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Recent Cases

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RECENT CASES

ADMINISTRATIVE LAW—RADIO LICENSES—FCC CONTROL OF RADIO PROGRAMMING

Appellant petitioned the Federal Communications Commission for authority to increase the power and to change the frequency of his radio station. If appellant's petition were granted, he proposed to broadcast Columbia network programs exclusively and to provide local programs only when CBS would not service him. The FCC denied the petition on the ground that network scheduling should be limited and particularly fitted to the local needs of each community by the use of more local programs. Appeal to the Court of Appeals for the District of Columbia. *Held,* affirmed.[1] *Simmons v. Federal Communications Commission,* 169 F. 2d 670 (App. D. C. 1948), *cert. denied,* 69 Sup. Ct. 67 (1949).

The physics of the radio spectrum necessitates governmental licensing of commercial radio outlets. Many more applicants seek radio licenses than there are available frequencies.[2] Hence, Congress delegated to the FCC the duty of providing for the public the best practicable use of the nation's limited radio facilities.[3] This agency is empowered by statute to grant, renew, amend, and revoke commercial radio licenses whenever the "public interest, convenience, and necessity" require it.[4] Another section of the same Act specifically denies the Commission any power of censorship under radio broadcasting.[5] It is thus the difficult task of the FCC, if it is to execute the Congressional mandate, to license stations which will best serve the public, and yet to avoid the imposition of censorship over its licensees.

In the principal case, the majority of the court affirmed the commission's contention that a broadcaster, if he is best to serve the "public interest, con-

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1. A concurring opinion condemned the FCC's action as arbitrary and capricious censorship expressly forbidden by statute. 48 STAT. 1091 (1934), 47 U. S. C. A. § 326 (Supp. 1948). Nevertheless, this judge concurred in the result because the appellant sought a frequency already in use in the same area.

2. "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." National Broadcasting Co. v. United States, 319 U. S. 190, 226, 63 Sup. Ct. 997, 87 L. Ed. 1344 (1943). See also Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850, 852 (App. D. C. 1932); Application of Mayflower Broadcasting Corp., 8 F. C. C. 333, 339 (1940).

3. The Federal Communications Act of 1934, 48 STAT. 1064 (1934), 47 U. S. C. A. §§ 151 *et seq.* (Supp. 1948).

4. 48 STAT. 1083 (1934), 47 U. S. C. A. § 307 (Supp. 1948).

5. 48 STAT. 1091 (1934), 47 U. S. C. A. § 326 (Supp. 1948). For a discussion of this statutory prohibition against censorship, see Caldwell, *Freedom of Speech and Radio Broadcasting,* 177 ANNALS 9 (1935). This statute supplements the constitutional guaranty of freedom of speech and press. U. S. CONST. AMEND. I.

venience, and necessity," must tailor the programs of a national network to the particular needs of this community. A United States Supreme Court decision supports this view.[6]

If it is conceded that the FCC can legally evaluate the program service of broadcasters in determining whether "public interest, convenience, and necessity" will be best served by granting initial licenses and license renewals, this program evaluation, even if not direct censorship, necessarily applies indirect restraints upon licensees. Under the present short-term licensing system in which program content is deemed a material element in considering renewal applications, the FCC controls the air-waves. This control of programming has been most effective despite the reluctance of the courts to recognize it as deliberate censorship.[7]

Thus far the commission has attempted evaluation only of the total performance of stations, and has not determined which individual programs best suit the local needs of each community.[8]

How far the FCC might proceed in exercising radio program controls, if it should choose to extend its powers to their legal limits, must await a final determination of the Supreme Court. The commission has decided that broadcasters must not be advocates in public discussion.[9] It has further proposed

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6. In National Broadcasting Co. v. United States, 319 U. S. 190, 63 Sup. Ct. 997, 87 L. Ed. 1344 (1943), the Court upheld a number of chain broadcasting regulations adopted by the FCC to restrict certain practices prevalent between local stations and national networks, and considered inimical to the public interest. One of these FCC regulations provided that a station might not contract away its right to reject network programs [FCC Regulations 3.105 (1941)]. The appellant in the principal case did not propose to restrict his freedom of program choice by a formal contract with a national network. The same result would have been achieved, however, by his announced intention to broadcast all network programs.

Mr. Justice Frankfurter, speaking for the Court in the *NBC* case, stated: "[T]he Commission's powers are not limited to the engineering and technical aspects of radio communication." 319 U. S. at 215. The opinion proceeded to state that as an incident of its licensing function, the FCC may consider whether the program policy of an applicant for a license will serve the "public interest, convenience, and necessity." Evaluation of this decision is found in WHITE, THE AMERICAN RADIO 167 (1947); 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 579-81 (1947). See also Segal, *Recent Trends in Censorship of Radiobroadcast Programs,* 20 ROCKY MT. L. REV. 366 (1948).

7. National Broadcasting Co. v. United States, 319 U. S. 190, 53 Sup. Ct. 627, 87 L. Ed. 1344 (1943); Federal Radio Commission v. Nelson Bond and Mortgage Co., 289 U. S. 266, 53 Sup. Ct. 506, 77 L. Ed. 1166 (1933); Trinity Methodist Church, South v. Federal Radio Commission, 62 F. 2d 850 (App. D. C. 1932), *cert. denied,* 284 U. S. 685; KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission, 47 F. 2d 670 (App. D. C. 1931). For a discussion of the significance of the *Trinity Methodist* and the *KFKB* cases, *supra,* with regard to the FCC's supervision of programming, see WARNER, RADIO AND TELEVISION LAW § 33c (1948).

8. 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 641 (1947); WARNER, RADIO AND TELEVISION LAW § 38 (1948). On the relationship between "quantitative controls" and "qualitative controls," see Note, 40 YALE L. J. 967 (1931).

9. In Application of Mayflower Broadcasting Corp., 8 F. C. C. 333, 339 (1940), the commission stated that a radio licensee must not editorialize, or otherwise express any personal bias over the air. Considerable doubt as to the advisability and constitutionality of this decision has been expressed by several critics. See WARNER, RADIO AND TELEVISION LAW § 34f.12 (1948); WHITE, THE AMERICAN RADIO 177 (1947); 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 638 (1947). There are indications that the FCC may

that past program service be measured against a prescribed yardstick to determine whether the public interest warrants license renewals.[10] The advisability of these measures has been criticised,[11] but their constitutionality has never been tested.

If the licensing function of the FCC is to be exercised intelligently, a measure of indirect coercion is unavoidable. Perhaps the commission has gone too far in prescribing the type of programming best suited to community life.[12] If so, Congress should establish a more definite standard than that of "public interest, convenience, and necessity." While the present standard is satisfactory for such purposes as requiring that licensees be financially stable and morally responsible, it is too indefinite to serve as an adequate criterion for the determination of questions involving freedom of speech and of the press.[13] A more restricted standard would better enable the courts to decide whether FCC decisions and regulations exceed statutory and constitutional limitations. The nation should receive the best radio service obtainable; yet the constitutional guaranty of free speech and a free press must remain inviolate. A current investigation to achieve this end is being conducted by the Commission on Freedom of the Press.[14] It has recommended specific action by Congress, the FCC, the broadcasters, the newspaper and magazine press, and the general public in order that our system of free enterprise broadcasting will provide the best obtainable radio service.[15]

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reconsider its *Mayflower* decision. See *In the Matter of Editorializing by Broadcast Licensees,* F. C. C. Mim. 11441 (1948).

10. The "yardstick" consists of four factors: (1) the carrying of sustaining programs, (2) the carrying of local live programs, (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 55 (1946). For an analysis of the varied criticism that this yardstick has received, see Note, 47 COL. L. REV. 1041, 1049 (1947).

11. WHITE, THE AMERICAN RADIO 177, 193 (1947); 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 639 (1947); Note, 47 COL. L. REV. 1041, 1050 (1947); WARNER, RADIO AND TELEVISION LAW §§ 34f.12, 36, 38 (1948).

12. The concurring opinion in the principal case emphasizes that the particular demands of a station's listeners, even without administrative direction, will compel each broadcaster to provide the program service best suited to the needs and desires of persons in his community. 169 F. 2d at 673.

13. Several recent Supreme Court cases have indicated that when an administrative agency takes action which amounts to a restriction of the freedoms guaranteed by the First Amendment, the standard governing its action, as established by the legislative body, must be more definite than is required for activities affecting other fields of the law. *E.g.,* Saia v. New York, 68 Sup. Ct. 1148 (1948), 2 VAND. L. REV. 113; Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); *cf.* Kovacs v. Cooper, 69 Sup. Ct. 448 (1949).

14. This commission was created to consider the freedom, functions, and responsibilities of the major agencies of mass communications: newspapers, radio, motion pictures, newsgathering media, magazines, and books. The commission has published several books on its findings, such as WHITE, THE AMERICAN RADIO (1947); CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); HOCKING, FREEDOM OF THE PRESS (1947); HUTCHINS, A FREE AND RESPONSIBLE PRESS (1947).

15. WHITE, THE AMERICAN RADIO v-xi, 234-236 (1947). The FCC, by its decision in the principal case, essentially carried out one of the specific proposals advanced by the Commission on Freedom of the Press. See *id.* at vii.

CONSTITUTIONAL LAW—CORPORATIONS—STATUTE REQUIRING SECURITY FOR COSTS IN STOCKHOLDER'S DERIVATIVE SUIT

A shareholder's derivative suit was brought in a federal district court of New Jersey charging certain officers and directors of a Delaware corporation with mismanagement and fraud. Pursuant to a New Jersey statute,[1] the corporation moved the court to order the complainant to give security in the amount of $125,000 for reasonable expenses, including counsel fees, which might be incurred by it and the other parties defendant in the action. The motion was denied on the ground that the statute is remedial and does not bind the federal courts. *Held,* the statute is binding on the court and is not unconstitutional as a violation of the due process clause of the Fourteenth Amendment. *Beneficial Industrial Loan Corp. v. Smith,* 170 F. 2d 44 (3d Cir. 1948).

The stockholder's derivative suit,[2] admittedly inadequate and subject to abuse by strike-suitors,[3] has nevertheless been the minority stockholder's only practical device for holding corporate directors and officers accountable.[4] Consequently, recent statutes patterned after Section 61-b of the New York General Corporation Law [5] have been severely criticized on the ground that,

1. "In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares . . . of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class, . . . unless the shares . . . held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject, . . . to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action." N. J. STAT. ANN. § 14:3-15 (1945).

2. On the general subject see BALLANTINE, CORPORATIONS 333 *et seq.* (Rev. ed. 1946); 13 FLETCHER, CYCLOPEDIA CORPORATIONS §§ 5939-6045 (Perm. ed. 1943); STEVENS, CORPORATIONS 654 *et seq.* (1936); Hays, *A Study in Trial Tactics: Derivative Stockholders' Suits,* 43 COL. L. REV. 275 (1943); Hornstein, *Legal Controls for Intracorporate Abuse —Present and Future,* 41 COL. L. REV. 405 (1941); KOESSLER, *The Stockholder's Suit: A Comparative View,* 46 COL. L. REV. 238 (1946); Simpson, *Fifty Years of American Equity,* 50 HARV. L. REV. 171, 191 (1936); Carson, *Current Phases of Derivative Actions Against Directors,* 40 MICH. L. REV. 1125 (1942).

3. "That it [the stockholders' derivative suit] is slow, cumbersome and expensive to all concerned, if the calculation is limited to the actual cases which reach the courts, cannot be doubted." Rifkind, J., in Brendle v. Smith, 46 F. Supp. 522, 526 (S. D. N. Y. 1942); Podell, *A Non-Bureaucratic Alternative to Minority Stockholders' Suits: A Third Viewpoint,* 43 COL. L. REV. 1045, 1047 (1943); see Note, *Extortionate Corporation Litigation: The Strike Suit,* 34 COL. L. REV. 1388 (1934). For suggested improvements or substitutes see Berlack, *Stockholders' Suits: A Possible Substitute,* 35 MICH. L. REV. 597, 604 (1937); Hornstein, *A New Forum for Stockholders,* 45 COL. L. REV. 35 (1945); Lasswell, *A Non-Bureaucratic Alternative to Minority Stockholders' Suits: A Proposal,* 43 COL. L. REV. 1036 (1943); Note, 29 GEO. L. J. 363 (1940).

4. "Despite the numerous abuses which have developed in connection with such suits . . . [t]hey have educated corporate directors in the principles of fiduciary responsibility and undivided loyalty. They have encouraged faith in the wisdom of full disclosure to stockholders. . . . The minatory effect of such actions has undoubtedly prevented diversion of large amounts from stockholders to managements and outsiders." Brendle v. Smith, 46 F. Supp. 522, 525 (S. D. N. Y. 1942); see Shielcrawt v. Moffett, 49 N. Y. S. 2d 64, 71 (Sup. Ct. 1944); Bayer v. Beran, 49 N. Y. S. 2d 2, 4, 5 (Sup. Ct. 1944).

5. N. Y. GEN. CORP. LAW § 61-b. The provisions of the New Jersey statute involved

while they do much to discourage the strike-suit evil, they discourage many more suits instituted in good faith by minority shareholders without providing an alternative means of redress or control.[6]

The principal case is significant in that it is the first in which a federal court has passed on the constitutionality of a statute of the "61-b" type.[7] In deciding that the statute as applied to this particular suit is constitutional, the court adopts the view of the New York Court of Appeals in *Lapchak v. Baker*[8] that, as the amount of required security had not been set below, the court on appeal needed only to decide whether the requirement of security in any amount was unconstitutional. In the instant case the court apparently leaves the question of what amount of security is reasonable, to be answered in other cases according to the facts peculiar to each. It is not indicated, how-

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here, *supra* note 1, are substantially the same as those of the New York statute. The only other states having comparable statutes are Pennsylvania and Maryland. See PA. STAT. ANN. tit. 12, § 1322 (Supp. 1946); MD. ANN. CODE GEN. LAWS art. 16, § 195 (Supp. 1947).

6. BALLANTINE, CORPORATIONS 374 (Rev. ed. 1946) ("drastic legislation . . . onerous requirement . . . dangerously oppressive and discriminatory"); Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944) ("rich man's law . . . to be hoped no others [states] will follow this example"); Zlinkoff, *The American Investor and the Constitutionality of § 61-b of the New York General Corporation Law*, 54 YALE L. J. 352 (1945) ("means the complete disappearance of any equitable judicial check on [corporate] fiduciaries"). Noting such criticism, the court in the instant case stated the general proposition that it is not the duty of the court to pass upon the wisdom of a public policy effected by a legislature, though it seemed that the statute represented a reasonable effort by the state to "eradicate an evil deemed by its Legislature to be widespread." 170 F. 2d at 56.

