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## CONTRIBUTORS TO THE MAY ISSUE

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## NOTES

AIRCRAFT — PRIORITY OF FEDERAL LIEN ON AIRPLANE FOR FORFEITURE OVER MORTGAGEE'S LIEN. — The recent growth and development of the aircraft industry and its direct consequence, the growth of private flying has opened many new and interesting fields in the law regarding aircraft ownership and operation. Financing of light airplanes is becoming a prevalent practice in the banks throughout the country. The legal status of the mortgagee in regards to other liens, especially those enforced by the Civil Aeronautics Authority for forfeitures arising out of infractions of rules and regulations upon the owner of the particular airplane is the point in question.

The body of law governing the operation of aircraft is found in the Civil Aeronautics Act of 1938.<sup>1</sup> This act was passed to supersede the Air Commerce Act of 1926<sup>2</sup> and embodies practically the same law as

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<sup>1</sup> U. S. C. A. Title 49, § 401.

<sup>2</sup> U. S. C. A. Title 49, § 171.

the former act only in a much broader scope. The administration of the act is placed in the hands of the Civil Aeronautics Authority upon whom rests the duty of passing such rules and regulations and the enforcement of said rules to promulgate safe operation of aircraft.<sup>3</sup> Violation of the rules carries with it a civil penalty in the form of fines ranging up to \$1,000 for each such violation. It is in the enforcement of these penalties that the question of priority of liens arises.

Subchapter 1, section 26 of the Civil Aeronautics Act provides that: "Operation of aircraft or operate aircraft means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee or otherwise) of the aircraft, shall be deemed to be engaging in the operation of aircraft within the meaning of this chapter."<sup>4</sup> This provision specifically includes the bailor for hire of an airplane as the operator even though at the time of the violation he is not in command of the aircraft, or has knowledge of the violation.

Subchapter IX, section 621 of the Civil Aeronautics Act provides that: "(a) Any person who violates (1) any provision of subchapters V, VI, VII, of this chapter on any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft such aircraft shall be subject to lien for the penalty: Provided that this subsection shall not apply to a violation of a rule or regulation of the Postmaster General."<sup>5</sup>

Subchapter IX, section 623 of the Civil Aeronautics Act, reads: "(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings *in personam* against the person subject to the penalty and, in case the penalty is a lien by proceedings *in rem* against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact if the value in controversy exceeds \$20. . . ."

"(2) Any aircraft subject to such lien may be summarily seized and placed in the custody of such persons as the authority may prescribe. . . ."

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<sup>3</sup> U. S. C. A. Title 49, § 421.

<sup>4</sup> U. S. C. A. Title 49, § 401 (26).

<sup>5</sup> U. S. C. A. Title 49, § 621.

"(3) The aircraft shall be released from such custody upon payment of the penalty . . . or seizure in pursuance of process of any court in proceedings *in rem* for enforcement of the lien."<sup>6</sup>

The question of priority of the lien rests upon the fact of who is considered the offender under the statute, the operator or the aircraft itself. Only two cases have reached the Federal Courts on this subject. They were brought up under the Air Commerce Act<sup>7</sup> and involved violation of custom laws. However, they are directly in point by virtue of the similarity of the wording of the Civil Aeronautics Act.

*United States v. Hunter*,<sup>8</sup> allowed the intervener mortgagee to recover on the theory the operator and not the aircraft was guilty of the violation. The court held that the proceeds of the sale of a monoplane sought to be forfeited for violation of regulations applying to customs laws was properly awarded to the holder of a purchase money mortgage thereon, where the person in charge of the aircraft incurred personal penalties, when the plane itself was not subject to forfeiture. It should be noticed that this decision is under the 1936 Act, and that the 1938 act clearly states the aircraft in any violation is subject to forfeiture.

This decision clearly indicates that by interpreting the statute now in effect the mortgagee's lien is secondary to that of the government in enforcing the penalty.

In *United States v. Batre*,<sup>9</sup> the court held the airplane, not the person, may properly be considered the offender under the statute requiring airplanes crossing international boundaries to land at a designated place. The lien of the United States on an aeroplane for the civil penalty prescribed by the Air Commerce Act for the violation of Treasury air customs and health regulations thereunder, by the owner of the plane in flying from Mexico into the United States without notice to the collector of customs, and in not making his first landing at an airport of entry, is paramount to the prior lien of the holder of a chattel mortgage upon the plane, although he had no notice or knowledge that the plane was used or intended to be used in violation of the law. The mortgagee permitted the plane to remain in the possession of the owner without restriction upon its use, and, having left it within the power of the owner to violate the law, could not complain; and that, had Congress desired an exemption from penalty under the act violated to apply to an innocent third party, it would have been so stated, as had been done in other enactments. Furthermore, the mortgage was executed after the passage of the Air Commerce Act,

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<sup>6</sup> U. S. C. A. Title 49, § 623.

<sup>7</sup> U. S. C. A. Title 49, § 171.

<sup>8</sup> 80 F. 2d 968 (1936).

<sup>9</sup> 69 F. 2d 673 (1934).

which became part of the mortgage. It is apparent then, that under the Civil Aeronautics Act the innocent mortgagee has no exemption from penalties under the act, committed by the mortgagor or someone permitted by the mortgagor to operate the aircraft.

AMERICAN JURISPRUDENCE,<sup>10</sup> "The lien of the United States on an airplane for the civil penalty prescribed by the Air Commerce Act for the violation of Treasury air customs and health regulations thereunder by the owner of the plane is paramount to the prior lien of the holder of a chattel mortgage upon the plane, although he had no notice or knowledge that the plane was used or intended to be used in violation of law."

How the mortgagee is to protect himself against such a lien is problematical. In computing the average worth of a lightplane and the probable extent of the penalty lien imposed, it is more than likely the mortgagee would have very little to redeem. This problem will likely become very acute with further development of the government training of pilots under the Civil Aeronautics Authority, Civil Aeronautics Board and various other programs to train civilian aviators. Practically all the aircraft used in this purpose is either financed by the factory sales corporation or the local banks. There insurance covers only damages to the aircraft itself and they are in no way protected from forfeiture in case of a violation of rules and regulations set up by the Civil Aeronautics Authority.

T. W. Cain.

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CONTRACTS — THIRD PARTY BENEFICIARIES IN MICHIGAN. — According to the old common law third party beneficiaries could not bring suits in their own name either at law or in equity. The reason for this was that there was no privity of contract between the beneficiary and the promisee. England has very strictly adhered to this rule but a recent decision in that country, *Les Affreteurs v. Walford*,<sup>1</sup> was to the contrary. In the United States, during the early years of its formation, all of the states followed the English Doctrine dogmatically. The departure from the common law first occurred in Massachusetts and was later adopted in New York when that state decided the case of *Lawrence v. Fox*.<sup>2</sup> This case has become the leading one on this question in the United States and has been followed by all but two or three states.<sup>3</sup>

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<sup>10</sup> Volume 6, Aviation § 42.

<sup>1</sup> (1919) A. C. 801.

<sup>2</sup> 20 N. Y. 268 (1859).

<sup>3</sup> WILLISTON ON CONTRACTS, (Rev. Ed.) chap. 14, page 1029.

One of the states which had failed to follow this Doctrine until very recently, was Michigan. It was once a settled principle in this state that a third party could not become entitled under the contract itself to demand performance of any duty thereunder and that he could not maintain an action on the contract, although it was entered into for his benefit.<sup>4</sup>

Students of Michigan Law and others vitally interested in this problem contended for a relaxation of the English rule in this state. In 1919 the case of *Preston v. Preston*<sup>5</sup> came to the Michigan Supreme Court, wherein a husband and wife agreed to make a transfer of certain property for the benefit of an invalid daughter. It was held, (two justices dissenting) that under 3 MICHIGAN COMPILED LAWS 1915 Section 12361, which provides among other things that, "in all equitable actions all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiff," — the daughter could maintain an equitable proceeding against her father to enforce the contract although she was not a party thereto.

This decision certainly tended to show that the Michigan Courts were beginning to relax their adherence to the English rule and adopt the dominant opinion of the other states, at least insofar as equity proceedings were involved. The full import of the desire of the courts to change the ruling is fully appreciated when it is noted that the court grasped at an act which had been adopted as a procedural and not a substantive relief.

On a rehearing of the case,<sup>6</sup> however, the court, although obtaining the same result, did so on other grounds. The opinion stated that doubt existed in the minds of some of the judges as to the applicability of the Judicature Act, and as a result the question was left undecided.

The oft-cited case, *Knights of the Modern Maccabees v. Sharp*,<sup>7</sup> laid down the rule that a third party beneficiary can not become entitled by a contract made by others for his benefit, to demand performance of any duty under such agreement, except as to provisions in marriage settlements creating trusts for the benefit of the children of the marriage, and this rule was deemed to be the same at equity as at law. The Court said, in the opinion, "It is the general rule in England that a third person can't become entitled by a contract made by others for his benefit, to demand performance of any duty under

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<sup>4</sup> *Mitts v. McMorran*, 64 Mich. 664, 31 N. W. 521 (1887), *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. 172 (1891), *Linneman v. Morros*, 98 Mich. 178, 57 N. W. 103 (1893), *Ebel v. Piehl*, 134 Mich. 64, 95 N. W. 1004 (1903), *Edwards v. Thoman*, 187 Mich. 361, 153 N. W. 806 (1915), *Bator v. Ford Motor Co.*, 269 Mich. 648, 257 N. W. 906 (1934).

<sup>5</sup> 207 Mich. 681, 175 N. W. 266 (1919).

<sup>6</sup> 207 Mich. 681, 175 N. W. 266 (1919).

<sup>7</sup> 163 Mich. 449, 128 N. W. 786 (1910).

the contract. In this state the English rule has been followed when the attempted enforcement of the contract by a third person was at law."

In spite of this opinion of the court exceptions to this doctrine soon found their way into the decisions of the state. One of these exceptions, *Clark Memorial Association v. Colman's Estate*,<sup>8</sup> stated that they were basing their decision on the established exception as set down in *Preston v. Preston, supra*. In this case an association, through one of its directors, promised to increase its subscription to a building fund in consideration of a donation of a like amount by another, also present. It was held that the promisee was not a stranger to the consideration furnished by the latter, but a party to the contract, and hence entitled to recover thereon from the promisor's estate.

Another case in this list of exceptions is *Basset v. American Baptist Publication Society*.<sup>9</sup> This case was a bill in equity for specific performance whereby the promisor took a seven year old boy as her own upon agreement to give the boy her property at her death. The court decided that it was specifically enforceable in the boy's action since he was consulted and gave his consent thereto.

Subsequently, however, *Knights of the Modern Maccabees v. Sharp, supra*, was overruled specifically in the case of *Smith v. Thompson*.<sup>10</sup> In this case an agreement by a husband and wife wherein the survivor was to receive the other's entire estate and then provide for certain designated relatives was held enforceable by the relatives, although they were not a party to the contract. The court closed the opinion with a quotation from BRONTLEY ON CONTRACTS,<sup>11</sup> "The establishment of this doctrine has been gradual and is a victory of practical utility over theory; of equity over technical subtlety." Whether the intention of the court in handing down this decision was to overthrow the pre-existing rule in Michigan as regarding donee beneficiary cases in general or whether it was merely to serve as an example for that particular type of case cannot be definitely known. The author of an annotation in an AMERICAN LAW REPORT,<sup>12</sup> however, expressed the opinion that this case definitely decided that a beneficiary may sue on a contract made expressly for his benefit, when he brings that suit in a court of equity.

The case of *Peoples Savings Bank v. Geisert*<sup>13</sup> does not settle the issue. The opinion of Judge Potter contains a reaffirmance of the English rule as laid down in *Knights of the Modern Maccabees v. Sharp*,

<sup>8</sup> 222 Mich. 599, 193 N. W. 219 (1923).

<sup>9</sup> 215 Mich. 126, 183 N. W. 747 (1921).

<sup>10</sup> 250 Mich. 302, 230 N. W. 156, 73 A. L. R. 1389 (1930).

<sup>11</sup> 2d Ed., p. 253.

<sup>12</sup> 73 A. L. R. 1389 (1930).

<sup>13</sup> 253 Mich. 694, 235 N. W. 888 (1931).

*supra*, insofar as that ruling extends to law. The other judges, although concurring in the result, reach their decisions on other grounds and do not touch this problem.

In 1937, however, with the courts obviously tending toward the adoption of the rulings in most of the states, the State Legislature passed the now-famous Act No. 296, PUBLIC ACTS 1937, which permitted third party beneficiaries to sue as promisees. The courts, as has been seen, had been attempting to discover a reason for outlawing the English Doctrine. Lawyers and students of the law were in constant agitation for such a move and public policy was beginning to demand it. The serious question then presented to all was as to how the courts would construe such a law.

The answer to this question is partially, at least, given in a review of the following two cases.

Formerly the vendor could not successfully institute a suit at law against the vendee's assignee who assumed and agreed to pay, since there was no privity of contract between the vendor and the vendee's assignee.<sup>14</sup> The vendor, if he attempted in equity to seek redress, could procure a deficiency decree against the assignee on foreclosure of the contract.<sup>15</sup> Therefore, when the first case containing this problem came before the court, all those who had been in agitation for legislative action anxiously awaited the decision of *Lutz v. Dutner*.<sup>16</sup> They were amply rewarded when the court specifically stated that the ruling as to third party beneficiaries was completely changed by Act No. 296, *supra*.

A mortgage beneficiary has always been able to receive relief in equity against the grantee of mortgaged property, but not on the theory of third party beneficiaries.<sup>17</sup> However, since the passage of the statute in 1937 which provided such relief to the mortgage beneficiary and since the court in the case of *Guardian Depositor's Corporation of Detroit v. Brown*,<sup>18</sup> showed that the courts were going to construe the statute in the way most favorable to the beneficiary, there seems small likelihood as to the future position of Michigan on this issue. In allowing the mortgage beneficiary to sue the assuming grantee at law for deficiency after foreclosure, the court said, "The case of *Smith v. Thompson (supra)* went far towards bringing our law into accord with the almost unanimous view elsewhere and this act removes all question."

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<sup>14</sup> *Tapert v. Schultz*, 252 Mich. 39, 232 N. W. 701 (1930), *Fender v. Feighner*, 265 Mich. 536, 251 N. W. 536 (1933).

<sup>15</sup> *VanDellen v. Castetter*, 265 Mich. 700, 253 N. W. 191 (1934), *Barnard v. Huff*, 252 Mich. 258, 233 N. W. 213 (1930).

<sup>16</sup> 286 Mich. 467, 282 N. W. 431 (1938).

<sup>17</sup> *Anderson v. Thompson*, 225 Mich. 155, 195 N. W. 689 (1923), *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849 (1904).

<sup>18</sup> 287 N. W. 798 (1939).



The two cases above studied, are the only ones which have been decided since the passage of the act. For this reason it is impossible to foretell, with any degree of accuracy, what the results will be in future cases. Whatever interpretation the courts give to future developments along this line will be interesting and whatever that interpretation might be, the fact remains that Michigan will be another state which has overthrown the doctrine of its Anglican Father.

*A. E. Kerger.*

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**COPYRIGHT LAW — AUTHOR: WRITING: PROMOTING THE PROGRESS OF SCIENCE AND THE USEFUL ARTS.** — The evolution of Copyright law through the medium of legislative enactment from 1790 to the present times can best be understood by making a cursory study of the Copyright acts that Congress has enacted.

The original Copyright Act of May 31, 1790, c. 18, 1 Stat. 124, provided for a term of fourteen years from date of recording title of work to be copyrighted in the clerk's office of the district court. A renewal for a period of fourteen years was secured by this act to the author or authors living at the expiration of the first term of their executors, administrators or assigns. The author or authors securing renewal as aforesaid must be "a citizen of these United States, or resident therein."

By Act of February 3, 1831, c. 16, 4 Stat. 436, which was in the nature of a revision of the laws relating to copyright, the original term for which copyright was secured was extended to twenty-eight years. Term of renewal remained at fourteen years. The privilege of renewal under the act, was granted to the author, or if dead, then to his widow or children.

Act of June 18, 1874, c. 301, Sec. 1, 18 Stat. 78, pertained to notice of entry of copyright and prescribed forms thereof in lieu of forms previously required under R. S. Sec. 4962.

Act August 1, 1882, c. 366, 22 Stat. 181, provided that manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal, subject to copywright, might put the copyright mark prescribed by R. S. Sec. 4962, upon the back or bottom of such articles, etc.

Act March 3, 1891, c. 565, Sec. 11, 26 Stat. 1109, provided that each volume of a book in two or more volumes, when such volumes were published separately, and each number of a periodical, should be considered an independent publication.

Act March 3, 1891, c. 565, Sec. 13, 26 Stat. 1110, related to copyright by citizens or subjects of foreign countries. By this act the privilege and protection of the copyright laws of the United States were, for the first time, extended to include aliens within certain limitations.

Act March 3, 1893, c. 215, 27 Stat. 743, provided that any author, etc. who had failed to deliver to the Librarian of Congress the copies, etc. required within the time limit prescribed might deliver such copies, etc., before March 1, 1893, and thereby become entitled to his copyright, etc.

Other provisions of Act March 3, 1891 together with the following acts: Act March 2, 1895, c. 194, 28 Stat. 956; Act January 6, 1897, c. 4, 29 Stat. 481; March 3, 1897, c. 392, 29 Stat. 694; March 3, 1905, c. 1432, 33 Stat. 1000, have amended various Revised Statutes pertaining to Copyright.

The enactment of the Act of March 4, 1909 superseded all previous legislation on copyrights. Section 4 of that act provides that "the works for which copyright may be secured under this act shall include all the writings of an author."

The Copyright Law of 1909 had for its purpose the bringing together of all the statutes applicable to the subject of copyright and in many instances the enlarging of the protection secured by copyright, particularly by protecting the works of authors and composers which have heretofore been regarded as sufficiently protected.<sup>1</sup> This is a sweeping departure from the narrow confines of earlier statutes, which, by a listing and enumeration of specific things that might be copyrighted, thereby endangered a liberal construction.

Copyright property under the Federal law is wholly statutory and depends upon the right created under the Acts of Congress passed in pursuance of the authority conferred under Article 1, Section 8 of the Federal Constitution. "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."<sup>2</sup> Copyright protection, therefore, extends to all the writings of an author that promote the progress of the useful arts as well as science.

This brings us to the consideration of the following three questions: I. Who is an Author? II. What is a Writing? III. What Does and Will Promote the Progress of Science and the Useful Arts?

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<sup>1</sup> Witmark & Sons v. Standard Music Roll Co., 221 F. 376, 137 C. C. A. 184 (N. J. 1915).

<sup>2</sup> American Tobacco Co. v. Weickmeister, 207 U. S. 284, Sup. Ct. 72, 52 L. Ed. (N. Y. 1907); Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425 (Ohio, 1888).

## WHO IS AN AUTHOR?

An author, is the person who actually represents, creates or gives effect to the idea, fancy or imagination. He is one who, by his own intellect, applied to the materials of his composition, produces an arrangement or compilation which is new in itself.<sup>3</sup> In *Burrow-Giles Lithographic Company v. Sarony*,<sup>4</sup> Mr. Justice Field defined an author as: "He to whom anything owes its origin; originator, maker, one who completes a work of science or literature. The author in photography is the man who, really represents, creates or gives effect to the fancy or imagination." So the case properly held that one being a photographer who selected and arranged the costumes, draperies and other various accessories in the said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression from the subject, was the author, inventor and designer of an original work of art.<sup>4</sup>

Proceeding from this point we see that the author is the designer and creator of the work in question, always keeping in mind, however, that the copyright covers not the subject matter but the personal reaction of the individual as brought about by the creator — the intellectual work bestowed upon the matter in hand.<sup>5</sup> So in the *Bleistein* case, it was not a poster or circus advertisement portraying a ballet number of persons performing on bicycles and groups of men and women whitened to represent statues which was protected by copyright, but the poster as depicted and portrayed by the employees of *Bleistein*.

The landmark case of *Nottage v. Jackson*<sup>6</sup> involved the question whether the plaintiffs who were the owners of a photographic company in London were the authors of certain photographs. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the entire team in a group. In accordance with this agreement they sent one of their artists to Australia. The team was photographed as per plan. Now there is a dispute as to whether the plaintiffs who owned the London establishment, where the photographs were made from the negatives taken by one of their men, were the authors, or the man who for their benefit took the negatives. The court held that the latter was the author and the action failed because the plaintiffs had described themselves as authors. The opinions of three justices in that case are worthy of note. Lord Justice Cotton said: "Author involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it is a drawing, or a painting or a photograph." Lord Justice Bowen stated

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<sup>3</sup> *Atwell v. Ferrett*, 2 Blatchf. 39; *Pierpont v. Fowle*, 2 Wood. & M. 23; *Gray v. Russell*, 1 Story 11; *Emerson v. Davies*, 3 Story 768.

<sup>4</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (1884).

<sup>5</sup> *Bleistein v. Donaldson Lithographic Co.*, 188 U. S. 239 (1903).

<sup>6</sup> *Nottage v. Jackson*, 11 Q. B. D. 627.

that, "Photography is to be treated for the purposes of the act as an art, and the author is the man who really represents or gives effect to ideas or fancies." Lord Justice Brett remarked: "It is the person who effectively is as near as he can be the cause of the picture which is produced, who is the author; that is the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position and arranging the place where the people are to be — the man who is the effective cause of that."

