govern.<sup>5</sup> When the statute makes no mention of a contract, but expressly prohibits the carrying on of a business without a license, then the majority of the courts hold that contracts made without a license are unenforceable and void.<sup>6</sup> The difficulty arises when there is no express prohibition. A majority of courts hold that if the statute is merely to provide revenue then an inhibition against contracting without a license, implied by the imposition of a penalty for so doing, will not invalidate the contract;<sup>7</sup> but when the principal purpose of the statute is to protect the public from deception and ignorance by exacting specific qualifications for a license, and revenue is only an incidental purpose, an implied inhibition will make the contract wholly illegal and unenforceable.<sup>8</sup>

The California exception,<sup>9</sup> utilized to grant relief to this plaintiff, is based upon a subsequent promise arising out of the illegal transaction.<sup>10</sup> It is difficult in theory to justify this exception to the unclean hands doctrine, however, if the transaction is illegal. How can a subsequent promise arising out of the illegal transaction clean the hands of the parties if the statute made the parties' hands unclean originally?

Where there has been a dissolution of a partnership each partner is entitled to an accounting of the partnership property unless some defense is

264 (1932); *Colbert v. Ashland Constr. Co.*, 176 Va. 500, 11 S.E.2d 612 (1940); *Sherwood v. Wise*, 132 Wash. 295, 232 Pac. 309, 42 A.L.R. 1219 (1925).

5. *Haas v. Greenwald*, 196 Cal. 236, 237 Pac. 38, 59 A.L.R. 1493 (1925), *aff'd without opinion*, 275 U.S. 490, 48 Sup. Ct. 33, 72 L. Ed. 389 (1927); *Shaffer v. Beinhorn*, 190 Cal. 569, 213 Pac. 960 (1923); *McMahon v. Boden*, 39 Conn. 316 (1872); *Johnson v. Stuart*, 7 Tenn. App. 1 (E.S. 1928).

6. *Birnbach v. Kirspel*, 188 Ark. 792, 67 S.W.2d 730 (1934); *Watkins Medical Co. v. Paul*, 87 Ill. App. 278 (1900); *Johnston v. Dahlgren*, 166 N.Y. 354, 59 N.E. 987 (1901); *Stevenson v. Ewing*, 87 Tenn. 46, 9 S.W. 230 (1888); *Johnson v. Stuart*, 7 Tenn. App. 1 (E.S. 1928). *Contra*: *Garvin v. Gordon*, 36 N.M. 304, 14 P.2d 264 (1932) (revenue measure).

7. *In re Brown*, 24 F.Supp. 166 (N.D. Ala. 1938); *Ziemer v. Babcock & Wilcox Co.*, 22 F.Supp. 384 (D. Nev. 1938); *Orlinoff v. Campbell*, 205 P.2d 67 (Cal. App. 1949); *Patterson v. Southern Ry.*, 214 N.C. 38, 198 S.E. 364 (1938); *Wolpa v. Hambly*, 20 Ohio App. 236, 153 N.E. 135 (1923).

8. *Payne v. De Vaughn*, 77 Cal. App. 399, 246 Pac. 1069 (1926); *Bernstein v. Peters*, 68 Ga. App. 218, 22 S.E.2d 614 (1942); *Howard v. Leby*, 197 Ky. 324, 246 S.W. 828 (1923); *Mueller v. Burchfield*, 218 S.W.2d 180 (Mo. App. 1949); *Massie v. Dudley*, 173 Va. 42, 3 S.E.2d 176 (1939). See Note, 30 A.L.R. 834, 845 (1924).

9. "Where the rights of third parties are not involved, California has recognized another exception to the general rule in certain cases where the action is between the contracting parties. That exception is that equitable relief will not be denied a party to a partnership contract against his partner where the business engaged in is a lawful one and not against public policy, but the parties failed to secure a required license, and where the cause of action is not directly predicated on the partnership agreement, but is or can be predicated on a new promise arising out of the executed partnership agreement." 209 P.2d at 28.

10. If the illegal business has been concluded, and a partner has accounted for proceeds and holds them under a new agreement as debtor or depository he may be compelled to pay them over. *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732 (U.S. 1864); *Davenport v. Witt*, 212 Ala. 114, 101 So. 887 (1924); *Burns v. Nottingham*, 60 Ill. 531 (1871); *Clamp v. Nolan*, 300 S.W. 105 (Tex. Civ. App. 1927); *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348 (1896). See *Chafee, Coming into Equity with Clean Hands*, 47 MICH. L. REV. 877, 1065 (1949).

asserted against him.<sup>11</sup> Such a defense is presented by unclean hands; it has frequently been used to bar recovery in cases when the nature of the transaction was such as to make it *malum in se*.<sup>12</sup> It should not be applied in the instant case, however, because this transaction was only *malum prohibitum* and the parties were not *in pari delicto*. The purpose of the licensing statute involved has been declared to be "to guard the public against the consequences of incompetent workmanship, imposition and deception."<sup>13</sup> This statute, therefore, is to safeguard third parties and does not expressly apply to interpartnership transactions and should have no application here. If by implication, however, this statute should apply to interpartnership transactions, nevertheless the plaintiff should be allowed to recover in an accounting suit since there is no moral turpitude involved. It is therefore suggested, and some states have so held, that where a contract is merely *malum prohibitum* and the illegality does not arise from any elements of moral turpitude, recovery in an accounting suit should be allowed without the recital of the unclean hands doctrine and an exception thereto.<sup>14</sup> This would clearly give force to the policy against allowing unjust enrichment and still not render ineffective the policy against enforcing an illegal contract.

#### CORPORATIONS—LIABILITY OF OFFICER TO CREDITORS FOR EXCESSIVE SALARY—BURDEN OF PROOF ON DEFENDANT TO SHOW REASONABLENESS

The trustee in bankruptcy of an insolvent corporation brought an action to compel its president to refund excessive salaries, and to account for other

11. *Rice v. Watkins*, 85 Cal. App. 2d 44, 191 P.2d 810 (1948); *Adam v. Obarr*, 123 Cal. App. 36, 11 P.2d 11 (1932); *Roberts v. Roberts*, 118 Colo. 524, 198 P.2d 453 (1948); *Trecker v. Trecker*, 334 Ill. App. 263, 78 N.E.2d 843 (1948); *Burnett v. Hopwood*, 187 Minn. 7, 244 N.W. 254 (1932); *In re Perry's Estate*, 192 P.2d 532 (Mont. 1948); *Mattson v. Wagstad*, 188 Wis. 566, 206 N.W. 865 (1926).

12. *McMullen v. Hoffman*, 174 U.S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117 (1899); *Cerino v. Van Orden*, 98 N.J.Eq. 7, 129 Atl. 704 (1925); *Vandegrift v. Vandegrift*, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404 (1910); *cf. Kist v. Coughlin*, 210 Ind. 622, 1 N.E.2d 602 (1936) (right to an accounting may be recognized where illegality is of slight degree). See 2 POMEROY, EQUITY JURISPRUDENCE § 402f (5th ed., Symons, 1941); Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. OF PA. L. REV. 261 (1947).

13. *Howard v. State*, 85 Cal. App. 2d 361, 363, 193 P.2d 11, 13 (1949); *Alvarado v. Davis*, 115 Cal. App. Supp. 782, 6 P.2d 121 (1931).

14. *City of Parkersburg v. Brown*, 106 U.S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238 (1882); *Sherman & Ellis, Inc. v. Indiana Mut. Casualty Co.*, 41 F.2d 588 (7th Cir. 1930), *cert. denied*, 282 U.S. 893 (1930); *Hill County v. Shaw & Borden Co.*, 225 Fed. 475 (9th Cir. 1915); *Chesnut v. Schwartz*, 293 Ill. App. 414, 12 N.E.2d 912 (1938); *Zorich v. Zorich*, 88 N.E.2d 694 (Ind. App. 1949); *Warner v. De Cuevas*, 186 Misc. 150, 58 N.Y.S.2d 751 (Sup. Ct. 1946); *Local Fed. Savings and Loan Ass'n v. Sheets*, 191 Okla. 439, 130 P.2d 825 (1942); *Bartron v. Codrington County*, 68 S.D. 309, 2 N.W.2d 337 (1942); *Hamm v. Hamm*, 30 Tenn. App. 122, 145, 204 S.W.2d 113, 123 (W.S. 1947); *Palmer Bros. v. Havens*, 29 Tenn. App. 8, 193 S.W.2d 91 (W.S. 1945) (allowed recovery notwithstanding parties *in pari delicto*); *cf. Moss v. Moss*, 116 P.2d 650 (Cal. App. 1941), *aff'd*, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422 (1942); *Maddox v. Yocum*, 109 Ind. App. 416, 31 N.E.2d 652 (1941).

fraudulent withdrawals from corporate assets. The defendant was the sole manager and stockholder except for qualifying shares in the name of his wife and secretary. The district court gave judgment for the trustee, and the defendant appealed. *Held*, judgment for the trustee affirmed as to the excessive salaries.<sup>1</sup> Defendant failed to sustain the burden of proving that his salaries were reasonable and not a misappropriation of corporate funds. *Lunsford v. Haynie*, 175 F.2d 603 (5th Cir. 1949).

The courts are generally in accord that a dominant stockholder is under a fiduciary duty to minority stockholders<sup>2</sup> and to creditors<sup>3</sup> to refrain from taking any action that would impair the capital structure of the corporation. The depletion of corporate assets by a controlling stockholder in the guise of drawing compensation as an officer or director constitutes such a breach of this fiduciary duty as to make him liable to the corporation for the excessive amounts;<sup>4</sup> and if the company has been rendered insolvent, a cause of action arises in favor of the corporate creditors or a trustee in bankruptcy.<sup>5</sup> The defense is often interposed that the transaction was ratified, or acquiesced in, by the stockholders, but it is seemingly the rule that an attempted ratification of acts which are fraudulent as to creditors is ineffective.<sup>6</sup> The test

1. The case was reversed and remanded, however, as to other claims in dispute.

2. *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 63 Sup. Ct. 454, 87 L. Ed. 626 (1943); *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 699 (1939) (duty of majority stockholder to adequately capitalize corporation); *Rogers v. Hill*, 289 U.S. 582, 53 Sup. Ct. 731, 77 L. Ed. 1385, 88 A.L.R. 744 (1933); *Lebold v. Inland Steel Co.*, 125 F.2d 369 (7th Cir. 1941); *Heim v. Jobes*, 14 F.2d 29 (8th Cir. 1926); *Boyle v. Clukey*, 126 Me. 443, 139 Atl. 461 (1927); *Baker v. Allen*, 292 Mass. 169, 197 N.E. 521 (1935); *Farmers' Loan & Trust Co. v. New York & N. Ry.*, 150 N.Y. 410, 44 N.E. 1043 (1896); *Kroener v. Pancoast*, 47 R.I. 470, 134 Atl. 6 (1926); *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 60 S.W. 206 (1900); *Berle, Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); *Israels, The Implications and Limitations of The "Deep Rock" Doctrine*, 42 COL. L. REV. 376 (1942); *Krottinger, The "Deep Rock" Doctrine: a Realistic Approach to Parent-Subsidiary Law*, 42 COL. L. REV. 1124 (1942); *Note*, 32 MICH. L. REV. 839 (1934).

3. *Pepper v. Litton*, 308 U.S. 295, 60 Sup. Ct. 238, 84 L. Ed. 281 (1939) (controlling stockholder has fiduciary duty similar to that of directors; their powers are powers in trust); *McCandless v. Furlaud*, 296 U.S. 140, 56 Sup. Ct. 41, 80 L. Ed. 121 (1935); *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099 (1919); *In re Cuyahoga Finance Co.*, 136 F.2d 18 (6th Cir. 1943); *Force v. Age-Herald Co.*, 136 Ala. 271, 33 So. 866 (1903); *Louisville & N.R.R. v. Nield*, 186 Ky. 17, 216 S.W. 62 (1919); *Eaton v. Robinson*, 19 R.I. 146, 31 Atl. 1058 (1895); *Towles & Co. v. Miles*, 131 Tenn. 79, 173 S.W. 439 (1914); *Deaderick v. Bank*, 100 Tenn. 457, 45 S.W. 786 (1897); *Sprecher, The Conflict of Equities under the "Deep Rock" Doctrine*, 43 COL. L. REV. 336 (1943).

4. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L. Ed. 328 (1875); *Quintal v. Kellner*, 264 N.Y. 32, 189 N.E. 770 (1934); *Saranac & L.P.R.R. v. Arnold*, 167 N.Y. 368, 60 N.E. 647 (1901); *Crocker v. Cumberland Min. & Mill. Co.*, 31 S.D. 137, 139 N.W. 783 (1913). See O'Neal, *Stockholder Attacks on Corporate Pension Systems*, 2 VAND. L. REV. 351.

5. *In re Muncie Pulp Co.*, 139 Fed. 546 (2d Cir. 1905); *Dean v. Shingle*, 198 Cal. 652, 246 Pac. 1049 (1926); *Ellis v. Ward*, 137 Ill. 509, 25 N.E. 530 (1890); *Sauberli v. Sledd*, 143 Kan. 350, 55 P.2d 415 (1936); *Manning v. Campbell*, 264 Mass. 386, 162 N.E. 770 (1928); *Fillebrown v. Haywood*, 190 Mass. 472, 77 N.E. 45 (1906); *Whitfield v. Kern*, 122 N.J. Eq. 332, 192 Atl. 48 (Ct. Err. & App. 1937); *Mills v. Hendershot*, 70 N.J. Eq. 258, 62 Atl. 542 (Ch. 1905); *Stephan v. Merchants' Collateral Corp.*, 256 N.Y. 418, 176 N.E. 824 (1931).

6. *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U.S. 312, 15 Sup. Ct.



generally applied in determining when a salary is excessive is that the compensation in question must bear a reasonable relation to the recipient's abilities, the time demanded of him, and the difficulties he must surmount in the proper execution of his office.<sup>7</sup> By the weight of authority a director has no right to compensation for performing the ordinary functions of his office in the absence of a provision in the charter, the by-laws, or a valid resolution;<sup>8</sup> however, where extra services are rendered, there is an implied promise enforceable against the corporation for the reasonable value of the services.<sup>9</sup>

On whom is the burden of proof when a corporation, its creditors or dissenting stockholders seek restoration of excessive amounts of salaries drawn by a director for serving as an officer? It is the prevailing view that if the compensation of an officer or director was approved by a disinterested board of directors without the participation of the director, then the plaintiff must prove any alleged unreasonableness of the remuneration,<sup>10</sup> but the defendant, because of his fiduciary position, must show affirmatively that the transaction was fair and honest.<sup>11</sup> Where, however, the director's presence was necessary for a quorum, or his vote essential for a majority vote, the salary contract is generally held voidable,<sup>12</sup> regardless of fairness, at the option of the corporation, or its creditors where insolvency has resulted.

The precise *ratio decidendi* of the court in the instant case is not clear,

621, 39 L. Ed. 713 (1895); *United Hotels Co. v. Mealey*, 147 F.2d 816 (2d Cir. 1945); *Keenan v. Eshleman*, 23 Del. Ch. 234, 2 A.2d 904, 120 A.L.R. 227 (Sup. Ct. 1938).

7. *E.g.*, *Rogers v. Hill*, 289 U.S. 582, 53 Sup. Ct. 731, 77 L. Ed. 1385, 88 A.L.R. 744 (1933); *Church v. Harnitt*, 35 F.2d 499 (6th Cir. 1929); *Wight v. Heublein*, 238 Fed. 321 (4th Cir. 1916); *Ashley v. Keith Oil Corp.*, 73 F. Supp. 37 (D. Mass. 1947); *Green v. Felton*, 42 Ind. App. 675, 84 N.E. 166 (1908); *Sagalyn v. Meekins, Packard & Wheat*, 290 Mass. 434, 195 N.E. 769 (1935); *Holden v. Lashley-Cox Land Co.*, 316 Mich. 478, 25 N.W.2d 590 (1947); *Gallin v. National City Bank of New York*, 152 Misc. 679, 273 N.Y. Supp. 87 (Sup. Ct. 1934) (contains the classic test for evaluating compensation); Carson, *Current Phases of Derivative Actions Against Directors*, 40 MICH. L. REV. 1125 (1942).

8. *Brampton Woolen Co. v. Comm'r*, 45 F.2d 327 (1st Cir. 1930); *Hayes v. Canada, Atlantic & Plant S.S. Co.*, 181 Fed. 289 (1st Cir. 1910); *Hall v. Woods*, 325 Ill. 114, 156 N.E. 258 (1927); *Lowe v. Ring*, 123 Wis. 370, 101 N.W. 698 (1904).

9. *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405, 14 Sup. Ct. 632, 38 L. Ed. 493 (1894); *Wenban Estate v. Hewlett*, 193 Cal. 675, 227 Pac. 723 (1924), 13 CALIF. L. REV. 235 (1925); *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N.E. 899 (1914); *Flynn v. Columbus Club*, 21 R.I. 534, 45 Atl. 551 (1900); *Reeve v. Harris*, 50 S.W. 658 (Tenn. Ch. App. 1897).

10. *Hotaling v. Hotaling*, 193 Cal. 368, 224 Pac. 455 (1924); *Beha v. Martin*, 161 Ky. 838, 171 S.W. 393 (1914); *Calkins v. Wire Hardware Co.*, 267 Mass. 52, 165 N.E. 889 (1929); *Seitz v. Union Brass & Metal Mfg. Co.*, 152 Minn. 460, 189 N.W. 586, 27 A.L.R. 293 (1922), 7 MINN. L. REV. 347 (1923). *But see* *Riddle v. Mary A. Riddle Co.*, 142 N.J. Eq. 147, 59 A.2d 599 (Ch. 1948); *Note*, 29 COL. L. REV. 338 (1929).

11. *Boggs v. Fleming*, 66 F.2d 859 (4th Cir. 1933); *Jordan v. Jordan Co.*, 94 Conn. 384, 109 Atl. 181 (1920); *Keenan v. Eshleman*, 23 Del. Ch. 234, 2 A.2d 904, 120 A.L.R. 227 (Sup. Ct. 1938); *Whitewater Tel. Co. v. Cory*, 117 Kan. 463, 232 Pac. 609 (1925); *Harris v. Lemming-Harris Agr. Works*, 43 S.W. 869 (Tenn. Ch. App. 1896).

12. *Davis v. Pearce*, 30 F.2d 85 (8th Cir. 1928); *Cowell v. McMillin*, 177 Fed. 25 (9th Cir. 1910); *Oil Fields Corp. v. Hess*, 186 Ark. 241, 53 S.W.2d 444 (1932); *Orlando Orange Groves Co. v. Hale*, 107 Fla. 304, 144 So. 674 (1932); *Connors v. Connors Bros. Co.*, 110 Me. 428, 86 Atl. 843 (1913); *McKey v. Swenson*, 232 Mich. 505, 205 N.W. 583 (1925); *Tefft v. Schaefer*, 136 Wash. 302, 239 Pac. 837 (1925).

but its holding is consistent with the growing trend to side-step fine legal distinctions and give a more realistic interpretation of the concept of corporate entity.<sup>13</sup> Because of the opportunity a sole stockholder has for the manipulation of corporate assets, it seems desirable that he as a director should show affirmatively that the corporation was adequately financed, and that its capital has not been unlawfully diminished, when he claims that his liability to corporate creditors is limited to his investment.<sup>14</sup> "In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation."<sup>15</sup> Perhaps one solution would be to subject closely-held corporations, as distinct from large "public" corporations, to more rigid legislative controls.

### CRIMINAL LAW—PROXIMATE CAUSE—RESPONSIBILITY FOR DEATH DUE TO ACTS OF PERSONS OPPOSING A FELONY

*A*, *B*, and *D* committed an armed robbery and were withdrawing from the scene when police arrived. In an exchange of shots an off-duty policeman was killed. Whether a shot from the robbers or from the police killed him could not be proved. The trial court instructed the jury that *D* would be guilty of murder if, in the perpetration of a robbery, either the robbers or persons opposing them fired the fatal shots. From a conviction of murder *D* appeals. *Held* (6-1), affirmed. The perpetrator of a dangerous felony is responsible for consequences of the resistance he invites when he attempts to commit such a crime. *Commonwealth v. Almeida*, 68 A.2d 595 (Pa. 1949).

In seeking to provide some test of "proximate cause," which is the minimum effective factual cause upon which to predicate legal responsibility, one writer suggests a three-part classification, under any part of which the accused would be held responsible for the consequences of a dangerous felony: (1) no intervening cause (accused's acts themselves cause death); (2) intervening cause caused by accused's act (such as medical treatment, not grossly negligent, of wound inflicted by him); (3) independent intervening cause (self-willed act of a third person in response to the act of the accused, which he actually foresaw or should have foreseen).<sup>1</sup> It is apparent

13. *J.J. McCaskill Co. v. United States*, 216 U.S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590 (1910); *Henry v. Dolley*, 99 F.2d 94 (10th Cir. 1938); *Alexander v. Theleman*, 69 F.2d 610 (10th Cir. 1934); *In re Burntside Lodge, Inc.*, 7 F. Supp. 785 (D. Minn. 1934); *Garford Trucking, Inc. v. Hoffman*, 114 N.J.L. 522, 177 Atl. 882 (Sup. Ct. 1935); *Everett v. Phillips*, 288 N.Y. 227, 43 N.E.2d 18 (1942); *State v. Nugget Coal Co.*, 60 Wyo. 51, 144 P.2d 944 (1944).

14. Fuller, *The Incorporated Individual: a Study of the One-Man Company*, 51 HARV. L. REV. 1373 (1938); Note, 45 HARV. L. REV. 1084 (1932).

15. *Pepper v. Litton*, 308 U.S. 295, 313 n.28, 60 Sup. Ct. 238, 84 L. Ed. 281 (1939) (quoting from the opinion of the District Court).

1. CLARK AND MARSHALL, *CRIMES* § 231 (4th ed., Kearney, 1940). For further work in the general field see GREEN, *RATIONALE OF PROXIMATE CAUSE*, 56-62 (1927);

that the facts of the instant case will fit (2) or (3), depending on whether one considers the acts of the police as caused by *D*'s acts or as the acts of independent third persons which *D* should have foreseen.

The proponents of other tests also speak in terms of causation,<sup>2</sup> but essentially the problem presented is not "Did he cause this result?" but rather, "Will the law attach legal responsibility for these consequences of his acts?"—purely a policy question once it is established that but for his act the death would not have occurred.<sup>3</sup> The common law and statutory expressions<sup>4</sup> pertaining to the enumerated dangerous felonies would seem to include within the limit of legal responsibility those deaths arising out of the foreseeable or probable use of force in opposition to a person in the perpetration of a dangerous felony. Would-be perpetrators are put on notice by society that these particular crimes are known to include real danger to life, either in themselves or because of the opposition they tend to engender;<sup>5</sup> so that death resulting from the normal risk created by their commission will be upon the head of the perpetrator. The policy question has been settled in these cases, and the only question remaining is for the jury: Should this death have been foreseen? Was the danger of a death such as this a part of the normal risk created by the commission of this crime?

A rule imposing more limited liability found expression in the early case of *Commonwealth v. Campbell*:<sup>6</sup> "No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose."<sup>7</sup> The

PROSSER, TORTS, § 45 (1941); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229 (1932); Focht, *Proximate Cause in the Law of Homicide—With Special Reference to California Cases*, 12 SO. CALIF. L. REV. 19 (1938); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

2. Focht, *Proximate Cause in the Law of Homicide—With Special Reference to California Cases*, 12 SO. CALIF. L. REV. 19 (1938).

3. GREEN, RATIONALE OF PROXIMATE CAUSE, 56-63 (1927); PROSSER, TORTS § 45 (1941). See facts of *People v. Garippo*, 292 ILL. 293, 127 N.E. 75 (1920).

4. *E.g.*, PA. STAT. ANN., tit. 18, § 4701 (1939).

5. "Every robber or burglar knows when he attempts to commit his crime that he is inviting dangerous resistance. Any robber or burglar who carries deadly weapons . . . thereby reveals that he expects to meet and overcome forcible opposition." *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736, 742 (1947); see HOLMES, THE COMMON

6. 89 Mass. 541, 544, 83 Am. Dec. 705 (1863). In this case "the question was whether defendant who was one of a number of rioters could be held for the homicide of a bystander who was killed by a shot from soldiers who were seeking to quell the riot. The court held not, indicating a lack of casual connection. But casual relation was not a problem. The question was whether the rule invoked comprehended this sort of risk. . . . The solution of the problem called for a declaration of policy." GREEN, RATIONALE OF PROXIMATE CAUSE 60-61 (1927).

