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Contributor to the November Issue/Notes

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CONTRIBUTOR TO THE NOVEMBER ISSUE

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NOTES

CONSTITUTIONAL LAW — JEHOVAH'S WITNESSES.—*Introduction.*—World history is punctuated with the periodic struggles of minority groups. In the past national, racial, and religious conflicts have developed as a result of human reaction to movements within the structure of society. Our own national history had its beginning with Pilgrims, Puritans, and Quakers whose struggles were the genesis of our system of government. The manifold democratic principles set forth in the Declaration of Independence and the Constitution were but the product of learned minds well versed in political experience.

In the last few years our judicial tribunals have been called upon to adjudicate the rights of a new minority, a religious sect known as Jehovah's Witnesses. The purpose of this organization, composed of militant evangelists, is the spread of the Gospel as interpreted by their teachings. Their source of biblical dogmas, the Watchtower Bible and Tract Society, is the publisher of such periodicals as the *Watchtower* and *Consolation*. An interesting legal problem arises when members of the sect offer these publications for sale on the streets or solicit their sale by door-to-door calls.

Another source of litigation is found in the opposition of Jehovah's Witnesses to military service. While they are conscientious objectors, the members prefer to gain their immunity as individual ministers of the Gospel. The flag salute, a standard of most American elementary curricula, is violently criticized by parents of children who are sect members. This belief is based upon their interpretation of the Biblical prohibition against adoration of a "graven thing."¹

Any comprehensive study of a religious denomination must include a full explanation of theological principles, as well as the problems encountered in practicing the faith. However, here we deal with the legal

¹ Exodus 20: 4-5.

aspects of a sect — the judicial action taken as a result of its cleavage with society. No attempt will be made to justify dogmas or rationalize the many teachings of its ministers. Expressions of public policy introduced will relate solely to the juridical concepts involved. Problems discussed include freedom of speech, press, and worship, along with those coincident with military service.

I. RELIGION AND THE LAW

A. *The Basic Concept*

One of the most zealously guarded doctrines of our government is Man's God-given right to freedom of worship. Its appearance in some state constitutions antedated the provision within the Federal Constitution.² It was held aloft as a battle standard of World War II in one of the guaranteed freedoms of the Atlantic Charter. Past violations of this right have precipitated "holy wars" since the beginnings of history.

In the present century the Jehovah's Witnesses, under their leader Judge Rutherford, have waged bitter legal battles over a claim to this right. Meanwhile, other sects and denominations have sprung up with little interference from society and its legal machinery. There must, therefore, be some basic difference within the tenets of the Witnesses' religion to produce this flood of litigation.

The conventional mode of expression among religious bodies is congregational or group worship. Oriental temples were functioning centuries before Christ. Christianity has progressed from the Sermon on the Mount³ to organized group worship wherein millions participate. The Jehovah's Witnesses, however, believe their faith to be one of missionary activity divinely ordered by their "Jehovah God." Other sects have carried on missionary work, too, but rarely do they trample upon the sensitive nature of modern society.

B. *Conflicting Rights*

The denomination under consideration believes their calling requires the public distribution of literature through the medium of street vendors and house-to-house canvassing. They ordain some of their vendors as ministers of the fold and therefore protest violently when such vendor is arrested. The reason for these arrests is found in nearly all codes of cities and towns, namely a licensing provision for vendors, hawkers, and peddlers. The failure of the Witnesses to comply with licensing was an arbitrary control of religious freedom. The sect is firmly established in its belief that missionary activity is divinely ordained and therefore within the protection of the First Amendment

² First Amendment, Constitution of the United States.

³ Matthew 5.

to the Federal Constitution.⁴ Their theory of obedience within the sect demands recognition of the Society's head as the absolute representative of God. The corporate existence of the sect is more than a legal convenience. The power of its president is shown in the following extract from a report of the Jehovah's Witnesses' Assembly: "The president of the WATCHTOWER BIBLE AND TRACT SOCIETY, therefore, is the physical mouthpiece of the organization and the one appointed by the Lord to determine policy, issue organization instructions, etc., he, of course, acting for the organization and as directed by the Lord."⁵

At this point it must be admitted that the stand taken by American society against the Jehovah's Witnesses is not always fully justified. However, an analysis of their writings will reveal certain sentiments calculated to inflame members of other Christian faiths. By public utterances and the printed word their ordained ministers criticize all religions except their own as "rackets." They are especially critical of the Catholic Church and point to its wealth as proof. This vehemence has produced an almost universal disrespect, if not open dislike of the sect, among members of other faiths.⁶ Their activity has not been confined to the United States but has spread to England. One of the most outspoken criticisms of the Jehovah's Witnesses can be found in an English book review of an American volume on the sect.⁷

II. PROBLEMS IN FREEDOM

A. *Evangelism and the Law*

Whether or not an ordained minister selling books upon a public thoroughfare is entitled to do so with the same freedom as he who preaches from a pulpit is, *prima facie*, a legal question. It was this legal query that generated a long series of cases involving the Jehovah's Witnesses. In 1936, the case of *Coleman v. City of Griffin*⁸ reached the Georgia Appellate Court. The city of Griffin, Georgia, had an or-

⁴ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievance."

these legislative mandates came about due to their belief that such

⁵ "Some Notable Features in the Authority Structure of a Sect" — Theodore W. Sprague, *Social Forces* 21:344, 347, quoting "Report of the Jehovah's Witness Assembly," p. 57f.

⁶ "The Witnesses of Jehovah," *The Sign*, 25:27, 28: "They have a total lack of respect for the opinions of other people and do everything possible to stir up hatred, prejudice, and disorder of every kind. Claiming the right of free speech, they use it as a means to sow discord and to assail the very government which gives them this guarantee and which they refuse to defend in its hour of peril and need."

⁷ *The New Statesman and Nation*, 30: 248, October, 1945, quot-book review of *The Jehovah's Witnesses*, by Herbert H. Stroup, Columbia University Press.

⁸ 55 Ga. App. 123, 189 S. E. 427 (1936).

dinance declaring it to be a municipal offense to distribute, by mail or otherwise, circulars, literature, or advertising within the corporate limits without written permission of the city manager. The defendant, a Jehovah's Witness, claimed that his religious freedom was abridged in so far as the exercise of this freedom was subject to the arbitrary discretion of the city manager. The sect member founded his claim upon the principle that the distribution of literature was an exercise of freedom. The prosecution argued that the ordinance did not limit the exercise of religious freedom, but merely restricted a scheme or purpose which he chose to consider a part of the religion. An analysis of the decision will reveal that no criticism of the "scheme or purpose" in line with public policy was offered.

The Supreme Court of the United States was asked to rule upon the question Coleman raised, but denied the appeal⁹ on two grounds. The first of these was want of a substantial federal question under the doctrine of *Reynolds v. United States*.¹⁰ The second ground of refusal offered by the Supreme Court was the want of a properly presented federal question under the *Erie Railroad Company v. Purdy* case.¹¹ It must be understood at this point that the Supreme Court ruled upon the appeal in 1937.

The City of Griffin again was brought into litigation by the Jehovah's Witnesses in the prosecution by the municipality of Alma Lovell. She, a sect member, was convicted in the Recorder's Court of violating the ordinance mentioned in the previous case.¹² The case ultimately came before the United States Supreme Court in 1938.¹³ Here her conviction was reversed in an opinion written by Chief Justice Hughes. The Chief Justice held, along with a majority of the court, that the ordinance in question related to distribution rather than publication of the religious documents. The decision held that an arbitrary prohibition against circulation of printed matter was unconstitutional. The court voiced the opinion that freedom of circulation was just as important as freedom of publication. It is apparent that our highest court has made a reversal of its prior finding.

Hardly was the doctrine of the latter Griffin case announced when another appeal to the Supreme Court was perfected. This case involved the town of Irvington, New Jersey.¹⁴ A history of the case shows one Clara Schneider, a Jehovah's Witness, to have been convicted

⁹ 302 U. S. 636, 58 S. Ct. 23, 82 L. Ed. 495 (1937).

¹⁰ 98 U. S. 145, 166, 167, 25 L. Ed. 244 (1879).

¹¹ 185 U. S. 148, 154, 22 S. Ct. 605, 46 L. Ed. 847 (1902).

¹² *Supra*, n. 8.

¹³ *Lovell v. City of Griffin, Ga.*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1937).

¹⁴ *Schneider v. State of New Jersey (Town of Irvington)*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

in Recorder's Court of violating a town ordinance. The town of Irvington had an ordinance in effect whereby it was required that canvassers should apply to the local chief of police for a permit. It was within the discretion of this official to grant or refuse such permission. The case ran the whole gamut of appellate channels in New Jersey before it was appealed to the United States Supreme Court. The Supreme Court found the questioned ordinance unconstitutional and Mr. Justice Roberts wrote: "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."¹⁵

In 1942, on appeal from the Supreme Court of New Hampshire, the federal Supreme Court ruled on the case of *Chaplinsky v. New Hampshire*.¹⁶ This suit arose out of an altercation the defendant, a Jehovah's Witness, had with a policeman in Rochester, New Hampshire. In that state a statute expressly forbade the uttering of offensive, derisive, or annoying words to any person lawfully in a public place. The statute further provided it to be an offense to call any such person by an offensive or derisive name. The Jehovah's Witness was convicted in the municipal court of violating the statute in so far as he called the law officer a "racketeer" and a "Fascist." Justice Murphy, in writing the opinion, stated that a distinction must be drawn between offensive and non-offensive words. The statute was held to be constitutional as long as it is construed to cover lewd, obscene, profane, or libelous language. It was added that the statute was constitutional also when applied to insulting or "fighting" words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

One of the leading cases involving the sect was first introduced upon the appeal to the United States Supreme Court of *Jones v. City of Opelika*¹⁷ in 1942. The case was decided along with two other Jehovah's Witness cases. The city of Opelika, Alabama, had an ordinance calling for the payment of a fee and granting of a license to sell pamphlets or books within the city. The defendant was convicted of selling Jehovah's Witness literature without the prerequisite license. Upon appeal to the federal Supreme Court the constitutionality of the ordinance was upheld. In the opinion by Justice Reed it was held that a state or municipality may charge a reasonable non-discriminatory license fee from religious followers engaged in the sale of books through ordinary methods used in commerce. Also, the Court went on to hold that a constitutional guarantee of religious freedom does not require the state to subsidize a religious faith in the form of exemption from taxation. It must be noted that the full application of this last state-

¹⁵ Ibid.

¹⁶ 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

¹⁷ 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691, 141 A. L. R. 514 (1942).

ment could radically change the existing taxation system. The holding in this case was not the unanimous opinion of the Court, for it should be noted that Chief Justice Stone and his colleagues Murphy, Douglas, and Black dissented.

The rule in this case *Jones v. Opelika*¹⁸ was short lived. In 1943 the Supreme Court received the case again on reargument.¹⁹ The prior holding was reversed and the Court held the ordinance requiring the payment of a license fee to be unconstitutional as a violation of the right to religious freedom. In line with their former holding Justice Reed, with Justice Frankfurter, dissented when the Court reversed the first doctrine. Justice Frankfurter challenged the existence of any constitutional authority for waving taxation in the case of religious functions. He gave as an example the fact that a clergyman's long distance telephone calls are subject to a tax and also his automobile. Mr. Justice Frankfurter in his dissent attempted to draw an analogy between a license tax upon distribution and the tax upon telephone calls. Both taxes are taxes upon a privilege and are valid only in so far as they do not contravene the policy of the constitution. However, freedom of the press and religion are such as are highly susceptible to infringement by regulation. In so far as the tax on periodical distribution tended to regulate religious activity it proved unconstitutional. If the tax on telephone calls tripled the ordinary cost of a call, such tax would fall under a like category.

Shortly before the review of the *Jones v. Opelika*²⁰ decision, the Jehovah's Witnesses perfected another appeal to the highest federal court. This latest litigation involved the city of Dallas, Texas and a sect member named Jamison.²¹ Once again we find the Witnesses defying a city ordinance relative to circulation of publications. After being convicted in the Corporation Court of Dallas and losing an appeal to a County Court, the defendant appealed to the United States Supreme Court on a federal question. The city claimed the pamphlets violated their ordinance due to the fact that advertised books were obtainable through a contribution of twenty-five cents. The Supreme Court found this ordinance unconstitutional, as might be expected from past decisions. In voicing the Court's opinion, Mr. Justice Black said: "They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."²²

¹⁸ Ibid.

¹⁹ *Jones v. City of Opelika*, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1943).

²⁰ *Supra*, n. 17.

²¹ *Jamison v. State of Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943).

²² Ibid.

Just as the city of Opelika²³ had its series of legal battles with the militant Witnesses, a city in Pennsylvania had a like experience. There existed in the city of Jeannette, Pennsylvania an ordinance prohibiting the sale of goods or distribution thereof within the municipality by canvassing for, or soliciting, without a license. The Witnesses involved maintained their rights, refused to pay the license fee, and were arrested. The conviction upon appeal was affirmed by the Pennsylvania Superior Court²⁴ and the sect brought certiorari. The Supreme Court of the United States announced once again the doctrine that religious liberty may not be infringed upon by licensing provisions.²⁵ The Court qualified their prohibition against licensing fees by declaring any such ordinance unconstitutional where the fee is not a nominal one imposed as a regulatory measure. Their use of the term "regulatory" is interesting. Contrary to popular thought the government may exercise some regulatory authority over religious freedom. However, in so far as such regulation abridges a right it will prove unconstitutional. The Court added that the nominal fee collected would be proper were it used to defray the expense of protecting homes and the general public against abuses by solicitors. That added qualification is no more than a reiteration of the principle that tax money may be used in supporting the exercise of the police power. It is interesting to note at this point that Justices Reed, Frankfurter, Jackson, and Roberts dissented to the opinion adopted by the Court.

