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RECENT DECISIONS

CIVIL PROCEDURE—CORPORATE AMENABILITY TO SERVICE OF PROCESS—FEDERAL LAW APPLICABLE TO DETERMINE CORPORATE PRESENCE.

*Jaftex Corp. v. Randolph Mills, Inc.*, (2d Cir. 1960).

Plaintiffs, citizens of Maryland, alleging injury from pajamas that “went up in flames,” instituted suit in the United States District Court for the Southern District of New York against Jaftex, a New York corporation. Jaftex sought to implead Randolph Mills, Inc. of North Carolina, the ultimate manufacturer of the fabric. Service of process was made in New York on an officer of Iselin-Jefferson Company, also named as a third-party defendant, as selling agent for Randolph Mills. On motion by Randolph Mills to vacate the service and dismiss the third-party complaint, the district court held that the service, though valid under federal law, was invalid under state law and that state law was controlling. The United States Court of Appeals, Second Circuit, reversed and remanded holding that service of process was valid under both New York and federal law and that federal law is to be applied in determining whether a foreign corporation is present within a district so as to make it amendable to service of process.¹ *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

Federal courts adjudicating state created rights only because of the diversity of citizenship of the litigants must apply state law,² if disregard of state law would “significantly affect the result” of the litigation.³ The avowed purpose of this rule is to insure that the result reached by a federal court will not be substantially different from the result which would have been achieved by a state court.⁴ Applying the test of uniformity of outcome literally, a federal court could not assert jurisdiction over a particular defendant and adjudicate a controversy if the state courts would not exercise jurisdiction. With the exception of the case of *Byrd*

1. Friendly, J. concurred in the result but disagreed with the latter, alternative holding.
v. Blue Ridge Rural Elec. Coop., uniformity of outcome seems to have been the sole consideration of the Supreme Court in determining whether state or federal law is to be applied. In the Byrd case the Court held that the doctrine of uniformity of outcome was not controlling where the state procedural law was not an integral part of the state created right and there was a strong federal policy opposed to the state law. That jurisdiction over the subject matter is determinable by federal law cannot be doubted, and although no such unequivocal assertion is possible regarding jurisdiction over the person, it has been argued persuasively that such jurisdiction is within a “twilight zone” between substance and procedure where Congress may provide a uniform rule of procedure for the federal courts. In the absence of legislation the court in the principal case purports to find a strong federal policy in prior judicial decisions determining corporate amenability to service of process through a federal “doing business” test. Although the Supreme Court has not decided whether state or federal law is to determine amenability to service of

7. Byrd v. Blue Ridge Rural Elec. Corp., 356 U.S. 525, 535 (1958). The strong federal policy in this case was the assignment of disputed questions of fact to the jury, as the Court said, “... under the influence — if not the command — of the Seventh Amendment....”
8. U.S. Const. art III, § 2, “The Judicial Power shall extend to ... controversies ... between Citizens of different States....”
11. Congress has supplied a standard of doing business in regard to venue. 28 U.S.C. § 1391(c) (1948). It is arguable that since the provisions regarding venue and jurisdiction were previously grouped together, 28 U.S.C. § 112 (1940), the doing business test of § 1391(c) is also applicable to jurisdiction over the person. However § 1391(c) refers explicitly to venue and since its purpose was probably to overcome the “waiver” theory in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), the validity of such argument is doubtful. See 67 YALE L.J. 1094, 1099 n.18 (1958) (suggesting possible adverse effects of equating the two provisions).
12. Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 512-13 (2d Cir. 1960). But see dissenting opinion arguing against not only the strength of a federal policy in this area but also against its existence. Id. 520-21.
process in diversity cases, it is apparent that the choice of law governing jurisdiction over the person is not immune from the uniformity of outcome doctrine when a state closes the doors of its courts to a litigant. At least where such a door closing statute is an expression of a clear and precise substantive state policy federal courts must also decline to hear the case. It appears that when a state declines to exercise jurisdiction, but does so not because of a substantive state policy, such ruling would not be binding on the federal courts if the state law were in opposition to a strong federal policy. However, although a state may exercise jurisdiction over a foreign corporation if such exercise does not offend due process it need not exercise the full extent of jurisdiction constitutionally allowable. Since the federal test of presence by doing business appears to be the allowable extreme short of violating due process requirements, application of federal law when a state does not exercise its full power could conceivably violate a state policy to restrict jurisdiction or impose on a state a policy not contemplated. It is therefore impossible to make an abstract assertion that jurisdiction over the person is divorced from state created rights. Courts adhering to the literal outcome determinative test limit the scope of federal law in determining corporate presence to a determination of whether exercise of jurisdiction consistent with state law would violate due
process requirements. The present court would probably apply state law where a case is removed to the federal court from a state court, and where service of process is made under a state statute; therefore the area of conflict appears to be limited to whether state or federal law is applicable under rule 4(d)(3) of the Federal Rules of Civil Procedure.

