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RECENT CASES

ADVERSE POSSESSION—STATUTES—MAY ONE ACQUIRE AN INDEFEASIBLE LIFE ESTATE UNDER TENNESSEE CODE SECTION 8582?

Testator devised a life estate to his wife, defendant, remainder to his children, complainants. Testator, in fact, had only a life estate by recorded deed granting the remainder to his children, who discovered the deed some eleven years after testator's death, during which time defendant had exclusive possession of the land. In an action to partition, defendant, claiming only a life estate under the will, entered a plea of adverse possession under both section 8582 of the Tennessee Code,[1] which vests an indefeasible title in fee in one in possession for seven years under recorded "assurance of title, purporting to convey an estate in fee," and section 8584,[2] which gives an adverse claimant a good defensive title after seven years' possession without recorded color of title. The chancellor sustained defendant's plea. The court of appeals reversed on the ground that a life tenant may not hold adversely to the remaindermen, and defendant appeals. *Held,* reversed. Since defendant is a stranger to the deed under which complainants claim, the rule that a life tenant cannot hold adversely to the remaindermen is not applicable. *West v. Moore,* 246 S.W.2d 74 (Tenn. 1952).

A Note in the preceeding issue of this *Review* discussed at length the problems arising under the several adverse possession statutes in Tennessee,[3] pointing out the question raised by the requirement of section 8582 that in order to vest an indefeasible title in the adverse claimant the recorded assurance of title under which he claims must purport to convey a *fee.* It was there suggested, however, that one who holds land adversely for seven years under

1. "Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title, *purporting to convey an estate in fee,* without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title *in fee* to the land described in his assurance of title. But no title shall be vested by virture of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession." TENN. CODE ANN. § 8582 (Williams 1934) (emphasis added). Title perfected under this section will support actions of ejectment and bills to remove clouds from title. Note, 5 VAND. L. REV. 621, 624 n.22 (1952).

2. "No person or anyone claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." TENN. CODE ANN. § 8584 (Williams 1934). This section represents the normal statute of limitations, available only as a defense to actions for real property. Note, 5 VAND. L. REV. 621, 626 (1952).

3. Note, *Title by Adverse Possession in Tennessee,* 5 VAND. L. REV. 621 (1952).

recorded color of title which purports to give him only a life estate with a remainder over should perfect, under section 8582, a title to the life estate of sufficient quality to support an action of ejectment, and not merely the defensive or possessory title provided by section 8584.[4]

The opinion in the instant case is primarily a decision that the rule that a life tenant cannot hold adversely to the remaindermen is not applicable. But the court tacitly holds, in accordance with the above suggestion and contrary to the express words of the statute, that an adverse claimant with recorded color of title purporting to convey him only a life estate may successfully perfect an indefeasible title to the life estate under section 8582. Although section 8584, the defensive title statute, is the only statute pointedly discussed by the court,[5] the chancellor had sustained defendant's plea of section 8582 as well as section 8584,[6] and his action is expressly affirmed.[7] The position taken in the Note is therefore at least partially vindicated by the holding in the instant case.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—EFFECT OF CITY ORDINANCE PROHIBITING SOLICITATION OF MAGAZINE SUBSCRIPTIONS WITHOUT PRIOR CONSENT OF PERSON SOLICITED

Defendant, an employee of a magazine subscription corporation, was convicted of violating a city ordinance prohibiting the solicitation of private residences without having obtained the prior consent of the home owner or occupant. At the trial there was a motion to quash on the ground, *inter alia*,[1] that the ordinance was invalid as violative of the constitutional guaranties of freedom of speech and of the press. The Supreme Court of Louisiana affirmed the conviction and expressly rejected the constitutional objection.[2] Defendant appealed to the United States Supreme Court. *Held* (6-3), affirmed.

4. *Id.* at 625.

5. 246 S.W.2d at 76.

6. "As a defense to the bil, she [defendant] expressly plead the seven years' adverse possession statutes carried in Code 8582 . . . and 8584. The insistence of complaints is that these code sections are not available to the widow, their statement in support of this insistence being that the 'possession of a life tenant is not adverse to the remaindermen.'

"The Chancellor sustained the widow's plea of adverse possession under the aforementioned code sections." 246 S.W.2d at 75.

7. "[T]he decree of the Court of Appeals will be reversed and that of the Chancellor affirmed." 246 S.W.2d at 77.

1. The other objections to the ordinance were that it was violative of the interstate commerce clause and the due process clause of the Constitution. For an extensive discussion of these grounds for attacking the constitutionality of such an ordinance, see Note, 9 A.L.R.2d 728-34 (1950).

2. 217 La. 820, 47 So.2d 553 (1950).

The city council may speak for the citizens, making this a case of trespass after notice, and it would be a misuse of the guaranties of freedom of speech and the press to force citizens of a community to admit solicitors to their premises.[3] *Breard v. City of Alexandria,* 341 U.S. 622, 71 Sup. Ct. 920, 95 L. Ed. 1233 (1951).

The right of freedom of the press, embracing not only freedom of publication but also freedom of distribution and circulation,[4] has always been most jealously guarded, put beyond the reach of majorities and officials, and reserved to each individual citizen as an inviolable right.[5] But it has never been considered an absolute privilege. It must be exercised so as not to infringe upon the rights of others.[6]

That this freedom of circulation extends not only to pamphlets distributed without charge but also to commercial publications is recognized by the court in the instant case.[7] However, the court interpreted this ordinance as constituting notice by each individual property holder to each solicitor that entry upon his land for the purpose of solicitation is forbidden, thus giving rise to a case of trespass after notice.[8] On the strength of this interpretation the court regarded this case as involving a conflict between the rights of property owners and the rights of the press to freedom of distribution. After balancing the rights of the home owner to privacy against the rights of the publisher to distribute as he pleases, and pointing out that there are less annoying ways to obtain subscriptions, the court held that the owners' rights take precedence.[9] To say that the ordinance is a device through which the people speak as individuals and that it gains constitutionality because private individuals are

3. The constitutionality of this ordinance was upheld in a prior suit brought by Breard to enjoin the enforcement of the ordinance. Breard v. City of Alexandria, 69 F. Supp. 722 (W.D. La. 1947).

4. Marsh v. Alabama, 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265 (1946), 46 COL. L. REV. 457, 34 GEO. L.J. 244, 44 MICH. L. REV. 848; Tucker v. Texas, 326 U.S. 517, 66 Sup. Ct. 274, 90 L. Ed. 274 (1946); Jamison v. Texas, 318 U.S. 413, 63 Sup. Ct. 669, 87 L. Ed. 869 (1943); Lovell v. City of Griffin, 303 U.S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938), 27 GEO. L.J. 803 (1939), 13 ST. JOHN'S L. REV. 141, 25 VA. L. REV. 96; Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936), 16 B.U.L. REV. 919; *Ex parte* Jackson, 96 U.S. 727, 24 L. Ed. 877 (1877); Jarett, *Circulation As An Essential Element Of A Free Press,* 13 ST. JOHN'S L. REV. 81 (1938).

5. See Board of Education v. Barnette, 319 U.S. 624, 638, 63 Sup. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 1178 (1943).

6. *Cf.* Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931); Kiyoshi Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945); Baxley v. United States, 134 F.2d 937 (4th Cir. 1943); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

7. 341 U.S. at 642.

8. For the proposition that the right to solicit is embraced in the right of freedom of distribution, see Robert v. City of Norfolk, 188 Va. 413, 39 S.E.2d 697 (1948).

9. But compare: "When we balance the constitutional rights of owners of property against those of people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." Marsh v. Alabama, 326 U.S. 501, 509, 66 Sup. Ct. 276, 90 L. Ed. 265 (1946), 46 COL. L. REV. 457, 34 GEO. L.J. 244, 44 MICH. L. REV. 848.

not prohibited from abridging freedom of the press seems to be begging the question of the constitutionality of the ordinance. An ordinance is a municipal action,[10] the authority for which comes by grant from the state,[11] and the police power of the city council is subject to such restrictions as are imposed upon the state.[12]

The court distinguished this case from two prior cases wherein similar ordinances were held unconstitutional.[13] These cases involved a corporation-owned town managed by an official of the corporation, and a government-owned town managed by a federal agent. In each of these cases the defendant was convicted for distributing literature on the streets of the privately owned town after notice that it was prohibited. The distinction is based upon the fact that the private property had become *public* by virtue of dedication, whereas in the instant case the trespass prohibited was on *private* property after notice. A nicer distinction might be based on the fact that the two distinguished cases involved ordinances which required the securing of a permit, the issuance of which was left to the discretion of one man. Wherever the right to distribute or solicit has been dependent upon the whim or discretion of a public officer, the ordinance has been struck down.[14] Upon this distinction the validity of the ordinance in the instant case could be reconciled with the decisions of the previous cases.

It should be noted that the ordinance under consideration does not prohibit distribution or solicitation entirely nor does it apply solely to products of the press, but to all solicitors, peddlers and hawkers. The First Amendment has never been considered a sufficient basis for exempting the press from regulations levied indiscriminately on all businesses, nor can freedom of the press be used as a shield behind which unlawful acts are immune from punishment.[15] The right of freedom of the press is not an absolute right but is subject to reasonable regulation. This ordinance does not completely regulate distribution but merely pertains to one step in distribution, *i.e.*, solicitation; it is not an absolute prohibition of solicitation but merely a requirement that

10. King Mfg. Co. v. Augusta, 277 U.S. 100, 48 Sup. Ct. 489, 72 L. Ed. 801 (1928); *see* Lovell v. City of Griffin, 303 U.S. 444, 450, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938).

11. 37 AM. JUR., *Municipal Corp.* § 51 (1941).

12. *Id.* § 279.

13. Marsh v. Alabama, 326 U.S. 501, 66 Sup. Ct. 276, 90 L. Ed. 265 (1946); Tucker v. Texas, 326 U.S. 517, 66 Sup. Ct. 274, 90 L. Ed. 274 (1946).

14. Cantwell v. Connecticut, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Schneider v. State, 308 U.S. 147, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939); *cf.* Saia v. New York, 334 U.S. 558, 68 Sup. Ct. 1148, 92 L. Ed. 1574 (1948); see Paulsen, *State Constitutions, State Courts and First Amendment Freedoms,* 4 VAND. L. REV. 621, 625-27 (1951).

15. Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 Sup. Ct. 511, 90 L. Ed. 607 (1946); Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155 (Pa. 1788); see Fleming v. Lowell Sun Co., 36 F. Supp. 320, 332 (D. Mass. 1940). *But see* Murdock v. Pennsylvania, 319 U.S. 105, 115, 63 Sup. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

permission be obtained. Therefore, it may be considered as a slight infringement, in fact, on the freedom of the press but recognized as a justified infringement, in law. Its justification is evident when the ordinance is measured against the standards discussed above. This is one instance in which freedom of the press might well give way to the rights of public welfare;[16] "the press, like individual citizens, must not abuse its constitutional rights or overlook its obligations to others."[17]

CONSTITUTIONAL LAW—STATUTES—REQUIREMENT OF LOYALTY OATH AS VALID EXERCISE OF POLICE POWER

A statute of Oklahoma required all teachers to take an oath that they would not advocate or join any organizations that has as its purpose the overthrow of the government of the United States or of the state of Oklahoma. Plaintiff taxpayer sought to enjoin the payment of teachers salaries at Oklahoma A. & M. College until they have complied with the statute. The teachers intervened as party defendants and asserted that the statute violates the Fourteenth Amendment of the Federal Constitution and constitutes a bill of attainder. The trial court granted the injunction. On appeal, *held*, affirmed. The statute was a valid exercise of the state police power which did not offend the Fourteenth Amendment, and since no punishment is provided it is not a bill of attainder. *Board of Regents v. Updegraff*, 237 P.2d 131 (Okla. 1951).

The loyalty or test oath is by no means an innovation in the field of Anglo-American jurisprudence. "It helped English rulers identify and outlaw Catholic, Quakers, Baptists, and Congregationalists. . . ."[1] The American founding fathers deemed that a loyalty oath was not entirely inappropriate for the President of the United States and expressly provided for such in the Constitution.[2] Immediately after the Civil War loyalty oaths were required of certain named individuals[3] by the Federal Government, and a few of the

16. Cox v. New Hampshire, 312 U.S. 569, 61 Sup. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941); *cf.* Francis v. People of Virgin Islands, 11 F.2d 860 (3d Cir. 1926), *cert. denied*, 273 U.S. 693 (1926); 11 AM. JUR., *Const. Law* § 267 (1937). For an historical UNDERSTANDING THE SUPREME COURT 7-27 (1949).

17. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291, 295 (1942).
account of the discord between personal rights and property rights, see FREUND, ON

1. Black, J. (dissenting), American Communications Ass'n v. Douds, 339 U.S. 382, 447, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950). For a more detailed history of loyalty oaths see, *Test Oaths, Henry VII to the American Bar Association*, 11 LAW. GUILD REV. 111 (1951).

2. "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States." U.S. CONST. Art. II, § 1.

3. *Ex parte* Garland, 4 Wall. 333, 18 L. Ed. 366 (U.S. 1867).

state governments had a similar requirement.[4] The most recent development in this field are statutes in a number of states[5] requiring oaths similar to the one in question in the instant case.

Due to the rapidly increasing number of such statutes, there have been numerous decisions on substantially the same issue as in the present case.[6] Basically these decisions, as the instant case illustrates, have involved two far-reaching questions. First, does the requirement of a loyalty oath by public employees constitute a violation of the First Amendment as applied to the Federal Government, or of the Fourteenth Amendment as applied to the state governments? Second, is a statute requiring such an oath a bill of attainder?

The decisions thus far would definitely answer the first question in the negative. Although it is firmly established "that the guarantees contained in the First amendment . . . are implicit in the concept of due process contained in and made applicable to the States in the Fourteenth amendment,"[7] it is equally well established that these freedoms are not absolutes but subject to reasonable governmental restraints for the public good.[8] It is said that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of the community."[9] Upon this basis no case thus far has found a violation of the due process clause where loyalty oaths have been required of city and county employees,[10] school teachers,[11] and candidates for state

4. Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356 (U.S. 1866).

5. *Cf.* ARIZ. CODE ANN. § 54-1002 (1939); MARYLAND LAWS c. 86 (1949); MASS. ANN. LAWS c. 71 § 30A (1945); MICH. STAT. ANN. § 15-701 (Cum. Supp. 1947); N.J. STAT. ANN. § 41:1-1 (Cum. Supp. 1950); OKLA. STAT. §§ 37.1-37.8 (Supp. 1951).

6. Adler v. Board of Education of New York, 72 Sup. Ct. 380 (1952); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951), 50 MICH. L. REV. 466 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950), 19 GEO. WASH. L. REV. 446 (1951); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1949); Shub v. Simpson, 76 A.2d 332 (Md. 1950), *aff'd* 340 U.S. 881 (1951); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951), 25 TEMP. L.Q. 207; Dworken v. Cleveland Board of Education, 94 N.E.2d 18 (Ohio 1950).

7. Baltimore Radio Show v. State, 67 A.2d 497, 507 (Md. 1949). See also West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943); Adamson v. People of Calif., 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947); Palko v. State of Conn., 302 U.S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937); Thorp v. Board of Trustees, 4 N.J. 698, 79 A.2d 462 (1951). To the effect that freedom of thought is a freedom protected by the Fourteenth Amendment, see Hughes v. Superior Court of California, 339 U.S. 460, 70 Sup. Ct. 718, 94 L. Ed. 985 (1950).

8. Dennis v. United States, 341 U.S. 494, 71 Sup. Ct. 857, 95 L. Ed. 1137 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950). See *infra,* notes 9, 10 and 11.

9. Kovacs v. Cooper, 336 U.S. 77, 83, 69 Sup. Ct. 448, 93 L. Ed. 513 (1949). See note 6 *supra.*

10. Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951); Steiner v. Darby, 88 Cal. App.2d 481, 199 P.2d 429 (1949).

11. Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951); Dworken v. Cleveland Board of Education, 94 N.E.2d 18, (Ohio 1950).

office.[12] Furthermore the Supreme Court has said that a state statute which directed education officials to compile a list of subversive organizations and dismiss teachers found belonging to them was constitutional.[13]

The test used in determining whether the statutes constitute a valid exercise of the police power is simply that the statute be designed for the public good, "not be unreasonable, arbitrary, or capricious,"[14] and "bear a reasonable relation to the apprehended public evil."[15] This position is further strengthened by the argument that although the First Amendment freedoms are constitutionally protected rights, school teaching and public employment are not.[16] The courts stress the point that the fundamental personal freedoms themselves "are dependent upon the power of constitutional governments to survive"[17] and that civil liberties cannot be made the open door to subversive penetration. One court has reached a contrary result on essentially the same facts, but the decision was based on a construction of the particular state constitution.[18]

These statutes have likewise been attacked as bills of attainder.[19] However, the courts have overruled this objection on the ground that the statutes do not inflict any express punishment.[20] Two previous decisions[21] of the Supreme Court of the United States holding statutes requiring oaths to be bills of attainder have been distinguished on the ground that the statutes involved expressly stated the punishment for their violation.[22] However, it seems that the statement of Justice Field in Ex parte *Garland* to the effect

12. Shub v. Simpson, 72 A.2d 332 (Md. 1950), *aff'd*, 340 U.S. 881 (1951).

13. Adler v. Board of Education of New York, 72 Sup. Ct. 380 (1952).

14. 237 P.2d 131 at 137.

15. Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462, 467 (1951). See statement of Chief Justice Vinson in the American Communications Ass'n v. Douds, 339 U.S. 382, 394, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950), to the effect that such statutes do not come within the traditional "clear and present danger" test which has been applied to First Amendment freedoms.

16. Thorp v. Board of Trustees, *supra* note 6. For an earlier case announcing a similar rule see, Crenshaw v. United States, 134 U.S. 88, 10 Sup. Ct. 431, 33 L. Ed. 825 (1890).

17. American Communications Ass'n v. Douds, 339 U.S. 382, 394, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950). Quoted with approval in Thorp v. Board of Trustees, *supra* note 6.

18. Tolman v. Underhill, 229 P.2d 447 (Cal. 1951).

19. "A bill of attainder is a legislative act which inflicts punishment without judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties." Cummings v. Missouri, 4 Wall. 277, 323, 18 L. Ed. 356 (U.S. 1866). See generally Wormuth, *Legislative Disqualifications as Bills of Attainer*, 4 VAND. L. REV. 603 (1951).

20. Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951).

21. *Ex parte* Garland, 4 Wall. 333, 18 L. Ed. 366 (U.S. 1867); Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356 (U.S. 1866). See United States v. Lovett, 328 U.S. 303, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

22. Garner v. Los Angeles Board of Public Works, 341 U.S. 716, 71 Sup. Ct. 909, 95 L. Ed. 1317 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951).

that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment of such conduct"[23] is completely overlooked by the courts.

On the basis of similar decisions the result reached in the instant case seems entirely correct, but historical precedent suggests that loyalty oaths may be dangerous threats to individual freedoms as well as inadequate remedies for the evil towards which they are directed.[24]

CONTRACTS—PROCUREMENT OF GOVERNMENT CONTRACTS ON CONTINGENT FEE BASIS—EFFECT OF EXECUTIVE ORDER

Plaintiff was engaged by the defendant school on a contingent fee basis to procure contracts with the Federal Government. Plaintiff obtained contracts under which students were trained by defendant and now brings a bill in equity for an accounting of the fees due him under the agreement. The defendant contends that such contracts are void as being contrary to public policy and prohibited by an Executive Order which provides that the contractor must warrant to the Government that he has not hired anyone on a contingent fee basis to procure the contract, with an exception for contracts procured by "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." *Held,* reversing and remanding a dismissal in the trial court, the plaintiff was a bona fide established agent for securing business and was therefore within the exception to the order. *Buckley v. Coyne Electrical School, Inc.,* 99 N.E.2d 370 (Ill. App. 1951).

While the courts are not in accord as to the validity of contingent fee agreements to procure government contracts, a substantial number follow the view established by the Supreme Court of the United States in *Providence Tool Co. v. Norris*[1] that such agreements are contrary to public policy if they are contingent upon the agent's success.[2] In that case the Court announced

23. *Ex parte* Garland, 4 Wall. 333, 377, 18 L. Ed. 366 (U.S. 1866).

24. "Whether religious, political, or both, test oaths are implacable foes of free thought." Black, J. (dissenting), American Communications Ass'n v. Douds, 339 U.S. 382, 448, 70 Sup. Ct. 674, 74 L. Ed. 925 (1950).

1. 2 Wall. 45, 17 L. Ed. 868 (U.S. 1865).

2. Crocker v. United States, 240 U.S. 74, 36 Sup. Ct. 245, 60 L. Ed. 533 (1916); Hazelton v. Sheckles, 202 U.S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939 (1906); Noonan v. Gilbert, 68 F.2d 775 (D.C. Cir. 1934); Russell v. Courier Printing and Publishing Co., 43 Colo. 321, 95 Pac. 936 (1908); Critchfield v. Bermudez Asphalt Co., 174 Ill. 466, 51 N.E. 552 (1898); Hardesty v. Dodge Mfg. Co., 89 Ind. App. 184, 154 N.E. 697 (1927); Weehawken Realty Co. v. Hass, 13 N.J. Misc. 231, 177 Atl. 434 (Sup. Ct. 1935); *In re* Crooks Estate, 316 Pa. 285, 175 Atl. 410 (1934); Whitley v. White, 176 Tenn. 206, 140 S.W.2d 157 (1940); Goodier v. Hamilton, 172 Wash. 60, 19 P.2d 392 (1933); see Notes, 46 A.L.R. 208 (1927), 148 A.L.R. 768 (1944).

such an agreement "suggests the use of sinister and corrupt means for the accomplishment of the ends desired. The law meets the suggestion of evil and strikes down the contract from its inception."[3] The court reasoned that such agreements, by their very nature, have a tendency to corrupt public officials.[4] Although a substantial number of courts still cite the *Tool Company* case with approval,[5] some subsequent decisions indicate a modification of this rule.[6] These courts take the view, which is probably more generally accepted,[7] that contingent fee agreements are not void solely because of the manner of compensation given the agent and will uphold the agreement if the parties did not contemplate that the agent's personal influence[8] was to be used in negotiating the contract.[9] The decisions under this view have not established any specific test in determining what amount of personal influence will be considered so excessive as to vitiate the agreement, but say that in the last analysis each case will turn upon its own particular facts.[10]

The court in the instant case in refusing to follow the *Tool Company* case intimates that the contingency of compensation would not of itself nullify the agreement,[11] but the decision in essence is based upon the construction of Executive Order 9001.[12] This necessarily poses the question as to whether

3. 2 Wall. at 55.

4. *Id.* at 54.

5. Noonan v. Gilbert, 68 F.2d 775 (D.C. Cir. 1934); Russell v. Courier Printing and Publishing Co., 43 Colo. 321, 95 Pac. 936 (1908); Critchfield v. Bermudez Asphalt Co., 174 Ill. 466, 51 N.E. 552 (1898); Hardesty v. Dodge Mfg. Co., 89 Ind. App. 184, 154 N.E. 697 (1927); *In re* Crooks Estate, 316 Pa. 285, 175 Atl. 410 (1934); Goodier v. Hamilton, 172 Wash. 60, 19 P.2d 392 (1933).

6. Oscanyan v. Arms Co., 103 U.S. 261, 26 L. Ed. 539 (1881). However, the court quotes Providence Tool case with approval. *Cf.* Coyne v. Superior Incinerator Co., 80 F.2d 844 (2d Cir. 1936), which says that the agreement is not void in the absence of personal influence. See also Stanton v. Embrey, 93 U.S. 548, 23 L. Ed. 983 (1877); Valdes v. Larrinaga, 233 U.S. 705, 34 Sup. Ct. 750, 58 L. Ed. 1163 (1914).

7. 6 WILLISTON, CONTRACTS § 1729 (Rev. ed. 1938).

8. The courts are not clear as to what constitutes personal influence. It would seem that if the agent is hired because of his influence over government officials, he is hired because of his personal influence and the agreement is illegal. Whether the parties contemplated such is a question of fact for the jury. Noble v. Mead-Morrison Mfg. Co., 237 Mass. 5, 129 N.E. 669 (1921).

9. Coyne v. Superior Incinerator Co., 80 F.2d 844 (2d Cir. 1936); Bush v. Russell 180 Ala. 590, 61 So. 373 (1913); Mitchell v. Jones, 104 Colo. 62, 88 P.2d 557 (1939); Cary v. Neel, 54 Ga. App. 860, 189 S.E. 575 (1936); Kansas City Paper House v. Farley River Printing Co., 85 Kan. 678, 118 Pac. 1056 (1911); Parkey v. Brook, 222 Ky. 34, 299 S.W. 1061 (1927); Noble v. Mead-Morrison Mfg. Co., 237 Mass. 5, 129 N.E. 669 (1921); Beck v. Bauman, 187 App. Div. 774, 175 N.Y. Supp. 881 (Sup. Ct. 1919); Huges v. Woodard, 182 Okla. 372, 77 P.2d 685 (1937); REST., CONTRACTS § 563 (1937). It would seem that these courts apply the same theory in determining the validity of all agreements to procure government favors. Notes, 46 A.L.R. 208 (1927), 148 A.L.R. 768 (1944).

10. Noble v. Mead-Morrison Co., 237 Mass. 5, 129 N.E. 669 (1921).

11. 99 N.E.2d at 374.

12. "Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms: The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the government the right to annul the contract, or in its discretion, to

this Order has established a set public policy in regard to contingent fee agreements.[13] The answer to such a query is not easily discernible from the decisions in which the Executive Order has been applied.

The courts construing the Order disagree as to its effect and applicability. The state courts generally hold that since the Executive Order does not expressly declare agreements between agent and employer void, voidable or unenforceable, it will not be applied to contracts between agent and employer; that the Order is only evidence of the fact that the Federal Government wishes to discourage contingent fee contracts, and it may, or may not, coincide with the public policy of the state in regard to such agreements.[14] These courts will then interpret the agreement in light of the pre-existing law on the subject.[15] Under this view the Executive Order would not be applied in the instant case. The federal courts, however, apply the Order to agreements between the agent and employer,[16] and merely look to see if the agent can bring himself within the exception set forth in the Order,[17] thus giving it the effect of a statute and applying it as the law of the land.[18] These courts take the position that since the exception made by the Order was provided to facilitate war production, the Government evidently considered certain kinds of contingent fee contracts desirable and valid.[19]

The instant decision is the first by a state court aligning itself with the view that the Order does apply to agent-employer relationships. The court in the instant case could have reached the contrary result by first holding that the Order applies only to the contractor and the Government, and then looking to the applicable state law which would have rendered the

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deduct from the contract price or consideration the amount of such commission payable by contractors upon contracts or sales received or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." Exec. Order No. 9001, 8 FED. REG. 1429 (1941).

13. The importance of this question is based upon the fact that all the decisions on contingent fee agreements since 1941 have revolved around the construction of the Executive Order.

14. Ebeling v. Fred J. Swaine Mfg. Co., 357 Mo. 549, 209 S.W.2d 892 (1948); Glass v. Swimaster Corp., 74 N.D. 282, 21 N.W.2d 468 (1946); Stone v. William Steinen Mfg. Co., 22 N.J. Misc. 353, 39 A.2d 241 (Cir. Ct. 1944); Singer v. Bruner Ritter, Inc., 180 Misc. 928, 42 N.Y.S.2d 881, *aff'd*, 44 N.Y.S.2d 589 (App. Div. 1943); Bradford v. Durkee Marine Products Corp., 180 Misc. 553, 40 N.Y.S.2d 448 (Sup. Ct. 1943); Hall v. Anderson, 18 Wash.2d 625, 140 P.2d 266 (1943).

15. See note 14 *supra*.

16. Mitchell v. Flintkote Co., 185 F.2d 1008 (2d Cir. 1951), 64 HARV. L. REV. 1200; United States v. Paddock, 178 F.2d 394, (5th Cir. 1949), *cert. denied*, 340 U.S. 813 (1950); Reynolds v. Goodwin-Hill Corp., 154 F.2d 553 (2d Cir. 1946); Bradley v. American Radiator and Standard Sanitary Corp., 6 F.R.D. 37, *aff'd*, 159 F.2d 39 (2d Cir. 1947); Beach v. Illinois Lumber Co., 92 F. Supp. 564 (E.D. Ill. 1949).

17. See note 12 *supra*.

18. See Bradley v. American Radiator and Standard Sanitary Corp., 6 F.R.D. 37, *aff'd*, 159 F.2d 39 (2d Cir. 1947).

19. See note 16 *supra*.

contract unenforceable as contrary to the public policy of the state.[20] However, the result in the present case appears to be a desirable one in that it provides a safeguard for honest and legitimate agents, and guarantees them reward for their endeavors if they fulfill their agency in good faith.

It remains to be seen whether the Executive Order will be applied in subsequent cases in view of the fact that it was designed to meet the exigencies of the war emergency in 1941. It would, however, be a great asset to the clarity and uniformity of the law if it should be applied by courts to contingent fee agreements to procure Government contracts. This would reduce the test to the simple rule: can the agent bring himself within the exception set forth? If so, he may prevail.

CRIMINAL LAW—MENS REA—REQUIREMENT IN ACTION FOR CONVERTING GOVERNMENT PROPERTY—NECESSITY FOR CRIMINAL INTENT

Defendant was convicted of knowingly converting Government property in violation of 18 U.S.C.A. § 641.[1] He testified that he thought the property had been abandoned and that he took it with no wrongful or criminal intent. The trial court ruled that under the statute this was no defense and refused to submit to the jury the question of the defendant's intent. The jury was charged that the only question of intent was whether or not defendant intended to take the property, felonious intent being presumed from the act.[2] The Supreme Court granted certiorari. *Held* (8-0), reversed. Under a statute that is declaratory of a common law crime the question of criminal intent must be submitted to the jury where the legislature did not in unequivocal language declare that intent is not an element of the crime. *Morissette v. United States,* 72 Sup. Ct. 240 (1952).

At common law the fundamental concept of crime included criminal intent,[3] and until the advent of public welfare offenses the courts, in the absence of legislative instructions to the contrary, interpreted statutory crimes

20. See Critchfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 51 N.E. 552 (1898) (agreement void as contrary to public policy if the agent's compensation is contingent upon success).

1. "Whoever embezzles, steals, purloins or knowlingly converts to his use or the use of another . . . any . . . thing of value of the United States [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ." 62 STAT. 725 (1948), 18 U.S.C.A. § 641 (1950).

2. 187 F.2d 427 (6th Cir. 1951), 25 So. CALIF. L. REV. 135.

3. 4 BL. COMM. *21; 1 BISHOP, CRIMINAL LAW § 287 (9th ed. 1923). On the problem of criminal intent, see Perkins, *The Civil Offense,* 100 U. OF PA. L. REV. 832 (1952). The principal case is discussed.

as requiring *mens rea* in conformity with the common law.[4] In the cases involving public welfare offenses, however, a new rule of construction was developed, the courts holding that the omission by the legislature of the necessity of intent dispensed with it and that there could be a conviction without a showing that the accused had any unlawful intent.[5]

Since statutory crimes extend from one extreme, where knowledge is a part of the definition of the crime (receiving stolen property with knowledge that it was stolen), to the opposite extreme, where knowledge is wholly immaterial (the public welfare offense),[6] the courts are faced with the problem of ascertaining which statutory crimes constitute public welfare offenses. Only upon predetermining this question can the courts decide whether intent is an essential element of the crime when the legislature has failed to provide specifically for it. Also upon this question may hinge the constitutionality of the statute under the due process clause.[7]

The development of these statutes dispensing with criminal intent, was at first met by a barrage of fear and objection from all sides—courts, practitioners and scholars. These statutes were termed the "eclipse of *mens rea*,"[8] and were described by a Tennessee court as "intolerable tyranny."[9] After a time, however, the validity of these statutes was established and they were held not to constitute a denial of due process;[10] and as society became more complex and the need for regulations became more acute, these laws were

4. Masters v. United States, 42 App. D.C. 350, 1916A Ann. Cas. 1243 (1914); *cf.* State v. Bridgewater, 171 Ind. 1, 85 N.E. 715 (1908); see United States v. Jackson, 25 Fed. 548 (W.D. Tenn. 1885). Statutory crimes should be construed in conformity with the common law. United States v. Carll, 105 U.S. 611, 26 L. Ed. 1135 (1881); CLARK AND MARSHALL, CRIMES § 41 (4th ed. 1940). *Mens rea* is a requisite of statutory crimes. Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (1875).

5. "While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement." United States v. Balint, 258 U.S. 250, 251-52, 42 Sup. Ct. 301, 66 L. Ed. 604 (1922); *cf.* United States v. Behrman, 258 U.S. 280, 42 Sup. Ct. 303, 66 L. Ed. 619 (1922).

6. See Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 917 (1939).

7. The Supreme Court has held that a statute creating a crime without criminal intent as an essential element is constitutional. Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 30 Sup. Ct. 663, 54 L. Ed. 930 (1910). "The constitutional requirement of due process is not violated merely because mens rea is not a required element of a prescribed crime." United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943). For interpretations which seem to indicate that the Shelvin-Carpenter case applies only to welfare crimes see Nigro v. United States, 4 F.2d 781, 784 (8th Cir. 1925); and United States v. Schultze, 28 F. Supp. 234, 235 (W.D. Ky. 1939).

