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Recent Decisions

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RECENT DECISIONS

CRIMINAL LAW—INSANITY—PRODUCT OF MENTAL DISEASE TEST—DEGREE OF CAUSALITY NECESSARY TO ACQUIT.

Douglas v. United States (D.C. Cir. 1956).

Defendant was indicted for two separate robberies. He pleaded not guilty in each case and petitioned for a lunacy inquiry. He was committed and at the end of twenty-one months was adjudged competent to stand trial. At separate trials for each robbery, defendant was convicted. On appeal it was *held* that the juries should have had a reasonable doubt that defendant's unlawful acts were not the product of mental disease. The court in so holding gave a definite meaning to the word "product" in the "product of mental disease" test of insanity now in force in the District of Columbia [1] when it said that the juries were unwarranted "in reaching an abiding conviction that the abnormal mental condition definitely ascertained . . . was not *a cause without which the . . . robberies would not have occurred.*" (Emphasis supplied) *Douglas v. United States* (D.C. Cir. 1956).[2]

Where insanity is raised as a defense at a criminal trial, the right-wrong test of criminal responsibility is the sole test in England and in twenty-nine American jurisdictions. At least fourteen states have added the irresistible impulse test to the right-wrong test.[3] These two tests have been formulated in various ways by different courts. The gist of the right-wrong test is that the defendant will not be criminally responsible if owing to a disease of the mind he was unable to know the difference between right and wrong with regard to the particular act charged or was unable to know the nature and quality of his act.[4] The irresistible impulse test states that despite the ability to know the nature and quality of the act and to know that it was wrong, the defendant will not be responsible if owing to the duress of mental disease his actions were not subject to the control of his will.[5] These combined tests have long been

1. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

2. Douglas v. United States, 25 U.S.L. WEEK 2214 (Nov. 9, 1956). Quotations are from the unpublished opinion of the United States Court of Appeals for the District of Columbia Circuit.

3. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 51 (1954).

4. Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955).

5. Parsons v. State, 31 Ala. 577, 2 So. 854 (1887).

the rule in federal jurisdictions.[6] The District of Columbia is a recent exception, having adopted, in *Durham v. United States,*[7] the "product of mental disease" test which has been the law in New Hampshire since 1871.[8] No state or federal jurisdiction has followed the District of Columbia in its adoption of the new test in criminal cases.[9] The rule is formulated: "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." [10] The word "product" connotes causality [11] but the degree of causal connection that must exist between disease and act is not set forth in the *Durham* case. The instant case contains the first judicial determination of the concept of causality as applied to this test.

In the instant case the court says that the juries were unwarranted "in reaching an abiding conviction that the abnormal mental condition . . . was not a cause without which the . . . robberies would not have occurred." [12] This means that the degree of causality must be such that but for its presence the act would not have occurred. In terms of reasonable doubt, the jury, to acquit, must doubt that the act would have occurred had there been no disease. In other words, the jury finding a causal connection between disease and act must ask themselves further if the act would have occurred in the absence of disease. If they come to a firm conviction that the act would have taken place anyway, they must convict. If they are reasonably unable to give an affirmative answer, they must acquit, even though they have found that there was a lesser causal connection. Once mental disease is established the jury can convict (1) if there is no causal connection between the disease and the act; or (2) despite the presence of some causal connection, if they are convinced that the act would have occurred anyway. Under such an interpretation of the word "product" it is difficult to see how a conviction could ever be returned once the presence of mental disease is established. The "integrated personality" theory spoken of in *Durham* would seem to negative the possibility of any finding other than not guilty by reason of insanity. For under that theory, a mental disease would not be a malady limited to one compartment of the defendant's make-up but would affect

6. Davis v. United States, 160 U.S. 469 (1895); Howard v. United States, 232 F.2d 274 (5th Cir. 1956).

7. 214 F.2d 862 (D.C. Cir. 1954).

8. State v. Jones, 50 N.H. 369 (1871).

9. The cases which have considered the *Durham* test without adopting it fall into four groups: (1) reject it on its merits, Bryant v. State, 207 Md. 565, 115 A.2d 502 1955); (2) consider it a problem for the legislature, People v. Berry, 44 Cal.2d 426, 282 P.2d 861 (1955); (3) prefer to await a determination by the Supreme Court, Anderson v. United States, 237 F.2d 118 (9th Cir. 1956); Howard v. United States, 232 F.2d 274 (5th Cir. 1956); (4) give no reason, State v. Kitchen, 286 P.2d 1079 (Mont. 1955).

10. Durham v. United States, 214 F.2d 862, 874-875 (D.C. Cir. 1954).

11. "The question will be simply whether the accused acted because of mental disease. . . ." *Id.* at 876.

12. Unpublished opinion of the court at p. 13.

his whole personality. A jury would be hard put to find that there was no causal relation between a diseased personality and the acts proceeding from that personality. Nor could they be convinced that such person would have done the act despite the fact that his mental condition did have some effect on his act. It is submitted that the interpretation given the word "product" in the instant case when considered in the light of the psychological theory of the *Durham* case, constitutes no advance in the law prior to *Durham*. At least under the right-wrong test coupled with the irresistible impulse test it could be determined that, if the defendant knew the difference between right and wrong and was able to control himself, his mental condition was not the primary cause of his unlawful act and that he, therefore, is criminally responsible. It may also be observed that, despite the court's formulation of the test, and its reversal on that basis, there is another element in the court's thinking that seems to be the real reason for reversal. The court goes on to say "we are constrained to conclude that it would be inconsistent with applicable legal standards to hold on the records as presently constituted that punishment for criminal conduct, rather than treatment for a mental disease, was the proper remedy." [13] This is a basic sociological consideration, and one of great importance. It is pointed out by the court that one committed for treatment of a mental disorder is not returned to society until he may safely do so; whereas one imprisoned returns at the end of his sentence whether he is ready for a law-abiding life or not.[14] Important as this consideration is, it is not the legal test of criminal responsibility. To uphold the convictions in the present case would not be to hold that punishment rather than treatment is the proper remedy, it would simply be to hold that the defendant was criminally responsible.

Anthony J. Ryan

CRIMINAL LAW—THE ELEMENT OF INTENT IN BIGAMY—MISTAKE OF FACT AS A DEFENSE.

People v. Vogel (Cal. 1956).

Defendant was convicted of bigamy under the California Penal Code.[1] The trial court refused to admit evidence tending to show that the defendant's first wife had married another before his second marriage and excluded defendant's testimony of his first wife's statement to him that she was going to divorce him. On appeal, the supreme court reversed and *held* that the exclusion of defendant's evidence and testimony was prejudicial

13. *Ibid.*
14. *Ibid.*, n. 12.

1. CAL. PEN. CODE § 281 (Deering 1949).

error because it deprived him of the defense of a bona fide reasonable belief that facts leaving him free to remarry existed. *People v. Vogel,* 299 P.2d 850 (Cal. 1956).[2]

At common law a crime consisted of two elements, an evil intention and an unlawful action. *Actus non facit reum, nisi mens sit rea.*[3] This has been said to be a universal doctrine [4] notwithstanding the fact that in many statutory offenses a guilty mind is unnecessary.[5] Prior to 1604, bigamy or polygamy, as it is sometimes called,[6] was punished only by the ecclesiastical courts.[7] In that year, it was, by statute, made a crime punishable in the civil courts.[8] As bigamy is a statutory and not a common-law crime, controversy has arisen as to the necessity of a guilty mind when the statute is silent on the subject. Generally, whether or not a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design.[9] The majority of American courts seem to hold that a guilty mind is not necessary to commit the crime of bigamy in the absence of words in the statute to the contrary.[10] These cases proceed on the theory that the legislature may forbid the doing of an act and make its commission criminal without regard to intent [11] or that a party doing an act which a statute has made criminal is automatically chargeable with the criminal intent of doing it.[12] These cases reject a good faith mistake of fact as a

2. People v. Vogel, 299 P.2d 850 (Cal. 1956).

3. Morissette v. United States, 342 U.S. 246 (1952); People v. Connors, 253 Ill. 266, 97 N.E. 643 (1912); 1 BISHOP, NEW CRIMINAL LAW § 290 (8th ed. 1892).

4. 1 BISHOP, NEW CRIMINAL LAW § 291 (8th ed. 1892).

