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ASSAULT AND BATTERY—INJURY SUSTAINED IN PRIZE FIGHT—CONSENT AS A BAR TO CIVIL LIABILITY

Defendants, who operated an illegal[1] boxing concession in connection with their carnival, solicited plaintiff, an eighteen-year-old boy, to engage in one of the matches for a consideration. Plaintiff in voluntarily participating therein, suffered a broken jaw, a concussion of the brain and minor injuries. There was no anger between the contestants, nor was the force used in excess of that which is to be anticipated in such a contest. Action by the boy for personal injuries and by his father for medical and surgical expenses. *Held* (2-1), no recovery in either action on the ground that consent bars recovery. *Hudson v. Craft,* 195 P. 2d 857 (Cal. App. 1948).

As a general rule, that to which a person consents is not esteemed in law an injury. *Volenti non fit injuria.*[2] Yet a majority of American courts[3] have refused to apply this fundamental principle to assault and battery by mutual consent, it being generally held that consent to engage in a mutual combat which amounts to a breach of the peace is not a good defense in a civil action for injuries received as a consequence, and that each participant is civilly liable to the other.[4] A minority of the courts, however, deny re-

1. CAL. PEN. CODE § 412 (1941); CAL. BUS. AND PROF. CODE §§ 18752, 18780 (1944). *Cf.* Million, *The Enforceability of Prize Fight Statutes,* 27 KY. L. J. 152 (1939).

2. "He who consents to an act is not wronged by it." CAL. CIV. CODE § 3515 (1941); Adolff v. Columbia Pretzel & Banking Co., 100 Mo. App. 199, 73 S. W. 321, 323 (1903); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N. E. 264, 266 (1924); BROOM, LEGAL MAXIMS 217 (7th London ed. 1900).

3. Schwaller v. McFarland, 228 Iowa 405, 291 N. W. 852 (1940); Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008 (1892); Morris v. Miller, 83 Neb. 218, 119 N. W. 458 (1909); Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278 (1915); Colby v. McClendon, 85 Okla. 293, 206 Pac. 207 (1922); Wiley v. Carpenter, 64 Vt. 212, 23 Atl. 630 (1892); Strawn v. Ingram, 118 W. Va. 603, 191 S. E. 401 (1937); Notes, 6 A. L. R. 388 (1920), 30 A. L. R. 199 (1924), 47 A. L. R. 1092 (1927).

4. "Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. . . . But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification." 1 COOLEY, TORTS 327 (4th ed. 1932). See also POLLOCK, TORTS 159-164 (12th ed. 1923); PROSSER, TORTS 123 (1941). It has been held however, that consent to mutual combat will prevent the allowance of punitive damages. Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008 (1892); Morris v. Miller, 83 Neb. 218, 119 N. W. 458 (1909); Strawn v. Ingram, 118 W. Va. 603, 191 S. E. 401 (1937); Shay v. Thompson, 59 Wis. 540, 18 N. W. 473 (1884). Where both parties suffer injuries the procedure in some states allows the defendant to offset his claim against that of the plaintiff. Brown v. Patterson, 214 Ala. 351, 108 So. 16 (1926); *cf.* Pelton v. Powell, 96 Wis. 473, 71 N. W. 887 (1897). For criticism of the majority rule see Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace,* 24 COL. L. REV. 819 (1924); 73 U. OF PA. L. REV. 74 (1924); 3 ROCKY MT. L. REV. 285 (1931); 22 MINN. L. REV. 546 (1938); 17 VA. L. REV. 374 (1931).

covery on the grounds that a party voluntarily engaging in the combat has assented to the invasion of his rights.[5] This is the position taken by the Restatement.[6]

There are surprisingly few cases wherein a voluntary participant in a prize fight has sought to recover damages for physical injuries sustained therein. The case which first announced the majority rule in this country, *Stout v. Wren*,[7] noticed the prize fight as an example where the rule would apply. In a case nearly a hundred years later, although the jury in a special verdict found that the contest there involved was a "mere boxing exhibition match" and judgment was accordingly rendered for the defendant, the court inferred that if they had found instead that it was a prize fight, judgment would have been for the plaintiff, whose son was fatally injured therein.[8] The question of whether such a contestant may recover was presented directly

5. "The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law." Galbraith v. Fleming, 60 Mich. 408, 27 N. W. 581, 583 (1886); McNeil v. Choate, 197 Ky. 682, 247 S. W. 955 (1923); Lykins v. Hamrick, 144 Ky. 80, 137 S. W. 852 (1911); White v. Whittall, 113 Mich. 493, 71 N. W. 1118 (1897); Smith v. Simon, 69 Mich. 481, 37 N. W. 548 (1888); *cf.* Wright v. Starr, 42 Nev. 441, 179 Pac. 877 (1919); Van Vooren v. Cook, 273 App. Div. 88, 75 N. Y. S. 2d 362 (4th Dep't 1947); Dixon v. Samartino, 163 S. W. 2d 739 (Tex. Civ. App. 1942); Bohlen, *supra* note 4.

An additional argument offered in some of the cases for holding no recovery is that the parties were engaged in an illegal transaction and therefore should not be entitled to the aid of the court. Similar reasoning has been used to bar recovery in several abortion cases. *E.g.*, Hunter v. Wheate, 289 Fed. 604 (App. D. C. 1923); *cf.* Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84 (1902) (recovery denied to one receiving a pistol wound through the negligence of a co-participant in a charivari party, an unlawful breach of the peace). Such reasoning does not seem applicable since it would lead to the conclusion that a plaintiff could not recover for an injury caused by a defendant, where it was sustained in an unlawful enterprise, even though the defendant had exceeded plaintiff's consent. Courts following the minority rule in mutual combat cases, however, give recovery where the invasion exceeds consent, despite the illegality of the transaction.

6. "Except as stated in § 61, an assent which satisfies the rules stated in §§ 50 to 59 prevents an invasion from being tortious and, therefore, actionable, although the invasion assented to constitutes a crime." Illustration 1: "A and B engage in a boxing match which is illegal because the required license has not been obtained. Each is guilty of a breach of the peace, but neither is liable to the other." RESTATEMENT, TORTS § 60, Illustration 1 (1934). See also § 53.

7. 1 Hawks 420 (N. C. 1821). That case relies on two old English cases for authority. Matthew v. Ollerton, Comb. 218, 90 Eng. Rep. 438 (K. B. 1693), contained the first intimation that mutual consent to breach the peace would not bar mutual liability between the participants therein, in a dictum to the effect that "license to beat me is void, because 'tis against the peace." In Boulter v. Clark (Nisi Prius 1747), in BULLER, NISI PRIUS *16 (7th ed. 1817), the court noting this dictum, held "the fighting being unlawful, the consent to fight, if proved, would not be a bar to plaintiff's action." This appears to be the only British case on the point, but several later cases indicate in dicta that consent, even to a breach of the peace, is a bar to civil liability. Regina v. Coney, 8 Q. B. D. 534 (1882); Hegarty v. Shine, L. R. 4 Ir. 288, 294 (1878) ("Mutual assent to a prize fight might prevent the pugilists having a remedy *inter se*"). Referring to these authorities, Professor Bohlen is of the opinion that all the American cases adhering to the majority rule are based ultimately on the "slender" foundation of a dictum in a 1693 case, which was due then to a technicality of the old English law, subsequently changed by statutes. Bohlen, *supra* note 4, at 826-27.

8. Parmentier v. McGinnis, 157 Wis. 596, 147 N. W. 1007 (1914).

for solution for the first time in *Teeters v. Frost*,[9] an Oklahoma case involving facts similar to those in the instant case. The court in that case held that consent to engage in an unlawful prize fight did not bar recovery from the promoter by the parents of the contestant who had consented and was fatally injured in the contest. The Washington court, in a case decided a few months later,[10] was of the opinion that a participant in a prize fight should not recover for injuries in the absence of a showing of anger, malicious intent to injure, or excessive force, though it avoided adopting either the minority or the majority view.[11] The instant case reaches an opposite result from *Teeters v. Frost*,[12] basing its decision largely on section 60 of the Restatement,[13] which adopts the minority rule.

In a jurisdiction following the minority rule the holding of the principal case is clearly correct. But the same result might well be reached in a jurisdiction still adhering to the majority rule. Many elements of the ordinary mutual combat are missing from a prize fight contest—anger or personal enmity, the desire to inflict substantial physical injuries by fair means or foul, and the lack of rules and regulations. A prize fight is more like a business transaction, lacking the heat and passion of an unregulated brawl and is not as popularly associated with the phrase "breach of the peace."[14] Where the details of a prize fight meet all the statutory requirements, consent of the contestants will, of course, bar recovery. And if all that prevents a particular match from being legal is a failure to secure a license from the state boxing commission beforehand, it is not the hitting of the blows that is unlawful, but rather the lack of a license. With this consideration in mind, those jurisdictions now following the majority might reasonably except such a transaction from its application. A holding to that effect could prove to

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9. 145 Okla. 273, 292 Pac. 356 (1930), noted 79 U. OF PA. L. REV. 509 (1931), 3 ROCKY MT. L. REV. 285 (1931), 17 VA. L. REV. 374 (1931).

10. Hart v. Geysel, 159 Wash. 632, 294 Pac. 570 (1930), noted 9 TENN. L. REV. 205 (1931).

11. "It is sufficient to say that in our opinion one who engages in prize fighting, even though prohibited by positive law, and sustains an injury, should not have a right to recover any damages that he may sustain as a result of the combat, which he expressly consented to and engaged in as a matter of business and sport. To enforce the criminal statute against prize fighting, it is not necessary to reward the one that got the worst of the encounter at the expense of his more fortunate opponent." Hart v. Geysel, 159 Wash. 632, 294 Pac. 570, 572 (1930).

12. 145 Okla. 273, 292 Pac. 356 (1930).

13. See note 6 *supra*.

14. The argument frequently advanced in favor of the present majority rule, that knowledge on the part of a would-be peace-breacher that damages will be allowed by the courts to the parties injured in such action will be a deterrent, seems rather weak. Fear of criminal prosecution by the state doubtless is a positive restraint in many cases, but it is unlikely that one angered to the point of readiness to engage in a fist fight, for example, would be restrained by the former consideration. Especially is this so, since if he wins the fight he will have satisfied his desires to punish his enemy; and, under the majority rule, if he loses, he can look forward to a recovery against his enemy in a civil action. Theoretically, then, the majority rule is more likely to be an incentive to breach the peace than a deterrent, if it has any effect one way or the other beforehand.

be a transitional step toward subsequent adoption of the more logical minority rule in general.

CONSTITUTIONAL LAW—ELECTIONS—VOTING RIGHTS OF RESIDENTS OF FEDERAL ENCLAVE WHERE POLLING PLACES ARE ON LAND UNDER EXCLUSIVE FEDERAL JURISDICTION

Petitioner, contesting a state election, sought a writ of mandamus to compel exclusion by the State Canvassing Board of the returns from a precinct lying within the Los Alamos Project of the Atomic Energy Commission. A portion of the area involved was public domain when New Mexico became a state; jurisdiction over it was not reserved by the United States nor ceded by the state. The Federal Government acquired the remainder of the territory by eminent domain for military purposes, and in the statutory manner accepted the exclusive jurisdiction ceded by New Mexico. Although residents of both portions voted in the election, all of the polling places were in the area acquired by condemnation. *Held* (4-1), writ granted. The condemned portion, being under exclusive federal jurisdiction, is not "in New Mexico" for voting purposes. Residents of the public domain lands, being under general state jurisdiction, are "in New Mexico" and are entitled to vote. However, since the polling places were not "in the state," the election was a nullity in this precinct. *Arledge v. Mabry,* 197 P. 2d 884 (N. M. 1948).

The method by which the Federal Government acquires lands within a state largely determines the political status of residents thereon, and formerly, more than at present, it affected most of their other rights and duties.[1] The three principal ways in which the United States acquires lands within a state are: (1) by purchase with consent of the state legislature, as provided in the Constitution;[2] (2) by purchase without such consent; (3) by cession of state-owned property.[3] Many states have general consent

1. For general discussions of the problems arising from the existence of federal lands within the states, see Laurent, *Federal Areas Within the Exterior Boundaries of the States,* 17 TENN. L. REV. 328 (1942); Notes, 38 COL. L. REV. 128 (1938), 5 GEO. WASH. L. REV. 248 (1937), and 1 ROCKY MT. L. REV. 272 (1929).

2. U. S. CONST. Art. I, § 8, clause 17, authorizing Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." It has generally been held that "purchase" includes condemnation and any other method of acquisition except descent. The term "exclusive legislation" is construed to mean "exclusive jurisdiction"; on these points see cases cited in the principal case, 197 P. 2d at 890. The doctrine of *ejusdem generis* has never been applied to the phrase "other needful Buildings," and a wide variety of institutions have been held to be included in the term. *See, e.g.,* James v. Dravo Contracting Co., 302 U. S. 134, 143, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937); *cf.* Laurent, *supra* note 1, at 330.