Generally, authorship implies that there has been put into the production, something meritorious from the author's own mind.<sup>7</sup>

Mr. Justice Holmes gives this enlightening view on the subject: "Even if actual groups had been drawn from life, that fact would not deprive them of (copyright) protection. The opposite proposition would mean that a portrait by Whistler or Velasquez was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright."<sup>8</sup>

Just what constitutes an intellectual work drawn from common material raises questions which demand answers based on a nicety of finding. In *Walter v. Lane*<sup>9</sup> the court held that where a stenographic report of speeches by Lord Rosebery was pirated, the shorthand reporter who took down and later transcribed the speeches was the author of the transcript because that was his work.

Justice Pitney in *International News Service v. Associated Press*<sup>10</sup> stated that: "Information respecting current events contained in the literary production is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be first to report a historic event the exclusive right for any period to spread the knowledge of it."

A translator of a dramatic piece from a foreign language into English is an author within the meaning of a statute (3 & 4 William IV. Chap. 15) giving protection as to performing rights to the "author of a dramatic piece" and is entitled to the sole rights of performance of the play as translated by him.<sup>11</sup>

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<sup>7</sup> *National Tel. v. Western Union*, 119 F. 294 (1902).

<sup>8</sup> *Bleistein v. Donaldson Lithographic Co.*, *supra*.

<sup>9</sup> *Walter v. Lane*, A. C., 539; 83 L. T. (N. S.) 289 (1900).

<sup>10</sup> *International News Service v. Associated Press*, 248 U. S. 211 (1918).

<sup>11</sup> *Pollock v. Williamson*, 13 Brit Rul. Case 542 (1923).

Generally speaking, one who employs another to perform literary or artistic work is not deemed to be the "author" of what is produced by the employee. Under some circumstances, however, the employer may acquire, by virtue of the contract, the rights of a prospective "proprietor" of the work to be produced and become in this capacity entitled to the protection of the Copyright acts. This situation is predicable whenever it is a reasonable inference that the parties intended that the ownership of the work was to vest in the employer as it should come into existence. Their intention in this regard may be established by express evidence bearing directly upon the point.<sup>12</sup>

Labor bestowed upon the productions of others, if no rights are thereby invaded, will often constitute a valid claim to authorship, the test in such cases being applied to that which represents the claimant's own labor, thought, and skill.<sup>13</sup> The reporter of law reports is entitled (in the absence of expressed legislation to the contrary) to a copyright in his volumes for what is the result of his own labor and research — tables of cases, headnotes, footnotes, etc., even though he can have no copyright in the opinions themselves, including everything which is the work of the judges.<sup>14</sup> However, the mere arrangement of reported cases in a sequence and their paging and distribution into volumes are not features of such importance as to entitle the author to a copyright.<sup>15</sup>

#### WHAT IS A WRITING?

"Congress," said Mr. Justice Miller, "very properly has declared that a writing includes all forms of writing, printing, engraving, etching, etc. by which the ideas in the mind of the author are given visible expression." This statement was made in the basically important case of *Burrow-Giles Lithographic Co. v. Sarony*<sup>16</sup> where the validity of the copyright of one of Oscar Wilde's photographs by Sarony was upheld. The defense claimed that since photographs were not mentioned specifically in the copyright act of 1874 they were not such subject matter as could come under the protection of the Act. The court then reiterated the history of the copyright law prior to 1874, showed that maps and charts as well as books were subjects for copyright and since photographs could not be distinguished from charts, cuts, engravings, maps, and designs, then they came within the protection of the copy-

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<sup>12</sup> *Trade Auxiliary Co. v. Middlesborough & D. Tradesmen's Protection Association*, L. R. 40 Ch. Div. 425; *Lawrence v. Dana*, 4 Cliff. 1, Fed. Case No. 3136 (1869); *Mallory v. Mackaye*, 86 F. 122 (1898).

<sup>13</sup> 4 VIRGINIA LAW REVIEW 386.

<sup>14</sup> *West Publishing Co. v. Lawyers Cooperative Publishing Co.*, 79 F. 756 (1897).

<sup>15</sup> *Banks Law Publishing Co. v. Lawyers Cooperative Publishing Co.*, 169 F. 386 (1909).

<sup>16</sup> *Burrow-Giles Lithographic Co. v. Sarony*, *supra*.

right law. "We entertain no doubt that the Constitution is broad enough to cover an Act authorizing the copyright of photographs, so far as they are representations of original intellectual conceptions of the author." The findings and views in this case may be looked upon as the forerunners of the more liberal Copyright Act of 1909. As future events are said to cast their shadows, beforehand, so the same can be said for the *Sarony* case and for what it stands.

On the authority of the *Sarony* case the courts have held that writings include maps and charts, designs, etchings, cuts, prints,<sup>17</sup> photographs,<sup>18</sup> motion picture films,<sup>19</sup> and lithographs.<sup>20</sup>

Little by little, copyright has been extended to the literature of commerce so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, directories, and other similar works. Nothing, it would seem, evincing in its makeup that there has been beneath it, in some substantial way, the mind of a creator or originator, is now excluded.<sup>21</sup>

The object of copyright is to promote science and the useful arts. If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright could narrow the field of thought that is open for development and exploitation to such an extent that science, poetry, narrative and dramatic fiction, and other branches of literature would be hindered by copyright rather than being promoted. A poem consists of words, expressing conceptions of words, or lines of thought; but copyright in the poem gives no monopoly in the separate words, or in the ideas, conceptions or facts expressed or described by the words. A copyright extends only to the arrangement of the words. A copyright does not give a monopoly in any incident in a play. Other authors have a right to exploit the facts, experiences, field of thought and general ideas provided they do not substantially copy a concrete form in which the circumstances and ideas have been developed, arranged, and put into shape.<sup>22</sup>

The fundamental principle upon which the law proceeds as to what may be the subject of copyright is that copyright exists in the expression and not the matter, in the form and not the substance. Ideas, methods, opinions, and the like are not protected, only their expression

<sup>17</sup> *Ibid.*

<sup>18</sup> *Nottage v. Jackson, supra*; *Falk v. Brett Lithographing Co.*, 48 F. 678 (1891); *Fulk v. City Item Printing Co.*, 79 F. 321 (1897).

<sup>19</sup> *American Nutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262 (1905).

<sup>20</sup> *Bleistein v. Donaldson Lithographic Co., supra.*

<sup>21</sup> *National Telegraph News Co. v. Western Union Co.*, 119 F. 294 (1902).

<sup>22</sup> *Holmes v. Hurst*, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904 (1899).

in literary or other works.<sup>23</sup> It is not the contents of a literary or dramatic composition which is protected by copyright, but the form and sequence, the incidental, yet, essential adornment and trimmings. It is not the subject but its treatment that is protected.<sup>24</sup> An idea incorporated in a mechanical device or process is protected by the patent laws. An idea contained in a copyrighted work is protected as to the means of its expression. Ideas in the abstract, however, have consistently been denied the status of a property right, regardless of their originality.<sup>25</sup>

A method of advertising as by displaying merchandise in a certain way, e. g. "a specimen of Morris' tinted zinc paints. Card of outside colors," is not protected under the copyright law.<sup>26</sup> So too, manufacturers of unpatented articles cannot practically monopolize their sale by copyrighting a catalogue containing illustrations of them.<sup>27</sup>

There is a clear distinction between a book as such, and the article which it is intended to illustrate. The object of the one is illustration; of the other, it is the use thereof. The former may be secured by copyright, the latter by patent.<sup>28</sup>

A book, embodying the pictorial illustration of the horse, "Sparky," was held copyrightable. The artist's concept of humor was embodied in the copyrightable form, was addressed to the contemplation of the observer and the reader; its essence was the concept of humor embodied within that form,<sup>29</sup> and its object was the production of humor.

There can be no doubt that a work on the subject of book-keeping, though it only explains well known systems, may be the subject of a copyright when claimed only as a book. Such a book may be explanatory, either of old systems or of an entirely new system; and considered as a book, as the work of an author conveying information on the subject of book-keeping and containing explanations of the art; it may be a very valuable acquisition to the practical knowledge of the community. However, blank account books are not subject to copyright.<sup>30</sup>

It would be difficult to define comprehensively what character of writing is copyrightable and what is not. It may be said to end where authorship proper ends and more annals begin. If a catalogue has in its makeup some peculiar mental endowment, there may be authorship

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<sup>23</sup> Deeks v. Wells, 1 D. L. R. 353 (1933); Commercial Signs v. General Motors Products, 2 D. L. R. 310 (1937). See also Fortnightly, L. J. 8, 312 (1938).

<sup>24</sup> Rush v. Oursler, 39 F. 2d 468 (1930); Roe-Lawton v. Hal Roach Studios, 18 F. 2d 126 (1927).

<sup>25</sup> 72 U. S. L. Rev. 439.

<sup>26</sup> Ehret v. Pierce, 10 F. 553 (1880).

<sup>27</sup> National Cloak Co. v. Standard Mail Order Co., 191 F. 528 (1911).

<sup>28</sup> Baker v. Seldon, 101 U. S. 99, 25 L. Ed. 841 (1880).

<sup>29</sup> King Features v. Fleischer, 299 F. 533 (1924).

<sup>30</sup> Baker v. Seldon, *supra*.

within the copyright law. Mere notations of horse-race results cannot be said to bear an individualistic touch. They fail to reach the plane of authorship. In a work of simple notation, "The mind is guide only to the fingers that make the notations." In authorship the product has some likeness to the mind beneath it. "One is a product of originality; the other is a product of opportunity."<sup>31</sup>

In *Burke v. Johnson*<sup>32</sup> it was held that the copyright of a pamphlet containing articles of association and by-laws of a mutual burial association did not protect the system, considered merely as a system so as to confer on the person owning the copyright or his transferees the exclusive right to organize associations under the plan described.

The question in *Griggs v. Perrin*<sup>33</sup> was whether the copyright of a book describing a new system of shorthand protected the system apart from the language by which it is explained. Judge Coxe there stated that: "A party may invent a new machine and write a book describing it for which he may secure a copyright. This does not prevent another author from describing the same machine. He may not copy the copyrighted book, but he may write one of his own. So with a process, a system or an art, the fact that one person has described and obtained a copyright for his description does not prevent others from describing the same art, etc., in their own language. The copyrighted book is sacred, but not the subject of which it treats."

In a case that is very frequently cited, the plaintiff was the deviser of a scheme or system of advertising which would be very beneficial to insurance companies. He notified the defendant of this system as an inducement to receive employment with the defendant company. The defendant appropriated the system but did not employ the plaintiff. The plaintiff sued for conversion of his property. The court held that the plaintiff did not state a good cause of action.<sup>34</sup>

In *Burnell v. Chown*<sup>35</sup> the complainant devised a system of collecting, classifying, and publishing credit ratings with a key of his own design. The defendant used the same system but in a territory that was different from the one covered by the plaintiff's publication. In rendering the decision in the case, Judge Ricks stated: "The most that can be said for the plaintiffs is that the defendant has appropriated their scheme, devise, conception, and idea for gathering and imparting this particular information." Admitting that they have gathered this information and seek to impart it upon the same plan which the plaintiff has conceived and originated, that conception is not a matter which can be protected either by the copyright law or the common law.

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<sup>31</sup> National Telegraph News Co. v. Western U. Tel. Co., *supra*.

<sup>32</sup> *Burke v. Johnson*, 146 F. 209 (1906).

<sup>33</sup> *Griggs v. Perrin*, 49 F. 15 (1892).

<sup>34</sup> *Bristol v. Equitable Life Ass'n*, 5 N. Y. S. 131, 30 N. E. 506 (1869).

<sup>35</sup> *Burnell v. Chown*, 69 F. 993 (1895).



The rule at common law is the same in this respect. In the absence of special circumstances showing a breach of contract, express or implied, or fraud, a person, whose ideas or schemes, separately and distinct from his unpublished manuscript, are used or appropriated by another person, has no redress.

A bi-transit railway system was the subject of alleged infringement in a New York case.<sup>36</sup> It explained with painstaking elaboration and minuteness the difficulties encountered in providing rapid transit in large cities and the remedies proposed by the patentee for overcoming these difficulties. Plaintiff sued defendant for infringement on his copyrighted system. The defendant, by demurrer, states that the patent upon its face discloses an entire lack of novelty entitled to protection and that the claims are not for combinations but for aggregations merely. The court held that conceding that a machine may be patented, if new and useful, it is manifest that no mere abstraction, no idea however brilliant, can be the subject of a patent irrespective of the means designed to give it effect.

The case of *Haskins v. Ryan*<sup>37</sup> is to the same effect, it there being said that it never has been held that mere ideas are capable of legal ownership and protection.

Trade-marks were not created by Acts of Congress and they not being the writings of an author, do not come under the protection of copyright laws and acts. Moreover, the power conferred on Congress by the Constitution to protect writings and inventions refers to fruits of intellectual labor and does not extend to the protection of trade-marks.<sup>38</sup>

It cannot be said that a thing having practical utility will under all circumstances constitute an infringement of a copyrighted work. That depends not so much upon the character of the alleged infringing thing, as upon the character of the copyrighted work. So practical a thing as a chair which embodied a copyrighted design was held to constitute an infringement of a photograph.<sup>39</sup> A doll, having utility was said to infringe upon a cartoon.<sup>40</sup> Yet a dress, equally as useful a thing as a chair, has been held not an infringement of a copyrighted picture,<sup>41</sup> because it was held that if it was copyrighted it would create a monopoly in the article illustrated. The court in the *Alderman* case,<sup>42</sup> in attempting to differentiate the facts at bar from those in the *Kings Features* case<sup>43</sup> pointed out that, in the latter case, the infringing dolls,

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<sup>36</sup> *Fowler v. City of New York*, 121 F. 747 (1903).

<sup>37</sup> *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 A. 436 (1906).

<sup>38</sup> *Trademark Cases*, 100 U. S. 82 (1879).

<sup>39</sup> *Falk v. Howell & Co.*, 37 F. 202 (1888).

<sup>40</sup> *King Features v. Fleischer*, *supra*.

<sup>41</sup> *Adelman v. Sonner & Gordon, Inc.*, 21 U. S. Pat. Q. 218 (1934).

<sup>42</sup> *Ibid.*

<sup>43</sup> *King Features v. Fleischer*, *supra*.

unlike the alleged infringing dresses were entirely lacking in any functional use and they served no utilitarian purpose. This is a fine distinction which is open to argument.

The celebrated case of *Fuller v. Bemis*<sup>44</sup> brings us to the consideration of whether a dance is subject-matter for copyright. The plaintiff performed a serpentine dance. She claims that it was a dramatic composition and therefore should be protected by the copyright which she had. The defendant produced the serpentine dance with merely colorable alterations. The court held that since this dance told no story and conveyed to the spectator no idea other than the picture of a beautiful woman executing a rhythmic dance, it was not a dramatic composition but merely an idea producing a pleasing effect and therefore not entitled to protection under the copyright law.

The case of *Barnes v. Miner*<sup>45</sup> well illustrates the point that the bounds of copyright law are defined not by a positive statement of what is within the realm of copyrightable material but by a declaration of what is not subject to copyright. The court there held that a stage performance consisting of the singing of well-known songs by a woman dressed to impersonate other singers, prefaced by a short and commonplace dialogue having no reference to such performance, and with a kinoscope exhibition during the intervals when the performer is changing costume, in which she is shown while making such changes by means of moving pictures previously taken photographically on a film, is not a subject of copyright, the dialogue not being a dramatic composition and neither the dialogue, performance, nor exhibition being such as to "promote the progress of science or the useful arts" within the meaning of the constitutional provision conferring upon Congress power to enact copyright laws and by which power is limited.

Stage performances supported by song and dance have been the subject of dispute in regard to copyright as early as the middle of the last century. The courts have been at variance as to the nature and quality of these theatrics and are not all in harmony as to just what is copyrightable in this field and what does not come within the protection of copyright. A few cases will illustrate the point well.

In *Bloom & Hamlin v. Nixon*<sup>46</sup> the plaintiffs were the owners and producers of a copyrighted song which was rendered during the performance of an extravaganza by an actress who was required during the action to step to one of the boxes, single out some particular person, and sing the song to him alone, accompanied by certain gestures, postures and other artistic effects; she being assisted in the chorus by a number of other actresses. The court held that an imitation of the actress while singing such song by another actress, in which she, in good

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<sup>44</sup> *Fuller v. Bemis*, 50 F. 926 (1892).

<sup>45</sup> *Barnes v. Miner*, 122 F. 480 (1903).

<sup>46</sup> *Bloom & Hamlin v. Nixon*, 125 F. 977 (1903).

faith, attempted to mimic the postures and gestures of the original actress and used the chorus of the song only as a vehicle for the imitation was not prohibited by Rev. Stat. Sec. 4966, amended in 1897, which prohibited any person from publicly performing or representing any dramatic or musical composition for which a copyright had been obtained, without the consent of the proprietor. The decision of Judge McPherson adds confusion to the issue, unless facts extraneous to those actually reported were present in the case. "No doubt, the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would probably be prohibited from doing in a round-a-bout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus is an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music, I do not believe that such performance is forbidden by copyright."

The plaintiffs copyrighted the words and dialogue of the musical comedy, "Filmzauber" or "The Girl on the Film."<sup>47</sup> The defendants are producing a comedy called, "All Aboard." The plaintiff charges an infringement of copyright by the defendants. In the second act of "Girl on the Film," a scene occurs in which an old miller informs a meeting of English villagers of the dangers of a French invasion, and it is agreed that in case such a thing happens, a bell shall be rung to call them together for resistance. Then a moving picture company appears and arranges to take a moving picture representing Napoleon and French soldiers and a young girl beseeching Napoleon to release her sweetheart who is about to be executed as a spy. The miller seeing this, rings the bell, the villagers rally, and set upon the party which is being photographed for the moving picture.

In the defendant's play, at the end of the first act there is a scene laid in California in which a countryman warns others of the danger of a Japanese invasion, whereupon it is agreed that if such a thing occurs, an alarm bell shall be rung, so that the countryside may turn out to resist it. Then a moving picture company appears, arranging to take pictures of a Japanese and troops and the effort of a woman to save a spy from execution by importuning the general. One of the countrymen seeing this, rings the alarm bell. The neighbors turn out and a fight ensues with the moving picture company. Held, that the defendant infringed upon the plaintiff's copyright. Judge Ward said, "While the voice, motions, and postures of actors and mere stage business may be imitated because they have no literary quality and can-

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<sup>47</sup> Chappell & Co. v. Fields, 210 F. 864 (1914); See also Daly v. Palmer, Fed. Case No. 3552 (1868); Daly v. Webser, 56 F. 483, 4 C. C. A. 10 (1892); Brady v. Daly, 83 F. 1007, 28 C. C. A. 253 (1897).

not be copyrighted, a scene like the one under consideration, has literary quality and is entitled to protection against infringement."

*Scienter* is an element considered in the *Shubert* case.<sup>48</sup> The court there held that where a defendant's play was the result of the defendant's independent efforts of its authors who had never heard of plaintiff or heard of or seen his copyrighted play, and though there were characters in both plays having a similarity and some instances of similar phraseology were present, the theory of the two plays and the method of execution being entirely different, there was no infringement of the plaintiff's copyright.

The case of *Serrana v. Jefferson*<sup>49</sup> bears note at this time, not so much for the interesting factual set-up of the case, but more for these instructive words of Judge Lacombe who rendered the decision in the case. "Heroes and heroines, as well as villains, of both sexes, have for a time whereof the memory of the theatre-goer runneth not to the contrary, been precipitated into conventional ponds, lakes, rivers, and seas. So frequent a catastrophe may fairly be regarded as the common property of all playwrights. The plaintiff's contention is founded solely upon the circumstance that in their play the river into which the fall takes place is mimicked by a tank filled with real water, instead of by an apparatus constructed of cloth, canvas or painted paste-board. Such a mechanical contrivance, however, is not protected by a copyright of the day in which it is introduced. The decisions which extend the definition of 'dramatic composition' so as to include situations and 'scenic effects,' do not cover the mere mechanical instrumentalities by which such effects or situations are produced."

#### WHAT PROMOTES THE PROGRESS OF SCIENCE AND THE USEFUL ARTS?

It is a difficult task to mark out the bounds within which works having the progress of science and the useful arts fall. The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.<sup>50</sup> The Constitution does not limit the useful to that which satisfies immediate bodily needs.<sup>51</sup>

Merit and morality, generally speaking, are the safe guides in judging whether a work promotes the progress of science and the useful arts.

<sup>48</sup> *Vernon v. Sam & Leo Shubert*, 220 F. 694 (1915).

<sup>49</sup> *Serrana v. Jefferson*, 33 F. 347 (1883). Compare *Daly v. Palmer*, *supra*.

<sup>50</sup> *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722 (1906); *Ford v. Blaney Amusement Co.*, 148 F. 642 (1906).

<sup>51</sup> *Bleistein v. Donaldson Lithographic Co.*, *supra*.