5. United States v. Balint, 258 U.S. 250 (1922) (sale of narcotics); People v. Sobelman, 199 Minn. 232, 271 N.W. 484 (1937) (permitting minor to remain in tavern); Tenement House Dep't v. McDevitt, 215 N.Y. 160, 109 N.E. 88 (1915) (prohibited use of tenement house). See also Morissette v. United States, 342 U.S. 246, 250-260 (1952) where the court analyzes the development of these various statutory offenses not requiring mens rea. *But see* 1 BISHOP, NEW CRIMINAL LAW § 291 (8th ed. 1892) where it is stated that these statutory offenses are not really exceptions to the doctrine requiring evil intent in the commission of a crime. The author explains that in these offenses the form alone is criminal while the matter is civil, and, therefore, the full rules of criminal law do not apply; *cf.* Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55, 72-75 (1933); Hall, *Prolegomena to a Science of Criminal Law,* 89 U. PA. L. REV. 549, 568-569 (1941).

6. State v. Armington, 25 Minn. 29, 38 (1878). See also Toncray v. Budge, 14 Idaho 621, 95 Pac. 26, 34 (1908).

7. CLARK, CRIMINAL LAW § 116 (3d ed. 1915); MILLER, CRIMINAL LAW § 133 (1934).

8. Statute of James I, 1604, 1 Jac. I, c. 2. See also 4 BLACKSTONE, COMMENTARIES *164.

9. United States v. Balint, 258 U.S. 250 (1922); State v. Kuehnle, 85 N.J.L. 220, 88 Atl. 1085 (1913); *cf.* Masters v. United States, 42 App. D.C. 350 (1914) in which it is stated that, where an act is by statute made a crime, the statute should be construed in the light of the common law, and, that, while it is within the power of the legislature to declare an act criminal, irrespective of the intent with which it is done, a statute will not be construed to have that effect unless it clearly appears that such is the legislative intent. See also 1 BISHOP, NEW CRIMINAL LAW § 291(b) (8th ed. 1892).

10. People v. Spoor, 235 Ill. 230, 85 N.E. 207 (1908); State v. Goonan, 89 N.H. 528, 3 A.2d 105 (1938).

11. State v. Armington, 25 Minn. 29 (1878); State v. Lindsey, 26 N.M. 526, 194 Pac. 877 (1921).

12. Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844) (criticized in McMurray, *Changing Conceptions of Law and of Legal Institutions,* 3 CALIF. L. REV. 441, 452

defense.[13] However, there are some courts which allow the defense of mistake of fact to an indictment for bigamy,[14] the accused having the burden of proving a reasonable and good faith mistake.[15] The California bigamy statute, under which the indictment in the instant case was brought, does not expressly exclude the element of intent from the crime of bigamy.[16] The court interprets this omission in the light of two other sections of the penal code [17] and says that it is clear "that such an omission was not meant to exclude intent as an element of the crime but to shift to the defendant the burden of proving that he did not have the requisite intent." [18]

The decision in the instant case is against the weight of authority and necessitated the overruling of one case and the disapproval of another which were consistent with the prevalent view.[19] However, the position taken by the court does not come as a complete surprise. There seem to be few, if any, reasons to support the practice of construing similarly the statutory crime of bigamy and statutory offenses not requiring a guilty mind, especially in view of the fact that bigamy is wholly unlike the latter. Also, the elimination of the guilty mind from bigamy merely because a statute is silent on the subject would seem to be an indiscriminate act. To do so is to impute to the legislature a perfection and completeness of expression that is generally not found in legislation. Finally, it appears inconsistent that among serious crimes involving heavy penalties, moral obloquy, and damage to reputation, bigamy is maintained in the unique position of being indictable without a showing of the existence of a guilty mind or moral blameworthiness. The Supreme Court of the United States has said that the line has not been drawn between crimes which require a guilty mind and those which do not.[20] If such a line is to be drawn, it would appear that bigamy should stand on that side requiring a guilty mind.

Michael J. Dempsey

(1915) and in Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 74 (1933)); State v. Zichfeld, 23 Nev. 304, 46 Pac. 802 (1896). *But see* MILLER, CRIMINAL LAW § 20(h) where this theory is said to be "an unnecessary resort to fiction and sophistry."

13. Ellison v. State, 100 Fla. 736, 129 So. 887, (1930); State v. Trainer, 232 Mo. 240, 134 S.W. 528 (1911); State v. Hendrickson, 67 Utah 15, 245 Pac. 375 (1926).

14. Squire v. State, 46 Ind. 459 (1874); Baker v. State, 86 Neb. 775, 126 N.W. 300 (1910).

15. State v. Cain, 106 La. 708, 31 So. 300 (1902).

16. "Every person having a husband or wife living, who marries any other person, . . . is guilty of bigamy." CAL. PEN. CODE § 281 (Deering 1949).

17. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PEN. CODE § 20 (Deering 1949). "All persons are capable of committing crimes except those belonging to the following classes:

". . . .

"(4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." CAL. PEN. CODE § 26 (Deering 1949).

18. People v. Vogel, 229 P.2d 850, 853 (Cal. 1956). The court further stated that "guilty knowledge, which was formerly a part of the definition of bigamy was omitted from section 281 to reallocate the burden of proof in a bigamy trial." *Id.* at 854.

19. People v. Hartman, 130 Cal. 487, 62 Pac. 823 (1900) (overruled); People v. Kelly, 32 Cal.App.2d. 624, 90 P.2d 605 (1939) (disapproved).

20. Morissette v. United States, 342 U.S. 246, 260 (1952).

EQUITY—INJUNCTION—JURISDICTION OF EQUITY TO RESTRAIN DIVORCE SUIT.

Dumais v. Dumais (Me. 1956).

Plaintiff brought a bill in equity to enjoin his wife from proceeding further with a divorce action in which she also sought custody of their four minor children. The plaintiff's theory was that his wife's suit was violative of an antenuptial contract whereby she agreed not to seek a divorce and also to raise any children born to them in the Roman Catholic faith; that this contract was not available as a defense in the divorce action; and thus, there was no adequate remedy at law. The defendant's demurrer to the bill was sustained and the bill was dismissed. On appeal, the Supreme Judicial Court of Maine affirmed and *held* that the controversy was not a proper subject for equity jurisdiction since by statute jurisdiction was vested in the law courts. *Dumais v. Dumais,* 122 A.2d 322 (Me. 1956).[1]

It was formerly held that equity jurisdiction was based on the existence of a property right.[2] This view stems from what appears to be an erroneous interpretation[3] of the case of *Gee v. Pritchard.*[4] In time most courts began to grant equity jurisdiction in cases which really concerned personal rights through a somewhat tortuous interpretation of the concept of property rights.[5] Today, most courts frankly hold that cases involving only personal rights are a fit subject for equity jurisdiction.[6] A fundamental requisite to the exercise of equity jurisdiction is the lack of an adequate remedy at law.[7] At common law, an equitable defense was inadmissible in an action at law.[8] Today, however, as a result of the enactment of the new codes of procedure (which began with the Field Code in 1848 in New York), most states have a provision,[9] as does Maine,[10] permitting a defendant to raise all of his defenses, both legal and equitable, in one action. Under the new procedural codes there is little if any occa-

1. Dumais v. Dumais, 122 A.2d 322 (Me. 1956).

2. Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896); Beach v. Bryan, 155 Mo. App. 33, 133 S.W. 635 (1911).

3. See Pound, *Equitable Relief Against Defamation and Injuries to Personality,* 29 HARV. L. REV. 640, 642 (1916).

4. 2 Swanst. 402, 36 Eng. Rep. 670 (Ch. 1818).

5. Grand Int'l Brotherhood L. Engineers v. Mills, 43 Ariz. 379, 31 P.2d 971 (1934); *Ex parte* Warfield, 40 Tex. Crim. 413, 50 S.W. 933 (1899).

6. Berrien v. Pollitzer, 165 F.2d 21 (D.C.Cir.1947); Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 180 P.2d 321 (1947); Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955).

7. Savage v. Iowa Development Co., 130 F. Supp. 42 (D. Minn. 1955); York v. McCausland, 130 Me. 245, 154 Atl. 780 (1931); Michelson v. Dwyer, 158 Neb. 427, 63 N.W.2d 513 (1954).

