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RECENT CASES

CONSTITUTIONAL LAW—ALIENS—CONSTITUTIONALITY OF McCARRAN ACT

Petitioner, a Mexican alien who entered the United States in 1918 and has remained except for brief occasional visits to Mexico, was a member of the Communist Party from 1944 to 1946. He was ordered deported under the Internal Security Act of 1950 (McCarran Act),[1] which made alien membership in the Communist Party a specific ground for deportation. Certiorari was granted to review a judgment of the court of appeals[2] affirming a denial of a writ of habeas corpus. Petitioner challenged the constitutionality of the Act and the sufficiency of the evidence to sustain his deportation, since at the time of his membership he was unaware of the violent advocacy of the Party. *Held,* (7-2),[3] judgment affirmed. Neither support nor even demonstrated knowledge of the Communist Party's advocacy of violence and force is a prerequisite to deportation under the Act, which is constitutional since it is neither a violation of due process nor an ex post facto law.[4] *Galvan v. Press,* 74 Sup. Ct. 737 (1954), *rehearing denied,* 75 Sup. Ct. 17 (1954).

There is no constitutional limit to the power of Congress to expel aliens.[5] The magnitude of this power is founded on the concept that if the power were less, the nation would be to that extent subject to the control of another power.[6] The alien, whose entry is permissive and whose presence is tolerative, has neither the right to enter nor

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1. 64 STAT. 1006 (1950), re-enacted without material change in the Immigration and Nationality Act, 66 STAT. 204 (1952), 8 U.S.C.A. § 1251 (1953). Section 22 of the original Act provides that the Attorney General shall take into custody and deport any alien "who was at the time of entering the United States or has been at any time thereafter . . . a member of any one of the classes of aliens enumerated in section 1(2) of this Act. . . ." Subparagraph (C) of § 1(2) lists "Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ."

2. 201 F.2d 302 (9th Cir. 1953).

3. Opinion by Mr. Justice Frankfurter; dissents by Mr. Justice Black and Mr. Justice Douglas.

4. U.S. CONST. Art. I, § 9. It has been held repeatedly that deportation is not "punishment" for purposes of ex post facto clause. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). See ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 317-18 (1939); 1 AM. JUR., *Aliens* § 72 (1936).

5. Prentis v. Manoogian, 16 F.2d 422 (6th Cir. 1926); Skeffington v. Katzeff, 277 Fed. 129 (1st Cir. 1922); Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920) (reversed on other grounds); 3 C.J.S., *Aliens* § 33 (1936). This power is vested in Congress exclusively by virtue of U.S. CONST. Art. I, § 8.

6. *See* Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889); 1 AM. JUR., *Aliens* § 68 (1936).

the right to remain.[7] He is, in both respects, the recipient of a mere privilege conferred by Congress[8]—a privilege which may be withdrawn at will.[9] The Court in the instant case concluded that the classification of the Communist Party as such an organization that an alien's membership therein, in and of itself warrants his deportation, is not so baseless as to be violative of due process.[10] The real basis for upholding the constitutionality of the Act, however, was that the plenary power of Congress over the formulation of policies regarding the exclusion and deportation of aliens is not qualified by the concept of substantive due process.[11] A distinction must be drawn between cases involving the constitutional rights afforded an alien while he enjoys the hospitality of the United States and those involving the Government's right to withdraw its acquiescence to his presence and deport him. In the first instance, aliens have been held to be entitled to certain substantive rights under the Fourteenth Amendment.[12] The alien facing deportation, however, enjoys no such rights since only his permission to remain is rescinded.

The petitioner, in contending that he was not a "member" of the Communist Party under the provisions of the Act, presented a problem of statutory interpretation with which the Court has previously been confronted. Under the Immigration Act of 1918 it was held that proof of knowledge of the aims and objectives of certain organizations was inessential in deporting aliens, Congress having specified that membership alone was sufficient.[13] The *Harry Bridges Case*[14] in 1945 emphasized that actual and literal membership in the Communist Party was essential to deportation under the Alien Registration Act of 1940. It was there held that mere cooperation and support of the Party would

7. Fong Yue Ting v. United States, 149 U.S. 698 (1893); 1 AM. JUR., *Aliens* § 69 (1936).

8. Latva v. Nicholls, 106 F. Supp. 658 (D. Mass. 1952).

9. Chung Yim v. United States, 78 F.2d 43 (8th Cir. 1935). Laws pertinent to the deportation of aliens have been enacted since the Alien and Sedition Laws of 1798. 1 STAT. 570. Political offenders were first listed as subjects of deportation in 1910. 36 STAT. 264. This classification of deportable aliens was enlarged in 1917. 39 STAT. 889. Deportation of aliens because of membership in prescribed subversive organizations was introduced in 1918. 40 STAT. 1012. Congress became dissatisfied with the 1918 law when in 1939 the Supreme Court held that it applied only to aliens who were members when proceedings were instituted against them, Kessler v. Strecker, 307 U.S. 22 (1939), and the next year passed the Alien Registration Act of 1940, 54 STAT. 670 (1940), 8 U.S.C.A. § 137 (1953), which made deportation mandatory for all aliens who at any time had been members of the described organizations. This Act continued in effect until the enactment of the Internal Security Act of 1950.

10. Instant Case at 742.

11. *Id.* at 743; Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Note, *Constitutional Law*, 66 HARV. L. REV. 99, 104-7 (1952).

12. Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

13. Kjar v. Doak, 61 F.2d 566 (7th Cir. 1932); Greco v. Haff, 63 F.2d 863 (9th Cir. 1933).

14. Bridges v. Wixon, 326 U.S. 135 (1945).

not suffice. In *Harisiades v. Shaughnessy*,[15] which affirmed the constitutionality of the 1940 Act, at least one of the deported aliens was deemed ignorant of the violent propensities of the Communist Party at the time of membership. A recent district court case,[16] which interpreted the membership requirement of the statute in the instant case literally, said any other interpretation "would be making, not interpreting law," since such action would open for aliens exits "with dimensions imprecisely defined and impractical of administration." Thus, the Court's literal interpretation of the statute is in harmony with previous interpretations of similar statutes and is indicative of the attitude of the courts toward the necessity of personal belief in and advocacy of the Communist Party principles by the alien subject to deportation.

In supporting its interpretation of the statute, the Court looked to that section of the statute which provides that aliens who innocently become members of certain prescribed organizations will be exempted from deportation. No such allowance is made for "innocent" members of the Communist Party. A 1951 amendment to the Act[17] provides other exceptions. Congress, by implication at least, has stated that when exceptions to the law are to be made, it will provide them. Senator McCarran, the sponsor of the Act, stated in Congressional debate prior to the passage of the Act that the word "member" under the Act would have the same meaning as it had been given by the courts since 1918.[18] In relying on this expression of legislative intent, the Court cited cases prior to 1950 in which aliens were held to be susceptible to deportation even though unaware of the aims of the groups with which they were affiliated. The Court concluded that the membership requirement of the 1950 Act is satisfied when an alien under his own free will joins the Communist Party, aware he is joining the organization as such.

Congress is moving in the direction of the "absolute"[19] power, in dealing with aliens, that upon occasion has been attributed to it. The Supreme Court, by a literal interpretation of the membership requirement for deportation and by again failing to interfere with retroactive deportation provisions, continues to allow Congress to purge certain aliens from the nation. The Congressional enactments involved are not examples of arbitrary withdrawal of the privileges extended

15. 342 U.S. 580 (1952), 66 HARV. L. REV. 105 (1953), *rehearing denied*, 343 U.S. 936 (1952).
16. Latva v. Nicholls, 106 F. Supp. 658, 663 (D. Mass. 1952).
17. 65 STAT. 28, 8 U.S.C.A. § 1182 (1952). Aliens are excepted when they join (1) when they were children, (2) by operation of law, (3) to obtain the necessities of life.
18. 97 CONG. REC. 2368-74 (1951).
19. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); 1 AM. JUR., *Aliens* § 69 (1936).

aliens, but rather are demonstrations of a Congressional conviction that the presence of certain aliens may be detrimental to the nation's welfare. Should the feeling of insecurity become more acute, it is reasonable to assume that Congressional measures will become more drastic and that the Court will continue to sustain such legislative action.

CONSTITUTIONAL LAW—DUE PROCESS—DUTY OF NON-RESIDENT VENDOR TO COLLECT USE TAX

Appellant, a Delaware Corporation, was held liable for delinquent use taxes which, under the terms of a Maryland statute,[1] it was required to collect from Maryland residents making retail purchases at appellant's Delaware store. Some of the taxed sales were cash-and-carry; others, amounting to some $8,000 over a four-year period, involved delivery in Maryland by private truck or common carrier. Appellant was neither qualified to do business in Maryland nor had it salesmen, solicitors, or agents there. No orders were taken by mail or telephone. Appellant advertised with only Delaware newspapers and radio stations; but, although no ads were directed specially to them, some reached Maryland residents. Circulars were periodically mailed to all former customers, including those in Maryland. The vendor appealed on the ground that under the given facts Maryland could not constitutionally require it to serve as tax collector. *Held,* (5-4) reversed. The facts fail to disclose a connection between the taxing state and the foreign corporation sufficient to meet the requirements of substantive due process. *Miller Brothers Co. v. Maryland,* 347 U.S. 340 (1954).

The use tax is levied upon the privilege of using, storing, or consuming tangible personal property within the taxing state, and has generally been enacted to discourage avoidance of the sales tax.[2] There is no doubt that the taxing state can collect the use tax from its citizens who use the goods in the taxing state.[3] An equally axiomatic postulate is that the taxing state can require an in-state vendor to collect, at the time of the sale, the tax due from the resident vendee.[4] The instant Maryland statute, however, seeks to make an out-of-state vendor serve as a use tax collector. Such a collection procedure has been upheld where: (*a*) the vendor had distributing agencies in the taxing state,[5] though the goods taxed were ordered by mail from the

1. MD. ANN. CODE GEN. LAWS art. 81 § 371 (1951).
2. Comment, 32 CALIF. L. REV. 281 (1944).
3. Instant case at 345.
4. Pierce Oil Corporation v. Hopkins, 264 U.S. 137 (1924).
5. Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

vendor's out-of-state branches,[6] and though the foreign corporation was not qualified to do local business in the taxing state;[7] (*b*) foreign vendors, having no agencies or offices in the taxing state, did business through soliciting salesmen there.[8]

The out-of-state corporation subjects itself to the power of the taxing state so as to satisfy due process requirements when the corporation has sufficient local contacts to make the exercise of jurisdiction reasonable and inoffensive to traditional notions of fair play and substantial justice.[9] In *Monamotor Oil Co. v. Johnson*[10] the Supreme Court first upheld the constitutionality of requiring collection of the use tax by the out-of-state vendor. The local contacts there present were subsidiary service stations maintained by the out-of-state vendor within the taxing state. Similarly, in *Nelson v. Sears, Roebuck & Co.*,[11] and in *Nelson v. Montgomery Ward*,[12] the foreign corporate vendor was authorized to do business and operated retail stores in Iowa. Iowa residents ordered goods directly from the vendor's out-of-state mail-order houses and the goods were delivered directly to the customer. Though the transactions in question were entirely unconnected with the vendor's intra-state activities, the intra-state activity was held to furnish the "contact" necessary to sustain the imposition of the duty to collect the use tax. The rationale of the *Monamotor, Sears,* and *Montgomery-Ward* cases is that the vendor's services in collecting taxes on out-of-state sales of property to be used in the taxing state may reasonably be ". . .exacted as a price of enjoying the full benefits flowing from its [the vendor's] aggregate . . . [in-state] business."[13]

In *General Trading Co. v. State Tax Commission*,[14] the out-of-state vendor had no office within the taxing state, but the Court, nevertheless, found the necessary contact in the activity of salesmen of the out-of-state vendor who actively solicited orders in the taxing state. The instant case differs from *General Trading* primarily in that here no active solicitation was present. This difference affords a basis for a rule which, though not stated by the Court, will explain and reconcile the two cases: The factor of active solicitation present in *General Trading* is different in kind from the mere delivery in the instant case. Regardless of the number of deliveries made by appellant-

6. Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).
7. Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62 (1939).
8. General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944).
9. ". . . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious. . . . the reasonableness of each regulation depends upon the relevant facts." Nebbia v. New York, 291 U.S. 502, 525 (1934).
10. 292 U.S. 86 (1934).
11. 312 U.S. 359 (1941).
12. 312 U.S. 373 (1941).
13. Nelson v. Montgomery Ward, 312 U.S. 373, 375 (1941).
14. 322 U.S. 335 (1944).

vendor there would still have been no type of contact on which to base a requirement that the vendor collect the tax. Apparently the sales would have been made in the instant case regardless of the factors of delivery and indirect solicitation; whereas, in *General Trading* there would have been no sale without the solicitation. The rule then evolves that in the absence of a branch within the taxing state, the requisite connection will be found only in activity within the taxing state which is an inducing cause of the out-of-state sale. The as yet unenunciated rationale of the rule deducible from *General Trading* and the instant case appears essentially similar to that drawn from *Monamotor, Sears-Roebuck,* and *Montgomery-Ward*—the out-of-state vendor who derives benefits from his activities within the taxing state may reasonably be required to collect a use tax in return therefor.

The Court in the instant case uses language which seems to indicate that since the taxing state cannot levy a sales tax on the out-of-state vendor, it cannot make this vendor serve as use-tax collector.[15] If the language were meant to convey this idea, it is in conflict with all precedent. An out-of-state vendor is not subject to a sales tax imposed by the domiciliary state of the vendee for the same reason that the tax could not be collected from the vendee himself:[16] A sales tax on an out-of-state sale contravenes the Commerce Clause. An out-of-state vendor has repeatedly been required to collect a use tax due from a resident vendee where there was sufficient contact to satisfy the requirements of substantive due process.[17] If the Court did not intend to question the basic constitutionality of the foreign-vendor collection device, it is indeed unfortunate that it has muddied the water in a yet not fully charted stream.

CONSTITUTIONAL LAW—DUE PROCESS—TAXABLE SITUS OF PROPERTY OF INTERSTATE AIR CARRIER

Plaintiff, an interstate air carrier, sought a declaratory judgment that a Nebraska *ad valorem* personal property tax[1] on its flight equipment was invalid. It alleged immunity under the due process and

15. ". . . it was recently settled that Maryland could not have reached this Delaware vendor with a sales tax on these sales. McLeod v. Dilworth Co., 322 U.S. 327. Can she then make the same Delaware sales a basis for imposing on the vendor liability for use taxes due from her own inhabitants? It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself." Instant case at 345.

16. McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).

17. Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

1. NEB. REV. STAT. §§ 77-1244 *et seq.* (1943).

commerce clauses of the Federal Constitution on the grounds that its flight equipment had not obtained a taxable situs in Nebraska and that Federal regulation of air navigation precluded such taxation. The Supreme Court of Nebraska dismissed the petition[2] and plaintiff appealed. *Held,* affirmed. Whether the property had acquired a taxable situs does not raise a commerce clause question. When an airline makes eighteen scheduled stops per day in a state from which it derives benefit and protection, it has sufficient nexus with that state to sustain an apportioned *ad valorem* tax[3] on its aircraft, over due process clause objection, even though none of the aircraft is continuously within the state.[4] *Braniff Airways, Inc. v. Nebraska,* 347 U.S. 590 (1954), *rehearing denied,* 75 Sup. Ct. 18 (1954).

A state may impose a local property tax on instrumentalities of interstate commerce which have obtained a taxable situs within the state.[5] Thus, property taxation of interstate instrumentalities such as ships,[6] telegraph lines,[7] railroads,[8] and aircraft[9] has been sustained. The state's power to impose such a tax rests on the theory that its lawmaking power extends to all property within its borders,[10] and that one receiving the benefit and protection of such laws may reasonably be subjected to a tax on its personal property located within the state.[11] Generally the taxpayer has relied on the due process and commerce clauses of the Federal Constitution to attack the imposition

2. Mid-Continent Airlines, Inc. v. Nebraska, 157 Neb. 425, 59 N.W.2d 746 (1953).

3. The apportionment formula considered the following elements as they were represented within the state compared to their total value in interstate operations: (1) aircraft arrivals and departures (2) revenue tons (3) originating revenue. NEB. REV. STAT. § 77-1245 (1943). The reasonableness of the formula was not questioned.

4. Plaintiff did not ultimately rely on the commerce clause and the court observed that exercise of the commerce power by Congress to regulate air carriers did not impair state action, finding precedents in its decisions upholding the exercise of federal power over navigable streams. *See* Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508, 534 (1941).

5. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); *see* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 206-7 (1905); HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 14-15 (1953).

6. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949). *But cf.* Standard Oil Co. v. Peck, 342 U.S. 382 (1952); St. Louis v. The Ferry Co., 11 Wall. 423 (U.S. 1870).

7. Western Union Telegraph Co. v. Attorney Gen. of Mass., 125 U.S. 530 (1888).

8. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); *cf.* Nashville, C. & St. L.R.R. v. Browning, 310 U.S. 362 (1940); New York *ex rel.* New York Central & H.R. R.R. v. Miller, 202 U.S. 584 (1906); *see* Johnson Oil Refining Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158, 163 (1953).

9. Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954); *cf.* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 153 A.L.R. 245 (1944). Note, 57 HARV. L. REV. 1097 (1944).

10. *See* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (1891).

11. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905); Western Union Telegraph Co. v. Attorney Gen. of Mass., 125 U.S. 530, 548 (1888).

of such taxes.[12] The problem frequently involves a determination of whether an instrumentality has obtained a situs within the taxing state, which was the question in the instant case.

The Court, in invalidating a tax on instrumentalities of interstate transportation and communication, does not always make it clear whether, in a given case, the tax contravenes the commerce clause or the due process clause, or both.[13] State taxation of the property of an interstate organism, based on an unfair apportionment of that property among the interested states, violates the commerce clause by placing an undue tax burden on interstate commerce.[14] The exercise of legislative jurisdiction over subject matter insufficiently connected with the taxing state to make reasonable the operation of the state's power thereon is violative of due process.[15] Thus, the due process clause requires that the taxing power exerted "bear[s] fiscal relation to protection, opportunities and benefits given by the state."[16] A property tax on instrumentalities of transportation and communication is often invalidated on both due process and commerce clause grounds where it does not fairly apportion the property between the taxing state and other states in which it is used.[17] Both the due process and commerce clause objections are obviated however, by use of a fair formula which equitably apportions the property among the states.[18]

12. See Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?*, 4 VAND. L. REV. 496 (1951).

13. Hays v. The Pacific Mail S. S. Co., 17 How. 596 (U.S. 1854); Standard Oil Co. v. Peck, 342 U.S. 382, 385 (1952); *see* Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949); HARTMAN, *op. cit. supra* note 5, at 15, 17; Barrett, *supra* note 13, at 496, 498.

14. During most of our constitutional history, including the present, the predominant doctrinal declaration of the Court has been that interstate commerce cannot be taxed at all by the states even though the tax is not discriminatory against such interstate commerce. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951); Freeman v. Hewit, 329 U.S. 249 (1946); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925); Brown v. Maryland, 12 Wheat. 419 (U.S. 1827). *See* Minnesota v. Blasius, 290 U.S. 1, 8 (1933). Nor can interstate commerce be taxed even though the same amount is laid on local business. Robbins v. Shelby Co. Taxing Dist., 120 U.S. 489 (1887). See HARTMAN, *op. cit. supra* note 5, at 28-33, 41-46. There have been interludes, however, when the Court seemed committed to the realistic view that interstate commerce should bear its fair share of the local tax burden so long as the tax on interstate commerce would not subject interstate business to multiple tax burdens not borne by local business. Western Live Stock v. Bureau of Rev., 303 U.S. 250 (1938); *see* Western Union v. Kansas *ex rel.* Coleman, 216 U.S. 1, 38-46 (1910); *cf.* Interstate Oil Pipeline Co. v. Stone, 337 U.S. 662 (1949); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948). Where interstate commerce is subjected to the risk of a heavier tax burden than local business, the tax is struck down. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

15. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); *see* Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940) (referred to as taxable event, jurisdiction to tax, business situs, and extraterritoriality); *cf.* Johnson Oil Refining Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933).

16. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

17. Johnson Oil Refining Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

18. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949) (ratio of intrastate ship mileage to total interstate mileage); Pullman's Palace Car Co.

It is not constitutionally improper to require interstate commerce to pay its own way, although this consideration has seldom been given much weight by the Court.[19]

The Court, in resolving this problem of property taxation of interstate instrumentalities, generally has applied the doctrine expressed in the maxim *mobilia sequuntur personam* (subject to the law of owner's domicile) to intangible personal property[20] and that in *lex situs* (subject to law where it is kept and used) to tangible personal property.[21] In the early leading case of *Pullman's Palace Car Co. v. Pennsylvania*[22] the Court applied the *lex situs* doctrine and upheld a formula which properly apportioned a property tax to the benefits and protection received by the vehicles operating interstate where the taxing state was not the owner's domicile. The *lex situs* doctrine has also found application in the taxation of ships,[23] railroads,[24] and aircraft.[25] A further development occurred with the decision in *New York Central H.R. R.R. v. Miller*[26] that where a portion of the taxed vehicles was out of the domiciliary state on such random excursions that they did not become taxable elsewhere, then the domiciliary state did not lose its power to tax the entire group of vehicles. *Northwest Airlines v. Minnesota*[27] reaffirmed the doctrine advanced in the *Miller* case holding that all of the taxpayer's aircraft were taxable by the domiciliary state. In the latter case, however, no showing was made that the taxed vehicles had acquired a taxable situs elsewhere, while in *Northwest Airlines* it was stipulated or found as a fact that Northwest had regularly scheduled operations in eight states

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v. Pennsylvania, 141 U.S. 18 (1891) (percentage of capital stock measured by ratio of intrastate railway mileage to total interstate mileage); *cf.* Western Union Telegraph Co. v. Attorney Gen. of Mass., 125 U.S. 530 (1888) (percentage of capital stock measured by ratio of intrastate telegraph-line mileage to total interstate-line mileage. It is recognized that property thus taxed may be valued as a "unit" which considers its augmented value as derived from its use in interstate operations. Pullman's Palace Car Co. v. Pennsylvania, *supra;* HARTMAN, *op. cit. supra* note 5, at 92.

19. *See* Western Livestock v. Bureau of Rev., 303 U.S. 250, 254 (1938); Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 259 (1919); New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U.S. 338, 351 (1930) (dissenting opinion).

20. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 206 (1905); Note, 139 A.L.R. 1463 (1942).

21. Originally the doctrine, *mobilia sequuntur personam* was applied to tangibles. *See* Union Refrigerator Transit Co. v. Kentucky, *supra* note 20, at 206; Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (1891).

22. 141 U.S. 18 (1891).

23. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949). *But cf.* Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

24. Johnson Oil Refining Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); *cf.* New York *ex rel.* New York Central & H.R. R.R. v. Miller, 202 U.S. 584 (1906).

25. Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954); *cf.* Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

26. 202 U.S. 584 (1906); *accord,* Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911).

27. 322 U.S. 292 (1944).

which ostensibly would have had power to tax. Therefore, doubt was raised by *Northwest Airlines* as to what showing would be necessary to relieve a taxpayer from taxability of his entire fleet of interstate vehicles by his domiciliary state. In *Ott v. Mississippi Valley Barge Line Co.*[28] the Court showed that it had not deviated from the "apportionment doctrine." That case allowed a domiciliary state to tax barges operating interstate where a fair formula was employed to apportion the property to the taxing state. In *Standard Oil Co. v. Peck*[29] the Court refused on due process grounds, to allow the domiciliary state to tax the full value of taxpayer's fleet where it was shown that a portion thereof was subject to taxation on an apportionment basis by other states. In the *Peck* case the Court distinguished on the ground that no showing had been made that Northwest's aircraft were taxable elsewhere and thus subject to multiple tax burdens not borne by local business. As thus explained, *Northwest Airlines* is in line with prior doctrine. It only remained for the principal case to apply the apportionment doctrine used in taxing ships and railroads to airlines.

Henceforth, interstate airlines will apparently be subject to property taxation in any state in which they have scheduled operations.[30] However, to avoid taxation on the total value of their property in their domiciliary state, they will have to show that a portion thereof has attained a taxable situs in another state.[31] The question of the taxability of non-scheduled carriers by a non-domiciliary state has not yet arisen. On theory no reason appears why they should be exempt. As a matter of convenience, however, they will probably remain taxable only by the state of their domicile.

DOMESTIC RELATIONS—INFANTS—RIGHT TO DISAFFIRM SEPARATION AGREEMENT

Defendant, a minor, and her husband entered into a separation agreement, providing for their immediate separation and a waiver by each of all rights against the other arising out of the marital relationship, including defendant's right of support. When the husband died shortly afterwards, defendant sought a wife's share in the estate

28. 336 U.S. 169 (1949). This case placed water and land transportation on the same footing. *Compare* Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911) (water transportation taxable only at the domicile of the owner), *with* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) (railroads taxable on an apportionment basis in all states in which they operate.)

29. 342 U.S. 382 (1952).

30. *Cf.* Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905). *But cf.* Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

31. Northwest Airlines v. Minnesota, 322 U.S. 292 (1944); New York *ex rel.* New York Central & H.R. R.R. v. Miller, 202 U.S. 584 (1906).

in contravention of the agreement. Plaintiffs, parents and sole surviving heirs of the deceased, sought to have the agreement declared valid and to enjoin payment by the administrator of any part of the estate to the defendant. On appeal from a directed verdict for the defendant, *held,* reversed. As the defendant, though an infant, was lawfully married, she falls within the purview of a statute authorizing separation agreements between husband and wife and cannot now disaffirm. *Burlovic v. Farmer,* 115 N.E.2d 411 (Ohio App. 1953).

Formerly all separation agreements[1] between husband and wife were considered void as contrary to public policy.[2] Today, however, both in England and in this country, the separation agreement is upheld,[3] at least when the parties comply with certain formal[4] and substantive requirements of the various jurisdictions. In the United States only those agreements which contemplate an immediate or existing separation are upheld.[5] Agreements which look forward to a separation in the future are void,[6] as are those which promote or facilitate divorce.[7] The agreement must be in all respects fair and reasonable, particularly with regard to the wife and her right to support,[8] and must be free of fraud and duress.[9] Although there is a considerable difference of judicial opinion,[10] many courts require that

1. For a list of books, articles, notes and annotations on separation agreements in general, see 2 VERNIER, AMERICAN FAMILY LAWS 470 (1932). For the suggested form and provisions of separation agreements, see LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 35 (Rev. ed. 1953) (contains also a list of tax considerations); MACKAY, LAW OF MARRIAGE AND DIVORCE SIMPLIFIED 60 (1946); WINNET AND GIBSON, FAMILY LAW 57 (1952). An excellent review of separation agreements with cases cited may be found in 1 NELSON, DIVORCE AND ANNULMENT § 13.05 *et seq.* (2d ed. 1945).

2. PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS § 93 (3d ed. 1930); TIFFANY, PERSONS AND DOMESTIC RELATIONS 238 (3d ed. 1921).

3. Matthews v. Matthews, 24 Tenn. App. 580, 148 S.W.2d 3 (1941) (leading case in Tenn.); Rex v. Mead, 1 Burr. 541, 97 Eng. Rep. 440 (K.B. 1758) (first case upholding agreement); LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 45 (Rev. ed. 1953) (citing cases from almost every jurisdiction). For a history of the subject and a review of the cases, see Foote v. Nickerson, 70 N.H. 496, 48 Atl. 1088 (1901). See also, 17 AM. JUR., *Divorce and Separation* § 723 (1938) (citing cases and annotations); 2 VERNIER, AMERICAN FAMILY LAWS 469 (1932).

4. For formal requisites of the various jurisdictions, see 17 AM. JUR., *Divorce and Separation* § 730 (1938).

5. 1 NELSON, DIVORCE AND ANNULMENT § 13.17 (2d ed. 1945) (citing cases).

6. Stevralia v. Stevralia, 182 Misc. 1050, 48 N.Y.S.2d 646 (Sup. Ct. 1944); 1 NELSON, DIVORCE AND ANNULMENT § 13.05 (2d ed. 1945).

7. Dodd v. Dodd, 278 Ky. 662, 129 S.W.2d 166 (1939); 1 NELSON, DIVORCE AND ANNULMENT § 13.22 (2d ed. 1945) (citing cases).

8. WINNET AND GIBSON, FAMILY LAWS 58 (1952). In determining what is fair, courts turn to tests used in awarding alimony. *Id.* at 58 (listing various considerations).

9. Alderson v. Alderson, 247 Ky. 12, 56 S.W.2d 534 (1933); 17 AM. JUR., *Divorce and Separation* § 724 (1938) (citing cases and annotations); 1 NELSON, DIVORCE AND ANNULMENT § 13.21 (2d ed. 1945).

10. See Archbell v. Archbell, 158 N.C. 408, 74 S.E. 327 (1912). The case is extensively footnoted in COMPTON, CASES ON DOMESTIC RELATIONS 347 (1951).

there be some substantial motivating cause for the separation.[11] In the United States the agreement is enforced only as to its provisions concerning property rights;[12] in England, however, the agreement to live apart is also upheld.[13]

At least ten states have statutes specifically relating to separation agreements.[14] All ten are substantially similar to the Ohio statute involved in the instant case, stating merely, in general terms, that separation agreements will be upheld. A statute, no more explicit in its terms than this, must be construed in the light of the common law surrounding its subject matter,[15] and hence, would not seem to abrogate any of the rules set forth above. It is submitted, therefore, that the defendant in the instant case, who was provided no support and who received no consideration[16] for the release of her rights other than the mutual release of the rights, if any, of the husband, should have legitimate grounds for attacking the agreement regardless of her infancy. The fact that she was an infant aggravates the unfairness of the agreement if nothing else.

The rule that the contracts of an infant are valid, void, or voidable as they are beneficial or detrimental to his interests,[17] has given way to the more modern view that with certain specific exceptions the contracts of an infant are voidable only.[18] The exceptions embrace instances in which the infant is bound, not to his contract, but by law,[19] through the operation of statutes[20] and principles of unjust enrichment,[21] where public policy demands performance of all those

11. Baum v. Baum, 109 Wis. 47, 85 N.W. 122 (1901); 17 AM. JUR., *Divorce and Separation* § 725 (1938) (citing cases and annotations).

12. Foote v. Nickerson, 70 N.H. 496, 48 Atl. 1088 (1901); TIFFANY, PERSONS AND DOMESTIC RELATIONS 241 (3d ed. 1921); PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS 283 (3d ed. 1930).

13. Besant v. Wood, 12 Ch. D. 605 (1879) (first case where rule recognized); Kennedy v. Kennedy, [1907] P. 49; TIFFANY, PERSONS AND DOMESTIC RELATIONS 239 (3d ed. 1921); PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS 282 (3d ed. 1930) (citing cases and annotations).

14. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 43 (Rev. ed. 1953); 2 VERNIER, AMERICAN FAMILY LAWS § 138 (1932) (setting forth the various statutes).

15. 3 SUTHERLAND, STATUTORY CONSTRUCTION 3 (3d ed. Horack, 1943) (citing cases).

16. Consideration is requisite to the validity of the agreement. Wolff v. Wolff, 134 N.J. Eq. 8, 34 A.2d 150 (Ch. 1943); 1 NELSON, DIVORCE AND ANNULMENT § 13.20 (2d ed. 1945) (citing cases and treatises). Ordinarily the wife's release of her right to support is sufficient. *Ibid.*

17. Swafford v. Ferguson, 71 Tenn. 292 (1879); 27 AM. JUR., *Infants* § 311 (1940) (citing cases).

18. State v. Hodge, 129 W. Va. 820, 42 S.E.2d 23 (1947); 1 WILLISTON AND THOMPSON, LAW OF CONTRACTS § 226 (Rev. ed. 1936); 27 AM. JUR., *Infants* § 12 (1940) (citing cases and annotations). "Voidable" as used in this context, has been generally held to mean "valid until avoided." 1 WILLISTON AND THOMPSON, LAW OF CONTRACTS § 231 (Rev. ed. 1936).

19. 1 WILLISTON AND THOMPSON, LAW OF CONTRACTS § 228 (Rev. ed. 1936). See also in this regard, 81 U. OF PA. L. REV. 731 (1953).

20. 27 AM. JUR., *Infants* § 14 (1940) (setting forth specific examples with cases and annotations cited).

21. 27 *id.* § 15.

who enter such a relationship regardless of considerations of age. Thus there can be said to be no strictly contractual obligations which an infant may not timely disaffirm. If, then, the infant in the instant case is to be bound by a statute making no specific reference to infants, it should only be because the statute is interpreted as expressing a policy against the right of disaffirmance, which overrides policy considerations to the contrary behind the general rule. The statute is capable of no such interpretation. If anything, it would seem that policy would more strongly favor the right of disaffirmance in this situation than in any other. It must be remembered that whereas marriage does not remove the civil disabilities,[22] it does emancipate the person,[23] freeing the child from parental control and destroying the correlative right of parental support. A child of tender years and experience who is denied the right to disaffirm a separation agreement (particularly as in the instant case where no support was provided) may thus become a legal orphan and hence a charge of society. Reasoning not nearly so compelling is responsible for the general rule.

The paucity of cases dealing with the precise point is understandable in view of the fact that the right of disaffirmance is probably seldom questioned in such a situation. Only three cases were found,[24] none of which involved statutes similar to that in the instant case. All held, with a minimum of reasoning, that a separation agreement was voidable at the infant's election. There are numerous cases dealing with infants' disaffirmance of ante-nuptial marriage settlements which, though distinguishable from the instant case, are today unanimous in upholding the right to disaffirm,[25] at least in the absence of a statute expressly to the contrary.[26]

The only reason profferred by the court for the holding in the instant case is that the terms "husband" and "wife" used in the statute embrace infants. There is, concededly, authority for the proposition that if the words of a statute, not expressly excluding infants, are sufficiently broad to include them, they will be bound.[27] Such a rule, however, cannot prevail in the face of a showing of a legislative intent to exclude, as manifest in the general purpose and subject matter of the statute, as well as in other parts of the law.[28]

22. Wharen v. Funk, 152 Pa. Super. 133, 31 A.2d 450 (1943); 43 C.J.S., *Infants* § 29 (1945) (citing cases).

23. Bonnette v. Flournoy, 9 La. App. 467, 119 So. 736 (1929); 43 C.J.S., *Infants* § 29 (1945).

24. Walker v. Walker, 209 Ga. 490, 74 S.E.2d 66 (1953); Sellers v. Sellers, 160 Ga. 516, 128 S.E. 659 (1925); Drummond v. Drummond, 171 N.Y. Supp. 477 (Sup. Ct. 1918).