8. Stallybrass, *The Eclipse of Mens Rea*, 52 L.Q. REV. 60 (1936). For an exhaustive list of articles dealing with this matter see CLARK AND MARSHALL, CRIMES § 42, n.35 (4th ed. 1940).

9. Duncan v. State, 26 Tenn. 109, 111 (1846).

10. Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 30 Sup. Ct. 663, 54 L. Ed. 930 (1910).

more readily accepted. This trend has been attributed to the shift in emphasis from the protection of individual interests to the protection of public interest,[11] the rationale being that in interest of the greater good the burden is put on the individual who has the opportunity of informing himself of conditions rather than upon the helpless public.[12]

How far can this doctrine be extended? Public welfare offenses have not yet reached the stage where their limits can be accurately fixed. Usually they deal with those crimes that are *mala prohibita* rather than *mala in se*.[13] Other suggested distinctions are that the purpose of such statutes is not to single out the wrongdoers but to serve in a regulatory nature;[14] and that the severity of the punishment is not too great to impose upon one who had no guilty intent.[15]

In the instant opinion the Supreme Court has acknowledged the difficulties present in distinguishing between public welfare crimes and those requiring intent as an essential element.[16] But the Court has considerably narrowed what heretofore was a vast twilight zone in American law by setting up some judicial guides. The factors set forth by the Court as tending to indicate a welfare crime are: (1) that it is a crime against the authority of the state, not in the sense of treason, but insofar as it impairs the efficiency of controls deemed essential to social order; (2) that the injury to the people is the same whatever the intent of the violator; (3) that the accused is in a position to prevent the injury by the use of a reasonable degree of care; (4) that the penalty is small and does no substantial damage to the reputation of the violator, the creation of the crime being to require a degree of diligence that makes the violation impossible; and finally (5) whether it is a new crime or the codification of a common law crime carrying with it the inherent essentials of the crime at common law.

Had the Supreme Court chosen to do so, it might have disposed of this case upon simpler grounds, but in doing so it would have deprived the legal profession of the useful guide set forth in this opinion. The Court could have said that this statute is penal in nature and, in consequence, the ambiguous

11. Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933).

12. See United States v. Dotterweich, 320 U.S. 277, 284-85, 64 Sup. Ct. 134, 88 L. Ed. 48 (1943).

13. United States v. Balint, 258 U.S. 250, 42 Sup. Ct. 301, 66 L. Ed. 604 (1922). For the most recent discussion of this point, see Perkins, *The Civil Offense*, 100 U. OF PA. L. REV. 832 (1952).

14. Sayre, *Public Welfare Offense*, 33 COL. L. REV. 55 (1933).

15. *Ibid.*

16. "Neither this Court nor . . . any other has undertaken to delineate a precise line . . . for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static." 72 Sup. Ct. at 248.

phrase,[17] "knowingly converts," must be construed strictly in favor of the accused.[18] The Court points out that the term "knowingly converts" is surrounded by words (embezzles, purloins, steals) which do require criminal intent,[19] and it could have stopped there, merely holding that for the purpose of construing this particular statut-a criminal intent will be required, the words of the statute being construed so as best to harmonize with the context.[20] Upon this alone the Court might have rested securely. But the Court was not content to stop there.

Though the above criteria set up by the Court do not "delineate a precise line" they do require the prosecutor to prove intent where under a more loose interpretation such proof would not be required. Since the birth of this innovation—the welfare crime—the trend has been in the direction of convictions without a showing of intent. It is believed that this case will act as a check to that dangerous trend whereby the rights of persons as individuals could succumb to the demands of persons as parts of a collective mass.

DAMAGES—INJURY TO CHILD—EXPENSES OF PARENT IN ATTENDING CHILD

An infant was injured in British Columbia by the negligence of the defendant's truck driver. The child was flown to Vancouver where he remained in a serious condition. His father stayed with him during the critical period, and later made plane trips for consultation with doctors. The mother was in Arizona at the time for her health. She immediately flew to Vancouver, where she and her daughter (who attended the ill mother) took a hotel suite for the entire hospitilization period. The father sought to recover as damages his own travel and lodging costs, the travel and lodging costs of the mother, and the board of both mother and daughter in Vancouver, despite the fact that he would have incurred some of these expenses for the mother regardless of the accident. *Held,* the expenses of both mother and father were allowed as special damages, as well as the reasonable expenses for the transport of the mother's goods from Arizona. The expenses of the daughter were denied. *Sheasgreen v. Morgan,* 3 W.W.R. (N.S.) 677 (Brit. Col. 1951).

17. "If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." United States v. Reese, 92 U.S. 214, 220, 23 L. Ed. 563 (1875).

18. United States v. Resnick, 299 U.S. 207, 57 Sup. Ct. 126, 81 L. Ed. 127 (1936); United States v. Northern Pacific Railway, 242 U.S. 190, 37 Sup. Ct. 22, 61 L. Ed. 240 (1916).

19. 72 Sup. Ct. at 253.

20. *Cf.* "And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." Gooch v. United States, 297 U.S. 124, 128, 56 Sup. Ct. 395, 80 L. Ed. 522 (1936); Ash Sheep Co. v. United States, 252 U.S. 159, 40 Sup. Ct. 241, 64. L. Ed. 507 (1920).

When a person is injured by the negligent act of another he usually has only one cause of action in which to recover a monetary evaluation of the damage done him.[1] He must allege, therefore, both present and probable future damage.[2] Generally in a personal injury action the plaintiff may recover for reasonable medical expenses,[3] pain and mental suffering,[4] impairment of earning capacity[5] and earnings already lost.[6] As to each of these, general damages (*i.e.*, where the injury is a necessarily expected result of defendant's negligence) may be recovered automatically on the determination of liability. Special damages (those caused by, but not a necessary result of the negligence) must be alleged and proved to be recoverable.[7] The difficulty of evaluating this last type of damage does not seem to trouble the court as much as the question of causation, *i.e.*, whether the harm or expense is too remote from the act.[8] In determining this, the court will look at the particular individual and his occupation in society, or to what special class he belongs and its relation to the injury.[9]

One of these special classes is the relationship of child and parent or guardian. The owner of a damaged chattel may recover the cost of its repair and for the loss of its use during repairs.[10] Similarly when an infant is negligently injured the parent is under an obligation to provide medical care[11] and may recover medical expenses thus incurred and for loss of the child's services.[12] The problem in the case of the child, however, is determining the reasonableness of the medical expenses.

In the instant case, the special damages allowed had no direct connection with the physical treatment of the child's injury; but the family relationship

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1. MCCORMICK, DAMAGES § 86 (1935).
2. Gibraltar Coal Mining Co. v. Miller, 233 Ky. 129, 25 S.W.2d 38 (1930).
3. McCall v. Pitcairn, 232 Iowa 867, 6 N.W.2d 415 (1942).
4. Nashville v. Brown, 25 Tenn. App. 340, 157 S.W.2d 612 (M.S. 1938).
5. Cunningham v. Pennsylvania R.R., 55 F. Supp. 1002 (E.D.N.Y. 1944).
6. Eleazar v. Illinois Central R.R., 24 So.2d 387 (La. App. 1946).
7. See Burlington Transport Co. v. Josephson, 153 F.2d 372 (8th Cir. 1946) (false imprisonment); Stoltz v. Converse, 75 Cal. App. 909, 172 P.2d (1946) (personal injuries in a truck accident). See also MCCORMICK, DAMAGES § 8 (1935).
8. Kimball v. Thompson, 70 F. Supp. 803 (D. Neb. 1948); *cf.* Harper v. Young, 139 Neb. 624, 298 N.W. 342 (1941).
9. See, *e.g.*, Teissier v. Stewart, 11 La. App. 164, 121 So. 777 (1929) (young girl with scars and glass eye); Fehely v. Senders, 170 Ore. 457, 135 P.2d 283 (1943) (pregnant woman's fear of miscarriage); Flint v. Lovell [1935] 1 K.B. 354 (70 year-old man). *But cf.* Hogan v. Santa Fe Transport Co., 148 Kan. 720, 85 P.2d 28 (1938) (failure to recover for loss of enjoyment of playing violin).
10. MCCORMICK, DAMAGES § 124 (1935).
11. See, *e.g.*, Arementrout v. Virginian Ry., 72 F. Supp. 997 (S.D. W. Va. 1947).
12. This is a recognition of the common law rule that a parent had the right to the services of the child and to his earnings, in return for which he had the duty to support and maintain the child during minority. This is reflected in 1 BL. COMM. *143. For cases applying the modern aspect of this doctrine, see Finnerty v. Cummings, 132 Cal. App. 48, 22 P.2d 37 (1933); Jackiewicz v. United Illuminating Co., 106 Conn. 310, 138 Atl. 151 (1927); Eichten v. Central Minn. Co-op Power Ass'n, 224 Minn. 180, 28 N.W.2d 862 (1947).

makes the negligent act a cause of the expenses.[13] In the United States there is a similar recognition of the family unit as a special causal factor. Thus, a husband and wife have recovered expenses of travel and lodging in attending their injured son in another town.[14] Another court awarded similar expenses to a husband who traveled to another city to be with his wife during an operation necessitated by the defendants' acts.[15] The instant case seems to be a further extension of these holdings. Here the mother, due to her own ill health, was not at the family home but at a much more distant place. The court emphasized two factors in holding that regardless of the distance travelled, there is sufficient causation to make the defendant liable for these expenses:[16] first, the seriousness of the injury, and[17] second, the age of the child (in the instant case, 6 years). The younger the child and the more serious the injury the more proximate the cause. If here the child had been 16 years old and had only broken his leg, it is less likely that these damages would have been awarded. In such case there is less need of parental comforting and the injury is not the type to cause alarm. The more serious the injury, the less important the age factor becomes.[18]

Then arises the problem of what degree of relationship must exist. The court in the instant case intimates that it will award expenses only for the parents and not for brothers and sisters.[19] But if only a sister or brother or some other person had been able to attend the injured boy, the expenses would probably have been allowed. If these expenses are allowed as a reasonable medical expense, what if the facts are such that there is actually parental comfort, for example, where the child is unconscious? Though the courts seem to refer to medical expenses, it is likely they would not require actual benefit from the parents' presence in all instances.[20]

The expenses of the mother were of a type (food, travel, etc.) that would be incurred eventually despite the accident, assuming as indicated by the

13. See Note, 35 VA. L. REV. 618 (1949).

14. Woodman v. Peck, 90 N.H. 292, 7 A.2d 251, 122 A.L.R. 1402 (1939). Here the infant was a passenger in a car forced off the road by the defendant. He was taken to the nearest town which was some distance from his home.

15. Baird v. Employers' Liability Assurance Corp., 38 So.2d 66 (La. App. 1949).

16. In Woodman v. Peck, 90 N.H. 292, 7 A.2d 251 (1939), these factors are not discussed.

17. The court stated that it was necessary to amputate the infant's leg and that for a period it was not certain he would live. *Cf.* Bonzik v. Delaware & Hudson R.R., 25 F. Supp. 435 (M.D. Pa. 1938), *rev'd sub nom.* Delaware & Hudson R.R. v. Bonzik, 105 F.2d 341 (3d Cir. 1939).

18. It would seem the same degree of "family" urgency would be present regardless of age if the injured person was near death.

19. The court said here the sister's presence was necessitated by the mother's ill health and not by the accident, making no mention of any similar reason for both mother and daughter's presence, 3 W.W.R. (N.S.) at 682.

20. The present court referring to the father's accompaniment of his son and his stay in Vancouver said, "It was *fitting* and *proper* that he do so." 3 W.W.R. (N.S.) at 681 (italics added).

facts that she was not planning to return to Arizona. Some courts have disallowed damages for these items.[21] Two circumstances may support the allowance here: the fact that the mother was forced to cut short her stay in Arizona, and that her presence was probably a unique aid in the restoration of the child's health. This is in accord with the general rule that whenever a parent or relative provides medical aid he is entitled to compensation for these services.[22]

DIVORCE—DETERMINATION OF PLACE WHERE ABANDONMENT OCCURS—EFFECT OF RESIDENCE REQUIREMENT FOR BRINGING ACTION

H, in California, had telephoned *W* who was temporarily staying with her parents in Tennessee, and informed her of his intention to abandon her. *W* then established a domicile in Tennessee and sued *H* for divorce on grounds of abandonment and nonsupport. The lower court dismissed the bill for lack of jurisdiction. *Held*, reversed. *H* effected an act of abandonment in Tennessee, and complainant being a bona fide citizen of that state when the bill was filed, the statute requiring two years residence before filing of a bill was not applicable. *Holman v. Holman*, 244 S.W.2d 618 (Tenn. App. W.S. 1951).

Jurisdiction to entertain a divorce suit normally belongs to a court because of some domiciliary connection of the state with a party.[1] Most states do not desire to make their courts available to spouses whose marriage is of more interest to another sovereign. To enforce this policy they require that the complainant prove that he was domiciled in the state chosen as the forum for a designated period immediately preceding application for divorce in order to establish jurisdiction to hear the divorce suit.[2] The place where the offense

21. See, *e.g.*, Kirk v. Seattle Electric Co., 58 Wash. 283, 108 Pac. 604 (1910) (neither board nor meals allowed; held not related to injury). In the *Baird* case, 38 So.2d 669 (La. App. 1949) expenses weren't allowed for meals, apparently on the theory they were necessary despite the accident.

22. See Lewark v. Parkinson, 73 Kan. 553, 85 Pac. 601, 5 L.R.A. (N.S.) 1069 (1906); Sedlock v. Trosper, 307 Ky. 369, 211 S.W.2d 147 (1948).

1. 1 BEALE, CONFLICT OF LAWS §§ 110.1-11.1 (1935); GOODRICH, CONFLICT OF LAWS 395-413 (3d ed. 1949); MADDEN, DOMESTIC RELATIONS 318 (1931); 1 RABEL, CONFLICT OF LAWS 396-416 (1945); SCHOULER, DIVORCE MANUAL §§ 16-17 (Warren ed. 1944). If neither party was domiciled where the decree was rendered, it is void. Bell v. Bell, 181 U.S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804 (1901); Lister v. Lister, 86 N.J. Eq. 30, 97 Atl. 170 (1916). But see Notes, 8 ALA. LAW. 37 (1947); 62 HARV. L. REV. 514 (1949).

2. *E.g.*, "A divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action." MONT. REV. CODES ANN. § 5766 (1947). See IDAHO COMP. LAWS Ann. tit. 32, § 32-701 (1949) (same statute with six-week resident requirement); R.I. GEN. LAWS c.416, § 10 (1938) (two-year resident requirement).

was committed is not considered to be of vital importance on the question of jurisdiction in these states.[3]

Section 8428 of the Tennessee Code[4] provides that: "A divorce may be granted for any of the aforesaid causes, though the acts complained of were committed out of the state, or the petitioner resided out of the state at the time, no matter where the other party resides, if the petitioner has resided in this state two years next preceding the filing of the petition." Tennessee abolished its general residence requirement in 1840, and this present section of the Code is intended to fulfill the purpose of the usual "residence period" requirements.[5] The statute prevents Tennessee from becoming a marital dumping ground[6] and at the same time goes a long way toward avoiding the specific instances of hardship which often arise from a general "residence period" requirement.[7] The Tennessee courts have construed this section so that it is applicable only when the acts complained of occurred out of Tennessee.[8] Thus to establish the jurisdiction of Tennessee courts to hear a divorce suit petitioner must show: (a) that one of the parties is domiciled in

3. For a collection of the state statutes see SCHOULER, DIVORCE MANUAL, c.38 (Warren ed. 1944).

4. TENN. CODE ANN. § 8428 (Williams 1934).

5. Four states have substantially similar requirements. D.C. CODE § 16-401 (1940); ILL. ANN. STAT. c. 40, § 3 (Supp. 1951); MD. ANN. CODE GEN. LAWS art. 16, §§ 41A, 43 (Cum. Supp. 1947); MO. REV. STAT. ANN. § 1517 (Cum. Supp 1951).