A very interesting type of "things in sheep's clothing"<sup>52</sup> which have occupied the courts with disputes as to their merits include credit ratings,<sup>53</sup> legal blanks and catalogues.<sup>54</sup> The ease with which these may be copied has been the reason for tendencies in this direction.

Directories and other compilations have been subject-matter for copyright even prior to the Copyright Act of 1909. The earlier opinions hinted that directories were not entitled to copyright protection. However, the law is now well settled to the contrary in this country<sup>55</sup> as well as in England.<sup>56</sup> If any doubt has ever existed on the subject, this uncertainty was finally and definitely dispelled by the Copyright Law of 1909, wherein Section 9521 expressly names directories as copyrightable material.<sup>57</sup>

A jewelry catalogue is proper subject-matter for copyright. In a directory there is but one way to state the facts, and a subsequent compiler cannot copy the form of expression of the earlier edition because there is no form. When however, there is any such form, however intangible and difficult to distinguish as such, then the second compiler must depend upon his own resources to express the facts independently. He may not use the same form.<sup>58</sup>

A mere curiosity, a scientific process which excites wonder, yet not producing physical results, whatever its quality and whatever skill has been involved in its production, does not fall within the required class of useful invention.<sup>59</sup>

Even though a list or directory has been compiled from public records, it is still proper matter for protection for the copyright laws. The compiler is as much an author as if he obtained this material from private independent sources instead of, as here, from the public records.<sup>60</sup>

A code list is copyrightable because it is a compilation and arrangement of words, expressions, or symbols in a unique manner which is the product of the arranger's mind.<sup>61</sup>

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<sup>52</sup> Lamb: "DETACHED THOUGHTS ON BOOKS AND READING."

<sup>53</sup> Ladd v. Oxnard, 75 F. 703 (1896).

<sup>54</sup> Brightley v. Littleton, 37 F. 103 (1888).

<sup>55</sup> Trow Directory Co. v. U. S. Directory Co., 122 F. 191 (1903); Williams v. Smythe, 110 F. 961 (1901); Hartford Directory & Publishing Co. v. Hartford Printing Co., 146 F. 332 (1906).

<sup>56</sup> Lamb v. Evans, 1 Ch. Div. 218 (1893); Morris v. Wright, L. R. 5 Ch. A. 279; Kelly v. Morris, L. R. 1 Equ. 696.

<sup>57</sup> Jewelers Circular Pub. v. Keystone Pub., 281 F. 83 (1921).

<sup>58</sup> *Ibid.*

<sup>59</sup> Robinson on PATENTS.

<sup>60</sup> New Jersey Motor List Co. v. Barton Business Service, 57 F. 2d 352 (1931).

<sup>61</sup> American Code Co., Inc. v. Bensinger, 282 F. 829 (1922).

Trade catalogues, although they contain photographs, charts, and illustrations are copyrightable. The copyright law has extended its protection to catalogue illustrations of designs for monuments,<sup>62</sup> catalogue pictures of statues,<sup>63</sup> catalogue illustrations of furniture,<sup>64</sup> and catalogues describing piston rings.<sup>65</sup>

The mere aggregation of old material into a single publication does not amount to ordinary skill sufficient to lend copyrightability. A combination of old methods can scarcely be said to be a new method illustrating the subject.<sup>66</sup> However, there is authority that does not require that a work embody even ordinary skill, but that any work in the production of which labor has been expended is entitled to copyright.<sup>67</sup> There is no standard of literary merit required by the copyright statutes to which a publication should measure up, to be entitled to a copyright. Even works of very little literary merit have been held to be entitled to copyright where they tended to propagate useful knowledge, or give general information.<sup>68</sup>

Musical compositions have always been and still are copyrightable as such. This includes both words<sup>69</sup> and music.<sup>70</sup> New productions are not the only ones which are entitled to copyright protection. The popular present day arrangements of old songs are said to have literary merit if they are something more than a copy of the old number, with variations having something more than any writer of music with skill and experience might readily make.<sup>71</sup> In *Norden v. Oliver Ditson*<sup>72</sup> the plaintiff copyrighted the song entitled, "O Gladsome Light; Arkhaugelsky." He claimed it was an adaptation of English Text to the Russian music of Arkhaugelsky. Defendant called his song, "O Light Divine." Defendant had never seen the original Russian composition but copied the plaintiff's composition, changing the rhythm to meet the differences in the number of syllables of the text used by him, and also changing certain notes in order to make the music more euphonious or more "singable." He took some of the words from an old hymn book and the others were original with him. The only similarity between the words of the plaintiff's and the defendant's songs were the words "light" in the title and the word "divine" at the end of the fifth line. The court held that there were no changes in the original harmony but

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62 *Grace v. Newman*, L. R. 19 Eq. 623.

63 *Da Prato Statuary Co. v. Giuliani Statuary Co.*, 189 F. 90 (1911).

64 *Davis v. Benjamin*, 2 Ch. D. 491 (1906).

65 *No-Leak-O Piston Ring Co. v. Norris*, 277 F. 951 (1921).

66 *Bullinger v. Mackey*, Fed. Case No. 2127 (1879).

67 *Baker v. Libbio*, 210 Mass. 599, 97 N. E. 109 (1912).

68 *Drone on COPYRIGHT*, 208 et seq.; *Scoville v. Toland*, 6 West. L. J. 84; *Coffeen v. Brunton*, 4 McLean 516.

69 *Henderson v. Tomplins*, 60 F. 758 (1894).

70 *Witmark & Sons v. Standard Music Roll Co.*, 221 F. 376 (1915).

71 *Norden v. Oliver Ditson Co.*, 13 Fed. Sup. 816 (Mass. 1936).

72 *Ibid.*

simply occasional changes in the length of certain notes, such changes not making an adaptation entitled to copyright protection. As Judge McLellan said, "It was the same old tune, and merely a copy of the Russian number with minor changes."

So also the court denied copyright protection where the evidence showed that the source of plaintiff's copyrighted popular song was previously published material which had partially become part of public domain of music and that the plaintiff made no such variations, modifications or changes on such material which would entitle him to the claim of originality.<sup>73</sup>

The last phase which will be treated is the relationship between illegality and immorality and the copyright law. It may be generally stated that the law will not lend its protection to an owner or author of an unlawful production.<sup>74</sup> Thus even though musical compositions of an immoral character cannot be protected by copyright, still where a copyright is held invalid because of the use of a word of immoral significance, the owners thereof may republish the song, omitting the objectionable matter and may obtain a valid copyright thereof.<sup>75</sup>

Illegality and immorality must be inherent in a work before copyright protection will be refused it. Thus, the mere fact that the work may be used for an unlawful purpose will not deprive it of its right to protection.<sup>76</sup> So, an "official form chart" which consists of a list of race horses and a compilation of facts and statistics relating to the performance of such race horses on race tracks, is the proper subject matter for copyright, where it is shown to be purchased and used by persons engaged in breeding, training, and racing horses. On a proper showing a court of equity will not refuse a preliminary injunction against infringement of such copyright on the ground that the chart is also used for betting purposes; so too where the designs for playing cards are copyrighted.<sup>77</sup> The fact that the playing cards may be used by persons to violate the gambling laws does not of itself deprive them of the protection of the law. Courts of justice will not lend their aid to protect the authors of immoral works. But where there is nothing immoral or improper in the prints themselves, the fact they may be used by persons to violate the gambling laws does not, of itself, deprive them of the protection of the law. To do this it must appear either that there is something immoral, pernicious, or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal or immoral act.<sup>78</sup>

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<sup>73</sup> *Husch v. Paramount Pictures*, 17 Fed. Sup. 816 (Cal. 1937).

<sup>74</sup> *Broder v. Zeno Mauvais Music Co.*, 88 F. 74 (1898), where the use of the word "hottest" was held to be immoral.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Egbert v. Greenberg*, 100 F. 447 (1900); *Richardson v. Miller*, Fed. Case No. 11791 (1877).

<sup>77</sup> *Richardson v. Miller*, *supra*.

<sup>78</sup> *Ibid.*

So a work which has the purpose to defraud the public by misrepresentation of source of material is not entitled to be copyrighted.<sup>79</sup> A publisher pretended that a work he had copyrighted was a translation from a well-known foreign writer. The pretense was for the purpose of attracting attention and lending interest to an alleged occurrence which, if told as fiction, would have been tawdry and unconvincing and which naturally would not have the sales appeal of the work as now presented under "false colors." Such pretense vitiated the copyright because the public was being misled and defrauded.<sup>80</sup>

Advertisements to be entitled to copyright must be true and must not mislead by false statements therein.<sup>81</sup> Where a so-called manual of instruction in a system of salesmanship consisted of a collection of forms of advertisements to be used by dealers in connection with special sales of pianos, and though they were intended to be used by all dealers licensed by the publisher to use them, they contained representations of facts concerning the sale and success thereof, which could not possibly be true as to all dealers, and by their extravagant "puffing" and misrepresentation had a tendency to mislead and deceive the public, such forms were held not to be copyrightable and hence, the use thereof was not an infringement of a copyright of the manual of instruction.

The novel, "Three Weeks," dealing with sensual adulterous intrigue was held not entitled to protection because, as the court stated, the Constitution did not intend that Congress should pass laws to promote immorality or anything except the useful arts and science.<sup>82</sup>

If a play or any literary production is of an immoral character, it is no part of the office of a court to protect it by injunction or otherwise. The rights of the author are secondary to the right of the public to be protected from what is subversive of good morals.<sup>83</sup>

Libellous<sup>84</sup> and blasphemous works<sup>85</sup> do not promote the useful arts and science, and so must be excluded from the class of writings and productions which may receive the aid of the protecting arm of copyright.

*Ronald P. Rejent.*

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<sup>79</sup> Wright v. Tullia, 1 C. B. 873.

<sup>80</sup> *Ibid.*

<sup>81</sup> Stone & McCarrick, Inc. v. Dugan Piano Co., 220 F. 837 (1915).

<sup>82</sup> Glyn v. Western Feature Film Co., W. N. Pt. II, 5 (1916).

<sup>83</sup> Shook v. Daly, 49 How. Pr. 336; Martinetti v. Maguire, 1 Daedy 223; Drone on COPYRIGHT, 181.

<sup>84</sup> Baschot v. London Illustrated Standard Co., 1 Ch. 73 (1900); Southey v. Sherwood, 2 Merr. 435.

<sup>85</sup> Murray v. Benbow, 4 English Ch. 474; Cowan v. Milbourn, L. R. 2 Exch. 230.



LIABILITY OF GAS COMPANY TO CONSUMER FOR DISCONTINUANCE OF SERVICE. — A gas company is liable to the consumer in an action for damages in failing or refusing to furnish the consumer with gas.<sup>1</sup> For this breach of a contract to furnish gas or for the breach of any other valid contract entered into by the gas company under statutory authority, it is liable in damages.<sup>2</sup> An injunction can be maintained where irreparable damage would be caused by the wrongful deprivation of the gas which is necessary to the consumer. Mandamus can be used where there has been no previous dealings between the parties.

In the action against the gas company for this wrongful refusal or neglect to furnish gas, all damages directly traceable to such neglect or refusal, and arising without an intervening agency, and without fault of the injured person himself, are recoverable.<sup>3</sup> The gas company has the power to determine when its rules have been violated by a customer, but the company is liable for tortious act when it illegally cuts off customer's gas supply.

Where the contract is made by the city or municipality with the gas company, the private consumer can maintain an action against the gas company or utility as the real party in interest for whom the contract is made. The municipality can also enforce the contract as to the continuance of service.<sup>4</sup> These rights will be enforced by the courts by mandamus and injunction where other remedies are inadequate.<sup>5</sup> Each householder has the right to contract for service, in his own name, within reason. And where the customer complies with the reasonable regulations of the gas company a contract results and a right of action accrues to the consumer for a breach.

CORPUS JURIS, Vol. 10, Section 640 sets forth the principle of the implied contract to be "that when a contract intended to create mutual rights and obligations is entered into, and the contract does not specify the duties and obligations intended to be assumed by one of the parties, the law will imply a contract on his part to do and perform those things that according to reason and justice he should do to carry out the purpose for which the contract was entered into, and the nature of such a contract will be gathered from the facts and circumstances surround-

<sup>1</sup> *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535 (1897); *Carson v. Fort Smith Light and Traction Co.*, 108 Ark. 452, 158 S. W. 129, Ann. Cas. 1915B-92 (1913).

<sup>2</sup> *Pennsylvania Natural Gas Co. v. Cook*, 136 Pa. St. 170, Reporter Citation (1889).

<sup>3</sup> *Carson v. Fort Smith Light Co.*, 108 Ark. 452, 158 S. W. 129, Ann. Cas. 1915B-92 (1913).

<sup>4</sup> *City Real Party in Interest: City of Jamestown v. Pennsylvania Gas Co.*, 1 Fed. 2d 871 (1924); *East Ohio Gas Co. v. City of Akron*, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 322 (1909). Individual cannot sue on the contract: *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 128 N. E. 58 (1920).

<sup>5</sup> POND, PUBLIC UTILITIES, § 251.

ing the parties at the time the contract was made.”<sup>6</sup> Therefore, the gas company that undertakes to furnish gas to the inhabitants of a municipality under a municipal franchise impliedly assumes the duty of reasonable care to maintain a supply adequate to the needs of consumers, and is liable for losses caused them by breach of such undertaking, although no express contract exists either with the consumer or the municipality as to the quantity to be furnished.<sup>7</sup> There is no implied obligation on the part of a gas company which has contracted in writing to furnish gas to the consumer, but which does not agree to supply the same at any certain pressure, to maintain a standard pressure according to custom.<sup>8</sup>

The company has the duty to supply reasonable service to the consumer. It assumes the further duty of using care, diligence and reasonable expediency in maintaining, repairing, inspecting, and operating its equipment and lines so that an adequate supply of gas will be available. In one case the company was liable for colds contracted while the gas line was being repaired.<sup>9</sup> It is very well put by Judge Stevens in a Wisconsin case: “The duty to supply reasonable service did not make the gas company an insurer of continuance of service, if conditions over which it had no control caused interruptions in service, provided that the gas company at all times exercised reasonable and practicable care, foresight, and diligence in so constructing, maintaining, and operating its plant as to prevent such interruptions so far as possible.”<sup>10</sup>

Breach of the duty to supply gas to a consumer, on the part of the gas company is a tort and damages may be recovered for all injuries of which the breach was the proximate cause. The contract with the consumer is regarded as but a statement of the reasonable conditions under which the company is required to perform its duty, and in such a case the remedy is in either contract or tort. The principles governing liability for negligence are in general applicable in actions against gas companies for personal injuries or property damages and the liability of the company is based on negligence and in some instances imposed by statute.<sup>11</sup> So accompanying every contract there is a common law duty to perform the thing agreed to be done with care, skill, reasonable expediency and faithfulness, and a negligence failure is, as stated above, a tort as well as a breach of a contract.<sup>12</sup>

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<sup>6</sup> 6 R. C. L. 586, 1 CHITTY, CONTRACTS 15.

<sup>7</sup> *Humphreys v. Central Kentucky Natural Gas Co.*, 190 Ky. 733 21 A. L. R. 644 (1920). WORDS & PHRASES, 1st & 2nd Series, (Implied Contracts).

<sup>8</sup> *Flaccus v. West Pennsylvania Gas Co.*, 213 Pa. 561, 62 Atl. 1111 (1906).

<sup>9</sup> *Oklahoma Natural Gas Co.*, 97 P. 2d 768 (Okla., 1939).

<sup>10</sup> *Waukesha Gas & Electric Co. v. Waukesha Motor Co.*, 190 Wis. 462, 209 N. W. 590 (1926).

<sup>11</sup> *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 35 N. E. 1059, 29 L. R. A. 337 (1893).

<sup>12</sup> *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924 (1906).

The contract though made with one member of a family subjects the company to care in performance as to the others who are dependent on the one who contracted for the service. In an Oklahoma case, Judge Bayless said, "any one contracting with a husband must know and realize the members of the family have a beneficial interest in having the necessities furnished. Any violation of this contract and the incidents flowing therefrom may give rise to a cause of action on part of individual members of the family other than the husband."<sup>13</sup>

A mandamus or injunction action by the consumer will lie against the gas company under the ordinary rules governing the use of the actions. Where a dispute arises between the company and the consumer, the latter is entitled to have his rights investigated by the courts, and an injunction will be granted to prevent the cutting off of the supply of gas until the case can be tried.<sup>14</sup> But where the company contracted to supply to the plaintiff only so long as a sufficient amount would flow from the defendant's well it was held that the plaintiff was not entitled to an injunction to restrain the company from stopping service in absence of a showing that the plaintiff had no other means of heating or lighting their dwelling.<sup>15</sup> Obviously that case would make the injunction practically out of the question under ordinary circumstances. In a recent New York case the customer brought mandamus to compel the company to furnish gas but due to meter tampering by the consumer the statutory duty of the company to continue service was held to terminate.<sup>16</sup> In another mandamus action it was held that an assignment by a corporation for the benefit of creditors worked a change of ownership, not only in legal title, but in the interests represented by it and the gas company could not refuse to furnish gas to the assignee because bills for gas incurred by the corporation remained unpaid. It was stated that an action of mandamus would lie where there have been no previous business dealing between the parties and the company had refused to furnish gas but an injunction would not lie.<sup>17</sup>

Where repairs must be made to the gas company's property, and as a result the gas must be turned off in the consumer's house, the gas company must notify the patron of this intention to shut off the gas temporarily. A tenant was sleeping in a room where a gas stove was burning, when employees of the company turned off the gas without notice to the tenant but with permission of the landlord and the tenant was nearly overcome when the gas was again turned on. The court said the company was bound to use proper care to see that the occupants of the rooms had an opportunity to protect themselves and

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<sup>13</sup> *Inter-Ocean Oil Co. v. Marshall*, 166 Okla. 118, 26 P. 2d 399 (1933).

<sup>14</sup> *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 P. 329 (1904).

<sup>15</sup> *Loy v. Madison & Hancock Gas Co.*, 156 Ind. 332, 58 N. E. 844 (1900).

<sup>16</sup> *Rocka v. Consolidated Edison Co. of N. Y.*, 22 N. Y. S. 157 (1940).

<sup>17</sup> *Cox v. Malden & Melrose Gaslight Co.*, 85 N. E. 180, 127 Am. St. Rep. 503, 17 L. R. A. (N. S.) 1235 (1908).

whether the company did use care was a question of fact.<sup>18</sup> The gas company was also held responsible for the death of a customer who was convalescing from an attack of typhoid fever and was dependent on a gas heater when the gas was turned off and remained off under protest.<sup>19</sup> In another case it was held that the company need only notify the person in charge of the house and not all the occupants of the premises, that the gas would be turned off temporarily. It termed the duty which would otherwise be imposed on the gas company, to go through the house and examine each gas jet, unreasonable.<sup>20</sup>

Where an action for death of a six months old child was brought because the company cut the gas supply off, it was held that the causal connection between the cutting off of the gas and the death of the child was insufficient, as the child had previously been ill from pneumonia and the medical witness could not say definitely that the death was due to cutting off the gas.<sup>21</sup> The gas company, however, was held liable in \$11,500 damages for wilfully and negligently cutting off the gas in the home of the consumer. The result being the death of a fourteen year old boy from pneumonia due to staying in the cold house overnight.<sup>22</sup>

A customer sued for physical suffering because of lack of heat in the bedrooms but the company cut off the service because the gas being used in the two heaters located in the bedrooms was not passing through the meter. The court said the company did not contract to furnish gas free of charge and the consumer cannot recover for gas which she for the previous year has received without payment.<sup>23</sup> On the other hand, a consumer was allowed to recover for physical injuries and mental suffering caused by the gas company during the four days the gas was turned off after the company had given inadequate service for two years due to defective pipes.<sup>24</sup>

In an action to recover for sickness of a child when it had to be taken out of the cold house, the evidence was held insufficient for recovery as the medical witness was not certain and Judge Baker said, "the indulgence of inferences will not supply a nonexistent fact. Inferences to support a verdict arise out of fact established by evidence. Other inferences are purely speculative, or conjecture."<sup>25</sup> Where the

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<sup>18</sup> Beyer v. Consolidated Gas Co., 44 App. Div. 158, 60 N. Y. S. 628 (1899).

<sup>19</sup> Hoehle v. Allegheny Heating Co., 5 Pa. Sup. C. 21 Reporter Cit. (1897).

<sup>20</sup> Skogland v. St. Paul Gaslight Co., 89 Minn. 1, 93 N. W. 668, 13 Am. Neg. Rep. 353 (1903).

<sup>21</sup> Rock Cassel Gas Co. v. Kirk's Adm'r., 92 S. W. 2d 10, 263 Ky. 149 (1936).

<sup>22</sup> Warfield Natural Gas Co. v. Clark's Adm'x., 257 Ky. 724, 79 S. W. 2d 21 (1935).

<sup>23</sup> Texas Cities Gas Co. v. Martinez, 82 S. W. 1040 (Tex. Civ. App., 1935).

<sup>24</sup> Indiana Natural & Illuminating Gas Co. v. Anthony, 58 N. E. 868, 126 Ind. App. 307 (1900).