25. *E.g.*, Smith v. Smith, 107 Va. 112, 57 S.E. 577 (1907), 12 L.R.A. (N.S.) 1184 (1908); 26 AM. JUR., *Husband and Wife* § 276 (1940) (citing cases and annotations).

26. 26 AM. JUR., *Husband and Wife* § 276 (1940).

27. 27 AM. JUR., *Infants* § 14 (1940).

28. McCall v. Parker, 13 Met. 372 (Mass. 1842); 27 AM. JUR., *Infants* § 14 (1940).

In view of what has been said regarding policy and existing law, it is felt that a finding of such a legislative intent was mandatory in the instant case and that the wife was entitled to disaffirm.

DOMESTIC RELATIONS—RES ADJUDICATA—FAILURE TO CROSSCLAIM IN SEPARATE MAINTENANCE SUIT AS BAR TO SUBSEQUENT DIVORCE

A wife obtained an award of separate maintenance on grounds of abandonment. Later her husband brought suit for divorce in another county of the same state. The wife sought a writ of prohibition on the ground that the prior decree for separate maintenance deprived any other court of jurisdiction to grant a divorce. *Held,* writ denied. As it was not necessary to allege grounds for divorce to obtain separate maintenance, the award of separate maintenance did not bar the divorce action. The mere fact that the husband did not seek a divorce by cross petition in the separate maintenance case does not deprive him of his right to seek such relief in a separate proceeding. *Hill v. Rowles,* 264 S.W.2d 638 (Ark. 1954).

It is well established that a decree of separate maintenance is entirely separate and distinct from a decree of divorce.[1] At common law, a husband generally had a duty to support his wife, even though they might live separate and apart.[2] Since there was no remedy at common law to compel the husband to support his wife, equity developed the suit for separate maintenance.[3] Although equity jurisdiction of this action has been considered inherent in most states,[4] some have enacted statutes expressly conferring such jurisdiction.[5]

In the early days, separate maintenance was referred to as alimony.[6]

1. Wood v. Wood, 54 Ark. 172, 15 S.W. 459 (1891); *see* Shirey v. Shirey, 87 Ark. 175, 112 S.W. 369, 372 (1908); Cohen, *Suit for Separate Maintenance Independent of Divorce,* 5 VA. L. REG. (N.S.) 417 (1919).

2. Galland v. Galland, 38 Cal. 265 (1869); Milliron v. Milliron, 9 S.D. 181, 68 N.W. 286, 62 Am. St. Rep. 863 (1896) (by implication); *see* Kientz v. Kientz, 104 Ark. 381, 149 S.W. 86, 89 (1912); *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083, 1084 (1899); Robinson, *Alimony without Divorce,* 2 VA. L. REV. 134 (1914).

3. Purcell v. Purcell, 14 Va. (4 H. & M.) 507 (1810); *cf.* Corley v. Corley, 67 Tenn. 7 (1874); *see* Lang v. Lang, 70 W. Va. 205, 73 S.E. 716, 717, 38 L.R.A. (N.S.) 950, 953, [1913D] Ann. Cas. 1129, 1130 (1912).

4. Galland v. Galland, 38 Cal. 265 (1869); Milliron v. Milliron, 9 S.D. 181, 68 N.W. 286, 62 Am. St. Rep. 863 (1896); Almond v. Almond, 25 Va. (4 Rand.) 662 (1826); Lang v. Lang, 70 W. Va. 205, 73 S.E. 716, 38 L.R.A. (N.S.) 950, [1913D] Ann. Cas. 1129 (1912); Cureton v. Cureton, 117 Tenn. 103, 96 S.W. 608 (1906); *cf.* State v. Superior Court, 85 Wash. 72, 147 Pac. 436 (1915); MADDEN, DOMESTIC RELATIONS § 99 (1931); Cohen, *supra* note 1, at 417; Robinson, *supra* note 2, at 134.

5. *See* Cureton v. Cureton, *supra* note 4; MADDEN, DOMESTIC RELATIONS § 99 (1931).

6. *See* Wood v. Wood, 54 Ark. 172, 15 S.W. 459 (1891) (alimony defined as allowance which husband might be compelled to pay to wife for her maintenance when she was divorced or living apart from him). See also 17 AM. JUR., *Divorce* § 496; Cohen, *supra* note 1, at 417.

Later a distinction was made, and alimony came to be considered as an adjunct of divorce, while separate maintenance was designed to provide the wife with the necessities of life without affecting the marriage ties.[7] Thus, the purpose of the separation decree is to adjust marital difficulties with a view to maintaining the possibility of a reconciliation.[8] It follows that since a separate maintenance decree is distinct from divorce, a suit for separate maintenance may be maintained apart from any divorce action,[9] and the wife in such case need not set forth facts sufficient to obtain a divorce.[10] For this reason, a finding in favor of the wife for separate maintenance is not necessarily a showing that the husband lacks grounds for divorce, or that the wife actually has such grounds.[11]

A separate maintenance decree is res adjudicata in a subsequent divorce action by either spouse only as to those matters which were actually litigated, or which necessarily should have been included and disposed of by the action.[12] Even though some matters might have been put in issue in the former suit, if they were, in fact, not litigated, they are not concluded.[13]

Thus, a separate maintenance decree will not bar a subsequent action for absolute divorce, unless the allegations of the second action were adjudicated between the parties in the original suit.[14] The decree is not a bar to a suit for divorce for acts occurring after the separation decree,[15] nor is it a bar to a divorce suit for acts occurring prior to the separate maintenance decree if they were not alleged by

7. *Cf.* Laird v. Laird, 201 Ark. 483, 145 S.W.2d 27 (1940); *see* Butts v. Butts, 152 Ark. 399, 238 S.W. 600, 601 (1922); Wood v. Wood, 54 Ark. 172, 15 S.W. 459, 460 (1891); Simonton v. Simonton, 40 Idaho 751, 236 Pac. 863, 865 (1925), 42 A.L.R. 1363 (1926); Note, 31 ORE. L. REV. 62 (1951).

8. 44 HARV. L. REV. 996 (1931).

9. Wood v. Wood, 54 Ark. 172, 15 S.W. 459 (1891); Galland v. Galland, 38 Cal. 265 (1869); *In re* Popejoy, 26 Colo. 32, 55 Pac. 1083 (1899); State v. Superior Court, 85 Wash. 72, 147 Pac. 436 (1915); Lang v. Lang, 70 W. Va. 205, 73 S.E. 716, 38 L.R.A. (N.S.) 950 (1912), [1913D] Ann. Cas. 1129; *see* Shirey v. Shirey, 87 Ark. 175, 112 S.W. 369, 372 (1908); Cohen, *supra* note 1, at 417; Robinson, *supra* note 2, at 134.

10. Tilton v. Tilton, 16 Ky. L. Rep. 538, 29 S.W. 290 (1895); Watts v. Watts, 160 Mass. 464, 36 N.E. 479, 23 L.R.A. 187, 39 Am. St. Rep. 509 (1894).

11. Watts v. Watts, 160 Mass. 464, 36 N.E. 479, 23 L.R.A. 187, 39 Am. St. Rep. 509 (1894).

12. Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701 (1914). *Cf.* Campbell v. Jones, 230 S.W. 710 (Tex. Civ. App. 1921); Middleton v. Nibling, 142 S.W. 968 (Tex. Civ. App. 1911); *see* Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61 (1917); 2 FREEMAN, JUDGMENTS §§ 689, 693 (5th ed. 1925); 27 AM. JUR., *Husband and Wife* § 425 (1940).

13. Drainage Dist. No. 1 v. Turney, 235 Mo. 80, 138 S.W. 12 (1911); cf. Middleton v. Nibling, 142 S.W. 968 (Tex. Civ. App. 1911); 2 FREEMAN, JUDGMENTS § 689 (5th ed. 1925).

14. Bates v. Bates, 53 Nev. 72, 292 Pac. 298 (1930); Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701 (1914) (by implication); Vickers v. Vickers, 95 W. Va. 323, 122 S.E. 279 (1924), 41 A.L.R. 266 (1926); 44 HARV. L. REV. 996 (1931).

15. Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61 (1917); *see* Averbuch v. Averbuch, *supra* note 14; Note, 31 ORE. L. REV. 62 (1951).

one of the parties in that proceeding.[16] For instance, if a husband fails to allege his wife's act of adultery as a defense to the wife's separate maintenance suit or as a counter-claim in that suit, he will not be barred from later using that same act as the basis for a suit for absolute divorce. To assert the wife's adultery in the former case might bar any chance or hope of the husband for a reconciliation.[17] If reconciliation then failed, the husband would not be penalized for failure to assert his claim.[18]

The law encourages reconciliations and the resumption of marital relations between estranged spouses.[19] Although the rules of res adjudicata apply in divorce actions, it is desirable that the decisions in divorce cases be regulated by the social interests involved, rather than by more legalistic considerations which might bar a chance of reconciliation.[20]

FEDERAL JURISDICTION AND PROCEDURE—FEDERAL STATUTORY RIGHT—CHARACTERIZATION OF RIGHT FOR PURPOSE OF APPLYING STATE STATUTE OF LIMITATIONS

In an action brought in the Federal District Court of Kansas to recover treble damages under the Clayton Act,[1] it was necessary for the court to determine which of two provisions of the Kansas statute of limitations was applicable.[2] Defendant urged that the court adopt the Kansas interpretation of its statute and apply the provision covering actions for statutory penalties. Plaintiff argued that, the action being federally created, and the Supreme Court having characterized a similar action under the Sherman Act as non-penal, the court was bound to apply the state limitation on statutory liabilities other than penalties. *Held:* In determining the nature of this action for purposes of applying a state statute of limitations, the court will follow the federal definition of "statutory penalties" and will consider the action remedial and compensatory, not penal. *Fulton v. Loew's Inc.*, 114 F. Supp. 676 (D. Kan. 1953).

16. Campbell v. Jones, 230 S.W. 710 (Tex. Civ. App. 1921) (by implication); 2 FREEMAN, JUDGMENTS § 689 (5th ed. 1925); Note, 31 ORE. L. REV. 62 (1951); 44 HARV. L. REV. 996 (1931).

17. *See* Gustafson v. Gustafson, 178 Minn. 1, 226 N.W. 412, 414 (1929); Note, 31 ORE. L. REV. 62 (1951).

18. *See* Gustafson v. Gustafson, *supra* note 17, at 414.

19. *Accord*, Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61 (1917); Note, 31 ORE. L. REV. 62 (1951); 44 HARV. L. REV. 996 (1931).

20. Gustafson v. Gustafson, 178 Minn. 1, 226 N.W. 412 (1929) (by implication); 29 COL. L. REV. 1015 (1929).

1. 38 STAT. 731 (1914), 15 U.S.C.A. § 15 (1951).

2. KAN. GEN. STAT. § 60-306 (1949) ("action upon a statute for penalty or forfeiture" subject to one-year limitation; three-year limitation placed upon "an action upon a liability created by statute other than a penalty or forfeiture").

Whether a state statute of limitations is applicable to a right created by federal statute, enforceable only in federal courts and subject to no federal limitation, was answered affirmatively by the Supreme Court in *Campbell v. Haverhill.*[3] Language in the *Campbell* case indicated that state statutes should be applied according to their local interpretation.[4] However, a later Supreme Court decision in *Chattanooga Foundry and Pipe Works v. Atlanta,*[5] coupled with a reluctance on the part of some federal courts to apply the *Campbell* rule fully, has resulted in considerable confusion among federal courts when they are called upon to apply state limitations on statutory penalties to actions brought under the Clayton Act. In the *Chattanooga Foundry* case the Court, in considering the appropriate limitation on a right of action for treble damages created by the Sherman Act,[6] declined to apply a federal five-year limitation on "any suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States."[7] The Court relied on a restrictive construction of the phrase "suit for a penalty" which it had previously announced.[8] Having determined the federal statute to be inapplicable, the Court accepted the lower tribunal's decision as to the applicable state statute of limitations. The Court stated that weight was given to the opinion of the lower court because the question involved the construction of local law and the judge who rendered the decision had had considerable experience on the state supreme court. The state statutes, however, included a limitation on penal actions, and the Supreme Court did not make clear whether this limitation was disregarded because it was inapplicable under state law, or because it was precluded by the court's determination that the action was non-penal insofar as the federal statute was concerned.[9]

With these decisions for authority, and confronted with state inter-

3. 155 U.S. 610 (1895). See generally Blume and George, *Limitations and the Federal Courts,* 49 MICH. L. REV. 937 (1951).

4. "In creating a new right and providing a court for the enforcement of such right, must we not presume that congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?" Campbell v. Haverhill, note 3 *supra,* at 616.

5. 203 U.S. 390 (1906).

6. 26 STAT. 210 (1890), 15 U.S.C.A. §§ 1-7 (1951) (operation of provision restricted to violations of Sherman Act).

7. REV. STAT. § 1047 (1875), superseded by 62 STAT. 974 (1948), 28 U.S.C.A. § 2462 (1950).

8. See Brady v. Daly, 175 U.S. 148 (1899); Huntington v. Attrill, 146 U.S. 657 (1892).

9. The following language by Holmes, J., is the genesis of the confusion: "As to the article touching statutory penalties, notwithstanding some grounds for distinguishing it from Rev. Stat. Sec. 1047, which were pointed out, so far as this liability under the laws of the United States is concerned we must adhere to the construction of it which we already have adopted." Chattanooga Foundry and Pipe Works v. Atlanta, note 5 *supra,* at 398. For the lower court's opinion see Atlanta v. Chattanooga Foundry and Pipe Works, 127 Fed. 23 (6th Cir. 1903), *reversing* Atlanta v. Chattanooga Foundry and Pipe Works, 101 Fed. 900 (C.C.E.D. Tenn. 1900).

pretations which place actions for multiple damages within the scope of their limitations on statutory penalties,[10] federal courts have followed two divergent lines of approach. Courts adopting the "state" approach rely upon the state's construction of its statutes and cite the *Chattanooga Foundry* case as authority for this view;[11] courts taking the "federal" approach apply what they consider the rule of the *Chattanooga Foundry* case, that the action is remedial and compensatory, and then select the appropriate state limitation statute.[12]

The court in the instant case reviewed the *Chattanooga Foundry* decision and found it vague on this point. Nevertheless, it concluded that the federal approach is both "reasonable" and "permissible," looking with approval on three major arguments used by courts which have adopted the federal approach: (1) that state interpretations would assert a creative influence on an exclusively federal action;[13] (2) that differing state interpretations would cause a lack of uniformity in federal decisions determining the nature of the action;[14] and (3) that other questions directly concerned with the proper period of limitation have been answered in accordance with federal law.[15]

The federal approach, when viewed in the light of a scrupulous interpretation of the *Chattanooga Foundry* case and a careful examination of the arguments presented, seems to be without substantial basis and a clear departure from the rule announced in the *Campbell* case. The *Chattanooga Foundry* case held that the federal limitation on statutory penalties did not apply to an action created by the Sherman Act. Federal courts which find in that holding a rule obviating the applicability of state penal statutes seem to feel that the charac-

10. M.H. Vestal Co. v. Robertson, 277 Ill. 425, 115 N.E. 629 (1917); Sherill v. Stewart, 199 Miss. 216, 23 So.2d 915 (1945); Butler v. Butler, 62 S.C. 165, 40 S.E. 138 (1901).

11. Hoskins v. Truax-Traer, 191 F.2d 912 (7th Cir. 1951), 65 HARV. L. REV. 1457 (1952); Florida Wholesale Drug, Inc. v. Ronson Art Metal Works, Inc., 110 F. Supp. 573 (D.N.J. 1953).

12. Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952); Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942). *But cf.* Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y. 1953) ("federal" approach ostensibly used, but "state" result reached by ultimate reliance on state interpretations).

13. Electric Theater Co. v. 20th Century Fox Film Corp., 113 F. Supp. 937 (W.D. Mo. 1953).

14. Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952). See Note, *Federal Statutes Without Limitations Provisions*, 53 COL. L. REV. 68 (1953); 65 HARV. L. REV. 1457 (1952).

15. Several situations have been treated as federal questions. Rawlings v. Ray, 312 U.S. 96 (1941) (accrual of the cause of action); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947) (commencement of the action); Culver v. Bell, 146 F.2d 29 (9th Cir. 1944) (whether an amendment relates back to the complaint); Barnes Coal Co. v. Retail Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942) (survivability). Others have been considered to be governed by state law. Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569 (9th Cir. 1948) (fraudulent concealment of cause of action); Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942) (whether an action brought in a federal court resulted in reversal otherwise than on the merits so as to come within state law governing renewal of such actions).

terization of an action as penal or remedial for purposes of applying a statute of limitations becomes a part of the action itself. In reality, it would seem that such a determination of the nature of an action is not a construction of the action, but a construction of the statute of limitations under consideration, and has no binding effect on the statutes of limitations of other jurisdictions which may be applicable to the same action. The opposite view, which implies that a right can be characterized in the abstract and that such characterization becomes part of the action for all purposes, has created a situation where, had Kansas enacted a statute placing a specific one year limitation on all actions for multiple damages, the court in the instant case would have been bound to apply it; yet in the absence of such a statute the court could and did refuse to accept a limitation on statutory penalties which, through state judicial determination, includes actions for multiple damages.