The purpose of diversity jurisdiction is to insure non-resident litigants a trial free from local prejudice and the underlying policy of the *Erie* case is to avoid discrimination against local residents by refusing to allow non-residents a choice of law when a resident may use only state law. Identity of outcome between state and federal courts is the rule devised to implement this policy and not an end in itself. The purpose of the doctrine is to implement this underlying policy and not to destroy uniformity of procedure in the federal courts. When this policy conflicts with another federal policy it would seem strict application of an outcome determinative test to state procedural law is to harden the doctrine into a rule without reason. When policy reasons conflict the stronger should prevail. The *Byrd* case recognizes this but the federal policy deemed controlling there was almost a constitutional command. Furthermore the state procedural law disregarded was interpreted as a practice developed without reason and not an integral part of the state created right. Thus the federal policy was as strong as possible without being a clear constitutional directive or statute and the state procedural law almost totally severed from the state created right. Whether the doctrine of identity of outcome should control if a lesser degree of either requisite is present is debatable. In the principal case there is no applicable constitutional provision nor a discernable legislative provision. When Congress has legislated uniformity of procedure within the "twilight zone" where it may constitutionally act it is a clear manifestation of federal policy, and were there a specific statute directed to jurisdiction over corporations authorizing a standard of doing business in the district to determine amenability to service of process, there is no doubt but

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24. Fed. R. Civ. P. 4(d) "... Service shall be made as follows: ... (3) Upon a domestic or foreign corporation ... by delivering a copy of the summons and complaint to an officer, a managing or general agent or to any other agent authorized by appointment or by law to receive service of process ..."


27. See note 7, *supra*.

that it should prevail over a contrary state law. In the absence of such clear legislative direction, a procedural policy developed pursuant to a constitutional inference, also within the "twilight zone," is strong enough if the state procedural law is not an integral part of the state created right.\(^2\)

Where no strong federal policy exists in opposition to the *Erie* doctrine, outcome determination should be the only consideration whether or not the state procedural law is an integral part of the state created right.\(^3\)

It is submitted that strained statutory construction\(^4\) and pre-*Erie* judicial decisions\(^5\) relied on in the instant case present no such strong federal policy as will obviate the *Erie* doctrine. To expand the concept of policy enunciated in the *Byrd* case as advocated by the court would seem to lead to the entanglements the Supreme Court sought to avoid when it said: "A policy [the *Erie* doctrine] so important to our federalism must be kept free from entanglements with analytical or terminological niceties."\(^6\)

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*Edward C. McCordle*

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**CONFLICT OF LAWS—INSURANCE CONTRACT—Effect of Endorsement on Choice of Law.**


Pursuant to a New York statute\(^1\) providing that no insurance policy covers any liability of the insured due to injury to his or her spouse unless such coverage is specifically included in the policy, plaintiff insurer sought a declaratory judgment that defendant's automobile liability policy, which contained no such provision, did not cover injuries sustained by his wife in a collision while defendant was driving in Connecticut.\(^2\) Defendant had lived in New York, and the policy had been originally issued and delivered in that state. Subsequently he had moved to Connecticut, so a change of address had been endorsed on the policy\(^3\) and a portion of

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\(^29\). See note 7, *supra*. See also 72 Harv. L. Rev. 147-50 (1958) (suggesting this "policy" would prevail even if the state procedural law were an integral part of the state created right).


\(^31\). See note 11, *supra*.

\(^32\). See note 13, *supra*.


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1. N.Y. INSURANCE LAW § 167(3).
2. Connecticut had no comparable statute.
3. The endorsement was made in New York; this would be one factor in favor of adopting New York law under the "grouping of contracts" theory explained later.
the premium refunded due to the lower risk incidence there. Six months later, after the accident had occurred, defendant's wife sued him in a still pending Connecticut action for personal injury damages. Plaintiff then brought the declaratory judgment action in which defendant contended that the refund and endorsement rewrote the contract of insurance so as to make Connecticut law applicable in determining his liability to his spouse. The New York Supreme Court denied plaintiff's motion for summary judgment, but the Appellate Division, in a three to two decision, reversed the lower court order and granted the motion, holding that the endorsement and refund did not constitute the making of a new contract subject to Connecticut law; thus the New York statute still applied and plaintiff was not subject to liability.4 Employers' Liability Assurance Corp. v. Aresty, 11 App. Div. 2d 331, 205 N.Y.S.2d 711 (1960).