<sup>25</sup> Fort Smith Gas Co. v. Blankenship, 102 S. W. 2d 75 (Ark., 1937).

company wrongfully turned off the gas and prevented the customer from treating a diseased arm with hot water, and damages were sought for both pain and suffering and permanent injury, speculative character of evidence on whether the failure to secure hot water was proximate cause did not invalidate a verdict for \$1,000, where evidence that lack of hot water caused much pain was disputed.<sup>26</sup>

Another customer brought an action to recover damages due to the freezing of certain fruits and vegetables because of a wrongful shutting off of the supply, and was allowed to recover when evidence was sufficient to justify finding that the shutting off of the gas was the proximate cause of the damage.<sup>27</sup> In another case the company had entered into a contract to furnish the inhabitants of a town with natural gas for domestic and residential use and the gas supply failed due to frost affecting the regulator of the company. The company was held not liable for damages to baby chicks raised for commercial purposes in another out-building to which the customer had piped gas for a brooder. The contract had stated that gas was to be furnished for only domestic purposes and residential purposes.<sup>28</sup> A gas company shut off the gas for non-payment of a disputed bill, having the power to do so, while a meal was in preparation and the customer purchased an oil stove for \$18. Judge Arnold stated "that even without this proof, and in the light of the honest dispute over the correctness of the bill presented, it must be held the plaintiff's legal rights were invaded under the circumstances, and this affords sufficient basis for finding of damages." Under such a state of facts damages will be presumed.<sup>29</sup> It was said in another case that exemplary damages are recoverable, even where the tortious conduct involves a breach of contract.<sup>30</sup> A company wrongfully disconnected the gas to force the customer to pay at the time when there were many guests in the home and they had to be sent home due to the cold. The consumer was given \$500 by the jury as damages for humiliation and the finding was upheld on appeal.<sup>31</sup>

The gas company is also, in some states, forced by statute to pay the consumer who has been damaged by the cutting off of service, or on the refusal to furnish an applicant having no previous business dealings. In New York, for example, the statute states that if the company refuses or neglects to furnish the gas ten days after a written applica-

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<sup>26</sup> *Arkansas-Louisiana Gas Co. v. Phillips*, 117 S. W. 2d 349 (Ark., 1938).

<sup>27</sup> *Citizens Gas & Fuel Co. v. Warden*, 90 Ind. App. 182, 149 N. E. 565 (1925).

<sup>28</sup> *Warfield Natural Gas Co. v. Anderson*, 249 Ky. 586, 61 S. W. 2d 27 (1933).

<sup>29</sup> *Randolph v. St. Joseph Gas Co.*, Kansas City Court of Appeals of Missouri, 250 S. W. 642 (1923).

<sup>30</sup> *Southern Gas & Electric Co. v. Stanley*, 70 S. W. 2d 413 (Tex., 1934).

<sup>31</sup> *Glover v. Southern Cities Distributing Co.*, Louisiana App., 142 So. 289 (1932).

tion, it shall pay to the applicant ten dollars and five dollars a day during which the failure or refusal continues.<sup>32</sup>

Thus a gas company engaged in supplying gas for heating and illuminating purposes is a public service company, and being bound to furnish service to all persons applying for it and complying with the reasonable regulations of the company, is liable in damages for the failure to so do.<sup>33</sup>

*Carl J. Kegelmayer.*

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NUISANCE THEORY AS A MEANS OF HOLDING MUNICIPAL CORPORATIONS AND QUASI-PUBLIC BODIES LIABLE IN TORT. — It is surprising with the modern systems of education, the expansive knowledge of social conditions and the form of government we live under, that the theory whereby an individual citizen injured or killed through no fault of his own but through the express fault of a municipality should be made to bear the expense of his injury, still exists in our system of law. This writing will attempt to show the injustice of compelling the individual citizen to suffer his loss and the justice in compelling the municipality or quasi-municipality to bear the burden when it is completely at fault in causing damage. The basis on which the private citizen is compelled to bear his loss is the crumbling foundation of the sovereign maxim "the King can do no wrong." The courts in recent years have awakened to the inequality of the particular results of cases relying on this theory and have developed artificial means of overcoming the rule that city governments cannot be held liable in governmental functions for their gross negligence.<sup>1</sup> The chief fiction used is the nuisance theory of liability. It is the purpose of this article to show what the holdings of courts have been in the past in regard to municipal liability for torts, the injustice of these holdings in many cases, and to point out the recent trend of the decisions to concentrate on the nuisance theory in making the outcome of suits against municipal corporations more equitable and fair. It is better that the burden of the injury be distributed among the whole community when the municipal corporation is at fault than to place the burden of the misfortune upon the innocent individual who happens to be injured.

If there is any problem confusing in the law of Municipal Corporations it is the problem of when a municipality or a quasi-public corporation is liable for its torts or the torts of its servants. It is a problem which is confusing to judges, a nightmare to lawyers, and amazing in its

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<sup>32</sup> Bennet v. Eastchester Gaslight Co., 54 App. Div. 74, 66 N. Y. S. 292 (1900).

<sup>33</sup> Shepard v. Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679 (1862).

<sup>1</sup> BORCHARD, GOVERNMENTAL LIABILITY IN TORT, p. 258.

results to laymen. It is caused by a dual theory of responsibility attaching to governmental corporations a theory which holds a city government liable in some cases, and, again in others, immune under the sovereignty theory. Though it is said under the medieval maxim "the King can do no wrong" that a municipal corporation is not liable when performing in its governmental capacity, there is a distinction made between municipal corporations, such as cities, and quasi-municipalities, such as school boards, boards of education, school districts, towns, counties, state hospitals, charitable institutions, Park Commissions, Zoological Societies and similar quasi-public governing bodies. When these latter organizations function either in a governmental or proprietary capacity they are generally not held liable for tort actions brought against them.<sup>2</sup> The phrase "quasi-corporations" is used to designate bodies not having full corporate stature — they have not full corporate powers and are lower down in the scale of corporate existence than are regular, full-grown municipal corporations.<sup>3</sup> In regards the full-fledged municipal corporation, it has rarely been held liable when operating in a governmental capacity; while when operating in its proprietary functions it usually is liable for torts committed through its own negligence.<sup>4</sup> The problem arises when the courts begin to decide how a municipality or its little brother the quasi-municipality has functioned. In *Roumbos v. City of Chicago*, the court said: ". . . the division of municipal functions into public and governmental on the one hand and private and corporate on the other is not well defined, but is vague and indefinite. No definition of the terms has been declared which is of much practical value, or 'which will precisely embrace torts for which a civil action will lie, in the absence of a statute declaring the liability against a municipal corporation.'" <sup>5</sup> "Can we apply any tests to determine when a municipal activity is corporate and when it is governmental? There are three main tests, and we name them for what they are worth. One test is whether or not the function in question is one which a private individual would perform for a profit. If the municipality engages in such a function it is called corporate. A second test is whether or not the function performed by the city is for the benefit of the citizen of the state at large or merely for the benefit of the citizens of the municipality. If it is for the benefit of the citizens of the state, then it is called a governmental activity, if it is merely for the benefit of the citizens within the municipality it is called a corporate activity. A third test is whether or not the func-

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<sup>2</sup> McQUELLAN, MUNICIPAL CORPORATIONS, (1st ed., 1911), Vol. 6, § 2605.

<sup>3</sup> *Kennedy v. County of Queens*, 47 N. Y. App. 250, 254; 64 N. Y. Supp. 276 (1900); cf. 8 THE LAWS OF ENGLAND (HOLSBRURY), p. 304, note.

<sup>4</sup> COOLEY, MUNICIPAL CORPORATIONS, p. 376 (1914).

<sup>5</sup> *Roumbos v. City of Chicago*, 332 Ill. 70, 163 N. E. 361, 60 A. L. R. 87 (1928).

tion is imposed by the state as a duty upon the city. If it is so imposed, the function is governmental."<sup>6</sup>

That a municipal corporation is liable for the torts of its servants committed in performance of a proprietary function and is not liable for torts committed in governmental functions is well settled.<sup>7</sup> South Carolina, however, has held the rule that no liability attaches in either function.<sup>8</sup> While Ohio has held a municipal corporation liable in both functions.<sup>9</sup> The Ohio case made no distinction between governmental and proprietary functions but has since been overruled and the Ohio view has now fallen in line with the majority of states in recognizing the distinction.<sup>10</sup> It is the writer's conviction that the former Ohio decision should have been retained in abolishing the distinction between functions governmental and proprietary in regards liability for torts committed by a municipality. As regards the liability of quasi-municipal corporations which act as agents of the state, it has in the past been handed down as the general rule that they are not held liable for torts committed in this capacity.<sup>11</sup> Quasi-public bodies are immune because of their involuntary and public character. They are state agencies performing governmental functions. They are purely for the public use, benefit and service and have rarely been held liable for negligence in performing any functions under the sovereignty theory of immunity. In some states even county boards, or fire departments are not liable for their negligent acts.<sup>12</sup> The commissioner of sewage disposal is a corporation of a governmental capacity and not liable for negligent acts.<sup>13</sup> Similarly with a board of park commissioners.<sup>14</sup> In Massachusetts a quasi-municipal corporation is not liable unless the statute authorizes that it can be so held.<sup>15</sup>

As stated *supra*, a distinction exists between the liability of municipal corporations and these quasi-corporations. The general rule holds the quasi-corporations exempt from any liability<sup>16</sup> as to the liability of counties classified as quasi-corporations;<sup>17</sup> as to charitable institu-

<sup>6</sup> LAW AND THE MODERN CITY (BARNET HODES), pp. 55, 56.

<sup>7</sup> 4 DILLON MUNICIPAL CORPORATIONS, (5th ed.) § 1625 (1911); COOLEY, MUNICIPAL CORPORATIONS, p. 376 (1914); 4 U. OF PITT. L. REV. 138. The majority of the cases hold this rule.

<sup>8</sup> Barnet v. Greenville, 106 S. C. 255, 91 S. E. 203 (1917).

<sup>9</sup> Fowler v. Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919).

<sup>10</sup> Alderich v. Youngstown, 106 Ohio St. 342, 140 N. E. 164 (1922).

<sup>11</sup> COOLEY, MUNICIPAL CORPORATIONS, p. 376 (1914).

<sup>12</sup> 79 Mich. 281, 4 Am. Rep. 450.

<sup>13</sup> 146 Ky. 562, 143 S. W. 3 (1912).

<sup>14</sup> 66 Ill. App. 507 (1896).

<sup>15</sup> Mower v. Leichester, 9 Mass. 247, 6 Am. Dec. 63 (1812); Riddle v. Lockes and Canals, 7 Mass. 169 (1810).

<sup>16</sup> Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877).

<sup>17</sup> 33 Pac. 184 (1893); 75 N. E. 185 (1905).



tions;<sup>18</sup> boards of education;<sup>19</sup> and reform schools.<sup>20</sup> In an Ohio case,<sup>21</sup> a public school corporation was not liable in damages for an injury to a pupil due to its negligence unless it had the power to raise money from the taxpayers to pay the damages. In Pennsylvania it has been held that school districts are merely agents of the commonwealth, and cannot be held liable for the negligence of their employees.<sup>22</sup> An Indiana school corporation, which is an involuntary corporation, established as part of the school system of the state, in compliance with the constitution,<sup>23</sup> and organized solely for the public benefit, is not liable for an injury received by a person through the negligence of its officers or agents, it not being made liable by statute and not being authorized to raise money to pay damages.<sup>24</sup> Whether the courts tend to hold a quasi-municipal corporation liable or not, the plaintiff in a case against a public corporation or against a nuisance of a public character maintained by the city must show a special injury not affecting the public as a whole. A court of equity has jurisdiction to restrain public nuisances injuring specially an individual citizen, or the citizen privately injured may have his remedy by indictment or in an action at law for damages.<sup>25</sup>

It has been recognized in the past few years by leading writers<sup>26</sup> and by the courts that due to the inherent hardships placed upon the individual receiving damage due to the fault of a quasi-municipal corporation or a municipality that the trend should be the other way — and they have so held. The writer accepts this view entirely though there are arguments for and against it. There is a matter of public policy involved. If the theory of strict liability is enforced, the legal confusion on the problem would be solved. But supposing this to be the rule would it be the best one? Cities would be deluged by the number of law suits brought against them and the city treasuries would feel the pinch. A permanent field day for ambulance chasers and “shysters” would begin.

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<sup>18</sup> McQUILLAN MUNICIPAL CORPORATIONS, (1st ed. 1911), Vol. 5, § 2459.

<sup>19</sup> 171 Ill. 332, 49 N. E. 536 (1898); 102 N. W. 1028 (1905); 93 N. W. 535 (1903).

<sup>20</sup> House of Refuge v. Ryan, 37 Ohio St. 197 (1881); Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702 (1876); State ex rel. v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, 36 Am. St. Rep. 651 (1892); Roth v. House of Refuge, 31 Md. 329; Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452 (1886).

<sup>21</sup> Finch v. Toledo Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414 (1876).

<sup>22</sup> 121 Pa. 543, 15 Atl. 812, 1 L. R. A. 607 (1888).

<sup>23</sup> Article 8, § 182, 187.

<sup>24</sup> Freel v. School City of Crawfordsville, 14 Ind. 27, 41 N. E. 312, 37 L. R. A. 301 (1895).

<sup>25</sup> 20 R. C. L. § 877.

<sup>26</sup> PROF. EDWIN M. BORCHARD, GOVERNMENT LIABILITY IN TORT, 34 YALE L. J. 1, 2-3. See also: 30 HARV. L. R. 20, 37.

On the other hand if complete immunity is given municipalities as has been done in South Carolina, except where the statute permits cities to be sued, the problem would also be made easier, but the advances in social legislation would to a degree be hindered and the humanitarian aspect of protecting individual citizens against permanent injury or death would definitely be as bad public policy as where the city treasury is drained under the first theory mentioned above. A solution to the problem is paramount. There has been suggested by one writer that possibly municipal claim insurance is the solution, or that complete immunity be invoked and an equitable settlement be made between the municipal corporation and the claimant that would not too tightly pinch the city treasury.<sup>27</sup> A solution to the problem has not yet been reached, but the courts, noting the injustice of complete immunity with no compensation to the innocently injured citizen, have employed the nuisance theory to hold the municipalities liable, since they are usually not held under the negligence rule. Cases holding the municipalities or quasi-municipalities liable on this theory follow: An early case of *Watson v. Town of New Milford*,<sup>28</sup> which cites even earlier cases, holding in like manner, granted claimant an injunction against the Town for polluting a stream running along his land, with sewage from the town buildings and school houses though the land was not being used and its value was not lessened. In *Bates v. Inhabitants of Westborough*,<sup>29</sup> the court ruled that when a town by constructing a new drain emptying into a culvert, floods land with the same culvert, the town is liable for the resulting damage. In an early Indiana case<sup>30</sup> an action lied against a county for erecting and maintaining near the dwelling house of the plaintiff, a pest house where persons infected with a malignant disease were treated therefor by order of the defendant, by reason whereof the plaintiffs premises became unhealthy, his premises were infected with the same disease and the occupancy of the premises was rendered unsafe and unpleasant. More recent cases indicate that this theory of liability of a municipal corporation or of a quasi-municipal corporation for the creation or maintenance or failure to abate a nuisance has in the past ten years become very favorable in the eyes of liberal courts which take an observing attitude on the modern humanitarian social trends rapidly rooting themselves in our American way of life. An interesting Connecticut case of 1931<sup>31</sup> holds the city of Bristol liable in maintaining a dangerous diving board used by the public. In the case the board was placed about four feet above the surface of the water which was

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<sup>27</sup> LAW AND THE MODERN CITY, BARNET HODES, p. 65.

<sup>28</sup> 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345 (1900).

<sup>29</sup> 23 N. E. 1070, 7 L. R. A. 156 (1890).

<sup>30</sup> *Haag v. Board of Commissioners of Vandenburg County*, 60 Ind. 511, 28 Am. Rep. 654 (1878).

<sup>31</sup> *Henry Hoffman v. City of Bristol*, 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191 (1931).

not more than three feet deep, and so opaque that its shallowness was not discernible by one standing on the board. There were not adequate signs or danger signals. The diver jumped from the board and was severely injured. The court held the city liable for maintaining a nuisance in that the defense of immunity from liability as for negligence in performance of governmental duty is not available in an action by the injured person against the city. Judge Hinman, in his opinion referred to *McQUILLAN ON MUNICIPAL CORPORATIONS*<sup>32</sup> and to *CORPUS JURIS*.<sup>33</sup> They reiterate, where a municipal corporation creates and maintains a nuisance, it is liable for damages to any person suffering special injury therefrom, irrespective of whether the misfeasance or nonfeasance causing the nuisance also constituted negligence. This liability cannot be avoided on the ground that the municipality was exercising governmental functions or powers, even in jurisdictions, where, as here, immunity is afforded from liability for negligence in the performance of such functions. In *Melker v. New York*,<sup>34</sup> it is said "If the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but, if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as a matter of law."

It has been held that cities and quasi-public corporations are liable though exercising functions governmental in nature, for injury produced to real estate.<sup>35</sup> The theory on which recovery by a citizen is had against the municipal corporation in injury to real estate is that if recovery were not permitted it would be a violation of the constitutional clause prohibiting the taking of private property without just compensation.<sup>36</sup> It is the writer's contention that if compensation is given a private individual for injury to a real property right by a municipal corporation or quasi-municipal corporation, it is only just and reasonable to compensate the private individual suffering personal injury due to gross negligence committed by the city or because of a nuisance maintained by the city. Certainly the personal injury is compensable on the same level if not on a higher level than the injury to realty.

<sup>32</sup> *McQUILLAN ON MUNICIPAL CORPORATIONS* (2nd ed., 1928) Vol. 6, § 715.

<sup>33</sup> 43 *CORPUS JURIS*, p. 956.

<sup>34</sup> 190 N. Y. 481, 83 N. E. 565, 16 L. R. A. (N. S.) 621, 13 Am. Cas. 544 (1908).

<sup>35</sup> *District of Columbia v. Tatten*, 55 App. D. C. 312, 40 A. L. R. 1461, 5 Fed. 2d 374 (1925); *Miles v. Worchester*, 154 Mass. 511, 13 L. R. A. 841, 26 Am. St. Rep. 264, 28 N. E. 676 (1891); *Windel v. Springfield*, 320 Mo. 459, 8 S. W. 2d 61 (1928). Also see: *RULING CASE LAW*, p. 1085.

<sup>36</sup> *Mansfield v. Balliett*, 65 Ohio St. 451, 58 L. R. A. 628, 63 N. E. 86 (1902); *Georgetown v. Ammerman*, 143 Ky. 209, 136 S. W. 202 (1911); *Hines v. Rocky Mount*, 162 N. C. 409, L. R. A. 1915C 751, 78 S. E. 510, Ann. Cas. 1915 A. 1321 (1913).

This is the basis on which municipalities should be compelled to compensate persons physically injured through the fault of the municipality whether it is done so, on a city paid "claim insurance" system, or by means of an equitable settlement arranged by a commission or court.

The number of courts recognizing the principle that municipalities are liable for injuries due to their negligence amounting to the creation or maintainance of a nuisance have increased in recent years. Thus in *Knoxville v. Lively*,<sup>37</sup> a street car conductor whose duties made it necessary for him to stand on a running board on the outside of the car to collect fares, who was injured by being knocked from the car by a road roller belonging to a city, left standing too near the street railway tracks, was held to be entitled to recover against the city though the roller was left in the street by an agent of the city in performance of a governmental function. It was considered a temporary nuisance. In an Ohio case<sup>38</sup> where a statute required municipal corporations to keep streets open, in repair and free from nuisances, a city was held liable for injuries, sustained by a person using a street, in colliding with a raised platform in the street, designed to aid passengers boarding street cars, and to protect passengers in safety zones, where the condition amounted to a nuisance, although the city was performing a governmental function. *Evans v. Berry*,<sup>39</sup> and *West Palm Beach v. Grimmett*,<sup>40</sup> are other interesting cases of the same view recently decided.

More recent cases holding municipal corporations liable under the nuisance theory are *United States v. City of New York*,<sup>41</sup> where a municipal corporation was held liable for the act of a police property clerk in returning money found on a person when arrested; *Oeters v. City of New York*,<sup>42</sup> where the New York City Bureau of Buildings was held liable in negligently destroying buildings thereby endangering lives of persons using adjoining highways; *Khoury v. Saratoga County*,<sup>43</sup> in which case cities, towns, and counties were held to be jointly and severally liable for death of and injuries to pedestrians resulting from failure to properly maintain inter-county bridge connecting city and town, where nuisance resulted from permitting ice to form thereon without giving warning.

But in *Ashbury v. Norfolk*,<sup>44</sup> the court held that the municipality was not liable in tort for negligence where it occurs in the performance

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<sup>37</sup> 141 Tenn. 22, 206 S. W. 180, 75 A. L. R. 1200 (1918).

<sup>38</sup> *Hamilton v. Dilley*, 120 Ohio St. 127, 165 N. E. 713, 75 A. L. R. 1200 (1929).

<sup>39</sup> 262 N. Y. 61, 186 N. E. 203, 89 A. L. R. 387 (1933).

<sup>40</sup> 102 Fla. 680, 137 So. 385 (1931); where a citizen was injured by a motorcycle operated by a policeman.

<sup>41</sup> Dist. Ct., S. D. New York, 12 Fed. Supp. 169 (1935).