In support of the "federal approach" it is argued that uniformity demands that all federal courts consider the action created by the Clayton Act as non-penal. If this were done, a uniformity in applying only state limitations on remedial actions would be achieved. Yet this would be only a fractional step toward complete uniformity, since variety in result will remain so long as there are differing periods of limitations from state to state. No doubt, the solution lies in a federal statute of limitations. Until the enactment of legislation, the divergence in views should be resolved in favor of uniformity in conforming to state law. Refusal to accept state interpretations achieves no complete uniformity, but only requires that federal courts follow the incongruous practice of applying state statutes without the state interpretations which give them meaning.

INCOME TAXATION—TAXABLE INCOME—INCLUSION OF PROCEEDS OF PUNITIVE DAMAGES

Plaintiff, Glenshaw Glass Co., sued the Commissioner of Internal Revenue for a refund of income taxes exacted from a settlement of a claim for treble damages which arose under Section 4 of the Clayton Act.[1] Another plaintiff, William Goldman Theatres, Inc., sued the Commissioner for a refund of income taxes paid on the proceeds of a judgment obtained pursuant to Section 4 of the Clayton Act. The Tax Court held for the taxpayers,[2] and the Commissioner appealed. The two cases were heard at the same time before the United States Court

1. 38 STAT. 731 (1914), 15 U.S.C.A. § 15 (1951).
2. Glenshaw Glass Co. v. Commissioner of Int. Rev., 18 T.C. 860 (1952); William Goldman Theatres, Inc. v. Commissioner of Int. Rev., 19 T.C. 637 (1953).

of Appeals for the Third Circuit. *Held,* affirmed. Punitive damages are not taxable income. *Commissioner of Int. Rev. v. Glenshaw Glass Co.,* 211 F.2d 928 (3d Cir. 1954).

The Sixteenth Amendment gave Congress power to lay and collect taxes on income from whatever source derived,[3] but Congress left to the courts the task of determining the proper bounds of taxable income by enacting a tax statute containing the broad language of the Amendment rather than a definition of income.[4] There has been no agreement among economists, accountants or lawyers as to the exact meaning of "income," but as early as 1913 it had been judicially defined as the gain derived from capital, labor or both combined,[5] and in 1920 the Supreme Court completed what has become the traditional definition, in *Eisner v. Macomber,*[6] by adding profits gained through a sale or conversion of capital assets. This definition, limiting income to three sources, became the basis for exempting windfalls,[7] punitive damages,[8] and prizes and awards which required no rendition of services.[9] In the 1954 Code, however, Congress showed dissatisfaction with the traditional definition by taxing all prizes and awards.[10] Even prior to 1954 the courts had been broadening the definition by taxing the proceeds of extortion,[11] certain settlements of claims or damages in lawsuits,[12] and the increase in value of improved land regained by forfeiture.[13] The *Eisner* definition, therefore, does not state the present limits of taxable income.

Highland Farms Corp. v. Commissioner of Int. Rev.,[14] the first case in which the issue of taxability of punitive damages was squarely presented, excluded punitive damages from taxable income on the basis of the *Eisner* definition. The instant case, following the *Highland Farms* decision, reaches its holding on the basis of several reasons: (1) punitive damages are not included in the *Eisner* definition of income; (2) punitive damages are a gift from the injuring party taken from his pocket by the law; (3) punitive damages are analogous to a

3. U.S. CONST. AMEND. XVI.
4. INT. REV. CODE §§ 61, 63 (1954).
5. Strattons Independence v. Howbert, 231 U.S. 399, 415 (1913).
6. 252 U.S. 189, 207 (1920).
7. Central R.R. v. Commissioner of Int. Rev., 79 F.2d 697 (3d Cir. 1935), 101 A.L.R. 1448 (1936).
8. Highland Farms Corp. v. Commissioner of Int. Rev., 42 B.T.A. 1314 (1940).
9. Washburn v. Commissioner of Int. Rev., 5 T.C. 1333 (1945).
10. INT. REV. CODE § 74 (1954).
11. Rutkin v. United States, 343 U.S. 130 (1952).
12. Blease v. Commissioner of Int. Rev., 16 B.T.A. 972 (1929); Buffalo Union Furnace Co. v. Commissioner of Int. Rev., 23 B.T.A. 439 (1931) (damages for services rendered); Burnet v. Sanford and Brooks Co., 282 U.S. 359 (1931) (damages for expenditures under a contract); Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247 (1941) (damages for loss of property in excess of its cost).
13. Helvering v. Bruun, 309 U.S. 461 (1940).
14. 42 B.T.A. 1314 (1940).

contribution by the sovereign, in the general public interest, to an individual; (4) punitive damages are a windfall and the ordinary man would not regard them as income within the terms of common speech.

However, the *Eisner* definition does not represent the present status of the law and should not be controlling. As a gift, punitive damages lack both a voluntary intent and usual gift motivation, *i.e.*, love and affection. In comparing punitive damages to a contribution by the sovereign, the court relied on *Edwards v. Cuba R.R.*,[15] in which money contributed to the capital of the corporation was held not taxable, but there seems to be little in common between punitive damages and contributions by non-stockholders to a corporation's capital. The common-speech test has been uttered with approval by the Supreme Court,[16] but with the warning by Justice Holmes that the meaning of a word is a growing thing.[17] The Court of Claims taxed a recovery under Section 16(b) of the Securities Exchange Act,[18] and declared that all windfalls are within the meaning of income.[19] In *General American Investors Co. v. Commissioner of Int. Rev.*,[20] the Tax Court approved taxation of money recovered under Section 16(b) of the Securities Exchange Act, but expressly stated that money so recovered was not punitive damages. It did this so as not to disturb its earlier holding on the nontaxability of punitive damages. The Court of Appeals for the Second Circuit, in an opinion[21] by Judge Medina, affirmed the judgment against the corporation without designating the payments as either windfall or penalty, considering the question irrelevant.

Judge Medina, finding no infallible way to determine the limits of taxable income, suggested that the old exclusion by rigid adherence to a definition should give way to policy considerations in an empirical case-by-case approach. It would then be possible, on the one hand, to argue that treble damages collected under antitrust laws such as the Clayton Act should be non-taxable because they serve the public good by encouraging such lawsuits, and at the same time argue that punitive damages in tort cases offer a desirable source of taxation, lacking the evils of penalizing hard work and initiative.

The Commissioner of Internal Revenue, on the other hand, contends

15. 268 U.S. 628 (1925).
16. See United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931); Eisner v. Macomber, 252 U.S. 189, 206-7 (1920).
17. Towne v. Eisner, 245 U.S. 418 (1918).
18. 48 STAT. 896 (1934), 15 U.S.C.A. § 78p(b) (1951).
19. Park and Tilford Distillers Corp. v. United States, 107 F. Supp. 941 (Ct. Cl. 1952) (corporation recovered profit made by director who purchased and sold shares of corporation's stock in the open market within a six-month period).
20. 19 T.C. 581 (1952).
21. 211 F.2d 522 (2d Cir. 1954).

that taxable income is any increase in net worth through the receipt of money or property except where specifically excluded by the statute.[22] Because there is no agreement as to what is income, under the Commissioner's approach the exclusions are dictated on policy considerations by Congress alone. However, Congress, having defined income in vague, general language, would seem to have left it to the courts to set the precise boundary lines by means of this case-by-case approach. The holding of the instant case may be justified on grounds of policy, even though both the courts and Congress have shown dissatisfaction with the traditional definition and have approved Judge Medina's approach.

NATURAL GAS ACT—STATUTORY CONSTRUCTION—SCOPE OF STATUTE AS AFFECTED BY SUBSEQUENT DECISIONS

Phillips Petroleum Company, an independent producer and gatherer,[1] sold natural gas to an interstate pipeline company. The Federal Power Commission instituted proceedings[2] to determine whether Phillips' sales to an interstate pipeline company were within the purview of the Natural Gas Act.[3] The Commission denied jurisdiction to regulate Phillips' rates.[4] The court of appeals reversed.[5] *Held* (5-3),[6] affirmed. The purpose of the Natural Gas Act was to occupy the area which had been held to be immune from state regulation, and the sale of natural gas by independent producers was a portion of this area. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), *rehearing denied*, 75 Sup. Ct. 17 (1954).

The problem in the instant case is essentially one of statutory construction. The Natural Gas Act confers on the Federal Power Commission jurisdiction over "the sale in interstate commerce of natural gas for resale"; however, the "production or gathering of natural gas" is exempt from the purview of the statute.[7]

22. Instant Case at 930.

1. An independent producer and gatherer of natural gas is one who neither engages in the transportation of natural gas in interstate pipelines nor is affiliated with an interstate pipeline company. See Berger and Krash, *The Status of Independent Producers under the Natural Gas Act*, 30 TEXAS L. REV. 29 n.1 (1951).

2. 7 F.P.C. 983 (1948).

3. 52 STAT. 821 § 1(b) (1938), 15 U.S.C.A. § 717(b) (1948).

4. *In re* Phillips Petroleum Co., 10 F.P.C. 246, 90 P.U.R. (N.S.) 325 (1951), 52 COL. L. REV. 135 (1952).

5. Wisconsin v. Federal Power Comm'n, 205 F.2d 706 (D.C. Cir. 1953), 22 GEO. WASH. L. REV. 118 (1953), 32 TEXAS L. REV. 762 (1954).

6. Opinion by Mr. Justice Minton; concurring opinion by Mr. Justice Frankfurter; dissenting opinions by Mr. Justice Douglas and Mr. Justice Clark with Mr. Justice Burton concurring; Mr. Justice Jackson took no part in the consideration or decision of the case.

7. 52 STAT. 821 § 1(b) (1938), 15 U.S.C.A. § 717(b) (1948).

Phillips' activity lies in the area which is overlapped by the language of the grant of jurisdiction and that of the exemption.[8] Although exceptions to the primary grant of authority are to be strictly construed,[9] this rule would seem to be inapplicable in the instant case because the "production or gathering" exemption was not intended to be covered by the language in the affirmative grant of jurisdiction.[10] Since the language of the statute is susceptible to two conflicting interpretations, resort to the legislative history of the Natural Gas Act is appropriate, as indicated in the instant case.[11] Extensive research in the legislative history, however, does not reveal conclusive or controlling evidence of congressional intent to deal with the specific problem of wholesale sales by independent producers.[12]

It is generally recognized that the primary purpose of the Natural Gas Act was to complement state regulation.[13] Prior to the enactment

8. Mr. Justice Douglas, in his dissenting opinion, said, "The sale by this independent producer is a 'sale in interstate commerce . . . for resale.' It is also an integral part of 'the production or gathering of natural gas,' . . . for it is the end phase of the producing and gathering process. So we must make a choice; and the choice is not an easy one." Instant Case at 688.

For discussion of the *Phillips* case and the problem of regulation of independent producers, see Baker and Illig, *Natural Gas Supplies for Tomorrow*, 19 LAW & CONTEMP. PROB. 361 (1954); Berger and Krash, *The Status of Independent Producers under the Natural Gas Act*, 30 TEXAS L. REV. 29 (1951); Hardwicke, *Some Consequences of Fears by Independent Producers of Gas of Federal Regulation*, 19 LAW & CONTEMP. PROB. 342 (1954); McLane, *Jurisdiction of the Federal Power Commission over Production and Gathering of Gas*, 28 TULANE L. REV. 343 (1954); Ross and Foster, *Phillips and the Natural Gas Act*, 19 LAW & CONTEMP. PROB. 382 (1954); Scanlan, *Administrative Abnegation in the Face of Congressional Coercion: The Interstate Natural Gas Company Affair*, 23 NOTRE DAME LAW. 173 (1948); Notes, 17 U. OF CHI. L. REV. 479 (1950), 59 YALE L.J. 1468 (1950).

9. Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682, 690-91 (1947). But see 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4936 (3d ed., Horack, 1943).

10. "The [exceptions] are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the Act, the committee has included it in this bill." H.R. REP. No. 709, 75th Cong., 1st Sess. 1, 3 (1937); the Senate Report adopted the House Report, SEN. REP. No. 1162, 75th Cong., 1st Sess. 1 (1937).

11. Instant Case at 682; see 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5001 (3d ed., Horack, 1943).

12. *Compare* the majority opinion, *with* the dissenting opinions in the following cases: *In re* Phillips Petroleum Co., 10 F.P.C. 246, 90 P.U.R. (N.S.) 325 (1951); *In re* Columbian Fuel Corporation, 2 F.P.C. 200, 35 P.U.R. (N.S.) 3 (1940). The hearings and debates in Congress indicate primary concern with the regulation of interstate transportation; and there is somewhat vague testimony indicating intent to exclude independent producers and gatherers from the scope of the Natural Gas Act. See Berger and Krash, *The Status of Independent Producers under the Natural Gas Act*, 30 TEXAS L. REV. 29, 32-37 (1951).

13. Federal Power Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 502-3, 509-15 (1949); Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 519-21 (1947); Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682, 690 (1947); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 609-10 (1944); Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456, 467 (1943).

of the Natural Gas Act, the Supreme Court had held that the commerce clause of the Constitution prohibited state regulation of the rates of natural gas sold to local distributors after transportation across state lines and the wholesale rates of electricity moving in interstate commerce.[14] The Natural Gas Act was passed to occupy this area of the natural gas industry which the states could not regulate.[15] Since the scope of the Natural Gas Act ended where state regulation began, there was to be no overlapping or imbrication of federal and state jurisdiction.[16] The Court in the instant case concluded that the decisions, prior to the enactment of the Natural Gas Act, prohibited the states from regulating the wholesale sales by independent producers and gatherers in interstate commerce.[17] Assuming this to be an accurate interpretation of these decisions, the scope of the Natural Gas Act at the time of enactment encompassed the wholesale sales by independent producers and gatherers in interstate commerce.[18]

Subsequent to the enactment of the Natural Gas Act, the Supreme Court modified its view of the commerce clause, and the area subject to state regulation was expanded. In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*,[19] the Supreme Court held that a state is constitutionally competent to regulate, as a conservation measure, the wellhead price of natural gas sold by a producer in interstate commerce. The majority in the instant case seems to concede that after the Natural Gas Act was passed, the constitutional restriction on state regulation of sales by independent producers in interstate commerce was relaxed; but the Court rejected consideration of these cases

14. Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Public Utilities Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). See Howard, *Gas and Electricity in Interstate Commerce*, 18 MINN. L. REV. 611, 660-91 (1934).

15. H.R. REP. No. 709, 75th Cong., 1st Sess. 1-2 (1937); SEN. REP. No. 1162, 75th Cong., 1st Sess. 1-2 (1937); Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682, 690 (1947); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 609-10 (1944).

16. Federal Power Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513 (1949).

17. Instant Case at 683.

18. Phillips disputed the accuracy of this interpretation. Instant Case at 677. In Public Utilities Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927), and Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924), the Supreme Court held that wholesale sales made in the stream of interstate commerce by interstate pipeline companies to local distributors were national in character and thus immune from state regulation. Phillips was not an interstate pipeline company and its sales were not made in the stream of interstate commerce to local distributors. Therefore, it would seem questionable that these decisions brand Phillips' activity as essentially national in character and thus not subject to state regulation. See Berger and Krash, *The Status of Independent Producers under the Natural Gas Act*, 30 TEXAS L. REV. 29, 35-37 (1951).

19. 340 U.S. 179 (1950); *accord*, Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

because the scope of the Natural Gas Act was to be determined at the time of its enactment.[20]

It is generally accepted that the language of a statute may include circumstances uncontemplated at the time of its enactment.[21] Moreover, it would seem that the purview of a statute may be expanded to encompass situations consonant with the language and purpose of the statute but not envisioned by the legislature to be constitutionally subject to regulation.[22] Assuming that when the Natural Gas Act was passed, the Supreme Court had construed the commerce clause to permit the states to regulate the rates of independent producers, the jurisdiction of the Federal Power Commission would not attach because the Natural Gas Act was designed to complement state regulation.[23] However, if the Supreme Court, after enactment of the Natural Gas Act, had overruled the decision permitting the states to regulate the rates of independent producers, it would seem that jurisdiction of the Federal Power Commission would attach because the purpose of the Natural Gas Act was to occupy the area in which the states may not act.[24] This would be an expansion of the scope of a statute consistent with its purpose to complement state regulation and to avoid a hiatus in the regulation of the natural gas industry. If the purview of a statute may expand, it would seem logically to follow that it may contract if the circumstances warrant and the language may bear such a judicial construction.[25] An overruling would not be prerequisite to this conclusion since there are no previous decisions on the specific problem.

When the Natural Gas Act was passed, its scope included sales by independent producers in interstate commerce because the states were not then constitutionally competent to regulate this area; subsequently the commerce clause was construed to permit the states to regulate this area. Therefore, it would seem that the scope of the

20. Instant Case at 684.

21. Browder v. United States, 312 U.S. 335, 339 (1941); 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5102 (3d ed., Horack, 1943); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

22. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). "We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power." *Id.* at 557. *Cf.* Davis v. Department of Labor, 317 U.S. 249 (1942). *But cf.* Federal Power Comm'n v. East Ohio Gas Co., 338 U.S. 464, 472 (1950); Helvering v. Griffiths, 318 U.S. 371 (1943); Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Federal Trade Comm'n v. Bunte Bros., Inc., 312 U.S. 349 (1941), 50 YALE L.J. 1294. For an excellent discussion of this concept, see Lyon, *Old Statutes and New Constitution*, 44 COL. L. REV. 599 (1944).

23. See note 13 *supra*.

24. See note 15 *supra*.

25. "While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope." De Lima v. Bidwell, 182 U.S. 1, 197 (1901).