6. Carter v. Carter, 113 Tenn. 509, 82 S.W. 309 (1904) (petitioner did not have to meet two-year residence requirement because the grounds arose in Tennessee); Fitzpatrick v. Fitzpatrick, 131 Tenn. 54, 173 S.W. 444 (1914) (since petitioner failed to meet the two-year residence requirement she could only show the acts constituting a non-continuing grounds for divorce that occurred in Tennessee). Domicile gives the court jurisdiction, and if section 8428 cannot be complied with, the court cannot grant a divorce but can grant separate maintenance. Cureton v. Cureton, 117 Tenn. 103, 96 S.W. 608 (1906) (acts occurred outside state and petitioner could not meet two year residence requirement to entitle her to a Tennessee divorce). Tennessee probably would construe the statute as a juridictional prerequisite. McFerrin v. McFerrin, 28 Tenn. App. 552, 191 S.W.2d 946 (W.S. 1945) (if section 8428 is not complied with, the court cannot hear the divorce suit); Wills v. Wills, 104 Tenn. 382, 58 S.W. 301, (1900) (collateral attack dismissed because of procedure question, but court impliedly held that the statute was jurisdictional). A few states have held that the "residence period" requirement is not jurisdictional. DeYoung v. DeYoung, 27 Cal.2d 521, 165 P.2d 457 (1946) (domicile gives the court power to hear the suit, and the statutory residence requirement only involves a proper exercise of its power to hear); Kern v. Field, 68 Minn. 317, 71 N.W. 393 (1897); Schillerstrom v. Schillerstrom, 75 N.E. 667, 32 N.W.2d 106 (1948), 24 NOTRE DAME LAW. 242 (1949) (court held that domicile may be attacked collaterally but not the statutory residence requirement); Notes, 25 N.D. BAR BRIEFS 262 (1949), 24 TEX. L. REV. 215 (1946), 59 L.R.A. 135, 154 (1903).

7. Carter v. Carter, 113 Tenn. 509, 82 S.W. 309 (1904). The hardship of being without a remedy even though the grounds exist is most apparent when the family has recently moved to the jurisdiction when the grounds arise. Carter v. Carter, 113 Tenn. 509, 82 S.W. 309 (1904). See also Dings v. Dings, 123 Ill. App. 318 (1905) (*W*, domiciled in South Dakota when *H* committed adultery in Illinois, was awarded an Illinois divorce decree without one year's residence).

8. If the acts occurred in Tennessee, there is no residence requirement. Fitzpatrick v. Fitzpatrick, 131 Tenn. 54, 173 S.W. 444 (1915); Carter v. Carter, 113 Tenn. 509, 82 S.W. 309 (1904); McFerrin v. McFerrin, 28 Tenn. App. 552, 191 S.W.2d 946 (W.S. 1945). Domicile in the state at the time the acts are committed outside the state will give the court jurisdiction by the statutes of the District of Columbia, Illinois and Missouri. This is not true in Tennessee and Maryland.

Tennessee at the time of filing the divorce bill;[9] and (b) either petitioner's Tennessee domicile for the two years next preceding the filing of the divorce bill,[10] or that the two-year residence requirement is not applicable because the acts complained of occurred within the state.

The court in the instant case was faced with the problem of determining where the act of abandonment occurred. In criminal law it is well settled that abandonment and nonsupport occur where the wife is residing,[11] and a few courts have also allowed prosecution of the husband where he is at the time, because these are continuing offenses[12] and necessary elements have arisen in different jurisdictions.[13] Abandonment is desertion without any time requirement,[14] and generally the necessary elements are said to be: (1) intent,[15] (2) absence[16] and (3) nonconsent.[17] By analogy to jurisdiction over

9. Brown v. Brown, 155 Tenn. 530, 296 S.W. 356 (1927); Gettys v. Gettys, 71 Tenn. 260 (1879); Sturdavant v. Sturdavant, 28 Tenn. App. 273, 189 S.W.2d 410 (M.S. 1944) (collateral attack on the grounds that soldier had not established Tennessee domicile successfully voided his divorce decree); Tyborowski v. Tyborowski, 28 Tenn. App. 583, 192 S.W.2d 231 (M.S. 1945) (court did not take jurisdiction because neither petitioner nor the defendant had established a domicile in Tennessee). Many states hold that defendant's domicile is not sufficient. Way v. Way, 64 Ill. 406 (1872) (defendant's domicile was insufficient to give the court jurisdiction even though the grounds arose in Illinois); McConnell v. McConnell, 167 Mo. App. 680, 151 S.W. 175 (1912). *Contra:* McFerrin v. McFerrin, 28 Tenn. App. 552, 191 S.W.2d 946 (W.S. 1945) (defendant's domicile sufficient if grounds arose in Tennessee).

10. Sparks v. Sparks, 114 Tenn. 666, 88 S.W. 173 (1905) (since the acts did not occur in Tennessee and petitioner failed to establish his Tennessee domicile for the two years next preceding the filing of his bill the court was without jurisdiction); White v. White, 13 Tenn. App. 622 (W.S. 1931). The defendant's two-year domicile probably will not give the Tennessee court jurisdiction if the acts occurred outside the state. Sloan v. Sloan, 155 Tenn. 422, 295 S.W. 62 (1927) (petitioner argued that since the grounds arose out of the state and cross-petitioner had not met the two-year residence requirement the court could not grant her divorce, but the court held that while such is the general rule a divorce may be granted the nonresident on her cross-bill because once a court of equity acquires jurisdiction of the subject-matter it will exercise such jurisdiction until all the relief has been granted).

11. See, *e.g.*, Johnson v. People, 66 Ill. App. 103 (1895); State v. Dvoracek, 140 Iowa 266, 118 N.W. 399 (1908); State v. Gilmore, 88 Kan. 835, 129 Pac. 1123 (1913). This is true even though the husband has never been there. Cleveland v. State, 7 Ga. App. 622, 67 S.E. 696 (1910); *Ex parte* Price, 168 Mich. 527, 134 N.W. 721 (1912). See 2 WHARTON, CRIMINAL LAW § 1851 (12th ed. 1932); Note, 47 L.R.A. (N.S.) 218 (1914). *Contra:* State v. Borum, 188 La. 846, 178 So. 371 (1938); *Ex parte* Roberson, 38 Nev. 326, 149 Pac. 182 (1915).

12. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936); State v. Barton, 201 S.C. 225, 22 S.E.2d 585 (1942). *Contra:* People v. Flury, 173 Ill. App. 640 (1912); *Ex parte* Roberson, 38 Nev. 326, 149 Pac. 182 (1915); State v. Hannon, 168 N.C. 215, 83 S.E. 701 (1914). Some courts, in accord with the instant case, hold abandonment and nonsupport to be continuing grounds for divorce. 244 S.W.2d at 621; Dee v. Dee, 87 Cal. App. 17, 261 Pac. 501 (1927).

13. Generally a party who in one jurisdiction puts in operation a force which does harm in another jurisdiction is responsible in both jurisdictions for the harm. 1 WHARTON, CRIMINAL LAW §§ 334, 335 (12th ed. 1932). The courts unaminously hold defendant responsible where the act takes effect. State v. Hall. 114 N.C. 909, 19 S.E. 602, 28 L.R.A. 59 (1894).

14. The elements of abandonment are the same as those for desertion. Nelson v. Nelson, 244 Ala. 421, 14 So.2d 155 (1943); 1 SCHWARTZ, MATRIMONIAL ACTIONS § 246 (1947); SCHOULER, DIVORCE MANUAL § 112 (Warren ed. 1944); Note 119 Am. St. Rep. 617 (1908).

15. Davis v. Davis, 37 N.H. 191 (1858). If defendant left with intent to return, intent to abandon begins from the time letter is written stating intent not to return. Kupka v.

criminal acts it seems that the Tennessee courts should, if necessary, exercise their divorce jurisdiction on proof that an essential element of the ground for divorce has occurred in Tennessee.

In deciding whether to apply section 8428 to the situation presented in the instant case the court distinguished noncontinuing grounds (*e.g.*, adultery, conviction of an infamous crime, cruelty, indignities to the person)[18] from continuing grounds (*e.g.*, impotency at the time of marriage, desertion for two years, habitual drunkenness, abandonment and nonsupport),[19] then concluded that the same rule should apply to both situations. If a noncontinuing cause occurs outside the state, or if petitioner "was physically present out of the state when she learned of the true state of affairs . . ."[20] giving rise to a continuing cause,[21] then the residence requirement of section 8428 is applicable. The fact that petitioner, aware of a continuing ground, subsequently comes to Tennessee, where the cause "continues" to exist, is immaterial and does not avoid the statute. On the other hand, if, as in the principal case, a continuing ground of divorce first takes *effect*[22] in Tennessee where petitioner is physically present, the two year residence requirement will have been avoided. Such a ruling places an important limitation upon the construction of section 8428 which, if followed, would preserve the purpose of the statute.

Kupka, 132 Iowa 191, 109 N.W. 610 (1906); Edwards v. Edwards, 69 N.J. Eq. 522, 61 Atl. 531 (1905); Pinkard v. Pinkard, 14 Tex. *356, 65 Am. Dec. 129 (1855). See Notes, 20 AUST. L.J. 336 (1947); 21 AUST. L.J. 55 (1947).

16. Smith v. Smith, 129 Conn. 704, 30 A.2d 916 (1943); Lynch v. Lynch 33 Md. *328 (1870). A separation with consent is no desertion. Rutledge v. Rutledge, 37 Tenn. *554 (1858); Cox v. Cox, 35 Mich. 461 (1877); Davis v. Davis, 60 Mo. App. 545 (1895).

17. Bailey v. Bailey, 6 Tenn. App. 272 (W.S. 1927); Benkert v. Benkert, 32 Cal. 467 (1867); Marsh v. Marsh, 1 McCarter 315, 82 Am. Dec. 251 (N.J. Eq. 1862); Merritt v. Merritt, 85 N.H. 210, 155 Atl. 692 (1931).

18. "[S]ome of the grounds for divorce are *non-continuing* in the sense that once the fault has occurred the act is completed and the cause of action exists then and there without further repetition. . . ." 244 S.W.2d at 621.

19. "Other grounds are *continuing* in character in the sense that once the fault has arisen it continues to exist through mere passivity of the wrongdoer. . . ." *Id.* at 621.

20. *Id.* at 621-22.

21. Neither Tennessee nor any of the states with similar statutes require that the complainant be a resident of such state at the time the cause of action arose. This is a strained interpretation of the Tennessee statute if the word "resided" in section 8428 means domicile. See COHEN, DIVORCE & ALIMONY IN TENNESSEE § 148 (1949). The principal case would require that petitioner be physically present in Tennessee at the time the cause of action arose if she was a non-resident. 244 S.W.2d at 621. *Accord*, Fitzpatrick v. Fitzpatrick, 131 Tenn. 54, 173 S.W. 444 (1915) (*H* and *W* domiciled in Pennsylvania, but acts occurred during visit to Tennessee and section 8428 was not applicable); Carter v. Carter, 113 Tenn. 509, 82 S.W. 309 (1904) (*H* and *W* were moving to Tennessee, *H* sent *W* ahead and never followed, the abandonment occurred in Tennessee and section 8428 was not applicable).

22. Volutary separation becomes desertion from the time one spouse has intent not to return and the other spouse does not consent. Hankinson v. Hankinson, 33 N.J. Eq. 66 (1880); Conger v. Conger, 13 N.J. Eq. 286 (1861) (*W* left with *H*'s consent and her subsequent refusal to return did not constitute abandonment from the time she originally left); Carroll v. Carroll, 68 N.J. Eq. 724, 61 Atl. 383 (1905). In criminal law the place where the shot takes effect is the place of trial. State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894). The telephone conversation in the instant case places the intent in California.

DOMESTIC RELATIONS—LEGITIMATION STATUTE—INTERPRETATION AND EFFECT

A recent Tennessee statute[1] declares that all illegitimate children whose parents shall later marry "shall thereby become legitimized and shall become legitimate. . ." The statute has been upheld as constitutional this year.[2] But it creates some problems of interpretation by declaring that it applies to "marriages later found to have been illegal, void or voidable."[3] Tenn. Acts 1949, c. 70; TENN. CODE ANN. § 9567 (Supp. 1951).

At common law any child born out of wedlock or of an annulled marriage, was illegitimate. His parents owed him no obligation (the child was *nullius filius*—nobody's child), he could inherit from no one, and he had no heirs except those of his own body.[4] These harsh rules have been characterized as "one of the reproaches of the common law which has shocked the legislative and judicial conscience of the civilized world."[5] Every jurisdiction has enacted statutes for improving the status of the illegitimate, the most widely adopted measures providing that intermarriage of the parents legitimates a child born out of wedlock.[6] In general the courts have tended toward liberal interpretations of this type of statute, but difficulties arise when the statute purports to legitimate issue of a "void marriage" and the decision as to what constitutes a void marriage must be made by the courts.[7]

The effect of legitimation statutes must be found from legislative intent, public policy and construction of the precise words of the statute. For in-

1. "All illegitimate children whose parents heretofore intermarried or who shall hereafter intermarry shall thereby become legitimized and shall become legitimate for all purposes and entitled to all the rights and privileges of legitimate children, without the necessity of any proceedings under this and preceding sections of the Code. . . . This section shall be applicable in all cases where the father of an illegitimate child has married or shall marry the mother of such child, including such marriages later found to have been illegal, void or voidable, and the father recognizes or holds said child out as being his." TENN. CODE ANN. § 9567 (Supp. 1951). See discussion in 21 TENN. L. REV. 453 (1950).

2. Southern Ry. v. Sanders, 246 S.W.2d 65 (Tenn. 1952). The statute was challenged as invalid under Sec. 6 of Art. XI of the Tennessee Constitution: "The legislature shall have no power to . . . pass acts . . . legitimating persons, but shall, by general laws, confer this power on the Courts." The Court reviewed the legislative history of Section 6 and found that its objective was to prohibit special acts of legitimation for named individuals, while leaving in the legislature power to pass general legitimation laws.

3. "The concern of the state in a status [such as marriage] is based upon its social interest in the personality of its domiciliaries, and its interest in such of their domestic relations as have to do with the procreation and nurture of its citizens. . . ." RESTATEMENT, CONFLICT OF LAWS § 119(c) (1934). See MADDEN, DOMESTIC RELATIONS 5 (1931), and cases cited on the power of the state to control marriage, divorce, etc. of its domiciliaries.

4. MADDEN, *op. cit. supra*, note 3, 348-54; 1 VERNIER, AMERICAN FAMILY LAWS § 49 (1931).

5. *In re* Clark's Estate, 228 Iowa 75, 290 N.W. 13, 31 (1940).

6. MAY, MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES (1929); 4 VERNIER, AMERICAN FAMILY LAWS §§ 242, 243 (1936).

7. Discussed in Notes, 84 A.L.R. 499 (1933), 30 VA. L. REV. 352 (1944).

stance, in the Tennessee act, did the legislature intend to legitimate only children born *before* the marriage of its parents, or does the statute also legitimate issue of an existing marriage null at law? What is the effect of public policy in deciding which void marriages the legislature intended to include? Other states under similar statutory provisions have reached varying results. The Kentucky legislature left no doubt as to its intent by specifically bastardizing the issue of an incestuous or miscegenetic marriage and legitimating the issue of all other illegal or void marriages.[8] The Kentucky courts accordingly have found that a common law marriage, though not recognized in Kentucky, is a "void marriage" within the intent of the statute, and children of such a union are legitimate.[9] In the same jurisdiction a statute (now repealed)[10] requiring "good faith" on the part of one party to give color to a bigamous marriage was held not to be a limitation on the breadth of the legitimating statute.[11] Virginia in 1785[12] made legitimate the issue of void marriages and has held that children of bigamous unions (void *ab initio*) are legitimate;[13] while in a split decision, based on legislative intent, an early Virginia court refused to recognize miscegenates as legitimate.[14] But later, in *Henderson v. Henderson*,[15] the Virginia court stated emphatically (though without referring specifically to miscegenetic marriages) that there are no words of limitation or qualification in the statute and that the issue of marriages null at law, without regard to the ground of nullity, are legitimated.

Exact interpretation of the phrase "null at law" was discussed in *Fout v. Hanlin*[16] and *Capraro v. Propati*.[17] In both cases the conclusion was that such words do not mean a marriage subject to a decree of annulment, but extend to all marriages void *ab initio*. Several years earlier, in another jurisdiction, a court construed the words "deemed null at law" to mean a marriage which a court of equity could *decree* null.[18]

8. KY. REV. STAT. § 391.100 (Baldwin 1943). See Note, 76 A.L.R. 776 (1932), discussing incestuous marriages.

9. Copenhaver v. Hemphill, 235 S.W.2d 778 (Ky. App. 1951); *cf.* Hodge v. Hicks, 233 S.W.2d 557 (Texas 1950) (requiring proof of a common law marriage), and Pickens v. O'Hara, 120 W. Va. 751, 200 S.E. 746 (1938).