7. The applicability of the statute to cases arising in federal courts has heretofore been the main concern of the federal judges. In Boyd v. Bell, 64 F. Supp. 22 (S. D. N. Y. 1945), the first consideration by a federal court of § 61-b, *supra* note 5, the court refused a request for security on the ground that the statute was a local procedural law not affecting the federal court's right to proceed. The same court in Craftsman Finance & Mortgage Co. v. Brown, 64 F. Supp. 168 (S. D. N. Y. 1945) denied a request, saying that although the purpose of the law was said to prevent strike suits, the complaint there alleged transactions the good faith of which should be tested on trial and that it rests in the sound discretion of the federal judge under Rule 34 of local civil rules whether the court will apply state procedure. "If the stockholder's charges are serious, specific and appear to have merit, the Court's discretion should not be exercised in such a way as to bar a trial of the issues. To follow such a course, might grant a delinquent or dishonest corporate director and his accomplices immunity from suit." *Id.* at 178. In Donovan v. Queensboro Corp., 75 F. Supp. 131 (E. D. N. Y. 1947), noted in 34 VA. L. REV. 465 (1948), it was held that the statute expresses the policy of the state and its application rests in the sound discretion of the federal judge, but a federal court can and should avail itself of this policy provided the facts justify the granting of such security.

The court in the instant case terms the New Jersey statute embracing the same provisions a "legal hybrid," at once creating and limiting rights, and says the complainant cannot escape those statutory limitations on her action by merely suing in the local federal court instead of the state court, since the federal court must enforce the law and policy of the state wherein it sits. 170 F. 2d at 54.

8. 298 N. Y. 89, 80 N. E. 2d 751 (1948). Prior to this case, the lower courts of New York were in disagreement on the constitutionality of § 61-b. Constitutional: Shielcrawt v. Moffett, 49 N. Y. S. 2d 64 (Sup. Ct. 1944), *aff'd*, 268 App. Div. 352, 51 N. Y. S. 2d 188 (1st Dep't 1944), *rev'd on other grounds*, 294 N. Y. 180, 61 N. E. 2d 435 (1945); Wolf v. Atkinson, 182 Misc. 675, 49 N. Y. S. 2d 703 (Sup. Ct. 1944); Isensee v. Long Island Motion Picture Co., 184 Misc. 625, 54 N. Y. S. 2d 556 (Sup. Ct. 1945). Unconstitutional: Citron v. Mangel Stores Corp., 50 N. Y. S. 2d 416 (Sup. Ct. 1944), *aff'd*, 268 App. Div. 905, 51 N. Y. S. 2d 754 (1st Dep't 1944). See Note, 159 A. L. R. 978 (1945).

ever, whether the court would consider the matter as a constitutional question or merely one of statutory construction and application.

It is said that the right to bring a shareholder's derivative suit is not a property right but only a means of setting the judicial machinery of the court in motion [9] and that the "Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." [10] Though the statute created a limitation on the plaintiff's right to maintain the suit at bar, the court held it to be a reasonable limitation and not a legal impairment of that right.[11]

The assurance that the right to maintain a derivative suit "remains legally unimpaired" is likely to give little comfort or encouragement to one told that he will have to put up, say, $50,000 [12] security as a condition to maintaining his suit. The only statutory limitation upon the discretion of the court is the word "reasonable," [13] but even the reasonable expenses in a protracted and intricate litigation against several defendants, each utilizing the services of distinguished counsel, may be so formidable as to effectively deprive a plaintiff of his cause of action,[14] however clear his technical right may be. Since the interests of stockholders in assets entrusted to the officers and directors of their corporation are property rights,[15] a statute expressly abolishing the stockholder's derivative suit would very probably be declared unconstitutional as a violation of the Fourteenth Amendment.[16] The legislature should not be able to do indirectly what it cannot do directly.[17] It may well be assumed that

9. Overfield v. Pennroad Corp., 146 F. 2d 889, 894 (C. C. A. 3d 1944); Continental Securities Co. v. Belmont, 206 N. Y. 7, 13, 15, 99 N. E. 138, 140 (1912).

10. Jones v. Union Guano Co., 264 U. S. 171, 181, 44 Sup. Ct. 280, 68 L. Ed. 623 (1924), quoted in 170 F. 2d at 58, as applicable to the principal case.

11. 170 F. 2d at 58.

12. In Donovan v. Queensboro Corp., 75 F. Supp. 131 (E. D. N. Y. 1947), a request for $50,000 was held not to be unreasonable.

13. See note 1 *supra*.

14. *See* Citron v. Mangel Stores Corp., 50 N. Y. S. 2d 416, 419 (Sup. Ct. 1944).

15. Goldstein v. Grosbeck, 142 F. 2d 422 (C. C. A. 2d 1944).

16. See ROTTSCHAEFER, CONSTITUTIONAL LAW § 251 (1939). In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 682, 50 Sup. Ct. 451, 74 L. Ed. 1107 (1930), Mr. Justice Brandeis said: "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." And see further, Gibbes v. Zimmerman, 290 U. S. 326, 332, 54 Sup. Ct. 140, 78 L. Ed. 342 (1933); New York Central R. R. v. White, 243 U. S. 188, 201, 37 Sup. Ct. 247, 61 L. Ed. 667 (1917); Gilman v. Tucker, 128 N. Y. 190, 202, 28 N. E. 1040 (1891).

17. Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U. S. 35, 44, 45, 47, 43 Sup. Ct. 55, 67 L. Ed. 115 (1922); Oklahoma Operating Co. v. Love, 252 U. S. 331, 337, 40 Sup. Ct. 338, 64 L. Ed. 596 (1920); Life & Casualty Insurance Co. v. McCray, 291 U. S. 566, 54 Sup. Ct. 482, 78 L. Ed. 987 (1934); Wadley Southern Ry. v. Georgia, 235 U. S. 651, 661, 35 Sup. Ct. 214, 59 L. Ed. 405 (1915); Straus v. Victor Talking Machine Co., 297 Fed. 791 (C. C. A. 2d 1924).

few minority shareholders could raise such "reasonable" security, and few, in any event, would be willing to gamble it in a lawsuit where the individual share of recovery would be so disproportionately small, however meritorious the cause might seem.[18] It is submitted that such procedure would not be in keeping with the spirit of due process, "fairplay." [19] However, the holding in the principal case, that the statute is constitutional, may perhaps be sustainable upon the narrow question raised, *i.e.*, whether the requirement in any amount whatever is unconstitutional as a violation of due process.

Those who have awaited with interest a determination of the constitutionality of the "61-b" type of statute by a federal court will be disappointed that this court does not come to grips with the equally important question of equal protection.[20] Further attacks using this as one of the weapons may be expected.

CONSTRUCTIVE TRUSTS—TAX SALES—RIGHT OF REMAINDERMAN TO PURCHASE AT TAX SALE TO THE EXCLUSION OF LIFE TENANT

The state purchased land at a tax sale held for nonpayment of taxes falling due during the time the life tenant was in possession. Neither the life tenant nor the remainderman [1] redeemed. After the period for redemption, the remainderman purchased the land from the state. *Held,* that the purchased title was not held in a trust capacity and that the life tenant had no equitable

18. *See* Wadley Southern Ry. v. Georgia, 235 U. S. 651, 661, 35 Sup. Ct. 214, 59 L. Ed. 405 (1915). "'The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts.' . . . It would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage." Straus v. Victor Talking Machine Co., 297 Fed. 791, 799 (C. C. A. 2d 1924).

19. Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U. S. 35, 44, 43 Sup. Ct. 55, 67 L. Ed. 115 (1922).

20. The court merely says, "we conclude also that the application of R. S. 14: 3-15 to the suit at bar will not fall within the prohibition of the Fourteenth Amendment of the Constitution of the United States," and "[the constitutional question] is, we think, answered fully and clearly by the decision of Chief Judge Loughran in Lapchak v. Baker. . . ." 170 F. 2d at 58, 55. The *Lapchak* case found that the classification was reasonable in view of the evil it was enacted to meet. "The Legislature . . . inquired and found (1) justification for making special provision in respect to derivative suits brought by holders of relatively small amounts of a corporation's stock and (2) occasion for requiring plaintiffs in such suits to give reasonable security for the litigation expenses of defendants therein." Lapchak v. Baker, 298 N. Y. 89, 80 N. E. 2d 751, 753 (1948); *see* Citron v. Mangel Stores Corp., 50 N. Y. S. 2d 416, 420 (Sup. Ct. 1944); Zlinkoff, *The American Investor and the Constitutionality of § 61-b of the New York General Corporation Law,* 54 YALE L. J. 352, 384 (1945) (attacking the classification as unjust and unreasonable in view of its purported end).

1. The term "remainderman" will be used herein to include holders of various types of future interests. Actually in the instant case if the purchaser had any interest in the premises, it was an executory reversionary interest. Since the title of the state became absolute after the period for redemption elapsed, the purchaser really had no interest at all. The court indicated, however, that the result of the case would have been the same if the purchaser had retained his executory interest. 212 S. W. 2d at 906.

rights in the land. *McGee v. Carter,* 212 S.W. 2d 902 (Tenn. App. E. D. 1948).

As a general rule the mere fact that one owns an interest in land does not preclude his acquiring at a tax sale a new and paramount title to the exclusion of others having an interest in the same property.[2] However, if the purchaser has a duty to pay the taxes on the land, and if the land is sold because of his failure to perform this obligation, then his purchase at the tax sale operates only as payment of the taxes and leaves the title otherwise undisturbed.[3]

It is universally held that a life tenant is under a duty to pay the ordinary annual taxes in the absence of some agreement or controlling equity to the contrary.[4] Where by his own neglect he fails to meet this obligation, he is usually held to be under a disability to purchase the land at a tax sale to the exclusion of the future interest holders.[5] There are two underlying reasons for this rule: (1) a quasi-fiduciary relationship exists between a life tenant and a remainderman, placing the life tenant under an obligation to preserve the estate;[6] (2) it would be manifestly unjust to permit the life tenant to profit by his own breach of duty to pay the current taxes.[7]

Conversely, although no cases have been found, it would appear that where the remainderman is under a duty to pay the taxes,[8] as where there has been a special assessment,[9] this would give rise to a similar fiduciary relationship and obligation to preserve the estate *in toto,* creating a disability on the remainderman to purchase at a tax sale to the exclusion of the life tenant.

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2. 51 AM. JUR., *Taxation* § 1053 (1944).

3. *Id.* § 1054; 3 BOGERT, TRUSTS AND TRUSTEES § 486 (1946).

4. *E.g.,* Atkins v. McCoy, 275 Ky. 117, 120 S. W. 2d 1019 (1938); Medford v. Mathis, 176 Miss. 188, 168 So. 607 (1936); Duffley v. McCaskey, 345 Mo. 550, 134 S. W. 2d 62 (1939); see Notes, 17 A. L. R. 1384 (1922), 94 A. L. R. 311 (1935), 126 A. L. R. 862 (1940); 1 RESTATEMENT, PROPERTY §§ 129, 130 (1936); 3 SIMES, FUTURE INTERESTS § 631 (1936); 1 TIFFANY, REAL PROPERTY § 63 (3d ed., Jones, 1939).

5. *E.g.,* Higginbotham v. Harper, 206 Ark. 210, 174 S. W. 2d 668 (1943); Williams v. Williams, 200 Iowa 398, 202 N. W. 434 (1925); Defreese v. Lake, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744 (1896); see Note, 17 A. L. R. 1384, 1399 (1922); 1 RESTATEMENT, PROPERTY § 149 (1936); 1 TIFFANY, REAL PROPERTY § 68 (3d ed., Jones, 1939).

6. Defreese v. Lake, 109 Mich. 415, 67 N. W. 505 (1896); Duffley v. McCaskey, 345 Mo. 550, 134 S. W. 2d 62 (1939); Mathews v. O'Donnell, 289 Mo. 235, 233 S. W. 451 (1921); 3 SIMES, FUTURE INTERESTS § 637 (1936).

7. "It was moreover the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners, would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary he must be presumed to have intended by procuring that release to extinguish the title under that sale." Varney v. Stevens, 22 Me. 331, 334 (1843). See also note 6 *supra.*

8. The future interest holder's duty to pay the taxes usually arises from the construction of a written instrument. See Note, 17 A. L. R. 1384, 1406 (1922).

9. For rules as to the apportionment of a special assessment between the life tenant and future interest holder, see Note, 83 A. L. R. 793 (1933); 1 RESTATEMENT, PROPERTY §§ 132 *et seq.* (1936). For the rights, powers and immunities of future interest holders as against a life tenant see 2 RESTATEMENT, PROPERTY c. 13 (1936).

However, there is a split of authority as to whether a remainderman can purchase to the exclusion of the life tenant even in cases where the latter has the primary duty to pay the taxes. A few courts have held that in the absence of fraud, officiousness, or bad faith on the part of the remainderman who had no duty to pay taxes, the latter is under no disability to divest the life tenant of his interest in the land by purchasing at a tax sale.[10] There is limited authority, however, which states that the very relationsbip of life tenant and remainderman gives rise to a relation of confidence and trust, and that, irrespective of any duty to pay taxes, the remainderman may not divest the life tenant by purchasing.[11]

Although by statute in Tennessee the tax lien extends to the entire fee,[12] this state follows the accepted common law rule that the life tenant is primarily obligated to pay the annual taxes.[13] In the principal case there was no misconduct by the future interest holder, no special assessment and no agreement or controlling equity to place a duty on the holder of the future interest to pay any part of the taxes. The court declined to follow the minority rule promulgated by the West Virginia court,[14] failed to find a fiduciary relationship which could raise a constructive trust in favor of the life tenant, and adopted the more equitable and reasonable rule of the leading case, *Jinkiaway v. Ford*.[15]

CRIMINAL PROCEDURE—EVIDENCE—EXCLUSION OF VOLUNTARY CONFESSION OBTAINED DURING ILLEGAL DETENTION

Petitioner was arrested without a warrant and illegally detained[1] for thirty hours. Solely on the basis of confessions obtained during this imprisonment he was convicted of grand larceny in a federal district court. The Court of Appeals affirmed,[2] and petitioner appealed to the Supreme Court. *Held*

10. Jinkiaway v. Ford, 93 Kan. 797, 145 Pac. 885, L. R. A. 1915E 343 (1915); Duffley v. McCaskey, 345 Mo. 550, 134 S. W. 2d 62 (1939), 24 MINN. L. REV. 589 (1940); *see* Fox v. Coon, 64 Miss. 465, 1 So. 629 (1886).

11. Hall v. Hall, 173 Minn. 128, 216 N. W. 798 (1927); Callihan v. Russell, 66 W. Va. 524, 66 S. E. 695, 26 L. R. A. (N.S.) 1176 (1909). In each of these cases, however, there was misconduct on the part of the future interest holder. This fact would seem to weaken the doctrine adopted in these cases, in spite of the strong language used.