8. Braddick v. Thompson, 8 East 344, 103 Eng. Rep. 374 (K.B. 1806); Scholey v. Mearns, 7 East 148, 103 Eng. Rep. 56 (K.B.1806).

9. See 1 POMEROY, EQUITY JURISPRUDENCE § 40 (5th ed. 1941).

10. ME. REV. STAT. ANN. c. 113 § 18 (1954).

sion [11] for the defendant in an action to seek to have the plaintiff enjoined from the prosecution thereof, since whatever is to form the basis of the injunction may be raised as a defense to the plaintiff's suit.[12]

Since the plaintiff in the instant case can raise all his defenses in the action he seeks to have enjoined, he has an adequate remedy at law; hence, the court correctly dismissed his bill. A more interesting aspect of the case is presented by the antenuptial agreement. Although antenuptial contracts are not mentioned as a defense in the divorce statute, apparently the defenses listed are not intended to be exclusive, since only legal defenses appear.[13] However, regardless of the way in which this defense is raised, it seems safe to conclude that it will not be enforced. The marriage contract creates a status in which the state, as well as the parties, has an interest.[14] The enactment of a divorce statute creates a policy under which, if the requisite grounds exist, a party has the right to have the marriage dissolved. Permitting the parties to avoid this enactment denies the state's interest in the marriage and allows the parties to substitute their policy for that of the state. Thus, to enforce such an agreement on behalf of one of the parties is to concede his independence of a law expressly passed to protect a state interest. The enforcement of it would tend to promote the very wrongs for which the state has decided a divorce is in order. Although the indissolubility of marriage is certainly a worthy objective, it can not be guaranteed in this fashion.

Joseph M. Smith

INFANTS—CONTRACT TO PURCHASE A CHATTEL DISAFFIRMED—BURDEN OF PROOF TO SHOW ABILITY TO RETURN CONSIDERATION.

Rotondo v. Kay Jewelry Co., 123 A.2d 404 (R.I. 1956).

The nineteen year old plaintiff purchased a diamond engagement ring from the defendant, revealing his age and purpose at the time of sale. Installment payment was arranged. The engagement was terminated and

11. Depending upon the code provisions in the instant jurisdiction there are three possible classes of cases wherein a defendant, to raise his defense, must institute his own action in equity. See 4 POMEROY, EQUITY JURISPRUDENCE § 1370-1373 (5th ed. 1941).

12. Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A.2d 22 (1906); Miller v. Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527 (1896).

13. The defenses listed are collusion, adultery by both parties, and certain matters of residence. ME. REV. STAT. ANN. c. 166, § 55 (1954).

14. Adams v. Palmer, 51 Me. 480 (1863). Based on this interest the various states have enacted divorce statutes which permit a married person to rid himself of his partner, for certain of specified causes, and then remarry. This is a misinterpretation of the state's interest. Both divine law and the natural law forbid the granting of divorce with the right to remarry. See ST. MATTHEW'S GOSPEL, c. 9, v. 6 for the former and HIGGINS, MAN AS MAN, p. 387 (1949), for the latter. However, American jurisprudence has adopted the principle that a state has such a right. Hence, an antenuptial contract such as the one here considered must be viewed in that light.

the minor disaffirmed the purchase. Subsequently he brought an action for the return of $93.39 paid before disaffirmance. The trial court, without a jury, found that the plaintiff had not proved by a fair preponderance of evidence that he was unable to return the ring. The Supreme Court of Rhode Island reversed and *held* that the burden of proof was upon the seller to show the infant's ability to return the ring. *Rotondo v. Kay Jewelry Co.*, 123 A.2d 404 (R.I. 1956).[1]

The right of an infant to avoid his contracts is well founded on a policy to guard minors against their own imprudence.[2] Where the minority of the buyer was revealed at the time of purchase, return or tender of return of the goods is not a condition precedent to his right to disaffirm and recover his payments, if he is unable to return the goods.[3] However, he is obliged to return any part of the goods which are still under his control.[4] Such return or an accounting is held in some jurisdictions as a condition precedent to disaffirmance,[5] in others it is a condition precedent only to recovery of payment made.[6] Since the risk of nonpersuasion of a fact generally rests upon the litigant whose cause of action requires that fact by force of the substantive law,[7] those jurisdictions which require the infant plaintiff to account for or return what he can before he will be allowed to recover place the risk upon the infant to show his inability to make the return.[8] This court says that to require the minor to risk not persuading the jury of his inability to return the ring, in effect, imposes a condition precedent to his recovery, and that this is against the protective policy of the substantive law.

By the same token, this court, in effect, is saying that the minor can recover even though able to return the ring so long as the vendor cannot persuade the jury that the minor is able to return it. Thus, instead of apportioning the risk on the basis of procedural policy—that the infant should be indulged with every fair procedural advantage [9] or that a litigant should not have the burden of proving a negative [10]—the instant case ex-

1. Rotondo v. Kay Jewelry Co., 123 A.2d 404 (R.I. 1956).
2. 1 WILLISTON, CONTRACTS § 235 (rev. ed. 1936).
3. MacGreal v. Taylor, 167 U.S. 688, 698 (1897); Friedman v. Huber, 92 Pa. Super. 245, 246 (1927); McGuckian v. Carpenter, 43 R.I. 94, 110 Atl. 402, 403 (1920).
4. *In re* Huntenberg, 153 Fed. 768, 769, 770 (E.D. N.Y. 1907); Yubas v. Witaskis, 95 Pa. Super. 296, 300 (1928); McGuckian v. Carpenter, 43 R.I. 94, 110 Atl. 402, 403 (1920).
5. Standard Motors, Inc. v. Raue, 37 Ala. App. 211, 65 So.2d 829, 830 (1953); Mosko v. Forsythe, 102 Colo. 115, 76 P.2d 1106, 1107 (1938); Shellabarger v. Jacobs, 316 Ill. App. 191, 45 N.E.2d 184, 186 (1942); 1 WILLISTON, CONTRACTS § 237 (rev. ed. 1936).
6. Sassenrath v. Lewis Motor Co., 246 S.W.2d 520, 522 (Mo. 1952); Pieri v. Nebbia, 178 Misc. 388, 34 N.Y.S.2d 317, 319 (Monroe County Ct. 1942).
7. 9 WIGMORE, EVIDENCE § 2485, at 273 (3d ed. 1940).
8. Mosko v. Forsythe, 102 Colo. 115, 76 P.2d 1106, 1107 (1938); Whitman v. Allen, 123 Me. 1, 121 Atl. 160, 162 (1923); 6 AM. JUR. LEGAL FORMS ANNOTATED § 988 (1954). *Contra*, 6 ANDERSON, PENNSYLVANIA CIVIL PRACTICE § 907 (1951).
9. There is some support for this view: Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S.E. 788, 791 (1905); Britton v. South Penn Oil Co., 73 W.Va. 792, 81 S.E. 525,528 (1914).
10. 9 WIGMORE, EVIDENCE § 2486, at 274 (3d ed. 1940).

tends a protective policy at a time when nineteen year old males need it, perhaps, less than ever before. In doing so, the court cites only two cases neither of which lends much support to its view.[11] Unless there is some other possible action for the vendor, contemplated [12] though not indicated in its opinion, this court departs from the weight of authority.[13]

Thomas E. Eichman

INTERNAL REVENUE—DEDUCTIONS—LEGITIMATE EXPENSES OF ILLEGITIMATE BUSINESS.

Commissioner v. Doyle (7th Cir. 1956).

Respondent was engaged in an illegal gambling business, the operation of a handbook in Illinois. He paid rent for a room in Chicago, where he accepted, recorded and paid the wagers. In the conduct of this business, he paid wages to several employees. The Tax Court of the United States allowed these expenses, for rent and wages, to be deducted from the respondent's gross income as ordinary and necessary expenses even though they were contrary to declared public policy of the State of Illinois. On appeal by the Commissioner of Internal Revenue this ruling was *affirmed.*[1] *Commissioner v. Doyle,* 231 F.2d 635 (7th Cir. 1956).