10. KY. REV. STAT. § 2099 (Carroll 1936). Repealed 1940.

11. Martin v. Coburn, 266 Ky. 176, 98 S.W.2d 483 (1936).

12. Now VA. CODE ANN. § 5270 (1950). See Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943), for legislative history of the statute.

13. Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10 (1948); Goodman v. Goodman, 150 Va. 42, 142 S.E. 412 (1928). The Mississippi statute expressly bastardizes the issue of a bigamous marriage. MISS. CODE ANN. § 2744 (1942).

14. Greenhow v. James, 80 Va. 636 (1885). The opposite view, based on a "good faith" interpretation of the marriage, was taken in *In re* Atkins, 151 Okla. 294, 3 P.2d 682, 84 A.L.R. 491 (1931).

15. 187 Va. 121, 46 S.E.2d 10 (1948).

16. 113 W. Va. 752, 169 S.E. 743 (1933).

17. 127 N.J. Eq. 419, 13 A.2d 318 (Ct. Err. & App. 1940).

18. Stripe v. Meffert, 287 Mo. 336, 229 S.W. 762 (1921); *accord*, Defferari v. Terry, 128 Tex. 521, 99 S.W.2d 290 (1936).

Since *Southern Ry. v. Sanders*[19] decided only the question of constitutionality and did not construe the Tennessee statute, its effect on a marriage void by judicial decision and interpretation rather than by express legislative fiat is still to be answered by the Tennessee courts. Section 8452 of the Tennessee Code, which prohibits the marriage of a person divorced for adultery to his or her paramour, has been strictly construed in the older decisions;[20] and more recently these decisions were reluctantly affirmed in *Jennings v. Jennings*,[21] in which the court conceded that the statute does not expressly make adulterous marriages void, and felt constrained by the "determined public policy" voiced in previous cases, to find the marriage void and its issue illegitimate. Only half a dozen other states have similar statutes, and these usually contain mitigating provisions which give the courts the power to remove the disability.[22]

As to the legislative intent in the Tennessee act, by the combination of the intermarriage of parents provision and the "marriage illegal, void or voidable" provision in a single legitimating statute, it is strongly suggested that the legislature meant the two to be interdependent.[23]

As to public policy, there are indications in the later Tennessee cases that the courts are willing to change their attitude toward legitimating issue

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19. 246 S.W.2d 65 (Tenn. 1952).

20. Owen v. Bracket, 75 Tenn. 448, 449 (1881) (statute "accords with public policy, is predicated of common sense, and tends to assure a decent propagation of the human race"); Pennegar v. State, 87 Tenn. 244, 10 S.W. 305 (1889) (marriage void in Tennessee even though valid where performed); Newman v. Kimbrough, 59 S.W. 1061 (Tenn. Ch. App. 1900) (marriage invalid even if no intent to evade Tennessee law); Bennett v. Anderson, 20 Tenn. App. 523, 101 S.W.2d 148 (1936) (no presumption of validity by ceremonial marriage).

21. 165 Tenn. 295, 54 S.W.2d 961 (1932); 11 TENN. L. REV. 198 (1933).

22. LA. CIV. CODE ANN. art. 161 (marriage expressly declared a nullity). See Lathan v. Edwards, 121 F.2d 183 (5th Cir. 1941); Oppenheim, *Recent Developments in the Succession Law of Louisiana*, 24 TULANE L. REV. 419 (1950); MISS. CODE ANN. § 2744 (1942) (court may remove disability after a year); N.Y. DOMESTIC RELATIONS LAW § 8 (court may remove disability after three years); PA. STAT. ANN. tit. 23 § 92 (1930) (expressly legitimates issue). See *In re* Thorn's Estate, 353 Pa. 603, 46 A.2d 258 (1946); *In re* Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L.R.A. 539 (1898); S.D. CODE § 14.0707 (1939) (14.0301 legitimates issue of all marriages null in law); VA. CODE ANN. § 20-119 (1950) (court may decree prohibition of remarriage and may revoke this decree after six months). For discussion of statutes restricting remarriage of divorced person, see 36 VA. L. REV. 665 (1950).

23. This would avoid a restrictive decision such as People *ex rel.* Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't 1947) (marriage of parents must be valid under Domestic Relations Law § 24, which is identical to marriage-of-parents provision of § 9567 of the Tennessee Code; child born prior to marriage not legitimated under N.Y. CIV. PRAC. ACT § 1135, which legitimates issue of specified annulled marriages); *cf.* Hayes v. Hayes, 184 Misc. 895, 54 N.Y.S.2d 853 (Sup. Ct. 1945). See Olmstead v. Olmstead, 190 N.Y. 458, 83 N.E. 569 (1908), *aff'd*, 216 U.S. 386, 54 L. Ed. 530, 30 Sup. Ct. 292 (1910) (New York will not recognize legitimation of issue under another state's laws if marriage void under New York law; affirmed as to property rights, the United States Supreme Court refusing to rule on New York's interpretation of its statutes). See Adams v. Adams, 154 Mass. 290, 28 N.E. 260, 13 L.R.A. 275 (1891); *cf.* Finley v. Brown, 122 Tenn. 316, 335-38, 123 S.W. 359, 364 (1909). See Session Laws of New York 1439 (McKinney 1951), for report of committee recommending amendment of the New York legitimation laws.

of marriages void *ab initio* and in the *Sanders* case the court refers with approval to the language in *Swanson v. Swanson*,[24] which advocates a liberal approach. In *Duggan v. Ogle*[25] the court stated, in referring to a fraudulent marriage procured without a license and performed by a false official, "It cannot be reasonably said that this statute [§ 8453, which legitimates the issue of an annulled marriage] protects all children born in all other marriages void *ab initio* and casts no benefit on this one."[26] The same language might be applied to the children of adulterous marriages.[27]

Since "the design was to relieve the innocent children, where there was a ceremonial marriage, of the drastic pre-existing consequences of the parental transgression . . . ,"[28] there seems to be no reason to continue the "determined" Tennessee policy, particularly in view of the statute's express refusal to validate the marriage itself, thus relieving the children of the "stain of bastardy" while continuing to punish the wrongdoing parents.[29]

EVIDENCE—UNREASONABLE SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE OBTAINED BY A CONCEALED RADIO TRANSMITTER

Defendant was arrested for a violation of the Narcotic Drugs Import and Export Act and released on bail. Two weeks later a government informer carrying a concealed radio transmitter entered the defendant's laundry and engaged him in conversation. The defendant did not know of the transmitter nor that a federal agent was overhearing their conversation by means of a receiving set placed several doors down the street. At the trial the agent was allowed to testify that defendant had admitted selling opium for a syndicate and that he intended to do so in the future. Defendant was convicted and he

24. 32 Tenn. 446, 454-55 (1852) ("the courts in the exposition of statutes conferring this right [of legitimation] are to give [statutes] at least a fair and reasonable, if not a liberal, construction.") *Cf.* Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979 (1947).

25. 25 Tenn. App. 467, 159 S.W.2d 834 (E.S. 1941).

26. See also Keith v. Pack, 182 Tenn. 425, 187 S.W.2d 618, 619 (1945) (distinguishing on grounds of public policy the upholding of marriage of a 13-year-old girl in another state to escape Tennessee law from refusal to recognize miscegenetic and adulterous marriages which are valid in another state); see also Diehl v. Jones, 170 Tenn. 217, 94 S.W.2d 47 (1935) (issue of marriage void *ab initio* for insanity of one party legitimate, otherwise § 8453 is "vain and useless"); Smith v. North Memphis Savings Bank, 115 Tenn. 12, 89 S.W. 392 (1905) (marital rights of common law wife); Note, 3 VAND. L. REV. 610 (1950).

27. See Thomas v. Murphy, 107 F.2d 268 (D.C. Cir. 1939), discussing repeal of similar District of Columbia statute.

28. Capraro v. Propati, 127 N.J. Eq. 419, 13 A.2d 318 (Ct. Err. & App. 1940).

29. "Often the only purpose served by the restriction [prohibiting remarriage] is to encourage adultery, or to permit the guilty party to avoid his obligations to an innocent second wife and her children, or to bastardize such children, or to remove all incentive to reformation. The guilty party often escapes the effect of the statute only to have the penalty visited upon his innocent issue, for after the wrongdoer's death the right to inherit from him is often called into question." Note, 36 VA. L. REV. 665, 672 (1950).

appealed, claiming this an unreasonable search and seizure under the Fourth and Fifth Amendments to the Constitution. *Held* (2-1),[1] affirmed. The Fourth and Fifth Amendments are not violated where the only "trespass" by a federal employee is the fact that he concealed his true identity to gain information. *United States v. On Lee,* 193 F.2d 306 (2d Cir. 1951), *rehearing denied,* 72 Sup. Ct. 665 (1952).

It is an established rule in the federal courts that evidence obtained by an unreasonable search and seizure in violation of the Fourth and Fifth Amendments to the Constitution is inadmissiable.[2] Obtaining information by trick or deceit, however, has never of itself been regarded as an illegal search and seizure.[3] If the information in the instant case had been obtained from the defendant on the street, there would have been no possible argument for its rejection except Justice Holmes' "dirty business" dissent in the *Olmstead* case.[4] The Supreme Court refused to overrule the *Olmstead* decision both in the *Goldstein*[5] and *Goldman*[6] cases, however, and the holding in that case appears to be firmly established.

The principal point of difference between the majority and the dissent in the instant case is whether or not an illegal entry was effected. The majority maintains that an entry secured by the mere concealment of true identity is not a sufficient "trespass" to constitute a violation of the Fourth Amendment.[7] On the other hand, Judge Frank's dissent contends that the combination of secrecy and the use of the concealed transmitter was a substantial "trespass."[8] If the government informer's presence could be called a "trespass," the case of *Neuslein v. District of Columbia*[9] would support Judge

1. Opinion by Swan, J. (Clark concurring); dissenting opinion by Frank, J.

2. See *e.g.,* Wolf v. Colorado, 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949); Lustig v. United States, 338 U.S. 74, 69 Sup. Ct. 1372, 93 L. Ed. 1819 (1949); United States v. Lefkowitz, 285 U.S. 452, 52 Sup. Ct. 420, 76 L. Ed. 877 (1932); Amos v. United States, 255 U.S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654 (1921); Weeks v. United States, 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914). See also 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

3. Goldman v. United States, 316 U.S. 129, 62 Sup. Ct. 993, 86 L. Ed. 1322 (1942); United States v. Mandel, 17 F.2d 270 (D. Mass. 1927); 3 WIGMORE, EVIDENCE § 841(1) (3d ed. 1940). In regard to state courts generally see 20 AM. JUR., EVIDENCE § 519 (1939).

4. *See* Olmstead v. United States, 277 U.S. 438, 470, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928) (dissenting opinion).

5. Goldstein v. United States, 316 U.S. 114, 122, 62 Sup. Ct. 1000, 86 L. Ed. 1312 (1942).

6. Goldman v. United States, 316 U.S. 129, 135, 62 Sup. Ct. 993, 86 L. Ed. 1322 (1942). But see *id.* at 136 (dissenting opinions of Stone and Frankfurter, J.J.).

7. 193 F.2d at 309.

8. *Id.* at 311, 316.

9. 115 F.2d 690 (D.C. Cir. 1940). Defendant taxi driver collided with a parked car and left his cab nearby. The police obtained his identification from the registration card and proceeded to his house. They entered without a search or arrest warrant and called for the defendant; he responded that he would join them shortly and did so a few minutes later. He stated that he was driving the cab at the time of the accident. He was then arrested, charged with driving while drunk and convicted. The Court of Appeals reversed, stating that the defendant's declaration was not admissible as it was procured by an unreasonable search and seizure.

Frank's position. However, there is no more a trespass in the instant case than there was in the *Goldman* case where information gained by means of a detectaphone was admitted in evidence.[10]

There is a second point of dispute between the judges in the principal case. Judge Swan reached the conclusion that as nothing "tangible" was taken by any federal officer, no "seizure" occurred.[11] He relies upon Chief Justice Taft's interpretation of the Fourth Amendment in the *Olmstead* case in which it was stated that the search is to be of material things—the person, his house, his papers or his effects.[12] But Judge Frank contended that the procurement of intangibles by invasion of a person's premises is a seizure within the protection of the Fourth Amendment.[13] This view is based upon the *Neuslein* case in which Judge Vinson[14] stated that the crucial thing found in that search was a declaration of fact by the defendant.[15] This interpretation, however, might well be stretching the amendment beyond the original intention.

Judge Frank raised an interesting question in his dissenting opinion—what will be the effect of new detecting devices on the right of privacy of the individual and on the Fourth and Fifth Amendments?[16] No one can foretell the bounds of modern scientific discovery and invention. Perhaps some day a house may be thoroughly searched by federal officers without even setting foot on the premises. Whether or not to allow the admission in evidence of information so obtained would present a difficult question of policy to the federal courts, for such action would seem to be just as much a violation of the Fourth Amendment as physically searching the premises after a forced entry. Therefore, argues the dissent, the courts must keep abreast of changing conditions by interpreting existing laws in the light of those conditions or the legislatures must enact new laws.

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10. Goldman v. United States, 316 U.S. 129, 62 Sup. Ct. 993, 86 L. Ed. 1322 (1942). In this case federal agents committed a trespass by entering the defendant's office at night and installing a listening apparatus in a small aperture in the partition wall of the adjoining office. However, the next afternoon the apparatus did not work. A detectaphone was then placed against the partition so that the agents could overhear everything that was said by the defendant. The court admitted the evidence thus obtained, stating that there had been no unreasonable search or seizure.

11. 193 F.2d at 308-09.

12. Olmstead v. United States, 277 U.S. 438, 463-66, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928). On wire-tapping see 8 WIGMORE, EVIDENCE § 2184b (3d ed. 1940).

13. 193 F.2d at 311-16.

14. The present Chief Justice of the Supreme Court was serving as an Associate Judge of the Court of Appeals for the District of Columbia at that time.

15. *See* Neuslein v. District of Columbia, 115 F.2d 690, 692 (D.C. Cir. 1940).

16. 193 F.2d at 315-17.

INCOME TAXATION—LIABILITY OF RECEIVER FOR CORPORATION—WHAT CONSTITUTES "OPERATION OF THE PROPERTY OR BUSINESS" UNDER SECTION 52?

In a suit against Apex Oil Corporation, a receiver was appointed in 1940 to take charge of a portion of the property of the company, consisting only of merchandise and accounts receivable. The remainder of the property (chiefly property mortgaged to secure Apex's bondholders) was retained by Apex and sold, the proceeds being paid directly to the bondholders. The buyer of this property thereafter used it in its own oil business. In 1943 Apex's charter was revoked by the state, and by 1944 the property in the hands of the receiver had been completely liquidated except for two suits which the receiver brought against the officers and directors for wrongful diversion of Apex's money, upon which there was substantial recovery in 1946 and 1948.[1] The Commissioner of Internal Revenue filed a claim against the receiver[2] for taxes on these recoveries under section 52 of the Internal Revenue Code.[3] The chancery court disallowed this claim and the Commissioner appealed. *Held,* affirmed. The activities of the receiver in prosecuting the two cases, receiving recovery therein and disbursing the proceeds thereof did not constitute "operating the property or business" of Apex Oil Corporation under section 52, and the receiver need not pay an income tax on the recovery. *Standard Oil Co. of Louisiana v. Apex Oil Corp.,* 244 S.W.2d 176 (Tenn. App. M.S. 1951).

A corporation in the hands of a receiver or other fiduciary may be subject to a federal income tax under two provisions of the Internal Revenue Code. Profits realized by the fiduciary in control of the assets may be held taxable under section 22(a). For example, the regulations indicate that this is true where there is a sale of assets by the fiduciary and he is a "liquidating agent" of the corporation or a "trustee in dissolution," as distinguished from a "trustee for the stockholders."[4] In the typical situation the corporation has found a buyer for its assets, and, in order to avoid capital gains taxes on their sale, conveys to a "trustee" or "assignee" who makes a declaration that he

1. Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344 (1948), affirmed a judgment in favor of the receiver in one of the two suits.

2. There is no constitutional objection to a federal tax upon a receiver, even though he is appointed by, and therefore an officer of, a state court. Buckley v. Comm'r, 66 F.2d 394 (2d Cir. 1933), *cert. denied,* 290 U.S. 698 (1933); State v. American Bonding & Casualty Co., 225 Iowa 638, 281 N.W. 172 (1938).

3. "Every corporation . . . shall make a return. . . . In cases where receivers, trustees in bankruptcy, or assignees are operating the property of business or corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns . . . shall be collected . . . from the corporations of whose business or property they have custody and control." INT. REV. CODE § 52(a).