3. Any early doubt as to the authority of a state to cede jurisdiction over lands to the

statutes[4] providing for the exclusive jurisdiction of the United States over lands acquired for a purpose named in the Constitution;[5] acquisition for any other purpose, or for an enumerated purpose without state consent, gives the Federal Government only the rights of an ordinary proprietor, except that the state may not interfere with the effective use of the lands for federal purposes.[6] Cessions of state-owned property, or of lands under concurrent state and federal jurisdiction, may be conditioned as the state sees fit;[7] formerly this right to qualify acquisitions did not extend to acquisitions made in the constitutional manner,[8] except that reservation of the right to serve state process in the ceded area has never been held to interfere with exclusive federal jurisdiction.[9] Modern authority allows qualification of all acquisitions, however, in recognition of the undesirability of "exclusive jurisdiction" over the vast areas now held by the Federal Government within the states.[10]

Although many courts and writers now regard the concept of "exclusive jurisdiction" as an unnecessary carry-over from earlier conceptions of the sovereignty of state and national governments,[11] and although statutes

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United States was resolved in Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885).

4. See Note, 38 COL. L. REV. 128, 131 n. 37 (1938). The Tennessee general consent statutes were expressly repealed during the emergency period of World War II, Tenn. Pub. Acts 1943, c. 10, § 3, TENN. CODE ANN. §§ 98, 99 (Williams 1934).

5. It was once presumed that such jurisdiction was accepted by the Federal Government by the very fact of purchase, if for an enumerated purpose. Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 528, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885); Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926). That the Government could refuse such jurisdiction, however, was clearly stated by the Supreme Court in Atkinson v. State Tax Commission, 303 U. S. 20, 58 Sup. Ct. 419, 82 L. Ed. 621 (1938), and in Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187 (1937). By statute it is now conclusively presumed that exclusive jurisdiction is not accepted until acceptance is communicated to the state governor. 54 STAT. 1083 (1940), 40 U. S. C. A. § 255 (1943). Until changed by Congress, the laws of the state in effect at the time of acquisition remain in effect in federal enclaves, but statutes passed after that time do not affect them. Pacific Coast Dairy Inc. v. Dept. of Agriculture, 318 U. S. 285, 63 Sup. Ct. 628, 87 L. Ed. 761 (1943); Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 Sup. Ct. 431, 84 L. Ed. 596 (1940). Thus a New Mexico statute conferring voting rights upon residents of federal enclaves, even if valid under the state constitution, could not affect the status of residents of Los Alamos, which was ceded prior to the enactment of the statute. See the principal case, 197 P. 2d at 893.

6. See, *e.g.*, James v. Dravo Contracting Co., 302 U. S. 134, 141, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937); Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 530, 539, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885); Lowe v. Lowe, 150 Md. 592, 133 Atl. 729, 732 (1926); State v. Oliver, 162 Tenn. 100, 118, 35 S. W. 2d 396 (1931).

7. James v. Dravo Contracting Co., 302 U. S. 134, 141, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937); Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885).

8. Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397 (1869); State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299 (1906).

9. The purpose of such reservation is to prevent the federal enclave from becoming a refuge for criminals. Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926); 1 KENT COMM. * 429.

10. Stewart & Co. v. Sadrakula, 309 U. S. 94, 99, 60 Sup. Ct. 431, 84 L. Ed. 596 (1940); James v. Dravo Contracting Co., 302 U. S. 134, 149, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937).

11. See particularly the dissenting opinions of Justices Frankfurter and Murphy in Pacific Coast Dairy Inc. v. Dept. of Agriculture, 318 U. S. 285, 296, 303, 63 Sup. Ct.

have eliminated many of the problems arising from the existence of federal "islands" within the states,[12] nevertheless the residents of such areas still do not have all of the rights and privileges of those living outside of the federal enclaves. However technical the result may appear, particularly in the principal case where the existence of two types of federal lands in one area makes the contrast more striking, it is settled law that residents of lands under exclusive federal jurisdiction may not vote in local elections, while residents of federal areas under state jurisdiction may vote. Thus inmates of soldiers' homes[13] and of military reservations[14] under exclusive jurisdiction of the United States have been denied the right to vote in state elections; but residents of defense housing areas may vote where Congress has not accepted exclusive jurisdiction.[15] Similarly, on lands merely leased by the Government for housing projects, residents may vote; but on lands bought for a post-office site, residents may not vote, even if the land is used temporarily for a defense housing area.[16] In consenting to federal acquisition of national parks, national forests, and internal development projects, a state may retain general jurisdiction or may qualify its consent as it desires; in Tennessee the right to vote is expressly reserved to residents of such areas.[17]

While its expediency may be doubtful, therefore, the holding of the principal case as to the voting rights of the residents of the precinct rests

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628, 87 L. Ed. 761 (1943). See also the cases cited *supra* note 10, and the dissenting opinion of Chief Justice Bond in Lowe v. Lowe, 150 Md. 592, 133 Atl. 729, 733 (1926); 11 GEO. WASH. L. REV. 381 (1943); 91 U. OF PA. L. REV. 761 (1943).

12. For collections of these statutes see Stewart & Co. v. Sadrakula, 309 U. S. 94, 101 n., 60 Sup. Ct. 431, 84 L. Ed. 596 (1940); Laurent, *Federal Areas Within the Exterior Boundaries of the States,* 17 TENN. L. REV. 328, 333 n. 42 (1942).

13. Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397 (1869); State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299 (1906). These decisions were made under the older view that acquisitions for constitutional purposes could not be qualified, and in each case a statute reserving voting rights to the inmates was struck down. See also Herken v. Glynn, 151 Kan. 855, 101 P. 2d 946 (1940), denying the vote to inmates of a soldiers' home upon lands over which the state could have reserved voting rights but did not do so.

14. *In re* Town of Highlands, 22 N. Y. Supp. 137 (Sup. Ct. 1892); McMahon v. Polk, 10 S. D. 296, 73 N. W. 77 (1897). But if the Government ceases to use the tract for a military reservation and converts it to a use not mentioned in the Constitution, its exclusive jurisdiction ceases, and residents thereon may vote. La Duke v. Melin, 45 N. D. 349, 177 N. W. 673 (1920).

15. Johnson v. Morrill, 20 Cal. 2d 446, 126 P. 2d 873 (1942).

16. State *ex rel.* Parker v. Corcoran, 155 Kan. 714, 128 P. 2d 999 (1942). See Note, 142 A. L. R. 430 (1943). "It is well settled in this state, and generally elsewhere, that when the Federal government, under authority of Congress, exercises exclusive legislation over a tract of land situated within the state for any of the purposes mentioned in the Federal constitution . . . , and such exclusive legislation by Congress is consented to by the state . . . , a resident of such a tract of land is not deemed a resident of the state with authority to vote at state elections." State *ex rel.* Parker v. Corcoran, 155 Kan. 714, 128 P. 2d 999, 1004 (1942).

17. Tenn. Pub. Acts 1933, c. 161, § 2, TENN. CODE ANN. § 5201.3 (Williams 1934). The Great Smoky Mountains National Park is excepted from the above act, but the right of residents thereof to vote is specifically reserved in Tenn. Pub. Acts 1929, c. 99. The federal statutes usually state that the state shall retain general jurisdiction over such areas; see, *e.g.,* 30 STAT. 36 (1897), 36 STAT. 963 (1911), 16 U. S. C. A. § 480 (1941) as to national forests.

upon "controlling precedents, affording unanimity of judicial opinion." [18] Much less desirable and necessary, however, is the exclusion of the votes of residents of the public domain portion merely because the polling places were on the condemned area. The result is based upon the construction given the state constitution in three absentee-voting cases, in which it was held that citizens of New Mexico must personally appear in the precinct of their residence in order to vote; [19] because these polling places were not considered "in" the precinct, the court nullified the ballots. Admittedly, however, the condemned area is treated as part of the state and county for many purposes; [20] and, as pointed out by the dissent, [21] it would be no radical departure from logic or precedent to treat it as such in order to validate votes personally cast there by fully qualified voters from the adjoining portion. This would be more in accord with the modern tendency to preserve, rather than to destroy, the rights and duties of residents of federal enclaves whenever possible.[22]

CONSTITUTIONAL LAW—MISCEGENATION STATUTES—STATUTORY PROHIBITIONS AGAINST INTER-RACIAL MARRIAGES HELD UNCONSTITUTIONAL

A white woman and a Negro man were denied a marriage license pursuant to a California statute.[1] Another state law declared inter-racial marriages void.[2] Mandamus proceedings were instituted to compel the issuance of a license. *Held* (4-3),[3] both statutes violate the equal protection clause of the Fourteenth Amendment. *Perez v. Lippold,* 198 P. 2d 17 (Cal. 1948).

18. 197 P. 2d at 889. Since Tennessee expressly repealed its general consent statute (*supra* note 4), it retains general jurisdiction over the lands acquired by the Federal Government at Oak Ridge, Tenn. No consent to exclusive federal jurisdiction over the area has been given, and residents thereon vote in state elections.

19. Chase v. Lujan, 48 N. M. 261, 149 P. 2d 1003 (1944); Baca v. Ortiz, 40 N. M. 235, 61 P. 2d 320 (1936); Thompson v. Scheier, 40 N. M. 199, 57 P. 2d 293 (1936).

20. 197 P. 2d at 889, 896.

21. 197 P. 2d at 896.

22. See, *e.g.,* Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 Sup. Ct. 431, 84 L. Ed. 596 (1940); Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 60 Sup. Ct. 279, 84 L. Ed. 322 (1939); James v. Dravo Contracting Co., 302 U.S. 134, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937); Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187 (1937). *But cf.* Pacific Coast Dairy Inc. v. Dept. of Agriculture, 318 U. S. 285, 63 Sup. Ct. 628, 87 L. Ed. 761 (1943).

1. No marriage "license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." CAL. CIV. CODE § 69 (1941).

2. "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." CAL. CIV. CODE § 60 (1941). California has upheld the validity of inter-racial marriages where the marriages were contracted in a state having no miscegenation statutes. Pearson v. Pearson, 51 Cal. 120, 125 (1875).

3. Opinion by Traynor, J. (Gibson, C. J. and Carter, J., concurring); special concurring opinions by Carter and Edmonds, JJ.; dissent by Shenk, J. (Schauer and Spence, JJ., concurring).

This decision is the first to hold miscegenation laws unconstitutional. The majority opinions rely upon four bases: (1) miscegenation statutes infringe the constitutional guaranty of religious freedom; (2) the right to marry is a fundamental right which may not be restricted upon a basis of race alone; (3) the equal protection clause of the Fourteenth Amendment guarantees equal protection to individuals as individuals, and not merely to groups; (4) California's miscegenation statutes are too ambiguous to be constitutionally enforceable.

The concurring opinion which develops the first basis states that the right to marry is protected by the constitutional guaranty of religious freedom and as such may be abridged only on a showing of "clear and present danger." [4] In contrast, the court's principal opinion makes clear that miscegenation statutes would be valid unless unconstitutional on grounds other than the religious issue.[5]

By characterizing the right to marry as a "fundamental right," the court in its second premise is apparently classing this right with the personal freedoms guaranteed by the First Amendment, and treating it as if it were specifically protected by the Constitution. Yet the right to marry has always been regarded as peculiarly subject to regulation by the states; [6] no previous case has accorded this right equal station with the specifically guaranteed constitutional freedoms of speech, religion, press, and assembly.[7] Perhaps

4. 198 P. 2d at 35. Mr. Justice Edmonds was the only majority member of the court who relied upon the religious issue.

5. "If the miscegenation law under attack in the present proceeding is directed at a social evil and employs a reasonable means to prevent that evil, it is valid regardless of its incidental effect upon the conduct of particular religious groups." 198 P. 2d at 18.

The United States Supreme Court decisions pursue the more moderate view adopted by Mr. Justice Traynor's principal court opinion, as the following quotation illustrates: "[Religious freedom] embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U. S. 296, 303, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940). *Accord,* Cleveland v. United States, 329 U. S. 14, 67 Sup. Ct. 13, 91 L. Ed. 12 (1946); Murdock v. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1942); Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637 (1889); Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1878).

6. "Marriage, as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution, has always been subject to the control of the legislature." Maynard v. Hill, 125 U. S. 190, 205, 8 Sup. Ct. 723, 726, 31 L. Ed. 654, 657 (1888). *Accord:* Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1878); Stevens v. United States, 146 F. 2d 120 (C. C. A. 10th 1944); Green v. State, 58 Ala. 190, 29 Am. Rep. 739 (1877); State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 (1871); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); *In re* Shun T. Takahashi's Estate, 113 Mont. 490, 129 P. 2d 217 (1942); State v. Hairston, 63 N. C. 451 (1869); Lonas v. State, 50 Tenn. 287 (1871); Frasher v. State, 3 Tex. App. 263, 32 Am. Rep. 131 (1877); Kinney v. Commonwealth, 30 Gratt. 858, 32 Am. Rep. 690 (Va. 1878). For a comprehensive treatment of state controls over the marriage relationship, see 1 VERNIER, AMERICAN FAMILY LAWS, §§ 37-47 (1931); also see §§ 37-47 (Supp. 1938).