The Jeannette matter was not closed by the decision rendered, for there remained a procedural point to be settled. In *Douglas v. City of Jeannette*²⁶ the Supreme Court was asked to rule on the petitioner's equity action to restrain threatened prosecution by the municipality. The Court ruled that the petitioner had not established a good cause of action in equity in so far as the record disclosed no irregularity in the criminal proceeding. The defendants were not threatened with any other injury normally incident to every criminal prosecution brought in good faith where an applicable ordinance is thought to be unconstitutional. To have ruled otherwise would have left open the door to an abuse of legal process.

Again in 1943 the question of the validity of a city ordinance was considered by the United States Supreme Court.²⁷ Thelma Martin, a Jehovah's Witness, was convicted of violating an ordinance of the city of Struthers, Ohio. The city's law read as follows: "It is un-

²³ *Supra*, notes 17 and 19.

²⁴ *Commonwealth v. Murdock*, 149 Pa. Super. Ct. 175, 27 Atl. (2d) 666 (1943).

²⁵ *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81 (1943).

²⁶ 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943).

²⁷ *Martin v. City of Struthers, Ohio*, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

lawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such hand bills, circulars or other advertisements they or any person with them may be distributing.”²⁸ The Court construed the ordinance as unconstitutional and an abridgement of freedom of the press and speech. Justice Black added by way of dictum: “No one supposes, for example, that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.”²⁹

Whether or not the sect will attempt to evangelize within another church is open to question. No case on the books reports such an occurrence. Admittedly, the ordinance questioned was as far reaching as any encountered thus far. Nevertheless, Justice Reed again dissented on the ground that the ordinance in no way limited freedom of speech since it referred solely to the ringing of doorbells and the sounding of door knockers. His interpretation put the right of the property owner on a higher plane than any privilege exercised by a visitor. This view should be especially noted, for several years later his contention was specifically opposed in a majority opinion by Mr. Justice Black.³⁰

In passing it is well to note the case of *Follett v. Town of McCormick, South Carolina*.³¹ Here an ordinance similar to those previously discussed in so far as it required the Jehovah's Witness to procure a book agent's license. The only new feature was that the Witness made his livelihood in this community from contributions solicited in exchange for religious books. The Supreme Court held that the First Amendment applied to the evangelist as well as the orthodox religious adherent.

Thus far the litigation involving sect members has been concerned with their right to distribute literature. Early in 1946 the Supreme Court decided two cases relative to a new point along the same lines. First, the rule in *Marsh v. State of Alabama*³² will be reviewed. Of all Jehovah's Witness cases ever before the United States Supreme Court, this decision will be best remembered. It was here that an entirely new concept of American constitutional law was introduced. There existed in Alabama a statute making it a crime to enter or remain on premises after a warning not to do so.³³ Grace Marsh, a sect member, was convicted of remaining on the streets of Chicksaw, Alabama. Chicksaw was a company-owned town operated by the

28 Ibid.

29 *Supra*, n. 27.

30 *Infra*, n. 35.

31 321 U. S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944).

32U. S., 66 S. Ct. 276, 90 L. Ed. 227 (1946).

33 Code of Alabama 1940, Tit. 14, § 426.

Gulf Shipbuilding Corporation. The streets were open and fully used by travelers both interstate and local. The state contended that Grace Marsh was obliged to abide by the order issued by the company. The Supreme Court declared the statute unconstitutional and a prohibition against constitutional rights. Justice Black, in commenting upon the rights of individuals in privately owned towns, noted: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."³⁴ In so far as Mr. Justice Black was referring to company-owned towns he was only reciting a principle that has been widely recognized. Such a rule is followed today in the many privately owned coal mining villages in Pennsylvania. Further in the same opinion, the same Justice made a pronouncement that was new in the field of constitutional law. He said: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position."³⁵ Thus in one sentence the Supreme Court has placed the rights of freedom of the press and religion over and above those of property owners. What future litigation this holding will bring is open to conjecture. It is submitted, that by no great stretch of the imagination a deliberate trespass could be constitutionally condoned. Mr. Justice Reed voiced a dissent to this new doctrine when he said: "A state does have the moral duty of furnishing the opportunity for information, education, and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer without compensation the private property of other citizens to carry out that obligation."³⁶ Whether or not the Supreme Court will qualify the majority view will be an interesting development to observe.

The other case decided early in 1946 concerned the Hondo Navigation village, in Texas.³⁷ The Army Air Forces had established a navigation training school at Hondo, and the Federal Public Housing Authority set up a housing project for civilian employees. A. R. Tucker, an ordained Jehovah's Witness minister, was engaged in distributing literature within the F. P. H. A. project. The project manager ordered him to quit the premises, citing a F. P. H. A. rule authorizing him to order any person to leave the village. In the trial the existence of such rule was not proven, but there was cited a Texas statute which was deemed to apply. The statute made it an offense for a peddler

³⁴ *Supra*, n. 32.

³⁵ *Ibid.*

³⁶ *Supra*, n. 32.

³⁷ *Tucker v. State of Texas*,U. S....., 66 S. Ct. 274, 90 L. Ed. 235 (1946).

or hawker to refuse to leave property after notification.³⁸ Upon appeal to the United States Supreme Court, Tucker's conviction was reversed on the ground that the statute was not applicable to ordained ministers. Justice Black, in the opinion, added by way of dicta: "True, under certain circumstances it might be proper for security reasons to isolate the inhabitants of a settlement, such as Hondo Village, which houses workers engaged in producing war materials."³⁹ Immediately the question arises: What if an ordained minister had elected to pursue his calling in Oak Ridge, Tennessee? Would the importance of national security and atomic research be placed above the right to freedom of speech and religion? Justice Black would lead us to believe that it would. The books have not disclosed any attempt by the Jehovah's Witnesses to invade the sanctum of the Manhattan Engineering (atomic bomb) project.

B. Military Service

Under the Selective Training and Service Act of 1940⁴⁰ an ordained minister of the Gospel is classified in Class IV-D. One who claims to have conscientious objections to bearing arms is placed in Class IV-E. Conscientious Objectors are required to report for work of national importance in camps established for that purpose. Men classified IV-D are not required to report for any military service but may join one of the service chaplains' corps on a volunteer basis.

The classification of any individual under the draft program is based upon his "questionnaire" and the decision of his local draft board. An appeal from this classification may be brought before other higher boards and finally, in some cases, to the President of the United States.

Among the doctrines of the Jehovah's Witnesses there is a definite precept against bearing arms. In every assembly of this sect each individual is an ordained minister regardless of his lay occupation. Thus a farmer, laborer, or office worker becomes an ordained minister by virtue of his membership in the sect. This belief created an obvious conflict during World War II when whole groups of people claimed mass immunity from the draft law. In the majority of cases the local draft boards classified the Jehovah's Witnesses according to their outward occupations. This frequently resulted in induction of a sect member against his wishes. In many cases the objections put forth by the Jehovah's Witness before the local board resulted in his being placed among other conscientious objectors in Class IV-E. The resulting order to report for work in an objectors' camp brought forth militant action among some sect members. It was contended that such an order resulted in an involuntary servitude and a deprivation of liberty. The inevitable result of this conflict was an appeal for judicial

³⁸ Penal Code of Texas 1925, Art. 479.

³⁹ *Supra*, n. 37.

⁴⁰ 50 U. S. C. A. Appendix § 301 Et. Seq.

review. Some sect members violated the order to report and criminal prosecution ensued. Others were inducted and appealed to the courts in *habeas corpus* proceedings.

In *Goff v. United States*,⁴¹ the Circuit Court of Appeals permitted judicial review. In the same year, a Circuit Court of Appeals of another district denied the applicability of judicial review in this type of case.⁴² Therefore, as late as 1943, the federal courts were not agreed upon this proposition. There was an immediate need for a controlling decision from the Supreme Court. The need for a definite stand upon the question of judicial review was answered in 1944 by the rule in *Falbo v. United States*.⁴³ The United States Supreme Court had before it an appeal from a conviction for violating the Selective Training and Service Act.⁴⁴ The registrant, a Jehovah's Witness, failed to report for service on the ground that the local board's action was arbitrary and capricious. Justice Black, in the opinion, stated that the Act did not authorize judicial review of such questions as the propriety of a draft board's classification. It was settled that the propriety of an individual's classification was a question of fact for the determination of the local board. Some doubt as to the wisdom of this decision was raised in the dissenting opinion. Justice Murphy dissented on the ground that the denial of judicial process was never justified because of public necessity.

C. *The Flag Salute*

The third major source of Jehovah's Witness litigation is to be found in their refusal to salute the flag of the United States. This refusal is based upon a religious conviction resulting from their interpretation of a biblical precept. In 1940 there were eighteen states with statutes requiring the flag salute.⁴⁵ Other jurisdictions had local school boards prescribing the salute as part of elementary school work. The ceremony involved usually took the form of a recitation of the "Pledge of Allegiance" accompanied by a hand or arm gesture.

In 1937 the Supreme Court of Massachusetts had before it the appeal of *Nicholls v. Mayor and School Committee of Lynn*.⁴⁶ The plaintiff, an eight year old boy, refused to salute the flag during a school exercise. He was dismissed from school and thereby deprived of an opportunity for education. The appeal was taken upon the ground that there had been an infringement of liberty of worship. The Court, in deciding in favor of the school committee, set a precedent that was much followed in other Jehovah's Witness cases. Chief Justice

⁴¹ 135 F. (2d) 610 (1943).

⁴² *Broneman v. United States*, 138 F. (2d) 333 (1943).

⁴³ 320 U. S. 549, 64 S. Ct. 517,L. Ed..... (1944).

⁴⁴ *Supra*, n. 40.

⁴⁵ "Legal Considerations Behind Statutes Requiring a Salute to the Flag" — *Rocky Mt. L. Rev.* 12: 202-8.

⁴⁶ 297 Mass. 65, 7 N. E. (2d) 577 (1937).

Rugg wrote: "The pledge of allegiance to the flag, as set forth in the rule of the school committee is an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed. It has nothing to do with religion."⁴⁷ One finds in the opinion by the Chief Justice a note of the biblical dogma: "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's."⁴⁸

The United States Supreme Court in 1940 promulgated a rule that was much criticized. The Jehovah's Witnesses had appealed *Minersville School District et al. v. Gobitis et al.*⁴⁹ The Court, in deciding upon the rights of a school child to refuse to salute the flag, held that patriotism was above religious freedom. The salute was officially proclaimed a requirement in those jurisdictions where it was a part of the curriculum. Justice Frankfurter wrote in the opinion: "The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious."⁵⁰

This holding immediately brought forth a flood of comment. The Bill of Rights Review criticized the majority opinion and lauded the dissent by Justice Stone. It commented in part: "Its fundamental fallacy was the assertion that any good result could be expected from attempting to force conformity to a particular ceremony, in the face of religious scruples. National unity is important, even vital in these days, but the penalizing of religious beliefs held by a few school children is hardly the way to promote it. There are many other and better methods."⁵¹

The opinion by Justice Frankfurter answered this objection in part by reciting the famous dilemma used by Abraham Lincoln: "Must a government of necessity be too strong for the liberties of its people or too weak to maintain its own existence?"⁵²

The decision showed an absence of any consideration of the "clear and present danger" doctrine. There was no direct affront offered to the sovereign state by the Jehovah's Witnesses. The Social Service Review voiced the universally held opinion that compulsion is not conversion in this case.⁵³

Three years after the Minersville decision the sect appealed a flag salute case from West Virginia. In this case of *West Virginia Board*

⁴⁷ Ibid.

⁴⁸ Matthew 22: 21-22.

⁴⁹ 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940).

⁵⁰ Ibid.

⁵¹ Bill of Rights Review 1: 267-8 (1941).

⁵² *Supra*, n. 49.

⁵³ Social Service Review, 16: 672.

of *Education v. Walter Barnette*,⁵⁴ the Minersville rule was reversed. The Board of Education required the salute under penalty of expulsion and proceedings against the parents for unlawful absence. Justice Jackson, in commenting on the Lincoln dilemma, wrote: "It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies."⁵⁵ An interesting sidelight can be found in the fact that the West Virginia case was decided during World War II when national patriotism was at its highest ebb.

While the reversal of the Minersville decision was pending, the Washington Supreme Court had an appeal from one Bolling, a Jehovah's Witness, before it.⁵⁶ The Court held that it was permissible for a young Witness to stand silently at attention during the flag salute. This compromise was laudable and in no way constituted a disrespect for the flag under federal law.⁵⁷

In 1943 the United States decided *Taylor v. State of Mississippi*.⁵⁸ Here the Court construed a state statute in favor of the Jehovah's Witnesses and held that their refusal to salute the flag was without sinister purpose. The questioned statute made it a criminal offense to teach any doctrine tending to create an attitude of "stubborn refusal" to salute the flag.

III. CONCLUSION

Definite progress has been made by a minority sect toward complete religious freedom. The rights enjoyed today by the Jehovah's Witnesses are a far cry from those at the beginning of the last decade. Prior to the first case mentioned in this study their existence was an extremely precarious one. In 1930 a newspaper account of a sect member being cut off the relief rolls because of his religious affiliation caused no great surge of public sympathy.⁵⁹ The progress made has been due chiefly to a more liberal attitude prevalent toward minority groups. In some respects the Courts have gone too far. The future conduct of the Jehovah's Witnesses will determine whether or not this judicial latitude was justified.

Charles G. Hasson.

⁵⁴ 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A. L. R. 674 (1943).

⁵⁵ *Ibid.*

⁵⁶ *Bolling v. Superior Court*, 16 Wash. (2d) 373, 133 P. (2d) 803 (1943).

⁵⁷ 36 U. S. C. A. § 171 Et. Seq., and § 172.

⁵⁸ 319 U. S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600 (1943).

⁵⁹ Editorial, *St. Louis Post Dispatch*, October 12, 1930.