Natural Gas Act should be contracted in order to complement state regulation by occupying only that area in which the states may not now validly act. The decision in the instant case, granting jurisdiction to the Federal Power Commission to regulate the rates of independent producers, would seem to create an imbrication of federal and state jurisdiction. An avowed purpose of the Natural Gas Act was to avoid such a plight.

NEGLIGENCE—USED-CAR DEALER—DUTY TO INSPECT

Defendant used-car dealer purchased and resold a used automobile without inspecting it. After driving only a few blocks, the vendee lost control of the car due to defective brakes and ran against plaintiff, who brought suit against the used-car dealer for resulting injuries. From a judgment for plaintiff, defendant appealed. *Held,* affirmed. A used-car dealer may be liable to third persons for negligence in selling an automobile which he has not used reasonable care to inspect, even though he had no actual knowledge of the defects and made no representation as to the condition of the automobile. *Gaidry Motors, Inc. v. Brannon,* 268 S.W.2d 627 (Ky. 1954).

It is now a widely recognized principle of tort law that a manufacturer, vendor or supplier of an article may be liable to third persons for supplying the article in a defective condition, although the rule for many years seems to have been otherwise.[1] Since the landmark case of *MacPherson v. Buick Motor Co.*[2] manufacturers of chattels have been held liable to ultimate consumers[3] and to more remote plaintiffs.[4] Furthermore, injured third persons may recover from bailors, lessors and vendors of chattels if the defendant: (1) fails to apprise the vendee or bailee of known defects, (2) represents the article to be in safe condition, or (3) repairs or inspects the article negligently.[5]

1. Eldredge, *Vendor's Tort Liability,* 89 U. OF PA. L. REV. 306 (1941); Note, [1950] WASH. U.L.Q. 85; 30 CHI-KENT REV. 168 (1952); 19 TENN. L. REV. 800 (1947).

2. 217 N.Y. 382, 111 N.E. 1050, [1916F] L.R.A. 696 (1916).

3. Duval v. Coca-Cola Bottling Co., 329 Ill. App. 290, 68 N.E.2d 479 (1946); Notes, 142 A.L.R. 1490 (1943), 140 A.L.R. 191 (1942). *But cf.* Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952) (insufficient evidence).

4. McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927); Okker v. Chrome Furniture Mfg. Corp., 26 N.J. Super. 295, 97 A.2d 699 (1953) (defective tavern stool); Note, 122 A.L.R. 997 (1939); RESTATEMENT, TORTS § 395 (1934).

5. Egan Chevrolet Co. v. Bruner, 102 F.2d 373, 122 A.L.R. 987 (8th Cir. 1939) (defendant undertook to recondition); Al DeMent Chevrolet Co. v. Wilson, 252 Ala. 662, 42 So.2d 585 (1949) (gratuitous bailment); Kothe v. Tysdale, 233 Minn. 163, 46 N.W.2d 233 (1951) (house trailer with defective hitch); Vaughn v. Millington Motor Co., 160 Tenn. 197, 22 S.W.2d 226 (1929); Flies v. Fox Brothers Buick Co., 196 Wis. 196, 218 N.W. 855 (1928), 60 A.L.R. 357 (1929) (vendor represented vehicle to be safe).

While the cases contain some confusing language regarding the dangerous character of the automobile, it appears settled that automobile suppliers are subject to the rules of ordinary negligence, rather than to the rules applicable to "inherently dangerous" articles.[6] The course of conduct which will constitute due care may vary, however, depending upon what class of supplier is involved. Manufacturers and bailors are apparently bound to exercise more care in selling or letting their vehicles than are other vendors.[7] In some jurisdictions a duty is imposed by statute.[8] There has been little litigation involving casual or non-habitual suppliers. It seems doubtful that in the near future this class of defendants will be held liable to third persons for mere failure to discover defects.[9]

Used-car dealers have in some situations been held liable to third persons for negligence in supplying defective automobiles.[10] This liability has sometimes arisen from violation of a statutory duty to inspect the vehicle before sale,[11] but more often liability has been predicated upon the failure to exercise reasonable care to discover defects which would render the vehicle a menace upon the highways.[12] Only rarely, however, has liability been imposed for the mere failure to inspect,[13] and doubt has been expressed as to the propriety of holding vendors to such a duty.[14] In the great majority of cases there has been some additional element which constituted actionable

6. "It is common knowledge that an automobile with defective brakes is . . . a dangerous instrumentality . . . . An automobile dealer is not an insurer against the defective condition of a car put into the hands of a prospective purchaser. . . ." Bogart v. Cohen-Anderson Motor Co., 164 Ore. 233, 98 P.2d 720, 721 (1940).

7. PROSSER, TORTS 681 (1941); Note, [1950] WASH. U.L.Q. 85, 89 (1950); *see* Shroder v. Barron-Dady Motor Co., 111 S.W.2d 66, 70 (Mo. 1937). *But see* Kaplan v. Stein, 198 Md. 414, 84 A.2d 81, 84 (1951) (refutes distinction between gratuitous bailor and bailor for hire); Standard Oil Co. v. Leaverton, 239 Mo. App. 284, 192 S.W.2d 681 (1946).

8. Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951); Bogart v. Cohen-Anderson Motor Co., 164 Ore. 233, 98 P.2d 720 (1940).

9. See [1953] WASH. U.L.Q. 443.

10. See Notes, 170 A.L.R. 611, 676 (1947), 122 A.L.R. 997 (1939), 99 A.L.R. 240 (1935).

11. Benton v. Sloss, 38 Cal.2d 399, 240 P.2d 575 (1952); Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951); Bogart v. Cohen-Anderson Motor Co., 164 Ore. 233, 98 P.2d 720 (1940).

12. "[A] dealer in used motor vehicles . . . is generally under a duty to exercise reasonable care in making an examination thereof to discover defects therein which would make them dangerous to users or to those who might come in contact with them, and upon discovery to correct those defects or at least give warning to the purchaser." Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419, 423, [1953] WASH. U.L.Q. 443 (1953).

13. Al DeMent Chevrolet Co. v. Wilson, 252 Ala. 662, 42 So.2d 585 (1949); Standard Oil Co. v. Leaverton, 239 Mo. App. 284, 192 S.W.2d 681 (1946), 12 Mo. L. REV. 57 (1947). In neither case had the sale been consummated; there were bailments for demonstration purposes.

14. "These decisions . . . are not only a departure from sound theory but on their facts they are unwholesome precedents which invite litigious purchasers and unscrupulous lawyers to build up cases to mulct retailers in damages." Eldredge, *supra* note 1, at 331. The comment is not, however, directed specifically at automobile vendors.

negligence. This element has been found in the vendor's actual knowledge of the defect,[15] his representation that the car was in satisfactory condition,[16] or his affirmative undertaking to recondition.[17]

An important matter for consideration in this class of cases is the significance to be attached to the intervening negligence of the vendee or another. The courts are in disagreement on the question of whether such intervening negligence will insulate the liability of the used-car dealer to injured third persons.[18] Proximate causation must be established, and its existence will depend upon the facts of each case.[19]

The apparent effect of the decision in the instant case is the imposition of a duty upon used-car dealers to make an inspection of the vehicle before sale. As the dissent points out, however, it is doubtful that the court needed to go so far, since there was evidence of defendant's actual knowledge of the defect, which he failed to convey to the vendee.[20] Moreover, the case leaves open several important questions. Among them are inquiries as to what classes of vendors are now obligated to inspect chattels before sale and what chattels must be inspected. Although the case seems consistent with the modern trend toward extending tort liability, there is little precedent for the present extension, nor are its limits yet defined. While these matters may be determined by future decisions, legislative action to clarify the duties of used-car dealers and other vendors would seem desirable.

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15. *See* Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E.2d 395, 396 (1940).

16. Egan Chevrolet Co. v. Bruner, 102 F.2d 373, 122 A.L.R. 987 (8th Cir. 1939); Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E.2d 395 (1940); Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953); Flies v. Fox Brothers Buick Co., 196 Wis. 196, 218 N.W. 855 (1928), 60 A.L.R. 357 (1929); Bock v. Truck & Tractor, Inc., 18 Wash.2d 458, 139 P.2d 706 (1943).

17. Egan Chevrolet Co. v. Bruner, 102 F.2d 373, 122 A.L.R. 987 (8th Cir. 1939); Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951).

18. Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951) (no); Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 13 U. OF CHI. L. REV. 518 (1946), 19 TENN. L. REV. 800 (1947) (yes).

19. In Bock v. Truck & Tractor, Inc., 18 Wash.2d 458, 139 P.2d 706 (1943), the defendant used-car dealer was held liable to a third-party plaintiff where the truck sold had a defective spring, and the resulting accident took place 25 days after the sale. But in an action by a *vendee* who was burned while trying to plug a leaky gas tank 36 days after the sale, the defendant used car dealer's negligence was found not to be the proximate cause of injury. Ayers v. Amatucci, 206 Okla. 366, 243 P.2d 716 (1952).

20. Instant Case at 630.

SALES—IMPLIED WARRANTY—REQUIREMENT OF PRIVITY BETWEEN PROCESSOR AND ULTIMATE CONSUMER

Plaintiff brought actions for negligence and breach of implied warranty alleging that his show dogs had become ill as a result of having eaten packaged dog food processed by defendant and sold to plaintiff by a third person. Defendant moved to dismiss the warranty action for lack of privity. *Held,* motion denied. Under California law, privity is not essential to support an action for breach of implied warranty by an ultimate user against the processor of impure animal food. *McAfee v. Cargill, Inc.,* 121 F. Supp. 5 (S.D. Cal. 1954).

At common law an action could be brought by the purchaser against the retailer of impure and unwholesome food for human consumption on the theory of breach of implied warranty.[1] It is not clear whether this action was an evolution of trespass on the case for deceit, or the result of statute, or some combination of both.[2] Most jurisdictions which today allow such an action require privity of warranty in order for the consumer to recover;[3] there is, however, a minority contra.[4]

Of the American jurisdictions that have passed on the question, a majority has permitted the owner of an animal killed or injured by impure food to recover from the seller of the food on an implied warranty, usually a warranty of fitness for purpose arising out of the buyer's having relied on the judgment of the seller.[5] A minority denies the owner recovery from the seller on implied warranty notwithstanding the seller's knowledge, and forces the owner to base his case on negligence.[6]

On the other hand, a strong American minority has endorsed without qualification the holding that the processor of human food is liable to the ultimate consumer on an implied warranty of purity, notwith-

1. 3 BL. COMM. 1119, 1157 (Lewis' ed. 1902); Ames, *History of Assumpsit,* 2 HARV. L. REV. 1, 8-9 (1888); see also the discussion by Parke, B., in Burnby v. Bollett, 16 M. & W. 644, 153 Eng. Rep. 1348 (Ex. 1849).

2. 1 WILLISTON, SALES § 241 (Rev. ed. 1948). *Compare* 3 BL. COMM. 1119, n. 30 (Lewis' ed. 1902) *with Id.* at 1157, n. 53. See also 37 MARQ. L. REV. 356 (1954).

3. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); 22 AM. JUR., *Food* § 96 (1939); 77 C.J.S., *Sales* § 305b(3) (1952).

4. Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939); 77 C.J.S., *Sales* § 305b(3) (1952) and cases there cited.

5. Judd v. H.S. Coe & Co., 117 Conn. 510, 169 Atl. 270 (1933); Swift & Co. v. Redhead, 147 Iowa 94, 122 N.W. 140 (1909); McBride v. Farmers' Seed Ass'n, 248 Ky. 514, 58 S.W.2d 909 (1933); Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 252 P.2d 1040 (Mont. 1952); Poovey v. International Sugar Feed No. 2 Co., 191 N.C. 722, 133 S.E. 12 (1926); Coyle v. Baum, 3 Okla. 695, 41 Pac. 389 (1895); Houk v. Berg, 105 S.W. 1176 (Tex. Civ. App. 1907); Thatcher Milling & Elevator Co. v. Campbell, 64 Utah 422, 231 Pac. 621 (1924); Larson v. Farmer's Warehouse Co., 161 Wash. 640, 297 Pac. 753 (1931). *See* French v. Vining, 102 Mass. 132 (1869), 3 Am. Rep. 440 (1912); Shute v. Levin, 66 Pa. Super. 67 (1917).

6. National Cotton Oil Co. v. Young, 74 Ark. 144, 85 S.W. 92 (1905); Lukens v. Freiund, 27 Kan. 664 (1882), 41 Am. Rep. 429 (1912); Dulaney v. Jones & Rogers, 100 Miss. 835, 57 So. 225 (1912); A.H. Andrews & Son v. Harper, 137 Wash. 353, 242 Pac. 27 (1926).

standing lack of privity.[7] There is general confusion, however, as to the rationale of this line of cases.[8] In *Klein v. Duchess Sandwich Co.*,[9] upon which the opinion in the instant case is based, the Supreme Court of California reviewed the cases adopting this point of view and commented:

> "[T]he foregoing authorities . . . are not in entire accord . . as to the exact reasoning employed in holding a manufacturer liable on a warranty theory . . . . Manifestly, however, the factor of public policy affords a background for these decisions."[10]

The instant case is an extension and merger of the two lines of cases, one on animal food and the other on human food, outlined above. It is the first case that research reveals to have extended to animal foods the implied warranty of human foods that sometimes runs from processor to user. In *Pease & Dwyer Co. v. Somers Planting Co.*,[11] the Mississippi Supreme Court held that an express warranty by a processor of animal food to a seller, which was admitted, could not be extended to the ultimate user, and that there was no implied warranty of fitness between processor and user. This is not surprising in view of the holding of the same court in *Dulaney v. Jones & Rogers*,[12] to the effect that a user of animal food could not maintain a warranty action against the seller. The Wisconsin Supreme Court adopted the view of the Mississippi court in *Cohan v. Associated Fur Farms*[13] when it held that there could be no implied warranty between the processor and the user without privity. In so holding, it followed its own precedent regarding human food, set forth in *Prinsen v. Russos*.[14] The California

7. Alabama Coca-Cola Bottling Co. v. Ezzell, 22 Ala. App. 210, 114 So. 278 (1927); Eisenbeiss v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933); Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920), 17 A.L.R. 649 (1922); Parks v. G.C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914), [1915C] L.R.A. 179; Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Armour & Co. v. McMillain, 171 Miss. 199, 155 So. 218 (1934); Helms v. General Baking Co., 164 S.W.2d 150 (Mo. App. 1942); Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916); Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 Atl. 314 (Ct. Err. & App. 1908) 19 L.R.A. (N.S.) 923 (1909); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), 142 A.L.R. 1479 (1943). New York seems to be unsettled on the question. *Compare* McSpedon v. Kunz, 271 N.Y. 131, 2 N.E.2d 513, 105 A.L.R. 1497 (1936) *with* Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923).

8. See Notes, 142 A.L.R. 1490, 1494 (1943); 140 A.L.R. 191, 250 (1942); 111 A.L.R. 1239, 1251 (1937); 105 A.L.R. 1502, 1511 (1936); 88 A.L.R. 527, 534 (1934); 63 A.L.R. 340, 349 (1929); 39 A.L.R. 992, 1000 (1925); 17 A.L.R. 672, 709 (1922).

9. 14 Cal.2d 272, 93 P.2d 799 (1939), 15 IND. L.J. 242 (1940), 25 WASH. U.L.Q. 293 (1940).

10. 93 P.2d 799, 804 (1939).

11. 130 Miss. 147, 93 So. 673 (1922).

12. 100 Miss. 835, 57 So. 225 (1912).

13. 261 Wis. 584, 53 N.W.2d 788 (1952), 7 RUTGERS L. REV. 420 (1953).

14. 194 Wis. 142, 215 N.W. 905 (1927).

Supreme Court, however, in *Klein v. Duchess Sandwich Co.*[15] did away with the requirement of privity of implied warranty in human food cases between processor and user.[16] Hence, the *Cohan* case and the instant case are consistent to the extent that each applies the law of its state on processed human food to processed animal food.

In view of the modern methods of packaging and handling processed animal food, this case would seem to reach a fair result. It is perhaps unfortunate, however, that the district court in its opinion seemed to equate the value of animal life with that of human life.[17] The implied warranty of fitness for purpose that the court found in the *Klein* case to run from the processor to the consumer under the Uniform Sales Act would seem to offer a less questionable ground for the decision.

TORTS—UNATTENDED AUTOMOBILE STATUTE—LIABILITY OF OWNER FOR NEGLIGENT DRIVING OF THIEF

Defendant's employee, in violation of a statute,[1] left his taxicab unattended with the key in the ignition lock and the motor running. A thief stole the cab and while in flight negligently collided with the parked car of the plaintiff. On appeal from a judgment[2] affirming the trial court's refusal to dismiss the complaint, *held,* affirmed.[3] Violation of the statute is negligence and creates a liability which becomes

15. 14 Cal.2d 272, 93 P.2d 799 (1939).

16. This was after the passage of [1931] CAL. STATS. 2239, CAL. CIV. CODE § 1735 (Supp. 1953), a codification of § 15 of the Uniform Sales Act:

> "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The court said that the legislative intent was that strict privity of warranty should not be enforced under this statute, and that its ruling was an expression of the legislative intent.

17. "The same public policy considerations present for the protection of humans in the use of packaged and processed foods are also present where instead we deal with animals." Instant Case at 6.

1. "(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway. ILL. ANN. STAT. c. 95½, § 189(a) (Supp. 1953).