7. See also *People v. Ferlin*, 203 Cal. 587, 265 Pac. 230 (1928); *Butler v. People*, 125 Ill. 641, 18 N.E. 338, 1 L.R.A. 211, 8 Am. St. Rep. 423 (1888); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085, 2 L.R.A. (n.s.) 719, 123 Am. St. Rep. 189, 11 Ann. Cas. 1024 (1905). Compare the two decisions in *People v. Ferlin*, 257 Pac. 857 (Cal. 1927) (first hearing); 203 Cal. 587, 265 Pac. 230 (1928) (decision on rehearing).

instant case and another recent Pennsylvania case, *Commonwealth v. Moyer*,<sup>8</sup> clearly refuse to recognize the limitation of the *Campbell* case and impose a broader liability. Several other cases have reached a similar result. The "shield" cases are said to be distinguishable on the ground that the use of a bystander as a shield is in furtherance of the felon's purpose,<sup>9</sup> but it is arguable that they encroach on the *Campbell* doctrine. Other cases reaching the result that the accused is liable include fact situations when he deliberately released a nearly subdued lunatic;<sup>10</sup> when a victim struggled for a weapon and caused its discharge;<sup>11</sup> and when he willfully set a fire which later killed a responding fireman.<sup>12</sup>

Although there is much dispute as to the concept of proximate cause and whether it has identical application to civil and criminal cases,<sup>13</sup> it is neither legally logical nor socially desirable to exclude from the felony-murder doctrine those deaths resulting from legal force exerted in opposition to the commission of one of the so-called dangerous felonies.<sup>14</sup>

#### CRIMINAL LAW—VIOLATION OF THE MANN ACT—ACTUAL TRANSPORTATION ENTIRELY WITHIN A SINGLE STATE

By telegraph from Houston, Texas, defendants reserved a hotel room in Texarkana, Arkansas, and then transported a prostitute from Houston to Texarkana, Texas. From there the woman walked to the hotel on the Arkansas side of the border. While she was completing the journey afoot, defendants drove on to the hotel with her luggage and obtained the room which they had previously reserved for her. They were indicted and convicted under the Mann Act of having knowingly transported a woman in interstate commerce for immoral purposes. *Held* (2-1), that the transportation was not deprived of its interstate character by this device. *Wright v. United States*, 175 F.2d 384 (8th Cir. 1949).

8. *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947), 17 *FORD. L. REV.* 124 (1948).

9. *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *Taylor v. State*, 41 Tex. Crim. Rep. 564, 55 S.W. 961 (1900).

10. *Johnson v. State*, 142 Ala. 70, 38 So. 182, 2 L.R.A. (N.S.) 897 (1905).

11. *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63, 20 A.L.R. 1441 (1922).

12. *State v. Glover*, 330 Mo. 709, 50 S.W.2d 1049, 87 A.L.R. 400 (1932).

13. Focht, *Proximate Cause in the Law of Homicide*, 12 *So. CALIF. L. REV.* 19 (1938).

14. "An injury is the efficient, proximate cause of the death . . . if the act of the accused was the cause of the cause of death. . ." 40 *C.J.S. HOMICIDE* § 11 (1944). "It is held that defendant, committing some unlawful act which meets with justifiable resistance on the part of police officers or other persons, is not liable for the death of bystanders caused by the third person's acts of resistance or self defense. These decisions seem unupportable, as the result, as well as the intervening defensive acts, is foreseeable and probable." *CLARK AND MARSHALL, CRIMES* § 33 (4th ed., Kearney, 1940). "The court would probably say the damage was too remote, which sounds like a lack of causation, but which is in fact a refusal to extend the rule invoked to protect the interest which had been injured against this sort of risk." *GREEN, RATIONALE OF PROXIMATE CAUSE* 174 (1927).

In its attempt to minimize vice, Congress passed the Mann Act,<sup>1</sup> rendering illegal the use of facilities of interstate commerce for the transportation of women for immoral purposes.<sup>2</sup> The problems arising in the application of the Act fall into two main groups: those involving the question of transportation and those involving the question of immoral purpose. The courts have recently tended toward a broad interpretation of the Act as to the former, and a more restricted interpretation as to the latter.

Where there is no question as to the interstate nature of the transportation, but some doubt concerning the purpose of such transportation, the courts appear to favor leniency toward the accused.<sup>3</sup> It has been suggested that this attitude is prompted by a fear that the Act will be used by blackmailers in the perpetration of their predacities.<sup>4</sup> In any event, the principle is now well established that the immoral purpose must have been conceived before the transportation became interstate before there may be a conviction under the Act.<sup>5</sup> Recently a further limitation seems to have been advanced—that the immoral purpose must have been the dominant motive for the transportation.<sup>6</sup>

On the question of transportation, however, a different fear has led to a different approach by the courts in the interpretation of the Act. This is the fear that the intent of Congress may be frustrated by means of loopholes.<sup>7</sup> Interstate transportation is of course an essential requirement of any alleged violation of the Act.<sup>8</sup> It has long been held that such transportation is not necessarily limited to common carriers and may be by private automobile.<sup>9</sup> Recently another supposed loophole was plugged by the decision that the operation of the Act is not avoided by having the woman walk

1. 36 STAT. 825 (1910), formerly 18 U.S.C. § 398 (1946), now 18 U.S.C. § 2421 (1948).

2. See Cushman, *National Police Power Under the Commerce Clause*, 3 MINN. L. REV. 289, 303 (1919); Notes, 15 GEO. WASH. L. REV. 214 (1947), 19 SO. CALIF. L. REV. 250 (1946), 4 VA. L. REV. 653 (1917).

3. See 39 ILL. L. REV. 293 (1945); and *infra* notes 5 and 6.

4. See 39 ILL. L. REV. 293, 294 (1945); 56 YALE L.J. 718, 720 (1947). This fear found judicial expression in a dissenting opinion by McKenna, J., in *Caminetti v. United States*, 242 U.S. 470, 502, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917): "Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage."

5. *Shama v. United States*, 94 F.2d 1 (8th Cir. 1938); *Drossos v. United States*, 16 F.2d 833 (8th Cir. 1927); *Corbett v. United States*, 299 Fed. 27 (9th Cir. 1924).

6. *Mortensen v. United States*, 322 U.S. 369, 64 Sup. Ct. 1037, 88 L. Ed. 1331 (1944). See Note, 19 SO. CALIF. L. REV. 250, 255 (1946); 56 YALE L.J. 718, 722 (1947).

7. See *United States v. Jamerson*, 60 F. Supp. 281, 284 (N.D. Iowa 1944) ("... a means of trapping a few non-commercial minnows, while the sharks of commercialized vice carry on their predatory work with impunity and immunity").

8. *Ellis v. United States*, 138 F.2d 612 (8th Cir. 1943); *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940); *Gerbino v. United States*, 293 Fed. 754 (3rd Cir. 1923); *United States v. Wilson*, 266 Fed. 712 (E.D. Tenn. 1920); *In re Squires*, 114 Vt. 285, 44 A.2d 133, 161 A.L.R. 349 (1945).

9. *Wilson v. United States*, 232 U.S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728 (1914); *Holden v. United States*, 23 F.2d 678 (9th Cir. 1928); *Hart v. United States*, 11 F.2d 499 (9th Cir. 1926); *United States v. Burch*, 226 Fed. 974 (N.D. Cal. 1915).

across the state line and then re-enter the automobile.<sup>10</sup> In such cases the courts have viewed the trip in its entirety, deeming the short walk to be merely incidental to the transportation.

But the problem of the principal case is not disposed of so easily. Hereofore, it has been almost universally accepted that "transport" is synonymous with "carry."<sup>11</sup> Under this definition the holding of the principal case can hardly be supported, since there clearly was no "carrying" of the woman in more than one state.<sup>12</sup> Only if "transport" is redefined to include the idea of "effecting the movement of a woman from one state to another" can the holding be justified.<sup>13</sup> Thus, in the instant case, when the facts are viewed as a whole, there is no doubt but that the defendants effectively procured the movement of the woman from Houston, Texas, to Arkansas. In view of the broader construction now given the term "interstate commerce,"<sup>14</sup> perhaps the definition of the word "transport" should also be expanded. But it may be significant that the word "transport" has been carried over from the old Act to the new Code without comment, and transportation remains the only action which is prohibited by the Mann Act.

#### EVIDENCE—CONFIDENTIAL COMMUNICATIONS BETWEEN SPOUSES— ADMISSIBILITY OF TESTIMONY AS TO CONDUCT OF PARTY SPOUSE

In a prosecution for robbery the trial court admitted testimony of defendant's wife as to his conduct and appearance immediately subsequent to the alleged offense. A state statute which provided that "any communication privately made" between husband and wife should be privileged from

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10. *Mellor v. United States*, 160 F.2d 757 (8th Cir. 1947); *United States v. Jamerson*, 60 F. Supp. 281 (N.D. Iowa 1944); cf. *Simon v. United States*, 145 F.2d 345 (4th Cir. 1944) (fact that the woman walked across the state line was considered, not as destroying the interstate character of the transportation, but as further evidence that defendant knowingly transported her for immoral purposes).

11. See 42 WORDS AND PHRASES 358 *et seq.* (Perm. ed. 1940). See in particular, *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199 (U.S. 1817), where the Supreme Court, in construing a statute which used the word "transport," held that its ordinary meaning is "to carry." Hence driving live oxen was not a transportation of them, within the meaning of the statute.

12. It is fundamental that there can be no conviction if in fact there has been no violation of the Act itself, no matter what acts of impropriety the parties may have committed. *Williams v. United States*, 282 Fed. 481 (4th Cir. 1922).

13. Under this definition it would seem that a hike which crossed a state line could be the basis for conviction if the requisite immoral purpose was present, even though no other means of transportation had been employed during the trip.

14. 18 U.S.C. § 10 (1948) now defines the term "interstate commerce" to include "commerce between one State . . . and another . . ." wherever used in this title. Formerly, 36 STAT. 825 (1910) and 18 U.S.C. § 397 (1947) had defined "interstate commerce" as used in the Federal White Slave Traffic Act to include "transportation from any State . . . to any other State. . ." In the Reviser's Note in 18 U.S.C. § 10 (1948) it is said that "the word 'commerce' was substituted for 'transportation' in order to avoid the narrower connotation of the word 'transportation' since 'commerce' obviously includes more than 'transportation.'"

disclosure was held not to render the testimony inadmissible.<sup>1</sup> *Held*, reversed. The privilege should not be restricted to mere utterances or written words; it extends as well to conduct if the knowledge communicated thereby would not have been imparted except in the confidence of the marital relation. *Meneffee v. Commonwealth*, 55 S.E.2d 9 (Va. 1949).

At common law spouses of parties to an action were incompetent to testify either for or against the party spouse, regardless of whether the action was civil or criminal.<sup>2</sup> For this reason there was no common law rule of privileged communications between husband and wife.<sup>3</sup> Most American states, however, at an early date removed this disqualification by statute.<sup>4</sup> It was only then that a body of law developed, largely through statute, creating a "privilege" to have excluded certain types of communications between spouses.<sup>5</sup> The scope of this privilege varies with the terms of the statutes and the interpretations given to them by the courts.

In the majority of states these statutes protect any communications between spouses, except where there is a civil or criminal action by one spouse against the other.<sup>6</sup> A second group of states protects only "confidential communications" between the spouses, either by the express language of a statute<sup>7</sup> or by construing an "any-communication" statutes to include only "confidential communications" between husband and wife.<sup>8</sup> A third group of states extends the privilege to "private communications" between the spouses<sup>9</sup>

1. VA. CODE ANN. § 8-289 (1950).

2. 2 WIGMORE, EVIDENCE §§ 600-20 (3d ed. 1940). The problem of incompetency is to be distinguished from a privilege to have certain types of testimony excluded. See Note, 3 VAND. L. REV. 298 (1950).

3. *Shenton v. Tyler*, [1939] 1 Ch. 620, 18 CAN. B. REV. 129 (1940), 55 L.Q. REV. 329 (1939); Note, 56 L.Q. REV. 137 (1940). Also see 1 BL. COMM. \*443.

4. 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935); Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929). A number of states retain the rule that a spouse is incompetent to testify against a party spouse in a criminal action, while other states merely extend a privilege of disqualification. 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935).