4. U.S. Treas. Reg. 111, § 29.22(a)-20 (1943).

holds in trust for the stockholders and creditors and thereafter consummates the sale. The courts have been unwilling to countenance such a tax avoidance device where the form of the transaction conceals a sale of corporate assets by the corporation itself.[5] The theory by which such transactions are taxed under section 22(a) is clearly inapplicable in the instant case, however, since the recovery herein was not "arranged" in any sense by the corporation previous to the receivership. On the contrary, suits for recovery were contested over a period of several years after the receiver was appointed.

The theory of recovery urged by the Commissioner is based on section 52 of the Code,[6] which provides that where the receiver is "operating the property or business" of the corporation he stands in the stead of the corporation and therefore the tax is imposed on the corporation itself, not merely on the eventual recipients of the profits made. A provision similar to the present section 52 has been included in every Revenue Act since 1916,[7] but there have been few cases construing its coverage. In re *Heller, Hirsh & Co.*,[8] the first case, announced that the provision "was inserted in the act to meet the specified case of the profitable operation of the business of a corporation . . . for instance, the operation of the business of a railroad corporation by receivers or the operation of the business or a manufacturing corporation by a trustee in bankruptcy, etc." This interpretation would seem to indicate that purely liquidating operations such as collection of accounts and sales of operating equipment would not be taxed. Since that case, however, there have been periodic attempts to tax operations which were not strictly in accord with the purposes for which the corporation was organized; such attempts have met with fair success.[9] The Treasury Regulations, in fact, de-

5. Comm'r v. Court Holding Co., 324 U.S. 331, 65 Sup. Ct. 707, 89 L. Ed. 981 (1945); Louisville Property Co. v. Comm'r, 140 F.2d 547 (6th Cir. 1944), *cert. denied*, 322 U.S. 755 (1944); First Nat. Bank of Greeley v. United States, 86 F.2d 938 (10th Cir. 1936); Steinberger v. United States, 81 F.2d 1008 (9th Cir. 1936); Northwest Utilities Securities Corp. v. Helvering, 67 F.2d 619 (8th Cir. 1933), *cert. denied*, 291 U.S. 684 (1934); Hellebush v. Comm'r, 65 F.2d 902 (6th Cir. 1933); Caswell v. Comm'r, 36 B.T.A. 816 (1937); Boggs-Burnam & Co. v. Comm'r, 26 B.T.A. 988 (1932), *aff'd*, 71 F.2d 999 (6th Cir. 1934); *accord*, Whitney Realty Co. v. Comm'r, 80 F.2d 429 (6th Cir. 1935), *cert. denied*, 298 U.S. 668 (1936); *see* O'Sullivan Rubber Co. v. Comm'r, 120 F.2d 845, 847 (2d Cir. 1941). *But cf.* United States v. Cumberland Public Service Co., 338 U.S. 451, 70 Sup. Ct. 280, 94 L. Ed. 251 (1950), 3 VAND. L. REV. 829; Merchants Nat. Bldg. Corp. v. Comm'r, 45 B.T.A. 417 (1941), *aff'd*, 131 F.2d 740 (5th Cir. 1942); Fidelity National Bank and Trust Co. v. Comm'r, 37 B.T.A. 473 (1938); Smith v. Comm'r, 26 B.T.A. 1178 (1932).

6. See note 3 *supra*.

7. 39 STAT. 770 (1916); 40 STAT. 1081 (1919); 42 STAT. 259 (1921); 43 STAT. 287 (1924); 44 STAT. 45 (1926); 45 STAT. 808 (1928); 47 STAT. 188 (1932); 48 STAT. 697 (1934); 49 STAT. 1670 (1936); 52 STAT. 476 (1938); 53 STAT. 27 (1942).

8. 258 Fed. 208, 271 (2d Cir. 1919). *Cf.* language in Pennsylvania Cement Co. v. Bradley Contracting Co., 274 Fed. 1003, 1007 (S.D.N.Y. 1920), apparently misinterpreting the decision in *In re* Heller.

9. Pinkerton v. United States, 170 F.2d 846 (7th Cir. 1948); Louisville Property Co. v. Comm'r., 140 F.2d 547 (6th Cir. 1944); United States v. Metcalf, 131 F.2d 677 (9th Cir. 1942); State v. American Bonding and Casualty Co., 225 Iowa 638, 281 N.W. 172 (1938). *Contra: In re* Owl Drug Co., 21 F. Supp. 907 (D. Nev. 1937).

clare that even though the receiver be "engaged . . . only in marshaling, selling, and disposing of" the corporate assets, he is still operating the business.[10]

Whether or not the receiver is operating the business becomes most difficult to determine where the receiver is engaged chiefly in disposing of assets and reinvesting the proceeds. In such a case, the nature of the business for which the corporation was organized may be of primary importance.[11] Generally where the receiver is utilizing the physical plant of the corporation and its personnel and realizing a profit therefrom, there would seem to be little question that he is operating the property or business and thereby taxable as such.[12] The shortness of the period of operation does not change the nature of the receiver's activity,[13] not does the fact that he has not received specific authority to so act from the appointing court.[14]

The decision in the instant case accords with a common-sense interpretation of section 52. Only in a rather abstract sense can it be said that the recovery of money from defalcating officers is an element of the "operation" of a corporation's business or property. On the other hand, the decision ap-

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10. U.S. Treas. Reg. 111, § 29.52-2 (1943). The court in the instant case recognized the inconsistency of its decision with this regulation, but stated that the regulation was nonapplicable in its own terms, since the regulation concludes: "A receiver in charge of only part of the property of a corporation, however, as for example a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income." See, 244 S.W.2d at 180. But query, was not the receiver in possession of *all* of the corporate assets after the sale of the mortgaged property only one month after he was appointed and some time before the corporate charter was revoked? North American Oil Consolidated v. Burnet, 286 U.S. 417, 52 Sup. Ct. 613, 76 L. Ed. 1197 (1932), went into some detail on the policy behind the original provision now embodied in section 52(a), concluding that it applied only when the receiver was in full possession, in order to avoid a dual return by the corporation and the receiver. Obviously, sueh need not be feared here. See also, Buckley v. Comm'r, 66 F.2d 394 (2d Cir. 1933); Trojan Oil Co. v. Comm'r, 26 B.T.A. 659 (1932).

11. Pinkerton v. United States, 170 F.2d 846 (7th Cir. 1948); Louisville Property Co. v. Comm'r, 140 F.2d 547 (6th Cir. 1944); Comm'r v. Merchants Nat. Bldg. Corp., 131 F.2d 740 (5th Cir. 1942); United States v. Metcalf, 131 F.2d 677 (9th Cir. 1942); *In re* Owl Drug Co., 21 F. Supp. 907 (D. Nev. 1937); State v. American Bonding & Casualty Co., 225 Iowa 638, 281 N.W. 172 (1938).

12. United States v. Chicago & E.I. Ry., 298 Fed. 779 (N.D. Ill. 1924); Pennsylvania Cement Co. v. Bradley Contracting Co., 278 Fed. 1003 (S.D.N.Y. 1920) *semble; see, In re* Richter, 40 F. Supp, 758 (S.D.N.Y. 1941); *In re* Owl Drug Co., 21 F. Supp. 907 (D. Nev. 1937). The federal bankruptcy act contains a provision that receivers who conduct the business of the bankrupt may be allowed additional compensation, 52 STAT. 862 (1938), 11 U.S.C.A. § 76(a)(3) (1943), and a number of cases have construed it, with some strictness, against the receiver-claimant: *In re* Duke, 15 F.2d 92 (E.D. Mo. 1924); Jos. Capps, Inc. v. United States, 86 F. Supp. 712 (S.D. Cal. 1949); *In re* United States Products Corporation, Ltd., 57 F. Supp. 239 (N.D. Cal. 1944); *In re* Nixon, 23 F. Supp. 310 (W.D. Pa. 1938). Though these cases seem to go a long way in denying that the receiver is conducting the business of the bankrupt, it is doubtful that they are very persuasive authority in the instant situation. *Cf.* Judge Frank's warning in United Shipyards, Inc. v. Hoey, 131 F.2d 525 (2d Cir. 1942), *cert. denied*, 318 U.S. 791 (1943), against the lax application of analogies in tax matters.

13. Pinkerton v. United States, 170 F.2d 846 (7th Cir. 1948).

14. United States v. Metcalf, 131 F.2d 677 (9th Cir. 1942).

parently conflicts with an administrative ruling of long standing.[15] In view of the paucity of authority to date,[16] and the fact that this decision was rendered by a state court it must be observed that the question is by no means settled, and must await a more authoritative judgment by the higher federal courts.

INCOME TAXATION—NONBUSINESS EXPENSES—DEDUCTIBILITY OF ATTORNEYS' FEES

Plaintiff in 1940 paid a gift tax based upon his own evaluation of shares of stock which he gave to his wife and children.[1] In 1944 the Commissioner revalued the shares and notifed the taxpayer of a gift tax deficiency. Plaintiff sought a redetermination and through his attorney negotiated a settlement of his liability. The taxpayer paid his attorney for legal services involved in the controversy but did not deduct this amount in his income tax return. He later sought a refund on the ground that this sum was deductible under section 23(a)(2) as a nonbusiness expense. The district court allowed the deduction, but the court of appeals reversed. *Held,* affirmed. Amounts expended for legal services in contesting a gift tax deficiency are not deductible since they are neither for the production or collection of taxable income nor for the management, conservation or maintenance of property held for the production of taxable income. *Lykes v. United States,* 343 U.S. 118, 72 Sup. Ct. 585 (1952).

Before 1942 nonbusiness expenditures were not deductible although income from such sources was fully taxable;[2] section 23(a)(1) was restricted to the deduction of ordinary and necessary business expenses.[3] The *Higgins* case[4] so revealed the inequities resulting from this treatment that section

15. See note 10 *supra.*

16. See, *e.g.,* 8 MERTEN, LAW OF FEDERAL INCOME TAXATION § 47.29 (1942); 6 REMINGTON, BANKRUPTCY § 2798 (1937); Friedman, *Points to be Considered in Liquidating a Corporation,* FIFTH ANNUAL INSTITUTE ON FEDERAL TAXATION 747, 777-78 (New York University 1947).

1. The stock was that of a closely-held family corporation with little or no market activity.

2. See, *e.g.,* United States v. Pyne, 313 U.S. 127, 61 Sup. Ct. 893, 85 L. Ed. 1231 (1941); City Bank Farmers Trust Co. v. Helvering, 313 U.S. 121, 61 Sup. Ct. 896, 85 L. Ed. 1227 (1941); Higgins v. Comm'r, 312 U.S. 212, 61 Sup. Ct. 475, 85 L. Ed. 783 (1941); Van Wart v. Comm'r, 295 U.S. 112, 55 Sup. Ct. 660, 79 L. Ed. 1336 (1935).

3. "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." INT. REV. CODE § 23(a)(1)(A) (1948). See 3 ARK. L. REV. 194 (1949); 11 U. OF PITT. L. REV. 151 (1949); Legal Expenses, 1 CCH FED. TAX REP. ¶ 146.4017 (1951).

4. Higgins v. Comm'r, 312 U.S. 212, 61 Sup. Ct. 475, 85 L. Ed. 783 (1941). Here the taxpayer with large investments in stocks, bonds and real estate incurred considerable expense incident to the management of these affairs which he sought to deduct under § 23(a)(1). Included among his expenses were office rent, salaries of employees, etc. How-

23(a)(2) was added to the Code, providing a deduction for certain types of nonbusiness expenses.[5] However, personal expenses continued, as in the past, to be nondeductible.[6] At the outset the new amendment was strictly construed and narrowly applied.[7] Although the *Bingham* case[8] established that it was to be construed *in pari materia* with section 23(a)(1) and has been cited as authority for a liberal interpretation of the statute,[9] the extent to which legal expenses were deductible remained uncertain.[10]

In the instant case the Supreme Court expressly stated that legal expenses arising from gift tax controversies are not deductible because such expenses are personal.[11] Furthermore, the opinion indicates a limitation on the liberality with which the statute was being construed by the lower courts.

Nonbusiness deductions are allowed under the theory that the expenses of producing taxable income should not be a part of the tax base; that one should be taxed only on net income.[12] Thus, to come within the statute an expense must be proximately related to the pursuit of taxable income[13] or to the preservation of specific property held for the production of taxable income.[14] Consequently, the bare possibility that the taxpayer as contended in the principal case may realize income in the future as a result of the gift does not invoke the deduction.[15] Plaintiff's argument that contesting the claim represents

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ever, the Court held that such activities did not constitute a business within the meaning of the statute and refused to allow the deduction. This case is said to have been the motivating factor in the passage of § 23(a)(2). McDonald v. Comm'r, 323 U.S. 57, 61, 65 Sup. Ct. 96, 89 L. Ed. 68 (1944).

5. "In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." INT. REV. CODE § 23(a)(2).

6. See 4 MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.12 (Supp. 1951); Notes, 151 A.L.R. 1340, 1348 (1944), 19 U. OF CIN. L. REV. 350 (1950), 97 U. OF PA. L. REV. 251 (1948).

7. See, *e.g.*, McDonald v. Comm'r, 323 U.S. 57, 65 Sup. Ct. 96, 89 L. Ed. 68 (1944).

8. Trust of Bingham v. Comm'r, 325 U.S. 365, 65 Sup. Ct. 1232, 89 L. Ed. 1670, 163 A.L.R. 1175 (1945) (expenses of income tax litigation held deductible).

9. Lykes v. United States, 84 F. Supp. 537 (S.D. Fla. 1949). See, *e.g.*, Williams v. McGowan, 152 F.2d 570 (2d Cir. 1945); Stoddard v. Comm'r, 152 F.2d 445 (2d Cir. 1945).

10. On precisely the same question considered here the court of appeals reached a conclusion in accord with the instant decision but contrary to the ruling in the district court. Cobb v. Comm'r, 173 F.2d 711 (6th Cir. 1949).

11. 72 Sup. Ct. at 587.

12. See Brodsky & McKibbin, *Deduction of Non-Trade or Non-Business Expenses*, 2 TAX L. REV. 39, 40 (1946), for a discussion of the theory and the legislation whereby it was effected.

13. See, *e.g.*, Williams v. McGowan, 152 F.2d 570 (2d Cir. 1945); Josephs v. Comm'r, 8 T.C. 583 (1947); Tyler v. Comm'r, 6 T.C. 135 (1946); Marshall v. Comm'r, 5 T.C. 1032 (1945). See generally Lowndes, *Current Constitutional Problems in Federal Taxation*, 4 VAND. L. REV. 469 (1951).

14. See, *e.g.*, Trust of Bingham v. Comm'r, 325 U.S. 365, 65 Sup. Ct. 1232, 89 L. Ed. 1670, 163 A.L.R. 1175 (1945); Bagley v. Comm'r, 8 T.C. 130 (1947); Cammack v. Comm'r, 5 T.C. 467 (1945).

15. The taxpayer argued that increased interest in the company by the donee as a result of the gift would enhance the income potentialities of the stock retained by the

a conservation of income-producing property by protecting it against liens which would result from such claims is likewise insufficient to bring the expense within the terms of the statute.[16] If that were the case, any legal expense in defending against a claim might be deductible.

It is a settled rule that deductions are to be construed strictly since they are only a matter of grace.[17] It would appear, therefore, that the existing legislation definitely precludes such a deduction as that claimed here, and the decision in the instant case conforms therewith.

It has been suggested that new legislation is needed extending the non-business deduction to include all tax litigation, particularly in the light of the "arbitrary" nature of some tax assessment.[18] However, it is difficult to see how such an extension can be justified merely as to tax litigation alone. Litigation of any sort may be arbitrary, and no matter how summarily the action is dismissed the counsel fees must be paid. It is specifically stated in section 24(a)(1) that personal expenses are not deductible.[19] In the light of such a policy further legislation appears unlikely.

SALES—IMPLIED WARRANTY—ACTION FOR PERSONAL INJURY BY EMPLOYEE OF VENDEE OF CHATTEL

Plaintiff's husband was killed as a result of the disintegration of a grinding wheel purchased by his employer from the defendant. Plaintiff sued under a wrongful death statute with a second count in contract for a breach of implied warranty. Defendant demurred to the second count. *Held,* demurrer overruled. The grinding wheel carried with it an implied warranty of merchantability and such warranty extended to workmen of the vendee when injured by the wheel in its ordinary use because of latent defects. *Di Vello v. Gardner Machine Co.,* 102 N.E.2d 289 (Ohio C.P. 1951).

Breach of warranty was originally a tort action for the breach of a duty assumed by the vendor. Perhaps, because it usually arose in cases involving

donor through improved management by the donee and that § 23(a)(2) was therefore applicable. The Court, however, found that the evidence did not warrant a finding that the gift was made with this intent, particularly since the taxpayer did not seek to deduct full amount of the gift. 72 Sup. Ct. at 588.