2. Ney v. Yellow Cab Co., 348 Ill. App. 161, 108 N.E.2d 508 (1952).

3. Previously there was a conflict of opinion on this subject in the appellate courts of Illinois. The First District Appellate Court held the defendant liable in Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948), 10 LA. L. REV. 554 (1950). Later the Third District Appellate Court held the defendant not liable in Cockrell v. Sullivan, 344 Ill. App. 620, 101 N.E.2d 878 (1951), 30 CHI-KENT REV. 277 (1952).

absolute if the jury finds that the violation was the proximate cause of the accident. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954).

Most courts in the absence of statute[4] have held the thief's act to be an independent intervening cause,[5] frequently assuming, without deciding, that the owner was negligent. Though negligence is seldom the crucial issue in these cases, most of the courts which have considered the question indicate that the owner is not guilty of negligence.[6]

A violation of a criminal statute,[7] as in the present case, is generally assumed to be negligence.[8] However, does the statute so change the common-law rule that the car owner becomes liable for the plaintiff's injuries? There is a direct conflict on this question. Part of the majority assumes the violation of an unattended-car statute to be negligence.[9] However, all majority courts say the violator's act is not the proximate cause of the accident.[10] They hold as a matter of law that the thief's act in stealing the car and hitting the plaintiff or his property is an efficient intervening cause.[11] Thus, as at common law,[12] the plaintiff cannot recover from the car owner whose original act laid the foundation for the plaintiff's injury.[13] At least one jurisdiction holds that, where the statute is violated, the decision does not depend on the principle of intervening cause, but on the question of whether the statute was passed for the purpose of averting the risk of damage to the plaintiff.[14] Under this view the defendant's

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4. Hereafter the word "statute" will include both statutes and ordinances unless otherwise indicated.

5. Midkiff v. Watkins, 52 So.2d 573 (La. App. 1951); Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Saracco v. Lyttle, 11 N.J. Super 254, 78 A.2d 288 (1951), [1951] WIS. L. REV. 740. *Contra:* Schaff v. Claxton, 144 F.2d 532 (D.C. Cir. 1944).

6. See note 5 *supra;* PROSSER, TORTS 366 (1941).

7. COLO. STAT. ANN. c. 16, § 232 (Supp. 1953); ILL. ANN. STAT. c. 95½, § 189a (Supp. 1953); IND. ANN. STAT. § 47-2124 (Burns Supp. 1953); MASS. ANN. LAWS c. 90, § 13 (Supp. 1954).

8. Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), 158 A.L.R. 1370 (1945), *cert. denied* 321 U.S. 790 (1944); *cf.* Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950), 35 MINN. L. REV. 81 (1951).

9. Slater v. T.C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927); Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948); Volkert v. Diamond Truck Co., [1940] Can. Sup. Ct. 455.

10. See note 9 *supra;* Kiste v. Red Cab Co., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950).

11. See note 10 *supra;* RESTATEMENT, TORTS § 448, comment *a* (1934).

12. Midkiff v. Watkins, 52 So.2d 573 (La. App. 1951); Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951).

13. See note 10 *supra.*

14. Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), 158 A.L.R. 1370 (1945), *cert. denied* 321 U.S. 790 (1944). *Cf.* RESTATEMENT, TORTS § 286(a) (1934). See MORRIS, STUDIES IN THE LAW OF TORTS, 151 (1952) (discussion of civil liability based upon a v iolation of a criminal statute).

violation of the statute is, as a matter of law, the legal (proximate) cause of the plaintiff's injury.[15] A third point of view is adopted by the court in the instant case. The court states that the purpose of the statute is to prevent injury resulting from a thief's negligent driving. There may be special circumstances, however, that will keep the car owner from being liable. "Assume a defendant violates the statute . . . yet . . . secures the doors . . . [o]r . . . has . . . a . . . person . . . watching the vehicle . . . ."[16] Because of the possibility of the special circumstances being present, the question of proximate cause is held to be for the jury.

The court in the present case decided that the statute was passed to protect the public from the negligent driving of thieves. The majority view, which deems the thief's act to break the chain of causation, interprets the statute as an anti-theft measure, not a safety provision.[17] Possibly the statute could be considered both a theft statute and a safety measure.[18] However, the Illinois court by the present decision subjects car owners to a very heavy burden in exchange for comparatively little protection to the public. It is submitted that the majority courts are correct in saying, as a matter of law, that there is not such a high probability of intervening crime and pursuant negligent operation of the vehicle by a thief as to be reasonably foreseeable.[19]

TRUSTS—POWERS OF TRUSTEES—COURT CONTROL OF TRUSTEES' DISCRETION

Complainants, testamentary trustees holding titles to a department store building, signed a 25-year lease agreement with a business competitor of the occupant. As the lease would extend beyond the probable duration of the trust, the trustees, pursuant to the agreement, brought suit in the chancery court seeking a decree either affirming their power to make the lease or confirming their actions as being in the best interests of the *cestuis que trust*.[1] Guardians ad

15. Ross v. Hartman, *supra* note 14.
16. Instant Case at 80.
17. Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945).
18. *Cf.* Hines v. Foreman, 243 S.W. 479, 483-84 (Tex. Comm. App. 1922).
19. For an admirable treatment of the view expressed in this sentence, see Judge Achor's opinion in Kiste v. Red Cab Co., 122 Ind. App. 587, 106 N.E.2d 395 (1952).

1. Where a trust is to continue for an indefinite period, as for the lives of specified persons, there is a split of authority on whether a trustee has the power to execute a lease likely to extend beyond the life of the trust, in absence of express authority conferred in the trust instrument. Some courts hold that a trustee may make such a lease where his conduct is reasonable in view of the circumstances. Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929); Butler v.

litem, representing minor remaindermen and an incompetent beneficiary, filed a cross-bill in which made the present occupant of the building a defendant for the purpose of discovery as to the occupant's offer to re-lease the premises. The occupant answered and submitted a lease proposal substantially similar to that of its competitor. The court of appeals reversed a decree which ordered the trustees to accept occupant's proposal. On certiorari, *held* (3-2),[2] reversed and remanded. When property interests of minors and infants are before the court, the chancellor stands *in loco parentis* and must consider that which will be most beneficial for them. *Nashville Trust Company v. Lebeck*, 270 S.W.2d 470 (Tenn. 1954).

With rare exceptions[3] it is consistently held that a court will not substitute its judgment for that of trustees in the normal exercise of their discretionary powers.[4] That the court would have acted differently if it had been given the discretion is not a ground for judicial direction of the execution of the trust duties.[5] The usual basis for

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Topkis, 63 Atl. 646 (Del. Ch. 1906); Lindenberger v. Kentucky Title Trust Co., 270 Ky. 579, 110 S.W.2d 301 (1937); Montgomery Ward and Co. v. Norton's Trustee, 225 Ky. 244, 73 S.W.2d 41 (1934). *See* North v. Augusta Real Estate Ass'n, 130 Me. 254, 155 Atl. 36, 38 (1931); Sweeney v. Hagerstown Trust Co., 144 Md. 612, 125 Atl. 522, 524 (1924); 4 BOGERT, TRUSTS AND TRUSTEES § 788 (1948). But a majority of the cases deny the trustee this power and require him to procure court sanction for a lease of this type. Hunt v. Lawton, 76 Cal. App. 655, 245 Pac. 803 (1926); *In re* Hubbell Trust, 135 Iowa 637, 113 N.W. 512 (1907); Bergengren v. Aldridge, 139 Mass. 259, 29 N.E. 667 (1885); Standard Metallic Paint Co. v. Prince Mfg. Co., 133 Pa. 474, 19 Atl. 411 (1890); *In re* Caswell's Will, 197 Wis. 327, 222 N.W. 235 (1928); 4 BOGERT, *op. cit. supra* § 787. The Courts have power to grant authority to make the lease when it is shown that the benefits to the beneficiaries justify such action. Colonial Trust Co. v. Brown, 105 Conn. 261, 135 Atl. 555 (1926); Denegre v. Walker, 214 Ill. 113, 73 N.E. 409 (1905); Marsh v. Reed, 184 Ill. 263, 56 N.E. 306 (1900); *In re* Hubbell Trust, *supra;* Upham v. Plankinton, 152 Wis. 275, 140 N.W. 5 (1913); RESTATEMENT, TRUSTS § 189, comments c and *d* (1935). As a general rule, a lease that extends beyond the life of the trust is void on termination of the trust if it was not approved by the court. *In re* Hubbell Trust, *supra;* 4 BOGERT, *op. cit. supra* § 790; 2 SCOTT, TRUSTS § 189.2 (1939); Comment, 21 So. CALIF. L. REV. 260 (1948); 36 MARQ. L. REV. 121 (1952). See generally, 2 SCOTT, TRUSTS § 189 (1939); Harriman, *Leasing of Real Property Held in Trust and the Covenants of the Trustees*, 3 CONN. B.J. 80 (1929); Note, 21 HARV. L. REV. 211 (1907); Comments, 21 So. CALIF. L. REV. 260 (1948), 38 YALE L.J. 794 (1929); 7 N.C.L. REV. 94 (1928).

2. Opinion by Mr. Chief Justice Neil; concurring opinion by Mr. Justice Prewitt; dissent by Mr. Justice Tomlinson, with Mr. Justice Swepston concurring.

3. Ford v. Ford, 230 Ky. 56, 18 S.W.2d 859 (1929), 18 KY. L.J. 399 (1930); *In re* D'Epinoix's Settlement [1914] 1 Ch. 890, 28 HARV. L. REV. 216 (1915); *In re* Hodges, 7 Ch. D. 754 (1878).

4. *In re* Marre's Estate, 18 Cal.2d 184, 114 P.2d 586 (1941); McCarthy v. Tierney, 116 Conn. 588, 165 Atl. 807 (1933); Martin v. McCune, 318 Ill. 585, 149 N.E. 489 (1925); Marburg v. Safe Deposit and Trust Co., 177 Md. 165, 9 A.2d 222 (1939); Baer v. Kahn, 131 Md. 17, 101 Atl. 596 (1917); Dumaine v. Dumaine, 301 Mass. 214, 16 N.E.2d 625 (1938); Pritchard v. Carpenter, 212 Minn. 233, 3 N.W.2d 226 (1942); *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943), 42 MICH. L. REV. 952 (1944); Kirk v. Vohland, 135 Neb. 77, 280 N.W. 241 (1938); Loftin v. Kenan, 276 N.Y. 615, 12 N.E.2d 604 (1938).

5. *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943); RESTATEMENT, TRUSTS § 187, comment *e* (1935); 2 SCOTT, TRUSTS 988 (1939).

court intervention is a finding that the trustees in their actions abused their discretion[6] in acting under an improper motive,[7] defeating the intention of the settlor,[8] going beyond the bounds of reasonable judgment,[9] committing a breach of trust,[10] conducting themselves in an unreasonable, capricious and arbitrary manner,[11] or acting under a misapprehension as to their powers and duties.[12]

In the instant case the court based its intervention not on the ground of the trustees' misconduct, but on the principle that the chancellor stands *in loco parentis* to children and lunatics.[13] Broadly stated, this is an equitable principle which allows the chancellor to act for persons who, because of a disability, are unable to act for themselves.[14] These persons, it is said, become wards of the court and the chancellor must see that their interests are protected.[15] It has been utilized, *inter alia,* to allow the chancellor to correct a betrayal of confidence, to ratify or avoid a contract, or to convert a ward's realty into personalty.[16] In no American case found, however, has the minority or incompetency of the *cestui que trust* alone proved grounds for the court's usurpation of the discretion of a testamentary trustee. Evidential of the lack of precedent for such a holding are the unauthoritative citations in the opinion in the instant case. In addition to cases upholding the general rule of non-intervention despite the factor of disabled beneficiaries,[17] there is language in several cases which impliedly negates the principle advanced by the

6. Rinker's Adm'r v. Simpson, 159 Va. 612, 166 S.E. 546 (1932), 81 U. OF PA. L. REV. 1008 (1933).
7. Colton v. Colton, 127 U.S. 300 (1888).
8. Murphy v. Delano, 95 Me. 229, 49 Atl. 1053 (1901).
9. Stallard v. Johnson, 189 Okla. 376, 116 P.2d 965 (1941); Angell v. Angell, 28 R.I. 592, 68 Atl. 583 (1908).
10. Carter v. Young, 193 N.C. 678, 137 S.E. 875 (1927).
11. Keating v. Keating, 182 Iowa 1056, 165 N.W. 74 (1917).
12. *In re* Murray, 142 Me. 24, 45 A.2d 636 (1946).
13. To support its intervention the court enunciated another principle: "When complainants brought to the Chancery Court the question of their authority under the respective trusts, and craved its jurisdiction for specific purposes, the court then and there had jurisdiction for all purposes." 270 S.W.2d at 475.

Thus, in effect, it holds that when a trustee makes petition to the chancellor for any purpose, he abdicates the discretion vested in him. Such a proposition runs counter to the reason behind the general rule that a court will not direct a trustee in the use of his discretionary powers; that is, the settlor placed this discretion not in the chancellor but in the trustee, and judicial interference with it would therefore defeat the intention of the settlor. Martin v. McCune, 318 Ill. 585, 149 N.E. 489 (1925); *In re* Falsey's Estate, 56 N.Y.S.2d 556 (Surr. Ct. 1945). In the latter case the trustee of a trust for an incompetent beneficiary sought court direction as to the administration of the trust. *Held,* even on application of the trustee, the court may not direct him as to matters that fall within his discretion.
14. GIBSON'S SUITS IN CHANCERY § 35 (4th ed., Higgins and Crownover, 1937).
15. *Id.* § 970.
16. *Ibid.;* 4 POMEROY, EQUITY JURISPRUDENCE §§ 1303 *et. seq.* (5th ed., Symons, 1941); 27 AM. JUR., *Infants* §§ 101, 103 (1940).
17. *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1938); *In re* Falsey's Estate, 56 N.Y.S.2d 556 (Surr. Ct. 1945).

case at hand. In *Wood v. Wood*,[18] for example, the court, in ordering a guardian to change investments for the benefit of the minor owners, stated: "There being no legal trust vested in the guardian, in the character of trustee . . . this court may lawfully control the exercise of the legal power of the guardian over the property."[19]

Rather than affirmatively condoning judicial interference with the discretion of a trustee,[20] the court, by adverting to the chancellor's power *in loco parentis*, supported its opinion by a principle of dubious application to the situation presented.[21] It is regrettable that the court in reaching such a novel decision disregarded the basic issue presented by the appeal.

WILLS—REVOCATION BY OPERATION OF LAW—SEPARATION AND PROPERTY SETTLEMENT AS EFFECTING IMPLIED REVOCATION

Plaintiffs, children of testator, contested probate of their father's will which named their mother, the separated widow of the deceased, as sole devisee. Contestants' motion for a directed verdict was granted on the ground that the will had been revoked by a subsequent separation agreement containing a property settlement. Proponent appealed. *Held*, reversed. A separation agreement coupled with a property settlement does not amount to such a change of conditions as would effect a revocation by operation of law. *Price v. Price*, 269 S.W.2d 920 (Tenn. 1954).

The character of change in conditions essential for revocation implied by law is subject to great diversity of opinion. Modern statutes are essentially of two types:[1] (1) those in which revocation by operation of law is limited to situations expressly enumerated[2] and (2) those which state, following an enumeration of the traditional

18. 5 Paige 596, 28 Am. Dec. 451 (N.Y. 1836).
19. *Id.* at 604, 28 Am. Dec. at 457. *See* also Brown v. Hester, 237 Ala. 321, 186 So. 695, 697 (1939).
20. In support of such principle see 28 HARV. L. REV. 216 (1914); 18 KY. L.J. 399 (1930).
21. As stated in a dissenting opinion by Tomlinson, J.: "[T]he Court has strayed far from the law of trust, as heretofore understood and practiced, in going further by substituting its discretion for that of the trustees, in a matter as to which there is a choice, and in mandamusing, in effect, these trustees to scuttle the lease which they had made and sign the one which the majority of this Court considers 'superior'." Instant Case at 485.

1. Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 283 (1929).
2. FLA. STAT. ANN. §§ 731.09, 731.12, 731.16, 731.18 (1941); S.C. CODE, § 19-221 (1952); S.D. CODE, § 56.0217 (1939).

forms of revocation,[3] that the enumeration shall not be construed as preventing revocation implied by law.[4]

In the absence, as in Tennessee, of any statutory provision relating to revocation implied by law, and in jurisdictions having a statute similar to type (2) above, the common law is controlling. Revocation by operation of law resulted from only two situations at early common law.[5] Birth of issue following a subsequent marriage resulted in revocation of a man's will;[6] subsequent marriage alone effected a like result in the case of a woman's.[7]

Courts today are in dispute as to just what change in circumstances will warrant partial or complete revocation.[8] Most courts, however, do not limit the doctrine of implied revocation to the cases where the particular facts would have been sufficient to have worked a revocation at early common law.[9]

The English cases do not contain any references which indicate that a divorce, with or without a property settlement, will revoke a will, in whole or in part.[10] This situation is undoubtedly due to the infrequency of divorce in England until relatively modern times.[11] Although not within the letter of the common-law rule, divorce with settlement seems clearly to be within its spirit. The changed social and moral relations are of such character as to justify the legal assumption that the testator's failure to revoke was not intentional. Although Tennessee[12] and the majority of American jurisdictions[13]

3. By formal writing or by act on the document. See Bordwell, *Statute Law of Wills*, 14 IOWA L. REV. 283, 285; 4 KENT'S COMM. *520 (1896).