<sup>42</sup> 1 N. E. 2d 466, 270 N. Y. 364 (1936).

<sup>43</sup> 196 N. E. 299, 267 N. Y. 384 (1935).

<sup>44</sup> 152 Va. 278, 147 S. E. 223, 28 N. C. C. A. 861 (1929).

of a governmental function and "no nuisance is thereby created." Some courts reach similar conclusions.<sup>45</sup> Many courts still reason that a municipality is immune from liability for the creation, maintenance or failure to abate a nuisance. This seems a very harsh rule though accepted by most of the courts. As stated above the trend is beginning to swing to the more equitable view. In *Braunstein v. Louisville*,<sup>46</sup> a city was not liable for injuries sustained by a person working in a street, by rocks thrown into the street by the negligent blasting of the city's servants at its workhouse, since the maintenance of the workhouse was a governmental function. In cases of this type why should there be a distinction between a governmental function and a proprietary one when the person injured receives the burden under governmental immunity and would not if the act of the city is considered a proprietary one? The same result in the injury sustained shows the weakness of the distinction. The case of *Fowler v. City of Cleveland*,<sup>47</sup> will illustrate its absurdity in many instances. In that case it was held that although a fire department was a public function, yet while running to a fire it was engaged in a ministerial function so that the city was liable for injuries to the plaintiff. If it had been held a public or governmental one on the way to the fire the plaintiff would have lost the case and have had the burden of paying for his injuries himself. Again in *Finkelstein v. New York*,<sup>48</sup> the injustice of the recognition of the distinction is manifest . . . a recovery could not be had against the city for the death of a boy, which was caused by the falling of a brick wall of a jail maintained by the city, although the mortar had disintegrated so as not to hold the brick in place, and this condition constituted a nuisance, since the maintenance of the jail was a governmental function. Other recent cases holding the same way are: *Elrod v. City of Daytona Beach*,<sup>49</sup> *Gertrude A. Jensen v. Katherine Juul and Town Irene*,<sup>50</sup> *Viola Haggard v. City of Richmond*,<sup>51</sup> *Charles Aleas v. Borough of Rumson*.<sup>52</sup>

After reviewing cases pro and con, arguments for and against the theory of holding the municipalities liable there is no substantial reason why a complainant who has been injured should not be compensated. One writer says "the immunity rests upon three grounds: first, the technical rule that a sovereign is immune from suit; second, the ancient idea that it is better that the individual should suffer an injury

<sup>45</sup> *Bruhne v. LaCrosse*, 155 Wis. 485, 50 L. R. A. (N. S.) 1147, 144 N. W. 1100 (1914); *Fitzgerald v. Sharon*, 143 Iowa 730, 121 N. W. 523 (1909).

<sup>46</sup> 146 Ky. 777, 143 S. W. 375, 42 L. R. A. (N. S.) 538 (1912).

<sup>47</sup> 100 Ohio St. 158, 126 N. E. 72 (1917); overruled in *Oldrich v. Youngstown*, 106 Ohio St. 342, 140 N. E. 164 (1922).

<sup>48</sup> 183 App. Div. 539, 169 N. Y. Supp. 718 (1918).

<sup>49</sup> 132 Fla. 24, 118 A. L. R. 1049, 180 So. 378 (1938).

<sup>50</sup> 66 S. D. 1, 115 A. L. R. 1280, 278 N. W. 6 (1938).

<sup>51</sup> 172 Va. 145, 12 A. L. R. 1368, 200 S. E. 610 (1939).

<sup>52</sup> 115 N. J. 593, 102 A. L. R. 648, 181 Atl. 175 (1935).

than that the public should suffer an inconvenience; and third that liability would tend to retard the agents of the city in the performance of their duties for fear of suit being brought against the municipality. The first of these is a relic of the days of 'Divine Right of Kings' and certainly has no place in the present day law of municipal corporations. That it is being discarded is plainly shown by the ever-increasing number of claims which are being permitted in the federal court of claims and against the various states. The second does not conform to our present ideas, as it is now generally felt that a loss should be spread over society as much as possible. A familiar instance of this is insurance. That the state believes such alleviation to be wise policy is attested by our Workmen's Compensation Acts. The third argument advanced is more a matter of argument than an actual danger. It is submitted that the thought of suit being brought against a third party is not a very cogent deterrent of the actor."<sup>53</sup>

The distinction between governmental and proprietary functions of municipalities and quasi-municipalities in the field of torts seems to produce more litigation and render decisions less equitable between the parties than would decisions not based on the theory of immunity. Approval of the nuisance theory as a fictional means of curbing the injustice placed on many claimants by past decisions becomes more frequent as the newer decisions are handed down — and this is as it should be.

*William J. Syring.*

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PHYSICAL INJURY DUE TO MENTAL DISTURBANCES — IMPACT THEORY. — In view of the modern accentuation on the importance of psychology, mental therapy, and the influence that mind may have over matter we ought to vary our legal conception of mental suffering. Adhering to the alleged common law theory that mental suffering involves no legal injury seems an oversight as to the results of modern medical science in the field of the human mind; secondly, a misconception of the common law itself; and thirdly, an admission by the courts that they are incompetent to deal with modern injuries and outrages and judge of their legal merit.

What we will be concerned with primarily in this discussion is the so-called "Impact Theory" in determining the right to damages for physical injuries resulting from mental shock.

Two views or tests have been adopted by different courts in determining the right to recovery. The one is conservative and allows no recovery for physical injury resulting from nervous shock unless there

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<sup>53</sup> DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY FUNCTIONS OF MUNICIPAL CORPORATIONS, DELMAR W. DODDRIDGE, 23 MICH. L. R. 337, 8.

has been some physical impact accompanying and contemporaneous with the mental suffering. This attitude favors the reserved regard that the common law had for anything so intangible and unmeasurable as mental harm, and has been adopted by such states as New York in the case of *Mitchell v. Rochester Ry. Co.*,<sup>1</sup> Pennsylvania, in *Ewing v. Pittsburgh, C., C. and St. L. Ry. Co.*,<sup>2</sup> and Massachusetts in the case of *Spade v. Lynn and B. R. Co.*,<sup>3</sup> where recovery was denied for reasons of public policy, in as much as there had been no physical impact.

The common law in principle, though the principle was never applied, redressed injury due to mental suffering; and more specifically in the case of assault, which involved fear or apprehension of a battery, allowed recovery. But the common law was quick to point out, as in the case of *Wilkinson v. Downton*,<sup>4</sup> that recovery was allowed not for the intention to frighten but for the intention to inflict a physical injury. Compare a Michigan case, *Nelson v. Crawford*,<sup>5</sup> that held similarly where Defendant dressed himself in women's clothing and invaded the home of a neighbor, intent on scaring her. Recovery was not allowed. We are concerned not with intentional but negligent conduct on the part of the defendant that results in mental shock or fright. The common law was wary of the thoughts and feelings of men and considered them as improper matter for adjudication.

A saner and sounder attitude toward mental reactions, adopted by some courts, is that physical injury may be a natural and proximate consequence of mental disturbance. According to this second view, bodily contact contemporaneous with the fright is not a "*sine qua non*" of recovery; and the necessity of showing physical impact is precluded if the mental shock constitutes a link in the chain of causation culminating in physical injury. Because of its adaptability to modern circumstances it is a view that ought to receive the attention of the courts of today. In its application to mental suffering it is a modern doctrine, though anticipated as early as the eighteen nineties in decisions of the courts of Texas, in *Gulf, C. & S. F. Ry. Co. v. Hayter*,<sup>6</sup> in Minnesota in *Purcell v. St. Paul City Ry. Co.*,<sup>7</sup> and in South Carolina in *Mack v. South-Bound R. Co.*<sup>8</sup> The views adopted by these courts best conform with the recent developments of medical science in the field of mental phenomena.

There are very definite tangible physiological reactions that attend the emotional states. Some of these external evidences of internal

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1 151 N. Y. 107; 45 N. E. 354 (1896).

2 147 Pa. 40; 23 Atl. 340 (1892).

3 168 Mass. 285; 47 N. E. 88 (1898).

4 2 Q. B. 57; L. R. 1897.

5 122 Mich. 466; 81 N. W. 335 (1899).

6 93 Texas 239, 243; 54 S. W. 944 (1900).

7 48 Minn. 134; 50 N. W. 1034 (1892).

8 52 S. C. 323; 29 S. E. 905 (1898).

strife are swallowing, dry throat, paleness, vacant stare, uneasiness, fidgeting, the acceleration or retardation of the operation of certain glands. From these observations we gather that a condition of mind is not so vague and indefinable as it may have been previously made out to be. If such tangible physiological reactions can be effected it is a reasonable step to conclude that a state of mind may be a decided influence in producing physical injury and that such injury may be the natural and proximate consequence of an unnatural and overtaxed mind. With the establishment of that legal proximity we have subject matter for legal redress. Modern day medical science and psychology have established the causal connection between emotional distress and physical injury consequent thereto.

The courts have been slow to follow along with modern conceptions of the influence that the mind plays. Perhaps it is too long a devotion to precedent on the part of the courts. But in adhering too closely to the "impact theory" as they do, the courts are with too orthodox a scrupulosity adopting a form of puritanical procedure that disregards the facts of ordinary everyday modern life. There is no longer reason for the old apprehension surrounding anything dealing with the mind. The work of William James and Doctor Coué has done much to bring the field of mental phenomena into modern prominence. The courts should take these recent facts into consideration in the dispensation of justice and the redress of modern wrongs.

A most notable and favourable example of a trend by the courts in this direction comes from Nebraska, the case of *Rasmussen v. Benson*.<sup>9</sup> In this case recovery was allowed for the death of deceased, which had been brought on by worry over the possible loss of the deceased's dairy business. Defendant had been negligent in supplying poisoned bran for the dairy herd of the deceased. A less liberal court might have insisted on some physical impact; although there was an obvious and proximate injury resultant of the defendant's negligent act. Public policy ought not to be a court's defense for not entertaining such suits. A competent court, without fear of being flooded with factitious claims, ought to be able to judge of the causal connection between the emotional upset and the injury complained of.

The courts that place too much insistence on the necessity of concurrent physical impact seem to take an unreasonable attitude. In many cases, the impact, if only slight, is not a material factor in bringing about the injury complained of. To base recovery on the battery alone amounts, in such a case, to founding recovery on the existence of a mere technicality. Thus in *Homans v. Boston Elev. Ry. Co.*,<sup>10</sup> recovery was allowed because of a slight blow attending a collision, al-

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<sup>9</sup> 135 Neb. 232; 280 N. W. 890 (1938).

<sup>10</sup> 180 Mass. 456 (1902).



though in no way effecting or bringing on the convulsions and injuries sustained. To follow the impact rule strictly and absolutely may lead to glaring inconsistencies.

This case from Massachusetts evidences the stand of the Massachusetts court on the impact rule; although in subsequent cases it has been more liberal in determining what constitutes physical impact. Thus in *Conley v. United Drug Co.*,<sup>11</sup> and in *Kisiel v. Holyoke St. Ry. Co.*,<sup>12</sup> a fall attendant on fright and fainting was held sufficient to satisfy the impact requirement. And in *Driscoll v. Gaffey*<sup>13</sup> plaintiff's bumping into a door, through fright caused by a rock that had been blasted by explosion into the room in which plaintiff was, constituted an impact.

The New York court, although establishing the impact rule in the Mitchell case, *supra*, indicates a tendency to repudiate the ruling of that case in two later cases. The impact rule was applied in the cases of *Cook v. Village of Mohawk*,<sup>14</sup> and *Hack v. Dady*,<sup>15</sup> the former requiring some physical impact and the latter that in addition the causal connection between the injury and the shock must be shown. But the case of *Sider v. Reid Ice Cream Co.*<sup>16</sup> seems to be a confession on the part of the New York court of its own previous short-sightedness and a repudiation of the impact doctrine laid down in the Mitchell case. In the Sider case the plaintiff was allowed to recover for sickness occasioned by the presence of cockroaches in a dish of "charlotte russe," although she had consumed none of the foreign substance. This case was similar to a previous one *Barrington v. Hotel Astor*,<sup>17</sup> where the plaintiff became sick on discovering the presence of a dead mouse in a "kidney sauté" while she was dining at the Hotel Astor. Although in this case she had consumed part of the foreign substance, the evidence showed that that alone would not have caused the injury. In the Sider case, although the injury was brought about solely by the sight and knowledge of the foreign substance in the russe, the court said:

"There seems to be no reason for the rule announced in the Mitchell case, which it is said was adopted because of public policy, or as one of necessity to avoid the perpetration of fraud. Whatever may have been the prevailing conditions when this rule was announced, there is no need of it on the score of public policy or necessity. . . . We think this whole subject should receive the further consideration of the appellate courts."

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<sup>11</sup> 218 Mass. 238; 105 N. E. 975 (1914).

<sup>12</sup> 240 Mass. 29; 132 N. E. 622 (1921).

<sup>13</sup> 207 Mass. 102; 92 N. E. 1010 (1910).

<sup>14</sup> 207 N. Y. 311; 100 N. E. 815 (1906); reversing judgment of 128 N. Y. S. 1119; 143 App. Div. 961.

<sup>15</sup> 127 N. Y. S. 22; 142 App. Div. 510 (1911).

<sup>16</sup> 211 N. Y. S. 582; 125 Misc. Rep. 835 (1925).

<sup>17</sup> 171 N. Y. S. 840; 184 App. Div. 317 (1918).

These two decisions of the New York court indicate a step in the direction of a more modern appreciation of the effect of mental disturbance.

Two decisions from Pennsylvania, because they occurred about the same time and were decided so differently should not be overlooked. In *Morris v. Lackawanna and W. V. R. R. Co.*,<sup>18</sup> the injury complained of was a miscarriage resulting from nervous shock where there had been no physical impact save bumping over a track in the defendant's electric car. This case arose in 1910 and recovery was denied in spite of the fact that only the year before in 1909 in *Gillam v. Hogue*<sup>19</sup> recovery was allowed for deterioration in the value of a horse that had been frightened by an auto horn and rendered unfit to go on the road. In the miscarriage case judgment was for the defendant in spite of the fact that a physician testified as to the causal connection between the shock and the miscarriage.

A few other states that have followed the impact rule are Ohio, in *Ohliger v. Toledo Traction Co.*;<sup>20</sup> Kentucky, in *Reed v. Ford*;<sup>21</sup> Alabama, in *Bachelor v. Morgan*;<sup>22</sup> Iowa, in *Watson v. Dilts*;<sup>23</sup> Illinois, in *Elgin A. & S. Traction Co. v. Wilson*.<sup>24</sup>

Other cases have not been so insistent on the necessity of physical impact and seem to represent a saner view. The ruling of the Minnesota court in the Purcell case established a worthy precedent and one that might well open the avenue to similar decisions by other courts. In the Purcell case plaintiff suffered shock in an imminent wreck, went into violent convulsions and sustained a miscarriage. The latter was held to be the natural and proximate consequence of the emotional shock and recovery was allowed.

Later decisions of the Texas court have followed the ruling of the Hayter case, *supra*. In that case plaintiff was allowed to recover for paralysis resulting from shock attending a railroad collision that was due to negligence as to all the passengers. Recovery was not dependent on a physical impact. The proximate cause test was applied in subsequent cases in *Hendrix v. Texas and P. Ry. Co.*;<sup>25</sup> and *St. Louis S. W. Ry. Co. of Texas v. Murdock*.<sup>26</sup> And in a much more recent case in *Levine v. Trammel*,<sup>27</sup> plaintiff was allowed to recover for illness and

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<sup>18</sup> 228 Pa. 198; 77 Atl. 445 (1910).

<sup>19</sup> 39 Pa. Super. Court 344 (1909).

<sup>20</sup> Ohio Civ. Ct. Rep. 265.

<sup>21</sup> 129 Ky. 471; 112 S. W. 600 (1908).

<sup>22</sup> 179 Ala. 339; 60 So. 815 (1913).

<sup>23</sup> 116 Ia. 249; 89 N. W. 1068 (1902).

<sup>24</sup> 217 Ill. 47; 75 N. E. 436 (1905).

<sup>25</sup> 89 S. W. 461 (1905).

<sup>26</sup> 54 Tex. Civ. App. 249; 116 S. W. 139 (1909).

<sup>27</sup> 41 S. W. (2d) 334 (Texas, 1931).

a nervous breakdown consequent upon a shock occasioned by the defendant's use of harsh and offensive language on the plaintiff.

In the Mack case, *supra*, the South Carolina court, in allowing recovery for injury that was the proximate consequence of fright established a precedent that was followed more than twenty years later in *Folk v. Seaboard Airline Ry.*<sup>28</sup> In the latter case recovery was allowed for injuries resulting from fright attendant on a runaway that had been brought about by a backing train.

A North Carolina case, *Arthur v. Henry*,<sup>29</sup> admits in its opinion and concludes in the resulting decision that physical impact is not necessary. In that case the court allowed recovery to the frightened and injured plaintiff where, although there had been no physical impact, it was shown that the fright was the proximate cause of the injury.

The case of *Green v. T. A. Shoemaker & Co.*,<sup>30</sup> where fright and injury were the reasonable and natural consequence of blasting operations, evidences the Maryland Court's preference for the proximate cause test.

The reasons for still adhering to the impact theory are not irrefutable and seem to be a misconception of the part demanded of mental disturbance in the case of physical injury, *viz.* that it be a proximate cause and a connecting link in the chain of causation leading to the injury. It must be remembered that the basis of the action is not to recover for the fright but for actual injury due to the fright. Thus in Texas, a state that repudiates the impact doctrine, in the case of *Texas Utilities Co. v. Dear*,<sup>31</sup> it was held that recovery could not be had for fright alone which was not followed by some form of physical injury. Mental suffering alone, from which physical injury does not result, does not constitute legal damage.

Another aspect to consider is that recovery can not be sought by the plaintiff for injury due to mental suffering where no legal right of the plaintiff has been violated. Two cases from Minnesota evidence the necessity of a violation of a legal right even where the impact doctrine is not applied. In the case of *Sanderson v. Northern Pacific Ry. Co.*,<sup>32</sup> the fright and injury were caused by the attempt of the conductor to put one of the plaintiff's children off the train. Recovery was denied since no legal right enuring to the plaintiff had been violated. There was no tort committed against the plaintiff and no fear of personal violence. And in *Buckman v. Great N. Ry. Co.*,<sup>33</sup> offensive

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<sup>28</sup> 99 S. C. 284; 83 S. E. 452 (1914).

<sup>29</sup> 157 N. C. 438; 73 S. E. 211 (1911).

<sup>30</sup> 111 Md. 69; 73 Atl. 688 (1909).

<sup>31</sup> 64 S. W. (2d) 807 (Texas, 1933).

<sup>32</sup> 92 N. W. 542 (1902).

<sup>33</sup> 76 Minn. 373; 79 N. W. 98 (1899).

and abusive language was used against the plaintiff's husband in a depot station. It was held that such language directed at the husband was not a legal wrong as to the plaintiff. In these two cases there is a strong human tendency to disagree with the decisions, but it shows how skeptical and critical of mental suffering are the courts that do not require the impact.

The courts that recognize mental suffering as a possible cause of physical injury do not regard every instance of physical injury consequent upon mental shock worthy of indiscriminate compensation. But where legal injury has resulted proximately from a wrong, there ought to be a right of action for damages. Science has established the proximate causal relationship between the mental and physical elements. The damages are not too remote to destroy that causal relationship. It is yet to be hoped that the elucidations offered us by modern medical science on the subject of mental disturbance and the example of such courts as Texas, Minnesota, South Carolina, North Carolina, Maryland and Nebraska in recognizing the import theory will induce other courts to see the light.

*Leo L. Linck.*

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RIGHT OF UNITED STATES SUPREME COURT TO DECLARE ACT OF CONGRESS UNCONSTITUTIONAL — HISTORICAL STUDY. — The scope of this work is confined to a brief review of the development of the doctrine of the right of the United States Supreme Court to declare an act of Congress unconstitutional, especially noting the origin of the doctrine, its development and recent trends as indicated by modern jurists and leaders of the legal profession.

While it is to be admitted that there was no specific mention of the doctrine in the Constitution, the theory more generally accepted among writers on the subject seems to follow the interpretation of such colonial leaders as Alexander Hamilton and later Chief Justice Marshall who appear to be in accord in their belief that, when a conflict between a written constitution, a superior or higher law, and an act of Congress, an inferior law, arises, the latter must be regarded as *ipso facto* void.<sup>1</sup>

Other interpretations of the doctrine present the objection that the judges usurped the authority to review the validity of legislative acts.<sup>2</sup> Along with this view are those who believe in following the strict letter

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<sup>1</sup> McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES (New York, 1935) 308-312.