12. TENN. CODE ANN. § 1331 (Williams 1943).

13. Hadley v. Hadley, 114 Tenn. 156, 87 S. W. 250 (1904); Ferguson v. Quinn, 97 Tenn. 46, 36 S. W. 576 (1896).

14. Callihan v. Russell, 66 W. Va. 524, 66 S. E. 695, 26 L. R. A. (N.S.) 1176 (1909).

15. 93 Kan. 797, 145 Pac. 885, L. R. A. 1915E 343 (1915). In some jurisdictions the rights of life tenant and future interest holder are controlled by statute. *E.g.*, 2 N. C. GEN. STAT. ANN. § 105-410 (1943); OHIO CODE ANN. § 5688 (Throckmorton 1940).

1. FED. R. CRIM. P., 5(a): "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available [committing magistrate and] . . . a complaint shall be filed forthwith."

2. Upshaw v. United States, 168 F. 2d 167 (App. D. C. 1948).

(5-4),[3] that the confessions were inadmissible. *Upshaw v. United States,* 69 Sup. Ct. 170 (1948).

In *McNabb v. United States* [4] certain confessions obtained during the illegal detention of the defendant were held inadmissible. The Court's opinion did not make it clear, however, whether this exclusion was imposed as a penalty on federal officers for violating prescribed rules of procedure or whether the illegal detention was merely one circumstance which, along with others, rendered those particular confessions testimonially untrustworthy.[5] *United States v. Mitchell,*[6] while distinguishable on its facts,[7] contained language which seemed to support the latter interpretation.[8] The instant case in effect adopts the former, holding that even in the absence of any psychological compulsion no confession elicited while the accused is held in violation of federal rules requiring a prompt preliminary examination may be admitted in evidence against him.

The dissenting opinion contended that the present Court has misinterpreted the *McNabb* and the *Mitchell* decisions in finding a rule of strict exclusion, and suggested that the spirit of those cases reflects a desire to exclude only those admissions "extracted under psychological pressure." [9] But it must be observed that the Court in the *McNabb* case by-passed possible constitutional considerations to base the decision on the violation of rules and statutes relating to criminal procedure.[10] This fact would appear to indicate the Court's desire to formulate a rule of exclusion for the very violation, without regard to any circumstance of physical or psychological coercion.

That there is objection to a departure from the time honored "voluntary-

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3. Majority opinion by Black, J.; Reed, J., dissenting (Vinson, C. J., Burton and Jackson, JJ., concurring).

4. 318 U. S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).

5. In that case uneducated mountaineers were arrested on suspicion of murder and confined without commitment in violation of federal statutes for long hours in detention room bare of seats or other furniture, denied opportunity to see relatives and friends, and questioned singly and jointly for hours at a time. Confessions obtained during such period and under such circumstances were held inadmissible. The Court said, "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here." McNabb v. United States, 318 U. S. at 347. The lower courts promptly split in their interpretation of the decision. *E.g.,* United States v. Corn, 54 F. Supp. 307 (E. D. Wis. 1944); United States v. Klee, 50 F. Supp. 679 (E. D. Wash. 1943).

6. 322 U. S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944), *reh. denied,* 322 U. S. 770 (1944).

7. Mitchell confessed immediately after being taken into custody. It was held that subsequent illegal detention would not retroactively affect admissibility of his confession.

8. "Being relevant, [the confession] could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct." 322 U. S. at 70.

9. 69 Sup. Ct. at 183.

10. "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." McNabb v. United States, 318 U. S. 332, 345, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).

trustworthy" rule of admissibility of confessions [11] is evidenced by the refusal of state courts to subscribe to the persuasive influence of the Supreme Court, where similar state statutes and rules were violated;[12] by the disfavor shown to the proposed adoption of such a rule of exclusion in the Federal Rules; [13] and by the proposal of the Hobbs bill [14] which would make such confessions admissible.

Whatever view is taken as to the merit of the present decision, it does resolve the existing confusion as to the meaning of the *McNabb* case, since the inequitable circumstances of that case, bordering on coercion, were not present here. Whether the present case is considered an extension of the *McNabb* rule, as suggested by the dissent, or merely a re-application of that former rule, as held by the majority, the result is a mandate to federal courts that when existing rules are violated, exclusion of confessions obtained thereby necessarily follows.

There are valid objections both to adoption of a rule of absolute exclusion and to enactment of legislation such as the Hobbs bill, since the former would arm the criminal with a powerful weapon, while the latter would be a departure from rules excluding illegally obtained evidence.[15] It has been suggested

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11. 3 WIGMORE, EVIDENCE §§ 822 *et seq.* (3d ed. 1940).

12. A review of state decisions discussing the *McNabb* rule presents an interesting problem when a comparison is made with the rules of admissibility of illegally obtained evidence. For the status of these rules in the states see Notes, 88 A. L. R. 348 (1934), 52 A. L. R. 477 (1928), 41 A. L. R. 1145 (1926), 32 A. L. R. 408 (1924), 24 A. L. R. 1408 (1923). Rejection of the *McNabb* rule would follow logically in those states holding illegally obtained evidence admissible. Hall v. State, 209 Ark. 180, 189 S. W. 2d 917 (1945); State v. Browning, 206 Ark. 791, 178 S. W. 2d 77 (1944); People v. Zammora, 66 Cal. App. 2d 166, 152 P. 2d 180 (1944); Russell v. State, 196 Ga. 275, 26 S. E. 2d 528 (1943); State v. Smith, 158 Kan. 645, 149 P. 2d 600 (1944); State v. George, 43 A. 2d 256 (N. H. 1945); State v. Nagel, 28 N. W. 2d 665 (N. D. 1947); State v. Collett, 58 N. E. 2d 417 (Ohio App. 1944), *appeal dismissed,* 144 Ohio St. 639, 60 N. E. 2d 170 (1945); Commonwealth v. Wentzel, 360 Pa. 137, 61 A. 2d 309 (1948); Commonwealth v. Turner, 358 Pa. 350, 58 A. 2d 61 (1948). *Contra*: Phillips v. State, 248 Ala. 510, 28 S. 2d 542 (1946).

But in those jurisdictions holding illegally obtained evidence inadmissible, rejection of the *McNabb* rule would appear to indicate that reasonable detention for the purpose of improving the case is not considered illegal. Finley v. State, 14 S. 2d 844 (Fla. 1943); State v. Behler, 65 Idaho 464, 146 P. 2d 338 (1944); People v. McFarland, 386 Ill. 122. 53 N. E. 2d 884 (1944); State v. Ellis, 354 Mo. 998, 193 S. W. 2d 31 (1946) *cert. denied,* 328 U. S. 873 (1946); Fry v. State, 78 Okla. Crim. 299, 147 P. 2d 803 (1944); Ford v. State, 184 Tenn. 443, 201 S. W. 2d 539 (1945); McGhee v. State, 183 Tenn. 20, 189 S. W. 2d 826 (1945). *Contra*: Cavazos v. State, 172 S. W. 2d 348 (Tex. Crim. App. 1943) (announcing Texas law in accord with *McNabb* but terming confession voluntary).

For a collection of state statutes similar to those involved in the *McNabb* case see McNabb v. United States, 318 U. S. 332, 342 n. 7, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).

13. FED. R. CRIM. P., Preliminary Draft, § 5(b), submitted to the Supreme Court May 3, 1943: "Exclusion of Statement Secured in Violation of Rule. No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule." Quoted in the instant case, 69 Sup. Ct. at 182, n. 31. The Rules as adopted, effective March 21, 1946, failed to include this subsection.

14. H. R. 4, 80th Cong., 1st Sess. (1947). For a history of this proposed legislation see Note, 38 J. CRIM. L. & CRIMINOLOGY 136 (1947).

15. For a collection of recent federal cases voicing such rules of exclusion see Note, 150 A. L. R. 566, 571 (1944).

that enactment of a uniform arrest act [16] would provide a solution, in permitting necessary inquiry and questioning before commitment, under strict court supervision.[17] This procedure would satisfy requirements of legality as well as safeguard trustworthiness. The unrelenting stand of the Supreme Court in the present case may well encourage such a step.

DOMESTIC RELATIONS—ALIMONY—POWER OF COURT TO MODIFY OR REMIT PAST DUE INSTALLMENTS

Plaintiff obtained a decree for separate maintenance, payable in monthly installments, for herself and her minor children. Payments were made until 1942, when plaintiff advised defendant that she would accept no more payments. For four years no payments were demanded or tendered, nor was any change in the decree requested of the court. Then plaintiff brought this action, seeking a money judgment for accumulated arrears. From a judgment for defendant, plaintiff appeals. *Held* (2-1), judgment affirmed; suits for maintenance are equitable, and the court has authority to apply equitable principles, even as to past due installments. *Franklin v. Franklin,* 171 F. 2d 12 (App. D. C. 1948).

There is a marked split of authority on the question as to whether a court has the power to modify alimony provisions retroactively,[1] *i.e.,* to reduce or remit past due installments accruing under a separate maintenance or divorce decree.[2] The rule in the majority of the states is that installments of alimony become vested when they become due and that the court has no power to modify the decree as to them.[3] The language of the courts following this

16. Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315 (1942).
17. See Note, 38 J. CRIM. L. & CRIMINOLOGY 136, 138 (1947).

1. The question as to whether the court has authority to modify alimony provisions, as to future installments, given in connection with decrees awarding separate maintenance or divorce *a mensa et thoro* is universally answered in the affirmative, even in the absence of statutory authorization, inasmuch as this power exists at common law. However, there is a sharp disagreement as to the court's power to alter an alimony award granted with a divorce *a vinculo,* in the absence of authority reserved in the decree itself or by statute. The weight of authority seems to deny this power. Banda v. Banda, 192 Ga. 5, 14 S. E. 2d 479 (1941); Going v. Going, 144 Tenn. 303, 232 S. W. 443 (1921). KEEZER, MARRIAGE AND DIVORCE § 655 (3d ed. 1946). See Notes, 71 A. L. R. 723 (1931), 127 A. L. R. 741 (1940).

2. The term "alimony" as used in its broadest sense includes payments made under a decree for separate maintenance as well as those made under a divorce decree. In dealing with the matter of reducing past due installments apparently no distinction is made by the courts between installments accruing under a divorce decree and those accruing under a decree for separate maintenance. This is indicated in the principal case where the court, while dealing with a separate maintenance decree, overruled three cases concerned with divorce decrees.

3. Rochelle v. Rochelle, 235 Ala. 526, 179 So. 825 (1938); Adair v. Superior Court, 44 Ariz. 139, 33 P. 2d 995 (1934); Keck v. Keck, 219 Cal. 316, 26 P. 2d 300 (1933); Horn v. Horn, 221 Iowa 190, 265 N. W. 148 (1936); Whitby v. Whitby, 306 Ky. 355, 208 S. W. 2d 68 (1948); Williams v. Williams, 211 La. 939, 31 So. 2d 170 (1947);

"vested rights" theory is generally to the effect that "instalments of alimony become vested as they accrue, and . . . past-due installments become final judgments, and courts have no authority to cancel or reduce the amount of such accrued payments." [4] The minority view is that "the trial judge in the exercise of his discretion may modify or revise the provisions of a decree as to alimony and also the amount of accrued and unpaid alimony providing there is a change in the condition of the parties justifying the modification." [5]

The court in the instant case justifies the remittance of the accrued arrears of maintenance on the ground that suits for maintenance are equitable and that it would be inequitable, under the circumstances, to force defendant to pay these arrears. It approved the decision of the lower court which held that plaintiff was guilty of laches and also that she was estopped by reason of her direct representation to defendant. Even in a jurisdiction adhering to the "vested rights" theory the situation presented in the principal case would seem to lend itself most appropriately to an application of the doctrine of promissory estoppel.[6] This doctrine is frequently applied in situations involving representations as to an intended abandonment of existing rights, and some courts have even stated that the expressed intention to abandon an existing right is the only case in which promises as to the future may be the basis of an estoppel.[7] The courts agree that there can be no estoppel unless the party has relied on the representation and been induced to act by it,[8] and he must have so situated himself that he would suffer a loss as the consequence of his action, if the estoppel were not raised. "Although this action is usually affirmative, yet such affirmative action is not indispensable. It is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and

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Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919 (1942); Briggs v. Briggs, 178 Ore. 193, 165 P. 2d 772 (1946). See Note, 94 A. L. R. 331 (1935).

4. Clark v. Clark, 139 Neb. 446, 297 N. W. 661, 663 (1941).

5. Lytle v. Lytle, 319 Mich. 47, 29 N. W. 2d 138, 140 (1947); *accord*, Watts v. Watts, 314 Mass. 129, 49 N. E. 2d 609 (1943); Kumlin v. Kumlin, 200 Minn. 26, 273 N. W. 253 (1937). See Note, 94 A. L. R. 331, 333 (1935). In Crane v. Crane, 26 Tenn. App. 227, 231, 170 S. W. 2d 663, 665 (1942), the court, basing its decision on TENN. CODE ANN. §§ 8446, 8454 (Williams 1934), held that "the decree for the support of this minor child, even as to past-due and unpaid installments, could be modified at any subsequent term, so as to increase or decrease the allowance made, as the exigencies of the case might require."

6. The doctrine of promissory estoppel is "distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact." 3 WILLISTON, CONTRACTS 1989 (Rev. ed. 1936). "There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice." 3 POMEROY, EQUITY JURISPRUDENCE 211 (5th ed. 1941). See RESTATEMENT, CONTRACTS § 90 (1932).

7. Swinney v. Modern Woodmen of America, 231 Mo. App. 83, 95 S. W. 2d 655 (1936); Berrarducci v. Diano, 60 R. I. 305, 198 Atl. 351 (1938); Barnes v. Boyd, 18 Tenn. App. 55, 72 S. W. 2d 573 (1934). See Note, 115 A. L. R. 152, 155 (1938).

8. 3 POMEROY, *op. cit. supra* note 6 § 812 n. 5.

saved himself from loss." [9] The facts of the principal case meet this requirement in full, in that the defendant, in reliance upon the representation, refrained from availing himself of his privilege of going into court and seeking a modification, which undoubtedly would have been granted to him due to his wife's misconduct.[10] The result arrived at is just, and the decision appears to be sound, both as to its rationale and its conclusion. But the case would seem to take the District of Columbia out of the ranks of the majority adhering to the "vested rights" theory, in view of the fact that the opinion states that those prior cases on the subject [11] should be overruled insofar as they imply that the issuing court lacks authority to apply equitable principles when asked to enforce payment of accrued installments of alimony.