4. MINN. STAT. ANN. § 525.19 (West Supp. 1954). NEB. REV. STAT. § 30.209 (1943).

5. Durfee, *Revocation of Wills by Subsequent Changes in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406 (1942).

6. Shorten v. Judd, 60 Kan. 73, 55 Pac. 286 (1898); Glascott v. Bragg, 111 Wis. 605, 87 N.W. 853 (1901) (will revoked even though child was adopted).

7. Vandeveer v. Higgins, 59 Neb. 333, 80 N.W. 1043 (1899); *In re* Carey's Estate, 49 Vt. 236 (1877), 24 Am. Rep. 133 (1912); See *In re* Kelly's Estate, 191 Minn. 280, 254 N.W. 437, 92 A.L.R. 1007 (1934).

8. *In re* Bartlett's Estate, 108 Neb. 681, 190 N.W. 869 (1922), 25 A.L.R. 39 (1923) (divorce and property settlement); *In re* McGraw's Estate, 228 Mich. 1, 199 N.W. 686 (1924), 37 A.L.R. 308 (1925) (divorce alone).

9. *In re* Bartlett's Estate, 108 Neb. 681, 190 N.W. 869, 25 A.L.R. 39 (1922), declared, after holding a divorce accompanied by a property settlement sufficient to revoke testator's will, that the purpose of statutory enactments expressly retaining the common law rule was to preserve and perpetuate the underlying principle upon which those revocations were based. *But cf. In re* Brown's Estate, 139 Iowa 219, 117 N.W. 260 (1908) limiting those changes sufficient to imply revocation to those that would have amounted to revocation under the common law at the time the Iowa statute was enacted.

10. ATKINSON, WILLS 431 (2d ed. 1953); *see* Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699, 701 (1893), 35 Am. St. Rep. 545, 549 (1894).

11. ATKINSON, WILLS 431 (2d ed. 1953).

12. Rankin v. McDearman, Admr., No. 1 Gibson Equity, Sept. Sess., 1953, Tenn. App. W.D., Dec. 2, 1953 (unpublished).

13. Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699 (1893), 35 Am. St. Rep. 545 (1894); *In re* Hall's Estate, 106 Minn. 502, 119 N.W. 219 (1909); *In re* Martin's Estate, 109 Neb. 289, 190 N.W. 872 (1922) (regardless of intention). *Contra: In re* Bartlett's Estate, 108 Neb. 681, 190 N.W. 869, 25 A.L.R. 39 (1922); Hertrais v. Moore, 325 Mass. 57, 88 N.E.2d 909 (1949).

have held that a divorce, accompanied by a property settlement, revokes a legacy in favor of the divorced spouse, a divorce, unaccompanied by a property settlement, has been held not to constitute a sufficient change.[14]

In the instant case the Tennessee court held that a mere separation, though accompanied by a property settlement, was not sufficient to imply revocation. This decision was not, however, based on any strict adherence to the older view limiting the situation giving rise to a presumption of revocation to those existing under common law, but was merely recognition that testator, not having acquired a divorce, may not yet have completely and irrevocably severed all legal and moral ties with his spouse. It is the province of the legislature to extend the presumption of revocation to the fact situation in the instant case.

WILLS—TESTAMENTARY LIBEL—RECOVERY ALLOWED AGAINST TESTATOR'S ESTATE

Testator cut off a grandson in his will, referring to him with expressions which were libelous *per se*. In an action for testamentary libel against the testator's estate, the trial court sustained a demurrer to the complaint, and plaintiff appealed. *Held,* reversed. Death of the testator should not deprive plaintiff of a remedy when libelous statements are made by the testator under circumstances which result in their inevitable publication at his death. *Kleinschmidt v. Matthieu,* 206 P.2d 686 (Ore. 1954).

An essential element in the tort of libel is publication.[1] A substantial difficulty arises when the publication occurs after the death of the expressor, as is the situation in defamation by will.[2] The courts of the United States are split on the question of whether or not an action for testamentary libel may be maintained against the testator's estate.[3]

14. Card v. Alexander, 48 Conn. 492 (1881), 40 Am. Rep. 187 (1912); Murphy v. Markis, 98 N.J. Eq. 153, 130 Atl. 840 (1925). *But see In re* McGraw's Estate, 228 Mich. 1, 199 N.W. 686, 688 (1924), 37 A.L.R. 308, 310 (1925).

1. Commonwealth v. Szliakys, 254 Mass. 424, 150 N.E. 190 (1926); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246, 146 A.L.R. 732 (1942); 53 C.J.S., *Libel and Slander* § 1(a) (1936); RESTATEMENT, TORTS § 568 (1934).

2. See Rubin, *Defamation by Will,* [1950] WASH. U.L.Q. 122; Note, 1 U.C.L.A. L. REV. 575 (1954); Note, 8 INTRA. L. REV. (N.Y.U.) 292 (1953).

3. Action denied: Citizens and Southern Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 87 A.L.R. 230 (1933); Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948). Action allowed: Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945); *In re* Gallagher's Estate, 10 Pa. Dist. 733 (1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584, 49 L.R.A. (N.S.) 897 (1914). No American case has held an executor personally liable for his publication, as it is his legal duty to probate the will. See Note, 1 U.C.L.A. L. REV. 575, 577 (1954). In Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945) it was expressly held that an action against the executor personally cannot be maintained.

The primary obstacle to consistent reasoning by the courts is the fact that in a case of testamentary libel, unlike other tort suits, the cause of action does not accrue until the tortfeasor is dead. At common law, the causes of action for personal torts did not survive the death of the wrongdoer, in accord with the maxim *actio personalis moritur cum persona*—a personal action dies with the person.[4] Statutes specifying the causes of action which survive usually do not include libel and slander.[5] It may be felt by the legislatures that the social advantage in allowing litigation involving issues of morality is questionable where one of the parties is dead.[6]

The courts which refuse to sanction the action for testamentary libel advance several arguments. One theory is that since the testator is dead, and hence incapable of any act of publication, he cannot commit the tort of libel;[7] but this theory appears to be merely an afterthought and was not determinative in the one case in which it was employed. Another argument is that the rule which makes the pleadings in a judicial proceeding privileged ought to apply to wills;[8] but in the leading case in support of this proposition, the court seems to express doubt as to whether the privilege extends so far as to shield a testator who acts primarily from malice, rather than from a desire to control the distribution of his property.[9] A third argument[10] is based on the purported necessity for a strict adherence to the common-law maxim, *actio personalis moritur cum persona.* This view ignores the fact that the cause of action was not in existence prior to the death of the testator.[11] Those courts denying relief for testamentary libel have thus indulged in some rather questionable theorizing in order to reach a result which seems to spring from a fear that a departure from the common-law tradition that a personal cause of action dies with the defendant could not be confined to actions for testamentary libel.[12]

On the other hand, those courts allowing the action engage in equally doubtful reasoning in order to afford the plaintiff a remedy. In a Tennessee case[13] it was said that the executor acted as an agent of

4. PROSSER, TORTS 949 (1941); 1 C.J.S., *Abatement and Revival* § 115 (1936).
5. NEWELL, THE LAW OF SLANDER AND LIBEL, 363-64 (4th ed., 1924); 1 AM. JUR., *Abatement and Revival* § 122 (1936).
6. Evans, *A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators,* 29 MICH. L. REV. 969, 987 (1931).
7. See Citizens and Southern National Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 315, 87 A.L.R. 230, 234 (1933).
8. Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934).
9. Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487, 488-89 (1934).
10. Citizens and Southern National Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313, 87 A.L.R. 230 (1933); Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948).
11. See Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S.W. 584, 49 L.R.A. (N.S.) 897 (1914). See also Instant Case at 687.
12. See Carver v. Morrow, 213 S.C. 199, 48 S.E.2d 814, 818 (1948); Note, 87 A.L.R. 234 (1933).
13. Harris v. Nashville Trust Co., 128 Tenn. 573, 578, 162 S.W. 584, 585, 49 L.R.A. (N.S.) 897, 898 (1914). *But see* Instant Case at 688.

the testator in the publication of the libel, thus rendering the testator's estate liable under the doctrine of *respondeat superior*. Here the court ignores established principles of agency.[14] A second argument in favor of allowing the action is to the effect that the testator set in motion a chain of events calculated to lead to the inevitable publication of the libelous matter, thus completing the tort during the testator's lifetime.[15] Such a view, however, fails to take into consideration the doctrine of *actio personalis moritur cum persona,* which would still cut off liability.

The logical manner of treating the problem would seem to be to cast theory aside and to allow the action as a matter of general policy[16] which should afford the innocent person protection against the malice of the deceased tortfeasor.[17] Although no court has, as yet, been so frank, there are indications in several opinions that there may be a trend in this direction.[18] Several courts have implied their susceptibility to such influencing factors as the deliberation involved in the expression of the libel[19] and the permanency of the publication.[20] The instant case more closely approaches frank reliance on the policy argument than does any previous case.

14. "Upon the death of the principal, his former agent has no authority to act for the principal's estate even though the authority was given in contemplation of the principal's death . . . . It is only where a power, although in the form of an agency power, is given for the benefit of the agent or a third person, that the power is not terminated by the death of the one giving it . . . ." RESTATEMENT, AGENCY § 120, comment *a* (1933).

15. Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910 (Sup. Ct. 1945).

16. Cases involving other types of torts in which the cause of action arises subsequent to the death of the tortfeasor are virtually non-existent. There are, however, at least two cases which consider the problem indirectly. In Maloney v. Victor, 175 Misc. 258, 25 N.Y.S.2d 257, 258 (Sup. Ct. 1940), it was said that under a survival statute the plaintiff could maintain an action for damages resulting from a collision caused by the negligence of the decedent, even though the cause of action should not have arisen until after the death of the decedent. But it was held in the cited case that the cause of action did accrue prior to the death of the tortfeasor. In U.S. Casualty Co. v. Rice, 18 S.W.2d 760 (Tex. Civ. App. 1929), it was held that there was no cause of action for injury in an automobile collision by virtue of the survival statute where the injury was caused by the negligence of a person deceased at the time the injury was received.

17. PROSSER, TORTS 813 (1941).

18. "He composed the alleged libel and in justice his estate should bear the burden of defending it." Brown v. Mack, 185 Misc. 368, 56 N.Y.S.2d 910, 917 (Sup. Ct. 1945). See also Harris v. Nashville Trust Co., 128 Tenn. 573, 585, 162 S.W. 584, 587, 49 L.R.A. (N.S.) 897, 902 (1914).

19. "It was written in cold blood in contemplation of publication at a time when no action could be brought against the person of the wrongdoer . . . ." *In re* Gallagher's Estate, 10 Pa. Dist. 733, 736-37 (1901).

20. "No more effective means of publishing and perpetuating a libel can be conceived than to secure the inscription of such matters on court records, as by probate of a will." Harris v. Nashville Trust Co., 128 Tenn. 573, 578, 162 S.W. 584, 585, 49 L.R.A. (N.S.) 897, 900 (1914). See also *In re* Gallagher's Estate, 10 Pa. Dist. 733, 736-37 (1901).

WORKMEN'S COMPENSATION—LIMITATION OF ACTIONS—OCCUPATIONAL DISEASE

Plaintiff, employed by defendant county highway department as a rock crusher, became incapacitated for work by an attack of pneumonia. During convalescence, his personal physician and the state health department determined that he was suffering from pneumoconiosis, a disease which is not compensable under the Tennessee Workmen's Compensation Law. Subsequently, when plaintiff became permanently and totally disabled, the health department diagnosed his illness as silicosis, an occupational disease under the Tennessee schedule. Plaintiff's claim, which was filed immediately thereafter, was rejected by the trial court on the ground that claimant had suffered from silicosis, notwithstanding lack of diagnosis as such, for more than a year before bringing suit and that his cause of action was barred by the statute of limitations;[1] plaintiff appealed. *Held,* reversed and remanded. The statute will not begin to run until the claimant has actual or constructive knowledge that his disability is due to a compensable disease. *Wilson v. Van Buren County,* 268 S.W.2d 363 (Tenn. 1954).

The Tennessee court reasoned that it could not have been the intent of the legislature to require the claimant to file a claim for a disability from a disease that he did not know existed or which did not in fact exist.[2] The court had previously held that "incapacity for work" under the statute[3] did not mean the time that the injury commenced.[4] In view of this holding and the statutory provision that an occupational disease is one that can be diagnosed as such,[5] the court concluded that "incapacity for work" and the claimant's actual or constructive knowledge that the occupational disease is the cause must concur before the claim period begins to run.[6]

Considering the remedial nature of workmen's compensation legislation, which requires that the facts of a given claim be construed in the light most favorable to the claimant,[7] the Tennessee court has reached a result which finds general support in most jurisdictions

1. The failure to give written notice was excused by the court under authority granted to them by the statute. TENN. CODE ANN. § 6872 (Williams Supp. 1952).

2. See Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909, 911 (1947).

3. "The right to compensation for occupational disease shall be forever barred unless suit therefor is commenced within one year after the beginning of incapacity for work resulting from an occupational disease." TENN. CODE ANN. § 6852(d) (Williams Supp. 1952).

4. Holeproof Hosiery Co. v. Wilkins, 194 Tenn. 683, 254 S.W.2d 973 (1953).

5. "An employee has an occupational disease within the meaning of this law if the disease or condition has developed to such extent that it can be diagnosed as an occupational disease." TENN. CODE ANN. § 6852(d) (Williams Supp. 1952).

6. Instant Case at 367.

7. See Johnson Coffee Co. v. McDonald, 143 Tenn. 505, 514, 226 S.W. 215, 217 (1920); Ogle v. Tennessee Eastman Corp., 185 Tenn. 527, 531, 206 S.W.2d 909, 910 (1947).

which, either by statute or judicial construction, date their limitation periods from the "injury," the "disability," the "incapacity for work," or the "first distinct manifestation of the disease."[8]

The same problems of construction arise in occupational disease cases as in the cases of all slowly developing injuries.[9] The general rule may be stated that the statute of limitations for occupational disease runs from the time a reasonable claimant should know that his disability resulted from such a disease.[10]

Some statutes circumscribe the freedom of the courts to determine the time of accrual of a cause of action by dating the limitation period for filing claims in disease cases from the "last injurious exposure"[11] or imposing an overall limitation on any claim dating from the "accident"[12] or "last day of work."[13] In the face of an overall limitation provision, one court which followed the majority view in previous cases[14] said, in dictum in a case not involving a disease, that it was now an open question as to when the statute begins to run in occupational disease cases.[15] Some states, by judicial construction, have ignored or disregarded the "knowledge" requirement of the majority view and have held that, in disease cases, the statute runs from the

8. Great American Indemnity Co. v. Britton, 179 F.2d 60 (D.C. Cir. 1949) (injury diagnosed after one-year period expired); Kropp v. Parker, 8 F.Supp. 290 (D. Md. 1934) (latent injury); Hartford Accident & Indemnity Co. v. Industrial Comm'n, 43 Ariz. 50, 29 P.2d 142 (1934) (injury resulting in cyst); Pacific Indemnity Co. v. Industrial Acc. Comm'n, 205 P.2d 742 (Cal. App. 1949), *reversed*, 34 Cal.2d 726, 214 P.2d 530 (1950) (disease); Pullman Co. v. Industrial Acc. Comm'n, 164 P.2d 955 (Cal. App. 1945), *aff'd*, 28 Cal.2d 379, 170 P.2d 10 (1946) (disease); Marsh v. Industrial Acc. Comm'n, 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563 (1933) (disease); Globe Indemnity Co. v. Industrial Acc. Comm'n, 271 P.2d 149 (Cal. App. 1954) (disease); Bremner v. Marc Eidlitz & Son, 118 Conn. 666, 174 Atl. 172 (1934) (disease); Free v. Associated Indemnity Corp., 78 Ga. App. 839, 52 S.E.2d 325 (1949) (silicosis); Consolidated Coal Co. v. Porter, 192 Md. 494, 64 A.2d 715 (1949) (silicosis); Bergeron's Case, 243 Mass. 366, 137 N.E. 739 (1923) (lead poisoning); Finch v. Ford Motor Co., 321 Mich. 469, 32 N.W.2d 712 (1948) (pneumoconiosis); Ford v. American Brake Shoe Co., 252 S.W.2d 649 (Mo. App. 1952) (silicosis); Gleason v. Titanium Pigment Co., 93 S.W.2d 1039 (Mo. App. 1936) (sewer gas); Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N.W.2d 293 (1947) (accident aggravating dormant disease); Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873 (1944) (latent injury); Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940) (asbestosis); Larkin v. George A. Fuller Co., 76 R.I. 395, 71 A.2d 690 (1950) (latent injury); Baldwin v. Scullion, 50 Wyo. 508, 62 P.2d 531 (1936), 108 A.L.R. 304 (1937) (latent injury).

9. See 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.52 (1952).

10. See generally Note, 11 A.L.R.2d 298 (1950).

11. Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir. 1942); American Radiator & Standard Sanitary Corp. v. Hayden, 285 Ky. 684, 149 S.W.2d 6 (1941); Textileather Corp. v. Great American Indemnity Co., 108 N.J.L. 121, 156 Atl. 840 (Ct. Err. & App. 1931); Richardson v. State Comp. Comm'r, 74 S.E.2d 258 (W. Va. 1953).