<sup>2</sup> WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT (Boston, 1935) 96.

of the Constitution and eliminating any construction which can not be founded on an express provision of the Constitution.<sup>3</sup>

Among the supporters of those interpreters, who, after looking for an express provision in the Constitution for such a right, seek at least a precedent for the exercise of this power in the written or unwritten constitutions of other countries and also to the activities of their judicial organizations, are those critics who claim that there is no precedent for the exercise of such a power by the courts of the United States, basing their observations on the power exercised by the judges in England and likewise under French, German, and Swiss systems of jurisprudence.<sup>4</sup>

That the case of *Marbury v. Madison*,<sup>5</sup> was not the first instance in which this right of a court to declare a legislative act unconstitutional was discussed is evidenced by the statement of Alexander Hamilton to the effect that:

"The interpretation of the laws is the proper and peculiar problem of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."<sup>6</sup>

The various notes from the RECORDS OF MADISON as reprinted in Max Farrand's work substantiate the fact that the members of the Constitutional Convention of 1787 expressed themselves on the matter of the power of the Court to decide on the constitutionality of acts of the legislature.<sup>7</sup>

Cases of historical interest and which precede the decision of *Marbury v. Madison* in containing reference to the power of the courts is referred to, include the case of *Hylton v. United States* wherein the Court exercised the right to pass upon the constitutionality of an act of Congress imposing a duty on carriages. Although the Court sustained the statute the argument of the appellant was that the law was unconstitutional.<sup>8</sup> The case of *Calder v. Bull* was a controversy in which the plaintiffs in error argued that any law of the federal government or of any of the state governments contrary to the Constitution

<sup>3</sup> *Ibid.*, 55.

<sup>4</sup> BOUDIN, GOVERNMENT BY JUDICIARY (New York, 1932) 34-50.

<sup>5</sup> 1 Cranch 137 (U. S. 1803).

<sup>6</sup> HAMILTON, THE FEDERALIST ON THE NEW CONSTITUTION (Hallowell, Me., 1826) 434.

<sup>7</sup> FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (New Haven, 1937), III, 97.

<sup>8</sup> 3 Dallas 171 (1796).

of the United States is void; and that this Court possesses the power to declare such law void.<sup>9</sup> One of the first well-authenticated cases in which a legislative enactment was held to be void because of conflict with the state constitution was the case of *Trevett v. Weeden* wherein the act in question was one which imposed a heavy penalty on any one who should refuse to receive on the same terms as specie the bills of a bank chartered by the state, or who should in any way discourage the circulation of such bills. The penalty was made collectible on summary conviction without jury trial; and the act was held void on the ground that jury trial was expressly given by the Colonial charter, which then constituted the constitution of the state.<sup>10</sup>

It is well known that the case in which the United States Supreme Court first exercised the right to declare an act of Congress unconstitutional was that of *Marbury v. Madison* wherein Chief Justice Marshall laid down the rule which established that the federal judiciary enjoyed the power of passing upon the constitutionality of the acts of Congress.<sup>11</sup>

The case was an issue between Marbury, who claimed title to a commission of justice of the peace, and James Madison, Secretary of State, who allegedly should have delivered the commission to him. Marbury asked the Court for a mandamus commanding the delivery of the commission. Marshall gave judgment, refusing the writ on the ground that the Supreme Court had appellate jurisdiction only, and that this action was original. The action had been brought under the Judiciary Act of 1789 passed by Congress empowering the Court to issue writs of mandamus to any courts or officers of the United States. The Court held that this clause Congress had not the right to make for the Constitution limited the Supreme Court to appellate jurisdiction excepting in four instances.<sup>12</sup> Thereupon the Chief Justice asserted the supremacy of the Constitution and the power of judicial review. Marshall stated in his famous opinion:

“So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of these two conflicting rules governs the case. This is the very essence of judicial duty.”<sup>13</sup>

The result of this decision is well expressed by Marshall's own biographer, Beveridge, when he said that by this decision:

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<sup>9</sup> 3 Dallas 386 (1798).

<sup>10</sup> THAYER, CASES ON CONSTITUTIONAL LAW (Boston, 1895), I, 73.

<sup>11</sup> McLAUGHLIN, op. cit., 310.

<sup>12</sup> United States Constitution, Art. III, Sec. II.

<sup>13</sup> Op. cit., 177-178.

"John Marshall set up a landmark in American history so high that all the future could take bearings from it, so high that all the shocks the nation was to endure could not overturn it. Such a decision was a great event in American history. State courts, as well as national tribunals, thereafter fearlessly applied the principle that Marshall announced and the supremacy of written constitutions over legislative acts was firmly established."<sup>14</sup>

In view of subsequent developments and some of the more recent opinions it is hoped that a brief résumé of a few of the more important later decisions will either affirm or raise a doubt as to the affirmative statements above referred to.

While no attempt has been made to review all of the cases in which an act of Congress has been held unconstitutional, a few of the more important cases in relation to their historical value have been included. The first years of the doctrine laid down in Marshall's opinion saw the principle exercised infrequently and with great caution by the Supreme Court. Records indicate that during a period of some one hundred and forty-six years (1789 to 1936) there have been seventy-six cases decided in which an act or a part of an act of Congress has been held unconstitutional.<sup>15</sup>

During the formative period of American political institutions, that is, the period from 1789 to 1864, there was but one other decision, the *Dred Scott* case,<sup>16</sup> wherein the Supreme Court held an act of Congress void. As a matter of fact, the Civil War period may be said to have introduced a new era in American judicial history. The period from 1864 to June, 1886, showed a record of sixteen cases in which acts of Congress were held invalid by the Supreme Court.<sup>17</sup>

Following the Civil War period there was apparently a change in American jurisprudence. An interesting summary by Aumann presents several factors as having contributed to this trend. First, the growing complexity of state constitutions and the increasing number of limitations which necessarily encouraged state supervision over statutory enactments; second, the important changes in the federal Constitution immediately after the Civil War. As a result of the Thirteenth, Fourteenth, and Fifteenth amendments, the jurisdiction over state legislation has been changed to a great extent. Also added to these factors may be the changes in economic life of the country which tended to increase the business of the courts and enlarge their jurisdiction.<sup>18</sup>

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<sup>14</sup> BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, (Boston and New York 1916-19), III, 142.

<sup>15</sup> *PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES*, (Washington, 1936).

<sup>16</sup> *Scott v. Sandford*, 19 Howard 393 (U. S., 1857).

<sup>17</sup> WARREN, *op. cit.*, 135.

<sup>18</sup> Aumann, "The Doctrine of Judicial Review," 20 *KY. L. JNL.* 276.

Under Chief Justice Taney, the Supreme Court, during the Jackson administration stood for a strict construction of the Constitution, a great respect for the rights of the states, and a lessening of judicial interference in the public affairs of the nation. The gist of the majority opinion delivered by the Chief Justice in the Dred Scott case was that Congress had no power to prevent slavery in the territories.<sup>19</sup> Two propositions from the opinion of the majority may serve to illustrate the attitude of the Court at this time towards the right of the Court to declare an act of Congress unconstitutional. First in regard to the adherence to rigid interpretation of the Constitution:

“It is not the province of the Court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who framed the sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it according to its true intent and meaning when it was adopted.”<sup>20</sup>

The second reference reveals some thoughts regarding the Court's attitude towards the obligation of Congress to adhere to the strict wording of the Constitution:

“The act of Congress, upon which the plaintiff relies, declared that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all the parts of that Territory ceded by France under the name of Louisiana. . . . And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this Court to declare it void and inoperative, and incapable of conferring freedom upon one who is held as a slave under the laws of the states.”<sup>21</sup>

Although during the Civil War period the courts for the most part went unchallenged, in regard to the manner of their exercising judicial review, proposals were made in 1867 to “regulate the practice and define the power of the Supreme Court in certain cases arising under the Constitution” and later proposals were made to “amend the Constitution in regard to the judges of the Supreme and other courts.” The purpose of these proposals being to limit the court's function of judicial review. Due to the unfavorable reception accorded these proposals by the country at large and their postponements by the Senate, the proposals soon fell into obscurity.<sup>22</sup>

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<sup>19</sup> Scott v. Sandford, *op. cit.*

<sup>20</sup> *Ibid.*, 404.

<sup>21</sup> *Ibid.*, 432.

<sup>22</sup> WARREN, *op. cit.*, 188-193.



With the case of *Pollack v. Farmers' Loan and Trust Co.*,<sup>23</sup> the criticism of the judiciary was again revived. This case reversed the decision in *Springer v. United States*,<sup>24</sup> by invalidating a federal income tax law. The reargument at the suggestion of the parties went beyond the first case, in holding that "taxes" on personal property are direct taxes; and that "the tax imposed by Sections 27 to 37, inclusive, of the Act of August 27, 1894, so far as it falls within the meaning of the Constitution, is therefore unconstitutional and void because not apportioned according to representation."<sup>25</sup>

Perhaps another important factor involved in criticism of the exercise of this power by the Court arises from the prevailing uncertainty as to the meaning of "due process." This, the Supreme Court has always declined to give a comprehensive definition of, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.<sup>26</sup>

The question of judicial power once again became an important issue in the 1912 and 1924 political campaigns. Although there had been opposition to the power of judicial review from the early history of the Court, Theodore Roosevelt brought the matter to the attention of the country in 1912 when he advocated the recall of judicial decision.<sup>27</sup> Again in 1924 Senator Robert LaFollette led the attack upon the courts in seeking a modification of judicial power.<sup>28</sup>

In order that some inferences may be drawn as to the current trend in regard to the doctrine of the right of the Supreme Court to declare an act of Congress unconstitutional let us look to some of the more recent activities of the Court.

The Supreme Court in the *Minersville School District v. Gobitis* case,<sup>29</sup> held that a requirement of a local board of education in Pennsylvania that pupils salute the national "flag" in daily school exercises as a condition of attending a free public school is not violative of the "due process" clause when applied to pupils of compulsory school age who seek to avoid participation on sincere religious grounds. The family of the pupils involved in the action against the school district were affiliated with "Jehovah's Witnesses," for whom the Bible as the Word of God is the supreme authority. The children were brought up grounded in belief that such gesture of respect for the flag was forbidden by the command of the Scripture. In delivering the opinion

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<sup>23</sup> 157 U. S. 429 (1895).

<sup>24</sup> 102 U. S. 586 (1880).

<sup>25</sup> 158 U. S. 601 (1895).

<sup>26</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908).

<sup>27</sup> TAFT, *POPULAR GOVERNMENT*, (New Haven, 1913) 174.

<sup>28</sup> Warren, *op. cit.*, 132.

<sup>29</sup> 60 S. Ct. 1010 (1940).

of the Court, Justice Frankfurter said in regard to the power of the Court in interpreting an act of the legislature:

“Judicial review, itself a limitation on popular government is a fundamental part of our constitutional scheme. But to the legislature no less than to the courts is committed the guardianship of deeply-cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the form of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of the people.”<sup>30</sup>

Attorney-General Jackson in an address at the celebration of the one hundred and fiftieth anniversary of the first session of the Supreme Court seems to be in substantial accord with the opinion of Justice Frankfurter. It appears that Jackson in paying tribute to the beginning of the Court and the duty then required by it, by the interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve has entered upon a new era in its history in which the legislative and executive branches of the government may play a more important role. He said:

“Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time upon merit which is its own. There seems no likelihood that the tensions and conflicts of our society are to decrease. Time increases the disparity between underlying economic and social conditions, in response to which our Federation was fashioned, and those in which it must function. Adjustment grows more urgent, more extensive, and more delicate. I see no reason to doubt that the problems of the next half century will test the wisdom and courage of this Court as severely as any half century of its existence.”<sup>31</sup>

The dissenting opinion of Justice Black in the case of the *State of Indiana Ex Rel. Anderson v. Brand*,<sup>32</sup> is particularly interesting as it appears to represent a view slightly different from that of Justice Frankfurter and Attorney-General Jackson. It might be interpreted as being in favor of increasing the power of the legislative branch of the government. Justice Black said:

“The Indiana Constitution gives the state legislature complete authority to control the public school system. The state Supreme Court

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<sup>30</sup> Ibid., 1015-16.

<sup>31</sup> 26 AM. B. ASS'N. JNL. 204 (March, 1940).

<sup>32</sup> 58 S. Ct. 443.

declares that under the authority the Legislature can change school plans as often as it believes a change will promote the interest of education 'and for mistakes, or abuses it is answerable to the people, but not to the courts.' I believe the people of Indiana, if they prefer, have the right under the Federal Constitution to entrust this important public policy to their elective representatives rather than to the courts. Democracy permits the people to rule. I cannot agree that the Constitutional prohibition against impairment of contracts was intended to or does transfer in part the determination of the educational policy of Indiana from the Legislature of that state to this Court."<sup>33</sup>

Summing up these viewpoints as expressed by such modern American jurists it appears that there are at present two broad divisions of thought on the matter of the power of the Court. The statements of Attorney-General Jackson and Justice Frankfurter comprise one view at variance with the view of Justice Black. The former favoring the future attitude of the Court toward the power of judicial review as applying only in cases which permit a strict interpretation of precedents growing out of constitutional interpretation;<sup>34</sup> the other apparently favoring the power of responsibility of interpreting the Constitution to rest in the legislatures.<sup>35</sup>

Whatever may be the trend, it is the writer's opinion, that because the people, through their representatives, created the Supreme Court as the means of preserving the principles embodied in the Constitution from infringements by the states or the federal government; of preserving the natural rights of the individual from the oppression of majorities; and of protecting the states and individuals alike from acts of Congress not authorized by or in direct conflict with the Constitution, the Supreme Court must necessarily have and retain the power to declare an act which is in conflict with the Constitution void.

*Edward A. Mahoney, Jr.*

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TAXES — AN EXCISE TAX UPON THE PRODUCTION OF APPLES IN THE STATE OF MICHIGAN. — The State of Michigan legislature recently passed an ingenious tax on the sale of apples within and without the state, providing the apples were grown and shipped within the state. The fall of 1940 was the first application of the tax and as a result both cases<sup>1</sup> arose simultaneously and will be considered together in the text of this article.

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<sup>33</sup> Ibid., 453.

<sup>34</sup> Frankfurter, loc. cit., and Jackson, loc. cit.

<sup>35</sup> Black, loc. cit.

<sup>1</sup> Miller v. Michigan State Apple Commission, 296 N. W. 245 (Mich., 1941), Kull v. Michigan State Apple Commission, 296 N. W. 250 (Mich., 1941).

The act, popularly known as the Baldwin Apple Act, provides: "An act relating to apples: declaring the public policy of this state to promote the consumption and sale of apples by providing a research and a publicity and sales promotion program to increase the consumption of Michigan grown apples; levying an assessment on apple production and providing for its collection; creating an apple commission and resting in it the administration of this act; providing for the power, duties and authority of said commission; and providing penalties for the violation of this act." <sup>2</sup>

"There is hereby levied and imposed upon all apples grown in the year 1939, and annually thereafter, an assessment of one cent per bushel or two cents per one hundred pounds of all apples grown and produced in Michigan, payable by the grower or grower's agent when shipped, whether in bulk or loose, in boxes or any other container, or packed in any style package. Provided, That the provision of this act shall not apply to apples sold by growers or grower's agents direct to cider and/or vinegar plants for the use in making cider and/or vinegar: Provided, That each grower or grower's agent shall be exempt from said assessment on a maximum of 300 bushels of apples for each calendar year. All money levied and collected under this act shall be expended exclusively to advertise apples." <sup>3</sup>

The growers, in the cases brought to trial, both attacked the act on the ground it was unconstitutional as it violated both the 14th amendment of the federal constitution and Article 10, section 4 of the Michigan constitution, which provides; "The legislature may by law impose specific taxes, which shall be uniform upon classes which they operate." <sup>4</sup> The growers contend that this is not a tax upon a class as a whole, but a specific tax on a product of agriculture which amounts to aid to a particular private industry. In support of this view they cited *Michigan Sugar Company v. Auditor General*,<sup>5</sup> in which the Michigan Supreme court decided that a bounty for additional sugar beet acreage planted in order to increase sugar beet consumption in the State was unconstitutional as it was discriminatory in that it provided a bounty to a select group engaged in a particular branch of agriculture, and was to be paid out of the general funds of the State.

It was further contended by the growers that the act failed to provide for payment under protest or later recovery of the tax paid if the act should later be declared unconstitutional. This, they contended was a violation of the 14th amendment of the Federal constitution.<sup>6</sup>

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<sup>2</sup> MICH. STATS. ANN. (1940), Cum. Supp. § 12. 1220.

<sup>3</sup> *Ibid.* par. 9.

<sup>4</sup> Michigan Constitution of 1908, Art. 10 § 4.

<sup>5</sup> 124 Mich. 674, 83 Am. St. Rep. 354, 56 L. R. A. 329, (1900), appeal dismissed 185 U. S. 112 (1902), 22 Sup. Ct. 581, 46 L. Ed. 829.

<sup>6</sup> United States Constitution Amendment 14.

The court summarily dismissed this view by saying that those subject to the tax may always act to restrain collection thereof.

The judges of the lower courts and two judges of the Supreme court were in sympathy with the apple growers. The dissenting opinion of Justice Wiest of the Supreme court declared that the tax was not an excise tax, license or occupation tax, but a specific tax on a product of agriculture, and its assessment not within the police power or any other power of the legislature under the Constitution. It is an unauthorized tax to aid a particular private industry.

However, the majority of the court was of a different opinion. They held the tax was not a benefit to any particular group of individuals but to the public as a whole. The increase in the sale of apples due to the publicity achieved by means of money raised by the tax, was a benefit to the general public of the State. The tax was upon a privilege or right and was not unconstitutional for failure to include all engaged in agricultural pursuits.

"The penalty provided for in case of a violation does not violate the 14th amendment of the Federal Constitution, as it does not subject one to prosecution for neglect or inability to pay the specific tax, but rather for the purpose of subjecting one to prosecution who, by means of fraudulent or unlawful means, evades or aids in the evasion of compliance with provisions of the act." Just what the court means by this construction of the act is not readily understandable. If one by neglect fails to pay the tax, or by reason of inability to pay the tax, fails to do so, he by interpretation of the courts opinion is to be excused from non-compliance.

The court stated further that the tax was not a burden upon interstate commerce as the goods are taxed before they are put into the channels of trade and therefore does not impede such commerce.

The Michigan court is apparently reversing itself from the view maintained in *Michigan Sugar Company v. Auditor General*<sup>7</sup> and has construed the act on its economic benefit rather than the legal effect. This procedure is quite prevalent in the recent decisions.

There is one other state that has decided the similar problem in the same manner. The Florida Supreme Court in the case of *C. V. Floyd Fruit Co. v. Florida Citrus Commission*<sup>8</sup> stated: "So it cannot be reasonably contended that the protection and promotion of the citrus industry in Florida is not a matter of public concern or that the legislature may not determine within reasonable bounds what is necessary for the protection and expedient for the promotion of that industry. We are committed to the theory that advertising is a proper method

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<sup>7</sup> *Supra* 4.

<sup>8</sup> 128 Fla. 565, 175 So. 248, 112 A. L. R. 562 (1937).

for promoting the public welfare and that, therefore, the tax levied to provide funds for advertising serves a public end.”

In *Johnson v. State, ex rel Maxcy*,<sup>9</sup> the Florida court said; “The protection of a large industry, constituting one of the great sources of the State’s wealth and therefore directly or indirectly affecting the welfare of so great a portion of the population of the state, is affected to such an extent by public interest as to be within the police power of the sovereign.”

These are the only other cases to reach the courts on a similar point, and it should be noted that the Florida act covers the citrus production as a whole and not one individual product of the citrus industry. The question of public policy is a moot point and any definition of the public is relatively impossible. However, in view of the circumstances of both decisions, Florida and Michigan, it seems the Florida court is deciding on a question that affects a great many more people or a larger public, than the Michigan court. If the courts decide that a small group of farmers who are engaged in the occupation of apple production, constitute a public, there is nothing to bar the legislature from enacting taxes, not general taxes, but specific taxes, upon any one specialized branch of agricultural pursuit. It is indeed an ingenious means of taxation, but the Constitutionality, although decided upon by the court, is far from obvious.

*Thomas W. Cain.*

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THE ASSIGNABILITY OF EMPLOYMENT AND SERVICE CONTRACTS. — This writing is an attempt to show the distinction between the employment and service contracts that according to law may be assigned, and those that cannot. Generally either party to a contract may make a valid assignment of his rights under it.

An assignment of a right is a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person or to a third person.<sup>1</sup> A delegation by an obligor of the performance of a duty which he owes, or by an obligee of the performance of a condition to which his right is subject, is an authorization to another to render the performance.<sup>2</sup>

The type of assignment to be dealt with in this writing can best be defined as follows; where a party to a bilateral contract, which is at the time wholly or partially executory on both sides, purports to as-

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<sup>9</sup> 99 Fla. 1311, 128 So. 853 (1930).

<sup>1</sup> RESTATEMENT OF CONTRACTS, § 149.

<sup>2</sup> RESTATEMENT OF CONTRACTS, § 160.

sign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.<sup>3</sup>

The first portion of this note is a discussion of the delegation of duties in employment and service contracts. The second is a discussion of the assignment of rights on executed personal service contracts. The third portion is a brief discussion as to what form the actual assignment may take and still be valid and lastly a discussion of the enforcement of the contract by the assignee.