EMPLOYER'S DUTY TO BARGAIN UNDER THE NATIONAL LABOR RELATIONS ACT.—The term, collective bargaining, applies to the negotiation of conditions of employment between the employer, or employers' association and an organization representing the employees. It is the element of collectivity which distinguishes it from the bargaining which occurs between the employer and the individual employee. The ultimate end of this type of bargaining is the trade agreement which generally embodies all the essential terms pertaining to the conditions of employment, such as, union recognition, wages, hours, seniority rights, vacations, working conditions, etc. Prior to the enactment of the National Labor Relations Act the employers denied the employees their right to organize and refused to accept the procedure of collective bargaining, thus causing strikes and other forms of industrial strife and unrest. Congress recognized the fact that to prevent the continued interference with interstate commerce they must take steps toward industrial peace and also recognized the fact that the refusal of the employers to "give" instead of "taking all" was the practice they must try to remedy first. Thus in the National Labor Relations Act we find an affirmative duty on the part of the employers to bargain collectively.

Statutory Protection of Collective Bargaining

Section 7 of the National Labor Relations Act states that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." To fortify this right to collective bargaining Section 8 subdivision 5 further provides that "It shall be an unfair labor practice for the employer to refuse to bargain collectively with the representatives of the employees, subject to the provisions of Section 9 (a)."

Section 9 (a), referred to, provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours, and all other conditions of employment: Provided that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

What Constitutes Collective Bargaining

Collective bargaining denotes more than the mere physical meeting of an employer with the representatives of his employees. The essential elements of such bargaining are the negotiation with a sincere and honest effort to adjust differences in order to reach an agreement acceptable to both parties. It contemplates that the employer will exert every

reasonable effort to reach a reasonable settlement. On this matter the Board has said: "Collective bargaining means more than the discussion of individual problems and grievances with employers or groups of employees. It means that the employer is obligated to negotiate in good faith with his employees as a group, through their representatives, on matters of wages, hours, and basic working conditions and to endeavor to reach an agreement for a fixed period of time."¹ An employer who merely performs the gesture of negotiation has not engaged in collective bargaining within the meaning of Section 8 (5). It is expected that he will enter such negotiations in good faith. Therefore, merely listening to proposals and rejecting them without submitting counter-proposals or discussing the demands with sincerity is not bargaining in good faith.² So, too, the requirement by an employer that the employees submit a written list of demands, which are either accepted or rejected without explanation, does not constitute bargaining in good faith.³ In the *S. L. Allen & Co.* case⁴ the Board said, "Interchange of ideas, communication of facts peculiarly within the knowledge of either party, personal persuasion and the opportunity to modify demands in accordance with the total situation thus revealed at the conference is of the essence of the bargaining process."

Bargaining in good faith does not result from negotiations undertaken without an intent to reach an agreement but merely for the purpose of "stalling" and postponing a settlement until a pending strike can be broken. On this the Board has said that, "There is no doubt that the respondent negotiated with the representatives of Local 2269, meeting with them, receiving proposals, and putting forth counter-proposals of its own. But there is equally little doubt that if the obligation of the Act is to produce more than a series of empty discussions, bargaining must be more than mere negotiations. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible. Negotiations with an intent only to delay and postpone a settlement until a strike can be broken is not collective bargaining within the meaning of Section 8 subdivision 5 of the Act."⁵

Necessity To Reach An Agreement

Section 8 (5) does not compel the employer to enter into a contract. It does not compel any agreement whatever . . . The theory of the Act is that free opportunity for negotiation with credited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not at-

¹ Matter of Atlantic Refining Co., 1 N.L.R.B. 359 (1936).

² Matter of Edmond E. Cox, Printer, Inc., 1 N.L.R.B. 594 (1936).

³ Matter of S. L. Allen & Co., Inc., 1 N.L.R.B. 714 (1936).

⁴ *Supra* (3).

⁵ Atlas Mills, Inc., 3 N.L.R.B. 10 (1937).

tempt to compel.⁶ All that the employer is required to do is to bargain collectively in good faith and with an honest intention to reach an agreement. In discussing this situation the Board said, "The respondent is a relatively small concern in the meat producing industry. It appears to us from the record that the respondent was sincere in its belief that it could not conform to the Union scale of wages and hours and still continue to operate successfully on a competitive basis in the industry. Although the respondent's position apparently precluded the particular agreement sought by the Union, the respondent indicated a willingness to bargain with the Union on some other basis. Under the circumstances, we find that the respondent has not refused to bargain collectively with the Union."⁷ It is clear, therefore, that if the employer bargain in good faith, his failure to reach an agreement acceptable to himself and the employees does not constitute a violation of the Act.

Necessity For A Written Contract

Although the employer is not required to reach an agreement, if he does, he is required to embody such an agreement in a written contract.⁸ If the minds of the parties have met, and an understanding has been reached on the agreement, the execution of a contract in writing is regarded as an essential part of bona fide bargaining. "We therefore conclude that the Act imposes upon the employer the duty to meet with the duly authorized representatives of the employees, to bargain in good faith with them in a genuine attempt to achieve an understanding on the proposals and counter-proposals advanced, and finally, if an understanding is reached to embody that understanding in a binding agreement for a definite period. Here the respondent and the union had in the course of their negotiations achieved a meeting of minds upon four parts. The union then requested that the respondent enter into an agreement containing these four parts. In view of this Act, the minds of the parties having met, it imposed upon the respondent a definite obligation to embody the understanding in an agreement. The respondent's failure to do so constituted an unfair labor practice, within the meaning of Section 8 (1) and (5)."⁹

Effects Of Prior Contracts

The existence of prior contracts between the employer and the employees does not affect the right to collective bargaining.¹⁰ "Even if we assume that the agreements are binding upon the employee who

⁶ N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 108 A. L. R. 1352 (1937).

⁷ Matter of John Minder & Son, Inc., 6 N. L. R. B. 764 (1938).

⁸ Matter of Inland Steel Co., 9 N. L. R. B. 783 (1938).

⁹ Matter of St. Joseph Stock Yards Co., 2 N. L. R. B. 39 (1936).

¹⁰ Matter of New England Transportation Co., 1 N. L. R. B. 130 (1936).

signed them, such employees constituting a majority of those now employed by the respondent, and that they establish a formula for the handling of controversial matters by employee and management, the agreements in no wise prohibit the employees from changing their representatives for bargaining in accordance with the method prescribed. If the employees at the time of signing the agreement preferred that the association represent them under the agreement but now desire to be represented by the Union, the employer cannot object to such a change of representatives . . . The whole process of collective bargaining and unrestricted choice of representatives, while at the same time continuing the existing agreements under which the representatives must function . . . These representatives are of course free to bargain concerning changes in the existing agreements, since parties may bargain with respect to the termination of existing contracts."¹¹ Therefore the existence of prior contracts does not preclude the right of employees to collectively bargain through their old representatives or through their new representatives for a new agreement. The Board has, however, formulated a rule whereby a contract executed for a reasonable period will bar the necessity of collective bargaining.¹² The reason for this rule is to prevent employees from continually changing their representatives and thereby cancelling a valid contract which will expire in a reasonable time.

When The Duty To Bargain Ceases

Generally speaking, the duty to bargain collectively ends when negotiations have terminated in a contract or having been carried on in good faith, the parties nevertheless have been unable to reach an acceptable agreement. But the Employer cannot seize upon a temporary impasse as an excuse to avoid further negotiations. Thus in the *Jeffery-DeWitt Insulator Co.* case¹³ the Board said, "The company's second contention is that it was not guilty of an unfair labor practice in refusing to bargain with the Union on or after July 15, for the reason that efforts to bargain with it prior to June 20 had resulted in failure and an impasse in the negotiations had been reached. The answer to this is that nearly a month of "cooling time" had elapsed since the negotiations of June 15 to 20th, the status of the controversy had undergone considerable change as a result of the operation of the plant, the striking employees after nearly a month of idleness were doubtless willing to make concessions to compromise the matters in difference, and conciliators had arrived upon the scene for the purpose of trying to secure an adjustment." The employer may not use the existence of a strike to continue to refuse negotiation with the Union.¹⁴ Nor may

¹¹ Supra (10).

¹² Matter of Superior Electrical Products Co., 6 N.L.R.B. 19 (1938).

¹³ Matter of Jeffery-DeWitt Insulator Co., 1 N.L.R.B. 618 (1936).

¹⁴ N.L.R.B. v. Carlisle Lumber Co., 94 Fed. (2d) 138 (1937).

he refuse to bargain because he claims that the Union is irresponsible.¹⁵ But where the employer has negotiated in good faith and has made every effort to consummate an agreement, he is not required to continue bargaining where the parties cannot come to terms and future negotiations are palpably futile.¹⁶ So, too, the employer may lawfully refuse to bargain if he has a reasonable doubt that the Union represents a majority of the employees.¹⁷ However, if the doubt is unreasonable and is used as a pretext to avoid bargaining, the employer is liable for a violation of Section 8 (5).

Robert J. Mahoney.

LABOR LAW — PROPERTY RIGHTS OF WITHDRAWING MEMBERS IN FUNDS AND PROPERTY OF THE UNION.—What will be the effect of a transfer of membership from one union to another, where the second union is affiliated with a distinct and separate national organization? Will the withdrawing membership be entitled to a share in the assets of the deserted union on a pro rata basis? Will it be possible to effect a transfer of funds from the treasury of a local affiliated with one national organization to the treasury of a local affiliated with a second and distinct national organization because of a transfer in allegiance of the membership or a portion thereof? It is conceivable that union members now affiliated with a local of the C. I. O. may become dissatisfied with the progress or results of their demands for further concessions and transfer their allegiance to the A. F. of L. In such a case the question of the distribution of assets is a problem of prime importance. To ascertain these rights, if any such rights exist, is the purpose of this paper.

At the outset it should be noted that the nature of the contract existing between the parent organization and the local affiliate, arising by reason of the constitution and by-laws of the parent organization on the one hand, and the charter granted the local affiliate on the other, determine the property rights of the membership in the local affiliate. Thus in the case of *Fidelity and D. Co. v. Brotherhood of Painters, Decorators, and Paperhangers*¹ the by-laws of the parent organization provided that the funds of the local should not be divided among its members but should be the property of the local, with the qualification that should the local dissolve, the funds should be forwarded to the secretary of the parent organization. Therefore, when the charter was revoked it was directed that the funds should belong to the parent

¹⁵ Supra (8).

¹⁶ Matter of Trenton Garment Co., 4 N. L. R. B. 1186 (1938).

¹⁷ Supra (16).

¹ 120 N. J. Eq. 346, 184 A. 832 (1936).

organization. This same conclusion was reached in a very early case² wherein a majority of the union members voted to transfer both funds and allegiance to another national organization. In upholding the right of the members who remained loyal to the parent organization, though a minority of the membership in the local affiliate, to retain title to all funds in the treasury, the court said: "Looking to the constitution . . . as evidencing the contract under which the members parted with their money to create the fund in suit, the conclusion is irresistible that the association — the branch — took title to the fund, and that it was in no sense a collecting agent for the union, according to the understanding of the parties."³ In the adjudication of such disputes the courts look to the circumstances which gave rise to the creation of the union, i. e., the local affiliate, and in the average case⁴ conclude that inasmuch as the local union came into existence only by virtue of a charter granted it by a parent organization, all acts and proceedings of such affiliate would be construed in accordance with the instrument under which organized — the charter. And the charter in turn would be interpreted in conjunction with the constitution and by-laws of the parent organization. As was said in one of the first cases wherein the question arose: "These contracts may not be annulled, nor the property transferred to another organization by a mere majority vote, except under the forms of law. It would require more than a mere consent of a majority of the local union before such a change or transfer of the property could be effected."⁵

Thus the members deserting the union, where the same is organized in conformity with charter provisions of a similar import, lose their interest in the property and funds of the local affiliate which they abandon, the members who remain loyal succeeding thereto.⁶ All that is necessary is that the minority continue their allegiance to the parent organization and continue to function under the original charter. If such conditions are fulfilled, their title to the funds and property shall be paramount to that of the majority who seek to dissolve, divide the funds, or transfer same to another union.⁷ But where a new charter is issued to the loyal members in a different name than that used by the old local, it not appearing that the new charter was granted to them as successors of the old union which had its charter suspended, the newly constituted local is not entitled to the funds accumulated in the treasury through the payment of dues by the members of the old

² O'Neill v. Delaney, 158 N. Y. S. 665 (1909).

³ Id. at page 666.

⁴ Steinmiller v. McKeon, 21 N. Y. S. (2d) 621 (1940).

⁵ Brownfield v. Simon, 158 N. Y. S. 187, 190 (1916).

⁶ Lumber and Sawmill Workers Union v. International Wood Workers, 197 Wash. 491, 85 Pac. (2d) 1099 (1938).

⁷ Local No. 2508 L. S. W. v. Cairns, 197 Wash. 476, 85 Pac. (2d) 1109 (1938).

local.⁸ To dissipate any questions or doubts as to what constitutes a minority, the constitution of the parent organization usually provides a definite number of members who must remain loyal to have these and like provisions apply. The number varies with the parent organization but is usually quite small, as ten⁹ or seven.¹⁰

This designation of a minimum number of loyal adherents to the parent organization is not conclusive in all cases, however. And that alone will not serve to cloak the minority with the power of controlling the funds and property of the affiliate upon dissolution or desertion of the same by dissatisfied members thereof. Thus in the case of *Alexion v. Hollingsworth*¹¹ where 20 members sought to maintain the affiliate after 84 of the 135 members had voted to dissociate, the court held such attempt ineffectual. In that case, however, none of the minority voted against the resolution to dissociate, choosing to absent themselves because they realized that they were outnumbered, and also because, from the circumstances of the case, it appeared that the principal motive was fraudulent, and the attempted continuance of the association was done in bad faith. Where there is evidence of good faith on the part of the dissenting minority, however, their rights will be recognized and maintained even though all the officers of the local affiliate are included amongst the majority who seek affiliation with another union having a separate and distinct parental organization. New officers will be elected by the minority and will be entitled to the control and possession of the funds and property.¹²

Heretofore our consideration has been limited to those situations wherein only a portion of the membership seek to bolt union lines for more attractive and lucrative affiliations. But it should be noted that should the *entire*¹³ membership transfer its allegiance from one national parent organization to another, no rights are lost thereby nor contractual relations impaired. As was stated in a recent New York case: "Abundant authority can be marshalled in support of the proposition that severance or change of affiliation of a local union with the parent body does not alter the identity or take away the rights and responsibilities of the local."¹⁴ The reason for such a holding seems to be that "regardless of the changes in membership, and the changes in its affiliation, the association itself has remained the same."¹⁵

⁸ *Textile Workers Union v. Federal Labor Union*, 240 Ala. 198, 198 So. 606 (1940).