EMINENT DOMAIN—REMOVAL COSTS WHEN PART OF A LEASE IS TAKEN—EFFECT OF RENEWAL OF OPTION TAKING ALL OF LEASE

Westinghouse occupied warehouse premises under a lease to expire Oct. 30, 1944. The United States Government by condemnation proceedings acquired the use of the premises for a term for years ending June 30, 1943, with an option to renew for additional yearly periods during the national emergency. The Government twice exercised this renewal right, thereby extending the period of its occupancy beyond the expiration date of the Westinghouse lease. *Held* (2-1), that the cost to Westinghouse of removing its personal property from the premises might be proved as an element to be considered in determining the market value of the interests taken. *United States v. Westinghouse Electric and Mfg. Co.*, 170 F. 2d 752 (1st Cir. 1948).

When private property is taken for public use, the just compensation required by the Constitution is measured by the value of the interest taken, ordinarily its market value, and does not include consequential and personal losses such as loss of profits or damage to good will. Removal costs have generally been treated as a consequential loss which is not to be compensated.[1] However, in *United States v. General Motors Corp.*,[2] the Supreme Court held that, where the temporary use of property is taken for a period less than the unexpired portion of an existing leasehold, the tenant may prove his removal

9. *Id.* at 232.

10. The wife had been living in adultery, and the dissenting judge implies that this would have entitled defendant to a modification of the maintenance decree.

11. Lockwood v. Lockwood, 160 F. 2d 923 (App. D. C. 1947); Biscayne Trust Co. v. American Security & Trust Co., 20 F. 2d 267 (App. D. C. 1927); Caffrey v. Caffrey, 4 F. 2d 952 (App. D. C. 1925).

1. United States v. Petty Motor Co., 327 U. S. 372, 66 Sup. Ct. 596, 90 L. Ed. 729 (1946). See Note, 156 A. L. R. 397 (1945).

2. 323 U. S. 373, 65 Sup. Ct. 357, 89 L. Ed. 311 (1945), 39 ILL. L. REV. 420, 19 So. CALIF. L. REV. 64. See also Dolan, *"Just Compensation" and the General Motors Case*, 31 VA. L. REV. 539 (1945).

costs, not as an independent item of damage but as an element "which would certainly and directly affect the market price agreed upon by a tenant and a sublessee." [3] It is the partial taking which distinguishes that case from the ordinary case in which the tenant's entire interest is taken and in which proof of removal costs is not revelant to market price.[4]

The present case involves the novel situation in which a taking, initially partial, by subsequent extension became entire. To this situation the court with some hesitancy applied the rule of the *General Motors* case. It is submitted that the result is an unsound extension of that rule.

The premise of the *General Motors* case is that a tenant is exceptionally injured when only part of his interest is taken. The rule of that case is designed to compensate the tenant for this additional injury which results from the form of the taking. Removal costs may be proved as an element of that injury.[5] If additional injury results from a partial taking, however, it must be because the splitting up of the property destroys some of its value, because the parts are worth less after separation than the whole was worth before. This should be true whether the additional injury is measured in terms of market value or value to the owner, whether it is to be compensated directly or indirectly as reflected in an expanded concept of market value.[6] Then where, as here, compensation is awarded for the entire interest, it would seem that there is no additional injury from the form of the taking and, therefore, that proof of removal costs should not be received.[7]

There is another argument supporting this conclusion. As a result of the condemnation Westinghouse did not have to move out at the end of its term. This is clearly a benefit which would in most situations offset the loss incurred by the earlier removal.[8] If the loss is relevant to the market price it is logical that the benefit should likewise be relevant. And if each counteracts the other, then as a practical matter both should be disregarded.

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3. 323 U. S. at 383.

4. United States v. Petty Motor Co., 327 U. S. 372, 66 Sup. Ct. 596, 90 L. Ed. 729 (1946).

5. "And it might also include the storage of goods against their sale or the cost of their return to the leased premises." 323 U. S. at 383.

6. Compare the facts of the present case with the not unusual situation in which part of a tract of land is taken. In that situation the measure of compensation is the difference between the value of the whole property before the taking and the value after separation of the part not taken. It has been pointed out that this formula might well have been adopted in the *General Motors* case. Note, 26 TEX. L. REV. 199, 209 (1947).

7. The decision of the court turns on the fact that at the time of the taking only a part of the interest had been taken. It would seem, however, that it is not the form of the taking but the resulting injury which is important. If no injury results, the form of the taking should make no difference.

8. This consideration is commonly stated as an additional reason why a tenant whose entire interest is taken should not be compensated for his removal costs. *E.g.*, United States v. Petty Motor Co., 327 U. S. 372, 66 Sup. Ct. 596, 90 L. Ed. 729 (1946).

EVIDENCE—CHARACTER WITNESS FOR ACCUSED—CROSS-EXAMINATION AS TO KNOWLEDGE OF ARREST MANY YEARS PREVIOUSLY

Prosecution for bribing a federal revenue officer. On cross-examination four of the defendant's character witnesses were asked if they had ever heard that defendant had been arrested 27 years earlier for receiving stolen goods. Over defendant's objection, the trial court permitted this interrogation. The Circuit Court of Appeals affirmed,[1] and defendant appealed. *Held* (7-2),[2] affirmed. Although an affirmative answer to the question would have tended to derogate from defendant's character, it was admissible to test the extent of the witnesses' knowledge of defendant's reputation. *Michelson v. United States,* 69 Sup. Ct. 213 (1948).

The Supreme Court has never before ruled on the precise question involved in the instant case. The vast majority of state courts [3] and all lower federal tribunals [4] have held as does the principal case. Thus, almost universally the rule is that a character witness in a criminal prosecution may be cross-examined as to his knowledge of rumors of any particular criminal charges or specific acts of misconduct imputed to the defendant, for the sole purpose of testing the foundation upon which the witness' opinion of the defendant's reputation is based.[5] If it appears that the witness has heard of the charges or bad rumors, his assertion of the defendant's good reputation is at least partially discredited.[6] If he has not heard of them, his assertion of the defendant's good reputation is to that extent deficient, for the reason that he is therefore less qualified to speak on that subject.[7] While this rule has certain inherent objections in that such questioning may be highly prejudicial,[8]

1. United States v. Michelson, 165 F. 2d 732 (C. C. A. 2d 1948).

2. Opinion by Jackson, J.; dissent by Rutledge, J., joined by Murphy, J.

3. State v. Shull, 131 Ore. 224, 282 Pac. 237 (1929); Moulton v. State, 88 Ala. 115, 6 So. 758 (1889); Amos v. State, 209 Ark. 55, 189 S. W. 2d 611 (1945); People v. Gin Shue, 58 Cal. App. 2d 625, 137 P. 2d 742 (1943); State v. Bading, 236 Iowa 468, 17 N. W. 2d 804 (1945); State v. Keul, 233 Iowa 852, 5 N. W. 2d 849 (1942); People v. Rosa, 268 Mich. 462, 256 N. W. 483 (1934); People v. Fay, 270 App. Div. 261, 59 N. Y. S. 2d 127 (1st Dep't 1945); Lowrey v. State, 197 P. 2d 637 (Okla. 1948); Regina v. Wood, 5 Jur. 225 (Eng. 1841). See Note, 71. A. L. R. 1504 (1931).

4. Mannix v. United States, 140 F. 2d 250 (C. C. A. 4th 1944); Josey v. United States, 135 F. 2d 809 (App. D. C. 1943); Stewart v. United States, 104 F. 2d 234 (App. D. C. 1939); Lawrence v. United States, 56 F. 2d 555 (C. C. A. 7th 1932); Spalitto v. United States, 39 F. 2d 782 (C. C. A. 8th 1930); Clark v. United States, 23 F. 2d 756 (App. D. C. 1927); Mitrovich v. United States, 15 F. 2d 163 (C. C. A. 9th 1926); Jung Quey v. United States, 222 Fed. 766 (C. C. A. 9th 1915).

5. See notes 3 and 4 *supra;* 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940); 1 WIGMORE, EVIDENCE § 197 (3d ed. 1940); UNDERHILL, CRIMINAL EVIDENCE § 172 (4th ed., Niblack, 1935).

6. 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

7. *Ibid.*

8. "It is to be noted that the inquiry is always directed to the witness' hearing *of the disparaging rumor* as negativing the reputation. There must be no question as to the *fact of the misconduct,* or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce. . . . On this principle such inquiries are almost universally admitted. But the serious objection to

the accused has the option of putting his character in issue or completely closing the door to this line of inquiry.[9] Furthermore, the scope of the cross-examination to test the basis of the witness' opinion is within the sound discretion of the trial judge.[10]

There are two minority views. Illinois has adopted the rule that on cross-examination of a character witness by the prosecution, the witness can be interrogated only as to acts of misconduct or charges similar in nature to those for which the defendant is being tried.[11] The North Carolina court has held that a character witness may be cross-examined concerning the general reputation of the defendant as to particular vices and virtues, but not as to rumors of any specific acts of misconduct.[12] Both of these views would seem to substantially limit the ability of the cross-examiner to test the extent of the character witness' knowledge of the defendant's reputation.

While the rule adopted in the instant case makes possible the creation of unfair prejudice,[13] nevertheless questioning by the prosecution as to rumors of specific acts of prior misconduct is the only practical way for the prosecution to test the qualifications and dependability of the defendant's character witnesses. By strict supervision [14] and by the exercise of discretion in forbidding ques-

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them is that practically the above distinction—between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness . . . that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation. . . ." 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

9. Greer v. United States, 245 U. S. 559, 38 Sup. Ct. 209, 62 L. Ed. 469 (1918). In the instant case the court said: "[I]n cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him. Given this option, we think defendants in general and this defendant in particular have no valid complaint at the latitude which existing law allows to the prosecution to meet by cross-examination an issue voluntarily tendered by the defense." 69 Sup. Ct. at 223. See also People v. Fay, 270 App. Div. 261, 59 N. Y. S. 2d 127 (1st Dep't 1945).

10. People v. Gin Shue, 58 Cal. App. 2d 625, 137 P. 2d 742 (1943); *accord,* People v. Rosa, 268 Mich. 462, 256 N. W. 483 (1934); Lowrey v. State, 197 P. 2d 637 (Okla. 1948); State v. Shull, 131 Ore. 224, 282 Pac. 637 (1929). See also 3 WIGMORE, EVIDENCE § 987 (3d ed. 1940).

11. People v. Hannon, 381 Ill. 206, 44 N. E. 2d 923 (1942); Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1899).

12. State v. Robinson, 226 N. C. 95, 36 S. E. 2d 655 (1946); *accord,* State v. Shepherd, 220 N. C. 377, 17 S. E. 2d 469 (1941). "When counsel in cross-examination asks a witness if he has not heard that the defendant has been guilty of some specific and particularly atrocious conduct, even though the witness may answer in the negative, the average juror is extremely apt to assume from the mere fact the question has been asked that rumors at least to that effect are afloat, and even perhaps that those rumors are true." Viliborghi v. State, 45 Ariz. 275, 43 P. 2d 210, 215 (1935).

13. See note 8 *supra.*

14. "Where it is manifest that the primary object of the cross-examination is not to discredit or weaken the testimony of the character witness, but to prejudice the jury against the defendant by proving as a fact that he had on a former occasion actually committed a specific crime, and it is apparent that the inquiry must have been so received by the jury to his prejudice, then the evidence thus adduced is improper." Magee v. State, 198 Miss. 642, 22 So. 2d 245, 246 (1945); *accord,* Common-

tions whose sole purpose seems to be to prejudice the jury against the defendant, the trial judge can do much towards eliminating this evil.[15] Here, as elsewhere in the law, the fair administration of justice must depend upon the ability and high integrity of bench and bar.[16]

FEDERAL PROCEDURE—FOREIGN CORPORATIONS—WAIVER OF VENUE BY DESIGNATION OF AGENT FOR SERVICE OF PROCESS

Defendant, a New Jersey corporation, did business in New York under a certificate which designated the Secretary of State as its agent for service of process.[1] Plaintiffs, its employees, sued in a New York federal district court for overtime pay under the Fair Labor Standards Act.[2] The trial judge dismissed for improper venue. *Held,* order reversed. By appointing an agent to receive process defendant had waived its venue privilege. *Roger v. A. H. Bull & Co.,* 170 F. 2d 664 (2d Cir. 1948).

Under the general venue provisions of the old Judicial Code [3] no civil suit [4] could be maintained in a federal district court except in the district of which defendant was an inhabitant or, if jurisdiction was based solely on diversity of citizenship, in the district where either plaintiff or defendant resided. For venue purposes the courts consistently held that a corporation was an inhabitant [5] only of the state of its incorporation.[6] This construction severely limited access to the federal courts in actions against foreign corporations.[7]

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wealth v. Flynn, 137 Pa. Super. 458, 9 A. 2d 204 (1939); Commonwealth v. Thomas, 282 Pa. 20, 127 Atl. 427 (1925); Commonwealth v. Jones, 282 Pa. 368, 124 Atl. 486 (1924); also see 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

15. See note 10 *supra.*

16. "To leave the District Courts of the United States the discretion given to them by this decision presupposes a high standard of professional competence, good sense, fairness and courage on the part of the federal district judges. If the United States District Courts are not manned by judges of such qualities, appellate review no matter how stringent can do very little to make up for the lack of them." Concurring opinion of Mr. Justice Frankfurter in the principal case. 69 Sup. Ct. at 224.

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1. N. Y. GEN. CORP. LAW § 210.

2. 52 STAT. 1063, 1069 (1938), as amended, 29 U. S. C. A. §§ 207, 216(b) (Supp. 1948).

3. Judicial Code § 51, 18 STAT. 470 (1875), as amended, 28 U. S. C. A. § 112 (1927).

4. With certain exceptions not here material. *Ibid.*

5. "Inhabitant" and "resident" are synonymous. Shaw v. Quincy Mining Co., 145 U. S. 444, 447, 12 Sup. Ct. 935, 36 L. Ed. 768 (1892).

6. *In re* Keasbey & Mattison Co., 160 U. S. 221, 229, 16 Sup. Ct. 273, 40 L. Ed. 402 (1895); McLean v. Mississippi, 96 F. 2d 741 (C. C. A. 5th 1938), *cert. denied,* 305 U. S. 623 (1938). And of the district in which its official residence or principal headquarters are located. Galveston, H. & S. A. Ry. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248 (1894); *cf.* Suttle v. Reich Bros. Construction Co., 333 U. S. 163, 68 Sup. Ct. 587 (1948); see Dobie, *Venue in Civil Cases in the United States District Court,* 35 YALE L. J. 129, 134 (1925).

7. Under this rule a foreign corporation, by its right of removal, enjoyed in many cases a discriminatory power to choose between the state or federal courts. *See* Ward v. Studebaker Sales Corp., 113 F. 2d 567 (C. C. A. 3d 1940); Notes, 42 ILL. L. REV. 780 (1948), 49 YALE L. J. 724 (1940).