Section 23 of the Internal Revenue Code of 1939 [2] in setting forth what trade or business expenses may be deducted from gross income in computing net income makes no distinction between lawful and unlawful disbursements. The deduction of such expenses depends on the innate character of the item itself.[3] The Tax Court has held in the past that the "legitimate expenses of an illegitimate business" are deductible, in contradistinction to those expenses which are not deductible because contrary to public policy.[4] The Supreme Court has affirmed this policy,[5] and has indicated that it is not the purpose of the tax laws to penalize illegal business by taxing

11. McGuckian v. Carpenter, 43 R.I. 94, 110 Atl. 402 (1920) (Infant was unable to make a return, so the court said "the right of an infant to avoid his contract is absolute and paramount to all equities," but in dictum it said that if he could have made return, infant would have had to do so). Chandler v. Simmons, 97 Mass. 508 (1867) (Infant was unable to make return. No question of burden of proof was involved).

12. See McCarty-Green Motor Co. v. McCheney, 219 Ala. 211, 121 So. 713 (1929).

13. See Goble, *Infants' Contracts for the Sale of Chattels,* 20 ILL. L. REV. 343, 347, 348, 350 (1925).

1. Commissioner v. Doyle, 213 F.2d 635 (7th Cir. 1956).

2. Int. Rev. Code of 1939, § 23(a), 53 STAT. 47 (now INT. REV. CODE OF 1954, § 162(a)).

3. Cohen v. Commissioner, 176 F.2d 394 (10th Cir. 1949).

4. Anthony Cornero Stralla, 9 T.C. 801 (1947).

5. Lilly v. Commissioner, 343 U.S. 90 (1952).

gross rather than net income.[6] However, the generally accepted meaning of the language used in the statute authorizing deductions of trade or business expenses has been narrowed "in order that tax deduction consequences might not frustrate sharply defined national and state policies proscribing particular types of conduct." [7] But, the policies frustrated must be evidenced by some governmental declaration of them.[8] The Commissioner is not required, therefore, to use the "ordinary and necessary" test to disallow the deduction. The deduction is not permitted if the payment itself is illegal,[9] or, though not illegal, is itself contrary to public policy.[10] In a recent case arising in Illinois,[11] the Tax Court held that such payments as in the instant case are not deductible, because the payments themselves have been declared illegal by an Illinois statute,[12] and hence the payment of wages may itself be a crime.[13] The Tax Court and the court of appeals in the instant case did not rely on the statute, but seemed to follow the weight of authority in classifying and allowing these disbursements as ordinary and necessary expenses of an albeit unlawful business.

It seems well established that *some* expenses of an unlawful business are deductible as ordinary and necessary business expenses. The present problem lies in predicting exactly *which* expenses will be considered deductible. Any expense which is considered to be against public policy, or illegal, may not be deducted, even though ordinary and necessary. Thus, the difficulty becomes one of ascertaining which expenses are against public policy, and which are not; and which expenses are illegal, and which are not. The Commissioner will no doubt continue to object to any deduction that is in any way connected with an illegal business. While this attitude might be receiving new emphasis in the Treasury Department,[14] it is

6. Commissioner v. Heininger, 320 U.S. 467 (1943).
7. *Id.* at 473.
8. Lilly v. Commissioner, 343 U.S. 90 (1952).
9. Fuller v. Commissioner, 213 F.2d 102 (10th Cir. 1954) (Loss denied for cost of liquor confiscated because sold in violation of Oklahoma law).
10. Rugel v. Commissioner, 127 F.2d 393 (8th Cir. 1942) (Payments to secure political influence disallowed).
11. Sam Mesi, 25 T.C. 513 (1955).
12. "That any person who keeps any room, shed, tenement, tent, booth, or building, or any part thereof, or who occupies any place upon any public or private grounds within this state, with any book, instrument or device for the purpose of recording or registering bets or wagers, or selling pools, or any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election, or being the owner, lessee or occupant of any room, shed, tenement, tent, booth, or building, or part thereof, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or selling of such pools, or becomes the custodian or depository for hire or privilege, of any money, property, or thing of value staked, wagered or pledged upon any such result, shall be punishable . . . ." ILL. ANN. STAT. c. 38, § 336 (Smith-Hurd 1954).
13. While heavily relied on to disallow the deduction, the statute does not seem to be specific as to whether payment of wages is itself a crime.
14. "Our policy will henceforth be to disallow all deductions for expenses incurred in illegal enterprise, and the Treasury Department has promised us its fullest cooperation." Address by Attorney General Brownell, American Bar Association, August 27, 1953.

doubtful that the courts will go so far. Perhaps the Supreme Court will take action and establish a more precise test than legality or public policy, if that is possible. This would be most welcome. As Justice Brandeis stated, "In most matters it is more important that the applicable rule of law be settled than that it be settled right." [15]

Thomas F. Burns

JURISDICTION—DIVORCE—ALLOWANCE OF MAINTENANCE BASED ON YEAR'S RESIDENCE SUBSEQUENT TO HUSBAND'S EX PARTE DIVORCE.

Vanderbilt v. Vanderbilt (N.Y. 1956).

The husband, then domiciled in Nevada, and the wife, then domiciled in California, were married in Connecticut and established a California domicile until their separation. The defendant husband brought a suit for divorce in Nevada, in which the wife did not appear or answer, and the suit resulted in a divorce decree for the husband. One month prior to the commencement of the husband's suit, the plaintiff wife took up residence in New York. After more than a year's residence in New York, the wife, effecting service through publication and sequestration of the husband's New York assets, commenced action in New York for separation on the grounds of cruelty and abandonment, and for an award of alimony. The New York Court of Appeals, in a 5-2 decision,[1] *held* that while the husband was obtaining a Nevada divorce in an *in rem* proceeding the wife could begin satisfying New York residence requirements and later institute suit for maintenance under section 1170-b of the Civil Practice Act.[2] *Vanderbilt v. Vanderbilt,* 1 N.Y.2d 342, 135 N.E.2d 553 (N.Y. 1956).[3]

Under the rule of *Haddock v. Haddock* [4] full faith and credit did not require that the courts of one state recognize foreign *ex parte* divorce

15. Burnet v. Coronado Oil & Gas Co., 285 U.S. 406 (1932) (dissenting opinion).

1. The dissenting juctices were of the opinion that section 1170-b of the Civil Practice Act could be applied consistently with the dictates of the full faith and credit clause only where the earlier *ex parte* judgment of divorce did not purport to adjudicate the absent wife's right to alimony. They felt that the Nevada decree in this case had terminated this right. Vanderbilt v. Vanderbilt, 135 N.E.2d 553, 560 (N.Y. 1956).

2. "In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife." N.Y. CIV. PRAC. ACT § 1170-b.

3. Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553 (N.Y. 1956).

4. 201 U.S. 562 (1906).

decrees. Then in the first case of *Williams v. North Carolina*,[5] the Supreme Court held that full faith and credit[6] must be given to *ex parte* divorce decrees obtained in sister states. The second case of *Williams v. North Carolina*[7] held that while full faith and credit must be given to this type decree, the forum could inquire into the jurisdiction of the foreign state to ascertain whether a bona fide domicile had been established. Subsequently, New York, in the case of *Estin v. Estin*[8] held that while full faith and credit had to be given to the decree of dissolution of the marriage, alimony was an *in personam* element of the decree and since the Nevada court had no personal jurisdiction over the wife, her prior New York judgment of permanent alimony was unaffected by the Nevada decree. This was affirmed by the United States Supreme Court.[9] Thus, the doctrine of "divisible divorce" was established.[10] In *Armstrong v. Armstrong*[11] the doctrine was extended to include subsequent alimony judgments. This doctrine, while not previously unknown,[12] has recently received new emphasis. Apparently the doctrine need not be applied. It has been held that it is a matter for each individual state to terminate the wife's right to alimony under comity, by accepting the foreign decree's provision on the alimony issue.[13] There is a split of authority as to whether the foreign decree precludes the wife from obtaining alimony in her home state.[14] Even though the law of the foreign state holds that the divorce terminates all rights under a maintenance decree,[15] this law does not affect the personal jurisdiction requirement of the home state. And in a state where recognition is given to the alimony feature of the decree, the jurisdictional issue is still open to collateral attack.[16] However, in New York it has been held that where the wife appears in the foreign litigation, New York will give full faith and credit to the alimony part of the decree.[17] And a wife is estopped to assert her rights under a prior separate maintenance judgment if she obtains a foreign *ex parte*

5. 317 U.S. 287 (1942).

6. U.S. CONST. art. IV, § 1.

7. 325 U.S. 226 (1945).