⁹ *Harris v. Bachman*, 160 Ore. 520, 86 Pac. (2d) 456 (1939).

¹⁰ *Fidelity & D. Co. v. Brotherhood of Painters, Decorators, and Paperhangers*, 120 N. J. Eq. 346, 184 A. 832 (1936).

¹¹ 28 N. Y. S. (2d) 45 (1941).

¹² *Quinn v. Marvin*, 168 Ore. 52, 120 Pac. (2d) 227 (1941).

¹³ Italics those of the writer.

¹⁴ *World Trading Corp. v. Kolchin*, 2 N. Y. S. (2d) 195 (1938).

¹⁵ *Shipwrights, Joiners', and Calkers' Assn. v. Mitchell*, 60 Wash. 529, 111 Pac. 780 (1910).

It may be said as a general proposition, then, that as long as the entire membership acquiesces and allegiance is transferred to another parent national organization, the rules as contained herein do not operate. But should a minority dissent, and should they be acting in good faith in so doing, they shall be entitled to the control of the funds and property of the union even against the wishes of the majority who desert or abandon. But this should be qualified with the statement that the identity of the union must be maintained. Should a new union supplant the old, there is not such privity of relationship that will sustain a claim even on the part of the minority who are acting in good faith. Although there is a paucity of cases on this point, it is apparent that herein is contained a point of controversy that could provoke a great deal of inter-union dispute should the character of these rights be brought to the attention of the typical labor union whose loyalty is conditioned not on sentimental ties but on the ability of a national organization to achieve tangible benefits and immediate results.

Robert E. Sullivan.

THE CASE BILL.—The recent passage of the Case Bill by Congress and its subsequent veto by President Truman has pointed up the genuine need for an exhaustive study of the solution for the present and probable future labor crisis. There follows a brief analysis of the provisions of the Bill together with some comments on its possible efficacy, should there be other attempts to draft labor legislation in coming sessions of Congress.

The preamble of the Act sets out laudable objectives, and the first three sections confine themselves to definitions of what constitutes public policy under this act. The latter will be dealt with at length later, so we shall pass on to the fourth section dealing with the proposed new board. It would be composed of five members under the Department of Labor for five determinate periods, one expiring each year for the first five years of the board's life. All facilities of the U. S. Conciliation service are transferred to the Board which has main offices in Washington, D. C. and authority to establish regional offices, appoint agents, conciliation mediators and investigators, but no officer or employee may be an arbitrator.

The board has no mandatory powers to compel agreement or arbitration. It is directed to encourage settlements by mediation and conciliation. If arbitration at the board's request is refused, by one or both parties, the board shall immediately notify the Secretary of Labor that its efforts have failed. Its strongest coercive power is to emphasize to the parties their obligation under the Case Bill to provide for settlement of disputes in their agreements, under Section five.

In Section six, the board's action as regards a public utility is outlined. The board in the case of a collective bargaining dispute in-

volving a public utility whose rates are fixed by a government agency, must determine whether a substantial interruption of monopolized service is threatened. And if such determination is made it requests the President to appoint an emergency commission. This commission investigates the facts and reports to the President with recommendations concerning the adjustment of wages, hours, and working conditions. The report must be made within 30 days after appointment unless extended by the President for another 30 days.

The explicit instructions of Section three provide for employees and employers to arrange a conference within ten days after a written request therefor, whenever a dispute arises over the terms, or application of terms, of collective bargaining agreement. If the conference fails, full cooperation must be given the Federal Mediation board which may proffer its services on its own motion or by request of either party to the dispute.

Until the Federal Mediation board certifies that its efforts are concluded or until sixty days after the written request for a conference, whichever date is first, the contract in effect before the dispute, will continue in effect, unless altered by the new agreement retroactively.

During this period, strikes and slowdowns are prohibited under penalty of losing employee status under the Wagner Act, and lockouts are defined as an unfair labor practice under the same act. In the case of a dispute where appointment of an emergency commission is authorized, this period is extended until five days after the commission submits its report to the President.

Section seven which comes under Title one of the Case Bill redefines and broadens the scope of possible prosecution by the government in cases of union men, by inserting in the act of 1934, provisions called by some, anti-racketeering provisions. Section one, A, provides that the term commerce hereafter will mean commerce between any point in a state, territory or the District of Columbia, and any point outside thereof, or between points within the same state, territory or the District of Columbia, but through any place outside thereof. Thus under this enlargement, the penalties hereafter set out in the 1934 act for impeding commerce will apply to the old practice of New York union leaders stopping trucks entering from New Jersey, and requiring them to hire a surplus union man, paying in effect another days wage to a man who does nothing to earn it.

Section one, B, redefines "Robbery" and "Extortion" by enlarging their scope so that anyone who is guilty of these acts and in any degree obstructs, delays or affects commerce, as above defined, shall be guilty of a felony.

Title two of the proposed bill sets out the fact that Section 6 of the Clayton act ¹ is not modified by provisions here. This section of the

¹ Clayton Act. Title 15 U. S. C. A. Sect. 17 (1914).

Clayton act relates to the unions not being regarded under this law as susceptible to restraint and prosecution for activities anti-trust in nature. Unions are still immune from this type of prosecution and no change is made in the operation of the Norris-LaGuardia act,² the Railroad Mediation act³ or the Wagner act.⁴

Section eight of Title two makes it unlawful for the employer to pay, or agree to pay, or deliver any money, or other thing of value to any representative of any of his employees who are engaged in commerce, or in the production of goods for commerce. Consequently it shall also be illegal for the employees to receive anything under these conditions. It then provides that any plan in existence that conforms to present laws will not be included under this section. This part of the law was designed to eliminate building up huge funds controlled by the union since there is a provision for a fund that is jointly administered and in the event of a deadlock as to its disposition, an impartial arbitrator will assume jurisdiction, with the alternate right to take it into the courts for setting up as a trust, to make audits, and generally satisfy any conflicting claims that might arise.

Section nine entitled "Supervisory employees" makes provision for the amending of the Wagner act redefining employee, by inserting at the end of the paragraph under the exclusion section, "or any individual employed as supervisor."

The definition of a supervisor is anyone having the authority to hire, transfer, lay-off, suspend, promote, etc., five or more men. This insulates the supervisor from both labor and management and effectively deprives him of his status under the Wagner act. The paragraph states that nothing contained herein would prohibit a supervisor from becoming or remaining a member of a labor union but there can be no organization of foremen as such. The position of the supervisor is an anomalous one anyway and this does little to clarify his relationship with the parties in interest.

Section ten of the proposed bill deals with the liability of unions for breach of contract. Action for the violation of collective bargaining contracts may be brought by either party in District courts of the United States. Money judgments against the union are enforceable against the union as an entity, not good against the individual members or their representatives. Moreover any employee who strikes in violation of a collective bargaining agreement unless directed to do so by the appointed labor organization, shall lose his status as an employee under the Wagner act until rehired by the employer.

² Norris-LaGuardia Act. Title 29 U. S. C. A. Sect. 101 (1932).

³ Railway Labor Act. Title 45 U. S. C. A. Sect. 151-164 (1926-34-36-40).

⁴ Wagner Act. Title 29 U. S. C. A. Sect. 151 (1931).

Section eleven entitled "secondary boycotts" provides for a drastic revision of previous settled labor legislation. By making the unions subject to anti-trust laws the latitude of this section is a little greater than the writers imagined at the time. The secondary boycott would most certainly be eliminated under this section, but it would also effectively destroy the legitimate aims, thus leaving the gate open for a considerable amount of repression, and giving the employer a weapon against which there is no defense.

By amending the Clayton act to exempt union activities from the provisions of the Sherman act,⁵ it allows labor organizations to be subject to criminal prosecution and triple damages for combinations and conspiracies designed to restrain trade, whereas formerly a secondary boycott was not considered an unlawful labor practice.

Sections 12-14 include provisions with respect to making copies of collective bargaining agreements available to the public and also furnishing available information which may help in the settlement of labor disputes.

In the light of the unsettled times the fact that the Case Bill was passed and then vetoed is of little significance. The important thing to watch is the temper of the men who will comprise our new legislative body. This bill may act as a yardstick for a comprehensive labor measure in the next session of Congress. The objectionable features may be eliminated or if the complexion of the bodies change considerably, some additional items may be attached, in any event there will be a great deal of agitation for specific legislation to meet the whole problem, hence the efforts of these drafters cannot be discounted. We hope that because of the tensions that exist in our economy there will be a concerted effort to solve some of them by prompt legislative action.

Some of the points which they will have to consider further in a future bill which were not adequately provided for in the Case Bill are these: 1. Elimination of the wildcat strike where, in most cases, the objectives are against the policy of the Wagner act, by withdrawal of the protection of the act unless orderly processes are used. 2. A final determination as regards the supervisory employee who remains in a no man's land mostly because the framers of the Wagner act overlooked him. 3. Improve the position of the employer in two aspects of his labor activity; (a) freedom to talk with employees during the organization campaigns so long as coercion and other means are not resorted to; (b) allow the employer to petition for a bargaining election when a strike threatens and not make him wait for a contest between two or more unions. 4. Solidify the whole government labor structure by trying to improve the Labor department to the point where its opinions are respected.

John Kelly and John D. O'Neill.

⁵ Sherman Anti-Trust Act. Title 15 U. S. C. A. Sect. 1-7, 15 (1890).

THE ORIGIN OF PRIVACY AS A LEGAL RIGHT IN U. S.—The right of privacy was first put forth as a definite legal right in 1880 in an article in the *Harvard Law Review*¹ in which it was said: "Since instantaneous photography and newspaper enterprise have infiltrated the sacred precincts of private and domestic life . . . there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons."

The article went on to point out that: "Owing to the nature of the instruments by which privacy is invaded, in injury inflicted it bears a superficial resemblance to the wrongs dealt with in the laws of slander and libel."

However, as is shown in the article, the two rights are sharply marked off from each other; for while the right against libel is the right to have one's reputation protected — a thing entirely apart from one's inner feelings as far as the thing directly protected is concerned — the right to privacy is a right to be free from agencies that disturb the feelings of the injured party. Owing, however, to this superficial resemblance and also to the fact that the same act may infringe both the right of privacy and the right to be free from defamation, privacy cases generally contain some allusion as to whether the publication is a libel.

In the case of *Peck v. Tribune Co.*² the question of libel was discussed and made the basis of the Court's decision, and the right of privacy was dismissed with a few words. B published the photograph of A, but put beneath the photograph the name of X. Under the photograph was printed an indorsement of a certain brand of whiskey, stating that X had used it both for herself and as a nurse. In an action by A against B the Court, after finding that the indorsement was referable to A, although X's name was signed to it, held that the jury should have been allowed to decide whether the publication of the plaintiff's likeness was a *tort per se*. The case was appealed, and Holmes, J., in delivering the opinion, merely alludes to the right of privacy in the following words: "It is unnecessary to consider the question of whether the publication of the plaintiff's likeness was a *tort per se*. It is enough that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with the facts, even if more subtlety is needed to state the wrong than is here."

The first decision in which the right of privacy was expressly recognized was a Georgia case³ in which the court allowed a plaintiff to recover damages against defendant company for the unauthorized use

¹ IV *Harvard Law Review* 193 (1890).

² *Peck v. Tribune Co.*, 154 Fed. 330 (1907).

³ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905)

of the plaintiff's portrait in a life insurance advertisement. In delivering its opinion, the court said that "this right (privacy) has its foundation in the instincts of nature, that everyone is entitled to live a private life without coming before the public, and that although there be no precedent in which this right is recognized, the common law will judge according to the law of nature and the public good."

Since this case, the right of privacy has been recognized in many jurisdictions. In 1907, Thomas E. Edison⁴ sued to restrain the defendant from the use of his name as part of its corporate title and in connection with its business and advertising. The injunction was granted. In 1909 the Kentucky court⁵ ruled that in the case of the publication of a forged recommendation of patent medicine pills, the publication of the plaintiff's picture without his consent was a violation of the right of privacy and entitled him to recover without proof of special damages.

It has been held by the Missouri court⁶ that damages may be obtained for violation of the right of privacy in a case in which the plaintiff's picture was used in an advertisement; and the court added by way of dictum that it was a violation of a property right, and that an injunction would be granted to prevent publication.

In a Kansas case⁷ the plaintiff was in the dry goods store of the defendant as a customer, and the defendant, without her knowledge, caused moving pictures to be taken of her. Afterwards this film was used to advertise the business of the defendant by public exhibition in a moving picture theater in the neighborhood in which she lived. The defendant demurred on the ground that no special damages were shown, but the court held that the exhibition, in a moving picture theater, of the photograph of a person, taken without her consent and which was for the purpose of exploiting the publisher's business was a violation of the right of privacy and entitled her to recover without proof of special damages.

Judgment was denied in a Washington case⁸ in which a newspaper published an article stating that the plaintiff's father had been charged with fraud, giving the details of the fraudulent acts, and publishing a photograph of the members of the family, including the plaintiff. The plaintiff sought to recover on two grounds: (1) that the article and photograph taken together were libelous, and (2) that the unauthorized publication of the photograph was an invasion of her right of privacy. The court held (1) that the publication of the photograph in conjunction with the article does not constitute libel under a statute defining

⁴ Edison v. Edison Polyform Manf. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907).

⁵ Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909).

⁶ Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911).

⁷ Kuntz v. Allen & Bayne, 102 Kan. 883, 172 Pac. 532 (1918).

⁸ Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. Rep. 594 (1911).

libel as "exposing any living person to hatred, contempt, ridicule or obloquy, or depriving him of the benefit of public confidence or social intercourse" and (2) that the case did not fall within any of the rules so far recognized by the courts, permitting a recovery for an invasion of the right of privacy.