Venue, however, is a personal privilege which may be waived;[8] and in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*[9] the Supreme Court partly avoided the restrictive effect of its definition of inhabitant by holding that a foreign corporation which designated an agent for service of process in conformity with a valid state law thereby waived its privilege and consented to be sued[10] in the federal courts of that state.

In the *Neirbo* case the act importing consent to the otherwise improper venue was the designation of a resident agent for process rather than the transaction of business within the state;[11] and the lower federal courts, in applying the *Neirbo* doctrine, have sought to delimit the waiver by the express terms of the designation. Thus it has been held that a foreign corporation has not consented to defend actions in which, under state law, process could not have been served upon the statutory agent,[12] and that, at least in the absence of a state statute making doing business equivalent to designation,[13] a corporation which fails to file an appointment has not waived its right to insist upon proper venue.[14] The instant case is supported by the weight of authority in holding that the waiver extends to actions which arise under federal laws and over which state and federal courts have concurrent jurisdiction.[15] Its

8. Commercial Casualty Insurance Co. v. Consolidated Stone Co., 278 U. S. 177, 49 Sup. Ct. 98, 73 L. Ed. 252 (1929); Lee v. Chesapeake & O. Ry., 260 U. S. 653, 43 Sup. Ct. 230, 67 L. Ed. 443 (1923).

9. 308 U. S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939); Notes, 53 HARV. L. REV. 660 (1940), 38 MICH. L. REV. 1047 (1940), 49 YALE L. J. 724 (1940).

10. "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference." Frankfurter, J., in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 168, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).

11. The Court distinguished *In re* Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402 (1895), in which doing business was held not to imply waiver of venue. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 173 n. 15, 60 Sup. Ct. 153, 84 L. Ed. 167 (1939).

12. American Chemical Paint Co. v. Dow Chemical Co., 164 F. 2d 208 (C. C. A. 6th 1947) (opinion on rehearing); North Butte Mining Co. v. Tripp, 128 F. 2d 588 (C. C. A. 9th 1942); Ferrante v. Trojan Powder Co., 79 F. Supp. 502 (E. D. Pa. 1947); Harmann v. United States Fidelity & Guaranty Co., 64 F. Supp. 36 (W. D. La. 1946); Laffoon v. J. M. Farrin Co., 57 F. Supp. 908 (W. D. Mo. 1944).

13. Knott Corp. v. Furman, 163 F. 2d 199 (C. C. A. 4th 1947), *cert. denied*, 332 U. S. 809 (1947), 61 HARV. L. REV. 723 (1948), 33 VA. L. REV. 812 (1947); *accord*, Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945) (venue waived by driving under nonresident motorist statute); Krueger v. Hider, 48 F. Supp. 708 (E. D. S. C. 1943) (same); *cf.* RESTATEMENT, JUDGMENTS § 30 (1942).

14. *In re* Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402 (1895); Moss v. Atlantic Coast Line R. R., 149 F. 2d 701 (C. C. A. 2d 1945), *cert. denied*, 330 U. S. 839 (1947); Cummer-Graham Co. v. Straight Side Basket Corp., 136 F. 2d 828 (C. C. A. 9th 1943); see Note, 42 ILL. L. REV. 780, 784 (1948).

15. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 Sup. Ct. 215, 84 L. Ed. 537 (1940) (Constitution); Giusti v. Pyrotechnic Industries, Inc., 156 F. 2d 351 (C. C. A. 9th 1946) (Clayton Act); Iocono v. Anastasio, 75 F. Supp. 602 (S. D. N. Y. 1948) (Fair Labor Standards Act); Gibson v. United States Lines, 74 F. Supp. 776 (D. Md. 1947) (same); Beard v. Continental Oil Co., 42 F. Supp. 310 (E. D. La. 1941) (same); Bowles v. L. D. Schreiber & Co., 56 F. Supp. 814 (D. Minn. 1944) (Emergency Price Control Act); Bennett v. Standard Oil Co., 33 F. Supp. 817 (D. Md. 1940) (Jones Act); Canright v. General Finance Corp., 33 F. Supp. 241 (E. D. Ill. 1940) (Bankruptcy Act). *Contra:* American Chemical Paint Co. v. Dow Chemical Co., 161 F. 2d 956 (C. C. A. 6th 1947) (*Neirbo* rule limited to diversity

statement that under the *Neirbo* rule designation constitutes waiver in those suits and only in those which would be cognizable in the state courts,[16] however, is more restrictive than the decisions warrant; for a majority of the cases regard appointment of an agent "upon whom all process in any action" [17] may be served as actual consent to be sued in that state even though jurisdiction is exclusively federal;[18] and the cases which hold otherwise [19] seem to rest on a misinterpretation of the special venue statute by which they were governed [20] instead of on an implied limitation of the waiver to cases of concurrent jurisdiction.[21]

The difficulties experienced in the application of the *Neirbo* rule have resulted primarily from the fact that it avoided, rather than repudiated, the notion that a corporation resides where it is born.[22] The new Judicial Code,[23] which became effective September 1, 1948, represents a much sounder approach to the problem of venue in actions against corporations.[24] Section 1391(c) provides: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." [25] By redefining corporate "residence" according to more modern concepts, the new Code supersedes the consent theory of the *Neirbo* case [26] and makes a corporation suable wherever it is likely to incur liability

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cases), criticized in 36 GEO. L. J. 108 (1947), 60 HARV. L. REV. 1171 (1947), 27 NEB. L. REV. 595 (1948). But *cf.* opinion on rehearing, 164 F. 2d 208 (C. C. A. 6th 1947).

16. 170 F. 2d at 666; see 3 MOORE, FEDERAL PRACTICE 2132 (2d ed. 1948); Note, 49 YALE L. J. 724, 730 (1940).

17. N. Y. GEN. CORP. LAW § 210. But *cf.* TENN. CODE ANN. § 4120 (Williams, 1942): ". . . in all actions or suits brought against it *in the courts of this state* . . ." (italics supplied).

18. Independent Pneumatic Tool Co. v. Chicago Pneumatic Tool Co., 74 F. Supp. 502 (N. D. Ill. 1947); Randolph Laboratories v. Specialties Development Corp., 62 F. Supp. 897 (D. N. J. 1945); American Blower Corp. v. B. F. Sturtevant Co., 61 F. Supp. 756 (S. D. N. Y. 1945); Monroe Calculating Mach. Co. v. Marchant Calculating Mach. Co., 48 F. Supp. 84 (E. D. Pa. 1942); Vogel v. Crown Cork & Seal Co., 36 F. Supp. 74 (D. Md. 1940); *see* Shelton v. Schwartz, 131 F. 2d 805, 808 (C. C. A. 7th 1942).

19. Blaw-Knox Co. v. Lederle, 151 F. 2d 973 (C. C. A. 6th 1945); *see* Carbide & Carbon Chemicals Corp. v. United States Industrial Chemicals, Inc., 140 F. 2d 47, 50 (C. C. A. 4th 1944); Bulldog Electric Products Co. v. Cole Electric Products Co., 134 F. 2d 545, 547 (C. C. A. 2d 1943). *Contra:* California Stucco Products, Inc. v. National Gypsum Co., 33 F. Supp. 61 (D. Mass. 1940).

20. 29 STAT. 695 (1897), as amended, 28 U. S. C. A. § 109 (1927); *cf.* Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 62 Sup. Ct. 780, 86 L. Ed. 1026 (1942).

21. See Note, 42 ILL. L. REV. 780, 787 (1948).

22. See generally 3 MOORE, FEDERAL PRACTICE § 19.04[3] (2d ed. 1948); Levin, *Federal Venue in Actions Against Corporations*, 15 TEMP. U. L. Q. 92, 104-6 (1940); Note, 42 ILL. L. REV. 780, 792 (1948); 61 HARV. L. REV. 723 (1948); 27 NEB. L. REV. 595 (1948); 33 VA. L. REV. 812 (1947).

23. Pub. L. No. 773, 80th Cong., 2d Sess. (June 25, 1948).

24. See note 22 *supra.*

25. Pub. L. No. 773, 80th Cong., 2d Sess., § 1391(c) (June 25, 1948).

26. The *Neirbo* doctrine has not been abrogated, however. It still extends the statutory limits of venue in suits against defendants registered under fictitious names statutes, Surclo Manufacturing Co. v. Dunlap, 76 F. Supp. 552 (E. D. Pa. 1948), or using the highways under non-resident motorist or similar statutes, Andrews v. Joseph Cohen & Sons, Inc., 45 F. Supp. 732 (S. D. Tex. 1941).

through its business operations; by codifying the *forum non conveniens* doctrine[27] it protects the corporate defendant from the hardships of an inappropriate forum.

FULL FAITH AND CREDIT—SUIT ON FOREIGN REVIVED JUDGMENT—EFFECT OF LOCAL STATUTE OF LIMITATIONS ON REVIVAL OF JUDGMENTS

Eighteen years after the rendition of a Colorado judgment, it was revived in accordance with unchallenged Colorado procedure, which permitted a judgment to be sued on or revived within twenty years of rendition.[1] Soon after the revival by the Colorado court, action was brought on that judgment in Missouri, where the period when a judgment may be subject to suit or revival is limited to ten years.[2] This Missouri statute of limitations, which by its terms is applicable both to foreign and domestic judgments, was pleaded as a defense to the action on the Colorado revived judgment. *Held*, that since the Colorado judgment was not revived within ten years after its original rendition, suit on it is barred by the Missouri statute; the full faith and credit clause does not require that it be enforced. *Union Nat. Bank of Wichita, Kan. v. Lamb*, 213 S. W. 2d 416 (Mo. 1948).

When a foreign judgment has been revived by the state of rendition under its procedure, the cases are not in accord as to whether the statute of limitations of another state begins to run anew from the date of revival. Many cases have held that it does.[3] Others have held that where the rendering state considers the revival a mere continuance of the original action, the statute of the forum runs from the time of the original judgment.[4]

27. In a somewhat modified form. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Pub. L. No. 773, 80th Cong., 2d Sess., § 1404(a) (June 25, 1948). *See* Hayes v. Chicago, R. I. & P. R. R.., 79 F. Supp. 821 (D. Minn. 1948); 17 U. S. L. WEEK 3241 (Feb. 15, 1949).

1. "[F]rom and after twenty years from the entry of final judgment in any court of this state, the same shall be considered as satisfied in full, unless revived as provided by law." 3 COLO. STAT. ANN. c. 93, § 2 (1935).

2. The Missouri statute provides that the judgment is barred at the expiration of ten years from the date of original rendition, unless revived by personal service upon the defendant. Mo. REV. STAT. ANN. § 1038 (1939).

3. Kuykendall v. Tod, 219 Fed. 707 (C. C. A. 8th 1915); Tod v. Kuykendall, 206 Fed. 482 (D. Colo. 1913); Helton v. Turner, 228 Ala. 403, 153 So. 866 (1934); Fagan v. Bentley, 32 Ga. 534 (1861); Kratz v. Preston, 52 Mo. App. 251 (1893) (notwithstanding a want of personal service in the revivor proceedings). As to the effect of a revival of a judgment, see generally 2 FREEMAN, JUDGMENTS § 1081 (5th ed. 1925).

4. Meek v. Meek, 45 Iowa 294 (1876); Rice v. Moore, 48 Kan. 590, 30 Pac. 10 (1892); Gardner v. Autrey, 170 Okla. 526, 40 P. 2d 1042 (1934); Collin County Nat. Bank v. Hughes, 110 Tex. 362, 220 S. W. 767 (1920); Betts v. Johnson, 68 Vt. 549, 36 Atl. 489 (1896). These cases point out the lack of jurisdiction, where defendant is a nonresident, to render a new judgment on scire facias where he does not appear. "In the event a sister state or foreign judgment has been revived, this will not affect

Where the rendering state treats the revival as creating a new judgment, on which the statute would begin to run anew, if the revival was against a nonresident defendant on some type of constructive process the additional question arises whether the reviving court had jurisdiction over the nonresident. Unless due process of law is satisfied in this regard, no effect need be given the revived judgment under the full faith and credit clause, and the statute of the forum runs from the time of the original judgment.[5]

It is well settled as a general proposition that the faith and credit which must be given the judgment of another state under the Federal Constitution is that accorded such judgment by the state of its rendition, even though the judgment is based on a mistake of substantive law or enforcement of it would be repugnant to the local policy of the forum.[6] However, there are several grounds on which a court may constitutionally refuse to recognize or enforce a foreign judgment. Want of jurisdiction[7] and fraud in the procurement of the judgment[8] are two such grounds. In addition, it has been uniformly held that a state may pass a statute of limitations applicable to suits on foreign judgments without violating the full faith and credit

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the limitation period unless the revivor proceedings are regarded as a new action resulting in a new judgment establishing a new liability rather than a mere continuation of the original judgment. But even where treated as a new action, if personal service in the revivor proceedings was not obtained against a nonresident and non-appearing defendant personally served in the original action, it is held that the judgment of revival is not effective against, and does not affect, the running of the statute of the forum." 3 FREEMAN, JUDGMENTS 2997 (5th ed. 1925).

5. In speaking of a revival on scire facias, where defendant was a nonresident and did not appear, the Supreme Court of the United States said, "Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as a continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of nihil, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the lex fori." Owens v. Henry, 161 U. S. 642, 646, 40 L. Ed. 837, 838 (1896); *accord,* Rice v. Moore, 48 Kan. 590, 30 Pac. 10 (1892); Hepler v. Davis, 32 Neb. 556, 49 N. W. 458 (1891); Collin County Nat. Bank v. Hughes, 110 Tex. 362, 220 S. W. 767 (1920).

6. Roche v. McDonald, 275 U. S. 449, 48 Sup. Ct. 142, 72 L. Ed. 365 (1928) (refusal of a Washington court to enforce an Oregon judgment which had been given on a Washington judgment after the Washington statute of limitations had run thereon held a denial of full faith and credit); Christmas v. Russell, 5 Wall. 290, 15 L. Ed. 475 (U. S. 1866); Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908) (in a suit in Mississippi on a Missouri judgment based on a Mississippi contract the Mississippi court could not refuse to give full faith and credit to the Missouri judgment on the ground that the contract was illegal or void in Mississippi); 3 FREEMAN, JUDGMENTS 2798 (5th ed. 1925).

7. Williams v. North Carolina, 325 U. S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577 (1945), *reh. denied,* 325 U. S. 895; Baker v. Baker, Eccles & Co., 242 U. S. 394, 37 Sup. Ct. 152, 61 L. Ed. 386 (1917); Jackson v. Kentucky River Mills, 65 F. Supp. 601 (E. D. Ky. 1946); Bower v. Casanave, 44 F. Supp. 501 (S. D. N. Y. 1941); Lewis v. United Order of Good Samaritans, 182 Ark. 914, 33 S. W. 2d 53 (1930).