In general the test that is applied in determining the assignability of a contract is whether the contract is personal in nature, and this is determined for the most part by deciding what the intention of the parties was at the time the particular contract was made. As evidence of this it was held in Oklahoma, that in construing a contract, the court may look into the construction placed on it by the parties, and to the acts under it in carrying it into effect, to determine what their intent was as to assignability, when it was entered into.<sup>4</sup> An Ohio court also held that personal contracts are contracts in which personality of one of the parties is material and these contracts are not assignable, but whether personality of one or both parties is material depends on the intention of the parties as shown by language used and the nature of the contract.<sup>5</sup>

The test of assignability then is one of intention. To show how this test works I will sight a case and then apply the test. A Texas court held, that when the contract involves an extension of credit it cannot be assigned.<sup>6</sup> The reason for the above decision is easily seen by the application of the intention test. Since the extension of credit is based on a personal element the intention of the parties naturally was not to have the contract assigned.

Intention in turn is governed for the most part by the express terms of the contract. Article 2007 of the Civil Code of Texas says "All contracts for the hire of labor, skill or industry, without any distinction, whether they can be as well performed by the obligor, unless there be some special agreement to the contrary, are considered as personal on part of the obligor but heritable on the part of the obligee." That intention as construed by the courts is governed by the express terms of the contract is further evidence by a New York decision which said that, though parties may in terms prohibit assignment of any contract

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<sup>3</sup> RESTATEMENT OF CONTRACTS, § 164.

<sup>4</sup> *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 27 Okla. 90, 111 Pac 326 (1910).

<sup>5</sup> *Lucas v. J. H. Gross Motor Car Co.*, 320 Ohio App. 183, 161 N. E. 362 (1927).

<sup>6</sup> *Amsco Pipe Line Co. v. Donico Production Co.*, 112 S. W. 2d 483 (1938)

in absence of such prohibition, contracts other than those that are personal in character such as promises to marry, or engagements for personal service requiring skill, science or peculiar qualifications, may be assigned so as to bind personal representatives.<sup>7</sup>

Although a contract be assigned by one of the parties, this party is nevertheless responsible for its performance and is not relieved of liability if the assignee refuses or fails to render performance. The fact that the assignor has assigned the contract to another person does not prevent the other original party to the contract from suing the assignor if the contract is not performed. This reasoning was upheld by an Oregon court which said that the assignment of a contract does not discharge the assignor from his original undertaking.<sup>8</sup>

An assignment may be waived by inference. A contract for personal services may be assigned by consent of the parties, and conduct of a party to a contract with knowledge of assignment may warrant inference of waiver of provision therein prohibiting assignment.<sup>9</sup>

The next question to be dealt with is the assignment of rights on executed personal service contracts. Generally after substantial performance of a contract has been completed the contract or rather the rights under it may be assigned. A California court held that the principle that an attorney could not assign a contract for his services and substitute another attorney in his place, without the client's consent, has no application where the attorney has practically rendered all the services he contracted to do before the assignment was made; and in such a case the assignment of the contract is valid, being substantially an assignment of a debt due.<sup>10</sup> Another California court held that if a personal obligation has been practically discharged, a contract otherwise not assignable may be assigned.<sup>11</sup> In support of this same contention it was held in Illinois that where a contract has been fully executed and nothing remains to be done except to pay the money, the element of personal character, credit and substance of the party with whom the contract was made is no longer material and the claim becomes a chose in action and is assignable and enforceable.<sup>12</sup>

When are the assignment of rights and the delegation of duties on executory personal service contracts valid? The problem as to the assignability of employment contracts is the determining of whether the employment consists of personal services or not. The general rule

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7 *Janvey v. Loketz*, 122 App. Div. 411, 106 N. Y. S. 690 (1907).

8 *Corvallis and A. R. R. Co. v. Portland, E. and E. Ry. Co.*, 84 Ore. 524, 163 Pac. 1173 (1917).

9 *Orlando Orange Grove Co. v. Hale*, 119 Fla. 159, 161 So. 284 (1935).

10 *Taylor v. Black Diamond Coal Co.*, 86 Cal. 589, 25 Pac. 51 (1890).

11 *Fenn v. Pickwick Corporation*, 117 Cal. App. 376, 4 Pac. 2d 215 (1931).

12 *State Street Furniture Co. v. Armour and Co.*, 345 Ill. 160, 177 N. E. 702, 76 A. L. R. 1298 (1931).



regarding the assignability of a contract is that an executory contract, not necessarily personal in its character which can, consistently with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable in the absence of any stipulation in the contract to the contrary. But if a contract be personal in its character and calls for the personal service of either party, or creates relationships of personal credit, confidence and trust, or requires the exercise of knowledge, skill or taste peculiar to either party then such contract is not assignable.<sup>13</sup>

What are considered personal service contracts? The following examples are a few of the decisions of the various courts in this regard. (1) The assignee of a contract by a keeper of a livery stable to supply horses and wagons to a library, by means of which it might prosecute its business, was allowed to recover since it did not call for any service of a personal character.<sup>14</sup> (2) New York held that a contract for the painting, decorating and whitewashing of a building was assignable, since it did not involve a personal confidential relationship or exceptional personal skill or knowledge, which alone would make the contract non assignable.<sup>15</sup> (3) A New York court also held that a contract employing defendant to solicit customers was bilateral, and an unassignable contract, not enforceable by the purchaser of a business, though defendant continued in purchaser's employ.<sup>16</sup> (4) In Ohio a contract whereby a truck driver was to collect milk over a given route for a milk producers association and deliver milk to a dairy, was a contract for personal services which truck driver could not assign without consent of the association.<sup>17</sup> (5) A California court held that an executory contract to paint and finish a building did not imply such special reliance upon the personal skill and responsibility of the contractor as to render it unassignable to another contractor without the owner's consent; the satisfactory performance of the work, not the fact of having it done by the contractor being the consideration for the owner's obligation to pay.<sup>18</sup> (6) A contract employing a man to select and furnish lecturers, musicians and other entertainers for an assembly, and for supervision of such assembly, was not assignable.<sup>19</sup> (7) A contract for the installation of electric apparatus, providing that construction of the circuits shall be done under supervision of the contractor is for personal services and cannot be assigned.<sup>20</sup> (8) An

<sup>13</sup> Model Baking Co. v. Dittman, Texas Civil Appeals, 266 S. W. 802 (1924).

<sup>14</sup> Merritt v. Booklovers' Library, 89 App. Div. 411, 106 N. Y. S. 690 (1907).

<sup>15</sup> Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. S. 690 (1907).

<sup>16</sup> Avenue Z Wet Laundry Co. v. Yarmush, 129 App. Div. 427, 221 N. Y. S. 506 (1927).

<sup>17</sup> Caracaciolo v. Bonnell, 57 Ohio App. 397, 14 N. E. 2d 361 (1937).

<sup>18</sup> Gribling v. Boham, 26 Cal. App. 771, 148 Pac. 530 (1915).

<sup>19</sup> Standard Chatauqua System v. Gift, 120 Kan. 101, 242 Pac. 145 (1926).

<sup>20</sup> Swarts v. Narragansett Electric Lighting Co., 26 R. I. 388, 59 Atl. 77 (1904).

executory contract to design, manufacture, and install fixtures in conformity to special plans fitted for a special stone is a contract for work involving something of reliance on the personal efficiency of the contractor, and this is not assignable by him without the consent of the other party.<sup>21</sup> (9) A contract to split rails and deliver them was held not assignable.

The number of men employed in carrying out a contract has considerable influence on whether the contract may be assigned or not, since the larger the number the less likely the element of personal skill and service. A contract for drilling an oil well may be assigned by the contractor when the work necessarily requires the labor and attention of a number of men, and it does not appear that, because of his knowledge, experience or peculiar ability or for any other reason, the contractor was specially fitted to carry on the work. In a federal case it was held that where a contract to do logging work requiring the employment of a considerable number of men, and under which no credit was extended to the contractor and no personal service was required, is assignable.<sup>22</sup>

An important point as to the assignability of contracts was laid down in a Texas case which held that the rule against the assignment of personal service contracts does not apply to merely nominal owners or officials of parties bound nor employees without control over business or voice in its management, and assignment of such a contract without change of ownership, control or management does not relieve the other party of his obligation.<sup>23</sup>

To sum this up we may say that a contract in which the choice of the person is material, as where a person agrees to use his personal skill and knowledge, or has been contracted with by the reason of the confidence and trust placed in him, cannot be assigned by such person, while the agreement remains executory, without the consent of the other contracting party; but a contract in which the choice of the person is not material and which is for services that may as well be performed by one person as another is assignable unless the assignment thereof be prohibited by the terms of the contract. A very good case which supports this viewpoint held that a contract for legal services is personal in its nature and cannot be assigned by one party without consent of the other. Death or disability does not render the assignment without the consent of both parties valid. This death or disability merely annuls the contract and the client can procure another attorney's services, and a claim of money due for services by an alleged assignee of a disabled attorney is not good.<sup>24</sup>

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<sup>21</sup> *New England Cabinet Works v. Morriss*, 266 Mass. 175, 115 N. E. 315 (1917).

<sup>22</sup> *Panhandle Lumber Co. v. Mackay*, 21 Fed. 2d 916 (1927).

<sup>23</sup> *Model Baking Co. v. Dittman*, Texas Civil Appeals, 266 S. W. 802 (1924).

<sup>24</sup> *Corson v. Lewis*, 77 Neb. 446, 109 N. W. 735 (1906).

As to the form of an assignment it has generally been held that an assignment need not be in any particular form so long as it indicates the intention of the parties. Particular phraseology is not required to effect an assignment and it may be either in oral or written form.<sup>25</sup>

An assignee may sue on a contract. The rule that one who is not a party to a contract can only maintain suit thereon when it is for his benefit does not prevent suit by the assignee of an assignable contract.

For a concise review of this writing we may say that if the intention of the parties to the contract is one which regards the contract as personal in nature, and if this contract has not been substantially performed, it cannot be assigned without the consent of both parties.

*John P. Meyer.*

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THE FAMILY PURPOSE DOCTRINE — WHO ARE MEMBERS OF THE FAMILY AND WHAT IS THE FAMILY CAR FOR THE PURPOSE OF THIS DOCTRINE. — The Family Car Doctrine (or Family Purpose Doctrine) is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the invention of the automobile, and its common use, with the owner's permission, by the members of his family for whom he has provided it. The reasoning behind the rule is that when the head of a family furnishes a car for the pleasure and convenience of members of his family, he thereby makes the pleasure of the family his business, and when members of the family are using the car for the purpose furnished, pleasure, they are about the business of the head of the family, therefore, they are his agents or servants, and the head of the family becomes liable for their torts committed with the automobile. In every instance in which the Family Car Doctrine has been applied it was explained that such doctrine is merely an extension of the rules of principal and agent and master and servant, and not a device which seeks, for the purpose of public welfare, to fix liability on someone able to meet it. Any case cited in this note is an authority for the fact that the Family Car Doctrine is based on the principle of master and servant and principal and agent.

There is a great deal of conflict of opinion on this question of liability of the head of the family. When the member of the family is using the car for a purpose in which the father has a financial interest, every court will, of course, hold that the father is liable for the negligent use of that car, and the same will hold true when the member of the family is running an errand for the father. But the conflict of opinion occurs when it comes to the question of the member of the family using

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<sup>25</sup> Lone Star Cement Corporation v. Swartwout, 93 Fed. 2d 767 (1938).

the car for his own pleasure, and not that of the head of the family. Those jurisdictions holding the father liable for the negligent use of the family car by a member of the family using the car for his own pleasure have accepted the Family Purpose Doctrine. Those jurisdictions holding the father not liable, on the basis that he had no interest in the act of a member of the family using the car for his own pleasure, have rejected the Family Purpose Doctrine. On this question, two states, Florida and Wyoming, have not passed upon the doctrine, twenty-one jurisdictions<sup>1</sup> hold that one is liable under the Family Purpose Doctrine who furnishes a car for the pleasure of the family, and who in using it for that purpose commits a tort, and twenty-six jurisdictions<sup>2</sup> reject the doctrine by holding that one furnishing a car for the pleasure of the family, is not liable for the negligent use of that car by the family.

The source of the conflict exists in extending the principle of master and servant to such an extent. The twenty-six jurisdictions rejecting the doctrine, do so because in the opinion of their courts the principles

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<sup>1</sup> Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934). Donn v. Kunz, 52 Ariz. 219, 79 Pac. 2d 965 (1939). Armstrong v. Sengo, 17 Cal. App. 300, 61 Pac. 2d 1188 (1937). Maher v. Fahy, 112 Conn. 76, 151 Atl. 318 (1930). Smith v. Doyle, 69 App. D. C. 62, 98 Fed. (2d) 341 (1939). Golden v. Medford, 189 Ga. 614, 8 S. E. 2d 531 (1940). Hart v. Hinsley, 215 Iowa 915, 247 N. W. 258 (1933). Smith v. Overstreet's Adm'r., 258 Ky. 781, 81 S. W. 2d 571 (1935). Meisenheimer v. Pullen, 271 Mich. 509, 260 N. W. 756 (1935). Schreder v. Litchy, 190 Minn. 264, 251 N. W. 513 (1933). Hogg v. MacDonald, 128 Neb. 6, 257 N. W. 274 (1934). Jones v. Golick, 46 Nev. 10, 206 Pac. 679 (1922). Boes v. Howell, 24 N. M. 142, 173 Pac. 966, L. R. A. 1918F, 288 (1918). Vaughn v. Booker, 217 N. C. 479, 8 S. E. 2d 603 (1940). Posey v. Krogh, 65 N. D. 490, 259 N. W. 757 (1935). Steele v. Hemmers, 149 Ore. 381, 40 Pac. 2d 1022 (1935). Edmond v. Fallon, 56 R. I. 419, 186 Atl. 15 (1935). Hewitt v. Fleming, 172 S. C. 266, 173 S. E. 808 (1934). Long v. Tomlin, 22 Tenn. App. 607, 125 S. W. 2d 171 (1939). Cook v. Rafferty, 200 Wash. 234, 93 Pac. 2d 396 (1940). Wyant v. Phillips, 116 W. Va. 207, 179 S. E. 303 (1935).

<sup>2</sup> Teatherston v. Jackson, 183 Ark. 373, 36 S. W. 405 (1931). Boltz v. Bonner, 95 Colo. 350, 35 Pac. 2d 1015 (1934). Smith v. Callahan, (Del.), 4 W. W. Harr. 129, 144 Atl. 146, 64 A. L. R. 830 (1928). Colwell v. Bothwell, 60 Idaho 107, 89 Pac. 2d 193 (1939). O'Haron v. Leiner, 306 Ill. App. 230, 28 N. E. 2d 315 (1940). McGoran v. Cromwell, 86 Ind. App. 107, 156 N. E. 413 (1927). Thompson v. Kan. City Ry. Co., 113 Kan. 74, 213 Pac. 633 (1923). Benton v. Griffith, (La.) 184 So. 371 (1940). Robinson v. Warren, 129 Me. 172, 151 Atl. 10 (1930). Schneider v. Schneider, 160 Md. 18, 152 Atl. 498, 72 A. L. R. 449 (1930). Dennis v. Glym, 262 Mass. 233, 159 N. E. 516 (1928). Culpepper v. Holmes, 170 Miss. 235, 154 So. 726 (1934). Mulanix v. Reeves, 233 Mo. App. 143, 112 S. W. 2d 100 (1938). Clawson v. Dobson, 63 Mont. 488, 208 Pac. 924 (1922). Pickard v. Morris, (N. H.), 13 Atl. 2d 609, (1940). Wirth v. Gabry, 120 N. J. L. 432, 200 Atl. 556 (1939). Cherwien v. Geiter, 279 N. Y. Supp. 553, 5 N. E. 2d 185 (1937). Fulk v. Lorenzoni, 59 Ohio App. 287, 17 N. E. 2d 952 (1939). Gallager v. Halcomb, 172 Okla. 1, 44 Pac. 2d 44 (1935). Hildock v. Grosso, 334 Pa. 222, 5 Atl. 2d 565 (1939). Miller v. Stevens, 63 S. D. 10, 256 N. W. 152 (1934). Even v. Gandy, (Tex.), 141 S. W. 2d 772 (1940). Reid v. Owens, (Utah), 93 Pac. 2d 680 (1940). Hackley v. Robey, 170 Va. 55, 195 S. E. 689 (1938). Jones v. Knopp, 104 Vt. 5, 156 Atl. 399. Burant v. Studzinski, (Wis.), 291 N. W. 390 (1940).

of master and servant cannot be stretched so far as to hold that a member of the family using the car for the purpose intended by the father, pleasure, is the agent of the father. In rejecting the doctrine, the Illinois court in *Arkin v. Page*<sup>3</sup> said:

"If the son is his father's agent to amuse himself with an automobile, he must also be a like agent for his own amusement with bicycles, horses, and buggies, guns, golf clubs, baseballs and bats, row boats and motor and sail boats, if these should happen to be provided, and if, in carrying on his father's business by the use of any of these articles, as his father's agent, to amuse his father's son, he should negligently injure anyone, his father would be liable as principal."

This criticism is strengthened when we consider that even though Minnesota applies the Family Purpose Doctrine, it refused to apply it in the case of a motorboat,<sup>4</sup> even though furnished by the head of the family for the pleasure of the family. In short, Minnesota says that a son driving the family car for his own pleasure is the agent of the father, if the car was meant for the family's pleasure. But the son is not the agent of the father if it is a motorboat instead of an automobile, even though the motorboat be furnished for the pleasure of the son. When one considers contradictions such as this, it becomes apparent that the Family Purpose Doctrine is not as much an extension of the principles of master and servant as it is an attempt to fix liability on one able to meet it.

#### WHO ARE MEMBERS OF THE FAMILY?

In those jurisdictions which accept the Family Purpose Doctrine, there is some disagreement on the question as to who are members of the family for the purpose of this doctrine. They can be divided, in most cases, into two groups — those which give a liberal interpretation to the word "family," and those which construe it strictly. The Connecticut court expressed the definition of "family" for the first group in the case of *Smart v. Bissonette*.<sup>5</sup>

"The family group is not limited to those bound together by the ties of relationship. . . . Obviously, the basis of liability is the master-servant relationship and not that based on consanguinity. . . . The family group is not necessarily confined to those of his own kindred; it includes all those members of the collective body of persons living in his household for whose convenience the car is actually maintained and who have general authority to use it."

In this case, *Smart v. Bissonette*, the defendant was a priest, and his housekeeper who had served him for sixteen years had his general per-

<sup>3</sup> 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216 (1919).

<sup>4</sup> *Felcyn v. Gamble*, 185 Minn. 357, 241 N. W. 37, 79 A. L. R. 1159 (1932).

<sup>5</sup> 106 Conn. 477, 138 Atl. 365 (1927).

mission to use his car for her own pleasure, and in using it for that purpose negligently drove it and injured the plaintiff. Applying the above definition, the Connecticut court held that the housekeeper was a member of the priest's family, and that he was liable for her negligent use of his automobile. This case represents the greatest extreme to which the doctrine has been taken.

Those jurisdictions applying the strict definition of the word "family" hold that to constitute a group of persons a family there must be (1) subjection to the general management and control of the head thereof, (2) dependence of the members upon such managing head, (3) mutual gratuitous services with no intention on one hand of paying for such services, and no expectation on the other hand of receiving reward or compensation, (4) moral or legal obligation of the managing head to support the members.<sup>6</sup>

Under either of these definitions the courts which recognize the Family Purpose Doctrine hold, with three exceptions, that it is equally as applicable in the case of an adult child as a minor,<sup>7</sup> and that the test of liability is not whether the child is an adult or a minor, but if the car was being used for the purpose for which it was furnished, pleasure.<sup>8</sup> The three exceptions occur in the states of Kentucky, Tennessee, and Georgia. Kentucky holds that the doctrine is applicable to a minor but not to an adult child.<sup>9</sup> The Kentucky courts reason that the head of the family has an obligation to support a minor child, and when using the family car for his own pleasure the minor child is the owner's agent, as he is carrying out a purpose of the parent. But the parent has no moral or legal obligation to support an adult child, so the adult child is not the father's agent in driving the family car for his own pleasure, as he is serving no purpose of the father.<sup>10</sup> Tennessee and Georgia hold that the doctrine is applicable to an adult child who is dependent upon the head of the family, but is not applicable to a self supporting son because there is no moral or legal obligation to him.<sup>11</sup>

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<sup>6</sup> *Kearn v. Md. Casualty Co. of Baltimore, Md.*, (Judged by Ky. Law), 112 Fed. 2d 352 (1940). *Hogg v. McDonald*, 128 Neb. 6, 257 N. W. 274 (1934). *Jones v. Golick*, 46 Nev. 10, 206 Pac. 679 (1922). *McGee v. Crawford*, 205 N. C. 318, 171 S. E. 326 (1933). *Rogers v. Kuhnreich*, 247 Mich. 204, 225 N. W. 622 (1929).

<sup>7</sup> *Pearson v. Northland Transp. Co.*, 184 Minn. 560, 239 N. W. 602 (1931). *Linch v. Dobson*, 108 Neb. 632, 188 N. W. 227 (1922). *Carpenter v. Dunnell*, 61 N. D. 263, 237 N. W. 779 (1931). *Cook v. Rafferty*, (Wash.) *supra*, note 1. *Watson v. Burley*, 105 W. V. 416, 143 S. E. 95 (1928).

<sup>8</sup> *Carpenter v. Dunnell*, (N. D.), *supra*, note 7. *Watson v. Burley*, (W. Va.), *supra*, note 7.

<sup>9</sup> *Miracle v. Cavins*, 254 Ky. 646, 72 S. W. 2d 25 (1934).