It is usually conceded that the right of privacy does not prohibit any publication of matter which is of public or general interest. Thus damages were denied in a New York case ⁹ in which the plaintiff sought to enjoin defendant film company from presenting her picture in a motion picture film depicting current events, the picture having been obtained without her consent, while the plaintiff was actively engaged in the solution of a notorious murder mystery. The remedy was demanded under a statute which prohibits the use of a person's name or picture without their written consent "for advertising purposes and for the purpose of trade." The court held that this case did not come within the scope of the subject.

John M. Anderton.

PHYSICAL AND MENTAL INJURIES RESULTING FROM SHOCK WITHOUT IMPACT.—No action lies for negligence the consequences of which are limited to fright or other emotional disturbances. Some jurisdictions then proceed to a holding that, since fright or other emotional disturbance cannot form the basis of an action, no recovery may be had for injuries resulting therefrom.

Even in those jurisdictions so holding that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury, the doctrine does not apply where the emotional disturbance was in association with physical impact, even though slight.¹

Other jurisdictions, with somewhat varying qualifications thereon, have adopted the view that there may be recovery for such injuries, regardless of physical impact.²

The question arises then as to what legal protection is given the interest in the peace and comfort of one's own thoughts and emotions? According to the familiar formula, this interest is not given independent protection; such redress as law affords for its invasion is "parasitic" upon a cause of action for the violation of some other legal right. Nevertheless, Magruder, in his treatment of the subject very discern-

⁹ *Humiston v. Universal Film Mfg. Co.*, 178 N. Y. S. 752 (1919).

¹ *Sherman and Redfield on Negligence* (Rev. Ed.) p. 2006.

² *Chuichols v. Nev. Eng. Tailors*, 84 N. H. 329, 150 A. 540 (1930).

ingly concludes that, "All in all, it is fair to say that the courts have already given extensive protection to feelings and emotions. They have shown a notable adaptability of technique in redressing the more serious invasions of this important interest of personality. No longer is it even approximately true that the law does not pretend to redress mental pain and anguish, when the unlawful act complained of causes that alone. If a consistent pattern cannot yet be clearly discerned in the cases, this but indicates that the law on this subject is in a process of growth."³

On further investigation as to the source of this type of action one is made keenly aware as to why the growth has been stunted. Sir Richard Couch, in delivering the judgment of the Court in the case of *Victorian Railways Commissioners v. Coultas*, said: "The learned counsel for the respondents was unable to produce any decision of the English courts in which, such facts as were proved in this case, damages were recovered . . . It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent."⁴ And so it was held that the plaintiff was not entitled to recover damages for nervous shock caused by the defendant's negligence, in absence of proof of actual impact, even though serious physical injuries resulted from shock.

In the same month of the same year the Supreme Court of New York, in *Lehman v. Brooklyn City R. Co.*,⁵ an action for physical injuries due to nervous shock caused by plaintiff's being frightened at a runaway horse, likewise denied a recovery, on grounds that there were no cases in the books, nor referred to by counsel. Both courts rested their decisions upon a doctrine, if given universal application, would put an end to the growth of law by judicial decisions. In *Dulieu v. White and Sons*,⁶ the identical principle was involved upon which the *Coultas* case was decided. The plaintiff, a woman, while standing behind the bar of her husband's public house, through the negligence of the defendant's servant, sustained severe nervous shock, which in turn caused a miscarriage.

In elaborate opinions by Kennedy, J. and Phillimore, J. the *Coultas* case was repudiated. In adopting this attitude, the judges of the King's Bench were influenced partly by previous English and Irish cases, and partly by reason of the fact that the judgment in that case had been "unfavorably reviewed" by legal authors of recognized weight, such as Mr. Sedwick, Sir Frederick Pollock, and Mr. Beven, but the two judges writing opinions also examined at length the principle involved and stated fully the reasons upon which they justified a recovery.

³ Mental and Emotional Disturbance in Tort, 49 Harv. Law Review 1033.

⁴ 13 A. C. 22, 226 (1888).

⁵ 47 N. Y. 355, 356 (1888).

⁶ 2 K. B. 669 (1901).

In Scotland the doctrine of the *Coultas* case was repudiated by the Court of Sessions in 1910 in the case of *Gillidon v. Robb*,⁷ in which a woman was allowed to recover for illness due to a nervous shock, without impact, caused by a cow bolting from the street into the house in which plaintiff was.

The doctrine of the *Coultas* case was repudiated in Ireland within two years after the decision was announced in the case of *Bell v. Great Northern Railway of Ireland*.⁸ Thus the law in England, Scotland and Ireland is settled in favor of recovery for physical injuries resulting from nervous shock caused by the wrongful act of the defendant, without actual impact.

Unfortunately this cannot be said of America, as was evidenced in *Ewing v. Pittsburgh Railway Co.*,⁹ and in *Spade v. Lynn and Boston Railway Co.*,¹⁰ and it may be safely said that the rule, thus supported by the courts of last resort in Massachusetts, New York and Pennsylvania had become the weight of authority, thus establishing in a number of American jurisdictions the rule denying recovery for nervous shock without actual impact.

This doctrine, however, was not destined to meet with unanimous acceptance in America. It was repudiated in the Supreme Court of Minnesota in 1892, in the case of *Purcell v. St. Paul etc. Railway Co.*,¹¹ in which the court ignored the *Lehman* and *Coultas* cases cited by counsel. Again, the Supreme Court of South Carolina in 1897, in the case of *Mack v. Southern Bound Railway Co.*,¹² after an elaborate review of the decided cases and the views of the text writers on the subject, adopted the rule of liability. Following these two leading cases, the courts of an increasing number of jurisdictions have been adopting the rule of allowing a recovery.¹³ "The discordant state of

⁷ S. C. 856 (1910).

⁸ 26 L. R. Ir. 428 (1890).

⁹ 147 Pa. St. 40, 23 A. 340 (1892).

¹⁰ 168 Mass. 285, 47 N. E. 88 (1897).

¹¹ 48 Minn. 134, 50 N. W. 1034 (1892).

¹² 57 S. C. 323, 29 S. E. 905 (1898).

¹³ The following is a list of jurisdictions in which the rule of recovery prevails with a leading case in each: Ind.—*Kline v. Kline*, 158 Ind. 602, 64 N. E. 9 (1902); Ala.—*Alabama Fuel & Iron Co. v. Boladoni*, 15 Ala. App. 316, 73 So. 205 (1916); Cal.—*Lindley v. Knowlton*, 179 Cal. 298, 176 Pac. 440 (1918); Ga.—*Goddard v. Walters*, 14 Ga. App. 82 S. E. 304 (1914); Ia.—*Watson v. Dilts*, 116 Ia. 249, 89 N. W. 1068 (1902); Kan.—*Whitsell v. Watt*, 98 Kan. 508, 159 Pac. 401 (1916); La.—*Stewart v. Arkansas Southern R. Co.*, 112 La. 764, 36 So. 676 (1904); Md.—*Green v. Shoemaker*, 111 Md. 69, 73 A. 688 (1909); Minn.—*Purcell v. St. Paul City R. Co.*, 48 Minn. 34, 50 N. W. 1034 (1892); N. C.—*Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); Ore.—*Salmi v. Columbia etc. R. Co.*, 75 Ore. 200, 146 Pac. 819 (1915); R. I.—*Simone v. Rhode Island Co.*, 28 R. I. 186, 66 A. 202 (1907); S. C.—*Mock v. South-Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1897); Tenn.—*Memphis St. R. Co. v. Bernstein*, 137 Tenn. 637, 194 S. W. 902 (1917); S. D.—*Sternhagen v. Kozel*, 40 S. D. 396, 167 N. W. 398 (1918);

American authorities challenges attention to the reasons upon which the variant decisions are based. If, the rule against recovery is not based on reason, it may be expected to yield to that which is more in conformity with the maxim of the law that, 'for every wrong there is a remedy'.¹⁴

The principal reasons assigned by the courts for denying recovery in the class of cases in question are: First, that since fright caused by negligence is not itself a cause of action, none of its consequences can give a cause of action; Second, that the damages resulting from fright are too remote; Third, that it is contrary to public policy to allow recovery for damages for personal injuries resulting from fright and shock.

The question is, are these indisputable reasons, based on sound principles of justice? May not the first reason for denying recovery for nervous shock resulting from fright be dismissed with the statement that while it is true no recovery may be had for mere fright for want of physical injury, yet physical injury resulting from a wrongful act is actionable whether the injury be to the nerves or to some other part of the body, and regardless of whether the link in the chain of causation between the wrongful act and the injury to the nerves is physical impact or fright? The essential thing is the existence of the link in the chain of causation, not the character of that link.

With regard to the second reason, no better evidence of the absurdity of the rule denying recovery for personal injuries resulting from fright on the ground that the damage is too remote could be desired than the circumstance that many of the cases denying recovery from injuries resulting from fright alone authorize recovery for physical injuries resulting from fright where the fright was also accompanied by trifling impact, in itself causing little or no injury,¹⁵ which is more or less that of putting the cart before the horse.

Tex.—Gulf, etc. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944 (1900); Wash.—O'Meara v. Russell, 90 Wash. 567, 156 Pac. 550 (1916); Wis.—Pankoff v. Hinkley, 141 Wis. 146, 123 N. W. 625 (1909); Mass.—Frewen v. Page, 238 Mass. 499, 17 A. L. R. 134 (1921); W. Va.—Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924); Ohio—Pennsylvania Co. v. White, 155 C. C. A. 213, 242 F. 437 (1917); Ark.—Rogers v. Willard, 144 Ark. 587, 11 A. L. R. 1115 (1920); Neb.—Hanford v. Omaha C. B. St. Ry. Co., 113 Neb. 423, 40 A. L. R. 970 (1925); N. H.—Kenney v. Wong Len, 81 N. H. 427, 128 A. 343 (1925); N. Y.—Sider v. Reid Ice Cream Co., 211 N. Y. 582, 125 Misc. Rep. 835 (1925); Mont.—Cashin v. Northern Pac. Ry. Co., 96 Mont. 92, 28 P. (2d) 862 (1934); Colo.—Sager v. Sisters of Mercy of Colorado, 81 Colo. 498, 56 A. L. R. 655 (1927); Nev.—Babcock & Wilcox Co. v. Nolton, 71 P. (2d) 1051 (1937); Ore.—Hinsh v. Meier & Frank Co., 113 P. (2d) 438 (1942); Conn.—Orlo v. Connecticut Co., 128 Conn. 231, 21 A. (2d) 402 (1942).

¹⁴ Throckmorton, Damages for Fright, 34 Harv. Law Review 265.

¹⁵ McGee v. Vanover, 148 Ky. 737, 742 S. W. 147 (1912).

An analysis of the opinions denying recovery in such cases, on the ground of public policy discloses that the alleged public policy is based on one or more of the following reasons: I. There is no precedent for such a recovery prior to the latter part of the nineteenth century. II. Allowance of recovery would increase litigation. III. Allowance of recovery would lead to the bringing of actions on fraudulent claims. IV. Damages from nervous shock are difficult to prove and measure.

The first reason is no reason at all. If it were, every case of first instance would be decided against the party invoking the new rule of law or the new application of an old rule. It would put an end to all growth or progress of the law through judicial decision. Such a policy should be handled delicately as is evidenced by Justice Evans' opinion in *Alabama Fuel and Iron Co. v. Balodoni*. "The doctrine of expediency or public policy . . . is a doctrine that should be very sparingly and cautiously employed, for if a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency."¹⁶

A twofold answer to the second reason assigned for the alleged public policy is that the allowance of a recovery of damages for physical injuries caused by fright has not increased litigation to any marked extent; and that, even if it had, public policy does not forbid increased litigation for the redress of wrongs.

As to the reason that such actions would lead to fraudulent claims it may be assumed that such a reason is but dodging the issue. This reason has never been held sufficient to deny recovery for real injuries the existence of which have been proved under the rules of procedure established for the purpose of ascertaining the facts. Again, in the language of Evans, J.: "It may be that physical injuries springing out of fright are easily simulated and relief granted in such instances would open the door to fraud and imposture; but this is a matter involving the proof of the case and is addressed rather to the good sense and honesty of our juries than to the courts."¹⁷

The fourth reason much akin to the third, is also an attempt to avoid the issue. Moreover the refusal to apply the general rules to actions of this particular kind of injury is nothing short of a denial of justice as is brought out per Gains J., in *Hill v. Kimball*. "That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient grounds for refusing compensation in an action at law when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection be-

¹⁶ 15 Ala. App. 316, 73 So. 205 (1916).

¹⁷ *Supra*, P. 207.

tween the alleged cause and the injury, but if it be proved and the injury be the proximate result of the cause, we cannot say that a recovery should not be had."¹⁸

Although our courts of jurisdiction have progressed in administering remedy to those cases caused by fright and shock, there is much fact to the statement made by Magruder, "That where both severe impact and external cause are absent, the substantive end of redressing honest claims and the procedural end of detecting fabricated suits might better be reconciled by procedural devices such as judicial discretion to control the jury and the requirement of clear and convincing proof. Unfortunately, however, the courts of this country seem committed to the policy of restricting the discretion of the trial judge to withdraw the case from the jury."¹⁹

In more recent years the courts of not only the Southern and Western states, which are more lenient in dealing with this type of case, are beginning to agree with the logic behind the case of *Reed v. Real Detective Publishing Co.*, in which the judge so understandingly stated, "that the mind of an individual, his feelings, and mental processes, are as much a part of his person as his observable physical members. An injury, therefore, which affects the sensibilities is equally an injury to the person as an injury to the body would be."²⁰

In that respect a cause of action for the violation of privacy causing mental suffering to the plaintiff, is an injury to a person.

It may be concluded, as is evidenced by the number of cases brought before the courts in the past twenty years, that in general, damages for mental anguish are recoverable when they are the natural or proximate result of an act committed maliciously, intentionally, or with gross carelessness or recklessness as to show an utter indifference to the consequences when they must have been in the actor's mind.²¹ In most jurisdictions, damages are recoverable for mental anguish and suffering caused by a wilful, wanton, malicious or intentional wrong, even though no bodily injury is sustained.²² However, many more such actions would be successful if the sufferer sustained but a slight physical injury.