8. Simmons v. Simmons, 19 F. 2d 690 (App. D. C. 1927); Durden v. Durden, 184 Ga. 421, 191 S. E. 455 (1937). This is only where fraud would be a defense in the state of rendition. Louisville & Nashville R. R. v. Jones' Adm'r, 215 Ky. 774, 286 S. W. 1071 (1926). See generally 3 FREEMAN, JUDGMENTS § 1401 (5th ed. 1925); GOODRICH, CONFLICTS OF LAWS 535 (2d ed. 1938).

clause,[9] for the reason that such statutes affect the remedy only and hence are procedural matters to be governed by the lex fori.[10]

Previous cases which have dealt with the question of the effect of a revival of a sister state judgment on the statute of limitations of the forum do not appear to have considered the problem of full faith and credit. Apparently it has been assumed that if the court granting the revival had jurisdiction, the revived judgment would have to be given the same recognition and effect given it by the rendering state. But the Missouri court in the instant case disregards the real meaning of full faith and credit. Without considering either the effect given such a revival by Colorado or the question of whether the Colorado court had jurisdiction to affect the rights of the defendant, it denies effect to the revived judgment on the ground that the Missouri statute limits the time within which a judgment can be revived. But a Missouri statute could not constitutionally affect the validity or effect of a revival in Colorado of a Colorado judgment. The court, in holding that it did, contravened the basic and well established meaning of the full faith and credit clause that the same faith and credit must be given the judgment as is given it in the state of its rendition.[11]

The decision may or may not be correct on the facts. This would depend on the question of the effect given such a revival in Colorado and also on whether the Colorado court had jurisdiction over the defendant in the revival proceedings. Neither of these questions was considered by the court in its opinion.

JUDGMENTS—RES JUDICATA—PRIVITY AS BETWEEN BAILOR AND BAILEE

The owner of a truck bailed it to another, who collided with a private car while operating it. The car owner sued the bailee; before judgment, the bailor commenced this action against the car owner. Judgment in the first suit having been rendered for the car owner, he sought leave to interpose

9. M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177 (U. S. 1839); Randolph v. King, 20 Fed. Cas. 260, No. 11,560 (C. C. S. D. Ohio 1867); Kelly v. Heller, 74 Colo. 470, 222 Pac. 648 (1924); Schemmel v. Cooksley, 256 Ill. 412, 100 N. E. 141 (1912); Meek v. Meek, 45 Iowa 294 (1876); McArthur v. Goddin, 12 Bush 274 (Ky. 1876). But *cf.* Lamb v. Powder River Livestock Co., 132 Fed. 434 (C. C. A. 8th 1904) (three months statute of limitations on foreign judgments held so unreasonable as to constitute a violation of the full faith and credit clause). See generally, 3 FREEMAN, JUDGMENTS § 1456 (5th ed. 1925).

10. Metcalf v. Watertown, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861 (1894); Bacon v. Howard, 20 How. 22, 15 L. Ed. 811 (U. S. 1857); Rice v. Moore, 48 Kan. 590, 30 Pac. 10 (1892); Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212 (1900).

11. The court in the instant case said "A foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment." 213 S. W. 2d at 419. Another very recent case in which the court committed the same egregious error is Ross v. Beall, 215 S. W. 2d 225 (Tex. Civ. App. 1948). There the court denied effect to a Louisiana divorce decree on the ground that if rendered in

a supplemental plea of this judgment in bar to the action by the bailor. *Held,* the plea could not be received because the finding of negligence against the bailee in the prior action was not res judicata against the bailor in this action, there being no privity between the bailor and bailee. *Hudson Transit Corp. v. Antonucci,* 61 A. 2d 180 (N. J. 1948).

Where suit is brought on a cause of action and a valid judgment on the merits is renderd, those affected by the judgment, under the doctrine of res judicata,[1] include not only the parties to the litigation, but those in privity with them.[2]

Privity in res judicata has been said to be limited to relationships involving property rights,[3] and to require mutual or successive relationships to the same property rights which were the subject matter of the prior litigation.[4] Since persons in privity are bound because the same property rights were involved in the prior litigation, these rights must have been acquired after the commencement of the suit,[5] or in some cases after the rendition of the judgment.[6] But this definition of privity describes only one situation where persons other than parties may be affected by the rules of res judicata.[7] Persons who had a financial or proprietary interest in the litigated issues and controlled the litigation,[8] or whose interests were suffi-

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Texas under the procedure used, it would not have been valid, and that the presumption was that the law of Louisiana was the same as that of Texas in the absence of a showing to the contrary. It is to be hoped that these two recent decisions do not indicate any widespread misconception on the part of the state courts as to the proper interpretation of the full faith and credit clause.

1. The doctrine of res judicata comprises two main rules: (1) A valid judgment on the merits concludes the parties and their privies as to every matter which was, or might have been, litigated and bars a second suit on the same cause of action. (2) Any matter actually litigated and determined by a judgment on the merits is conclusive on the parties and their privies and cannot be relitigated between them. *See* Cromwell v. County of Sac, 94 U. S. 351, 353, 24 L. Ed. 195 (1876); Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1 (1942); 2 VAND. L. REV. 135 (1948).

2. Strong v. Aetna Casualty & Surety Co., 52 F. Supp. 787 (N. D. Tex. 1943); Patrick v. Daniel, 238 Ky. 172, 37 S. W. 2d 71 (1931); 2 BLACK, JUDGMENTS § 534 (1891); 1 FREEMAN, JUDGMENTS § 407 (5th ed. 1925).

3. McDonald v. F. W. Woolworth Co., 135 S. W. 2d 359 (Mo. App. 1939); Dillard v. Owens, 122 S. W. 2d 76, 83 (Mo. App. 1938); Hart v. Moulton, 104 Wis. 349, 80 N. W. 599 (1899); BIGELOW, ESTOPPEL 142 (6th ed., Carter, 1913).

4. Strong v. Aetna Casualty & Surety Co., 52 F. Supp. 787, 788 (N. D. Tex. 1943); Interstate Electric Co. v. Fidelity & Deposit Co. of Maryland, 228 Ala. 210, 153 So. 427, 428 (1934); 2 BLACK, JUDGMENTS § 549 (1891); 1 FREEMAN, JUDGMENTS § 438 (5th ed. 1925).

5. National Lead Co. v. Nulsen, 131 F. 2d 51, 56 (C. C. A. 8th 1942), *cert. denied,* 318 U. S. 758 (1943); Harris Realty Co. v. Austin, 134 Tex. 484, 137 S. W. 2d 19 (1940); 1 FREEMAN, JUDGMENTS § 440 (5th ed. 1925).

6. Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P. 2d 892, 894 (1942); White v. Peterson, 222 Iowa 720, 269 N. W. 878, 880 (1936); Hocken v. Allstate Insurance Co., 235 Mo. App. 991, 147 S. W. 2d 182, 186 (1941). "The critical date in determining the question of a purchaser's privity is the commencement of the suit rather than the date of the adjudication except that this may be affected by statutes governing lis pendens." 1 FREEMAN, JUDGMENTS 967 (5th ed. 1925).

7. See generally, 1 FREEMAN, JUDGMENTS § 409 (5th ed. 1925); RESTATEMENT, JUDGMENTS § 83 (1942); Note, 57 HARV. L. REV. 98, 100 (1943).

8. Western Electric Co. v. Hammond, 135 F. 2d 283 (C. C. A. 1st 1943); Kentucky

ciently represented by a party to the litigation,[9] are bound by the rules of res judicata. The *Restatement of Judgments* includes within the meaning of "privies" all three of the above classes.[10]

In addition there are situations where the rules of res judicata will affect persons who are neither parties nor "privies" as defined by the *Restatement,* such as situations involving derivative or joint liability.[11]

The court in the instant case found no privity between the bailor and bailee.[12] It described privity as "identity of interest through succession to the same rights of property involved in the prior litigation." [13] This definition describes but one of three classes of privies recognized in the *Restatement.* Since the bailor did not control the litigation and his interests were not represented therein by the bailee, the same result would have been reached under the broader *Restatement* definition. But if the bailor had actually controlled the defense in the prior action against the bailee, he would have been concluded by the finding of negligence against the bailee.[14] And if the bailee had sued for the entire injury to the bailed property, as he is privileged to do,[15] a judgment in his favor would be a bar to an action by the bailor.[16] It has also been held that a judgment against the bailee in such a suit will

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Bell Corp. v. Tye, 298 Ky. 674, 183 S. W. 2d 939 (1944); RESTATEMENT, JUDGMENTS § 84 (1942); 1 FREEMAN, JUDGMENTS §§ 432, 433 (5th ed. 1925).

9. Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62, 66 (1921); Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 867 (1893); RESTATEMENT, JUDGMENTS §§ 85-88 (1942); 1 FREEMAN, JUDGMENTS § 435 (5th ed. 1925).

10. RESTATEMENT, JUDGMENTS § 83 (1942); *see* Note, 57 HARV. L. REV. 98, 100 (1943).

11. Cressler v. Brown, 79 Okla. 170, 192 Pac. 417 (1920) (surety may take advantage of judgment for principal); Lasher v. McAdam, 125 Misc. 685, 211 N. Y. Supp. 395 (Sup. Ct. 1925) (failure to get judgment against master bar to subsequent suit against servant); see generally, RESTATEMENT, JUDGMENTS §§ 94-111 (1942); 1 FREEMAN, JUDGMENTS §§ 409, 444-68 (5th ed. 1925); Notes, 57 HARV. L. REV. 98 (1943), 35 YALE L. J. 607, 609 (1926), 91 U. OF PA. L. REV. 467, 469 (1943).

12. *Accord,* Unaka & City National Bank of Johnson City v. Lewis, 203 N. C. 644, 166 S. E. 800 (1932); Peck v. Merchants Transfer and Storage Co. of Topeka, 85 Kan. 126, 116 Pac. 365 (1911); *cf.* Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F. 2d 143 (C. C. A. 3d 1943) (on analogous facts, held that finding of negligence against third party in suit by bailor for damages to truck was not conclusive on third party in a suit by him against the bailee for personal injuries); see RESTATEMENT, JUDGMENTS § 88(3) (1942). *But cf.* C. I. T. Corp. v. Hungerford, 11 N. J. Misc. 897, 168 Atl. 791 (Dist. Ct. 1933) (denial of recovery to bailee barred later suit by bailor); Ladany v. Assad, 91 Conn. 316, 99 Atl. 762 (1917) (where suit against bailee involved title to bailed property).

13. 61 A. 2d at 182.

14. *Cf.* Caterpillar Tractor Co. v. International Harvester Co., 120 F. 2d 82 (C. C. A. 3d 1941), 9 GEO. WASH. L. REV. 977. See note 8 *supra.*

15. Terry v. Pennsylvania R. R., 35 Del. 1, 156 Atl. 787 (Sup. Ct. 1931); Union Pacific R. R. v. Meyer, 76 Neb. 549, 107 N. W. 793 (1906); Railway Express Agency Inc., v. Goodman's New York & Connecticut Express Corp., 129 Conn. 386, 28 A. 2d 869 (1942).

16. Corcoran v. Huntington Lumber & Coal Co., 211 App. Div. 803, 206 N. Y. Supp. 752 (2d Dep't 1924); Harris v. Seaboard Airline Ry., 190 N. C. 480, 130 S. E. 319 (1925); Terry v. Pennsylvania R. R., 35 Del. 1, 156 Atl. 787 (Sup. Ct. 1931).

bar the bailor.[17] The definition of privity announced in the instant case would not explain these results, but the *Restatement* definition would.

It seems that the problem of who is or is not bound by a judgment may have been obscured by the use of the terms "privity" and "privies." [18] At least to state categorically that there is or is not privity in a certain relationship, such as bailor and bailee, is not conclusive. The policy behind the doctrine of res judicata often requires that persons other than parties to the action be affected by a judgment in situations where no privity, in any technical sense, can be found. It is perhaps preferable to recognize that these cases are exceptions to the general rule that a judgment is binding only on the parties and their privies, rather than to attempt to reconcile them with the rule by stretching the concept of privity beyond its traditional legal meaning.

MARRIAGE—ANNULMENT FOR INCAPACITY—EFFECT OF ISSUE FROM ARTIFICIAL INSEMINATION BY HUSBAND

H and *W* were married in 1942. Both were physically capable, but the marriage was never consummated because of a psychological condition in *H*. Beginning in 1946, artificial insemination was attempted, utilizing semen of *H*, but not until after *W* left *H* in 1948 was it discovered that the treatment had resulted in pregnancy. Following the birth of a son in September, 1948, *W* petitioned for a decree of nullity on grounds of incapacity of *H*. *Held*, decree granted despite the fact that it would bastardize the child. *L. v. L.*, [1949] 1 All Eng. 141 (Prob., Div. & Adm.).

Under English law, incapacity of one of the parties to consummate the marriage, at the time of the marriage, makes that marriage voidable only and not void.[1] This rule, canonical in origin, is recognized in the United States by statutes in most states,[2] but there is a difference of opinion as to whether or

17. C. I. T. Corp. v. Hungerford, 11 N. J. Misc. 897, 168 Atl. 791 (Dist. Ct. 1933); RESTATEMENT, JUDGMENTS § 88(1)(b) (1942).

18. Taylor v. Sartorious, 130 Mo. App. 23, 108 S. W. 1089, 1094 (1908): "The question of who is concluded by a judgment has been obscured by the use of the words 'privity' and 'privies,' which in their precise technical meaning in law are scarcely determinative always of who is and who is not bound by a judgment. Courts have striven sometimes to give effect to the general doctrine that a judgment is only binding between parties and their privies by extending the signification of the word 'privies' to include relationships not originally embraced in it, whereas the true reason for holding the issue res judicata does not necessarily depend on privity, but on the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy."

1. 10 HALSBURY, LAWS OF ENGLAND 640, 641 (Hailsham ed. 1933) and cases cited. As to confusion in the use of the terms "void" and "voidable," see Newark, *Operation of Nullity Decrees*, 8 MOD. L. REV. 203 (1945), and letter in reply by Latey in 11 MOD. L. REV. 70 (1948). For discussion as to what constitutes capacity in the marital relationship, see Kingsley, *Physical Capacity to Marry*, 20 So. CALIF. L. REV. 319 (1947).