5. "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Woffle v. United States*, 291 U.S. 7, 14, 54 Sup. Ct. 279, 78 L. Ed. 617 (1934); see *Mercer v. State*, 40 Fla. 216, 24 So. 154, 157 (1898). See notes 6, 7 and 8, *infra*.

6. *E.g.*, CAL. CODE CIV. PROC. ANN. § 1881 (1946); MICH. STAT. ANN. § 27.916 (Henderson 1938), *People v. Rosa*, 268 Mich. 462, 256 N.W. 483 (1934) (limiting privilege to confidential communications between spouses); MINN. STAT. ANN. § 595.02 (1945), *White v. White*, 101 Minn. 451, 112 N.W. 627 (1907) (privilege not limited to confidential communications).

7. *E.g.*, MO. REV. STAT. ANN. § 1892 (1939); N.J. STAT. ANN. § 2:97-9 (1939); N.Y. PENAL LAW § 2445 (1944).

8. *People v. Rosa*, 268 Mich. 462, 256 N.W. 483 (1934); accord, *Keeler v. Russum*, 68 Colo. 196, 189 Pac. 255 (1920); *Lowry v. Lowry*, 170 Ga. 349, 153 S.W. 11 (1930) (apparently not exact statute but holding confidential communications only are privileged); *Beyerline v. State*, 147 Ind. 125, 45 N.E. 772, 774 (1897). *Contra*: *White v. White*, 101 Minn. 451, 112 N.W. 627 (1907).

9. LA. CODE CRIM. LAW AND PRAC. ANN. art. 461 (1943); MASS. ANN. LAWS, c. 233, § 20 (1933); VA. CODE ANN. § 8-289 (1950), *Thomas v. First National Bank*, 116 Va. 497, 186 S.E. 77 (1936) ("private" in statute construed to be synonymous with "confidential"); WIS. STAT. § 325.18 (1947).

and at least one court has construed an "any-communication" statute to mean only "private communications" between spouses.<sup>10</sup>

In addition to the divergence in the statutes and the interpretations given them as to what communications come within the privilege—*i.e.*, "confidential communications," "private communications," etc.—there is also a difference of opinion as to what is a "communication." The instant case holds that an act may be the subject of a communication. Other courts seem to limit the meaning of "communication" to spoken or written words.<sup>11</sup> The proper theory would seem to be the one expressed by Professor Wigmore, that a nonverbal act is not a communication unless it is done for the specific purpose of communicating a fact or conveying an idea to the other spouse.<sup>12</sup>

Several cases hold that any knowledge obtained through observing acts which would not have been performed in the witnessing spouse's presence except for marital confidence is communicated within the meaning of "communication" statutes.<sup>13</sup> This interpretation widens the scope of the privilege so that it is coextensive with that created by statutes which expressly include within the privilege testimony of any acts<sup>14</sup> or knowledge<sup>15</sup> gained by virtue of the marriage relationship. On the other hand several cases have held that testimony regarding the party spouse's physical appearance or mental condition is not within the legal inhibition relating to privileged communications between husband and wife,<sup>16</sup> generally on the theory that such knowledge

10. *Gifford v. Gifford*, 58 Ind. App. 665, 107 N.E. 308, 311 (1914).

11. "In other words, they may testify as to what was *done* by either spouse, but not as to what was *said* if it was in the nature of a confidential communication." *Postner v. New York Life Ins. Co.*, 56 Ariz. 202, 106 P.2d 488, 491 (1940); *Mullin-Johnson Co. v. Penn. Mut. Life Ins. Co.*, 2 F. Supp. 203 (N.D. Cal. 1933); *In re Pusey's Estate*, 180 Cal. 368, 181 Pac. 648 (1919); *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605 (1898); *State v. Dixon*, 80 Mont. 181, 260 Pac. 138 (1927); *cf. Wolfe v. United States*, 291 U.S. 7, 15, 54 Sup. Ct. 279, 78 L. Ed. 617 (1934); *United States v. Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943) *semble*; 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940); Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 403 (1930); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 464 (1938). See MODEL CODE OF EVIDENCE, Rules 214-17 (1942).

12. *See State v. Smith*, 198 Ind. 156, 152 N.E. 803, 806 (1926); 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940).

13. "[T]he term communication means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing." *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172, 174 (1949); *see Mercer v. State*, 40 Fla. 216, 24 So. 154, 157 (1898); *Smith v. State*, 198 Ind. 156, 152 N.E. 803, 806 (1926); *Todd v. Barbee*, 271 Ky. 381, 111 S.W.2d 1041, 1043 (1938); *Willey v. Howell*, 168 Ky. 466, 182 S.W. 619, 621 (1916); *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737, 738 (1913); *cf. Fraser v. United States*, 145 F.2d 139, 143 (6th Cir. 1944); *Pierson v. Illinois Cent. Ry.*, 159 Mich. 110, 123 N.W. 576, 577 (1909); *Phoenix Fire & Marine Ins. Co. v. Shoemaker*, 95 Tenn. 72, 31 S.W. 270, 272 (1895).

14. OHIO GEN. CODE ANN. § 11494 (1938); WYO. COMP. STAT. ANN. § 3-2602 (1945).

15. TENN. CODE ANN. §§ 9777, 9778 (Williams 1934), *Phoenix Fire & Marine Ins. Co. v. Shoemaker*, 95 Tenn. 72, 31 S.W. 270 (1895); VT. STAT., c. 84 § 1738 (1947).

16. *People v. Loper*, 159 Cal. 6, 112 Pac. 720 (1910); *Howard v. State*, 103 Tex. Crim. App. 205, 280 S.W. 586, 588 (1926); *accord, Casson v. Schoenfeld*, 166 Wis. 401, 166 N.W. 23 (1918). *Contra: In re Ford's Estate*, 70 Utah 456, 261 Pac. 15 (1927).



is involuntarily imparted by the party spouse rather than in reliance upon the marital confidence.

In the instant case the wife's testimony which was held to be privileged was that her husband had come home at a certain time in a highly nervous condition, that soon after arriving he placed a pistol on the mantle, that she later saw him scraping paint (which later was proved similar to that on a safe taken in the robbery) from his automobile trunk, and that she had on several occasions after the robbery driven him to the vicinity of the place where the safe was later found. Viewing these facts in the light of the law as previously developed, it seems questionable that the testimony should be held privileged. The defendant hardly intended his acts to communicate knowledge to his wife in marital confidence. The court seems to be broadening the Virginia statute privileging "communications privately made" to include any knowledge gained by virtue of the marital relation.<sup>17</sup> In view of the fact that the result of any such privilege is to keep out truth, the desirability of so widening the privilege is questionable.<sup>18</sup> The present decision seems inconsistent with the more limited privilege prescribed by the Virginia legislature, and is contrary to the current trend of authorities to construe the degree of the privilege strictly for policy reasons.

#### INSURANCE—COMMERCIAL-RADIUS INDORSEMENT IN AUTOMOBILE INSURANCE—EFFECT OF BREACH AFTER RETURN TO DESIGNATED AREA

Defendant issued to plaintiff a policy of liability and property damage insurance covering plaintiff's commercial vehicles. The policy contained an indorsement agreeing that "the automobiles will be used and operated entirely within a 500 mile radius" of Atlanta, and a further indorsement that "the company shall not be liable for any loss occurring while the vehicle is being operated outside the radius of 500 miles." Plaintiff's truck was driven to Miami (725 miles from Atlanta), and on the return trip, at a point 275 miles from Atlanta, was involved in a collision. The defendant disclaimed any responsibility under the policy. Plaintiff sought a declaratory judgment to construe the policy. *Held* (4-2), judgment for defendant affirmed. Plaintiff breached his promissory warranty in operating the vehicle beyond the 500-mile radius and released the obligations of the defendant for the purposes of

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17. 55 S.E.2d at 15.

18. In a collateral proceeding there is a common law rule that neither spouse can directly charge the other with an indictable offense but can testify to any matters which merely tend to incriminate. See *State v. Wilson*, 31 N.J.L. 77 (1864); *accord*, *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129 (U.S. 1839); *Royal Insurance Co. v. Noble*, 5 Abb. Pr. (N.S.) 54 (N.Y. 1868); *The King v. All Saints*, 6 M. & S. 194, 105 Eng. Rep. 1215 (K.B. 1817).

that trip in its entirety. *Wallace v. Virginia Surety Co.*, 80 Ga. App. 50, 55 S.E. 2d 259 (1949).

The warranty in the instant case is a promissory or continuing warranty as distinguished from an affirmative warranty.<sup>1</sup> Continuing warranties are usually construed more liberally in favor of the insured, and it is often held that the breach must materially affect the risk insured,<sup>2</sup> or that the policy is merely suspended during the period of the violation, and automatically revived upon the discontinuance thereof.<sup>3</sup> When a "while" clause is used rather than the old "if" clause, there remains little room for dispute that the policy is merely suspended.<sup>4</sup> The word "while" means *during the time* the vehicle is being operated outside the radius.<sup>5</sup> In the instant case it appears that the second indorsement was intended to exclude a construction of the first indorsement as a warranty allowing complete avoidance of the policy, but to make the two indorsements have the effect of a "while" clause.<sup>6</sup> In addition, the indorsement did not provide that the policy would be *void* if the radius were exceeded.

The instant case holds that "the liability of the insurance company under the policy was at an end when the plaintiff sent his truck beyond the 500 mile radius. . . ." <sup>7</sup> But this interpretation would seem to require the same result if the accident had occurred inside the radius on the *outward* trip, so long as the plaintiff intended to go outside the radius.<sup>8</sup> It appears more reasonable to interpret the "while" clause to suspend the liability of the insurer merely during that time the vehicles are outside the 500-mile radius.

The customary practice of insurance companies is to use "commercial radius" indorsements which provide for "regular or principal" use, and not exclusive use, within the stated radius.<sup>9</sup> This type of warranty would allow

1. PATTERSON, ESSENTIALS OF INSURANCE LAW § 65 (1935).

2. *Id.* at 268.

3. *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N.E. 255, 35 L.R.A. 595 (1896); *Schmidt v. Peoria Marine and Fire Ins. Co.*, 41 Ill. 295 (1866); *Born v. Home Ins. Co.*, 110 Iowa 379, 81 N.W. 676, 80 Am. St. Rep. 300 (1900); *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N.E. 737, 54 Am. Rep. 445 (1885); *McClure v. Mutual Fire Ins. Co.*, 242 Pa. 59, 88 Atl. 921, 48 L.R.A. (N.S.) 1221 (1913); *Contra: Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231 (1894); *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358 (6th Cir. 1899); *Jones & Pickett Ltd. v. Michigan Fire & Marine Ins. Co.*, 132 La. 847, 61 So. 846 (1913); *Kyte v. Assurance Co.*, 149 Mass. 116, 21 N.E. 361, 3 L.R.A. 508 (1889).

4. PATTERSON, ESSENTIALS OF INSURANCE LAW 219-20, 270-72 (1935). See also VANCE, INSURANCE 336-37 (2d ed. 1930).

5. See *National Reserve Ins. Co. v. Scudder*, 71 F.2d 884, 887 (9th Cir. 1934); *Fireman's Fund Ins. Co. v. Jackson*, 161 Ga. 559, 131 S.E. 359 (1926).

6. See note 5 *supra*.

7. 55 S.E.2d at 261.

8. Cf. *Connell v. Commonwealth Casualty Co.*, 96 N.J.L. 510, 115 Atl. 352 (1921) (plaintiff injured by bus being driven off "customary route" on outward trip: insurer liable).

9. *Standard Accident Ins. Co. v. Grimmer*, 32 F. Supp. 81 (W.D. La. 1939); *Kindred v. Pacific Automobile Ins. Co.*, 10 Cal.2d 463, 75 P.2d 69 (1938); *Person v. Tyson*, 215 N.C. 127, 1 S.E.2d 367 (1939); 4 APPLEMAN, INSURANCE LAW AND PRACTICE § 2632 (1941). See also Note, 72 A.L.R. 1375 (1931).

a more liberal construction than one such as is contained in the principal case. Several cases have arisen where "while" clauses have restricted the commercial radius of use. But in all the cases relied upon to extinguish the liability of an insurer, the loss occurred outside the radius. In the instant case the accident occurred within the 500-mile radius. There appears to be no other reported case where this situation was presented, so that the holding is unsupported by authority.