The ruling allowing recovery for damages for mental anguish and suffering caused by wilful, wanton and malicious acts is especially applicable in cases affecting the liberty, character, reputation, personal security, or domestic relations of the injured party.²³

Charles R. Gerard.

¹⁸ 76 Tex. 210, 215, 13 S. W. 59 (1890).

¹⁹ Op. Cit. Magruder, P. 1036.

²⁰ 162 P. (2d) 133 (1945).

²¹ *Dorsett v. Houston Elec. Co.*, 191 S. W. (2d) 514 (1945).

²² *Melon v. Woodruff*, 23 So. (2d) 364 (1945).

²³ *Blakeley v. Shortal's Estate*, 20 N. W. (2d) 28 (1945).

IMPUTED NEGLIGENCE DOCTRINE.—The imputed negligence doctrine whereby the negligence of a driver of a private vehicle is imputable to a guest occupant thereof had its inception in the famous English case of *Thorogood v. Bryan*.¹ That was a case of the collision of two omnibuses. An action by a passenger of one omnibus against the owner of the other omnibus was defeated upon the ground of imputed contributory negligence. The theory upon which the court rested its decision was that the passenger was so identified with the driver of his vehicle as to be chargeable with his negligence. The inference of the court's theory was that the driver was the agent of the passenger or at least that he was under the direction and control of the passenger. *Thorogood v. Bryan* was later disregarded² and finally overruled in England.³

In this country it is the general rule that where a person is riding in a vehicle over which he has no authority, and where he has no control over the driver, and has no reason to suspect a want of care or skill upon his part, and is injured by the concurring negligence of the driver and some third person, the negligence of the driver is not imputed to him so as to prevent a recovery for damages from the other tortfeasor.⁴ It has been held not to make any difference that the injured person was riding uninvited and without the knowledge of the driver of the vehicle.⁵

The Supreme Court of Michigan first applied the rule of *Thorogood v. Bryan* in 1872 in the case of *Lake Shore v. Miller*⁶ imputing the negligence of a driver of a wagon to a passenger. It consistently applied the rule and was just as consistently criticized both within and without its jurisdiction. Mr. Justice Field in *Little v. Hackett* stated that: "The truth is the decision of *Thorogood v. Bryan* rests upon indefensible grounds. The identification of the passenger with the negligent driver or the owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position . . ."⁷ In *Lachow v. Kimmich* Michigan's Chief Justice McDonald said: "Notwithstanding the fact that the rule has no foundation in reason or justice and is contrary to the overwhelming weight of authority in this country and in England our court has steadfastly though reluctantly adhered to it," and "It has been said by a learned legal writer that adopting a rule of law without reasoning is the best method of reaching a conclusion directly

¹ 8 C. B. 115 C. P. (1849).

² *Rigby v. Hewitt*, 5 Exch. 240, 134 Eng. Rep. 452 (1850).

³ *Mills v. Armstrong* (The "Berina"), 13 A. C. 1, 53 L. T. 425 (1887).

⁴ *Oklahoma Railroad Co. v. Thomas*, (Okla.), 164 Pac. 120, L. R. A. 1917E 405 (1917).

⁵ *Cincinnati Street Ry. Co. v. Wright*, 54 Ohio St. 181, 43 N. E. 688 (1896).

⁶ *Lake Shore v. Miller*, 25 Mich. 273 (1872).

⁷ 116 U. S. 366, 6 S. Ct. 391 (1886).

opposed to common sense and to the decisions of other courts," and that "Since its adoption it never has had a friend at court."⁸

After the turn of the century Michigan and Wisconsin appeared to be the sole jurisdictions holding that the negligence of the driver of an automobile was imputable to one riding with him as a guest or ordinary passenger.⁹ Wisconsin, as did Michigan, reasoned that one voluntarily in a private conveyance voluntarily trusted his personal safety in the conveyance to the person in control of it.¹⁰ By entering into the conveyance the passenger adopted it for the time being as his own and assumed the risk of the skill and care of the person guiding it. In 1921 Wisconsin overruled their doctrine¹¹ and adopted the general rule in its later decisions.¹²

In *Lake Shore v. Miller* the Michigan court applied the Roman Law doctrine of "identification"¹³ as in the *Thorogood* case, the passenger being so identified with the driver as to be charged with his negligence. Later the court rested the doctrine of imputed negligence upon the assumption that the relation of principal and agent or master and servant existed between the passenger and driver.¹⁴ Finally the court held that the negligence of the driver could not be imputed to a passenger on any theory other than the rule of joint enterprise founded on the law of principal and agent.¹⁵ The driver and passenger were thus assumed to have common control and possession of the automobile. Occupants of an automobile attending a dance together, each sharing equally in expense, and having an accident when returning, were held to have been engaged in a joint enterprise, and the driver's negligence was imputable to the others.¹⁶ Yet it was also held that the negligence of a master in driving was not, as a matter of law, imputable to the servant riding with the master in the course of his employment.¹⁷ Under the joint enterprise theory the negligence of a driver was held imputable to a passenger on a hunting trip and sharing the expenses.¹⁸ The Federal Court sitting in Michigan refused to follow the Michigan

⁸ 263 Mich. 1, 248 N. W. 531 (1933).

⁹ *Kneeshaw v. Detroit United R. Co.*, 169 Mich. 697, 135 N. W. 903 (1912) *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629 (1909).

¹⁰ *Prideaux v. Mineral Pt.*, 43 Wis. 513, 28 Am. Rep. 558 (1878); *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32 (1881).

¹¹ *Reiter v. Grober et al.*, 173 Wis. 498, 181 N. W. 739 (1921).

¹² *Druska v. Western Wis. Teleph. Co.*, 177 Wis. 621, 189 N. W. 152 (1922).

¹³ *Shearman & Redfield, Law of Neg.* (6th Ed. 1913) Sec. 66.

¹⁴ *Hampel v. Detroit G. R. & W. Ry. Co.*, 138 Mich. 1, 100 N. W. 1002 (1904).

¹⁵ *Farthing v. Hepinstall*, 243 Mich. 380, 220 N. W. 708 (1928).

¹⁶ *Frisorger v. Shepse et al.*, 251 Mich. 121, 230 N. W. 926 (1930).

¹⁷ *Robertson v. United Fuel & Supply Co. et al.*, 218 Mich. 271, 187 N. W. 300 (1922).

¹⁸ *Plantz v. Imperial Oil Corp.*, 275 Mich. 570, 267 N. W. 738 (1936).

rule¹⁹ but later, in declaring that the Michigan Guest Act did not abrogate the imputed negligence doctrine, overruled the decision and applied the imputed negligence rule.²⁰

The doctrine has been applied as between husband and wife²¹ but not between the driver and a minor, at first arbitrarily holding so,²² and later, under the principal and agent or master and servant theory, holding that an infant can be neither principal nor master.²³ Neither could negligence be imputed to passengers in public conveyances,²⁴ to a taxicab passenger,²⁵ nor to a passenger in a private carrier for hire.²⁶ Negligence of the driver was not imputed to a fellow servant riding on a fire engine as both the driver and fireman have distinct duties, and no agency, actual or implied, could be applied as to impute the driver's negligence.²⁷ In the case of a truck driver employed by a newspaper to distribute papers, it was held he was not a "fellow servant" or "joint adventurer" engaged in a common enterprise with a co-employee riding on the running board whose duty was to deliver papers at each stop, so as to impute the negligence of the truck driver to the co-employee.²⁸

In imputing the negligence of a driver of a private vehicle to a passenger on the grounds of agency as the basis for the "joint adventurer" test it is obvious that such agency is fictional for the guest passenger is not liable to a third party who is injured.²⁹ This is the general rule as to a guest who has no control over the driver.³⁰ Michigan is in accord.³¹ Further, under the joint enterprise theory there must be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in the control and management of the conveyance and surely this cannot be said of a guest riding as a passenger in a private vehicle. All theories used to impute the negligence of

¹⁹ *Commercial Electric Supply Co. v. Greschner*, 59 F. (2d) 512, C. C. A. 6th (1932).

²⁰ *Rehm v. Interstate Motor Freight System et al.*, 133 F. (2d) 154 (1943).

²¹ *Brady v. Pere Marquette R. Co.*, 248 Mich. 406, 227 N. W. 737 (1929).

²² *Schindler v. Milwaukee L. S. & W. Ry. Co.*, 87 Mich. 400, 49 N. W. 670 (1891).

²³ *Hampel v. Detroit G. R. & W. Ry. Co.*, 138 Mich. 1, 100 N. W. 1002 (1904).

²⁴ *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32 (1881).

²⁵ *Galloway v. Detroit United Ry.*, 168 Mich. 343, 134 N. W. 10 (1912).

²⁶ *Lachow v. Kimmich*, 263 Mich. 1, 248 N. W. 531 (1933).

²⁷ *McKernan v. Detroit Citizens Street Railway Co.*, 138 Mich. 519, 101 N. W. 812 (1904); *City of Grand Rapids v. Crocker*, 219 Mich. 178, 189 N. W. 221 (1922).

²⁸ *Skvarce v. Sales Necessities, Inc.*, 267 Mich. 540, 255 N. W. 328 (1934).

²⁹ *Reiter v. Grober*, 173 Wis. 493, 181 N. W. 739 (1921).

³⁰ *Jerome v. Hawley*, 147 N. Y. App. Div. 475, 131 N. Y. Supp. 897 (1911).

³¹ *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336 (1911).

the driver to a passenger in Michigan, whether the passenger is to be identified with the driver, or the driver is the agent of the passenger, or that the driver is at least under the direction and control of the passenger, are all purely fictional and neither sound nor just.

In *Colborne v. Detroit United Ry.* counsel for an injured passenger urged that the doctrine of imputed negligence should be overruled and the rule in harmony with many other jurisdictions be adopted but the court said: "Were the question new or uncertain in this state, it might call for serious consideration; but the doctrine of *stare decisis* is not to be lightly disregarded."³² The majority of the court in the case of *Mullen v. Owosso* adhered to the rule saying: ". . . It has been too long settled to be now disturbed."³³

Such had been the attitude in Michigan. Not until the very recent case of *Bricker v. Green* has this pernicious doctrine been overruled. Mr. Justice Bushnell, speaking for the court, said: "As a result of our study and observation we are convinced that in the long run the application of the rule is more harmful than helpful and results in more injustice than it prevents; . . .,"³⁴ and he cites Mr. Justice Cardozo, "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment."³⁵ An *amicus curiae* brief of the State Bar of Michigan to this case states their opinion as follows: "Must we continue for all time to drag in this exploded and obsolete legal monstrosity with the sole result of throwing the loss on the innocent party?"

Bricker v. Green was a death action brought by the administrator of the estate of the deceased who was killed while riding in an automobile driven by her husband which collided with an automobile driven by the defendant. This case overrules the imputed negligence doctrine in Michigan, the last state so holding, in that any negligence of the husband of the deceased could not be imputed to her. It must be noted, however, as the court makes clear, that their holding must not be construed as to exclude under appropriate circumstances the defense of contributory negligence on the part of the passenger, if relative to the cause of the accident the passenger fails to exercise such reasonable care and caution as he should have exercised under the circumstances. Nor has the so-called rule of imputed negligence been renounced where the driver of the automobile is under the control of the injured passenger.³⁶

³² 177 Mich. 139, 143 N. W. 32 (1913).

³³ 100 Mich. 103, 58 N. W. 663 (1894).

³⁴ 313 Mich. 218, 21 N. W. (2d) 105 (1946).

³⁵ "The Nature of the Judicial Process," pp. 142, 150.

³⁶ *Parks v. Pere Marquette Ry. Co.*, 23 N. W. (2d) 196 (1946).

The joint enterprise doctrine liberally applied appears to be a resurrection of the doctrine of *Thorogood v. Bryan*, in this country, which courts in several states first adopted and later repudiated.³⁷ It is difficult in the cases making a liberal application of the joint enterprise doctrine to see anything that looks like real control over the operator of the vehicle; so it seems to be no more than identification of passenger with the operator of the vehicle. Courts that make a strict application of the doctrine require more substantial evidence of control, such as ownership of the vehicle or a financial interest in the undertaking.

R. A. Macdonell.

CONDUCT OF THE INSURED UNDER COOPERATION CLAUSES IN POLICIES OF LIABILITY INSURANCE.—Liability insurance grew in importance during the last quarter of the nineteenth century. Its various forms proved popular insurance items, and holders of liability insurance policies soon were legion. This type of insurance has been defined as “. . . that form of insurance by which insured is indemnified against loss or liability on account of bodily injuries sustained by others, or, in a broader sense, against loss or liability on account of injuries to property.”¹ These policies cover a wide field of uses. Under them a doctor may be insured for loss arising under a suit for malpractice; the owners of automobiles may be covered for injuries to third persons resulting from automobile accidents; employers, for injuries to employees; railroads for injuries to passengers, and so on.

It was early seen that in a type of insurance where the liability of the company depended upon the successful conclusion of the injured person's suit against the insured, the company had a strong interest in seeing that a good defense was made by the insured. The earliest requirement of cooperation made of the insured in policies of liability insurance was that of notice that the accident had taken place. This phase of cooperation, relating to notice, will not be considered here. The cases at the beginning of the century show an emphasis on notice,² make passing reference to clauses requiring that “full particulars” of accidents be communicated to the insurer,³ and a textbook of the time

³⁷ See history of the doctrine, 8 L. R. A. (NS) 597.

¹ State ex rel. Travelers' Indemnity Co. v. Knott, 114 Fla. 820, 153 So. 304 (1934).

² Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York, 104 Mo. App. 157, 78 S. W. 320 (1904); Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110 (1902).