2. 1 VERNIER, AMERICAN FAMILY LAWS § 50 (1931).

not equity could act in the absence of statute.[3] It has been held that a physical defect is not essential to incapacity—a psychological block resulting in physical incapacity is sufficient.[4]

In determining whether or not a decree should issue in annulment proceedings, the courts enjoy discretion and take into consideration the motives of the party seeking the decree, possible equitable estoppel, and public policy. Requests for decrees of annulment for incapacity have been refused where the party complained of was obviously too old to be capable at the time of the marriage,[5] where an unreasonable time was allowed to elapse before proceedings were instituted,[6] and where the party complained of had changed his position in reliance on the marriage.[7]

Natural issue resulting from an unconsummated marriage is of course most unusual, and prior to the principal case the only instance of such issue occurred as the result of *fecundatio ab extra* during attempts to consummate.[8] Thus the court had little authority on which to rely in determining whether or not the presence of issue alone would influence the granting or withholding of the decree. In this case of first impression, the court followed what little authority existed and in so doing treated the two situations as analogous. Although the result of both situations is the birth of issue, there is a possible difference. In this case, artificial insemination [9] was resorted to voluntarily by both parties with the intention of producing a child; in the case of *fecundatio ab extra,* the production of issue is accidental. It would seem that the presence of intention might possibly be made the basis of estoppel.

If nothing more than a decree of annulment is granted, the effect of dissolution of the voidable union is to place the parties in the same position as existed before the marriage.[10] Thus, in reality the avoiding of the marriage

3. Anonymous, 24 N. J. Eq. 19 (1873); Burtis v. Burtis, 1 Hopk. Ch. 557, 14 Am. Dec. 563 (N. Y. 1825). But see Smith v. Morehead, 59 N. C. 360 (1863). See also Spencer, *Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint,* 25 YALE L. J. 58, 92 (1915); Note, L. R. A. 1916 C, 694.

4. R. G. v. J. G., 93 L. J. P. C. 163 (1924); Tompkins v. Tompkins, 92 N. J. Eq. 113, 111 Atl. 599 (1920), 6 CORN. L. Q. 333 (1921), 69 U. OF PA. L. REV. 388 (1921).

5. Hatch v. Hatch, 58 Misc. 54, 110 N. Y. Supp. 18 (Sup. Ct. 1908).

6. Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697 (1920). As to statutes of limitations specifying the time within which suit must be brought to annul for impotency, see 1 VERNIER, AMERICAN FAMILY LAWS § 56 (1931).

7. Watters v. Watters, 168 N. C. 411, 84 S. E. 703 (1915).

8. Clarke v. Clarke, [1943] 2 All Eng. 540 (P. 1942), distinguished in the instant case, [1949] 1 All Eng. at 144.

9. For recent discussions of the legal problems presented by artificial insemination, see generally Koerner, *Medicolegal Considerations in Artifical Insemination,* 8 LA. L. REV. 484 (1948); Tucker, *Legal Problems of Artificial Insemination,* 33 WOMEN L. J. 57 (1947); Notes, 33 MINN. L. REV. 145 (1949), 34 VA. L. REV. 822 (1948, 58 YALE L. J. 457 (1949).

10. Newbould v. Attorney-General, [1931] P. 75; P. v. P., [1916] 2 Ir. R. 400; People *ex rel.* Byrnes v. Retirement Board, 272 Ill. App. 59 (1933); Riesen v. Riesen, 105 N. J. Eq. 144, 147 Atl. 225 (1929); Sleicher v. Sleicher, 251 N. Y. 366, 167 N. E. 501 (1929); see also 1 BISHOP, MARRIAGE AND DIVORCE § 105 (6th ed. 1881); TIFFANY, PERSONS AND DOMESTIC RELATIONS 40 (2d ed., Cooley, 1909); Note, 30 COL. L. REV. 877 (1930).

results in making it void *ab initio* and renders any issue illegitimate.[11] The court in the principal case was faced with the dilemma of (1) refusing the decree and thus enforcing an unhappy and abnormal marriage, or (2) granting the decree and leaving the child of the dissolved marriage stained with the stigma of illegitimacy. It chose the latter course as the lesser of two evils.

The ideal solution to the problem presented would be to grant the decree but to make the issue legitimate. Statutes in many American jurisdictions achieve this result and thereby eliminate the dilemma present in the instant case.[12] These statutes are not universal in the United States, however, and many are so ambiguous as to present the courts with difficult problems of construction.[13] In at least one state it has been held as a matter of common law that the issue of an annulled marriage is legitimate.[14] With legitimacy a matter of public concern and with artificial insemination likely to come into more popular use, the need is great for legislation to cope with the problem presented in the principal case.

NEGLIGENCE—EMPLOYEE IN PERIL DUE TO OWN FAULT—LIABILITY OF EMPLOYEE AND EMPLOYER TO ONE INJURED TRYING TO RESCUE EMPLOYEE

The driver of defendant's truck negligently collided with another vehicle. Unconscious from the impact, he was in a position of great peril when fire threatened the cargo of butane gas carried in the truck. Plaintiff, a pedestrian, in attempting to rescue the driver, suffered severe burns from exploding gas. Action for damages against the driver and his employer. *Held,* plaintiff may recover from both. The negligence of the person rescued makes him liable to the rescuer, and this negligence is imputed to the employer under the doctrine of *respondeat superior. Longacre v. Reddick,* 215 S. W. 2d 404 (Tex. Civ. App. 1948).

The "rescue doctrine," long recognized by the courts, has usually been applied in situations where the defendant negligently imperils a third person and the plaintiff is injured in attempting to avert the danger. Almost universally the rescuer has been allowed recovery in these situations. He is held to be within the risk created by the defendant's negligence; his coming

11. *E.g.,* Matter of Moncrief's Will, 235 N. Y. 390, 139 N. E. 550 (1923), 8 CORN. L. Q. 364; JACOBS, CASES ON DOMESTIC RELATIONS 323 (2d ed. 1939); 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS § 14 (6th ed. 1921).

12. 1 VERNIER, AMERICAN FAMILY LAWS § 48 (1931), 4 *id.* § 247 (1931).

13. *Ibid.* In at least one jurisdiction a statute provides specifically that when a marriage is annulled because of the impotency of the husband, any issue of the wife shall be illegitimate. IOWA CODE § 598.22 (1946). It must have been passed under the assumption that the husband could not possibly be the father of the child if he was impotent, and its application to facts like those in the instant case poses an interesting problem.

14. Erwin v. Bass, 172 Miss. 332, 160 So. 568 (1935); Bass v. Erwin, 177 Miss. 46, 170 So. 673 (1936), 10 MISS. L. J. 85 (1937).

is deemed to be foreseeable and a natural and probable consequence of that negligence; and, unless clearly rash and reckless, his risking life and limb is not regarded as contributory negligence as a matter of law or as assumption of risk.[1] "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable." [2]

In the few cases involving the right of an injured rescuer to recover from a person negligently self-imperilled or from that person's employer, however, there is a split of authority. The early case of *Saylor v. Parsons* [3] held that there could be no recovery from either the rescued or his master since there were lacking both a duty to the rescuer and proximate causation.[4] Having no duty to keep himself free from danger, a rescued person solely responsible for his own peril could not be negligent toward a rescuer. Except in cases involving separate negligence by the defendant toward a rescuer who had already begun his attempt to save a third person, the court in the *Saylor* case regarded the rights of a rescuer as derived from those of the rescued.[5] Not all courts have agreed that the rescuer's rights are derivative in other types of cases,[6] but until fairly recently there was little dissent from

1. Upon the rescue doctrine generally, see BOHLEN, STUDIES IN THE LAW OF TORTS 568 (4th ed. 1926); 3 COOLEY, TORTS § 487 (4th ed. 1932); PROSSER, TORTS 358 (1941); 2 RESTATEMENT, TORTS §§ 445, 472 (1934); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471, 533 (1932); Note, 11 Mo. L. REV. 317 (1946). For collections of cases upon various phases of the rescue problem, see Notes, 5 A. L. R. 206 (1920), 19 A. L. R. 4 (1922), 158 A. L. R. 189 (1945), 166 A. L. R. 752 (1947).

2. Wagner v. International Ry., 232 N. Y. 176, 133 N. E. 437, 438 (1921). Where property, rather than persons, is rescued, the person negligently endangering the property is generally held liable to the owner or person in charge who is injured in attempting to avert the danger, provided that the acts of the latter are not unreasonable under the circumstances; in general however, less risk may be incurred in the rescue of property than in that of persons before the conduct is classed as unreasonable. Condiff v. Kansas City, Ft. S. & G. R. R., 46 Kan. 256, 25 Pac. 562, 564 (1891); see Notes, 64 A. L. R. 515 (1929), 166 A. L. R. 752 (1947). Where one attempts to save property in which he owns no interest, the courts are more ready to find contributory negligence than in cases involving the rescue of persons. *See, e.g.*, Pike v. Grand Trunk Ry., 39 Fed. 255 (C. C. D. N. H. 1889). However, liability has been found in some such cases. *E.g.*, Superior Oil Co. v. Richmond, 172 Miss. 407, 159 So. 850 (1935).

3. 122 Iowa 679, 98 N. W. 500 (1904) (rescued negligently placed self in danger of collapse of undermined wall).

4. 98 N. W. at 502.

5. *Id.* at 501.

6. "The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer." Wagner v. International Ry., 232 N. Y. 176, 133 N. E. 437 (1921). This theory will explain holdings in some situations that a separate duty is owed to the rescuer. It has been held that even when the rescued is contributorily negligent in creating his peril and may not recover from the defendant, his negligence is not imputed to the rescuer so as to bar the latter. Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700 (1911); Lynch v. Fisher, 34 So. 2d 513 (La. App. 1948); Pittsburgh, C. C. & St. L. Ry. v. Lynch, 69 Ohio St. 123, 68 N. E. 703 (1903); Bond v. Baltimore & O. R. R., 82 W. Va. 557, 96 S. E. 932 (1918); see Note, 5 A. L. R. 206 (1920). *Contra*: Scates v. Rapid Transit Ry., 171 S. W. 503 (Tex. Civ. App. 1914). But it has been held that a landowner is not liable to one entering upon his land to rescue a trespasser to whom the landowner had no duty of care. Ryan v. Towar, 128 Mich. 463, 87 N. W. 644 (1901). For an argument that a rescuer should be treated

the rule of the *Saylor* case in the rare situation where only the rescued person was at fault in creating the danger.[7] In 1932, the opposite result was reached in a New Jersey case [8] which permitted the rescuer to recover, but upon a different theory.[9] In 1944, the Supreme Court of Michigan allowed recovery to the rescuer of a driver who had negligently placed himself in peril.[10] While drawing a dubious distinction from the *Saylor* case,[11] the court held that the person rescued owed a duty to one saving him from the dangerous situation which he had created; the possibility of rescue was deemed a foreseeable result of his negligent conduct. Two years later a New York court openly refused to follow the *Saylor* rule in a widely approved opinion.[12] Adopting a theory long before advanced by Professor Bohlen in his criticism of the *Saylor* case,[13] the court held that a separate duty is owed to a rescuer not to create in his vicinity a situation inviting rescue, and that injuries to him resulting from breach of that duty are foreseeable.

The principal case is clearly in line with the majority of the modern decisions in holding the negligent driver liable. There seems to be no valid reason for denying recovery in this type of case. If, as has frequently been said, the rescue doctrine is a humanitarian one,[14] and if the law looks with favor upon the rescuer,[15] there is no reason to show less favor to him when

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as a person rightfully upon the land to whom a separate duty is owed, see 73 U. OF PA. L. REV. 409 (1925).

7. "[A] person who places himself in peril is not guilty of negligence toward another which entitles the latter to recover for injury suffered in attempting to rescue him from his peril." 20 R. C. L. 133 (1918). *Cf.* Alabama Power Co. v. Conine, 213 Ala. 228, 104 So. 535 (1925) (rescued negligently seized fallen power line; employer not liable to estate of rescuer); Linz Realty Co. v. McDonald, 133 S. W. 535 (Tex. Civ. App. 1911) (driller on oil well negligently imperilled self; employer not liable to rescuer); Dupuis v. New Regina Trading Co., Ltd., [1943] 2 W. W. R. 593, [1943] 4 D. L. R. 275 (Sask. C. A.) (rescuer killed in attempt to save defendant's negligently self-imperilled elevator operator), criticized 21 CAN. B. REV. 758 (1943).

8. Butler v. Jersey Coast News Co., 109 N. J. L. 255, 160 Atl. 659 (1932) (employer held liable to rescuer of servant imperilled because of reckless driving), noted 31 MICH. L. REV. 584 (1933), criticized 13 B. U. L. REV. 371 (1933).

9. A duty toward the plaintiff was found upon the basis of his rights as user of the highway. Because the danger from broken and fallen power lines surrounding the truck from which the rescue was made was not deemed "obvious," the court held that the rescue doctrine did not apply. 160 Atl. 659, 661 (1932). As to the soundness of this theory, see 32 CORN. L. Q. 605, 608 n. 16 (1947).

10. Brugh v. Bigelow, 310 Mich. 74, 16 N. W. 2d 668 (1944), 43 MICH. L. REV. 980 (1945), 10 Mo. L. REV. 321 (1945).

11. In the *Saylor* case "plaintiff was proceeding at his own risk on private property. . . . In the instant case defendant Bigelow was bound by the laws of Michigan to exercise due care for the safety of others in his driving upon a public highway." 16 N. W. 2d at 671.

12. Carney v. Buyea, 271 App. Div. 338, 65 N. Y. S. 2d 902 (4th Dep't 1946), *aff'd mem.*, 296 N. Y. 1056, 73 N. E. 2d 120 (1947) (defendant endangered from own carelessly-parked automobile and rescued by plaintiff, a guest of tenants on defendant's farm). Among the many favorable comments upon the case in the law reviews are: 32 CORN. L. Q. 605 (1947); 45 MICH. L. REV. 918 (1947); 18 MISS. L. J. 483 (1947); 20 ROCKY MT. L. REV. 414 (1948); and 14 U. OF CHI. L. REV. 509 (1947).

13. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 30 n. 33 (1924), reprinted in BOHLEN, STUDIES IN THE LAW OF TORTS 568 n. 33 (4th ed. 1926).

14. See, *e.g.*, 3 COOLEY, TORTS § 487 (4th ed. 1932), and cases cited.

15. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 171 (1925); *cf.* Wagner

the rescued is the negligent person than when a third person carelessly creates the danger. Certainly the rescuer is as heroic in one instance as in the other. And if duty and causation can be found in the usual rescue case, either upon the "foreseeability" test or upon any other,[16] they can be discovered when the rescued himself is negligently responsible for the danger. The negligence lies in carelessly creating a situation of peril in or near the presence of the rescuer.[17]

In imposing liability upon the employer, the instant case goes one step further than the Michigan and New York cases, where no master-servant relationship was involved; but the step is a natural one.[18] Admittedly the employer in the principal case was free from negligence toward either his driver or the plaintiff; but, as pointed out by the court, liability is imposed upon him, not because of his own conduct, but because he is the master of a servant whose negligence has resulted in injury to the plaintiff.[19] There seems to be no reason for distinguishing the present case from any other where vicarious liability is imposed, under the doctrine of *respondeat superior*, upon a master who is himself free from fault.[20]

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v. International Ry., 232 N. Y. 176, 133 N. E. 437 (1921); Eckert v. Long Island R. R., 43 N. Y. 502, 506, 3 Am. Rep. 721 (1871); Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 1072 (1900).