8. 296 N.Y. 308, 73 N.E.2d 113 (1947).

9. Estin v. Estin, 334 U.S. 541 (1948).

10. *Id.*, at 549.

11. 350 U.S. 568 (1956).

12. Thurston v. Thurston, 58 Minn. 279, 59 N.W. 1017 (1894).

13. Meredith v. Meredith, 204 F.2d 64 (D.C.Cir. 1953). *But see* Hopson v. Hopson, 221 F.2d 839 (D.C.Cir. 1955).

14. Precluding alimony: Dimon v. Dimon, 40 Cal.2d 516, 254 P.2d 528 (1953); Shane v. Shane, 324 Mass. 603, 88 N.E.2d 143 (1949); Commonwealth *ex rel.* McVay v. McVay, 117 Pa. Super. 623, 112 A.2d 649 (1955). Allowing alimony: Pawley v. Pawley, 46 So.2d 464 (Fla. 1950); Pope v. Pope, 2 Ill.2d 152, 117 N.E.2d 65 (1954); Isserman v. Isserman, 11 N.J. 106, 93 A.2d 571 (1952); Miller v. Miller, 186 Okla. 566, 99 P.2d 515 (1940); Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327 (1946).

15. Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378 (1933).

16. Esenwein v. Commonwealth *ex rel* Esenwein, 325 U.S. 279 (1944); Commonwealth *ex rel* McVay v. McVay, 117 Pa. Super. 623, 112 A.2d 649 (1955).

17. Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951).

decree.[18] Also, where the wife appeared in the foreign forum and contested the issue of jurisdiction, she was precluded from again raising that issue in her home state.[19] In the instant case, the wife prevailed under the New York statute,[20] which the court considered not to be limited to cases where the parties lived together in New York as their matrimonial domicile.[21] The important provision is that only the wife need live in New York for one year before commencing her suit.[22]

The instant case appears to be correct in the light of the trend of authority in the last few years. The first *Williams* case seemed to set an important precedent as to the full faith and credit that must be given foreign *ex parte* divorces. This sweeping pronouncement lost a great deal of its initial impact in the second *Williams* case which established the right to question the jurisdiction of the foreign tribunal. Then the *Estin* case, followed by the *Armstrong* case, further limited the full faith and credit requirement to the marital status only. Now the New York statute, as contrued in the instant case, further limits the holding of the first *Williams* case. Under this statute it is possible, as illustrated in the instant case, for an ex-wife, having no previous connection with New York, to remove there and, if her ex-husband can be personally served or has assets there, to obtain an alimony award despite a prior divorce. Thus, a strict divorce state is overcoming the effect of a divorce decree granted by a liberal state by limiting the consequences of the divorce as far as alimony is concerned. The situation now seems more confused than before the decision in the first *Williams* case. A state can make practically any law regarding alimony and thereby limit the effect of a foreign divorce in this respect. If the marital status is at issue, the divorce decree can be completely nullified by attacking the jurisdiction of the foreign tribunal. And lip service is still paid to full faith and credit.

Thomas F. Burns

NEGLIGENCE—ARCHITECTS' AND CONTRACTORS' LIABILITY TO PERSONS NOT IN PRIVITY.

Inman v. Binghamton Housing Authority (N.Y. 1956).

The infant plaintiiff fell from the porch of an apartment leased by his parents from the Binghamton Housing Authority, sustaining severe personal injuries. Plaintiff, through his guardian ad litem, brought suit against

18. McKay v. McKay, 279 App. Div. 250, 110 N.Y.S.2d 82 (1st Dep't 1952).

19. Sherrer v. Sherrer, 334 U.S. 343 (1948). See also Johnson v. Muelberger, 340 U.S. 581 (1951).

20. N.Y. CIV. PRAC. ACT § 1170-b.

21. Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 135 N.E.2d 553, 556 (1956).

22. N.Y. CIV. PRAC. ACT § 1165-a.

the Housing Authority, the architects and the builder. In each case there was a claim of negligence based upon the charge that the back porch of the building was so improperly designed and constructed as to create a dangerous and hazardous condition for the users thereof, especially children. The trial court dismissed the complaint against the builder and architects for failure to state a cause of action due to the lack of privity between the parties. On appeal the Appellate Division reversed, thereby extending the doctrine of *MacPherson v. Buick Motor Co.*,[1] which dealt only with personal property, to structures erected upon real property. The court said that, notwithstanding the lack of privity, if the porch was so improperly designed as to create dangerous condition for users thereof, the architect would be liable for injuries sustained by the plaintiff as a result of the fall, and if the plans were so defective that a builder of ordinary prudence would have been put on notice that to follow them would create dangerous conditions, he would be liable also. *Inman v. Binghamton Housing Authority,* 152 N.Y.S.2d 79 (3rd Dep't 1956).[2]

Initially, it was held that when work was done under a contract, or when goods were made and sold, the liability for negligence in performance or manufacturing was restricted to those who were parties to the contract or sale.[3] Thus, a manufacturer was not liable to anyone except his immediate buyer for damages caused by defective goods,[4] although he would be liable to persons not in privity with him if the goods were inherently or imminently dangerous to life or limb.[5] This general rule was rejected in the case of *MacPherson v. Buick Motor Co.*,[6] which held a manufacturer liable to the ultimate consumer if the nature of the product is such that it is reasonably certain to be dangerous if negligently made. This is the prevailing view today although the New York courts have taken a narrow view as to what is to be considered "dangerous if negligently made." Liability is not imposed where the products are simple appliances in ordinary use such as a beach chair,[7] cigarettes,[8] or a pair of shoes.[9] In early cases, the building contractor was treated similarly to the manufacturer of chattels in that he was not liable to persons with whom he had no contract for injuries occurring after he completed and turned the work over to the owner, even though the injuries resulted from his negligent workmanship.[10]

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. Inman v. Binghamton Housing Authority, 152 N.Y.S.2d 79 (3rd Dep't 1956).

3. Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

4. Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

5. Krahn v. J.L. Owens Co., 125 Minn. 33, 145 N.W. 626 (1914).

6. See note 1, *supra.*

7. Liedeker v. Sears, Roebuck & Co., 249 App. Div. 835, 292 N.Y. Supp. 541 (2nd Dep't 1937), *aff'd.,* 274 N.Y. 631, 10 N.E.2d 586 (1937).

8. Block v. Liggett & Myers Tobacco Co., 162 Misc. 325, 296 N.Y. Supp. 922 (Sup. Ct. 1937).

9. Sherwood v. Lax & Abowitz, 145 Misc. 578, 259 N.Y. Supp. 948 (Sup. Ct. 1932).

10. Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928); Holmes v. T.M. Strider Co., 186 Miss. 380, 189 So. 518 (1939); Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891).

The rationale of this view is that the act of the owner in taking over the premises is an intervention of an independent human agency which has the effect of breaking the chain of causation between the negligence of the contractor and an injury which might occur after acceptance.[11] There were certain well-recognized exceptions to this general rule. For example, the contractor was liable to third persons not in privity with him if the finished work constituted a nuisance,[12] or if it was inherently or intrinsically dangerous.[13] Although the courts have been extremely reluctant to apply the *MacPherson* doctrine to building contractors, recent decisions have placed them on the same footing as the manufacturer of goods. Without need of privity they have been held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence, even after acceptance of the work.[14] However, some jurisdictions have refused to adopt such a position and still do not impose upon a contractor liability to third persons after the negligently performed work has been accepted.[15] Although there is not much litigation on the point, an architect was in the same position as a builder prior to the extension of the *MacPherson* doctrine and thus, he was not liable to third persons injured through his negligent designing of a building after construction and acceptance of it by the owner.[16]

The mere fact that an owner accepts the finished work of a contractor should not absolve the latter from liability to persons other than the owner. It is unrealistic to say that a contractor's liability should cease after the owner has inspected the premises and taken possession, since he does not have the ability to ascertain if the structure is free from all defects. The New York court properly adopts the modern view which finds no reason for distinguishing between a contractor and manufacturer in regard to his liability to persons not in privity. In holding the architect liable the court has made a unique but desirable extension of the rule. However, in so holding the court appears to have created an interesting problem. If the plans were so defective that a builder of ordinary prudence should not have relied on them, perhaps the risk created by the architect has terminated.[17] Thus, we would have the odd situation of the architect being liable if he presented the builder with a defective set of plans, and escaping liability if the building was so poorly designed that the builder should not have relied on them.