Compare, however, Mr. Justice McReynolds' dictum in Meyer v. Nebraska, 262 U. S. 390, 399, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923), quoted on page 18 of the instant case.

7. Even those personal freedoms which are specifically enumerated in the First Amendment are not absolute. They may be restricted by some reasonable means if a clear and present danger to society exists. Hirabayashi v. United States, 320 U. S. 81,

the court here is creating an intermediate group of rights in which the reasonableness of statutes purporting to regulate such rights will be passed on by the courts in much the same way that the Supreme Court prior to 1937 passed on statutes regulating phases of economic life. It seems more likely, however, that restrictions based solely upon racial differences in other fields than marriage will be regarded as in violation of "fundamental rights" while other types of marital restrictions are not.

The court's third basis is that miscegenation statutes violate the equal protection clause, because this clause protects the rights of individuals as separate entities, and not merely groups or races of individuals.[8] When miscegenation statutes were claimed to violate the equal protection clause in previous cases, the invariable answer of the courts was that both races—whites and Negroes or whites and Mongolians—were treated alike.[9] The marriage was invalid as to both, and where the statutes prescribed criminal punishment for inter-racial cohabitation, each received the same punishment.[10] The court in the instant case stated that the problem was not whether the races were treated alike but whether individuals as individuals were treated with equal protection. Recent Supreme Court decisions indicate that the interpretation of the equal protection clause relied upon by the majority in the instant case will receive greater emphasis in future decisions affecting

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63 Sup. Ct. 1375, 87 L. Ed. 1774 (1943); Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Buck v. Bell, 274 U. S. 200, 47 Sup. Ct. 584, 71 L. Ed. 1000 (1927); *cf.* Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1879). Hence, even if it is conceded that miscegenation statutes restrict fundamental rights of individuals, undisputed authority would still hold them constitutional if they are a reasonable means to avoid some present, social danger. In the instant case, both the court and the dissent cite biological and sociological authorities to accentuate their respective contentions. Most recent expert opinion supports the court's position. MYRDAL, AN AMERICAN DILEMMA 140-153 (1946); HOLMES, THE NEGRO'S STRUGGLE FOR SURVIVAL 176 (1937); PATTERSON AND LANIER, STUDIES IN THE COMPARATIVE ABILITIES OF WHITES AND NEGROES (1929); GARTH, RACE PSYCHOLOGY, A STUDY OF RACIAL MENTAL DIFFERENCES (1931); KLINEBERG, NEGRO INTELLIGENCE AND SELECTIVE MIGRATION (1935); BENEDICT, RACE: SCIENCE AND POLITICS 98-147 (1943). But a number of specialists maintain that inferior progeny result from miscegenation. DAVENPORT, RACE CROSSING IN JAMAICA (1929); CASTLE, *Biological and Social Consequences of Race Crossing*, 9 AM. JOUR. OF PHYSICAL ANTHROPOLOGY 152 (1926); LAFARGE, THE RACE QUESTION AND THE NEGRO (1943); GREGORY, THE MENACE OF COLOR (1925); HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (1896).

While the present Supreme Court has often said that there is a presumption in favor of the constitutionality of state statutes particularly with regard to economic matters, Toombs v. Citizens Bank, 281 U. S. 643, 50 Sup. Ct. 434, 74 L. Ed. 1088 (1930); Corporation Comm. v. Lowe, 281 U. S. 431, 50 Sup. Ct. 397, 74 L. Ed. 945 (1930), the opposite is true of personal freedoms guaranteed by the Constitution. United States v. Carolene Products Co., 304 U. S. 144, 152 n. 4, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938).

8. 198 P. 2d at 20.

9. Green v. State, 58 Ala. 190, 29 Am. Rep. 739 (1877); Jackson et al. v. City and County of Denver, 109 Colo. 196, 124 P. 2d 240 (1942); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); *In re* Paquet's Estate, 101 Ore. 393, 200 Pac. 911 (1921); Lonas v. State, 50 Tenn. 287 (1871); Kinney v. Commonwealth, 30 Gratt. 858, 32 Am. Rep. 690 (Va. 1878).

10. Green v. State, 58 Ala. 190, 29 Am. Rep. 739 (1877); State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 (1883); Lonas v. State, 50 Tenn. 287 (1871); Kinney v. Commonwealth, 30 Gratt. 858, 32 Am. Rep. 690 (Va. 1878).

all phases of racial regulation.[11] Perhaps in time any law differentiating between individuals solely upon racial grounds will be held unconstitutional.

The fourth basis of the court was that California's miscegenation statutes are too ambiguous to be constitutionally enforceable.[12] While this might prove a meritorious premise if applied to individuals of mixed racial stock, the meaning of the statutes was unambiguous as applied to the petitioners.[13] Considerable authority confirms the dissenting statement that "a charge of unconstitutionality can be raised only in a case where that issue is involved in the determination of the action, and then only by the person or member of a class of persons adversely affected." [14]

In spite of frequent attacks upon constitutional grounds, prior to the instant case miscegenation statutes have always been upheld. While this holding was based primarily upon provisions of the Federal Constitution, nonetheless the case was decided by a state court acting under its own as well as the Federal Constitution. In view of this fact and also that the statutes were construed to be too ambiguous for enforcement, it seems unlikely that the Supreme Court will decide this case on the merits of the Federal Constitutional issue.[14a] The decision will probably have limited effect in most other states, where the question of constitutionality is apt to be regarded as a settled one. After all, the relative wisdom of a legislature's position is not the question before a court when it is passing on the constitutionality of a

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11. Shelley v. Kraemer, 334 U. S. 1, 68 Sup. Ct. 836 (1948), 2 VAND. L. REV. 119 (racial restrictive covenants held unenforceable); Oyama v. California, 332 U. S. 633, 68 Sup. Ct. 269 (1948) (statute imposing racial discrimination on right of a citizen to acquire real property held invalid); Sipuel v. Board of Regents, 332 U. S. 631, 68 Sup. Ct. 299 (1948) (racial discrimination in educational opportunities held unconstitutional); *cf.* Note, 1 VAND. L. REV. 403 (1948).

12. 198 P. 2d at 27.

13. "[P]etitioner Andrea Perez states that she is a white person and petitioner Sylvester Davis that he is a Negro." 198 P. 2d at 18.

14. *Id.* at 47. *Accord,* Ashwander v. T. V. A., 297 U. S. 288, 56 Sup. Ct. 466, 80 L. Ed. 688 (1936); Columbus and G. R. Co. v. Miller, 283 U. S. 96, 51 Sup. Ct. 392, 75 L. Ed. 861 (1930); Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252 (1900); American Fruit Growers v. Perker, 22 Cal. 2d 513, 140 P. 2d 23 (1943); *In re* Estate of Monks, 48 Cal. App. 2d 603, 120 P. 2d 167 (1941). See also cases cited in 11 AM. JUR., Constitutional Law §§ 111-115 (1937).

The miscegenation statutes of sixteen states in addition to California provide no definitions for such generic terms as "negro," "mongolian," or "mulatto." Thirteen others resort to such categorical descriptions as "Negro or descendant of a negro to the third generation, inclusive, though one ancestor of each generation was a white person." ALA. CONST. Art. IV, § 102. For a general description of the varieties of state miscegenation statutes and constitutional provisions, see 1 VERNIER, AMERICAN FAMILY LAWS § 44 (1931 and Supp. 1938).

14a. Since the above was written, the following statement has appeared in the December issue of the American Bar Association Journal: "No appeal from the judgment was taken by the defendant and the county clerk was instructed by the county counsel thenceforth to ignore the statute's prohibition of mixed marriages." 34 A. B. A. J. 1129 (1948).

statute.[15] Whenever changes may be expedient in the regulation of marriage, they should emanate from the legislatures, not from the courts.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF SOUND MOTION PICTURES OF RE-ENACTMENT OF CRIME BY DEFENDANTS

Defendants appeal a conviction of murder and robbery in the first degree, alleging as error that sound motion pictures of them voluntarily re-enacting the crime were admitted as evidence, over their objection. *Held,* convictions affirmed; though such evidence should be received with caution, there is no valid objection to it if the proper foundation is laid and if the re-enactment was voluntary. *People v. Dabb,* 197 P. 2d 1 (Cal. 1948).

Apparently this is the first case on record which presents the question of admissibility of motion pictures of the re-enactment of a crime by the defendants, though the question of admissibility of photographs and motion pictures in other connections has arisen in numerous cases.

Photographs have long been held admissible as evidence.[1] Motion pictures are now recognized as being admissible on the same basis as photographs,[2] as moving pictures are but a series of single pictures.[3] The requirement for both is that the proper foundation for their introduction be laid;[4] and when this requirement is met, admissibility rests largely within the sound discretion of the trial judge.[5] He may, for example, exclude such

15. Watson v. Buck, 313 U. S. 387, 61 Sup. Ct. 962, 85 L. Ed. 1416 (1941); Mutual Loan Co. v. Martell, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175 (1911); New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269 (1894); Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287 (U. S. 1870).

1. See 3 WIGMORE, EVIDENCE §§ 790-98 (3d ed. 1940).

2. When attempts were first made to introduce motion pictures as evidence, the courts looked upon them with disfavor, believing them to be too susceptible to fabrication, and too likely to exaggerate and distort the object they purported to depict. *See* Gibson v. Gunn, 206 App. Div. 464, 202 N. Y. Supp. 19, 20 (2d Dep't 1923); Massachusetts Bonding & Ins. Co. v. Worthy, 9 S. W. 2d 388, 393 (Tex. Civ. App. 1928). But with the rapid development of the motion picture as a common and accurate device for reproducing scenes and objects, the courts have come to accept them as dependable evidentiary mediums. See Boyarsky v. Zimmerman Corp., 240 App. Div. 361, 270 N. Y. Supp. 134, 138 (1st Dep't 1934); Commonwealth v. Roller, 100 Pa. Super. 125 (1930).

3. *E. g.* Heiman v. Market St. Ry., 21 Cal. App. 2d 311, 69 P. 2d 178 (1937); Morris v. E. I. Du Pont De Nemours & Co., 346 Mo. 126, 139 S. W. 2d 984 (1940); SCOTT, PHOTOGRAPHIC EVIDENCE § 624 (1942); 3 WIGMORE, EVIDENCE § 798a (3d ed. 1940); Note, 27 ILL. L. REV. 424 (1932).

4. Motion pictures: Boyarsky v. Zimmerman Corp., 240 App. Div. 361, 270 N. Y. Supp. 134 (1st Dep't 1934); Commonwealth v. Roller, 100 Pa. Super. 125 (1930), 78 U. OF PA. L. REV. 565 (1929) (discussion of case in lower court); Gray, *Motion Pictures in Evidence,* 15 IND. L. J. 408 (1940); Note, 27 ILL. L. REV. 424 (1932). Photographs: Stone v. Chicago, M., St. P. & P. R. R., 53 F. 2d 813 (C. C. A. 8th 1931); Edelson v. Higgins, 43 Cal. App. 2d 759, 111 P. 2d 668 (1941).

5. *E. g.,* Stone v. Chicago, M., St. P. & P. R. R., 53 F. 2d 813 (C. C. A. 8th 1931); Rogers v. City of Detroit, 289 Mich. 86, 286 N. W. 167 (1939); State v. Edwards, 194 S. C. 410, 10 S. E. 2d 587 (1940).

evidence if it does not serve to help the jury to understand the case[6] or to aid some witness in explaining his testimony,[7] or if it is designed unduly to excite the sympathy of the jury for one of the parties or to arouse their prejudice against the other.[8] But it will not be excluded merely because it tends to inflame the minds of the jury, if the issue represented is relevant and important to the decision of the case.[9]

As sound motion pictures are but a combination of motion pictures and phonographic reproductions of sound, both of which have been held admissible as evidence,[10] they should not be disqualified on grounds of general incompetency.[11] Sound motion pictures showing defendants confessing crime to officers have been admitted when the proper foundation has been laid, and when the confession has been shown to have been voluntary.[12]

Posed photographs of reconstructed scenes and re-enacted events have been admitted.[13] A motion picture of a reconstructed scene in a personal injury case has been held admissible.[14] Motion pictures of defendants re-enacting a crime should also be held admissible, provided the re-enactment was voluntary. The ruling in the instant case seems entirely justified as an extension of the established principles of motion picture and photographic evidence.