16. Although generally approving the rescue doctrine, several authorities have pointed out that the "foreseeability" test is highly unrealistic. *See, e.g.*, PROSSER, TORTS 359 (1941) and Bohlen, Book Review, 47 HARV. L. REV. 556, 557 (1934).

17. Probably where defendant had negligently endangered his own property the courts would be slower to impose liability upon him for injuries sustained by plaintiff in rescuing it, but in principle there is no reason why such liability might not be found. See cases *supra*, note 2.

18. The employer was held liable to the rescuer of his servant in Butler v. Jersey Coast News Co., 109 N. J. L. 255, 160 Atl. 659 (1932), but as indicated previously the servant's negligence was not founded upon the rescue theory. *Supra*, note 9. Contrast the language of the court in the principal case, 215 S. W. 2d at 406.

19. As to the employer's contention that a rescuer may never recover when the rescued himself has no right to recover, the court merely said that in this type of case the rule has no application. It could have pointed out that in some other types of cases the contention would not hold. One of these is when the defendant is negligent toward the rescuer but not toward the rescued. *See, e.g.*, Donahoe v. Wabash, St. L. & P. R. R., 83 Mo. 560, 53 Am. Rep. 594 (1884) (trainmen negligent in not seeing mother rescuing child from tracks, but not negligent toward the child); 2 RESTATEMENT, TORTS § 472, comment *b* (1934); Note, 19 A. L. R. 4, 11 (1922). Another is when the rescued has been contributorily negligent in creating the peril. 2 RESTATEMENT, TORTS § 472, comment *b* (1934); see cases cited *supra*, note 6. There are also situations in which a master is held liable to one injured by his servant's negligence when the person injured would not be able to hold the servant himself. *See, e.g.*, Hudson v. Gas Consumers Ass'n, 123 N. J. L. 252, 8 A. 2d 337 (1939) (defendant held liable to wife negligently injured by her husband, employee of defendant, even though she could not sue her husband); Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928), 42 HARV. L. REV. 697 (same). *But cf.* Raines v. Mercer, 165 Tenn. 415, 55 S. W. 2d 263 (1932), 11 TENN. L. REV. 281 (1933) (plaintiff denied recovery from father of her husband for injuries incurred by the son's reckless driving of father's car prior to marriage with plaintiff).

20. For discussion of the theoretical and practical bases of *respondeat superior*, see Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105 (1916). Where, as in the principal case, the master is held liable to the rescuer of his negligent servant, it is, of course, necessary that the servant be acting within the scope of his employment when he places himself in peril. The liability of the employer in this type of case would seem to be no broader than in any other case where vicarious liability is imposed.

NEGLIGENCE—PROOF OF CAUSE IN FACT—LIABILITY OF TWO NEGLIGENT DEFENDANTS WHEN IMPOSSIBLE TO TELL WHOSE SHOT INJURED PLAINTIFF

The two defendants and the plaintiff were hunting together when the plaintiff was injured as the defendants simultaneously fired at a bird, the plaintiff being in the line of fire. Both the defendants were found negligent, but it was impossible to ascertain which one caused the injury. *Held,* the defendants were jointly and severally liable. *Summers v. Tice,* 199 P. 2d 1 (Cal. 1948).

In tort law joint and several liability is generally limited to cases where the several defendants have either: (1) acted in concert;[1] (2) acted separately but each contributed to produce a single indivisible injury;[2] (3) violated a common duty;[3] or (4) had some special relationship between them such as master and servant[4] or partnership.[5] None of these grounds is applicable to the present case. There is no concert of action here, because concert requires an actual intent or at least conscious realization among the defendants that they are joining in the commission of a wrongful act.[6] Neither does the second possibility apply, since here all the harm was caused by one or the other of the defendants, not by both. It is clear that there is no special relationship, nor is there a common duty, since that concept pertains to cases where the same duty is owed by two or more persons, such as the duty to maintain a party wall.[7]

Because the instant case did not fit into any of these rules the defendants contended they should be treated as independent tortfeasors, each liable for the damage caused by him alone.[8] However, the court pointed out that a wrong had been done by one of the defendants and that a holding for the plaintiff was desirable. Because the court felt the desired result was not possible under the existing rules of law, it chose a basis of decision for which there is no case authority. It held that the burden of proof of causation was shifted to the defendants, and joint and several liability was imposed for failure to bear the burden. To justify the decision the court drew an analogy to the res ipsa

1. *E.g.,* Meints v. Huntington, 276 Fed. 245, 19 A. L. R. 664 (C. C. A. 8th 1921); Reyher v. Mayne, 90 Colo. 586, 10 P. 2d 1109 (1932).
2. *E.g.,* Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480 (1916); PROSSER, TORTS § 47 (1941).
3. *E.g.,* Woods v. Kansas City, K. V. & W. R. R., 134 Kan. 755, 8 P. 2d 404, 407 (1932); PROSSER, TORTS § 47 (1941); 4 RESTATEMENT, TORTS § 878 (1939).
4. *E.g.,* Weaver v. Hale, 82 Fla. 88, 89 So. 363 (1921); 1 COOLEY, TORTS § 87 (4th ed. 1932); PROSSER, TORTS § 47 (1941).
5. *E.g.,* Caplan v. Caplan, 268 N. Y. 445, 198 N. E. 23, 101 A. L. R. 1223 (1935); 1 COOLEY, TORTS § 88 (4th ed. 1932).
6. Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413, 429 (1937). In the principal case the court considered the concert-of-action concept at length, and although it did not entirely repudiate the idea, it did say that it would be straining the concept to hold for the plaintiff on that ground. Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413, 430 (1937). *But see* Oliver v. Miles, 144 Miss. 852, 110 So. 666, 50 A. L. R 357 (1926); 4 RESTATEMENT, TORTS § 876(b) (1939).
7. Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413, 431 (1937)
8. 1 COOLEY, TORTS § 50 (4th ed. 1932).

loquitur doctrine, but it did not attempt to fit this case into that doctrine. Instead, it reasoned that policy and justice demanded that the plaintiff be relieved of the burden. The defendants were the wrongdoers and they could best offer evidence as to who caused the harm.

Several writers have suggested this general result, with the possible qualification that it might not apply if the defendants were too numerous.[9] In this case the total injury was caused by one of the negligent defendants, but it was impossible to tell which. The language of the decision does not clearly indicate whether the new technique will be confined only to this fact situation. First, it may be extended to cases where several defendants, who were clearly negligent, are each known to have caused only a part of the harm but the proportion each caused is difficult or impossible to prove.[10] Or, second, it might possibly be extended to any case in which the defendant (or defendants) is clearly negligent and proof of causation is difficult or impossible. It seems likely that the influence of the decision will be limited to fact situations similar to the instant case and the first group, but there is some possibility that the case is starting on an entirely new doctrine which would apply to all three.[11]

WILLS—HOLOGRAPHIC CODICIL—INTERLINEATIONS ON FACE OF WILL

Testator's properly executed and attested typewritten will contained two interlineations and an additional paragraph at the bottom.[1] The inter-

9. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 396, 406 (1932); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 415 (1939); *cf.* WIGMORE, *A Summary of the Principles of Torts* § 153, in 2 SELECT CASES ON THE LAW OF TORTS 833, 865 (1912).

10. For example, it could be applied to stream pollution cases where recovery may be denied the plaintiff if he does not prove the proportion of the damage each of the defendants caused. Tucker Oil Co. v. Matthews, 119 S. W. 2d 606 (Tex. Civ. App. 1938). Some courts hold the defendants jointly and severally liable in the stream pollution cases because there was a single indivisible injury. Johnson v. Thomas Irvine Lumber Co., 75 Wash. 539, 135 Pac. 217 (1913), *rev'd on other grounds*, 140 Pac. 577 (1914); Wigmore, Note, 17 ILL. L. REV. 458 (1923).

11. As an indication of the uncertainty of the scope of the doctrine in the instant case, consider the following selections from the opinion: "When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. . . . Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. . . . If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment." 199 P. 2d at 4, 5.

1. The pertinent portions of the will with additions in testator's handwriting are as follows (with that part in testator's handwriting shown in italics): "4. I give and bequeath to Mrs. Elizabeth P. McKay, to Mrs. Hattie Propst and to my Nephew, Will Mayhew, the sum of Fifty Dollars each, and to my faithful servant, Mary Jane Martin, the sum of Fifty Dollars. *and to my nephew Burns Elkins 50.00 dollars* 5. All

lineations and additional paragraph, altering two bequests and creating another, were wholly in testator's handwriting and were signed by testator beneath the added paragraph. These changes, made after the execution of the will, were only partially inconsistent with the will, and no intention to revoke the will was found. *Held* (6-1), that the added portions in testator's handwriting constituted a valid holographic codicil to the will. In re *Goodman's Will,* 229 N. C. 444, 50 S. E. 2d 34 (1948).

A codicil is considered as an addition to the will, to be construed with it as one instrument.[2] It will be deemed to revoke the will only to the extent that its terms are inconsistent with it or an intention to revoke is clearly manifested.[3]

Holographic wills and codicils must be wholly written and signed in the handwriting of the testator.[4] But many cases have held that a holographic document is not invalidated by the presence of printed or written matter not in testator's handwriting if the words in testator's handwriting alone are sufficient to express testamentary intent.[5] A codicil to a formal will may be holographic.[6] A codicil may be executed on the same sheet as the will.[7]

Even in states recognizing holographic wills, unsigned interlineations or marginal notes in testator's handwriting, inscribed after execution of the will, are mere surplusage.[8] Although they will not effect an alteration or revocation by subsequent writing, they may be found to effect a revocation

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the remainder of my property, if any, I give and bequeath to Mrs. W. S. Wellborn, Mrs. Ida W. Stamey, Mrs. Tom Hough and Mason Goodman, share and share alike. *Mrs. Stamey gets 1 one half of my estate if she keeps me to the end."* Then at the bottom, following the testator's and witnesses' signatures: *"My dimon ring to be sold if needed to carrie out my will if not given to my grand daughter Mary Iris Goodman. Mary E. Goodman."* [Record, Exhibit "A".]

2. *E.g.,* Third Nat. Bank v. Scribner, 175 Tenn. 14, 130 S. W. 2d 126 (1939).

3. *E.g.,* Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131 (1917); Jackman v. Kasper, 393 Ill. 496, 66 N. E. 2d 678 (1946); Klein v. Gaines, 34 So. 2d 488 (Miss. 1948).

4. See generally ATKINSON, WILLS § 134 (1937). Wills written in testator's handwriting and signed by him, without attestation, are recognized in about 20 states.

5. Jones v. Myers, 178 Tenn. 24, 154 S. W. 2d 245 (1941); *In re* Morrison's Estate, 55 Ariz. 504, 103 P. 2d 669 (1940); *In re* Durlewanger's Estate, 41 Cal. App. 2d 750, 107 P. 2d 477 (1940); *In re* Wallace's Will, 227 N. C. 459, 42 S. E. 2d 520 (1947); Moyers v. Gregory, 175 Va. 230, 7 S. E. 2d 881 (1940).

6. *In re* Soher's Estate, 78 Cal. 477, 21 Pac. 8 (1889); *In re* Hengen's Estate, 337 Pa. 547, 12 A. 2d 119 (1940); Henderson v. Henderson, 183 Va. 663, 33 S. E. 2d 181 (1945).

7. *In re* Johnston's Estate, 64 Cal. App. 197, 221 Pac. 382 (1923) (holographic codicil commencing after signatures of witnesses and concluded on separate sheet); Witter v. Mott, 2 Conn. 67 (1816) (revocation clause written and signed by testator on back of will); Duncan v. Duncan, 23 Ill. 364 (1860); *In re* Johnson's Estate, 169 Misc. 215, 7 N. Y. S. 2d 81 (Sup. Ct. 1938); Clark v. Carpenter, 14 Ohio App. 278 (1921).

8. Board of Nat. Missions of the Presbyterian Church v. Sherry, 372 Ill. 272, 23 N. E. 2d 730 (1939); *In re* Rinker's Estate, 158 Kan. 406, 147 P. 2d 740 (1944) (testator wrote "null and void—later will" in margin); Stuart v. Foutz, 185 Md. 401, 45 A. 2d 98 (1945); Yont v. Eads, 317 Mass. 232, 57 N. E. 2d 531 (1944); *In re* Tremain's Will, 282 N. Y. 485, 27 N. E. 2d 19 (1940); *In re* Williams' Estate, 336 Pa. 235, 9 A. 2d 377 (1939). *But cf., In re* Smith's Estate, 31 Cal. 2d 563, 191 P. 2d 413 (1948) (revocation written and signed by testator across face of unexecuted copy of will held a valid revocation, not by cancellation, but by subsequent writing.)

by cancellation if they deface the words of the will.[9] But if the interlineations or notes are signed by testator and show testamentary intent, the requirements of a holographic codicil would seem to be fulfilled.[10]

The ruling in the instant case that the added paragraph [11] constituted a valid holographic codicil is correct.[12] Upon the same reasoning, the interlineation to paragraph (5) [13] at least, should be included as part of such codicil.[14] The possible objection that the interlineation following paragraph (4) [15] does not in itself express testamentary intent may be disposed of by observing that the requisite testamentary intent is shown by the other portions of the holographic writing, of which this interlineation is a part.

9. *E.g., In re* Barrie's Will, 393 Ill. 111, 65 N. E. 2d 433 (1946).

10. *In re* Atkinson's Estate, 110 Cal. App. 499, 294 Pac. 425 (1930). In the following cases the interlineations were unsigned, but the language in the opinions indicates that had the testator signed them they would have been held valid as holographic codicils. Board of Nat. Missions of the Presbyterian Church v. Sherry, 372 Ill. 272, 23 N. E. 2d 730, 732 (1939); Yont v. Eads, 317 Mass. 232, 57 N. E. 2d 531, 532 (1944); *In re* Tremain's Will, 282 N. Y. 485, 27 N. E. 2d 19, 22 (1940); *In re* Williams' Estate, 336 Pa. 235, 9 A. 2d 377, 378 (1939). See ATKINSON, WILLS § 160 (1937).

11. See note 1 *supra.*

12. *Cf. In re* Johnston's Estate, 64 Cal. App. 197, 221 Pac. 382 (1923) (fact that holographic codicil appeared partly on same sheet as will following signatures of witnesses not even suggested as a ground for challenging its validity).

13. See note 1 *supra.*

14. *In re* Atkinson's Estate, 110 Cal. App. 499, 294 Pac. 425 (1930).

15. See note 1 *supra.*