16. See, *e.g.,* Willmott v. Comm'r, 2 T.C. 321 (1943). The regulations also cover this situation. U.S. Treas. Reg. 111, § 29.23(a)-15(b) (1943), as amended by T.D. 5513, 1946-1 CUM. BULL. 61, 62.

17. "All deductions are a matter of legislative grace, and to obtain the benefit thereof, the taxpayer must he able to show that the claimed deduction falls clearly within one of the categories of allowable deductions defined in the statute." GLASSMOYER & McDOWELL, LEGAL PROBLEMS IN TAX RETURNS 74 (1950).

18. Lykes v. United States, 84 F. Supp. 537, 539 (S.D. Fla. 1949).

19. INT. REV. CODE § 24(a)(1).

a contract, it came to be looked upon as a contract action.[1] Out of this grew the requirement of privity of contract in actions for breach of warranty.

Early American attempts to disregard the requirement of privity between the ultimate user or consumer and the original vendor or manufacturer were defeated in the interest of protecting our young and growing commercial society.[2] Today the ultimate consumer is receiving more protection as evidenced by the abolition of the privity requirement in negligence cases[3] and the growing number of governmental regulations and restrictions.

Many of the courts have come to recognize an exception to the privity requirement in breach of warranty cases when dealing with beverages and food.[4] The various legal devices adopted to bridge this privity gap when dealing with food and beverages include agency,[5] assignment,[6] third party beneficiary contract,[7] a warranty running with the sale,[8] placing the goods on the market as a representation that they are suitable,[9] and express statements in advertising as forming a contract between the manufacturer and the ultimate purchaser.[10] A few cases have also held that public policy demands that a warranty be imposed by law regardless of privity,[11] while still others say the privity requirement is unnecessary.[12]

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1. PROSSER, TORTS § 83 (1941). See Note, 29 B.U.L. REV. 107 (1949).
2. Note, 29 B.U.L. REV. 107 (1949).
3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 698 (1916). RESTATEMENT, TORTS § 395 (1934).
4. "Privity states (including D.C.), 18; non-privity states, 12; uncertain, 19." DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 2.1, n.3 (1951).
5. Stave v. Giant Food Arcade, 125 N.J.L. 512, 16 A.2d 460 (1940) (where a woman purchased pineapple juice that made the whole family sick, husband could sue on agency doctrine but child had no action).
6. Hunter-Wilson Distilling Co. v. Forest Distilling Co., 181 F.2d 543 (3d Cir. 1950) (defendant warranted whiskey stored in his warehouse against excess outage, and plaintiff bought the whiskey from party who stored it receiving warranty by assignment, court held assignment valid and defendant liable on his warranty).
7. Singer v. Zabelin, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941) (daughter of purchaser of spoiled salmon allowed to recover from vendor on theory warranty was made for her benefit); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (court held where a bakery sells to grocer knowing he purchased to resell, an implied warranty arose for the benefit of ultimate consumer).
8. Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937) (plaintiff found dead mouse in his coca-cola and court held in food case manufacturer is under a duty to see to it his products are wholesome and an implied warranty runs with the sale); *cf.* Singer v. Zabelin, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941).
9. Coca-Cola Bottling Works of Greenwood v. Simpson, 158 Miss. 390, 130 So. 479 (1930) (plaintiff found parts of mouse or rat in his coca-cola and court held a manufacturer of a drink put on the market for human consumption impliedly warrants the drink fit for that purpose).
10. Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762, 764 (1932) (plaintiff found glass in a Baby Ruth candy bar and court said defendant, through nationwide advertising, had caused the plaintiff to rely on the trade name "Baby Ruth," and "it is as though the consumer had bought directly from the manufacturer").
11. "Here the liability of the manufacturer and vendor is imposed by operation of law as a matter of public policy for the protection of the public, and is not dependent on any provision of the contract, either express or implied." Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828, 831-32 (1942).
12. "To say that in the case at bar there was an implied warranty to Charles Haut who purchased the rabbits for food but that it did not extend to his wife and

The courts have been reluctant in extending these exceptions to anything other than the implied warranty in foodstuffs. However, most writers[13] feel public policy today demands an abolition of the privity requirement in all sales of goods. A few cases seem to indicate there is a recent trend toward such a goal.[14] One such case even censured the defendant for raising privity as a defense.[15] In earlier cases, not involving food or drugs, where the vendee or a member of his family sued the manufacturer rather than the immediate vendor, the courts were able to establish privity through direct statements by the manufacturer to the ultimate purchaser.[16] The instant case, however, goes a step further by allowing the vendor-manufacturer to be sued on behalf of a decedent who was neither a vendee nor a member of his family but only an employee of the purchaser. This gap of privity was bridged by use of the third party beneficiary doctrine.[17] It has been said that this is the best

children in our opinion does not make sense." Haut v. Kleene, 320 Ill. App. 273, 50 N.E.2d 855, 857-58 (1943).

13. Clark, *Let the Maker Beware,* 19 ST. JOHN'S L. REV. 85 (1945); Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles,* 37 MICH. L. REV. 1 (1938); Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees,* 24 VA. L. REV. 134 (1937); Llewellyn, *On Warranty of Quality and Society: II,* 37 COL. L. REV. 341 (1937). But see, Leidy, *Another New Tort,* 38 MICH. L. REV. 964 (1940) (suggests no need for an extension of warranty actions to include cases without privity because the negligence doctrine is broad enough to cover these cases).

14. In Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946), the plaintiff was the widow of deceased who was killed when wire rope manufactured by defendant broke allowing a scaffold to fall. Defendant had printed a manual describing the construction and strength of their rope. There was no privity between deceased and defendant, since the rope was purchased by deceased from an intermediary. Held, the manual was an express warranty by the manufacturer to the ultimate vendee and no privity need be shown. In Haut v. Kleene, 320 Ill. App. 273, 50 N.E.2d 855 (1943), the plaintiff bought rabbits from defendant. The rabbits were prepared by plaintiff's wife who had cut her finger about a week before. When the rabbits were cooked they were eaten by plaintiff, his wife and their two children. Neither the children nor plaintiff felt any ill effects, but the wife died of tularemia, apparently contracted when preparing the rabbits. Defendant argued the only warranty was that of wholesomeness to eat and also that there was no privity. Held, the warranty included handling the rabbits and extended to members of vendee's family. In Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931), the manufacturer mislabeled clover seeds as alfalfa seeds. Held, this label was an express warranty by the manufacturer to the ultimate user. In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932), the manufacturer gave its dealers pamphlets to distribute to prospective buyers. The pamphlet described the car as having a "shatter-proof" windshield. Plaintiff purchased the car and lost an eye when a small stone hit the windshield and shattered it. Held, the pamphlet was an express warranty by the manufacturer to the ultimate purchaser.

15. In a suit, on behalf of an infant injured when a vaporizor set fire to his bedding, the court answered the defendant's plea of no privity by saying,"[W]e feel impelled to state that it is surprising that Walgreen Company serving the people of Chicago in many stores, should have seen fit to advance such a defense." Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595, 602 (1946).

16. See Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W.2d 859 (1931); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932).

17. "The only controversy is as to the basis of the liability, some holding that the implied warranties are made for the benefit of subpurchasers and form the basis of liability, and others holding that there must be proof of negligence to impose a liability." Instant case, 102 N.E.2d at 293, citing Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

doctrine for overcoming the privity rule[18] since the warranty imposed by law upon the manufacturer when he sells his product could be intended for the benefit of but one person, the ultimate user, because he is the only one who will be injured by a breach of the warranty. The Uniform Commercial Code[19] has adopted this third party beneficiary doctrine. If the Commercial Code is accepted by the states, the instant case will represent the new law in regard to privity in warranty actions.

TAXATION—GIFT TAX—RENUNCIATION BY HEIR AS TAXABLE TRANSFER

Decedent, who died before executing a will which had been drafted pursuant to his instructions, left surviving him petitioners (his wife and daughter) and a son by an earlier marriage. Desiring to carry out his expressed wishes, petitioners filed "renunciations" of their intestate shares in decedent's estate and the entire estate was distributed to the son.[1] *Held,* title to their shares vested in petitioners by operation of law immediately upon decedent's death and the "renunciations" constituted taxable gifts to the son under the gift tax provisions of the Internal Revenue Code.[2] Unlike a donee under a will, an heir has no power to prevent by renunciation the vesting of title in himself. *Hardenbergh v. Comm'r,* 17 T.C. 166 (1951).

It is well settled that a devisee or legatee under a will may renounce his interest and prevent the passage of title to himself, provided he has not already accepted.[3] This is true in most states even though by such renunciation he defeats his judgment creditors, his motive being immaterial in the absence

18. "Of the various contractual theories which the courts have employed to remove the privity rule, probably the third party beneficiary doctrine is the most justifiable, but it is also based upon a legal fiction." Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees,* 24 VA. L. REV. 134, 156 (1937). For a discussion and application of the doctrine, see Singer v. Zabelin, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941).

19. "A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty." UNIFORM COMMERCIAL CODE § 2-318 (Proposed Final Draft 1950).

1. The petitioners were independently wealthy at the time of the decedent's death.

2. INT. REV. CODE, §§ 1000(a), 1000(b). These provisions tax transfers of property by gift, whether direct or indirect.

3. *E.g.,* Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933); Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20, 27 A.L.R. 465 (1922), 6 MINN. L. REV. 608; Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1940); Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1908); Townson v. Tickell, 3 Bar. & Al. 31, 106 Eng. Rep. 575 (K.B. 1819); ATKINSON, WILLS 725 (1937); 1 JARMAN, WILLS 565 (8th ed., Jennings, 1951); 4 PAGE, WILLS §§ 1402, 1408 (3d ed. 1941); see Note, 27 A.L.R. 472 (1923). *Contra: In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1941); Daniel v. Frost, 62 Ga. 697 (1879).

of fraud or collusion.[4] The renunciation is said to relate back to the death of the testator, and title is regarded as never having passed to the donee.[5] The rule is based on the theory that under a will, title passes not by operation of law but by the voluntary act of the testator as a gift, and a gift cannot be forced upon a donee.[6] The rule apparently originated in cases in which the testator attached some burden as a condition of enjoyment of the gift.[7]

However, when the owner of property dies without a will, under the common law the cases almost unanimously hold that title to his property passes to his heir by operation of law, and no voluntary act on the part of the subsequent owner after the ancestor's death is of any legal significance.[8] It is said that the law casts the title upon the heir and he cannot prevent its vesting by renouncing after the death of the ancestor.[9] Many of these cases have involved the rights of creditors of the renouncing heir, but the rule has been applied where no such interests were affected.[10] While most of the cases have concerned descent of land,[11] the courts have applied the rule to personalty as well, one expressly rejecting any distinction.[12]

The doctrine apparently stems from statements of English authorities that "an heir . . . is he upon whom the law casts the estate immediately at the death of the ancestor"[13] and has been adopted and applied by the courts

4. *E.g.*, Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20, 27 A.L.R. 465 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502, 19 L.R.A. (N.S.) 595 (1907); ATKINSON, WILLS 725 (1937); 4 PAGE, WILLS § 1405 (3d ed. 1941). *Contra: In re* Kalt's Estate, 16 Cal. 2 d. 807, 108 P.2d 401 (1941); Daniel v. Frost, 62 Ga. 697 (1879).

5. *E.g.*, Schoonover v. Osborne and Bradford v. Calhoun, note 4 *supra*; ATKINSON, WILLS 725 (1937); 4 PAGE, WILLS § 1404 (3d ed. 1941).

6. Townson v. Tickell, 3 Bar. & Al. 31, 106 Eng. Rep. 574 (K.B. 1819); ATKINSON, WILLS 725 (1937); 4 PAGE, WILLS § 1402 (3d ed. 1941).

7. See 4 PAGE, WILLS § 1403 (3d ed. 1941).

8. Maxwell v. Comm'r, P-H 1952 TC ¶ 17, 196 (1952); Hardenbergh v. Comm'r, 17 T.C. 166 (1951); Watson v. Watson, 13 Conn. 83 (1839); Payton v. Monroe, 110 Ga. 262, 34 S.E. 305 (1899); Coomes v. Finegan, 233 Iowa 448, 7 N.W.2d 729 (1943), 28 IOWA L. REV. 700, 92 U. OF PA. L. REV. 105; Bostian v. Milens, 239 Mo. App. 555, 193 S.W.2d 797, 170 A.L.R. 424 (1946), 12 Mo. L. REV. 67 (1947); 4 PAGE, WILLS § 1401 (3d ed. 1941); 2 WASHBURN, REAL PROPERTY § 1829 (6th ed., Wurts, 1902); WILLIAMS, REAL PROPERTY 118-19 (24th ed., Eastwood, 1926); *see* Dueringer v. Klocke, 86 Misc. 404, 149 N.Y. Supp. 332, 335 (Co. Ct. 1914); Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588, 591 (1945); McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197, 202 (M.S. 1939). See also 2 BL. COMM. *201; Co. LITT. *15(b).

9. Coomes v. Finegan, 233 Iowa 448, 7 N.W.2d 729 (1943), 28 IOWA L. REV. 700, 92 U. OF PA. L. REV. 105; 2 WASHBURN, REAL PROPERTY § 1829 (6th ed., Wurts, 1902). See WILLIAMS, REAL PROPERTY 118-19 (24th ed., Eastwood, 1926).

10. Watson v. Watson, 13 Conn. 83 (1839) (husband's disclaimer of tenancy by the curtesy after death of wife could not prevent estate from vesting in him, or put it in her heirs at law.)

11. Maxwell v. Comm'r, P-H 1952 TC ¶ 17, 196 (1952); Hardenberg v. Comm'r, 17 T.C. 166 (1951); Bostian v. Milens, 239 Mo. App. 555, 193 S.W.2d 797, 170 A.L.R. 424 (1946), 12 Mo. L. REV. 67 (1947).

12. Bostian v. Milens, note 11 *supra* (equitable title to personalty vests immediately in heir).

13. 2 BL. COMM. *201; Co. LITT. *15(b). These authorities are cited by WATKINS, LAW OF DESCENTS *25, *34 (1819). WILLIAMS, REAL PROPERTY 118-19 (24th ed. Eastwood, 1926) cites Watkins on this point and then adds, "No disclaimer that he [the heir] might make would have any effect. . . ." For this he gives no authority. This statement is

in this country.[14] In a recent decision similar to the instant case, it was held that a beneficiary under a will who was also the sole heir of the testator could renounce his legacy under the will, but that the renunciation merely vested the estate in him as heir, and his relinquishment of this interest was taxed as a gift to the next taker.[15]

Some courts have held that an expectant heir can transfer his expectancy before the death of the ancestor even though he thereby defeats his judgment creditors; and a few states have followed this rule even in the case of a judgment creditor who obtained his judgment before the transfer.[16] The transfer must be in good faith and for fair and adequate consideration, however. And in Louisiana, a civil law state, the heir may renounce the inheritance after the intestate's death, just as may a legatee.[17]

The reasons underlying the real property law distinctions between the power of a devisee under a will and an heir to renounce afford a poor basis for solving present-day problems of creditors' rights and taxation law.[18] There appears no valid reason why a beneficiary under a will should be allowed to renounce a gift and defeat his creditors, and at least a few courts have adopted the view that he cannot do so.[19]

Where taxation is concerned, as in the instant case, whether or not the renunciation of a death gift should be treated as a taxable transfer by the renunciator may be a question on which reasonable minds may differ. But there seems to be no realistic justification for treating intestate renunciations as gifts and testate renunciations not as gifts. As Mr. Justice Frankfurter said in *Helvering v. Hallock:* "The importation of . . . distinctions and controversies from the law of property precludes a fair and workable tax system. . . . Distinctions which originated under a feudal economy when land dominated social relations are particularly irrelevant in the application of tax measures now so largely directed toward intangible wealth."[20]

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cited by 2 WASHBURN, REAL PROPERTY § 1829 (6th ed., Wurts, 1902). For a good analysis of this point see 92 U. OF PA. L. REV. 105 (1943).

14. See note 8 *supra.*

15. Maxwell v. Comm'r, P-H 1952 TC ¶ 17, 196, 1952).

16. Richey v. Rowland, 130 Iowa 523, 107 N.W. 423 (1906); Hale v. Hollon, 90 Tex. 427, 39 S.W. 287 (1897); see 28 IOWA L. REV. 700, 701 (1943).

17. "No one can be compelled to accept a succession, in whatever manner it may have fallen to him, whether by testament or the operation of law. He may therefore accept or renounce it" LA. CIV. CODE ANN., art. 977 (1945).