#### PERSONAL PROPERTY—FINDING LOST GOODS—CHAMBERMAID'S RIGHT TO GOODS FOUND BY HER AS AGAINST HOTEL

Plaintiff, a chambermaid, while cleaning hotel rooms for her employer, found several \$100 bills carefully concealed under the paper lining of a dresser drawer in a guest room. Plaintiff immediately turned the bills over to the defendant, her employer, in order that they might be returned to the true owner if possible. Defendant failed to locate the true owner but refused to return the bills to the plaintiff. In an action for money had and received, the lower court gave judgment for the plaintiff, which was reversed on appeal to the supreme court.<sup>1</sup> Plaintiff petitioned for a rehearing. *Held*, petition denied. The employee had no rights as against her employer in mislaid property discovered in a guest room.<sup>2</sup> *Jackson v. Steinberg*, 205 P.2d 562 (Ore. 1949).

The early English case of *Armory v. Delamirie* laid down the broad rule that the finder of lost property "has such a property as will enable him to keep it against all but the rightful owner."<sup>3</sup> Since that time the courts have considerably narrowed this rule by various exceptions and distinctions.<sup>4</sup> The major distinction, and one drawn by the court in this case, is the distinction between "lost" and "mislaid" property. Property is defined as "lost"

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1. For former opinion see 200 P.2d 376 (Ore. 1948), 5 LOYOLA L. REV. 83 (1949).

2. The employee's duties in this case included the delivery to her employer of valuable property left in the guest rooms. However, it is not clear whether this was the actual basis of the decision. The court discusses at some length former Oregon decisions involving found property and other cases invoking the lost-mislaid distinction.

The following discussion purports to include only a brief analysis of the law relating to lost and mislaid personal property with regard to the controversy between the finder and the owner of the *locus in quo*. For a thorough discussion of the rights of various parties in property that has been found, see Aigler, *Rights of Finders*, 21 MICH. L. REV. 664 (1923); Riesman, *Possession and the Law of Finders*, 52 HARV. L. REV. 1105 (1939); Moreland, *The Rights of Finders of Lost Property*, 16 KY. L.J. 1 (1927).

3. 1 Str. 505, 93 Eng. Rep. 664 (1722). The substitution of the words "prior possessor" for "rightful owner" in this quotation would seem to give a better statement of the law since it is obvious that a finder has no right against a prior possessor, even though the latter's rights were based upon an earlier finding. *Clark v. Maloney*, 3 Harr. 68 (Del. Super. Ct. 1840); *Deaderick v. Oulds*, 86 Tenn. 14, 5 S.W. 487 (1887).

4. See notes 5, 6 and 9 *infra*. A distinction has also been made between things buried beneath the surface of the land and things on top. *Ferguson v. Ray*, 44 Ore. 557, 77 Pac. 600 (1904). And cases where the finder was a trespasser are treated differently. *Barker v. Bates*, 30 Mass. (13 Pick.) 255 (1832).

when its owner has involuntarily parted with possession of it, through neglect, carelessness or inadvertence.<sup>5</sup> Mislaid property, on the other hand, is "that which the owner has voluntarily and intentionally laid down in a place where he can again resort to it, and then has forgotten where he laid it."<sup>6</sup>

The general rule is that the finder of "lost" property is entitled to hold it as against everyone except a prior possessor.<sup>7</sup> This rule applies irrespective of the place of finding or the relation of the finder to the owner of the *locus in quo*.<sup>8</sup> Thus, where the place of finding is private in character, the occupier of the *locus* is entitled to the goods found as against the finder, since the occupier is a prior possessor.<sup>9</sup> "The possession of the land carries with it in general, by our law, possession of everything which is attached to or under that land, and in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence."<sup>10</sup> Thus the courts hold that when the *locus in quo* is private, the owner has the power and intent to exclude the general public, and that this constitutes a *de facto* possession of everything on or in the land.<sup>11</sup>

In cases involving "mislaid" property, the owner of the *locus in quo* is held to prevail over the finder, even where the place of finding is public in character.<sup>12</sup> The actual basis of these decisions is not clear. It is apparent that in this situation the occupier cannot qualify as a prior possessor, since the requisite intent is not present. Yet the cases sometimes refer to the occupier as a bailee, in which case he must have possession, and at other times as a mere custodian without legal possession.<sup>13</sup> In criminal cases the

5. *Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Sovern v. Yoran*, 16 Ore. 269, 20 Pac. 100 (1888); *Hamaker v. Blanchard*, 90 Pa. 377 (1879); *Lawrence v. State*, 20 Tenn. 173 (1839); BLACK, LAW DICTIONARY 1134 (3d ed. 1933); 34 AM. JUR., *Lost Property* § 2 (1941); 36 C.J.S., *Finding Lost Goods* § 1 (1943).

6. *Jackson v. Steinberg*, 200 P.2d 376, 377 (Ore. 1948). See cases cited note 5 *supra*. For a general discussion of the lost-mislaid distinction, see HOLMES, THE COMMON LAW 220 *et seq.* (1881); Aigler, *supra* note 2, at 668-78; Riesman, *supra* note 2, 1117-25; Moreland, *supra* note 2, at 5-7.

7. *E.g.*, *In re Savarino*, 1 F. Supp. 331 (S.D.N.Y. 1932); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904); *Deaderick v. Oulds*, 86 Tenn. 14, 5 S.W. 487 (1887); 34 AM. JUR., *Lost Property* § 8 (1941).

8. *E.g.*, *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172 (1878); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935); *Hamaker v. Blanchard*, 90 Pa. 377 (1879); 34 AM. JUR., *Lost Property* §§ 6-10 (1941); Note, 170 A.L.R. 706 (1947).

9. *Silcott v. Louisville Trust Co.*, 205 Ky. 234, 265 S.W. 613 (1924); *Foster v. Fidelity Safe Deposit Co.*, 264 Mo. 89, 174 S.W. 376 (1915); *Ferguson v. Ray*, 44 Ore. 557, 77 Pac. 600 (1904); *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44. *But cf.* *Erickson v. Sinykin*, 223 Minn. 232, 26 N.W.2d 172, 170 A.L.R. 697 (1947); *Toledo Trust Co. v. Simmons*, 52 Ohio App. 373, 3 N.E.2d 661 (1935); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904); *Hannah v. Peel*, [1945] 1 K.B. 509.

10. *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, 46, quoting POLLOCK AND WRIGHT, ESSAY ON POSSESSION IN THE COMMON LAW, p. 41.

11. See cases cited note 9 *supra*.

12. *McAvoy v. Medina*, 93 Mass. (11 Allen) 548 (1866); *Foulke v. New York Consolidated R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920); *Loucks v. Gallogly*, 1 Misc. 22, 23 N.Y. Supp. 126 (N.Y. Munic. Ct. 1892); *Flax v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946).

13. *Norris v. Camp*, 144 F.2d 1 (10th Cir. 1944) (custodian); *Kincaid v. Eaton*, 98

courts have held that the mislayer of goods retains constructive possession of them; therefore the occupier has custody only and his conversion of them constitutes larceny.<sup>14</sup>

It appears that the courts are motivated, in the main, by a desire to protect the interests of the loser.<sup>15</sup> When the occupier attempts to place the lost article beyond the reach of the loser, he is held to have mere custody. But when the finder is attempting to keep the lost property, the occupier is regarded as a gratuitous bailee.

It is submitted that the lost-mislaid distinction is an arbitrary one at best.<sup>16</sup> The owner of a public place is no more a bailee of a "mislaid" article than he is of a "lost" article. The only pertinent question should be whether the occupier was in possession of the article before the finder discovered it. If the owner of the *locus* had the necessary intent to exclude the general public (*i.e.*, if the place of finding was private in character), he was a prior possessor, and as such entitled to the discovered property. If no such intent was present, the finder was the first possessor, and entitled to keep the article as against the occupier.

Legislation is desirable to insure protection of all the interests involved, including those of the loser.<sup>17</sup> Professor Riesman has suggested such a rule, which is in substance as follows:<sup>18</sup> Whether the property be regarded as lost or mislaid, it should be left with the occupier for a reasonable time to protect the interests of the true owner if he should appear. At the end of this time the property should be returned to the finder except in cases where the property is found in a very private place, for instance the occupier's home. This rule would promote finder honesty by offering the finder the opportunity to own the article if the true owner did not appear. It would also remove from the occupier the temptation to pretend a search for the true owner, since he cannot now benefit if the true owner fails to appear.

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Mass 139 (1867) (depository); *Foulke v. New York Consolidated R.R.*, 228 N.Y. 269, 127 N.E. 237 (1920) (bailee); *Flax. v. Monticello Realty Co.*, 185 Va. 474, 39 S.E.2d 308 (1946) (bailee).

14. *People v. M'Garren*, 17 Wend. 460 (N.Y. 1837); *Lawrence v. State*, 20 Tenn. 173 (1839).

15. Riesman, *supra* note 2, at 1122.

16. See HOLMES, *THE COMMON LAW*, 222-23 (1881); Riesman, *supra* note 2, at 1117-23.

17. Though the courts could abolish or simply ignore the lost-mislaid distinction, there is still no judicial technique whereby they can require the occupier to hold the property for a stated time and then turn it over to the finder, without the aid of a statute.

18. Riesman, *supra* note 2, at 1125. A questionnaire sent to eighteen large companies, including theaters, department stores and public carriers, shows that these companies follow to a great extent the rule suggested by Professor Riesman. A table may be found at page 1128 of his article which shows the results of this survey.

**STATUTORY CONSTRUCTION—IMPLIED REPEAL OF STATUTES—  
ABATEMENT OF NUISANCE**

A Nevada statute, declaratory of the common law, made general provision for the abatement of nuisances.<sup>1</sup> Under this statute, Washoe County brought an action to enjoin the operation by defendant of a house of prostitution. Defendant contended that another statute,<sup>2</sup> making unlawful the operation of houses of prostitution within 400 yards of a school or church, or fronting upon a business district or main thoroughfare, impliedly authorized operation outside these enumerated areas, and moved to dismiss. *Held*, motion denied. Statutes adopting common law rules of nuisance were not impliedly repealed by subsequent statutes prohibiting operation of houses of prostitution within certain enumerated areas. *Cunningham v. Washoe County*, 203 P.2d 611 (Nev. 1949).

Repeals may be effected expressly<sup>3</sup> or by implication.<sup>4</sup> Where there is an express specific repeal,<sup>5</sup> the legislative intent is sufficiently shown by the words of the statute, and little difficulty is experienced in construing the statute.<sup>6</sup> But where there are merely general words of repeal,<sup>7</sup> or no words indicating an express intent to repeal a prior statute, more difficult problems are presented in determining whether it is necessary to hold the prior statute repealed by implication in order to give full effect to the legislative intent as evidenced by the subsequent statute.

Repeals by implication are not favored by the law;<sup>8</sup> nevertheless, where there is such a repeal, it is fully as effective as an express repeal.<sup>9</sup> Implied repeals are not to be presumed,<sup>10</sup> instead, statutes *in pari materia* will be

1. NEV. COMP. LAWS ANN. § 2043 (1929).

2. NEV. COMP. LAWS ANN. § 10193-94 (1929).

3. *Bear Lake & River Water Works & Irrigation Co. v. Garland*, 164 U.S. 1, 11, 17 Sup. Ct. 7, 41 L. Ed. 327 (1896); *Minter v. State*, 145 Tenn. 678, 238 S.W. 89 (1922).

4. *The San Pedro*, 2 Wheat. 132, 140, 4 L. Ed. 202 (U.S. 1817); *Merlo v. Johnson City & Big Muddy Coal & Mining Co.*, 258 Ill. 328, 101 N.E. 525, 527 (1913); 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 2011 *et seq.* (3d ed., Horack, 1943).

5. In cases involving express repeals, the statute to be repealed must be designated with reasonable certainty. *Noble v. Noble*, 164 Ore. 538, 103 P.2d 293 (1940); *House v. Creveling*, 147 Tenn. 589, 600, 250 S.W. 357, 360 (1923).

6. 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2010 (3d ed., Horack, 1943). Where the language is clear and unambiguous, there is no need for construction. *Chauncey v. Dyke Bros.*, 119 Fed. 1, 16 (8th Cir. 1902).