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6. Motion pictures: Gulf Life Ins. Co. v. Stossel, 131 Fla. 268, 175 So. 804, 805 (1937); Rogers v. City of Detroit, 289 Mich. 86, 286 N. W. 167 (1939). Photographs: Trucking, Inc., v. Krotzer, 106 F. 2d 447 (C. C. A. 6th 1939); Queen City Coach Co. v. Lee, 218 N. C. 320, 11 S. E. 2d 341 (1940).

7. Motion pictures: Richardson v. Missouri K. T. R. R. of Texas, 205 S. W. 2d 819, 823 (Tex. Civ. App. 1947). Photographs: Haven v. Snyder, 93 Ind. App. 54, 176 N. E. 149 (1931); Queen City Coach Co. v. Lee, 218 N. C. 320, 11 S. E. 2d 341 (1940).

8. Motion pictures: No cases on this point involving motion pictures were found. There is every reason to believe, however, that motion pictures would be treated the same as photographs, in view of the well-established principle that motion pictures are admissible on the same basis as photographs. Photographs: Southern Trans. Co. v. Adams, 141 S. W. 2d 739 (Tex. Civ. App. 1940); Cottrill v. Pinkerton, 211 Wis. 310, 248 N. W. 124 (1933).

9. Motion pictures: see *supra* note 8. Photographs: McKee v. State, 31 So. 2d 656 (Ala. App. 1947), *cert. denied,* 249 Ala. 433, 31 So. 2d 662 (1947).

10. Cases in which sound records have been admitted include: Kilpatrick v. Kilpatrick, 123 Conn. 218, 193 Atl. 765 (1937); State v. Raasch, 201 Minn. 158, 275 N. W. 620 (1937).

11. Commonwealth v. Roller, 100 Pa. Super. 125 (1930).

12. People v Hayes, 21 Cal. App. 2d 320, 71 P. 2d 321 (1937); Commonwealth v. Roller, 100 Pa. Super. 125 (1930).

13. Hughes v. State, 126 Tenn. 40, 148 S. W. 543 (1912); Butler v. State, 142 Ga. 286, 82 S. E. 654 (1914); State v. O'Reilly, 126 Mo. 597, 29 S. W. 577 (1895); *cf.,* Pollack v. State, 215 Wis. 200, 253 N. W. 560 (1934). *But see,* Babb v. Oxford Paper Co., 99 Me. 298, 59 Atl. 290, 292 (1904); Fore v. State, 75 Miss. 727, 23 So. 710, 712 (1898). See note, 27 A. L. R. 913 (1923).

14. Chicago, G. W. R. R. v. Robinson, 101 F. 2d 994 (C. C. A. 8th 1939).

CRIMINAL PROCEDURE—USE OF JURY PRIMER PRIOR TO TRIAL

The accused was convicted of assault with a deadly weapon by jurors who had been given a pamphlet of "General Instructions" [1] to read when they and other prospective jurors were impaneled several months before the time of the trial. The printed material consisted of detailed instructions as to the duties of jurors and other incidents of criminal trial in general. Appeal from an order denying accused's motion for a new trial on the ground that the use of the pamphlet denied his constitutional right [2] to be present at all stages of his trial and to have the jury instructed in his presence. *Held,* that the use of the pamphlet was not reversible error. *People v. Lopez,* 197 P. 2d 757 (Cal. 1948). [3]

A strong dissenting opinion contended that several passages in the pamphlet were prejudicial to accused, among which were (1) a statement that "the eye-witness [to a crime or accident] rarely sees more than ten per cent of all that is observable," (2) an implication that a finding by a grand jury or a magistrate at a preliminary hearing indicated that they believed that the defendant had committed the crime and (3) a discussion of impeachment failing to include all methods of impeaching, a fact which might lead the juror to reject other methods.[4]

The Supreme Court of Illinois in a recent decision [5] found the use of a similar pamphlet by an Illinois trial court reversible error, pointing out specific questionable features of the printed matter which would tend to prejudice one accused of crime.[6] The court discussed the impracticability of the use of such material although observing that it did not adopt the view that no jury primer could be used under any circumstances.

Neither the Illinois decision nor the dissent in the instant case suggested that the use of a pamphlet prior to trial necessarily violated the traditional or inherent rights of defendants in criminal cases. It is settled law that one accused of crime has the right to be present at all stages of his

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1. The complete text of the pamphlet is included as an appendix to the opinion, 197 P. 2d at 759.

2. CAL. CONST. Art. I, § 13.

3. The decision in effect overruled People v. Weatherford, 160 P. 2d 210 (1945), *aff'd on other grounds,* 27 Cal. App. 2d 401, 164 P. 2d 753 (1945). There the District Court of Appeals, Division 1, of California held the use of the same pamphlet under similar circumstances error.

4. The majority opinion had said, "There is no claim that any portion of the pamphlet is erroneous as a matter of law or is in conflict with the instructions given by the trial court, and we find nothing which could have been prejudicial to defendant." 197 P. 2d at 759 (Cal. 1945).

5. People v. Schoos, 399 Ill. 527, 78 N. E. 2d 245 (1948).

6. For a complete text of the pamphlet used see Miner, *The Jury Problem,* 41 ILL. L. REV. 183, 187 (1946). The author was the trial judge who was reversed in the *Schoos* case.

trial.[7] This right is guaranteed by the bill of rights of most state constitutions [8] and even without such provision is recognized at common law.[9] Cases which have held communications between judge and jury in absence of accused to be error are generally those which involved further instructions by the court after the jury has retired to deliberate on the verdict.[10] But this right to be present is given only to insure a fair and just hearing[11] and, in the absence of any showing of prejudice to the accused, its violation by instructing prior to trial will not be grounds for reversal.[12] Preliminary oral instructions of a general nature have been held bad if not stenographically reported,[13] the objection apparently being that in such case the accused had no opportunity to scrutinize for error.[14]

The propriety of the trial court's using instructive booklets has not received extensive discussion. Such handbooks have been adopted by some courts of the United States with apparent success.[15] Legal periodicals have commented favorably on their use.[16] As pointed out in the dissenting opinion of the instant case and in the Illinois decision, such booklets may contain prejudicial error, but this is not an argument against their use but a reminder of the care with which they should be drafted.

It is submitted that the difficulties of preparing a pamphlet of general instructions applicable to all cases and free of error are not greater than nor different from those confronting the trial judge in giving general instructions at the conclusion of any trial. Once adopted and revised as tested by experience, such a booklet dealing with general matters incident to any trial would

7. *See* Frank v. Mangum, 237 U. S. 309, 338, 35 S. Ct. 582, 59 L. Ed. 969 (1914). See also Lewis v. United States, 146 U. S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892).

8. *E.g.*, ILL. CONST. Art. II, § 9; IND. CONST. Art. I, § 13; MASS. CONST., Part the First, Art. II, § 13; TENN. CONST. Art. I, § 9.

9. See note 7 *supra*.

10. Pearson v. State, 119 Ark. 152, 178 S. W. 914 (1915); Puckett v. Commonwealth, 200 Ky. 509, 255 S. W. 125, 34 A. L. R. 96 (1923); Sargeant v. Roberts, 1 Pick. 337 (Mass. 1823); Booth v. State, 65 Tex. Cr. R. 659, 145 S. W. 923 (1912).

11. *See* Snyder v. Massachusetts, 291 U. S. 97, 107, 54 S. Ct. 281, 78 L. Ed. 674 (1933).

12. Knight v. State, 50 Ariz. 108, 69 P. 2d 569 (1937); People v. Cowan, 44 Cal. App. 2d 155, 112 P. 2d 62 (1941); People v. Tennant, 32 Cal. App. 2d 1, 88 P. 2d 937 (1939); Blackshear v. State, 126 Tex Cr. R. 417, 72 S. W. 2d 601 (1934) (oral instructions); Attaway v. State, 41 Tex Cr. R. 395, 55 S. W. 2d 45 (1900) (oral instructions); Commonwealth v. Katz, 138 Pa. Super. 50, 10 A. 2d 49 (1939) (oral instructions).

13. Commonwealth v. Cunningham, 137 Pa. Super. 488, 9 A. 2d 161 (1939); Commonwealth v. Cohen, 133 Pa. Super. 437, 2 A. 2d 560 (1938).

14. *See* Commonwealth v. Weiner, 340 Pa. 369, 17 A. 2d 357, 360 (1941).

15. *See* Knight v. State, 50 Ariz. 108, 69 P. 2d 569, 572-573 (1937); State v. Cooney, 23 Wash. 2d 539, 161 P. 2d 442, 446 (1945). See also editorial comment 11 A. B. A. J. (1925) (New York); Richardson, *The Jury, and Methods of Increasing Its Efficiency*, 14 A. B. A. J. 410 (1928); Berman, *Federal Jurors Handbook*, 5 ALA. LAWY. 354 (1944) (use optional in Federal courts).

16. See editorial comments 11 A. B. A. J. 289, supplemented at 401 (1925) and 17 A. B. A. J. 282 (1931); Committee of the American Bar Association, *The Judge-Jury Relationship in the State Courts*, 23 ORE. L. REV. 3, 5 (1943); Note, 38 J. CRIM. LAW AND CRIMINOLOGY 620 (1948). See also Richardson, *The Jury, and Methods of Increasing Its Efficiency*, 14 A. B. A. J. 410 (1928); Note, 9 TEX. L. REV. 37 (1930).

assure desirable uniformity, better comprehension by jurors of their duties and would eliminate one possible source of erroneous instructions.

ESTATE PLANNING—MISTAKE AS TO TAX CONSEQUENCES OF A GIFT—REQUIREMENTS FOR RESCISSION

In 1937 petitioner made a gift of stock to his wife. He told her at the time that his purpose was to create for her a personal estate. The corporation was dissolved in 1938 and a limited partnership formed out of the distributed corporate assets. Petitioner's wife paid an income tax on her share of the partnership profits until in 1942 the commissioner assessed the petitioner for such tax and the assessment was eventually sustained.[1] Petitioner now brings suit to rescind the stock gift of 1937 because of a mistake as to antecedent and existing legal rights. *Held,* rescission denied because petitioner's principal purpose in making the gift was not to minimize his income tax payments but was to create a personal estate for his wife. *Lowry v. Kavanagh,* 34 N. W. 2d 60 (Mich. 1948).

The question at issue here is whether a taxpayer should be allowed to rescind a gift when one of the purposes for which the gift was made has been thwarted by subsequent judicial interpretation of the legal consequences thereof. The legitimacy of efforts at tax avoidance has been recognized.[2] What is now the problem is the extent of judicial aid that will be given to rectify mistaken arrangements for such avoidance.[3]

In *Stone v. Stone,*[4] the petitioner had made a partnership arrangement among his children with the avowed purpose of reducing taxes. The *Tower* case rendered his efforts futile and upon petition, the court permitted a rescission because he had make a mistake as to his "antecedent and existing legal rights." There was no injury to any donee. The intended legal relations had been correctly and validly created. But a mistake as to the tax consequences of these relations resulted and the court considered the mistake of such nature to be a proper case for equity to grant a rescission. To distinguish the instant case from the *Stone* case the court found that the principal purpose

1. Lowry v. Commissioner, 3 T. C. 730 (1944), *aff'd* 154 F. 2d 448 (C. C. A. 6th 1946), *cert. denied* 329 U. S. 725 (1946). Affirmance was on the authority of Commissioner v. Tower, 327 U. S. 280, 66 Sup. Ct. 532, 90 L. Ed. 670 (1946).

2. Gregory v. Helvering, 293 U. S. 465, 55 Sup. Ct. 266, 79 L. Ed. 596 (1935). See Angell, *Tax Evasion and Tax Avoidance,* 38 COL. L. REV. 80 (1938); Buck, *Income Tax Evasion and Avoidance: The Deflection of Income,* 23 VA. L. REV. 107, 265 (1936-37).

3. Petitioner's wife would probably be willing for him to re-acquire the property transferred. A judicial declaration of rescission was apparently sought in order to avoid the gift tax which would have been imposed if the wife had voluntarily re-assigned her interest and in order that petitioner might file claim for refund on the gift tax originally paid. (Though the Commissioner of Internal Revenue was joined as a party to the action, this seems to have been for other reasons).

4. 319 Mich. 194, 29 N. W. 2d 271 (1947), 48 COL. L. REV. 470 (1948), 17 FORD L. REV. 129 (1948).

here was not to minimize income tax payments.[5] Therefore, because the principal inducing factor in making the gift was found not to have any relation to the subsequently discovered mistake, this was held not a proper case for equitable relief.