Francis P. Connors

11. Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919).
12. Schumacker v. Carl G. Neuman Dredging & Improvement Co., 206 Wis. 220, 239 N.W. 459 (1931).
13. O'Brien v. American Bridge Co., 110 Minn. 364, 125 N.W. 1012 (1910).
14. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3rd Cir. 1948); Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932); Foley v. Pittsburgh-Des Moines Steel Co., 363 Pa. 1, 68 A.2d 517 (1949).
15. Kolburn v. P.J. Walker Co., 38 Cal. App. 2d 550, 101 P.2d 747 (1940); Miller v. Davis-Averill, 137 N.J.L. 671, 61 A.2d 253 (1948).
16. Geare v. Sturgis, 14 F.2d 256 (D.C. Cir. 1926).
17. Pittsburgh Reduction Co. v. Horton, 87 Ark. 576, 113 S.W. 647 (1908).

SALES—IMPLIED WARRANTY—FITNESS FOR A PARTICULAR PURPOSE.

Frank R. Jelleff, Inc. v. Braden (D.C. Cir. 1956).

Plaintiff purchased a brunch coat or smock at the defendant's retail store. While she was wearing it at home the coat came in contact with the burner of an electric stove and went up in flames causing severe personal injuries. Plaintiff brought an action for breach of warranty of fitness for purpose under section 15(1) of the Uniform Sales Act.[1] There was a verdict and judgment against the defendant for $65,000. The court of appeals affirmed and *held* that on the whole record it was for the jury to say whether the garment was reasonably fit, and upon its finding that it was not, a breach of implied warranty of fitness was established. *Frank R. Jelleff v. Braden,* 233 F.2d 671 (D.C. Cir. 1956).[2]

To establish a warranty of fitness for a particular purpose the Uniform Sales Act requires that the seller be made aware, expressly or by implication, of the particular purpose for which the goods were purchased and that the buyer rely on the seller's skill and judgment in selecting the particular item.[3] Both section 15(1) of the Uniform Sales Act and its prototype, section 14(1) of the English Sales of Goods Act, represent attempts to codify the common law.[4] In England, at the time of the codification, the courts were just beginning to recognize the implied warranty of fitness where the seller was a dealer;[5] while at the time of the codification in the United States an implied warrany was recognized[6] but many courts enforced it only when the seller was a manufacturer.[7] Generally the recovery permitted in an action for breach of warranty of fitness is the difference between the value of the goods delivered to the buyer and the value of goods conforming to the warranty.[8] However, the Sales Act also authorizes

1. The action was actually brought under D.C. CODE § 28-1115(1) (1951) which is the same as § 15(1) of the Sales Act.

2. Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671 (D.C. Cir. 1956).

3. UNIFORM SALES ACT § 15(1). This corresponds to UNIFORM COMMERCIAL CODE § 2-315 which is somewhat broader on the point of reliance. The requirement of reliance is fulfilled by relying on the seller to select or to furnish suitable goods. The Code would impose the warranty if the seller knows or has reason to know the buyer's purpose.

4. 1 WILLISTON, SALES § 227 (rev. ed. 1948).

5. Brown v. Edgington, 2 Man. & G. 279, 133 Eng. Rep. 751 (C.P. 1841); Smith v. Baker, Son and Death, 40 L.T.R. (n.s.) 261-263 (D.C. 1878) (dictum). See Randall v. Newson, 2 Q.B.D. 102 (1877).

6 Murchie v. Cornell, 155 Mass. 60, 29 N.E. 207 (1891); Toledo Computing Scale Co. v. Frederickson, 95 Neb. 639, 146 N.W. 957 (1914). See Dushane v. Benedict, 120 U.S. 630 (1887).

7. Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N.W. 554 (1898); Hoe v. Sanborn 21 N.Y. 552, 78 Am. Dec. 163 (1860); Sellers v. Stevenson, 163 Pa. 262, 29 Atl. 715 (1894).

8. UNIFORM SALES ACT § 69 (7). The Corresponding UNIFORM COMMERCIAL CODE sections are §§ 2-714, 715 (2)(b) and are similar to provisions of the UNIFORM SALES ACT as to consequential damages for a breech of warranty but modify the rule by requiring that the buyer make a good faith attempt to minimize his damages.

recovery of special damages.[9] Such damages may be in the nature of tort damages for personal injury. In the leading case of *Kurriss v. Conrad & Co.*,[10] the Supreme Judicial Court of Massachusetts permitted the recovery of consequential damages against a retailer for a skin rash caused by a dye or poisonous substance found to be present in a dress sold to the plaintiff. In imposing such an onerous burden on a retail seller, the courts state that they are merely placing the responsibility on the party to the contract who is best able to protect himself against the wrong "and to recoup himself in case of loss because he knows and comes in touch with the manufacturer." [11] Courts also assert that such a rule will promote public safety since the retailer, knowing he will be held liable for a breach, will take steps to deal only in goods that meet the requirements of this warranty.[12]

While the decision in the instant case is sound and in accord with the development of the law on this subject it is not novel in this jurisdiction and is controlled by the earlier case of *Deffebach v. Lansburgh & Bro.*[13] Difficulty in this area of sales law arises from the statutory language of fitness for a "particular purpose." [14] The phrase carries an implication that the warranty runs only to commercial imperfections in the coat.[15] However, the decisions of the courts exact more than this. They go beyond the purely commercial aspects of the goods and, although using the same statutory language, impose a warranty covering all possible use-hazards. A more adequate wording would impose a warranty running to "all qualities" of the merchandise. Such a warranty would more accurately reflect the law as it is being applied and would also result in the recognition of the retailer as an insurer against defects in the goods he sells which create a risk of personal injury. The case vividly illustrates the difficult position in which a merchant may find himself and it gives an indication of the increasingly important role of products liability insurance, not only for manufacturers, but also for retail sellers.

Paul W. Callahan

9. UNIFORM SALES ACT §§ 69(7), 70.

10. 312 Mass. 670, 46 N.E.2d 12 (1942). See also Deffebach v. Lansburgh & Bro., 150 F.2d 591 (D.C. Cir. 1945); Cushing v. Rodman, 82 F.2d 864 (D.C. Cir. 1936); Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252 (1922); Ward v. Great Atlantic and Pacific Tea Co., 231 Mass. 90, 120 N.E. 225 (1918); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 44 A.2d 73 (1939); Ganoung v. Daniel Reeves, Inc., 149 Misc. 515, 268 N.Y.S. 325 (N.Y. Munic. Ct. 1933). *Cf.* Ringstad v. I. Magnin & Co., 39 Wash.2d 923, 239 P.2d 848 (1952).

11. Ward v. Great Atlantic and Pacific Tea Co., 231 Mass. 90, 94, 120 N.E. 225, 226, (1918) (dictum).

12. Chapman v. Roggenkamp, 182 Ill. App. 117, 121 (1931) (dictum); Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 712 (1936); Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494, 508-14 (1936).

13. 150 F.2d 591 (D.C. Cir. 1945).

14. See Llewellyn, *On Warranty of Quality, and Society*, 37 COLUM. L. REV. 341, 381 (1937).

15. See Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936) and 37 COLUM. L. REV. 341 (1937) for a discussion of the purely commercial approach that is taken in this field.

TORTS—CONTRIBUTION AMONG JOINT TORTFEASORS—RETENTION OF A RELEASED DEFENDANT.

Davis v. Miller (Pa. 1956).

In an action for personal injuries the original defendant joined as additional defendant the driver of the car in which plaintiffs were riding when the accident occurred. The additional defendant introduced in her pleadings releases received from the plaintiffs and from the original defendant. Her motion for judgment on the pleadings was sustained and she was discharged from the case. On appeal the supreme court *held* the original defendant had a right to require that the additional defendant remain in the action since, even though he could not recover contribution from her, his liability to the plaintiffs would be halved if he could establish that she was a joint tortfeasor. *Davis v. Miller,* 385 Pa. 348, 123 A.2d (1956).[1]

The right of contribution among joint tortfeasors did not exist at common law.[2] Under early statutes permitting it, a release of one joint tortfeasor released the others.[3] But under the Uniform Contribution Among Joint Tortfeasors Act [4] a release given to one joint tortfeasor does not discharge from liability anyone not a party to it.[5] Any consideration paid for a release will reduce to that extent the total claim for damages recoverable against those not released.[6] If the consideration paid is less than the released party's pro-rata share, he will be required, either in a separate action or by being made a third party defendant in the original action, to make up any difference the party not released may be called upon to pay.[7] Hence, if the release provides for a reduction in damages re-

1. Davis v. Miller, 385 Pa. 348, 123 A.2d 422 (1956).

2. Union Stock Yards Co. v. Chicago B. & O. R.R., 196 U.S. 217 (1905); Fidelity & Cas. Co. v. Chapman, 167 Ore. 661, 120 P.2d 223 (1941); Borough of Oakdale v. Gamble, 201 Pa. 289, 50 Atl. 971 (1902).