12. Morgan v. Rust Engineering Co., 52 So.2d 86 (La. App. 1951).

13. Andrzeczak v. Industrial Comm'n, 248 Wis. 12, 20 N.W.2d 551 (1945).

14. Trustees, Middle River Sanatorium v. Industrial Comm'n, 224 Wis. 536, 272 N.W. 483 (1937).

15. Andrzeczak v. Industrial Comm'n, 248 Wis. 12, 20 N.W.2d 551 (1945).

date of the "accident as a sudden occurrence,"[16] "disability from the disease,"[17] "disability from earning wages in the same employ,"[18] "the time the disease is apparent,"[19] and from the time "when a reasonable man would know he needed a doctor's help."[20]

The confusion as to when the limitation period begins to run in occupational disease cases results from the ambiguous language of the workmen's compensation and occupational disease acts. The proper remedy lies in legislation. With the exception of states whose statutes date the period from the "last injurious exposure" or "last day of work," however, there is apparently no statutory inhibition to the achievement by judicial construction of the equitable result reached under the majority view. For those who view such a liberal exercise of judicial construction with trepidation lest an undeserving claimant be awarded compensation, it is sufficient to say that each claimant still must prove his claim.[21]

WORKMEN'S COMPENSATION—STATUS OF CORPORATE EXECUTIVE—DUAL CAPACITY DOCTRINE OR SUPERVISION AND CONTROL TEST

The president of a mining corporation was killed while driving to a convention[1] to represent the corporation in an executive capacity. The officer had accepted workmen's compensation coverage by signing the company register, and had been included in the company's compensation insurance policy for almost twenty years. The Workmen's Compensation Board denied compensation to the widow; on review the circuit court ruled that a corporate president was an employee and death was compensable. *Held,* affirmed.[2] A corporate executive need not, at the time of injury, be performing work ordinarily done by a laborer to be considered an "employee" within the meaning of the Act. *Mine Service Co. v. Green,* 265 S.W.2d 944 (Ky. 1954).

16. Birmingham Electric Co. v. Meacham, 27 Ala. App. 471, 175 So. 316, *cert. denied,* 234 Ala. 506, 175 So. 322 (1937); Texas Employers Ins. Ass'n v. Chambers, 233 S.W.2d 893 (Tex. Civ. App. 1950).
17. State *ex rel.* Raymond v. Industrial Comm'n, 140 Ohio St. 233, 42 N.E.2d 992 (1942).
18. Carnegie-Illinois Steel Corp. v. Industrial Comm'n, 401 Ill. 382, 82 N.E.2d 449 (1948).
19. Pittsburgh Plate Glass Co. v. State Ind. Comm., 200 Okla. 281, 192 P.2d 1015 (1948).
20. Salyer v. Clinchfield Coal Corp., 191 Va. 331, 61 S.E.2d 16 (1950).
21. See 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.42(c) (1952).

1. When in the performance of his duties an employee is required to travel, and an accident occurs while he is so engaged, normally it arises out of and in the course of his employment and within the scope of the Workmen's Compensation Act. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212 (1949). See Coster v. Thompson Hotel Co., 102 Neb. 585, 168 N.W. 191 (1918).
2. Opinion by Moremen, J.; dissent by Sims, C. J., Stewart, J., concurring.

Early in the history of the Workmen's Compensation Acts the courts emphasized that the purpose of workmen's compensation, as indicated by the short title of the acts and the limitations thereof to employers employing workmen, was to provide financial protection to workmen and their dependents and not to protect corporate officials.[3] Soon, however, the courts began to qualify this view. While it was considered that officers of large corporations could not be regarded as employees since their duties are strictly executive, it was conceded that in small corporations it might be necessary for executives also to perform a workman's duties.[4] This was the beginning of the "dual capacity" doctrine, under which executive officers of a corporation will not be denied compensation merely because they are executive officers if, at the time of the injury, they are engaged in performing manual labor or the ordinary duties of a workman.[5] While the doctrine originated as an aid to the courts in determining who could be considered an "employee," its theory is found in Workmen's Compensation Acts defining "employee."[6] Today the theory is adhered to in the majority of decided cases.[7]

The dual capacity doctrine is rejected in the instant case as an "artificial distinction," and the court looks to the words of the Act to determine legislative intent[8] as to who should be classed as employer and employee.[9] It interprets the intention of the Act to be the inclusion of all employees. The fact that a person is not *acting* as an employee in the sense of a workman[10] does not preclude his being considered an employee; the fact that he is *employed* by someone,[11] an entity,[12] gives

3. Bowne v. S. W. Bowne Co., 221 N.Y. 28, 116 N.E. 364 (1917).
4. *In re* Raynes, 66 Ind. App. 321, 118 N.E. 387 (1917).
5. 71 C.J., *Workmen's Compensation Acts* § 238 (1935).
6. TEX. REV. CIV. STAT. ANN. art. 8309 (1925); *S.D. Code* § 31.3320 (1939).
7. See Grossman v. Industrial Comm'n, 376 Ill. 198, 33 N.E.2d 444 (1941); Mount Pleasant Mining Corp. v. Vermeulen, 117 Ind. App. 33, 65 N.E.2d 642 (1946); White v. Arnold Wood Heel Co., 90 N.H. 315, 8 A.2d 737 (1939); Brown v. Conway Electric Light & Power Co., 82 N.H. 78, 129 Atl. 633 (1925); Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120 (1942); Hillenbrand v. Industrial Comm'n, 72 Ohio App. 427, 52 N.E.2d 547 (1943); Lichty v. Lichty Const. Co., 69 Wyo. 411, 243 P.2d 151 (1952). See also 58 AM. JUR., *Workmen's Compensation* § 150 (1948).
8. Palmer v. Van Santvoord, 153 N.Y. 612, 47 N.E. 915 (1897), 38 L.R.A. 402 (1898).
9. KY. REV. STAT. ANN. § 342.003(1) (Baldwin Supp. 1953): "Employer shall mean and include individuals, partnerships, voluntary associations, and private corporations." "Employee" is not defined in the Act.
10. *Cf.* Brook's, Inc. v. Claywell, 215 Ark. 913, 224 S.W.2d 37 (1949) (president of five-man corporation counted as employee in order to bring corporation within Compensation Act). *Contra:* Grossman v. Industrial Comm'n, 376 Ill. 198, 33 N.E.2d 444 (1941); Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 Atl. 147 (1930); Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212 (1949); Brown v. Conway Electric Light & Power Co., 82 N.H. 78, 129 Atl. 633 (1925); Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120 (1942). See Note 15 A.L.R. 1288 (1921).
11. "The Workmen's Compensation Act contemplates that an employee must have an employer." Leigh Aitchison, Inc. v. Industrial Comm'n, 188 Wis. 218, 205 N.W. 806, 808 (1925).
12. "A corporation is a complete entity separate and distinguishable from its

him employee status.[13] In determining the decedent's status under the Act, the court utilized the control and supervision test[14] by which susceptibility to control and supervision is evidence of the employer-employee relationship.[15] By recognizing the corporate entity,[16] the court finds a control[17] to which the executive is responsible.[18] By the majority rule a stockholder,[19] officer or director of a corporation is not precluded from being at the same time an employee.[20] The Kentucky court, however, is apparently the first to say, in the absence of an express statute,[21] that an officer can be considered an employee

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stockholders and officers." Skoutchi v. Chic Cloak and Suit Co., 230 N.Y. 296, 130 N.E. 299, 300 (1919). See Dewey v. Dewey Fuel Co., 210 Mich. 370, 178 N.W. 36 (1920); Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212, 219 (1949); Milwaukee Toy Co. v. Industrial Comm'n, 203 Wis. 493, 234 N.W. 748 (1931).

13. Since a partnership is not considered, for most purposes, an entity separate from its members, partners are held not to be employees under the Compensation Act, unless the statute specifically provides otherwise. Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Ellis v. Joseph Ellis & Co., [1905] 1 K.B. 324. See 1 LARSON, WORKMEN'S COMPENSATION LAW § 54.31-54.32 (1952).

14. 25 NOTRE DAME LAW. 586 (1950).

15. Donaldson v. William H.B. Donaldson Co., 176 Minn. 422, 223 N.W. 772 (1929); Millers Mut. Cas. Co. v. Hoover, 216 S.W. 475 (Tex. Civ. App. 1919), *aff'd* 235 S.W. 863 (1921); see Leigh Aitchison, Inc. v. Industrial Comm'n, 188 Wis. 218, 205 N.W. 806 (1925); see also Hunter v. Hunter Auto Co., 204 N.C. 723, 169 S.E. 648 (1933), where the court applies both dual capacity, and control and supervision tests.

16. Emery's Case, 271 Mass. 46, 170 N.E. 839 (1930); Star Brewing Co. v. Flynn, 237 Mass. 213, 129 N.E. 438 (1921); McAlevey v. Litch, 234 Mass. 440, 125 N.E. 606 (1920).

17. Instant Case, at 946: "Mr. Green, although acting in a position of superior authority, was nevertheless subject to the superior will and direction of the corporate employer, which had the power to remove him by proper action."

18. *But cf.* Bendix v. Bendix Co., 217 Minn. 439, 14 N.W.2d 464 (1944); Bowne v. S.W. Bowne Co., 221 N.Y. 28, 116 N.E. 364 (1917); Leigh Aitchison, Inc. v. Industrial Comm'n, 188 Wis. 218, 205 N.W. 806 (1925). When the officer's position is such that he is in complete control of the corporation and is thus in effect working for himself, he is not regarded as an employee.

19. See Claude H. Wolfe, Inc. v. Wolfe, 154 Fla. 633, 18 So.2d 535 (1944); White v. Arnold Wood Heel Co., 90 N.H. 315, 8 A.2d 737 (1939); Beckman v. Oelerich, 174 App. Div. 353, 160 N.Y. Supp. 791 (3d Dep't 1917); Southern Surety Co. v. Childers, 87 Okla. 261, 209 Pac. 927 (1922). *Contra:* Donaldson v. William H.B. Donaldson Co., 176 Minn. 422, 223 N.W. 772 (1929); Kolpien v. O'Donnell Lumber Co., 230 N.Y. 301, 130 N.E. 301 (1921); Bowne v. S.W. Bowne Co., 221 N.Y. 28, 116 N.E. 364 (1917); Leigh Aitchison, Inc. v. Industrial Comm'n, 188 Wis. 218, 205 N.W. 806 (1925).

20. See Claude H. Wolfe, Inc. v. Wolfe, 154 Fla. 633, 18 So.2d 535 (1944); Stevens v. Industrial Comm'n, 346 Ill. 495, 179 N.E. 102 (1931); Mount Pleasant Mining Corp. v. Vermeulen, 117 Ind. App. 33, 65 N.E.2d 642 (1946); *In re* Raynes, 66 Ind. App. 321, 118 N.E. 387 (1917); Dewey v. Dewey Fuel Co., 210 Mich. 370, 178 N.W. 36 (1920); Delaney v. Dan Delaney, Inc., 227 Minn. 572, 36 N.W.2d 12 (1949); Hubbs v. Addison Electric Light & P. Co., 230 N.Y. 303, 130 N.E. 302 (1921); Skoutchi v. Chic Cloak and Suit Co., 230 N.Y. 296, 130 N.E. 299 (1919); Beckman v. Oelerich, 174 App. Div. 353, 160 N.Y. Supp. 791 (3d Dep't 1917); Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120 (1942); Southern Surety Co. v. Childers, 87 Okla. 261, 209 Pac. 927 (1922); Eagleson v. Harry G. Preston Co., 265 Pa. 397, 109 Atl. 154 (1919); Leigh Aitchison, Inc. v. Industrial Comm'n, 188 Wis. 281, 205 N.W. 806 (1925).

21. Iowa excepts "a person holding an official position, or standing in a representative capacity of the employer." IOWA CODE ANN. § 5.61(3c) (1947). California expressly includes corporate officers. CAL. LABOR CODE ANN. § 3351

when he performs only executive duties.[22]

The court refers to the inclusion of the president in the corporation's compensation insurance policy. Evidence that insurance premiums have or have not been paid for an executive claiming under the Workmen's Compensation Act has been given different weight by different courts.[23] In cases involving the Standard Workmen's Compensation and Employers' Liability Policy,[24] some courts have allowed recovery on the basis of the voluntary liability assumed under the policy[25] and not on the terms of the Workmen's Compensation Act.[26] Therefore, if the Kentucky court is looking to the words of the Act in arriving at its decision, the insurance provisions and premium payments should not be controlling, as the policy does not create legal liability under the Act.

Is the court's interpretation of who should be considered an employee under the Workmen's Compensation Act too broad? It is, according to

(Supp. 1953). New York expressly covers corporate executives unless they elect to the contrary. N.Y. WORKMEN'S COMPENSATION LAW § 54 (6).

22. *See* White v. Arnold Wood Heel Co., 90 N.H. 315, 8 A.2d 737 (1939); Southern Surety Co. v. Childers, 87 Okla. 261, 209 Pac. 927 (1922).

23. Grossman v. Industrial Comm'n, 376 Ill. 198, 33 N.E.2d 444 (1941) (inclusion of claimant's salary in premium paid by the corporation admissible as an indication that the employer intended such person should be considered an employee); Macshir Co. v. McFarland, 99 Ind. App. 196, 190 N.E. 69 (1934) (fact that claimant's wages received for traveling salesman duties were included in computing insurance did not give him right to recover for injuries received while acting in executive capacity); Holycross & Nye, Inc. v. Nye, 97 Ind. App. 372, 186 N.E. 915 (1933) (fact that company had not used wages of claimant vice president in computation of premiums was a determining factor in refusing recovery); Emery's Case, 271 Mass. 46, 170 N.E. 839 (1930) (fact that no remuneration for treasurer as workman was included in insurance policy held not to defeat recovery for injury received while performing workman's services; Cashman's Case, 230 Mass. 600, 120 N.E. 78 (1918) (executive was excluded from policy because his remuneration was not considered in determining premium); Kuehnl v. Industrial Comm'n of Ohio, 136 Ohio St. 313, 25 N.E.2d 682 (1940) (payment of premiums to the insurance company destroyed any right which claimant had to recover his loss from the corporation); Southern Surety Co. v. Childers, 87 Okla. 261, 209 Pac. 927 (1922) (corporation treating claimant as an employee for purposes of collection of premiums, estopped to deny that he was an employee).

24. Par. 5 of the Standard Workmen's Compensation and Employers' Liability Policy, written by all carriers in all states permitting private insurance except Colorado, allows recovery to executive officers under a provision that the policy shall apply to injuries sustained by persons whose remuneration is included in computation of premiums "and, also" to injuries sustained by a corporate officer; the remuneration of such officer not to be subject to premium charge unless he is performing duties of a superintendent, foreman or workman. Recovery by an executive performing only executive duties is allowed by interpreting the provision, that remuneration will be included in premium computation only if he is performing duties of a dual capacity nature, not to be a limitation on executive recovery, but an extension of the scope of the insurance. See RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION, 381-87 (1950). (1950).

25. American Mut. Liab. Ins. Co. of Boston v. Duesenberg, 214 Ind. 488, 14 N.E.2d 919 (1938), *rehearing denied* 16 N.E.2d 698 (1938); Sindelar v. Liberty Mut. Ins. Co., 161 F.2d 712 (7th Cir. 1947). See HOBBS, WORKMEN'S COMPENSATION INSURANCE 406 (1939).

26. Duesenberg v. Duesenberg, Inc., 98 Ind. App. 640, 187 N.E. 750 (1933).

the majority of decisions.[27] Administration costs of workmen's compensation, to be borne by the taxpayer, will be increased if executives are included within the acts. The low-income worker for whose financial protection the act was originated, will be burdened by having to pay, through increased consumer costs, for protection of high-salaried executives who may not require it. The holding seems very reasonable, however, when viewed in the light of the trend of the majority of state courts[28] to interpret Workmen's Compensation Acts liberally[29] "to make industrial disabilities, so far as they are truly attributable to the industry, a part of the cost of production."[30] Executives, industry and the public will benefit. Executives and dependents will be protected should corporate resources become impaired. Finally, corporations, particularly small corporations, who face the serious problem of large jury awards in cases involving corporate liability, will be able to insulate both stockholders and the public by shifting the liability for compensation payments to the insurance carrier.

27. Benson v. Hygienic Artificial Ice Co., 198 Minn. 250, 269 N.W. 460 (1936) (officer who performed no services other than in his executive capacity, held not an employee); Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 Atl. 147 (1930) (president held no employee when injured in fall while returning to the company factory after a visit in his executive capacity to the offices of corporation's attorneys and auditors); Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120 (1924) (corporation president held no employee when killed in auto accident while on his way to negotiate a contract in his executive capacity); Carville v. A. F. Bornot & Co., 288 Pa. 104, 135 Atl. 652 (1927) (vice president killed by an explosion while telephoning and investigating with the president a naphtha leak at the plant, held not a "servant"); Hodges v. Home Mortgage Co., 201 N.C. 701, 161 S.E. 220, 223 (1931) (death of executive vice-president killed in automobile accident while on his way to negotiate trust contracts, held not compensable—duty not within field of duties of ordinary employee).

28. See Hillenbrand v. Industrial Comm'n, 72 Ohio App. 427, 52 N.E.2d 547 (1943). See also Cate, *Workmen's Compensation,* 6 VAND. L. REV. 1012 (1953); 7 IND. & LABOR REL. REV. 43 (1953).

29. Carter and Patterson, *Workmen's Compensation in Kentucky,* 41 KY. L. J. 414 (1953).

30. Grain Handling Co. v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939) (opinion by Learned Hand). See also Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality,* 25 HARV. L. REV. 129 (1911).