As a preliminary premise, it must be assumed that not even in the *Stone* case was there one and only one purpose in making the gift. Stone would not have given the money or the partnership interest to a stranger. He chose his donees carefully. In addition he would not have made the gift even to his family at that time had he not believed the transfer would reduce income taxes on the partnership profits. This latter purpose was a sine qua non to the transfer. In the principal case even though the more important inducement for the gift was the desire to create a personal estate for his wife, it does not follow that the donor would still have made the gift had he known he would be liable for taxes on the income produced by the interest transferred. The minimizing of taxes was obviously a factor in inducing the gift. Before making the gift, petitioner consulted with attorneys and accountants as to the income tax consequences.[6] He testified at the trial that, while not the prime factor, family tax reduction was one of the basic reasons.[7] If this reason was a substantial inducing factor there should be ground for rescission.[8] There is no rule that requires that in searching among the various inducements for making the gift, only one may be counted as having been *the* substantial inducing factor.[9] There is not necessarily any sole and exclusive substantial inducing factor; there may be several such substantial factors. If any one of such factors was based upon a mistake as to the consequences of the action taken, equity may grant relief.

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5. Petitioner testified that tax avoidance was not "the prime consideration"; that the tax reason was one of "two basic reasons" but that the prime purpose was to create an estate for his wife. See the testimony of the petitioner as quoted in the case, 34 N. W. 2d at 64-65.

6. Brief for Appellant, p. 3.

7. 34 N. W. 2d at 65.

8. "We do not mean, the relative effects of inducements moving from different sources shall be determined by a comparison of their respective motive power. It is sufficient if a fraudulent concealment of the defendants materially contributed to effect the purchase, irrespective of any other cause." Jordan & Sons v. Pickett, 78 Ala. 331, 340-41 (1884).

9. "It is not necessary, however, that the mistake, whether or not caused by fraud, should be the sole inducing cause." RESTATEMENT, RESTITUTION § 9, comment *a* (1937); see also Illustration 3. The mistake must simply be one "as to a fact or rule of law constituting the assumed basis upon which the transaction rests." *Id.*, § 9, comment *c; cf.* § 26, comment *c*. This problem arises in legacies which are contested upon the grounds of fraud in the procurement. The approved test is whether or not the testator would have made the legacy had he known the true facts. It is not necessary that the fraud be the sole factor which induced the legacy. The leading case is Kennell v. Abbott, 4 Ves. 803, 31 Eng. Rep. 416 (Ch. 1799). See Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 HARV. L. REV. 309, 316-7 (1928); ATKINSON, WILLS 222-4 (1937). In speaking of fraudulent representations, Bigelow says: "[I]t is not necessary to prove that the plaintiff relied solely upon the defendant's representations. It is sufficient if the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action." 1 BIGELOW, FRAUDS 543-4 (1890). On the issue of liability for deceit if the misrepresentation is a substantial factor in determining the course of conduct which

The decision should not be regarded as authority for the proposition that rescission is available only where the mistake relates to the sole or principal cause of the gift. The court specifically relied upon the failure of the petitioner to claim in his complaint or in his testimony that he would not have made the gift except for his mistaken belief. Upon this narrow ground the result seems correct.[10]

EVIDENCE—IMPEACHMENT OF WITNESSES—WARNING QUESTION ON EXAMINATION AS TO PRIOR TESTIMONY

In an accident trial a witness testified that he had placed a flare in the lane occupied by his disabled truck. When asked whether he had not testified at a previous trial that he had set the flare on the center line of the pavement, the witness replied, "I don't recall." Evidence that the witness had in fact so testified was excluded by the trial judge on the grounds that "the failure of the witness to 'recollect' . . . his former testimony did not constitute a sufficient foundation for his impeachment." *Held,* the evidence should have been admitted. An adequate foundation was laid by a warning question which properly called the attention of the witness to his former statement.[1] *McGehee v. Perkins,* 49 S. E. 2d 304 (Va. 1948).

When a witness has testified on a material point, evidence that he has made statements at other times and places which cannot be reconciled with his assertions on the stand becomes relevant; for such evidence, if believed, indicates that his testimony is unreliable.[2] The witness now affirms what he has previously denied; it is inferred that his present story cannot be trusted. While this inference arises from the self-contradiction itself and does not depend upon the manner in which the former statements are proved, courts have sought to avoid unfair surprise by allowing the witness to explain or correct his testimony after his attention has been called to his previous utterances;[3]

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results in plaintiff's loss, the *Restatement of Torts* says: "It is not necessary that the other's reliance upon the credibility of the fraudulent representation be the sole or even the predominant factor in influencing his conduct; it is enough that he would not have acted or failed to act as he did, had he not relied upon a misrepresentation as true or probably so." RESTATEMENT, TORTS § 546, comment *a* (1938).

10. "[I]f it be shown or made probable that the same thing would have been done in the same way if the fraud had not been practised, it cannot be deemed material." McAleer v. Horsey, 35 Md. 439, 452 (1872).

1. The error was held not prejudicial, however, and the judgment was affirmed. 49 S. E. 2d at 309.

2. Some undefined capacity to err, "a defect either in the memory or in the honesty" of the witness, appears from the self-contradiction and shows that the witness is capable of making errors in his testimony. *See* Commonwealth v. Starkweather, 64 Mass. 59, 60 (1852); 3 WIGMORE, EVIDENCE § 1017 (3d ed. 1940).

3. King v. Wicks, 20 Ohio 87 (1851); The Queen's Case, 2 Brod. & B. 284, 313, 129 Eng. Rep. 976 (H. L. 1820); Hale, *Impeachment of Witnesses by Prior Inconsistent Statements,* 10 So. CALIF. L. REV. 135, 136 (1937).

and today almost all jurisdictions [4] require that a witness be asked a warning or preliminary question which specifies the time, place, and circumstances of his prior statements before extrinsic proof of them may be introduced to discredit his testimony.[5]

If the witness, in answering the warning question, admits the statements attributed to him, the self-contradiction is established without further proof.[6] If he denies them, evidence that they were made is everywhere admissible to impeach him.[7] If the witness answers that he cannot remember having made the alleged statements, however, this answer is often mistakenly regarded as the testimony under attack.[8] Thus it is frequently ruled by a trial judge [9] (as in the instant case [10]) or urged on appeal [11] that there is nothing to contradict when the witness answers the warning question, "I don't recall," and therefore that evidence of his former statements should be excluded. This is clearly erroneous. The self-contradiction exists, if at all, between the prior assertions of the witness and his present version of the incident, quite apart from his answer to the warning question.[12] The purpose of the foundation requirement is to call the attention of the witness to his previous statements and to afford him an opportunity to explain; his inability or disinclination to avail himself of this opportunity should not prevent his impeachment.[13] In the instant case the Virginia court states the unanimous position of the courts to-

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4. The preliminary question is not required in Maine, Massachusetts, and North Carolina. Currier v. Bangor Ry. & Electric Co., 119 Me. 113, 111 Atl. 333 (1920); Allin v. Whittlemore, 171 Mass. 259, 50 N. E. 618 (1898) (opponent's witness); State v. Morton, 107 N. C. 890, 12 S. E. 112 (1890); *cf.*, MODEL CODE OF EVIDENCE, Rule 106(2) (1942) (warning question requirement left to discretion of trial judge).

5. Chicago, Milwaukee and St. Paul Ry. v. Artery, 137 U. S. 507, 519, 11 Sup. Ct. 129, 34 L. Ed. 747 (1890); Cole v. State, 65 Tenn. 239 (1873); 3 WIGMORE, EVIDENCE § 1029 (3d ed. 1940).

6. "If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary. . . ." Abbott, C. J., in The Queen's Case, 2 Brod. & B. 284, 313, 129 Eng. Rep. 976 (H. L. 1820). But see 3 WIGMORE, EVIDENCE § 1037 (3d ed. 1940).

7. *E.g.*, Delaware, Lackawanna and Western R. R. v. Converse, 139 U. S. 469, 477, 11 Sup. Ct. 569, 35 L. Ed. 213 (1891); Moore v. Bettis, 30 Tenn. 66, 69 (1850); 70 C. J., Witnesses § 1219 (1935). The prior statements are admitted only for their impeaching effect, not as direct evidence of any facts which are asserted in them. See 3 WIGMORE, EVIDENCE § 1018 (3d ed. 1940).

8. This mistake was made by appellate courts in a few early cases. Robinson v. Pitzer, 3 W. Va. 335 (1869); Long v. Hitchcock, 9 C. & P. 619, 173 Eng. Rep. 981 (Ex. 1840); Wiggins v. Holman, 5 Ind. 502 (1854) *semble*.

9. State v. Taylor, 192 La. 653, 188 So. 731 (1939); Klein v. Muhlhausen, 83 Okla. 21, 200 Pac. 436 (1921); Morton v. Hood, 105 Utah 484, 143 P. 2d 434 (1943).

10. 49 S. E. 2d at 308.

11. People v. Young, 70 Cal. App. 2d 28, 160 P. 2d 132 (1945); McAllister v. Benjamin, 96 Vt. 475, 121 Atl. 263 (1923); State v. Worley, 82 W. Va. 350, 96 S. E. 56 (1918).

12. Searway v. United States, 184 Fed. 716 (C. C. A. 8th 1910); Billings v. State, 52 Ark. 303, 12 S. W. 574 (1889); State v. Worley, 82 W. Va. 350, 96 S. E. 56 (1918); 3 WIGMORE, EVIDENCE § 1037 (3d ed. 1940).

13. People's Shoe Co. v. Skally, 196 Ala. 349, 71 So. 719 (1916); Billings v. State, 52 Ark. 303, 12 S. W. 574 (1889); Crowley v. Page, 7 C. & P. 789, 173 Eng. Rep. 344 (N. P. 1837).

day,[14] that evidence of former inconsistent statements is admissible to impeach a witness whenever, after a proper warning, the witness does not clearly admit having made the statements.

INTERSTATE COMMERCE—SHERMAN ACT—APPLICABILITY TO ORGANIZED BASEBALL

The National and American Leagues of Professional Baseball Clubs entered into an agreement forbidding any other than a standard contract to be made between club and player. Plaintiff, a baseball player, signed the prescribed contract, but he later violated its terms and was suspended from organized baseball for five years. He now alleges that transportation of players, necessary purchase of equipment, and sale of radio broadcasting and television rights for national advertising cause organized baseball to be engaged in interstate commerce within the Sherman Act, and that the standard contract agreement is an illegal restraint of trade thereunder. *Held,* that organized baseball clubs are not engaged in interstate commerce within the meaning of the Act. *Gardella v. Chandler,* 79 F. Supp. 260 (S. D. N. Y. 1948).

The basic purpose of the Sherman Act [1] is to protect interstate commerce from unlawful restraints and monopolies [2] and to secure for the public the advantages of free competition.[3] Because of its broad scope, the Act has been held to have an "adaptability comparable to that found to be desirable in constitutional provisions." [4]

14. *E.g.,* Ewing v. United States, 135 F. 2d 633 (1942), *cert. denied,* 318 U. S. 776 (1943); Janeway v. State, 38 Tenn. 130 (1858); Estill v. Citizens & Southern Bank, 153 Ga. 618, 113 S. E. 552 (1922); State v. Perkins, 343 Mo. 560, 116 S. W. 2d 468 (1938).

1. 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7 (1941). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

2. United States v. Union Pacific R. R., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124 (1912); United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626 (E. D. Ill. 1946), 27 B. U. L. REV. 210 (1947). The restraint of commerce contemplated by the Sherman Act means restraint of competition. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600, 613, 34 Sup. Ct. 951, 58 L. Ed. 1490 (1914); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738, 743 (C. C. A. 3d 1945).

3. Fashion Originators' Guild v. Federal Trade Comm'n, 312 U. S. 457, 466, 61 Sup. Ct. 703, 85 L. Ed. 949 (1941); United States v. E. C. Knight Co., 156 U. S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325 (1894); United States v. Aluminum Co. of America, 148 F. 2d 416, 428-29 (C. C. A. 2d 1945).

4. United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626, 636 (E. D. Ill. 1946). "It is only through the painstaking application of the Sherman Act, case by case, to situations of modern monopoly, that its social and economic potentialities can be realized." Rostow, *The New Sherman Act: A Positive Instrument of Progress,* 14 U. OF CHI. L. REV. 567, 600 (1947). Several factors have been considered by the courts in reaching a determination of what activities constitute an unlawful restraint on commerce under the Act. "Some of the factors considered, singly and in combination, have been: (1) that the company acquired monopolistic powers; (2) wrongful intent; (3) indulgence in predatory practices and exclusion of competition . . . ; (9) consolidation and merger of competing businesses; (10) pooling of resources of competitors . . . ; (12) the elimination of competition between two competing companies." Note, 27 B. U.