³ In Ward et al. v. Maryland Casualty Co., 71 N. H. 262, 51 A. 900 (1898), a clause in a policy of employers' liability insurance requires that in case of ac-

speaks of “. . . the duty of the insured to resist claims made against him for personal injuries.”⁴

A lack of uniformity in the views of the courts regarding the question of cooperation is seen in the decisions as they appear over the next two decades, some holding that the insured was bound to no cooperation since none was expressly required in the policy, but others construing the existence of the requirement where it was not expressed. A New Hampshire case⁵ illustrated the former point of view. Here, the insured had driven the car in which his wife was the passenger, and by his negligence her injury was caused. The company sued in equity to enjoin further trial of an action at law brought by the wife against the husband, the company alleging collusion between husband and wife at the trial. The policy had no expressed provisions requiring aid of the insured in defense of the suit. It was clear that at this trial the husband had expressed hope that his wife would recover a “substantial verdict,” that he testified that he was under the influence of liquor at the time of the accident, that he admitted his liability, that he had encouraged his wife to prosecute him, and announced his expectation that the company would pay. The court in the equity proceedings dismissed the company's bill, and the Supreme Court of New Hampshire found no implied obligation of positive cooperation on the part of the insured.

Perhaps as a result of this and similar decisions, the insurance companies were rapidly convinced that it was necessary to specify with exactness in the policy itself the requirement of cooperation, and therein to notify the insured that his failure in the required cooperation would release the insurer from liability.

Such clauses began to make their appearance about 1928 in policies. For the most part they were soon held valid by the courts wherever their validity was tested.⁶

As to types, the cooperation clauses may be considered under four general headings.⁷ They may be listed in an ascending order as to

cident, “full particulars” thereof should be given insurer, was interpreted to mean only such details as would enable insurer to determine whether a claim would be likely to be made.

⁴ Vance, *Handbook of the Law of Insurance*, West Publishing Co., St. Paul, 1904.

⁵ *Maryland Casualty Co. v. Lamarre*, 83 N. H. 206, 140 A. 174 (1928).

⁶ *Aetna Life Insurance Co. v. Walley*, 174 Miss. 365, 164 So. 16 (1935); *Watkins v. Watkins*, 210 Wis. 606, 245 N. W. 695 (1932). In the latter case the court said: “If the insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision.”

⁷ But the courts everywhere today imply the cooperation clause even where it is not expressly written, and do not recognize that the insured may benefit by his policy and yet arbitrarily decline to assist in making any fair, legitimate de-

the requirements they place upon the assured. 1. The assured “. . . shall at all times render the company all cooperation and assistance in his power.”⁸ 2. The assured “. . . whenever requested by the company, shall aid in effecting settlements . . . but the assured shall not voluntarily assume any liability or interfere in any negotiations for settlement, or in any legal proceeding.”⁹ 3. “In the event of a claim or suit covered by this policy, the insured shall in no manner aid or abet the claimant, but shall cooperate fully with the company . . . in defense of such damage or suit.”¹⁰ 4. “Whenever requested by the corporation, the assured shall aid in securing information and evidence and the attendance of witnesses and in effecting settlement and in prosecuting appeals.”¹¹

Regardless of the wording of the clauses, however, the courts have evinced only the slightest differences in the flow of decisions that have stemmed from contests over them. But the contests themselves have been of great variety. For convenience they may be grouped as follows: 1. The cases wherein the conduct of the insured was determined as not violative of the cooperation clause, and 2. The cases wherein the conduct of the insured was determined to be violative of the cooperation clause.

Acceptable Conduct

Naturally, one of the situations most suspect of collusion has been where a close relationship has existed between the insured and the injured, as where injured and insured are wife and husband,¹² or lifelong friends,¹³ or in any other such close relationship. It is in such cases, more than any others, that the defenses have rung with cries of “Collusion!” At the outset it is obvious that mere close relationship is no proof of collusion. In the Louisiana case of *Neuman v. Eddy*,¹⁴ the insurance company claimed that the insured and the injured were in collusion. Here the injured party brought suit against the insured following an automobile accident. They had known each other as friends for at least twenty-five years. Immediately after the accident, the defendant made two reports of the event to the company, in neither

fense. *Glade v. General Mutual Insurance Association of Des Moines*, 216 Iowa 622, 246 N. W. 794 (1933).

⁸ *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367 (1928).

⁹ *Conroy v. Commercial Casualty Insurance Co.*, 292 Pa. 219, 140 A. 905 (1928).

¹⁰ *Schoenfeld v. N. J. Fidelity and Plate Glass Insurance Co.*, 197 N. Y. S. 606 (1922).

¹¹ *Royal Indemnity Co. v. Morris*, 37 Fed. (2d) 90 (1930); *George v. Employers Liability Assurance Corp., Ltd. et al.*, 219 Ala. 307, 122 So. 175 (1929).

¹² *Maryland Casualty Co. v. Lamarre*, supra.

¹³ *Neuman v. Eddy*, 15 La. App. 45, 130 So. 247 (1930).

¹⁴ *Ibid.*

of which he mentioned that while driving the car in which the plaintiff was passenger, he had committed an act of negligence. The fact of negligence by the defendant was discovered by the insurer only upon filing of the plaintiff's suit. Thereupon, at the request of the company, the insured submitted a further report of the accident, in which he mentioned the negligent act. It was inferable, moreover, that, because of their long-standing association, the plaintiff knew of the defendant's protective insurance. But the judge in this case believed that these facts were not sufficient to establish collusion, the inference being ". . . in favor of candor and truth — therefore assuming that the plaintiff had such knowledge before the suit and giving to the assumption all the weight to which it is entitled, in connection with defendant's failure to mention . . . (the matter of negligence) . . . previous to the suit . . . we are not satisfied that collusion exists. Intervener, however, is not to be blamed for being suspicious."

This case was moreover illustrative of the fact that discrepancies in statements by the insured, when not made in bad faith and not material in nature, do not constitute breach of the cooperation clause.¹⁵ Moreover, mere inadequacy or untruthfulness of a statement made by the insured to the insurer respecting circumstances of the accident has been held not to constitute failure to cooperate. In a case showing this,¹⁶ the plaintiff, prior to the trial, had stated his speed at the time of the accident was "30 miles per hour," a fact which would tend to exculpate him from a charge of negligent conduct. But after commencement of the action he told the attorney of the injured party that his first statement did not contain a true version of the transaction and that he had in fact been traveling 45 miles per hour or faster. The insurance company contended that it had suffered detriment by reason of the untruthful version of the first statement and withdrew from the case. But the court held that the untruthfulness of the first statement did not of itself constitute any failure to cooperate, but rather ". . . evinced a willingness and purpose to cooperate . . ."

Again in some cases, it has been held that cooperation does not require that the insured indulge in substantial personal expense in order to fulfill the letter of the clause. In *Medical Protective Co. v. Light*,¹⁷ it was held that the insured's failure to make a long trip at his own expense to attend trial of a suit brought against him, where he gave the company notice that such trip was financially impossible, did not constitute failure to cooperate.

¹⁵ *Porter v. Employers' Liability Assurance Corp., Ltd.*, 104 P. (2d) 1087 (1940).

¹⁶ *Rockmiss v. New Jersey Manu. Ass'n. Fire Ins. Co. et al.*, 112 N. J. L. Rep. 136, 169 A. 663 (1934).

¹⁷ 48 Ohio App. 508, 194 N. E. 446 (1934). See also *Lienhard et al. v. Northwestern Mutual Fire Ass'n. et al.*, 187 Wash. 47, 59 P. (2d) 916 (1936).

Many courts have taken a quite liberal view of the insured's duty under the cooperation clause and have stated that to relieve the insurer of liability more than a technical breach of the clause must appear,¹⁸ and that the failure of the insured must result in substantial prejudice and injury to the insurer's position.¹⁹ The lack of cooperation, said the court in *George v. Employers Liability Assurance Corporation*, must be "in some substantial or material respect. Any formal, inconsequential or collusive lack of cooperation is immaterial. If the insured, in the ordinary pursuit of his business and not to evade his duty to the insurer, removed to another city . . . but did not fail to give insurer such information as he possessed . . . and did not refuse to testify, but merely failed to come to the court at his own expense . . . where policy provides that the insurer shall defend the suit at its own cost, he is not thereby in default of his duty in cooperation."²⁰

Non-Acceptable Conduct

There is a variety of types of conduct — or lack of conduct — which the courts have held as constituting failure to cooperate. The effect of failure to cooperate is, as we have before mentioned, to release the insurer from liability on the policy.²¹

At the outset it is obvious that an outright refusal to permit the company to defend will release the insurer. In the case of *The Royal Indemnity Co. v. Morris*, the court commented: "It may be added that the duty of the insured in respect to permitting a defense in his name is not susceptible of precise definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility, and hence is not bound to yield to any demands which would entail violation of any law or ethical principle; but he cannot arbitrarily or unreasonably decline to assist in making any fair legitimate defense."²²

Another type of non-cooperation consists in withholding cooperation except at the price of the company's meeting with an unreasonable demand by the insured. Such an instance is seen in a New York case²³

¹⁸ There is much authority holding that any breach whatsoever is sufficient to relieve the insurer of liability. *Curran v. Connecticut Indemnity Co. of New Haven*, 127 Conn. 692, 20 A. (2d) 87 (1941).

¹⁹ *Conroy v. Commercial Casualty Insurance Co.*, supra.

²⁰ 219 Ala. 307, 122 So. 175 (1929).

²¹ *Cameron v. Berger*, 336 Pa. 229, 7 A. (2d) 293, (1938); *Finkle v. Western Automobile Insurance Co.*, 224 Mo. App. 783, 26 S. W. (2d) 843 (1930). Failure to cooperate in the latter case did not cause forfeiture of the policy, but was "mere evidence of the assured's breach," relieving the insurer of liability. See also *Metroplitan Casualty Co. v. Blue*, 219 Ala. 37, 121 So. 25 (1929).

²² 37 F. (2d) 90 (1930).

²³ *Coleman v. New Amsterdam Casualty Co.*, supra.

wherein the insurer made ready to defend a drug store corporation whose negligent filling of a prescription had caused injury to plaintiff. The insured, having admitted its mistake in compounding the prescription, refused to state any further facts regarding the subject of the litigation, unless the insurer would undertake to pay any judgment recovered against the person making the prescription, as well as the assured corporation. In giving his oft-quoted opinion, Justice Cardozo said: "The attitude of the assured was one of willful obstruction. It did not deny that it was in a position to give information . . . It affixed to the disclosure of whatever information it had an untenable condition . . . The insurer was not required to content itself with an unexplainable admission that a mistake had occurred, when, coupled with the admission, there was a refusal to say more, except at a price."

Further instances of non-cooperation are found in those cases where in the insured, following the accident, has removed himself from contact with the company, the favorite method seeming to be by leaving the state and leaving no forwarding address.²⁴ In an Ohio case,²⁵ deliberate evasion by the assured of his duty to cooperate was found by the court, by assured's failure to keep the company informed of his address, though knowing that the trial was to be held shortly. The assured was not present at the trial, though notice had finally reached him that his presence was necessary. The company had made strenuous efforts to locate and defend him.

Regarding the last mentioned point, it has been held that the insurer is bound to do only what a reasonably prudent man would do to keep in contact with the insured.²⁶

Fraud and collusion between the injured party and the insured have been said in at least one case to constitute failure to cooperate.²⁷ Inconsistencies between statements made at the investigation and at the trial have under some circumstances been considered so evidentiary of fraud as to release the insurer.²⁸

William B. Ball.

²⁴ Schoenfeld v. New Jersey Fidelity and Plate Glass Ins. Co., *supra*.

²⁵ Rohlf v. Great American Mutual Indemnity Co. et al., 27 Ohio App. 208, 161 N. E. 232 (1927).

²⁶ Cameron v. Berger, *supra*.

²⁷ Bradford v. Commonwealth Casualty Co., 10 N. J. Misc. 301, 158 A. 840 (1932).

²⁸ Medico v. Employers' Liability Assurance Corp., 132 Me. 422, 172 A. 1 (1934).

INSURANCE — EFFECT OF ASSIGNMENT BY INSURED TO ONE HAVING NO INSURABLE INTEREST.—While the motives of a person applying for life insurance may be mixed and varied, it may safely be said that generally life insurance is obtained with the thought of securing to the beneficiary or beneficiaries a small portion of the benefits that otherwise would be lost upon the demise of the *cestui que vie*. Little consideration is given to the possibility of utilizing the life insurance policy as a pledge to secure loans or advances. But with the advent of unanticipated reverses and financial problems, the *cestui que vie* ordinarily seeks to utilize this feature of his policy — whether so authorized by the policy itself or by the law of the state wherein domiciled. Consequently, there have arisen cases wherein the validity of assignments of life insurance policies to persons having no insurable interest in the life of the *cestui que vie* has been the point in issue. And due to the fact that there have been applied mutually exclusive principles to cases of the same genus and specie, the case law on this subject is hopelessly confused. By sheer weight of numerical superiority of cases there has been established a majority view. But those jurisdictions espousing the theory of the minority have been especially vociferous in their condemnation of the decisions in these non-conformist states. The purpose of this paper will be to inquire into the rights of the assignee of a life insurance policy from the *cestui que vie* in those situations wherein the assignee has no insurable interest. And as a matter of no less import, it will be directed to an examination of the theory underlying the majority — minority holdings.

It may be stated as a general proposition that, "It is well settled in all jurisdictions . . . that an assignment of a life policy to a person without an insurable interest, which the insured makes in bad faith and merely in order to circumvent the law, under such circumstances as where there was a preconceived agreement that the policy was to be assigned, will not be upheld."¹ Thus an assignment of a life insurance policy contemporaneous with the issuance thereof has been deemed a wagering contract and voided.² And the assignment in such a case has been condemned on the same grounds as the obtaining of a policy, by one having no insurable interest, in his own name.³ The grounds for this unanimity of judicial opinion was indicated in the case of *McRae v. Warmack*,⁴ wherein the policy assignment was agreed upon before the issuance thereof. The court declared the same to be void not only because the transaction was in the nature of a gambling contract but because it was in contravention of public policy as creating an interest in the early death of the *cestui que vie* on the part of as-

1 29 American Jurisprudence Sec. 357, Insurance.

2 *Finnie v. Walker*, 257 Fed. 698 (1919).

3 *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924 (1882).