7. General repealing clauses are without legal effect since they fail to designate the statute which is repealed. *State v. Yardley*, 95 Tenn. 546, 558, 32 S.W. 481, 484 (1895); *State v. Jackson*, 120 W. Va. 521, 199 S.E. 876, 877 (1938). Nevertheless they are still inserted in statutes with great frequency. See, *e.g.*, Tenn. Pub. Acts 1949, c. 261, § 3; *id.*, c. 264, § 6.

8. *E.g.*, *United States v. Borden Co.*, 308 U.S. 188, 198, 60 Sup. Ct. 182, 84 L. Ed. 181 (1940); *United States v. Noce*, 268 U.S. 613, 619, 45 Sup. Ct. 610, 69 L. Ed. 1116 (1925); *State v. Myers*, 152 Kan. 52, 102 P.2d 1028, 1030 (1940); *In re Colman's Estate*, 187 Wash. 312, 60 P.2d 113, 117 (1936), 12 WASH. L. REV. 87 (1937); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2014 (3d ed., Horack, 1943).

9. *E.g.*, *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516, 519 (1938).

10. *E.g.*, *Batchelor v. Palmer*, 129 Wash. 150, 224 Pac. 685 (1924); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2014 (3d ed., Horack, 1943).

construed together in such a manner as to achieve a consistent body of law wherever possible.<sup>11</sup> There is an implied repeal only when there is, and only to the extent of, an irreconcilable conflict between the repealing statute and a prior statute.<sup>12</sup> However, an implied repeal is often found where a special or local statute is followed by a general statute unequivocally indicating the legislative intent to effectuate a repeal of the special statute,<sup>13</sup> where a general statute is followed by a special statute which treats a phase of the general subject matter more minutely,<sup>14</sup> or where a subsequent penal statute provides a new penalty,<sup>15</sup> or substantially redefines the offense.<sup>16</sup>

Defendant's contention in the instant case was apparently based on the doctrine of *expressio unius*—that the expression of one exception to a rule implies that there are to be no other exceptions, or that a statute making an act illegal under certain circumstances implies that it shall be lawful under all other circumstances. But other canons of statutory construction tend toward the opposite result and seem more clearly to produce the result intended by the legislature. As the general statute under consideration, providing for the enjoining of the operation of houses of prostitution and the maintenance of other nuisances, is but a codification of the common law, the original presumption against repeal by implication is strengthened by the rule that statutes in derogation of the common law should be strictly construed.<sup>17</sup> Under the canon requiring that statutes *in pari materia* be construed in harmony rather than in conflict, a clear picture of the legislative purpose is presented: First, a statute allowing the operation of houses of prostitution to be enjoined wherever found, and second, a subsequent statute making it a crime to operate such houses in certain areas—indicating a greater degree of legislative harshness rather than leniency toward the ancient profession. To say that an act whose clear purpose was to restrict the practice of prosti-

11. *Hastings v. Rathbone*, 194 Iowa 177, 188 N.W. 960, 23 A.L.R. 392 (1922); *Glascott v. Bragg*, 111 Wis. 605, 87 N.W. 853 (1901); 1 SUTHERLAND, *op. cit. supra* note 10, at §§ 2014-16.

12. *State ex rel. Att'y Gen. v. Standard Oil Co.*, 179 Ark. 280, 16 S.W.2d 581 (1929); *Ferch v. People*, 101 Colo. 471, 74 P.2d 712 (1937); *Bemis Bro. Bag. Co. v. Wallace*, 197 Minn. 216, 266 N.W. 690 (1936); see *Summers v. Atchison, T. & S.F. Ry.*, 2 F.2d 717, 720 (E.D. Mo. 1924). For the many different ways in which an implied repeal may occur, see 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 2017-34 (3d ed., Horack, 1943); Note, 37 COL. L. REV. 292 (1937).

13. *Kirklands v. Town of Bradley*, 104 Fla. 390, 139 So. 144 (1932); *Board of Levee Comm'rs v. Parker*, 187 Miss. 621, 193 So. 346 (1940); *Morris v. Neider*, 259 App. Div. 49, 18 N.Y.S.2d 207 (4th Dep't 1940).

14. *E.g.*, *Stockburger v. Jordan*, 10 Cal.2d 636, 76 P.2d 671 (1938); *Wiedoelt v. Holton & Co.*, 294 Ill. App. 118, 13 N.E.2d 854 (1938); *State v. Ginther*, 53 Wyo. 17, 77 P.2d 803 (1938); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2022 (3d ed., Horack, 1943).

15. *State ex rel. Thompson v. Dixie Finance Co.*, 152 Tenn. 306, 278 S.W. 59 (1926).

16. *Maresca v. United States*, 277 Fed. 727, 737 (2d Cir. 1921), *cert. denied*, 257 U.S. 657 (1922).

17. *Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F.2d 985 (2d Cir. 1933); *Helms v. American Securities Co.*, 216 Ind. 1, 22 N.E.2d 822 (1939); *Roselle Park Trust Co. v. Ward Baking Corp.*, 177 Md. 212, 9 A.2d 228 (1939); 3 SUTHERLAND, STATUTORY CONSTRUCTION §§ 6201-06 (3d ed., Horack, 1943).

tution must have the effect of promoting prostitution would be absurd; and it is elementary that a statute should not be construed so as to reach an absurd or harsh result, even when the literal wording of the statute seems to require such a result.<sup>18</sup> Thus, in the instant case, there is no such irreconcilable conflict between the two statutes as to lead to an implied repeal of the general statute by the special statute.<sup>19</sup>

The instant case illustrates that the individual canons of statutory construction are never conclusive in arriving at the legislative intent,<sup>20</sup> but are only aids to be weighed one against the other and applied in the light of reason to determine whether a repeal has been effectuated.<sup>21</sup>

#### STATUTORY CONSTRUCTION—RESTRICTION OF APPLICATION OF STATUTE TO CONTEMPORARY CIRCUMSTANCES—PARTIES AS "WITNESSES" UNDER TENNESSEE DEPOSITION STATUTE

A Tennessee statute enacted in 1851 allowed parties to a civil action brought *in forma pauperis* to take the evidence of witnesses by deposition.<sup>1</sup> Subsequently a statute was enacted which provided that no person should be incompetent as a witness because he was a party to or interested in the action.<sup>2</sup> Defendant attempted to take plaintiff's deposition in a tort action brought *in forma pauperis*; and upon plaintiff's refusal to give testimony in obedience to summons issued under the deposition statute, the trial court dismissed the action. *Held*, reversed. Since parties to an action were not competent as witnesses when the deposition act was passed, "it is historically impossible . . . that the Legislature had 'parties' in mind when the word 'witnesses' was used in the Act." *Hubbard v. Haynes*, 225 S.W.2d 252 (Tenn. 1949).

The purpose of statutory construction is to determine the true meaning of the statute—the legislative intent which the words of the statute were designed to express.<sup>3</sup> Where the wording is such that there is no ambiguity

18. *E.g.*, *Abramson v. Hard*, 229 Ala. 2, 155 So. 590 (1934); *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437, 141 N.E. 907 (1923); *Brammall v. LaRose*, 105 Vt. 345, 165 Atl. 916 (1933); *Thomas v. State*, 218 Wis. 83, 259 N.W. 829 (1935).

19. For discussion of a similar problem, see Rhyne, *Statutory Construction in Resolving Conflicts Between State and Local Legislation*, 3 VAND. L. REV. 509 (1950).

20. *See, e.g.*, *State ex rel. Curtis v. De Corps*, 134 Ohio St. 295, 16 N.E.2d 459, 462 (1938).

21. 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 2006-07 (3d ed., Horack, 1943); Note, 37 COL. L. REV. 292, 302 (1937).

1. TENN. CODE ANN. § 9806(9) (Williams 1934).

2. *Id.* § 9777.

3. *People ex rel. Twenty-third St. R.R. v. Commissioners of Taxes*, 95 N.Y. 554 (1884); 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 4501-10 (3d ed., Horack, 1943); CRAWFORD, STATUTORY CONSTRUCTION § 158 (1940); 50 AM. JUR., *Statutes* § 223 (1944); Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 214 (1936). There has been much recent criticism of the concept of "legislative intent" on the ground



on the face of the statute, the "plain meaning" of the words of the statute will usually control.<sup>4</sup> Where the word is one to which the law has assigned a fixed meaning, it will be assumed that the legislature acted with knowledge of the law.<sup>5</sup> Thus the word "malice" as used in a statutory definition of murder is construed in accordance with its common law meaning rather than its popular meaning.<sup>6</sup> Where the statute is ambiguous, or where a literal application of it will lead to an absurdity, the court will construe the word so as to give it its proper meaning in relation to the context and the subject matter of the statute.<sup>7</sup> By far the surest method of determining the legislative intent, regardless of recent criticism of the rule, is through the application of Lord Coke's "Mischief Rule." Coke said that courts should consider the state of the law prior to the enactment, the mischief or defect in the law to be corrected, the remedy advanced by the legislature and the reason for the remedy.<sup>8</sup> The court should then give the statute such construction as will suppress the mischief and advance the remedy. Thus, a "Blue Sunday" statute prohibiting the operation of "theaters, variety theaters and such other amusements" was held to include "picture shows," even though the motion picture had not been invented when the statute was enacted, and the legislature could not possibly have had it in mind in prohibiting "such

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that the legislature itself, apart from its members, has no intent and that the law is not that which the legislature intended to enact, but that which it actually enacted. Radin. *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 *et seq.* (1930); Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 405-07 (1942). For a summary of three basic views as to statutory construction, see Pound, *Enforcement of Law*, 20 GREEN BAG 401, 404-06 (1908).

4. *Caminetti v. United States*, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1916); *Wall v. Pfanschmidt*, 265 Ill. 180, 106 N.E. 785 (1914). *Contra: In re Tyler's Estate*, 140 Wash. 679, 250 Pac. 456, 51 A.L.R. 1088 (1926) (applying the "equity of the statute" approach, the court held that the legislature, in providing that the husband should inherit from his wife, could not have intended to allow a husband who murdered his wife to benefit from his crime). For a critical analysis of the literary approach, see 2 SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 4701-06 (3d ed., Horack, 1943); Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335 (1949); Chafee, *The Disorderly Conduct of Words*, 41 COL. L. REV. 381 (1941).

5. 3 SUTHERLAND, *STATUTORY CONSTRUCTION* § 5303 (3d ed., Horack, 1943); CRAWFORD, *STATUTORY CONSTRUCTION* § 187 (1940).

6. *State v. Jacowitz*, 128 Conn. 40, 20 A.2d 470 (1941). For other examples of the use of words having settled legal meanings, see *Truelove v. Truelove*, 172 Ind. 441, 86 N.E. 1018 (1909) ("children" meaning "legitimate children"); *Aberdeen Bindery, Inc. v. Eastern States Printing & Publishing Co.*, 166 Misc. 904, 3 N.Y.S.2d 419 (1st Dep't 1938) ("person" meaning "natural person" in statute allowing a person to defend his own suit although not qualified to practice law).

7. *Nix v. Hedden*, 149 U.S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745 (1893); *Nashville & K. Ry. v. Davis*, 78 S.W. 1050 (Tenn. 1902). For an extreme example of the interpretation of words in relation to the general subject matter and purpose of the statute, see the opinion of L. Hand, J., in *Lenroot v. Western Union Telegraph Co.*, 141 F.2d 400 (1944), *reversed*, 323 U.S. 490, 65 Sup. Ct. 335, 89 L. Ed. 414 (1945), 13 GEO. WASH. L. REV. 383. In his opinion Judge Hand held that a statute regulating companies shipping in interstate commerce goods produced by the shipper included telegraph companies.

8. *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Ex. 1584); *Southern Express Co. v. Brickman Co.*, 187 Ala. 637, 65 So. 954 (1914); 2 SUTHERLAND, *STATUTORY CONSTRUCTION* §§ 5001-02 (3d ed., Horack, 1943); CRAWFORD, *STATUTORY CONSTRUCTION* § 161 (1940). For an excellent example of the use of legislative history in the interpretation of statutes, see *Standard Oil Co. v. United States*, 337 U.S. 293, 69 Sup. Ct. 1051 (1949), 3 VAND. L. REV. 156.

other amusements.”<sup>9</sup> The new type of entertainment came within the class of things included in the term “such other amusements,” and being within the purpose of the statute, was held to be within the statute.