3. Rushford v. United States, 204 F.2d 831 (2d Cir. 1953); Bee v. Cooper, 217 Cal. 96, 17 P.2d 740 (1932); Union of Russian Soc. of St. Michael & St. George v. Koss, 348 Pa. 574, 36 A.2d 433 (1944).

4. The act has been adopted in the following states: Ark. 1941; Del. 1949; N.M. 1947; Pa. 1951; R.I. 1940; and S.D. 1945.

5. PA. STAT. ANN. tit. 12, § 2085 (Supp. 1955). "A release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced . . ." Raughley v. Delaware Coach Co. 47 Del., 343, 91 A.2d 245 (1952); Maryland Lumber Co. v. White, 205 Md. 180, 107 A.2d 73 (1954).

6. *Ibid.*

7. PA. STAT. ANN. tit. 12, § 2086 (Supp. 1955). "A release by the injured person of one of the joint tortfeasors does not relieve him from liability to make contribution to another tortfeasor, unless the release . . . provides for a reduction to the extent of the pro-rata share of the released tortfeasor of the injured person's damages recoverable against all other tortfeasors." Smith v. Philadelphia Transp. Co., 173 F.2d 721 (3rd Cir.), *cert. denied,* 338 U.S. 819 (1949). Pennsylvania disregards comparative negligence of joint tortfeasors and makes each equally liable. Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955).

coverable against those not named in the release equal to the released party's pro-rata share there is no necessity to enforce a right of contribution.[8] Where one joint tortfeasor gives the other a general release the reason for denying any right of contribution is more emphatic.[9]

The instant case presents a conflict between the right of the original defendant to benefit from plaintiffs' releases to the additional defendant if the additional defendant was a joint tortfeasor and the right of the additional defendant to remain out of the action since she has settled her liability with all who can recover from her. The Uniform Act does not provide any procedure whereby a tortfeasor can assert in mitigation of damages a release given to a third party, until he shows that the third party was jointly liable with him.[10] The parties could have, by stipulation, agreed to discharge the additional defendant and hold the original defendant responsible for only one-half of plaintiffs' damages should he be found to be liable at all. Since this was not done, to insure original defendant's right not to be required to pay more than his pro-rata share if he is only a joint tortfeasor, the court properly retained the additional defendant until her liability in the absence of a release could be adjudicated. A contrary decision would, in effect, construe the original defendant's release to the additional defendant as a surrender of the original defendant's right under the Uniform Act to a pro-rata decrease in his liability to the plaintiffs.

Edward G. Mekel

WORKMEN'S COMPENSATION—JURISDICTION OVER SUBJECT MATTER—ESTOPPEL TO DENY JURISDICTION BY ACCEPTING AWARD.

Hart v. Thomasville Motors, Inc. (N.C. 1956).

The plaintiff was injured while working as a carpenter in the garage of the defendant. The defendant paid, and the plaintiff received and accepted, compensation as provided by the Workmen's Compensation Act. Subsequently plaintiff moved to set aside the award on the ground that the commission had no jurisdiction to grant it because plaintiff was not an employee of defendant, but an independent contractor. A deputy commissioner found for the plaintiff and the defendant appealed to the full

8. On a motion by the plaintiff a released defendant was dismissed from the case with prejudice towards plaintiff's claim against the remaining defendant. Fleck v. Marzano, 108 F. Supp. 556 (D.C. Pa. 1953); Smootz v. Ienni, 37 N.J. Super. 529, 117 A.2d 675 (1955); *accord*, Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 110 A.2d 24 (1954); Stroh v. Loose, 67 Dauph. 103, 2 D. & C. 2d 157 (1954).

9. Killian v. Catanese, 375 Pa. 593, 101 A.2d 379 (1954). *Contra*, Derby v. Matushonek, 42 Luz. L. Reg. 19, 80 D. & C. 272 (1951); Erbaugh v. Lefever, 17 Monroe L. R. 54, 103 P.L.J. 387 (1956). The difficulty is in ascertaining whether the releasor intended his release to extend to any right of contribution that may accrue.

10. *But see*, Giem v. Williams, 215 Ark. 705, 222 S.W. 2d 800 (1949).

commission which affirmed the decision. On appeal to the Supreme Court of North Carolina, it was *held* that the plaintiff, in accepting the compensation awarded by the commission, was not estopped from attacking its jurisdiction on the ground that he was an independent contractor, and therefore, not subject to the Workmen's Compensation Act. *Hart v. Thomasville Motors, Inc.*, 93 S.E.2d 673 (N.C. 1956).[1]

The jurisdiction of a court over a particular subject matter stems from the legislative act (or constitutional provision) which brings the tribunal into being. This jurisdiction is the power to hear and determine cases of the general class to which the proceeding in question belongs.[2] Since this power is granted to the courts by law, it is generally held that it cannot be acquired by estoppel,[3] or consent and waiver [4] of the parties to the action. There is some authority, however, that this jurisdiction may be acquired by something akin to estoppel.[5] The judgment of a court without jurisdiction is void [6] and may be attacked whenever it is asserted.[7] Industrial commissions are viewed as courts of limited jurisdiction whose authority and jurisdiction are established by the legislature.[8] The commissions are under the same restrictions as the courts in matters of jurisdiction and can acquire it neither by consent and waiver, estoppel,[9] nor stipulation.[10] An award made by a commission without jurisdiction is likewise a nullity [11] and, may be assailed at any time.[12] However, not all courts are of the same opinion on this question. Some take the view that once a

1. Hart v. Thomasville Motors, Inc., 93 S.E.2d 673 (N.C. 1956).

2. Peterson v. Falzarano, 6 N.J. 447, 79 A.2d 50 (1950).

3. Simmons v. Friday, 359 Mo. 812, 224 S.W.2d 90 (1949); Brown v. Brown, 281 S.W.2d 492 (Tenn. 1955).

4. Dever v. Bowers, 341 Ill. App. 444, 94 N.E.2d 518 (1950); McKim v. Petty, 242 Iowa 599, 45 N.W.2d 157 (1950); Bodwell-Leighton Co. v. Coffin & Wimple Inc., 114 Me. 367, 69 A.2d 567 (1949).

5. T.J. Dye & Son v. Nicholas, 89 Ind. App. 13, 141 N.E. 259 (1923); Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 567 (1908); Dean v. Dean, 136 Ore. 694, 300 Pac. 1027 (1931); Wells v. Wells, 2 Utah 2d 241, 272 P.2d 167 (1954).

6. Samson v. Bergin, 138 Conn. 306, 84 A.2d 273 (1951); Royal Indemnity Co. v. Savannah, 209 Ga. 383, 73 S.E.2d 205 (1952); Green v. Walsh, 5 Ill. App.2d 535, 126 N.E.2d 398 (1955).

7. Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952); Haefele v. Davis, 373 Pa. 34, 95 A.2d 195 (1953); Tescher v. Kijurina, 365 Pa. 480, 76 A.2d 197 (1950).

8. Industrial Comm'n v. Plains Utility Co., 127 Colo. 506, 259 P.2d 282 (1953); Chadwick v. Dept. of Conservation, 219 N.C. 766, 14 S.E.2d 843 (1941); Sheehan v. Industrial Comm'n, 272 Wis. 595, 76 N.W.2d 343 (1956).

9. Eastern Coal Corp. v. Morris, 287 S.W.2d 603 (Ky. 1956); Rosenberry v. Gillian Bros., 130 Pa. Super. 469, 197 Atl. 523 (1938); Welhouse v. Industrial Comm'n, 214 Wis. 163, 252 N.W. 717 (1934).