<sup>10</sup> *Bradley v. Schmidt*, 223 Ky. 784, 4 S. W. 2d 703 (1928).

<sup>11</sup> *Raley v. Hatcher*, 61 Ga. App. 846, 7 S. E. 2d 777 (1940). *Adkins v. Nanney*, 169 Tenn. 67, 82 S. W. 2d 867 (1935).

In those states recognizing the doctrine, it is as applicable to the spouse of the owner as it is to a child.<sup>12</sup>

Those states which recognize the doctrine hold that it is applicable to a grandchild,<sup>13</sup> stepchild,<sup>14</sup> and nephew,<sup>15</sup> when they live with the one furnishing the car, are subject to his control, and dependent upon him. If, however, they pay board, the courts generally construe it to mean that there is no subjection to the one furnishing the car, and that there is no family relationship or responsibility as between the two, and in these cases the doctrine is not applicable.<sup>16</sup>

When a son or daughter is the head of the family, he, or she, is liable for the negligent use of an automobile by a member of their family, when the car was furnished for the general use and pleasure of the family. In these cases the doctrine has been held applicable to a dependent sister,<sup>17</sup> mother,<sup>18</sup> and father.<sup>19</sup> The doctrine will not be applied in these cases, however, unless it appears beyond all doubt that the car was furnished by the son or daughter for the pleasure of the family, and that the son or daughter is in fact a head of the family, and the others dependent upon him.<sup>20</sup>

The doctrine has not been accepted as applicable to a son-in-law<sup>21</sup> or brother-in-law<sup>22</sup> because they are not members of the owner's family for the purpose of this doctrine, there being no moral or legal obligation to support. The fact that the owner furnished the car for the pleasure of such son-in-law or brother-in-law does not make a case against him when there is an absence of obligation of support.

<sup>12</sup> Kelly v. Hanwick, (Ala.), *supra*, note 1. Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966, L. R. A. 1918A, 1008 (1917). Stickney v. Epstein, 100 Conn. 107, 123 Atl. 1 (1923). Golden v. Medford, (Ga.), *supra*, note 1. Crawford v. McElhinney, 171 Iowa 606, 154 N. W. 310 (1915). Standard Oil Co. v. Thompson, 189 Ky. 830, 226 S. W. 368 (1920). Meisenheimer v. Pullen, 271 Mich. 509, 260 N. W. 756 (1935). Schreder v. Litchy, (Minn.), *supra*, note 1. Lyon v. Lyon, 205 N. C. 326, 171 S. E. 356 (1933). Ulman v. Lindeman, 44 N. D. 36, 176 N. W. 25, 10 A. L. R. 1440 (1919). Sundock v. Pittman, 165 Tenn. 17, 52 S. W. 2d 155 (1932). Hart v. Hogan, 173 Wash. 598, 24 Pac. 2d 99 (1933). Wyant v. Phillips, (W. Va.), *supra*, note 1.

<sup>13</sup> Mitchell v. Mullen, 45 Ga. App. 285, 164 S. E. 278 (1932). McGee v. Crawford, (N. C.), *supra*, note 6.

<sup>14</sup> Mooney v. Canier, 198 Iowa 251, 197 N. W. 625 (1924). Jones v. Cook, 96 W. Va. 60, 123 S. E. 407 (1924).

<sup>15</sup> Rogers v. Kuhnreich, *supra*, note 6.

<sup>16</sup> *Ibid.*, notes 13, 14, 15, *supra*.

<sup>17</sup> O'Keefe v. Fitzgerald, 106 Conn. 294, 137 Atl. 858 (1927). Levy v. Rubin, 52 Ga. App. 212, 182 S. E. 176 (1935).

<sup>18</sup> *Ibid.* Also, Crouse v. Lubin, 260 Pa. 329, 103 Atl. 725 (1918).

<sup>19</sup> Turner v. Gackle, 168 Minn. 514, 209 N. W. 626 (1926).

<sup>20</sup> *Ibid.*, notes 17, 18, 19 *supra*. Quinn v. Neal, 19 Ga. App. 484, 91 S. E. 786 (1916).

<sup>21</sup> Bryant v. Keen, 43 Ga. App. 251, 158 S. E. 445 (1931).

<sup>22</sup> Jones v. Golick, *supra*, note 6.

Even though there be a close degree of relationship, it is necessary that the user of the car live in the household of the one furnishing it.<sup>23</sup> Thus, in *Warren v. Norguard* the father was not liable for the son's negligent use of his family car when it appeared that the son was not living in the father's household.

There is one exception to the above paragraph, and that is in the case of some third person, not related to the owner of the car, and not living in his household, but driving his car with the permission of a member of the owner's family.<sup>24</sup> But the owner is only liable in these cases when the third person was driving the car for the purpose for which it was furnished, the pleasure of the owner's family. If the third person is driving for his own purpose, with the permission of a member of the owner's family, the owner will not be liable for the driver's negligent use, as he did not furnish the car for the pleasure of the third person, and under no conditions could the third person driving for his own pleasure be considered the owner's agent.

#### THE FAMILY CAR

The family car is usually defined as being a car furnished by the head of the family for the general use, pleasure, and convenience of the members of his family.<sup>25</sup> However, when it comes to a practical application of this definition, the courts which recognize the doctrine hold that a wife or mother who furnishes a car for the pleasure and convenience of her family is liable under the Family Car Doctrine for the family's negligent use of the car, even though she be not the head of the family.<sup>26</sup>

As said above, the family car is one furnished for the pleasure of the family, and some conflict of opinion arises when the car is used for both business and pleasure purposes. It is generally conceded that when a son is using the family car in his employer's business he is not using it for the purpose for which it was furnished, pleasure, and, therefore, he is not the father's agent and the Family Purpose Doctrine does

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<sup>23</sup> *Mitchell v. Mullen*, *supra*, note 13. *Warren v. Norguard*, 103 Wash. 284, 174 Pac. 7 (1918). *Hart v. Hogan*, (Wash., 1933), *supra*, note 12.

<sup>24</sup> *Golden v. Medford*, (Ga.), *supra*, note 1. *Schreder v. Litchy*, (Minn.) *supra*, note 1. *Schnebly v. Bryson*, 158 Wash. 250, 290 Pac. 849 (1930).

<sup>25</sup> *Mitchell v. Mullen*, *supra*, note 13. *Felcyn v. Gamble*, *supra*, note 4. *Morken v. St. Pierre*, 147 Minn. 106, 179 N. W. 681 (1920). *Hogg v. MacDonald*, *supra*, note 6. *Scates v. Sandefer*, 163 Tenn. 558, 44 S. W. 2d 310 (1931). *Dillon v. Burnett*, 179 Wash. 371, 85 Pac. 2d 656 (1938).

<sup>26</sup> *Wolf v. Sulick*, 93 Conn. 431, 106 Atl. 443, 4 A. L. R. 356 (1919). *Pentecost v. Massey*, 201 Ala. 261, 77 So. 675 (1918). *Fricklen v. Heichelheim*, 49 Ga. App. 777, 176 S. E. 303 (1934). *Smith v. Overstreet's Adm'r.*, (Ky.), *supra*, note 1. *Cockerham v. Potts*, 143 Ore. 80, 20 Pac. (2d) 423 (1933). *Williams v. Dickson*, 167 Wash. 229, 8 Pac. 2d 1087 (1932). *Wyant v. Phillips*, *supra*, note 12.



not apply.<sup>27</sup> The conflict arises in those cases in which the head of the family uses the car partly in his business and partly for family pleasure purposes. Whether or not the Family Purpose Doctrine will apply in these cases seems to depend on to what extent the car is used for business purposes, and to what extent it is used for pleasure purposes.<sup>28</sup> The general implication in these cases seems to be that if the car is used mostly for business purposes, and seldom for pleasure, it is not a family car for the purpose of this doctrine. But, if it is used generally for pleasure after business hours it is a family car. However, in *Williams v. Dickson*<sup>29</sup> it appeared that the father owned two cars, one for business and one for pleasure. His daughter used the business car for her own pleasure for the first time, and the Washington court held it to be a family car for the purpose of this doctrine, and the father was liable for the daughter's negligent use. But in *Eaves v. Coxe*<sup>30</sup> the North Carolina court, on the same set of facts, held the father to be not liable, the car not being a family car. It would seem that the great majority of the courts would follow the North Carolina rule.

The one upon whom it is sought to fix liability under the Family Purpose Doctrine must have full control of the car, and no liability will accrue if it appears that the defendant has only a nominal title to the car.<sup>31</sup>

The extension of the principles of agency to the Family Purpose Doctrine has, of course, met with severe criticism. But since it is an attempt to fix liability on one able to meet it, rather than an application of common law, it is probably here to stay, and those states which refused the doctrine at common law, are slowly adopting it by statute. Tennessee has already applied the doctrine to a motorcycle,<sup>32</sup> and a note in A.L.R. states that the day may come when it will be applied to airplanes.<sup>33</sup>

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<sup>27</sup> *Scates v. Sandefer*, *supra*, note 25. *Jetton v. Polk*, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933).

<sup>28</sup> *Denison v. McNorton*, 228 Fed. R. 401 (1916). *Doss v. Monticello Elec. Light & Power Co.*, 193 Ky. 499, 236 S. W. 1046 (1922). *Rubel v. Weiss*, 8 N. J. Misc. R. 269, 149 Atl. 756 (1930). *Eaves v. Coxe*, 203 N. C. 173, 165 S. E. 345 (1932). *Mann v. Cook*, (Tex.), 23 S. W. 2d 860 (1929). *Williams v. Dickson*, *supra*, note 26. *Ritter v. Hicks*, 102 W. Va. 541, 135 S. E. 601 (1926).

<sup>29</sup> *Williams v. Dickson*, *supra*, note 26.

<sup>30</sup> *Eaves v. Coxe*, *supra*, note 28.

<sup>31</sup> *Thalman v. Schultze*, 111 W. Va. 64, 160 S. E. 303 (1931). *Smith v. Doyle*, 98 Fed. 2d 341 (1938). *Kearn v. Md. Casualty Co. of Baltimore, Md.*, *supra*, note 6. *Cewe v. Schuminski*, 182 Minn. 126, 233 N. W. 805 (1930).

<sup>32</sup> *Meinhardt v. Vaughn*, (Tenn.), 17 S. W. 2d 5 (1929).

<sup>33</sup> Family Purpose Doctrine As Applicable to Instrumentality Other Than Automobile, 79 A. L. R. 1161 (1932).

WHEN IS THE NEGLIGENT ACTOR LIABLE IF THERE IS AN INTERVENING CRIMINAL ACT. — The scope of this note is meant to include only the responsibility of the negligent actor when the crimes of murder, rape, theft, arson, criminal assault, criminal use of explosives and criminal movement of trains and automobiles are the intervening actions. Thereby the crime of forgery and any others not specifically mentioned are eliminated from this consideration.

As a general rule if the negligent actor cannot anticipate the intervening criminal act, he is not liable for the injury to the third person. If, however, such an act or injury from the act could be expected as the natural, probable and ordinary consequence of his act, he is liable<sup>1</sup> and the liability is not influenced by the number of subsequent events and agencies.<sup>2</sup>

The important element is what the reasonable man would foresee as the natural consequence and whether or not the intervening criminal act is the natural consequence of the negligence. "A natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events, a result therefore which might have been reasonably anticipated."<sup>3</sup> Natural consequences are not "the extraordinary coincidence or conjunction of circumstances as that the usual course of nature should have been departed from."<sup>4</sup> Extraordinary conduct is "different in kind than that which would otherwise have resulted from the actor's negligence."<sup>5</sup> But the independent wrongful act to displace the original primary cause must be so disconnected in time and nature as to make it plain that the damage was not the natural consequence of the original wrongdoing.<sup>6</sup>

It is quite difficult to anticipate murder as the result of negligence so that the courts generally relieve the negligent of liability.<sup>7</sup> However this statement does not preclude the chances of foreseeability in this type of case.

Justice Holmes stated that, "Wrongful acts of independent third persons not actually intended by the defendant are not regarded by the

<sup>1</sup> Horan v. Watertown, 217 Mass. 185, 104 N. E. 464 (1914); Knouff v. City of Logansport, 26 Ind. App. 202, 59 N. E. 347, 84 Am. St. Rep. 292 (1901).

<sup>2</sup> McMillan v. Thompson, 35 P. 2d 419, 140 Cal. App. 437 (1934); Johnston v. Atlantic Coast Line R. Co., 138 S. C. 126, 190 S. E. 459 (1939).

<sup>3</sup> Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280 (1919).

<sup>4</sup> *Ibid.*

<sup>5</sup> Morse v. Homers Inc., 295 Mass. 606, 4 N. E. 2d 625 (1936); Carini v. Beaven, 219 Mass. 717, 106 N. E. 589, 590, L. R. A. 1915 B. 825 (1914).

<sup>6</sup> *Op. cit.* McMillan v. Thompson.

<sup>7</sup> Southwell v. Atlantic Coast Line, 72 L. Ed. 157, 275 U. S. 64, 68 (1927); Jarnegin v. Travelers Protective Association of America, 133 Fed. 892, 68 L. R. A. 499 (1904); Brodie v. Miller, Tenn. App. 143 S. W. 2d 1042 (1940).

law as natural consequences of his wrong and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual.”<sup>8</sup> But this statement seems a bit strong for although certain wrongful or criminal acts may not be actually intended by the one negligent he may be liable as when the court held that even though the defendant’s agent, the conductor, could not foresee that by letting a stranger into the pullman, a passenger might be murdered yet it would be foreseeable that theft might be committed, and in no way need the conductor intend such a crime to take place.<sup>9</sup> However if by “intending,” Justice Holmes means that every man intends the natural and probable consequences of his act, there will be no distinction.

When a rape was committed by a known criminal who escaped because of the negligence of the defendant, the court held that such negligence of the defendant was not the proximate cause of the injury to a third person.<sup>10</sup> Nor could an ecclesiastic superior foresee that an ecclesiastic inferior of allegedly known immorality might rape a young bride-to-be by dragging her from the altar to an ante-room of the church.<sup>11</sup> The court in commenting on the above mentioned case stated that seduction to fornication or adultery might be foreseen but not rape,<sup>12</sup> therein limiting the foreseeability to that which is a “natural response to the stimulus created by the actor’s negligent conduct.”<sup>13</sup> However when a conductor required a passenger to leave the train at a dangerous place and later the passenger was raped, such injury has been considered foreseeable.<sup>14</sup> This case is contingent on the relationship of carrier and passenger where the extraordinary care demanded makes slight negligence the proximate cause of such injury.<sup>15</sup>

If the assault is the proximate cause,<sup>16</sup> or if the negligence is the remote cause,<sup>17</sup> or if the consequences are not natural and probable<sup>18</sup> the liability does not fall on the negligent actor. It has occurred where the employer kept a dangerous superintendent in his employment and such knowledge of his character and consequently his negligence in not discharging him, made him liable for not foreseeing the assault on the

<sup>8</sup> *Burt v. Advertising Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (1891).

<sup>9</sup> *Ball, Exrs. of D. F. Connell, Deceased, v. Chesapeake & Ohio Railway Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792 (1896).

<sup>10</sup> *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S. E. 250, 40 L. R. A. 95, 3 Am. Neg. Rep. 133 (1897).

<sup>11</sup> *Carini v. Beaven*, *op. cit.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Morse v. Homers Inc.*, *op. cit.*

<sup>14</sup> *Hines v. Garret*, 131 Va. 125, 108 S. E. 690 (1921).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Davis v. Clyde, New England, and Southern Lines*, 118 N. E. 903 (1918).

<sup>17</sup> *Hullinger v. Worrell*, 83 Ill. 220 (1876).

<sup>18</sup> *Knouff v. City of Logansport*, *op. cit.*

plaintiff.<sup>19</sup> But see *Denis v. Clyde, New England and Southern Lines*<sup>20</sup> where there was no negligence but where the court assumed negligence and still relieved the employer of liability basing its decision on the "but for" test.

Another court based its decision on the reasoning that held that if a condition existed that aided the injury, the negligent is not liable, if such condition was all right for ordinary circumstances.<sup>21</sup> And, furthermore, "In order for the intervening event to arrest causation the original negligence must not be present at the same place and time of injury and must not contribute to the injury."<sup>22</sup>

In the theft and robbery cases, the negligent actor is held responsible more often than, for example, when the criminal act is murder or rape. Here the knowledge of thieves and their number make the foreseeability of such a crime easier and more likely for the ordinary or reasonable man.

All of the tests of causation are applied with the *sine qua non* prominent. But the possibilities of the damage and the likelihood of the criminal escaping are many so that some courts jump at these thereby making the "but for" test ineffective. Let us take the example of a burglar alarm case where the negligence in not setting the alarm was claimed by the plaintiff as the proximate cause of the loss of his goods, and here the court claimed that the possibility of the burglar escaping and the fact that the alarm might not have gone off through no negligence relieved the defendant of liability.<sup>23</sup>

" . . . When an act or omission has bound up in it perils, which in the natural order of things are liberated or eventuate through the conduct of a responsible human being which might have been anticipated, and injury results, the original act or omission is the proximate cause. Potency to do harm must be contained in the act or omission from the beginning, continue to threaten throughout the chasm of events and come to fruition in the ultimate injury, albeit the ultimate injury is promoted or perpetrated through the agency of an intervening third person.<sup>24</sup> A number of courts make the statement that "temptation is

<sup>19</sup> *Hall v. Smathers*, 208 App. Div. 599, 203 N. Y. S. 721 (1924); (Mod. 240 N. Y. 486, 148 N. E. 654.)

<sup>20</sup> *Op. cit.*

<sup>21</sup> *Knouff v. City of Logansport, op. cit.*

<sup>22</sup> *Alexander v. Town of Newcastle*, 115 Ind. 51, 17 N. E. 200 (1888).

<sup>23</sup> *Nirdlinger v. American Dist. Tel. Co.*, 245 Pa. 453, 91 A. 883, Ann. Cas. 1915 D. 1184 (1914); *Ragone v. State*, 123 Misc. Rep. 48, 204 N. Y. Supp. 178 (1924), affirmed in (1925) 211 App. Div. 573, 207 N. Y. S. 544 which is affirmed in (1926) 243 N. Y. 607, 154 N. E. 625.

<sup>24</sup> *Fraser v. Chicago R. I. & P. Ry. Co.*, 101 Kan. 122, 165 P. 831, L. R. A. 1917 F. 749 (1917).

not the cause"<sup>25</sup> and thereby dismiss the case. Although this is true, it does not necessarily follow that the case is finished for the open window through which the thief goes may be the temptation and also the *sine qua non*.

In a leading case *Brower v. New York Central & H. R. R. Co.*,<sup>26</sup> the defendant was held liable by a six to five decision for negligence which gave the thieves the opportunity to steal the plaintiff's goods. The court emphasized the concurrency of the acts that makes the theft more readily foreseeable. Also see other decisions<sup>27</sup> based on the same reasoning and on the fact that the theft and injury were the natural and probable consequences.

But in contrast are other courts where the doctrine is that the criminal act breaks the causation.<sup>28</sup> (Regardless of its foreseeability).

In two decidedly similar cases, the courts held differently as to the liability of the installment seller who leaves a door or window open in repossessing his property and through which the thief probably entered.<sup>29</sup>

In a certain railroad case the court decided the liability on the fact of whether the railroad was a carrier or acting only in the capacity of a warehouseman.<sup>30</sup> Absolute liability eliminates the necessity of the respective tests of causation.

In the next case a distinction is made that determines the liability of the original negligent person. If a person on the street negligently threw a match into some gasoline that the defendant left escape by an act of negligence, then the defendant would be liable but if the match were thrown from maliciousness and injury resulted to a third person, such latter act would not be foreseeable. Here foreseeability is based on human experience and the recurrence of certain acts.<sup>31</sup>

Other cases of explosions, have been decided on the above mentioned reasoning along with the general principles laid down. Such cases involve the negligent placing of explosives so that a third per-

<sup>25</sup> *Carter v. Atlantic Coast Line R. Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411 (1918).; *Chancey v. Norfolk & W. R. Co.*, 174 N. C. 351, 93 S. E. 834, L. R. A. 1918 A 1070, Ann. Cas. 1918 E. 580 (1917); *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Reports. 25 (1901).

<sup>26</sup> 91 N. J. L. 190, 103 Atl. 166, 1 A. L. R. 734 (1918).

<sup>27</sup> *Filson v. Pacific Express Co.*, 84 Kan. 614, 114 P. 863 (1911).

<sup>28</sup> *Nirdlinger v. American Dist. Tel. Co.*, *op. cit.*; *Andrews v. Kinsel*, *op. cit.*; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359 (1876).

<sup>29</sup> *Strong v. Granite Furniture Co.*, 294 P. 303, 78 A. L. R. 471 (1930); *Jesse French Piano & Organ Co. v. Phelps*, 47 Tex. Civ. App. 385, 105 S. W. 225 (1907).

<sup>30</sup> *Hutchinson v. United States Express Co.*, 128 W. Va. 128, 59 S. E. 949 (1907).

<sup>31</sup> *Watson v. Kentich & Indiana Bridge & R. Co.*, 137 Ky. 619, 132, 129 S. W. 341 (1910).