A word in a statute may be construed as referring to a particular thing,<sup>10</sup> in which case the statute will not apply to things not then in existence; or the word may be construed as referring to a class of things,<sup>11</sup> in which case the statute will apply to things later coming within the class, although not in existence at the time of the enactment. It could hardly be seriously contended that the Tennessee legislature intended in 1851 to authorize the taking of parties' depositions since parties were not then competent as witnesses, and the clear legislative intent was to enact a statute applicable to all persons within the general class of “witnesses.” When parties came within the class of persons competent as witnesses, it is reasonable to suppose that they came within the deposition statute. Instead of intending to enact a statute applicable to whoever, then or later, came within the class known as “witnesses,” the legislature may in 1851, as the court here held, have had specifically in mind all those who then constituted that class. Even so, as the provision under consideration is a statute, which the legislature may change at will (as contrasted with a constitutional provision, the scope of which cannot be changed by subsequent legislative changes in the meaning of words in the provision), some consideration should be given to the legislative intent in 1867 in providing that parties to an action were competent as witnesses.<sup>12</sup> Was it not the legislative intent to subject parties to *all* law then applicable to witnesses? The legislature itself apparently believed it necessary *expressly* to exempt parties from part of the law applicable to witnesses, for it provided that parties, when witnesses, should not be excluded from the courtroom.<sup>13</sup> Under the rule of *expressio unius*, the exclusion of parties from the operation of that part of the law applying to witnesses implies a legislative intent to subject them to the rest of the law applicable to witnesses. And the wording of the statute of 1867 gives no indication of a legislative intent to exempt parties from the operation of the

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9. *Zucarro v. State*, 82 Tex. Crim. Rep. 1, 197 S.W. 982, L.R.A. 1918B 354 (1917). *Contra*: *State v. Nashville Baseball Ass'n*, 141 Tenn. 456, 211 S.W. 357, 4 A.L.R. 368 (1918); *cf.* *Funk v. St. Paul City Ry.*, 61 Minn. 435, 63 N.W. 1099, 29 L.R.A. 208, 52 Am. St. Rep. 608 (1895). In the case last cited the court construed the words “railroad company” as not including “street railroad company.” Railroads were not at the time of the enactment of the statute used for intracity transportation. Although the language was broad enough to include the new “invention,” street railways were held not to be within the purpose of the act.

10. *State v. Nashville Baseball Ass'n*, 141 Tenn. 456, 211 S.W. 357, 4 A.L.R. 368 (1918).

11. *Creeck v. Ossep*, 149 Ga. 577, 101 S.E. 576 (1919) (holding contrary to the instant case); *People v. Kaye*, 212 N.Y. 407, 106 N.E. 122 (1914); *Zucarro v. State*, 82 Tex. Crim. Rep. 1, 197 S.W. 982, L.R.A. 1918B 354 (1917); *Gambart v. Ball*, 14 C.B. (N.S.) 306, 143 Eng. Rep. 463 (C.P. 1863).

12. TENN. CODE ANN. § 9777 (Williams 1934).

13. *Id.* § 9781.

deposition statute, or of any other law, common or statutory, with the one exception mentioned.

Under the reasoning of the instant case, a person who does not believe in God and a future state of rewards and punishment cannot be compelled to make a deposition;<sup>14</sup> nor a person interested in the action;<sup>15</sup> nor one spouse, in an action against the other, as to matters not arising out of the marital relation.<sup>16</sup> Yet all of these persons are now competent as witnesses,<sup>17</sup> and their depositions would serve the same useful purpose as the depositions of other competent witnesses.

#### TRIALS—CONFLICT OF EXPERT TESTIMONY AS TO WHETHER DENTIST'S TREATMENT IS GENERALLY RECOGNIZED BY PROFESSION—DETERMINATION BY COURT OR JURY?

Plaintiff sued defendant, a dentist, for malpractice, alleging that defendant was negligent in extracting two of plaintiff's teeth at a time when plaintiff had an acute trench mouth infection. There was substantial evidence to support a finding that the infection was acute and that the extraction caused the infection to spread, resulting in serious injury to plaintiff. There was conflicting expert testimony as to whether defendant's treatment was according to a recognized system of surgery. For this reason the trial court set aside a jury verdict for plaintiff. *Held*, reversed and judgment on the verdict reinstated. In the face of a conflict of expert testimony the court may not declare as a matter of law that a dentist has employed a recognized system of surgery. *Malila v. Meacham*, 211 P.2d 747 (Ore. 1949).

A physician or dentist is liable to a patient for harm resulting from a failure to use reasonable care in the performance of his professional services. He is bound to act according to his best judgment in treating his patients but is required to possess and exercise only that degree of skill and learning which is ordinarily possessed and exercised by reputable members of his profession

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14. Under the Tennessee common law rule, no person was competent as a witness who did not believe in God and a future state of rewards and punishments. *State v. Cooper*, 2 Tenn. 96, 5 Am. Dec. 656 (1807); *Harrel v. State*, 38 Tenn. 125 (1858); *Odell v. Koppee*, 52 Tenn. 88 (1871). This rule was changed by statute in 1895. TENN. CODE ANN. § 9775 (Williams 1934).

15. The Tennessee common law rule that the testimony of any person having a real interest in the action was inadmissible was changed by statute in 1868. TENN. CODE ANN. § 9777 (Williams 1934).

16. The Tennessee common law rule that husband and wife were incompetent to testify against each other, *Goodman v. Nicklin*, 53 Tenn. 256 (1871), was altered by statute in 1879, under which husband and wife were allowed to testify as to matters not arising from the marital relation. TENN. CODE ANN. § 9777 (Williams 1934); *Norman v. State*, 127 Tenn. 340, 155 S.W. 135, 45 L.R.A. (N.S.) 399 (1912). For a general discussion of the subject of spouses' testimony under present Tennessee law, see Note, 3 VAND. L. REV. 298 (1950).

17. *Supra*, notes 14-16.

in the same or similar communities.<sup>1</sup> A physician or dentist who has the requisite knowledge and skill and who exercises reasonable care will not be liable for harm which results from an honest mistake of judgment, where the proper course is open to reasonable doubt.<sup>2</sup> And where there are several accepted and recognized methods of treatment, a choice of one of them is not negligence.<sup>3</sup>

Whether or not a physician or dentist has adopted a recognized system of surgery is a question of fact and would, if disputed, ordinarily be for the jury to determine.<sup>4</sup> If, however, the plaintiff fails to produce some expert testimony as to the impropriety of the treatment, the court may rule that the evidence is insufficient to go to the jury.<sup>5</sup> But once the plaintiff has introduced some expert testimony on the fact in issue, the courts have shown no inclination to rule that the plaintiff's evidence is insufficient.<sup>6</sup> The narrow question presented in the instant case is whether in the event of a conflict of expert testimony the jury should be allowed to find that the defendant had not employed a recognized system of surgery.<sup>7</sup> In holding that it was a jury question the court in the instant case is in agreement with all but one of the courts which have decided the question.<sup>8</sup>

1. See, *e.g.*, *Dabney v. Briggs*, 219 Ala. 127, 121 So. 394 (1929); *Nelson v. Sandell*, 202 Iowa 109, 209 N.W. 440, 46 A.L.R. 1447 (1926); *Miller v. Toles*, 183 Mich. 252, 150 N.W. 118, L.R.A. 1915C 595 (1914); *Stohlman v. Davis*, 117 Neb. 178, 220 N.W. 247, 60 A.L.R. 658 (1928).

2. *McAlinden v. St. Maries Hospital Ass'n*, 28 Idaho 657, 156 Pac. 115, Ann. Cas. 1918A 380 (1916); *Staloch v. Holm*, 100 Minn. 276, 111 N.W. 264, 9 L.R.A. (n.s.) 712 (1907); *Pike v. Honsinger*, 155 N.Y. 201, 49 N.E. 760, 63 Am. St. Rep. 655 (1898); *Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780, Ann. Cas. 1917D 705 (1915); *PROSSER, TORTS* 237 (1941).

3. *E.g.*, *Korman v. Hagen*, 165 Minn. 320, 206 N.W. 650 (1925); *Vanhooover v. Berghoff*, 90 Mo. 487, 3 S.W. 72 (1887); *Swanson v. Hood*, 99 Wash. 506, 170 Pac. 135 (1918); *Browning v. Hoffman*, 86 W. Va. 468, 103 S.E. 484 (1920).

4. *Schaefer v. United States*, 251 U.S. 466, 476, 40 Sup. Ct. 259, 64 L. Ed. 360 (1920); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 382, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D 1029 (1913); *Curley v. Automobile Finance Co.*, 343 Pa. 280, 23 A.2d 48, 139 A.L.R. 1082 (1941); *Furman University v. Waller*, 124 S.C. 68, 117 S.E. 356, 33 A.L.R. 615 (1923).

5. *Foster v. Thornton*, 113 Fla. 600, 152 So. 667 (1934); *Carstens v. Hanselman*, 61 Mich. 426, 28 N.W. 159 (1886); *Lippold v. Kidd*, 126 Ore. 160, 269 Pac. 210 (1928). "Here the Courts have been obliged to insist on the dictate of simple logic, resulting from the principle . . . that expert testimony on the main fact in issue must somewhere appear in the plaintiff's whole evidence; and for lack of it the Court may rule, in its general power to pass upon the sufficiency of evidence . . . that there is not sufficient evidence to go to the jury. In actions for malpractice, therefore, something like a rule-of-thumb [that the plaintiff must introduce some expert testimony on the main fact in issue to establish a prima facie case] has been recognized in most jurisdictions." 7 *WIGMORE, EVIDENCE* § 2090 (3d ed. 1940).

6. See, *e.g.*, *Ross v. Hieronymus*, 2 Cal. App. 2d 258, 37 P.2d 837 (1934); *Vigneault v. Dr. Hewson Dental Co.*, 300 Mass. 223, 15 N.E.2d 185, 129 A.L.R. 95 (1938); *Tvedt v. Haugen*, 70 N.D. 338, 294 N.W. 183, 132 A.L.R. 379 (1940); *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907).

7. 211 P.2d at 759.

8. *Phillips v. Stillwell*, 55 Ariz. 147, 99 P.2d 104 (1940); *Sales v. Bacigalupi*, 47 Cal. App. 2d 82, 117 P.2d 399 (1941); *Tomer v. Aiken*, 126 Iowa 114, 101 N.W. 769 (1904); *Bennison v. Walbank*, 38 Minn. 313, 37 N.W. 447 (1888); *Stohlman v. Davis*, 117 Neb. 178, 220 N.W. 247, 60 A.L.R. 658 (1928); *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N.W. 252 (1893).

The Washington court has held that a conflict of expert testimony in such a case is conclusive in favor of the defendant.<sup>9</sup> The rationale of the Washington rule is that a layman jury is not qualified to determine the issue.<sup>10</sup> However true this may be, this rule deprives the jury of its elemental function of judging the credibility of witnesses.<sup>11</sup> Moreover, it would seem to exempt a physician or dentist from liability for improper treatment whenever he can procure one expert to testify in his behalf.<sup>12</sup>

The premise to the Washington rule is that "where physicians and surgeons of equal skill and learning, being in no way impeached or discredited, disagree in their opinions as to what the proper treatment should be, the jury will not be allowed to accept one theory to the exclusion of another."<sup>13</sup> This is a sound proposition and one which the court in the instant case accepts in so far as it refers to medical authorities as a whole and not merely to the opinions of the particular physicians who are testifying.<sup>14</sup> If the expert testimony is in agreement that among medical authorities there are conflicting views as to what treatment is proper, then there should be no question for the jury. But where, as in the cases under discussion, the expert testimony is in conflict on the question of whether there is any respectable medical authority which would sanction the treatment employed by the defendant, the experts on one side or the other must inevitably be wrong, even though they may be qualified and conscientious. Thus there is presented a question of fact upon which the expert testimony is in conflict. Such a conflict, as the instant case held, must be resolved by the jury in its capacity as sole judge of the credibility of witnesses.

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9. *Fritz v. Horsfall*, 24 Wash.2d 14, 163 P.2d 148 (1945); *Peddicord v. Lieser*, 5 Wash.2d 190, 105 P.2d 5 (1940), 13 Rocky Mt. L. Rev. 169 (1941), 17 WASH. L. REV. 118 (1942); *Dishman v. Northern Pac. Ben. Ass'n*, 96 Wash. 182, 164 Pac. 943 (1917).