10. Partin's Adm'r v. Black Mountain Corp., 237 Ky. 556, 36 S.W.2d 1, (1931); Seiler v. Otis Elevator Co., 281 App. Div. 140, 120 N.Y.S. 2d 325 (3rd Dep't 1952); Waldum v. Lake Superior Terminal & Transfer Ry. Co., 169 Wis. 137, 170 N.W. 729 (1919).

11. Industrial Comm'n v. Plains Utility Co., 127 Colo. 506, 259 P.2d 282 (1953); Hardman v. Industrial Comm'n, 60 Utah 203, 207 Pac. 460 (1922).

12. State v. Review Board, 230 Ind. 1, 101 N.E.2d 60 (1951); Pine v. Industrial Comm'n, 108 Okla. 185, 235 Pac. 617 (1925); Kutt v. Beaumont Birch Co., 177 Pa. Super. 352, 110 A.2d 816 (1955).

party has placed himself before the commission, he will not be heard to deny its jurisdiction.[13]

In the instant case, the Workmen's Compensation Act [14] did not apply to independent contractors, and the commission was without jurisdiction over the claim. While the decision is supported by the weight of authority it is unfortunate that the court did not adopt the reasoning of the concurring judge. He would distinguish between conferring jurisdiction by agreement, and making stipulations of fact which, if true, bring the proceeding within the statutory jurisdiction of the commission.[15] Thus, an estoppel would arise, not to confer jurisdiction, but to deny the facts which have been stipulated. This view is more in keeping with justice in that it would prevent the parties from denying, without show of good reason,[16] the stipulation on the strength of which the commission assumed jurisdiction.[17] In this way, not only would the employee be protected in his award, but the employer too would be secure in the finality of the commission's decision in a manner consonant with both the letter and spirit of the statute.

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WORKMEN'S COMPENSATION—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT—ALLOWING RECOVERY FOR CANCER INDUCED BY AN INJURY.

Charleston Shipyards, Inc. v. Lawson (E.D.S.C. 1955).

On January 18, 1952, claimant, in the course of his employment, stepped heavily on a piece of steel injuring the sole of his right foot. At the time of the injury, claimant had on this foot a wart-like lesion which had been present for many years, though it had never been painful or troublesome. The injury to the foot tore this lesion partially loose from the surrounding tissue. On January 28th the attending physician excised the lesion, and a laboratory examination showed it to be malignant. On February 4th claimant's right leg and the right half of his pelvis were amputated. The deputy commissioner found that the injury of January 18th activated and accelerated the pre-existing lesion, thus necessitating

13. Ray v. Hillman, 229 Ala. 424, 157 So. 676 (1934); T.J. Dye & Sons v. Nicholas, 89 Ind. App. 13, 141 N.E. 259 (1923).

14. N.C. GEN. STAT. § 97-3 (Supp. 1953).

15. Hart v. Thomasville Motors, Inc., 93 S.E.2d 673 (N.C. 1956) (concurring opinion).

16. The court did not consider the question of what constitutes "good reason." See Robertson v. Smith, 129 Ind. 422, 28 N.E. 857 (1891); Winston Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21 (1915).

17. RESTATEMENT, CONFLICT OF LAWS § 81, comment *g* (1934); RESTATEMENT, JUDGMENTS § 7, comment *e* (1942).

the amputation. Under the Longshoremen's and Harbor Workers' Compensation Act,[1] he ordered the employer, Charleston Shipyards, Inc., and the insurer, American Casualty Co., to pay claimant twenty dollars per week for the entire period of his total disability. Employer and insurer filed a petition to enjoin the order, and the court suspended payments required under the compensation award pending final disposition by the court. The district court *held* that, though the cancerous condition could not medically be positively attributed to the injury, in view of the sufficiency of nonmedical circumstantial evidence, the award would be sustained as supported by substantial evidence on the record considered as a whole. *Charleston Shipyards, Inc. v. Lawson,* 141 F. Supp. 764 (E.D.S.C. 1955).[2]

The basis for compensation laws is that accidents in industry are inevitable, and that society has a duty to protect the victims of such mishaps.[3] The Longshoremen's and Harbor Workers' Compensation Act[4] is in line with the trend, begun some decades ago, aiming to place the burden of industrial injuries on industry itself and ultimately on society whom it serves.[5] It was enacted to provide compensation for the various types of longshoremen and harbor workers to whom state compensation statutes did not apply.[6] The courts have given the act a liberal construction in furtherance of its purpose,[7] and have declared that any doubts should be resolved in favor of the workman.[8] An "accidental injury," within the act,[9] includes injuries sustained by employees who are suffering from physical infirmities, though the injury would not have occurred but for the physical weakness.[10] Compensation is granted for any aggravation or activation of a previous condition, provided it can be said that the aggravation arose out of the employment.[11] Thus, the deputy commissioner has allowed compensation for claims based on aggravation of latent conditions

1. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1952).

2. Charlestown Shipyards, Inc. v. Lawson, 141 F. Supp. 764 (E.D.S.C. 1955).

3. Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932).

4. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1952).

5. See Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932); Didier v. Crescent Wharf & Warehouse Co., 15 F. Supp. 91 (S.D. Cal. 1936).

6. State law cannot validly provide for recovery through workmen's compensation proceedings for an injury sustained while a worker is engaged in maritime employment on navigable waters of the United States. Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128, 131 (1929).

7. Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932); *accord,* Kobilkin v. Pillsbury, 103 F.2d 667, 670 (9th Cir. 1939).

8. Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932).

9. Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U.S.C. § 902(2) (1952).

10. Hoage v. Employers' Liability Assur. Corp., 64 F.2d 715 (D.C. Cir. 1933) (arteriosclerosis); Trudenich v. Marshall, 34 F. Supp. 486, 489 (W.D. Wash. 1940) (coronary thrombosis); *accord,* Ocean S.S. Co. v. Lawson, 68 F.2d 55 (5th Cir. 1933).

11. Hoage v. Employers' Liability Assur. Corp., *supra* note 10.

of tuberculosis,[12] syphilis,[13] diabetes,[14] and cancer itself.[15] Where there is substantial evidence supporting the finding of the deputy commissioner, the courts will affirm that decision as conclusive.[16] Under the statute, the court is sharply limited in its review of the inference which the deputy commissioner considers to be the most reasonable to be drawn from the basic facts.[17] Even though the court thinks the opposite inference is more reasonable or more consonant with the facts, it cannot set aside the deputy commissioner's inference if it is supported by evidence and not inconsistent with the law.[18]

The instant case is the second one decided under the Longshoremen's and Harbor Workers' Compensation Act in which the courts have affirmed the award of a claim for cancer.[19] However, it is only one of a great number of cases in which a commissioner or board has been faced with conflicting medical testimony on the role of strain or trauma in causing or aggravating this disease.[20] In carrying out the benevolent legislative policy, administrative agencies and courts have refused to make any subtle analyses of the causes of cancer—a subject on which there is no satisfactory expert testimony because of medical science's admitted ignorance of many aspects of the disease. While the court in the instant case purports to apply a "substantial evidence" test in upholding the finding of the deputy commissioner, its use of the term "rational inference" implies a more liberal standard. However, as medical science increases its knowledge of the causes of cancer, the courts doubtless will require a corresponding increase in the quantum and probative value of the evidence presented to the deputy commissioner before finding that he had "substantial evidence" from which he could "rationally infer" a causal connection between the injury and the subsequent disease.

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12. Grain Handling Co. v. McManigal, 23 F. Supp. 748 (W.D.N.Y. 1938).

13. Fidelity & Casualty Co. v. Henderson, 128 F.2d 1019 (5th Cir. 1942).

14. Avignon Freres, Inc. v. Cardillo, 117 F.2d 385 (D.C. Cir. 1940).

15. Southern S.S. Co. v. Norton, 41 F. Supp. 103 (E.D. Pa. 1940).

16. Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 478-79 (1947); Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 246 (1941).

17. Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U.S.C. §§ 19(a), 21(b) (1952).

18. Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 477-78 (1947).

19. The first case was Southern S.S. Co. v. Norton, 41 F. Supp. 103 (E.D. Pa. 1940).

20. O'Neill v. Babcock & Wilcox, 19 N.J. Misc. 659, 23 A.2d 116 (1941); Ellis v. Commonwealth, 182 Va. 293, 28 S.E.2d 730 (1944).