In analyzing what is interstate commerce within the Sherman Act,[5] an examination of cases reveals that the Supreme Court has held commerce to be involved in three general types of situations: (1) where a principal activity involves movement across state lines, or the use of channels of interstate transportation or communication—*e.g.,* the interstate operation of railroads,[6] the interstate movement of petroleum and its products,[7] the interstate lease and distribution of motion picture films,[8] and the interstate circulation of blacklists;[9] (2) where the principal activities are intrastate but depend for successful operation upon ancillary activities which involve movement across state lines or use of the channels of intertransportation or communication—*e.g.,* the manufacture of cigarettes which are sent to several states for sale therein,[10] the gathering and processing by a news-gathering agency of news matter which is distributed into many states,[11] the mining of coal which moves into various states,[12] and the processing of sugar beets into sugar which moves into markets of different states;[13] (3) where the principal activities are wholly intrastate but have a direct effect on movement across state lines or the use of interstate transportation—*e.g.,* a combination to corner the cotton market,[14] the transportation of interstate train passengers

L. REV. 210, 214 (1947). For a general discussion of monopolies and restraints of commerce, see Harbeson, *The Present Status of the Sherman Act,* 39 MICH. L. REV. 189 (1940).

5. The Act is not intended to affect contracts having a remote and indirect bearing upon interstate commerce; it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation. *Compare* Field v. Barber Asphalt Paving Co., 194 U. S. 618, 24 Sup. Ct. 754, 48 L. Ed. 1142 (1904), *with* United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940) (amount of interstate commerce affected unimportant), *and* Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U. S. 268, 55 Sup. Ct. 182, 79 L. Ed. 356 (1934) (importance of the commerce affected irrelevant). In United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1913), the Court held that the Act does not apply if the commerce affected is purely intrastate, or if the commerce affected is interstate unless the effect thereon is direct and not merely incidental.

6. United States v. Union Pacific R. R., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124 (1912).

7. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911).

8. Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 66 Sup. Ct. 574, 90 L. Ed. 652 (1946); United States v. Crescent Amusement Co., 323 U. S. 173, 65 Sup. Ct. 254, 89 L. Ed. 160 (1944); Binderup v. Pathé Exchange, Inc., 263 U. S. 291, 44 Sup. Ct. 96, 68 L. Ed. 308 (1923). See also Armstrong, *The Sherman Act and the Movies,* 20 TEMP. L. Q. 442 (1947).

9. Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490 (1914).

10. American Tobacco Co. v. United States, 328 U. S. 781, 66 Sup. Ct. 1125, 90 L. Ed. 1575 (1946), 21 ST. JOHN'S L. REV. 106.

11. Associated Press v. United States, 326 U. S. 1, 65 Sup. Ct. 1416, 89 L. Ed. 2013 (1945). For a general discussion of the *Associated Press* decision, see Note, 36 GEO. L. J. 66 (1947).

12. United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760 (1920).

13. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 68 Sup. Ct. 996, 1004 (1948). "[A] constantly growing number of others [cases] rejected the idea that production and manufacturing are 'purely local' and hence beyond the Act's compass, simply because those phases of a combination . . . were carried on within the confines of a single state or, of course, of several states."

14. United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1913).

by local taxicabs between railroad stations,[15] and an agreement between meat dealers not to bid against each other in live stock markets.[16]

In the present case, the decision is based solely upon the authority of *Federal Baseball Club v. National League*,[17] which in turn relied on cases holding that the business of insurance was not interstate commerce.[18] And now the authority of these insurance cases "has been substantially lessened if not completely overruled" [19] by *United States v. South-Eastern Underwriters Ass'n*.[20] The *Underwriters* case held that the business of insurance is commerce under the Sherman Act when, in negotiating and executing contracts, premiums, policies, and payment of policy obligations flow from all parts of the United States into the companies, resulting in a continuous stream of intercourse among the states. Even though this result in itself does not mean that baseball is commerce, it is difficult to find a distinction between baseball and insurance which would preclude a holding that baseball is commerce within the Act.

Although the principal activity of baseball is the playing of regularly scheduled games wholly within a certain state, there are several activities that involve interstate movement or communication. These activities include the transportation of players and equipment to and from the games, television and coast-to-coast radio broadcasts of the games for advertising purposes, the necessary purchase of equipment for players and ball parks, and the sale of admission tickets to persons who travel from surrounding states to attend the games. And even if the use of interstate channels of communications is disregarded, there remain, involved directly in interstate movement, at least two activities indispensable to organized baseball today: (1) the transportation of players and equipment and (2) the necessary purchase of equipment.

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15. United States v. Yellow Cab Co., 332 U. S. 218, 67 Sup. Ct. 1560, 91 L. Ed. 2010 (1947), 32 IOWA L. REV. 797.

16. Swift and Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518 (1905).

17. 259 U. S. 200, 42 Sup. Ct. 465, 66 L. Ed. 898 (1922). The Court at 208-9 held: "The business is giving exhibitions of base ball [*sic*], which are purely state affairs. . . . [T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines . . . is not enough to change the character of the business. . . . [P]ersonal effort, not related to production, is not a subject of commerce." See also Note, 26 A. L. R. 359 (1923).

18. The Court in Hooper v. California, 155 U. S. 648, 655, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895), held: "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states. . . . The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse. . . ." Substantially the same result was reached in Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (U. S. 1869).

19. Goddard, J., in the instant case, 79 F. Supp. at 263.

20. 322 U. S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944), 44 COL. L. REV. 772. See Note, 96 U. OF PA. L. REV. 223 (1947).

As the court recognized in the instant case, "there seems . . . to be a clear trend toward a broader conception of what constitutes interstate commerce [under the Sherman Act] than formerly in view of the expanding and changing conditions since the decision in the Federal Base Ball Club case." [21] With this trend and a clear conception of baseball's attendant activities in mind, a finding that baseball involves sufficient features of interstate commerce to come within the scope of the Act could properly be reached analytically,[22] and the question of whether the standard contract agreement is an unlawful restraint of trade would then be raised. Nevertheless, it is possible that the Supreme Court, if faced again with the problem, will not consider it desirable to apply the policy behind the Sherman Act to organized baseball.[23]

LABOR LAW—CONSTITUTIONAL LAW—VALIDITY OF PROHIBITION ON CONTRIBUTIONS AND EXPENDITURES OF LABOR ORGANIZATIONS IN FEDERAL ELECTIONS

Union funds were expended for advertisements in a commercial newspaper of general circulation and over a commercial radio station. The defeat of certain presidential and congressional candidates was advocated. The union was charged with a violation of the Federal Corrupt Practices Act as amended by section 304 of the Labor Management Relations Act.[1] This section prohibits the contribution or expenditure of money by any labor organization in connection with the election of certain designated federal officers. The defendants moved to dismiss on the ground that this section of the Act is unconstitutional. *Held,* the Act is not invalidated by its incidental effect upon the freedoms guaranteed by the First Amendment. *United States v. Painters Local Union No. 481,* 79 F. Supp. 516 (D. Conn. 1948).

The original statute,[2] which governed contributions by corporations only,

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21. 79 F. Supp. at 263.

22. "All in all . . . the odds would be in favor of a new law, a holding that baseball is commerce, and in its interstate features, subject to the provisions of the antitrust laws. The *Federal Baseball* case is a decision on baseball of another age. It antedates the era of nationally sponsored coast to coast broadcasts, television, million dollar gate receipts, and $80,000 salaries. It represents the legalistic approach rather than the realistic appreciation that organized baseball is a business and not merely a spectacle." Neville, *Baseball and the Anti-Trust Laws,* 16 FORD. L. REV. 208, 229-30 (1947).

23. See Note, 46 YALE L. J. 1386, 1390 (1937), where the author concludes that "So long as baseball's much maligned combination operates to the satisfaction of owners, players, and public, its present form of self-government will probably be allowed to continue notwithstanding apparent infractions of the law."

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1. 43 STAT. 1074 (1925), 2 U. S. C. A. § 251 (1927), as amended, 61 STAT. 159 (1947), 2 U. S. C. A. § 251 (Supp. 1947).

2. 34 STAT. 864 (1907), 2 U. S. C. A. § 251 (1927), as amended, 43 STAT. 1074 (1925), 2 U. S. C. A. § 251 (1927).

has been sustained.[3] Under the amended Act the making of a contribution or expenditure by any labor organization for certain designated political purposes is prohibited.[4] Problems as to the scope of this prohibition are illustrated by the several opinions of the U. S. Supreme Court in *United States v. C. I. O.*[5] That case held that the statute did not cover the publication and distribution, in the regular course of affairs of the labor organization, of a newspaper expressing political opinion.[6] Whatever questions are raised by the literal wording of the statute, its legislative history makes it clear that it is the expenditure of the general union dues paid by each member that is forbidden.[7] It was expressly stated in Congressional debate that the labor union could make any political expenditures it desired so long as the individual member consented.[8] Thus, if the intention of Congress is to be controlling, the primary question must be the nature of the fund expended.[9] In any event the question of statutory coverage does not appear to be significant in the instant case.[10]

In support of its decision that the statute, as applied in the instant case,

3. United States v. United States Brewers' Ass'n, 239 F. 163 (D. Pa. 1916).

4. "It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, . . ." 43 STAT. 1074 (1925), 2 U. S. C. A. § 251 (1927), as amended, 61 STAT. 159 (1947), 2 U. S. C. A. § 251 (Supp. 1947).

5. United States v. C. I. O., 68 Sup. Ct. 1349 (1948).

6. United States v. C. I. O., 68 Sup. Ct. 1349 (1948). Contrast the report of the Joint Committee on Labor-Management Relations made while this was pending. "If the allegations of fact are correct, the case squarely presents the application of the law to a newspaper supported out of general union funds when it goes beyond its usual course of business in support of a candidate for Federal political office." Report of the Joint Committee on Labor-Management Relations, Report No. 986, 80th Cong. 2d Sess. 39 (1948).

7. As indicative of the limitation of the prohibition to general union dues which is apparent throughout the Congressional debate, the following excerpts are given. Mr. Taft was asked if a particular expenditure would violate the Act. "If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes." 93 CONG. REC. 6436 (1947). Again Mr. Taft stated, "But the prohibition is against labor unions using their members' dues for political purposes. . . ." 93 CONG. REC. 6440 (1947). At another point in the discussion, Mr. Taft said, "The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper." 93 CONG. REC. 6440 (1947).

8. "The union can issue a newspaper, and can charge the members for the newspaper, that is, the members who buy copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper. I presume the members would be willing to do so. A union can publish such a newspaper, or unions can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose." 93 CONG. REC. 6440 (1947).

9. The four concurring justices in the *C. I. O.* case stated that "he [Mr. Taft] tested coverage invariably or nearly so by applying the very criterion the Court now discards, namely, the source of the funds received and expended in making the political publication." United States v. C. I. O., 68 Sup. Ct. 1349, 1364 (1948).

10. In the instant case neither the government nor the union raised any question as to statutory coverage. The advertisements were apparently paid from general union funds, and their publication could scarcely be regarded as in the regular course of union affairs.

is constitutional, the court stated that it was within the broad power of Congress to regulate elections.[11] The court points out that Congress can curb the political power of aggregations when this power is such as to interfere with a free election.[12] Finally, the court held that the fundamental right of the people in free elections is preponderant even over the freedoms of the First Amendment.[13] These arguments should be contrasted with those advanced by four members of the Supreme Court concurring in the *C.I.O.* case.[14] It was there stated that the prohibition on expenditures restricts the expression of the union's political views.[15] No conclusion is reached as to the existence of a clear and present danger[16] to interests which Congress may appropriately protect, but the statute is declared invalid because it is neither narrowly drawn[17] to meet a precise evil nor is the conduct made criminal defined with such precision as to inform adequately those subject to the law.

When an act is challenged on the ground that it violates the First Amendment, the first question should be whether the activity restricted or prohibited falls within the general scope of the freedoms set forth in that Amendment. If it is found to be in this category, the Court will test the validity.[18] The predominate test of regulations of speech and press is that of "clear and present danger"[19] as stated above. Practically, this should not mean more than that there are reasonable grounds to believe that certain speech or publications constitute an imminent danger to an interest which the legislature has the power to protect. In addition to meeting this test such statutes are normally required to be "narrowly drawn" to cover no more than the protection of such interests.[20]

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11. 79 F. Supp. at 521.
12. *Id.* at 522.
13. *Ibid.*
14. United States v. C. I. O., 68 Sup. Ct. 1349, 1361 (1948).
15. *Id.* at 1368.
16. *Id.* at 1366. The concurring members of the Court set out the three possible objectives of the Act: (1) To prevent the undue influence of labor unions on elections, (2) to preserve the purity of elections and of official conduct against the use of aggregate wealth by union and corporate entities, (3) to protect minority members of the union who hold views contrary to the majority from the use of funds contributed by them for political purposes.
17. *Id.* at 1371.
18. See Mr. Justice Stone's footnote in United States v. Carolene Products Co., 304 U. S. 144, 152, n. 4, 58 Sup. Ct. 778, 82 L. Ed. 1234 (1938). Followed in Thomas v. Collins, 323 U. S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430 (1945); Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).
19. Formulated by Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919), the test has been applied many times by the Court. Thomas v. Collins, 323 U. S. 516, 65 Sup. Ct. 315, 89 L. Ed. 430, (1944); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).
The Court does not always speak in terms of this test. United Public Workers v. Mitchell, 330 U. S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754 (1947).
20. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).