10. "To allow a jury or court to award damages against a physician for failure to perform such a delicate and risky surgical operation, where learned men of the profession have conflicting views touching the advisability of performing such an operation as appears by the evidence in this case, would be, indeed, to allow the awarding of damages to rest upon mere speculation and conjecture." *Dishman v. Northern Pac. Ben. Ass'n*, 96 Wash. 182, 164 Pac. 943, 949 (1917).

11. "It is to be remembered that the jury to whom these matters were submitted under proper instruction by the district court, under our system, are the sole judges of the credibility of the witnesses and the weight given to their testimony. In this manner and on this basis only may the constitutional right of trial by jury be accorded litigants." *Stohlman v. Davis*, 117 Neb. 178, 220 N.W. 247, 250, 60 A.L.R. 658 (1928).

12. *See Hewitt v. Eisenbart*, 36 Neb. 794, 55 N.W. 252, 254 (1893); 13 Rocky Mt. L. Rev. 169 (1941). Under the Washington rule would the defendant's testimony alone be sufficient to preclude liability?

13. *Peddicord v. Lieser*, 5 Wash.2d 190, 105 P.2d 5, 11 (1940).

14. *See note 3 supra*.

WRONGFUL DEATH ACTION—EMPLOYEE'S AGREEMENT NOT TO SUE  
THIRD PARTY FOR INJURIES RECEIVED IN COURSE OF EMPLOYMENT—  
EFFECT ON RIGHTS OF PERSONAL REPRESENTATIVE

Plaintiff telegraph company had agreements with various railroads whereby it was to indemnify them for any liability to plaintiff's employees arising out of injuries occurring upon the railroad rights of way. Defendant's decedent, in his employment contract with plaintiff, agreed that in the event of accidental injury or death upon the railroads, he or his representative would look solely to plaintiff's relief plan or to Workmen's Compensation. After the decedent was struck and killed by a motor car operated by employees of one of the railroads, his administratrix instituted suit against the railroad under the New York death statute.<sup>1</sup> Plaintiff seeks to enjoin that action under the terms of its employment contract with the decedent. *Held*, permanent injunction granted. The agreement is valid and enforceable. Since it would have barred an action by the decedent for injuries if death had not ensued, it will equally bar an action by his administratrix. *Western Union Telegraph Co. v. Cochran*, 91 N.Y.S.2d 792 (Sup. Ct. 1949).

The New York statute involved in the present action is a death statute,<sup>2</sup> which creates a new cause of action in favor of the decedent's personal representative for the benefit of certain designated survivors. The action is limited, however, to those cases in which the decedent could have recovered damages for his personal injuries had he lived.<sup>3</sup> Under such a statute a majority of the states hold that a release or judgment during the lifetime of the decedent defeats an action for the wrongful death;<sup>4</sup> but a substantial number of courts will allow recovery in such cases, requiring only that an action exist at the time of the injury.<sup>5</sup> A different problem arises, however,

1. N.Y. DEC. EST. LAW § 130. "The executor or administrator . . . of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death has not ensued."

2. The New York statute is patterned upon the original Lord Campbell's Act of England; it should be contrasted with the survival acts of some states, which preserve the cause of action vested in the decedent and which allow, also, recovery of damages resulting from the death. TIFFANY, DEATH BY WRONGFUL ACT §§ 19-33 (2d ed. 1913).

Under the survival acts it is clear that a release given by the decedent or a judgment obtained by him during his lifetime will bar any action after his death. *E.g.*, *Phillips v. Community Traction Co.*, 46 Ohio App. 483, 189 N.E. 444 (1933); *Stokes v. Collum Commerce Co.*, 120 Okla. 133, 252 Pac. 390 (1926).

3. For a general discussion of the New York statute and its interpretation see Steur, *The Action for Wrongful Death in New York*, 12 N.Y.U.L.Q. REV. 388 (1935).

4. *E.g.*, *Mellon v. Goodyear*, 277 U.S. 335, 48 Sup. Ct. 541, 72 L. Ed. 906 (1928); *Morton v. Georgia Ry. & Elec. Co.*, 145 Ga. 516, 89 S.E. 488 (1916); *Cogswell v. Boston & M.R.R.*, 78 N.H. 379, 101 Atl. 145 (1917); *Fontheim v. Third Ave. Ry.*, 257 App. Div. 147, 12 N.Y.S.2d 90 (1st Dep't 1939); PROSSER, TORTS § 103 (1941); RESTATEMENT, TORTS § 925, comment a (1939); 6 WILLISTON, CONTRACTS § 1770 n.18 (Rev. ed. 1938).

5. *E.g.*, *Earley v. Pacific Elec. Ry.*, 176 Cal. 79, 167 Pac. 513 (1917) (release); *Stokes v. Collum Commerce Co.*, 120 Okla. 133, 252 Pac. 390 (1926) (release); *Rowe v. Richards*, 35 S.D. 201, 151 N.W. 1001, L.R.A. 1915E 1075, Ann. Cas. 1918A 294 (1915) (release); *Blackwell v. American Film Co.*, 189 Cal. 689, 209 Pac. 999 (1922)

where the decedent has purported to contract away his own cause of action, and that of his representative, before the injury ever occurs. A provision in a contract of employment which exempts the employer from liability for negligent injury to the employee is against public policy and invalid,<sup>6</sup> but a provision to exculpate a third person from liability to the employee for injuries incurred in the course of the employment has generally been held valid.<sup>7</sup> Where these contract exemptions are held valid, so as to bar an action by the decedent for his injuries, there is a division of authority as to whether they defeat an action for the resulting death, with the majority apparently holding that they do.<sup>8</sup> Where, on the other hand, such contracts are deemed void, they are no defense, either to an action by the employee for his injuries or to an action by the representative for the wrongful death.<sup>9</sup>

Citing the case of *Robinson v. Baltimore & O.R.R.*<sup>10</sup> as authority, the court in the principal case held the contract made between the plaintiff and his employee to be valid and enforceable. A prior New York decision<sup>11</sup> had held that a contract under which the employee agreed that he and his representatives would accept workmen's compensation benefits, renouncing common law remedies for negligence as against the employer, was a valid agreement, and that the representative had no cause of action.<sup>12</sup> The court also

(recovery by decedent); 6 WILLISTON, CONTRACTS § 1770 n.19 (Rev. ed. 1938); Note, 6 U. OF CIN. L. REV. 212 (1932).

6. *E.g.*, *Bruce Co. v. Leake*, 176 Ark. 705, 3 S.W.2d 988 (1928); *Flaiz v. Chicago, B. & Q.R.R.*, 194 Mo. App. 472, 184 S.W. 917 (1916); *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388, 7 L.R.A. (N.S.) 537, 6 Ann. Cas. 1 (1906); *Pittsburgh, C., C. & St. L. Ry. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505, L.R.A. 1917D 641, Ann. Cas. 1918B 286 (1916); *see Chicago, B. & Q.R.R. v. Miller*, 76 Fed. 439, 442 (8th Cir. 1896).

Frequently statutes contain provisions prohibiting such exemption contracts. *See, e.g.*, Federal Employers' Liability Act, 35 STAT. 66 (1908), 45 U.S.C.A. § 55 (1943): "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. . . ."

7. *E.g.*, *Baltimore & O.S. Ry. v. Voigt*, 176 U.S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560 (1900); *Lindsay v. Chicago, B. & Q. Ry.*, 226 Fed. 23 (7th Cir. 1915); *Clough v. Grand Trunk Western Ry.*, 155 Fed. 81 (6th Cir. 1907); *Russell v. Pittsburgh, C., C. & St. L. Ry.*, 157 Ind. 305, 61 N.E. 678, 55 L.R.A. 253, 87 Am. St. Rep. 214 (1901); 4 WILLISTON, CONTRACTS § 1089A (Rev. ed. 1936).

8. *E.g.*, *Francis v. Southern Pac. Co.*, 333 U.S. 445, 68 Sup. Ct. 611, 92 L. Ed. 798 (1948); *Northern Pac. Ry. v. Adams*, 192 U.S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513 (1904); *Lindsay v. Chicago, B. & Q. Ry.*, 226 Fed. 23 (7th Cir. 1915); *Griswold v. New York & N.E.R.R.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115 (1885); *Western & A.R.R. v. Strong*, 52 Ga. 461 (1874); *Barnhart v. American Concrete Steel Co.*, 227 N.Y. 531, 125 N.E. 675 (1920). *Contra*: *Chicago, R.I. & P. Ry. v. Martin*, 59 Kan. 437, 53 Pac. 461 (1898); *cf. McKeering v. Pennsylvania R.R.*, 65 N.J. Law 57, 46 Atl. 715 (1900); *see Rovegno v. San Jose K. of C. Hall Ass'n*, 108 Cal. App. 591, 291 Pac. 848, 850 (1930); *Chicago, B. & Q.R.R. v. Wymore*, 40 Neb. 645, 58 N.W. 1120, 1123 (1894).

9. *E.g.*, *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388, 7 L.R.A. (N.S.) 537, 6 Ann. Cas. 1 (1906) (suit by employee); *Pittsburgh C., C. & St. L. Ry. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505, L.R.A. 1917D 641, Ann. Cas. 1918B 286 (1916) (suit by employee); *Chicago, R.I. & P. Ry. v. Smith*, 77 Okla. 297, 188 Pac. 670 (1920) (suit by deceased employee's executrix).

10. 237 U.S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849 (1915).

11. *Barnhart v. American Concrete Steel Co.* 227 N.Y. 531, 125 N.E. 675 (1920).

12. Two other New York decisions had held an action by the administratrix barred where the decedent had agreed to "assume all risk" in consideration of a reduced fare on a railroad. *Anderson v. Erie R.R.*, 223 N.Y. 277, 119 N.E. 557 (1918); *Hodge v. Rutland*

cited two earlier cases<sup>13</sup> in which the employee himself had instituted an action for damages against the negligent third party, in violation of a similar agreement, and in which the court had granted an injunction at the petition of the employer. Putting the holdings of these cases together, the court in this case of first impression in New York concluded that the plaintiff was entitled to the permanent injunction sought.<sup>14</sup>

Where a court holds (1) that a party may contract away his own cause of action before injury and (2) that after injury a decedent may release his representative's right of action for wrongful death, only a short step is required to hold that the decedent may bar the death action by agreement before any injury takes place. Several authorities, however, have offered sharp criticism of the majority view that a decedent may release, during his lifetime, the action which his representative otherwise would have for wrongful death.<sup>15</sup> This criticism is predicated upon the theory that the administrator has a separate cause of action from that for decedent's injuries, over which the decedent should have no control. This view has found expression in the first draft of a uniform act on the survival of tort claims and death by wrongful act.<sup>16</sup> In theory, at least, serious legal obstacles may stand in the way of the efficacy of a contract such as the one in the present case.

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R.R., 112 App. Div. 142, 97 N.Y. Supp. 1107, *decision amended*, 115 App. Div. 881, 100 N.Y. Supp. 764 (3d Dep't 1906), *aff'd mem.*, 194 N.Y. 570, 88 N.E. 1121 (1909).

13. *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 41 Sup. Ct. 93, 65 L. Ed. 205 (1920); *Western Union Telegraph Co. v. Tompa*, 51 F.2d 1032 (2d Cir. 1931).

14. In the present case the plaintiff showed that it had no status in the law action sought to be enjoined, and that in the event that it had to make indemnification to the railroad, it could not satisfy any judgment against the decedent's representative, since the decedent had left no estate. As to the power of equity to restrain the action at law, see *Bomeisler v. Forster*, 154 N.Y. 229, 48 N.E. 534, 39 L.R.A. 240 (1897); *Norfolk & N.B. Hosiery Co. v. Arnold*, 143 N.Y. 265, 38 N.E. 271 (1894). See, also, note 13 *supra*.

15. *Rowe v. Richards*, 35 S.D. 201, 151 N.W. 1001, L.R.A. 1915E 1075, Ann. Cas. 1918A 294 (1915); PROSSER, *Torts* § 103 (1941); Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924); 13 MINN. L. REV. 47 (1928).

16. For the text of this first draft and for a discussion of it, see Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—a Survey and a Proposal*, 16 TULANE L. REV. 386, 430 (1942). Section 10 of the draft, on defenses, provides: "No releases, compromises or settlements entered into between the deceased and the tortfeasor may be interposed as a defense to an action by the executor or administrator for wrongful death."