18. "The inescapable rationale . . . was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers which are too much akin to testamentary dispositions not to be subjected to the same excise. . . . It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property laws." Frankfurter, J., in Helvering v. Hallock, 309 U.S. 106, 112, 60 Sup. Ct. 444, 84 L. Ed. 604, 125 A.L.R. 1368 (1940), referring to the Supreme Court's decision in Klein v. United States, 283 U.S. 231, 51 Sup. Ct. 398, 75 L. Ed. 996 (1931).

19. *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940); Daniel v. Frost, 62 Ga. 697 (1879).

20. 309 U.S., *supra* note 18, at 119.

TORTS—IMMUNITY BETWEEN SPOUSES FOR PERSONAL INJURY—APPLICATION TO WRONGFUL DEATH ACTION

Defendant shot and killed his wife and was later declared insane. Under the wrongful death statute, his step-daughter successfully maintained an action against his guardian from which defendant appealed. *Held,* affirmed. Where the husband has destroyed the marital relationship by killing his wife the reasons for his common law immunity from suit by his spouse no longer exist; moreover, a wrongful death statute creates a new and independent cause of action in the statutory beneficiary of the deceased. *Deposit Guaranty Bank & Trust Co. v. Nelson,* 54 So.2d 476 (Miss. 1951).

At common law no action was permitted between husband and wife for personal torts.[1] When the Married Women's Acts were adopted, it was held that tort actions between spouses as to property rights were allowable,[2] but by the view of the majority these acts did not remove the common law immunity as to personal tort actions.[3] Much depends, however, upon the wording of the individual statute. Some courts have construed their statutes as abrogating the common law immunity and have allowed such actions for intentional torts;[4] others have gone even further, allowing actions for negligent torts.[5]

Those courts which follow the majority rule usually base the immunity on the ground that domestic tranquillity is fostered by prohibition of such

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1. MADDEN, PERSONS AND DOMESTIC RELATIONS § 69 (1931); PROSSER, TORTS 898 (1941); Haglund, *Tort Actions Between Husband and Wife,* 27 GEO. L.J. 697 & 893 (1931) (an exhaustive study); McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930); Notes, 25 MARQ. L. REV. 89 (1941), 26 NEB. L. BULL. 442 (1948), 28 N.C.L. REV. 109 (1949); Legis., 12 ST. JOHN'S L. REV. 156 (1937).

2. Wilkinson v. Wilkinson, 147 La. 315, 85 So. 794 (1920); Lombard v. Morse, 155 Mass. 136, 29 N.E. 205, 4 L.R.A. 273 (1891).

3. Thompson v. Thompson, 218 U.S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L.R.A. (N.S.) 1153 (1910); Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Cohen v. Cohen, 66 F. Supp. 312 (N.D. Tex. 1946); Cubbison v. Cubbison, 73 Cal. App.2d 437, 166 P.2d 387 (1946); Corren v. Corren, 47 So.2d 774 (Fla. 1950); Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Wright v. Davis, 53 S.E.2d 335 (W. Va. 1949). *Contra:* Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Comm. 42, 89 Atl. 889, 52 L.R.A. (N.S.) 185 (1914); Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657, 1916B L.R.A. 907 (1915); King v. Gates, 231 N.C. 537, 57 S.E.2d 765 (1950); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932). See Notes, 89 A.L.R. 118 (1934), 160 A.L.R. 1406 (1946). See 1945 WIS. L. REV. 463.

4. Johnson v. Johnson, 201 Ala. 41, 77 So. 335, 6 A.L.R. 1031 (1917); Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 52 L.R.A. (N.S.) 185 (1914); Gilman v. Gilman, 78 N.H. 4, 95 Atl. 657, 1916 L.R.A. 907 (1915); Fiedeer v. Fiedeer, 42 Okla. 124, 140 Pac. 1022, 52 L.R.A. (N.S.) 189 (1914). See Notes, 89 A.L.R. 118 (1934), 160 A.L.R. 1406 (1946).

5. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479 (1923); Wail v. Pierce, 191 Wis. 202, 209 N.W. 475, 48 A.L.R. 276 (1926).

actions;[6] but this view has been severely criticized.[7] In the instant case there is no family circle left to protect, and therefore the court saw no logical reason for following this rule.[8] Nevertheless, other courts have continued to follow the immunity rule even where there no longer is any possibility of a united family. These courts have refused to allow a tort action where the husband and wife are both dead,[9] where the wife is dead and the husband is in the penitentiary,[10] where the tort occurred during coverture and the action is brought after divorce,[11] where husband and wife were permanently separated at time of the tort and the suit is brought after the death of both,[12] and even where the marriage has been annulled.[13]

In the instant case if the wife had lived, by the majority rule she would not have been able to sue the husband. Therefore, in a state which has a survival statute no action would lie, since under this type of statute the plaintiff's rights are derivative from the rights of the deceased.[14] Under a survival statute it was recently held in West Virginia[15] that "as the wife . . . could not have maintained an action at law against her husband for damages for her injury if it had not resulted in her death, her personal representative cannot maintain this action against his personal representative for damages for her wrongful death."[16] The deceased's representative is limited to the rights which the deceased had and those rights only.[17]

However, in the instant case the statute is construed as a wrongful death statute creating a new cause of action, and the court holds that the wife's personal disability to sue does not apply to the beneficiaries, saying that the "disability of the wife to sue is one personal to her, and does not inhere in the tort itself."[18] In a recent Pennsylvania case,[19] it was similarly

6. PROSSER, TORTS 903 (1941).

7. Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

8. *Accord,* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951) (husband and wife dead); Robinson's Adm'r v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920) (wife dead); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663, 104 A.L.R. 1267 (1936) (both dead).

9. Dishon's Adm'r v. Dishon's Adm'r, 187 Ky. 497, 219 S.W. 794, 13 A.L.R. 625 (1920).

10. Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936).

11. Strom v. Strom, 98 Minn. 427, 107 N.W. 1047, 6 L.R.A. (N.S.) 191 (1906).

12. Wright v. Davis, 53 S.E 2d 335 (W. Va. 1949).

13. Callow v. Thomas, 332 Mass. 550, 78 N.E.2d 637 (1948).

14. PROSSER, TORTS 949 (1941).

15. Wright v. Davis, 53 S.E.2d 335 (W. Va. 1949).

16. *Id.* at 336.

17. *Accord,* Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926); Wilson v. Brown, 154 S.W. 322 (Tex. Civ. App. 1912).

18. 54 So.2d at 477. *Accord,* Fitzpatrick v. Owens, 124 Ark. 167, 186 S.W. 832, 1917B L.R.A. 774 (1916); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663, 104 A.L.R. 1267 (1936).

19. Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663, 104 A.L.R. 1267 (1936).

held that it was the intent of the wrongful death statute "to create a new right and to compensate for a loss independent of that suffered by the deceased."[20] Not all courts have accepted this theory and it is significant that most defenses which would have existed against the decedent are still available against the beneficiaries.[21]

The decision shows a dissatisfaction with the immunity rule and is an attempt to limit it as far as possible. It further indicates a trend away from holding to the marital immunity after the family has ceased to exist.[22] It may be that this rule will be extended to allow tort actions in other fact situations where the family relationship has been previously destroyed.

WILLS—CONTEST OF PROBATE—STANDING OF JUDGMENT CREDITOR OF DISINHERITED HEIR

Plaintiff, a judgment creditor of her divorced husband, brought an action to contest a will by which the husband was disinherited. Plaintiff relied on a statute which provided that "any interested person" may contest the probate of a will. From an order sustaining a demurrer, plaintiff appeals. *Held,* reversed. A judgment creditor of a disinherited heir is a "person interested" within the meaning of the statute, and is entitled to contest the will. In re *Harootenian's Estate,* 238 P.2d 992 (Cal. 1951).

In most jurisdictions, either by statute or common law, the right to contest the probate of a will is limited to "any person interested" adversely to the will or "any person aggrieved" by its admission to probate; that is, one who has an interest of a pecuniary nature in the devolution of the testator's estate which may be impaired or defeated by the probate of the will, or benefited by setting it aside.[1] There is considerable conflict, however, as to what degree of pecuniary interest is sufficient to bring a person within the rule.

It seems clear that persons who can show that the property of the alleged testator would go directly to them if the will were declared void are "interested persons." This group would include heirs, next of kin and legatees and devisees under a prior will.[2] On the other hand, in no state can a person

20. 184 Atl. at 664.

21. Gamble, *Action for Wrongful Death in Tennessee,* 4 VAND. L. REV. 289, 301 (1951); Wettach, *Wrongful Death and Contributory Negligence,* 16 N.C.L. REV. 211 (1938).

22. It is significant to note that the court rendering this decision decided Hewellette v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891), the first case in this country creating immunity within the family aside from the spousal relationship.

1. Lee v. Keech, 151 Md. 34, 133 Atl. 835, 836, 46 A.L.R. 1488 (1926). See, *e.g.,* ALA. CODE ANN. tit. 61 §§ 52, 64 (1940); CAL. PROB. CODE ANN. § 370 (1949); OHIO GEN. CODE ANN. § 10504-32 (Supp. 1950); *In re* Duffy's Estate, 228 Iowa 426, 292 N.W. 165, 168 (1940) (common law).

2. ATKINSON, WILLS § 190 (1937); 2 PAGE, WILLS §§ 610, 612 (3d ed. 1941). A

whose interest in the testator's property is a mere expectancy set a will aside, such as an heir who might later inherit from the person disinherited.[3] Between these two groups is a class of persons, characterized as claiming not directly but through an heir, whose right to contest is unsettled. Examples of this group are general creditors, judgment creditors and trustees in bankruptcy[4] of an heir.

By the great weight of authority a general creditor of a disinherited heir cannot attack the will. The basis for this view is that such a creditor has no interest in the testator's property itself which would be defeated by probate, but only a personal right against the heir.[5] In denying a general creditor the right to contest, these courts make no distinction between a solvent or insolvent debtor, but consider the heir's election not to contest as binding upon the creditor.[6] At least one court, however, has allowed such a contest, comparing the heir's refusal to contest to a fraudulent conveyance by a debtor.[7]

A judgment creditor of an heir, who would have a lien on the property if inherited, is, by the majority view, allowed to contest a will disinheriting the debtor.[8] The usual theory advanced in support of this position is that the creditor's apparent lien is an interest in the property itself which will attach at the time of the testator's death, and which will be defeated by the probate of a valid will.[9] A minority of jurisdictions deny the judgment creditor a right of contest, on the ground that the heir has only an expectancy

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legatee or devisee under a prior will must show that he takes more under it than under the contested will. Conner v. Brown, 9 Harr. 529, 3 A.2d 64 (Del. Super. Ct. 1938).

3. 2 PAGE, WILLS § 615 (3d ed. 1941). Nor can one to whom the heir has assigned his prospective interest contest, the theory being that such an expectancy is not capable of being transferred. Burk v. Morain, 223 Iowa 399, 272 N.W. 441, 112 A.L.R. 79 (1937).

4. Another person who might be included in this group is the grantee of an heir, where the heir's interest is purchased after the testator's death, contest usually being allowed in this situation. See, *e.g.*, Elmore v. Stevens, 174 Ala. 228, 57 So. 457 (1912); *In re* Thompson's Will, 178 N.C. 540, 101 S.E. 107 (1919); ATKINSON, WILLS § 190 (1937); and cases cited in 2 PAGE, WILLS § 617 (3d ed. 1941).

5. Smith v. Bradstreet, 16 Pick. 264 (Mass. 1833); *In re* Shepard's Estate, 170 Pa. 323, 32 Atl. 1040 (1895). See also Lockard v. Stephenson, 120 Ala. 641, 24 So. 996 (1899); Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541 (1906); *In re* Langevin's Will, 45 Minn. 429, 47 N.W. 1133 (1891); Bank of Tennessee v. Nelson, 40 Tenn. 634 (1859).

6. "If he [the heir] acquiesces in its validity by waiving his right to object and contest it . . . how can his creditor, who has to pass through him, to reach the property, make the objection for him?" Bank of Tennessee v. Nelson, 40 Tenn. 634, 637 (1859).

7. Brooks v. Paine's Ex'rs, 123 Ky. 271, 90 S.W. 600 (1906). The decision in this case does not even limit the right of the general creditor to contest to the situation of an insolvent heir, although on theory such a limitation would seem to be required. See also Mullins v. Fidelity & Deposit Co., 30 Ky. Law Rep. 1077, 100 S.W. 256 (1907).

8. See *In re* Duffy's Estate, 228 Iowa 426, 292 N.W. 165 (1940); Smith v. Bradstreet, 16 Pick. 264 (Mass. 1833); *In re* Langevin's Will, 45 Minn. 429, 47 N.W. 1133 (1891); Watson v. Alderson, 146 Mo. 333, 48 S.W. 478 (1898); *In re* Coryell's Will, 4 App. Div. 429 39 N.Y. Supp. 508 (3d Dep't 1896); Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604 (1908).

9. "[T]itle to real estate vests in the heir at law immediately upon the death of the ancestor, and at the same instant the lien of a judgment against such heir attaches to his interest in the land. If, subsequently, a valid will is probated, title may go in another direction and the apparent lien of the judgment be defeated. . . ." *In re* Van Doren's Estate, 119 N.J. Eq. 80, 180 Atl. 841 (Prerog. Ct. 1935).

of getting the property and a personal right of contest, incapable of exercise by the creditor.[10] These latter courts would seem to require that the person contesting the will be one upon whom ownership would devolve directly should intestacy be established.[11] Another reason advanced by some of the minority courts is that allowing creditors to resist probate of a will would result in a flood of litigation.[12]

While it has been said that a trustee in bankruptcy of an heir does not have a sufficient interest to contest a will, since the trustee can enforce the rights of the most favored creditor there is little logical reason for denying him this right in those jurisdictions which allow contest by a judgment creditor.[13]

In those states which follow the minority view in denying a judgment creditor the right to contest, a disinherited heir, by acquiescing to the probate of a spurious will, can defeat the rights of his creditor in the expected inheritance.[14] It is well settled, however, that the property of one who dies intestate passes by operation of law, and no act of renunciation on the part of an heir can prevent passage of title to him.[15] If, therefore, an heir of an intestate decedent is not allowed to directly defeat his creditor by renouncing the inheritance,[16] it does not seem reasonable to allow the heir to refuse to contest an invalid will and achieve the same result indirectly. In the instant case, one of first impression in California, the court has adopted the majority view and allowed contest by a judgment creditor, a result consistent with established policies of will probate as well as creditor's rights.

10. Lockard v. Stephenson, 120 Ala. 641, 24 So. 996 (1899); Lee v. Keech, 151 Md. 34, 133 Atl. 835, 46 A.L.R. 1488 (1926) (distinguishes between a creditor with a mere statutory lien and where the creditor has already levied execution on the property); Watson v. Alderson, 146 Mo. 333, 48 S.W. 478 (1898); *In re* Shepard's Estate, 170 Pa. 323, 32 Atl. 1040 (1895); Bank of Tennessee v. Nelson, 40 Tenn. 634 (1859).

11. For example in Tennessee it has been said that "one who is not an heir or a distributee of the testator at the time of his death . . . has no standing in court to resist the probate of a will. . . ." Ligon v. Hawkes, 110 Tenn. 514, 523, 75 S.W. 1072, 1074 (1903).

12. See *In re* Shepard's Estate, 170 Pa. 323, 32 Atl. 1040, 1041 (1895). In view of the paucity of cases, however, this danger has apparently failed to materialize.

13. The leading case on this point is *In re* Beinhauer's Estate, 118 Misc. 527, 193 N.Y. Supp. 758 (Surr. Ct. 1922), which denied the trustee the right to contest where the adjudication of bankruptcy took place prior to the testator's death, on the ground that the trustee was vested only with title to property held at the time of the adjudication, and the heir had no right of contest himself prior to death. In 36 YALE L.J. 150 (1926) this case is cited as denying that the trustee has sufficient interest to contest, but in GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 141 (Rev. ed. 1940), it is cited as upholding the proposition that a trustee in bankruptcy can contest.

14. Such an attempt was made in Brooks v. Paine's Ex'rs, 123 Ky. 271, 90 S.W. 600 (1906), where according to the bill of the creditors, the heir connived with others and had a spurious will probated which would have devised the supposed testator's property to the heir's children.

15. Bostian v. Milens, 239 Mo. App. 555, 193 S.W.2d 797, 170 A.L.R. 424 (1946); McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197 (M.S. 1939). See also WILLIAMS, REAL PROPERTY 118, 119 (24th ed. 1926); Note, 170 A.L.R. 435 (1947).

16. Watson v. Watson, 13 Conn. 83 (1839); Payton v. Monroe, 110 Ga. 262, 34 S.E. 305 (1899). See also 5 VAND. L. REV. 852 (1952).