It would seem incorrect to sustain this legislation by saying that the Congress considered it necessary to protect against undue influence of unions on elections.[21] Furthermore the power of Congress to regulate elections provides no solution to the constitutional issue. However, the act may still be considered valid as a reasonable protection of minority members of the union.[22] It is an assurance that the funds contributed by them will not be used for a political party which they individually may oppose.[23] This is an interest which Congress has power to protect and the use of union funds for broadcasts and advertisements clearly constitutes a clear and present danger to that interest.[24] The main question would seem to be whether the act is sufficiently narrowly drawn.[25] The legislative history suggests that it should be so interpreted as to give clear and restricted coverage to a field which Congress can regulate.[26] The union can still establish a political fund, receive contributions, and spend this money as it desires.[27] Or a union journal, sup-

21. It does not seem to be a substantive evil for a large group such as the union to freely express its views on political issues. As expressed by the four concurring justices in the C. I. O. case, "The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes." United States v. C. I. O., 68 Sup. Ct. 1349, 1368 (1948).

22. It is recognized that in the Congressional debate the minority protection was the main idea. "As has been stated, it was the 'minority protection' idea which became the dominantly stressed one in the Senate debates, although at the most § 313 on its face gave only slight suggestion of this purpose." United States v. C. I. O., 68 Sup. Ct. 1349, 1369 (1948).

England for some time had legislative protection for the minority members of the union. Trade Disputes and Trade Unions Act, 1927, 17 & 18 Geo. V, c. 22 § 4(1). When the labor party came into power such provisions were repealed.

The present statute seems to place the burden on the union to obtain the consent of members before using funds for political purposes. It is intimated in the concurring opinion of the *C. I. O.* case that if the burden were placed on the dissenting members it might be constitutional. "If merely 'minority or dissenter protection' were intended, it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portions of them to be applied to the forbidden uses without jeopardy to their rights as members. This would be clearly sufficient, it would seem, to protect dissenting members against use of funds contributed by them for purposes they disapprove, but would not deprive the union of the right to use the funds of concurring members, more often than otherwise a majority, without securing their express consent in advance of the use." United States v. C. I. O., 68 Sup. Ct. 1349, 1370 (1948).

23. In one case a union member was suspended for failure to pay a political assessment. The court refused him reinstatement in the union. DeMille v. American Federation of Radio Artists, 175 P. 2d 851 (Cal. App. 1946), *aff'd*, 31 Cal. 2d 137, 187 P. 2d 769 (1947).

Senator Taft expressed this view. "Why should they [union members] be forced to contribute money for the election of someone to whose election they are opposed?" 93 CONG. REC. 6440 (1947).

24. It is not difficult to spell out the clear and immediate danger. Congress should be able to protect minority members against the use of their funds for political purposes. Membership in a union should not be dependent upon the making of political contributions.

25. This was the principal objection voiced in the concurring opinion of the *C. I. O.* case. Thus the narrowly drawn aspect would seem to be a real question. United States v. C. I. O., 68 Sup. Ct. 1349, 1368 (1948).

26. See note 7 *supra*.

27. "[O]r unions can do as was done last year, organize something like the PAC, a political organization, and receive contributions, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose." This was a remark of Senator Taft during Congressional debate. 93 CONG. REC. 6440 (1947).

ported by contributions or an earmarked fund, can speak on any political issue.[28] Thus it is political expenditures from the general funds only that are prohibited.

OIL AND GAS—DRAINAGE CAUSED BY NEGLIGENT DRILLING OF WELL—LIABILITY IMPOSED AND RULE OF CAPTURE HELD INAPPLICABLE

Plaintiffs were the owners of an undivided interest in gas and oil. The defendant drilled an "offset well" on adjoining property in a negligent manner, this being the proximate cause of that well "blowing out." The fissure around this well increased until it enveloped and destroyed a well on the plaintiffs' land. Huge quantities of gas and oil were dissipated as a result, though substantially all of that which escaped from that part of the common reservoir which underlay the plaintiffs' land was lost through the opening on the adjoining land. Tort action to recover damages. *Held,* plaintiffs had not lost their title to these minerals under the law of capture and defendants must respond in damages. *Elliff v. Texon Drilling Co.,* 210 S. W. 2d 558 (Tex. 1948).

In considering the nature of the legal interests which a landowner has in the oil and gas beneath his surface estate, the courts have reached contrary results.[1] Some follow a qualified-ownership concept, holding that there is no ownership in these substances until they are reduced to physical possession. Others follow an ownership-in-place concept, holding that the owner of the surface estate has title to those substances lying beneath his land. The courts in Texas have adopted the latter view.[2] Due to the nature of gas and oil, the lack of sufficient information upon which any other result might be reached, and in order to achieve what was believed to be a socially desirable result, it has been held that any owner of land above a common pool is privileged to take these substances from his land even though this results in the drainage from a portion of the pool which extended beneath another's land.[3] The courts

28. "The union can issue a newspaper, and can charge members for the newspaper, that is, the members who buy copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to contribute to that kind of a newspaper." 93 CONG. REC. 6440 (1947).

1. For a collection of cases disclosing these divergent results see Andrews, *The Correlative Rights Doctrine in the Law of Oil and Gas,* 13 So. CALIF. L. REV. 185, 189, n. 15 *et seq.* (1940); 1 SUMMERS, OIL AND GAS § 62 (Perm. ed. 1938).

2. Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F 989 (1915). The absolute property right in Texas is not in any sense an undivided interest as a co-tenant in the common pool. This idea has been definitely rejected. Magnolia Petroleum Co. v. Zeppa, 70 S. W. 2d 777 (Tex. Civ. App. 1934).

3. Brown v. Humble Oil Refining Co., 126 Tex. 296, 83 S. W. 2d 935 (1935), *rehearing denied,* 87 S. W. 2d 1069 (1935); *accord,* Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N. E. 912 (1900) (rule of capture recog-

have recognized that an appropriation of these substances by an adjoining landowner, though this is without the consent of the owner, imposes no liability under the so-called rule of capture,[4] where the taking was for a legitimate purpose.

In the past, courts have granted relief to a private individual where his right to take a fair share of gas and oil from the common pool was injured by wrongful conduct or where the method whereby he was producing these substances was damaged. Thus, where due to a failure to drill in a vertical manner there had been a subterranean trespass whereby defendants obtained oil from a stratum which lay directly beneath the plaintiffs' land, damages were awarded for the oil thus extracted.[5] And where a large quantity of nitroglycerin was used to shoot a well on the defendant's land and shortly thereafter salt water appeared in the plaintiff's well, the jury held the injury was caused by the defendant's negligence and damages were awarded.[6] A Texas court construed an administrative order regarding vacuum pumps, so as to give rise to a private right of action for damages, where the violation of this rule caused a decrease in the production capacity of the plaintiff's land.[7] It has been held that a taking of these substances must be reasonable, for a legitimate purpose and without a wasting of them. Where they were taken for the purpose of injuring the common source without benefit to the taker, in the absence of statute damages have been awarded.[8]

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nized under qualified-ownership concept). This rule of capture is said not to be an affirmative privilege, but rather a negative freedom from liability for damages. For an excellent discussion of the rule see Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas,* 13 TEX. L. REV. 391 (1935). The rule of capture is made necessary due to the fact that these substances will migrate towards any low pressure area created by the penetration of the common pool by a well.

4. The courts which follow the qualified-ownership concept reach this result on the theory that no one has any title until title is vested in that person who reduces the substances to actual possession. The courts following the ownership-in-place concept reach this result on the theory that the landowner loses title to these substances when they migrate beneath another's lands. For an explanation of the apparent inconsistencies under the absolute ownership concept see Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566 (1923).

5. Bell Corp. v. Bell View Oil Syndicate, 24 Cal. App. 2d 587, 76 P. 2d 167 (1938).

6. Comanche Duke Oil Co. v. Texas & Pacific Coal & Oil Co., 298 S. W. 554 (Tex. Comm. App. 1927), 6 TEX. L. REV. 399 (1928); *cf.* People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59 (1892). As to liability generally see 4 SUMMERS, OIL AND GAS §§ 654, 655 (Perm. ed. 1938).

7. See, Peterson v. Grayce Oil Co., 37 S. W. 2d 367 (Tex. Civ. App. 1931), *aff'd on other grounds* 128 Tex. 550, 98 S. W. 2d 781 (1936) (shortly after this case the statute was modified so as to provide expressly for compensation to a party injured by wrongful use of vacuum pumps). *Cf.* United Carbon Co. v. Campbellsville Gas Co., 230 Ky. 275, 18 S. W. 2d 1110 (1929) (in absence of statute court refused to enjoy the stimulation of the flow of natural gas by a compressor when the use was for a legitimate purpose). But *cf.* Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768 (1900) (use of a pumping device held to be unlawful and enjoined, independent of statute).

8. Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S. W. 368 (1903) (result reached under qualified-ownership concept). *Contra*: Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141 (1893) (court refused to enjoin waste). A penal statute against an individual who was wasting the natural gas taken has been upheld. Commonwealth v. Trent, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209 (1903). Statutes

In the instant case the court was confronted with the problem as to whether the rule of capture absolved one of liability to an adjoining owner, when the substances underlying the plaintiffs' lands had migrated from and had become wasted as a result of the defendants' negligence. Here the defendants were engaged in a legitimate activity, and there was intent neither to injure the common source nor to cause injury to the plaintiffs by wasting these substances.[9] The fault of the defendants was solely the negligent manner in which they were carrying on a legitimate enterprise, which resulted in waste. The court holds that "under the common law, and independent of the conservation statutes [they] were legally bound to use due care to avoid the negligent waste or destruction . . . ," [10] and the fact that the majority of these substances escaped and were wasted on the defendants' land was "immaterial." It concluded that by the law of capture the plaintiffs' title was defeasible, but where there was a negligent waste of the substances taken as in this case, there was neither a legitimate drainage nor a lawful or reasonable appropriation. Damages were awarded for the deprivation of the plaintiffs' right and opportunity to produce these substances.[11]

This decision based on common law principles,[12] following an established public policy of the state,[13] provides a new remedy for the difficulty which is created when the law will permit neither uncontrolled production nor unrestrained drilling of offset wells,[14] as a protection against drainage by others

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prohibiting waste have been held valid and such action has been enjoined by the state. Ohio Oil Co. v. Indiana (No. 1), 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729 (1900). See also Walker, *Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production*, 16 TEX. L. REV. 370 (1938). 1 SUMMERS, OIL AND GAS § 71 (Perm. ed. 1938). In Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 69, 57 Sup. Ct. 364, 81 L. Ed. 510 (1937), the United States Supreme Court stated in a dictum a result which is contrary to the holding of this court, saying "the common law of the State did not, apparently, afford a remedy against depleting the common supply by wasteful taking or use of oil or gas drawn from the wells on one's own property." (The court was considering the validity of an order of a Texas administrative agency).

9. The court held that the defendants "had knowledge that a failure to use due care in drilling their well might result in a blowout with the consequent waste and dissipation of the oil, gas and distillate from the common reservoir." 210 S. W. 2d at 563. Query: Would it be possible for anyone to dig a well and not be chargeable with this knowledge? Is this knowledge an essential element to the imposition of liability?

10. *Id.* at 563.

11. The same result could be reached even though the plaintiff had taken no action to reduce these substances to actual possession.

12. "This reasonable opportunity to produce his fair share of the oil and gas is the landowner's common law right under our theory of absolute ownership of the minerals in place. But from the very nature of this theory the right of each land holder is qualified, and is limited to legitimate operations." 210 S. W. 2d at 562.

13. Texas by constitutional amendment in 1917 declared conservation of the natural resources to be an established public policy. Pursuant to this, statutes have been enacted declaring waste to be unlawful. For a general discussion see Hardwicke, *Legal History of Conservation of Oil in Texas* in LEGAL HISTORY OF CONSERVATION OF OIL AND GAS: A SYMPOSIUM 214 (Am. Bar Ass'n 1938).

14. In the period of development of the law of gas and oil, in almost every case where the court declined to grant relief for waste, the remedy of self-help (*i.e.* drilling offset wells) was available to the plaintiff and it was believed that this remedy adequately protected the individual's interest. This remedy of self-help has been modified by statutes and administrative regulation, so that today protection against drainage has been im-

who have wells bottomed in the common pool. Although this result is not a complete solution to the problem of equitably distributing the substances contained in a common pool, this is a step forward. Although under this view an individual's absolute ownership is defeasible under the law of capture *only* if the taking by another does not result in unreasonable waste, it should be noted that this is a limitation only on the manner of taking and in no wise affects the quantity that may be taken for a legitimate purpose when there is no waste.