4 98 Ark. 52, 135 S. W. 807 (1911).

signee who had no corresponding interest in his life. In other words, it is mere speculation upon the continuance of the life of the *cestui que vie*.⁵

But however unanimous the holding in this respect, where there is expressly evidenced bad faith on the part of the assignee, our concern is with the transactions wherein the good faith of the parties to the assignment is uncontroverted. Representative of the chaos wherein the courts seemingly labor fruitlessly is the statement of an authoritative text on the subject: "While there has been much conflict in the authorities as to whether public policy is violated by the assignment of a life insurance policy to a person who has no insurable interest in the life of the insured, the prevailing view in most jurisdictions is that such an assignment, at least when made by the insured in good faith and without any intention that the assignment is simply to be used as a cover for a mere wager or gambling transaction, is not against public policy but is authorized. . . . The minority view . . . is that the assignment of a life policy by the insured to one having no insurable interest in his life is repugnant to public policy, apparently even in the absence of any bad faith or of intention to assign at the time of the issuance of the policy."⁶ To perceive the point of and the theory underlying this divergence of judicial opinion it is well to examine a few of the grounds upon which such transactions have either been upheld or avoided.

In support of the majority view, one court⁷ has overruled the necessity of an insurable interest in the assignee for the reason that without this right, the usefulness of life insurance is cut in half. However, in that case there was a provision in the policy itself allowing assignments. But even in the absence of any such provision, there have been numerous cases wherein the courts permitted such assignments on the grounds that there was no restriction in the policy, the by-laws of the insurer, or the state statutes wherein the transaction was effected, relative to the right of the *cestui que vie* to assign.⁸ The various reasons for denying the validity of such assignments have been discussed in detail in cases from those jurisdictions conforming to the majority rule. Thus insofar as the moral hazard is concerned it has been said: "A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums, and afterwards become unable to pay more, and, if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed or lost. To impair the value and utility of his policy, or require him

⁵ *Cisna v. Sheibley*, 88 Ill. App. 385 (1900).

⁶ 29 American Jurisprudence Sec. 357, Insurance.

⁷ *St. John v. American Mutual Life Ins. Co.*, 13 N. Y. 31 (1855).

⁸ *Keckley v. Coshoccon Glass Co.*, 86 Oh. St. 213, 99 N. E. 299 (1912).

to lose it, on the grounds that, if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling, is, as a matter of law, extremely fanciful and unsatisfactory.”⁹ And insofar as wagering is concerned, “It is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet upon his life, and repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy, as a matter of business, after it has once been duly issued under the sanction of the law and is therefore an existing chose in action or right of property which its owner may have the the best reasons for wishing to dispose of.”¹⁰

One of the chief arguments advanced by the minority is that of wagering upon human life. The Kansas court¹¹ in seeking to determine the intention of the insurer in issuing the policy concluded that it was beyond the purview of the transaction that the policy should belong to anyone interested in the insured’s death, rather than in his life, and therefore any assignment to a person without an insurable interest would be void. One outstanding case has formulated a test whereby the validity of all such assignments is determined: “Our court has placed the inhibition against such contracts on the higher and sounder ground that the public, independent of the consent or the concurrence of parties, has an interest that no inducement shall be offered to one man to take the life of another. Making this the test in every phase of such cases, there can be no inconsistency in our decisions, and the public good will be better guarded.”¹² The reason all such assignments to persons not having an insurable interest in the life of the *cestui que vie* have been declared void has been succinctly stated as being “the pecuniary interest which the holder has in procuring the death of the subject of insurance, thus opening a wide door by which a constant temptation is created to commit for profit the most atrocious of crimes.”¹³

Some states have sought to deviate the inconsistencies and discrepancies of the law on this point by specific statutory provisions. Thus California¹⁴ and Montana¹⁵ provide for assignments to persons irrespective of whether or not they have insurable interests. To the

⁹ *Murphy v. Red*, 64 Miss. 641, 1 So. 761, 762 (1887).

¹⁰ *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496 (1877).

¹¹ *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517 (1887).

¹² *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 275 (1894).

¹³ *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, 318 (1884).

¹⁴ *Curtiss v. Aetna Ins. Co.*, 90 Cal. 245, 27 Pac. 211 (1891).

¹⁵ *Capital Finance Corp. v. Metropolitan Life Ins. Co.*, 75 Mont. 460, 243 Pac. 1061 (1926).

same effect is Virginia,¹⁶ although there is a provision that there must be a valuable consideration for such an assignment to be effective.

As can be seen from the foregoing, the inconsistencies as regards the holdings in the majority — minority jurisdictions are not to be resolved by a recourse to the cases. The reasons either upholding the validity of such assignments or declaring the same to be void are in most respects one and the same. The problem is one of referring to the particular provisions of the policy, the by-laws of the insurer, and the law peculiar to the state wherein the assignment is sought to be made. It is a question of specific reference to the law of the jurisdiction involved and so no generalizations can be drawn from the decided cases rather than that the holding of the majority seems to be the one more conscionable and in accord with justice.

Robert E. Sullivan.

MARKETABLE TITLES.—In the early courts the title to land was either good or bad. If it was deemed bad then it could not be marketed until such time as the defect had been cleared or the statute of limitations had run and barred action on the defect. It was the old courts of equity that coined the phrase “marketable title” to designate a title. Thus a title might be bad, or it might be one with material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person and cause him to refuse to take the property at its full or fair value.¹

Clear title, good title, merchantable title, marketable title are somewhat synonymous: “clear title” meaning that the land is free from incumbrances, “good title” being the one free from litigations, palpable defects, and grave doubts, comprising both legal and equitable titles and fairly deducible of record.² However, an equitable title is a right in the party to whom it belongs to have the legal title transferred to him or the beneficial interest of one person whom equity regards as the real owner, although the legal title is vested in another.³ An imperfect title is one which requires a further exercise of the granting power to pass the fee in the land or one which does not convey full absolute dominion.⁴ A legal title is one which is cognizable or enforceable in a court of law, or is complete and perfect so far as regards the

¹⁶ *Crismond v. Jones*, 117 Va. 34, 83 S. E. 1045 (1915).

¹ *Eggers v. Busch*, 154 Ill. 604, 39 N. E. 619 (1895).

² *Ogg v. Herman*, 71 Mont. 10, 227 P. 476 (1924); *Sipe v. Greenfield*, 116 Okla. 241, 244 P. 424 (1926).

³ *Beringer et al. v. Lutz et al.*, 188 Pa. 364, 41 A. 643 (1893).

⁴ *Lambert v. Gant*.

apparent right of ownership and possession, but which carries no beneficial interest in the property. Thus it is possible for the beneficial interest to be in another.⁵ A presumptive title is of the lowest order. It arises out of the mere occupation or simple possession of property without any apparent right, or any pretense of right, to hold and continue such possession.⁶

The early rule and the rule today is that every purchaser is entitled to a marketable title; a title which so far as antecedents are concerned, may at all times and under all circumstances be forced upon an unwilling purchaser.⁷ The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace. Dean Pound has said, "Every title is in law and in fact, either good or bad and equity will not compel a purchaser to take a bad title." A title may be doubtful because of the absence of parties who may be in a position to maintain either contention.⁸ The doubt necessary to render a title unmarketable must be rational and not fanciful.⁹ Such doubts are not clearly outlined and thus courts may differ in their interpretation or construction of the facts and law involved in a particular situation. A title which is doubtful in one case may be forced upon a purchaser in another case.¹⁰ An individual can protect himself in the contract he makes for purchase of land by obtaining a warranty deed. Title insurance has come into existence as a means of affording protection to the parties involved in the sale of land. Again it is worthy to keep in mind that a mere suspicion against a title or speculative possibility that a defect may appear in the future does not render the title unmarketable.

The topic of marketable titles is one of interpretation of a definitive proposition to practical situations and the facts therein. Below are a few broad definitions and later are some examples of specific defects that will render titles unmarketable by most courts. In studying this subject one sees clearly the application of precedents laid down by the courts as a basis on which to advise clients.

A contract of sale of land requiring a conveyance by good and sufficient warranty deed, in fee simple, is satisfied by the giving of a good and marketable title which is a title not open to reasonable doubt; and such is a title by prescription, with irregularities in the title only prior to the commencement of the period of limitation; and an in-

⁵ Wheeler v. Ballard et al., 91 Kan. 354, 137 P. 789 (1914).

⁶ Black's Law Dictionary.

⁷ Lord Eldon, Eng. Reports, Vol. 32, P. 416, 8 Ves. 417 (1803).

⁸ Chesebro v. Moers, 233 N. Y. 75, 134 N. E. 842 (1922).

⁹ Barger v. Gery, 64 N. J. E. 263, 53 A. 483 (1902); Methodist Epis. Church v. Roberson, 68 N. J. E. 433, 58 A. 1056 (1904).

¹⁰ Fry, 6th Ed., Special Performance.

dubitable title is one open to no possible objections, however trivial.¹¹ Another court has held that a marketable title authorizing specific performance, is one free from reasonable objections to purchaser. An ancient breach in the record title to land cured by lapse of time and adverse possession and where the title is rendered valid and unimpeachable, will not defeat specific performance of a contract for sale of land with deed of general warranty, the title thus established constituting a good "marketable title," there being no contracts for covenants against such material defects or incumbrances.¹² A title that is not marketable is one in which the written instrument contains on its face some notice of something outside which may lead to some fact that may disturb the title; where the deeds, wills, or decrees give on their face some indication of some existing outstanding fact which will affect the title or where the title depends necessarily upon matter *in pais*, which is in itself a doubtful fact and never can be determined or established except by bringing every party interested into court. An instance of this is a will without a proper attestation clause, properly executed in fact, but not so appearing on its face and never offered for probate.¹³ A California court held that if the title is founded on a devise the will must have been admitted to probate in the state where the land is situated to render the title marketable.¹⁴ The courts in Oregon have defined marketable title as meaning a title appearing to be marketable by record of conveyances or other public memorial, as distinguished from titles resulting in parol.¹⁵

A title clouded by a trust deed by a stranger to the record title, but who is not shown to be in fact a stranger to the true title is not a marketable title.¹⁶ Where a serious question of fact might be decided in different ways by the courts and thus affect the title to land, such title would not be marketable.¹⁷ The title must be of such a character that it is freely made the subject of resale.¹⁸ Marketable title implies fee-simple to whole real estate, free from reservations and incumbrances. A tax deed fair upon its face is prima facie a marketable title which the vendee is bound to accept as such, unless specific objection is made.¹⁹ While Texas has held that any title that has developed through adverse possession is not marketable, there is a case in Indiana holding that there could be a marketable title in such cir-

11 *Close v. Martin*, 208 Mass. 236, 94 N. E. 388 (1911); *Attebery v. Blair*, 244 Ill. 363, 91 N. E. 475 (1910).

12 *Bowden v. Laing et al.*, 103 W. Va. 733, 138 S. E. 449 (1927).

13 *Rutherford Land & Improv. Co. v. Sanntrock*, 64 N. J. L. R. 148, 44 A. 938 (1899).

14 *Turner v. McDonald*, 76 Cal. 177, 18 P. 262 (1888).

15 *Winslow v. Gilstrap et al.*, 147 Ore. 374, 32 P. (2d) 767 (1934).

16 *Zimmerann v. Wilkson*, 35 N. M. 117, 290 P. 795 (1930).

17 *Street v. French et al.*, 147 Ill. 342, 35 N. E. 814 (1893).

18 *Trimboli et al v. Kinkel*, 226 N. Y. 147, 123 N. E. 205 (1919).

19 *Gates v. Parmly et al.*, 93 Wis. 294, 66 N. W. 253 (1896).

cumstances if all the requisites of adverse possession had been fulfilled and could be shown.²⁰ Unless there is a substantial identity between the name of grantor in any particular conveyance and the record owner at the time as will create a presumption of identity of persons, the title is not marketable.²¹ Where the name of a grantee in a deed in the chain of title is not the same or *idem sonans* with that in which he purports to convey the land, it is an apparent defect in the title, rendering it unmarketable.²² The more liberal rule and possibly the best from a practical viewpoint is when these names are *idem sonans*, and his identity is clearly proved by oral evidence, this will remove the apparent defect and render it (title) marketable.²³ There is a conflict among the cases as to whether an opinion of counsel is strong enough basis for a person to refuse performance because of an unmarketable title. In Minnesota one may rely on an attorney's opinion that there is some defect making a title unmarketable.²⁴ Iowa courts have held just the opposite.²⁵ There has been no adjudication of this point in many states. When the record indicates a clear case of estoppel it would appear that the matter should be considered an estoppel of record and thus a title needing such support would be marketable.²⁶ Where the records pertaining to lands have been destroyed by fire or otherwise one must wait until proper procedure and steps by the legislature have been taken to re-record the original instruments. During this time the titles of the lands in the area might not be marketable unless all original instruments were on hand along with affidavits to the effect that there were no outstanding encumbrances on the property.

A title based on judicial proceedings (quieting title action) is marketable if the proceedings were regular and all parties in interest were parties thereto. Where there was no administration of an estate and the property was received through heirship the title is still marketable, if it is shown there were no debts of the deceased which might result in levying on the land for satisfaction thereof.

Foreclosure proceedings, title by descent, devise or sale in the course of administration, pending litigation, defects in prior conveyance, and encumbrances and charges are outstanding possible sources of defects rendering the title of land unmarketable. Restrictive covenants in deeds which have been disregarded for long periods of time and the actions on them barred by the statute of limitation do not make titles

²⁰ Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355 (1893).

²¹ Knotts v. Tuxbury, 69 Ind. App. 248, 117 N. E. 282 (1917).

²² Peckham v. Stewart, 31 P. 928, 97 Cal. 147 (1893).

²³ Attebery v. Blair, 244 Ill. 363, 91 N. E. 475 (1910).

²⁴ Leining v. Clarke Nat. Bank, 97 Minn. 385, 107 N. W. 397 (1906).

²⁵ Buchan v. German American Land Co., 180 Iowa 911, 164 N. W. 119 (1917).

²⁶ Swofford Bros. Dry Goods Co. v. Owen et al., 37 Okla. 616, 133 P. 193 (1913).