TORTS—CAUSATION—SECOND INJURY RESULTING FROM WEAKENED CONDITION PRODUCED BY FIRST INJURY

Plaintiff's hand was injured in a fall caused by defendant's negligence. About a year later, in going up a flight of stairs, plaintiff fell again and received an additional injury. In suing for both injuries she alleged that a weakness of her hand produced by the first injury prevented her from sustaining herself by holding to the rail. The jury awarded damages for injuries from both falls. *Held,* recovery for both injuries affirmed. The second fall might be found to be a natural consequence of the first. *Mitchell v. Legarsky,* 60 A. 2d 136 (N. H. 1948).

Where a negligent actor is liable for an injury which impairs the physical condition of another's body, is the actor also liable for a subsequent injury attributable to the impaired condition? The present case answers affirmatively without detailed discussion. Cases in point are conflicting. A material factor seems to be the bodily location of the subsequent injury. Where there is an "aggravation" of an existing injury, the courts generally allow recovery.[1] This is not true, however, where a previously sound part of the body is subsequently injured.[2]

Apparently, though not expressly, the present case is of the latter type in

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paired. See, *e.g.,* Magnolia Petroleum Co. v. Blankenship, 85 F. 2d 553 (C. C. A. 5th 1936) *cert. denied* 299 U. S. 608, 57 Sup. Ct. 234, 81 L. Ed. 449 (1936).

1. *E.g.,* Postal Telegraph Cable Co. v. Hulsey, 132 Ala. 444, 31 So. 527 (1901); Wilder v. General Motorcycle Sales Co., 232 Mass. 305, 122 N. E. 319 (1919); Batton v. Public Service Corp., 75 N. J. L. 857, 69 Atl. 164 (1908); Wagner v. Mittendorf, 232 N. Y. 481, 134 N. E. 539 (1922); Port Arthur v. Wallace, 141 Tex. 201, 171 S. W. 2d 480 (1943); Smith v. Northern Pac. Ry., 79 Wash. 448, 140 Pac. 685 (1914); Weiting v. Town of Millston, 77 Wis. 523, 46 N. W. 879 (1890).

2. Allowing recovery: Brown v. Beck, 63 Cal. App. 686, 220 Pac. 14 (1923); Whalen v. Boston, 304 Mass. 126, 23 N. E. 2d 93 (1939); Marshall v. Pittsburgh, 119 Pa. Super. 189, 180 Atl. 733 (1935); Culbertson v. Kieckhefer Container Co., 197 Wis. 349, 222 N. W. 249 (1928).

Denying recovery: Watters v. City of Waterloo, 126 Iowa 199, 101 N. W. 871 (1904); Snow v. New York, N. H. & H. R. R., 185 Mass. 321, 70 N. E. 205 (1904); Ault v. Kuiper, 279 Mich. 1, 271 N. W. 530 (1937); Sporna v. Kalina, 184 Minn. 89, 237 N. W. 841 (1931); Powers v. Kansas City, 224 Mo. App. 70, 18 S. W. 2d 545 (1929); Kolyer v. Westmoreland Coal Co., 149 Pa. Super. 473, 27 A. 2d 272 (1942).

which the subsequent injury is "new." The New Hampshire court, so far as the opinion shows, treats the case as though the only problem involved is that of causation in fact. This may be an adequate test of liability in the typical "aggravation" case, where the causal relation between the impaired condition and the subsequent injury is direct.[3] But as applied to the more complex facts of the typical "new injury" case, the cause-in-fact test of liability seems inadequate.[4] It ignores factors which have influenced other courts to deny recovery. The subsequent injury may not be a normal or foreseeable result of the impaired condition.[5] This is especially true where the original injury has substantially healed.[6] The plaintiff's conduct may be important as a cause of the subsequent injury, and where this conduct is characterized as negligent,[7] or imprudent,[8] or even voluntary,[9] recovery has been denied. Other considerations of policy may lead to the conclusion that the subsequent injury is causally remote from the impaired condition.[10] The desirability of keeping liability within practical limits is at least tacitly present in most of the opinions which deny recovery. This problem, like most of those involving legal cause, cannot be reduced to any single rule.

TORTS—PROXIMATE CAUSE—SUICIDE AS NEW AND INDEPENDENT AGENCY

The complaint alleged that defendant, in violation of a statute, sold a habit-forming drug, a barbiturate preparation, to plaintiff's deceased, originally as a remedy for nervousness; that deceased was unaware of its habit-forming quality; that, as the result of taking this drug, deceased became an addict; that defendant continued to supply him illegally for a period of one year, at the end of which time deceased committed suicide. The administratrix brings this action for damages. *Held,* demurrer to the complaint properly sustained; a voluntary act of suicide is a new and independent agency, cutting off liability. *Scott v. Greenville Pharmacy,* 48 S. E. 2d 324 (S. C. 1948).

"The problem of the connection between the act or omission of the defendant and the damage which the plaintiff has suffered usually is dealt

3. Postal Telegraph Cable Co. v. Hulsey, 132 Ala. 444, 31 So. 527 (1901).
4. A better test would require that the subsequent injury arise from a normal risk incident to the impaired condition. 16 TEX. L. REV. 281 (1938).
5. With knowledge of the extent of the impaired condition, could the subsequent injury have been foreseen?
6. Powers v. Kansas City, 224 Mo. App. 70, 18 S. W. 2d 545 (1929).
7. Sporna v. Kalina, 184 Minn. 89, 237 N. W. 841 (1931); Yarbrough v. Polar Ice & Fuel Co., 79 N. E. 2d 422 (Ind. 1948).
8. Snow v. New York, N. H. & H. R. R., 185 Mass. 321, 70 N. E. 205 (1904).
9. Ault v. Kuiper, 279 Mich. 1, 271 N. W. 530 (1937). However, it has been pointed out that a normal and prudent use of the body should not be viewed as an intervening cause. Carpenter, *Proximate Cause,* 16 So. CALIF. L. REV. 1, 21 (1942).
10. Sporna v. Kalina, 184 Minn. 89, 237 N. W. 841 (1931).

with by the courts in terms of what is called 'proximate cause,' or 'legal cause.' " [1] Proximate cause [2] is merely the limitation which the courts have felt necessary, as a practical matter, to place upon one's liability for the consequences of his acts. A specific problem in regard to the question of the extent to which liability shall be carried arises in the case of an intervening force.[3] "The defendant will not be relieved of liability by an intervening force which could reasonably have been foreseen, nor by one which is a normal incident of the risk created." [4] If the intervening force takes the form of a suicide the majority rule in the United States is that such act is a new and independent agency if the deceased knows the purpose and physical effect of his act.[5] "From the cases bearing upon the subject . . . the rule seems to be that an action under the [death] statute may be maintained when the death is self-inflicted, only where it is the result of an uncontrollable influence, or is accomplished in delirium or frenzy, caused by the defendant's negligent act or omission, and without conscious volition of a purpose to take life; for then the act would be that of an irresponsible agent." [6] There is some authority to the effect that the English rule permits recovery for the suicide of an insane person, even though the act was voluntary.[7] The rule

1. PROSSER, TORTS 311 (1941).

2. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence,* 40 AM. L. REG. (N.S.) 79 (1901); Gregory, *Proximate Cause in Negligence—A Retreat from "Rationalization,"* 6 U. OF CHI. L. REV. 36 (1938); Seavey, *Mr. Justice Cardozo and the Law of Torts,* 52 HARV. L. REV. 372 (1939); Terry, *Proximate Consequences in the Law of Torts,* 28 HARV. L. REV. 10 (1914).

3. "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." 2 RESTATEMENT, TORTS § 441 (1934).

4. PROSSER, TORTS 352 (1941). Intervening forces are considered in detail in Beale, *The Proximate Consequences of an Act,* 33 HARV. L. REV. 633 (1920); McLaughlin, *Proximate Cause,* 39 HARV. L. REV. 149 (1925).

5. Scheffer v. Washington City, V. M. & G. S. R. R., 105 U. S. 249, 26 L. Ed. 1070 (1881) (suicide resulting from physical injury); Salsedo v. Palmer, 278 Fed. 92 (C. C. A. 2d 1921) (physical and mental torture); King v. Henkie, 80 Ala. 505 (1886) (intoxicating liquor); Stevens v. Steadman, 140 Ga. 680, 79 S. E. 564 (1913) (letter requesting resignation); Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N. E. 80 (1909) (physical injury); Daniels v. New York N. H. & H. R. R., 183 Mass. 393, 67 N. E. 424 (1903), 17 HARV. L. REV. 125 (physical injury); Jones v. Stewart, 183 Tenn. 176, 191 S. W. 2d 439 (1946) 19 TENN. L. REV. 855 (1947), 12 Mo. L. REV. 89 (1947) (accusation of crime). See Notes, 23 A. L. R. 1271 (1923), 79 A. L. R. 351, 370 (1932). *But cf.* Stephenson v. State, 205 Ind. 141, 179 N. E. 633 (1932), 45 HARV. L. REV. 1261 (girl committed suicide after attempted rape; defendant convicted of murder).

6. Brown v. American Steel & Wire Co., 43 Ind. App. 560, 88 N. E. 80, 85 (1909); *accord,* Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N. E. 2d 776 (1942). "A voluntary act of suicide of an *insane* person, knowing the purpose and physical effect of his act, is such a new and independent agency as to break the line of causation." Long v. Omaha & C. B. St. Ry., 108 Neb. 342, 187 N. W. 930 (1922) (syllabus by the court; italics supplied). *But cf.* Elliott v. Stone Baking Co., 49 Ga. App. 515, 176 S. E. 112 (1934) (petition alleging insanity as a result of physical injury, followed by suicide while insane, held to state good cause of action, although there was no allegation that such act was accomplished in delirium or frenzy).

7. Marriott v. Maltby Main Colliery Co., 37 T. L. R. 123 (C. A. 1920), noted in 34 HARV. L. REV. 563 (1921), 69 U. OF PA. L. REV. 286. "[T]he English rule is that where a man commits suicide under the impulse of insanity, itself caused by an injury due to the misconduct of the defendant, then, no matter how premeditated the suicide may be, the

generally followed by the American courts, denying liability, is also applied in those cases arising under workmen's compensation acts.[8]

However, there is one type of situation in which the American courts allow recovery for a death by suicide, even though the deceased was fully aware of the consequences of his act. "Where a suicide is caused by the use of intoxicating liquors, it seems that an action will lie under a civil damage act against the person who sold the liquor, to recover damages for the loss of maintenance and support." [9] In such a case it is held to be unnecessary to inquire whether the suicide was the natural, reasonable or probable consequence of the defendant's acts, since the action is founded upon a special liquor statute rather than upon a death statute.[10]

The majority rule, denying recovery, has usually been applied in cases involving physical injury, where it would be difficult to say that suicide was included within the risk of the defendant's negligent conduct. However, in the instant case, if the drug in question had been cocaine, which results in addiction, destroys will power and brings about a despondent condition which perhaps would lead to suicide, then the defendant's conduct would have created a risk which would include suicide, and there might well have been liability.[11] The drug involved in the principal case was a barbiturate, which does not frequently, if ever, result in addiction.[12] Therefore the best way the holding can be justified is for the court to take judicial notice of this fact, in view of the circumstance that the decision was based on a demurrer to the complaint. The court was no doubt influenced by a belief that this drug, was not the real cause of the suicide, but that point was not raised by the demurrer.[13]

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chain of causation is not broken." 69 U. OF PA. L. REV. 286 (1921). See Note, 143 A. L. R. 1227, 1232 (1943).

8. *E.g., In re* Sponatski, 220 Mass. 526, 108 N. E. 466 (1915); McKane v. Capital Hill Quarry Co., 100 Vt. 45, 134 Atl. 640 (1926); Barber v. Industrial Commission, 241 Wis. 462, 6 N. W. 2d 199 (1942). *Contra*: Sinclair's Case, 248 Mass. 414, 143 N. E. 330 (1924). See Bauer, *Suicide as Intervening Cause in Workmen's Compensation Cases as Compared With Suicide in Cases of Wrongful Death*, 5 B. U. L. REV. 229 (1925); Note, 143 A. L. R. 1227 (1943). All of above cases involve physical injury.

9. Note, 23 A. L. R. 1271, 1276 (1923).

10. One such liquor statute is the Illinois Dramshop Act which provides that: "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action . . . against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication . . . of such person." ILL. REV. STAT. c.43, § 135 (1945). A somewhat similar statute, though more narrow in scope, is that of Wisconsin, which is applicable only where the intoxicated person is a minor or habitual drunkard. WIS. STAT. § 176.35 (1947).

11. A similar viewpoint must have influenced the legislatures which passed the statutes mentioned in the preceding footnote, which expressly included suicide within the risk where alcoholic beverages were concerned.

12. GOODMAN & GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 135 (1941).

13. The demurrer was sustained on the additional ground that deceased was contributorily negligent, and thus no cause of action was available under the death statute.