The many different rules laid down in various jurisdictions, and often within the same jurisdiction, for determining the law applicable to insurance contracts has led one court to remark that "decisions involving the application of the insurance laws of several states to transactions including foreign elements appear irreconcilable in terms of any uniform conflict of laws theories." The specific problem in the instant case is to decide what law should be applied in determining plaintiff's liability for a Connecticut accident under a policy issued in New York to a New Yorker who has since moved his domicile to Connecticut and uses and garages his car there. The traditional rule is that the execution, interpretation and validity of a contract are determined by the law of the state where the contract is made, and its performance by the law of the state where it is to be performed. Other courts have adopted a different rule, or what is sometimes called an exception to the former one, in which the law applicable is determined by the intent of the parties at the time of the making of the contract.8 A third rule which was adopted by the New York Court of Appeals in 19549 is based on the "center of gravity" or "grouping of contracts" theory, whereby the law of the place that has the most significant contacts with the matter in dispute has been held to be controlling.10 Often all the rules give the same result due to the fact that the state where the policy is issued and the state of the insured's domicile

4. A secondary basis for not holding the insurer liable was that such would be unfair to him in that the defendant had not paid for coverage of the risk involved in the instant case. See text at footnote 20, infra.
8. Mutual Benefit Health and Accident Ass'n v. Baldridge, 70 F.2d 236 (10th Cir. 1934).
are one and the same; in such a case the law of that state naturally applies. This has been held to be true even if the accident involved in the suit occurred outside that state. The problem is made more complex however, when an endorsement is made on an existing contract of insurance, especially when the endorsement recognizes that the insured now has a foreign domicile. The general rule in construing endorsements is that both the endorsement and the policy must be read together, and the policy remains in full force except as altered by the words of endorsement. Endorsements are not usually considered to be or to create new contracts, and hence are subject to the same law as the original policy. The instant case held this to be so and New York law to be applicable even though the endorsement signified a change of the insured’s domicile and of the place of primary use and garage of the insured car.

The majority opinion applied the rule that the law of the place where the contract is made governs the insurer’s liability, citing the 1939 case of Swift & Co. v. Banker’s Trust Co. In 1954, however, the New York Court of Appeals adopted in Auten v. Auten the “grouping of contracts” theory for conflicts problems, and that rule has been followed in later New York cases. Admittedly the 1957 New Amsterdam Casualty Co. v. Stecker case went back to the old rule of Swift but then inexplicably it favorably cited Auten in support of its reasoning. In any event, Auten has never been overturned and it would seem should have been followed here. Applying the grouping of contacts rule, it appears that Connecticut has more significant contacts involved than does New York. Alternatively it would be more reasonable for the court to apply the intent

17. 3 N.Y. 2d 1, 143 N.E.2d 357 (1957).
18. The majority did note the Auten case but then made the perplexing assumption that the decision there was really based on the intent of the parties and the place of performance. It is perplexing in light of the following language taken from the Auten case: “Turning to the case before us, examination of the respective contacts with New York and England compels the conclusion that it is English law which must be applied.” (124 N.E.2d at 102); “[E]ven if we were not to place our emphasis on the law of the place with the most significant contacts . . . .” (124 N.E.2d at 103).
19. Among the Connecticut contacts are: the insured is domiciled there, the car is used principally and garaged there, the accident occurred there, and the marital relations between two of her citizens are involved. Among the New York contacts are: the policy was issued and endorsed there, the insurer’s main office is there and the insured was a resident there.
theory than the traditional rule which, according to the majority opinion, requires a new contract before the applicable law can be changed. Under the circumstances of the principal case, it can be inferred that the parties intended Connecticut law to apply at the time they made the endorsement. Even if no new contract was created in law, it would appear not to be unreasonable to give effect to the intention of the parties as exhibited by their endorsement. Furthermore, in answer to the majority's secondary point that the rate charged was not commensurate with the risk sought to be imposed since the insurer did not include possible spouse liability in computing the adjusted premium, two solutions are possible; either the insurer could be forced to bear the loss due to his own inadvertence or, preferably, the defendant's recovery from the insurer could be reduced by the added premium he should have paid. While that might seem to be giving the insured an overly advantageous interpretation of the contract, it must be remembered that an insurance contract is a contract of adhesion and is to be construed most strongly against the insurer.

Frederick M. Lavin

CONSTITUTIONAL LAW—FIFTEENTH AMENDMENT—STATE STATUTE ALTERING MUNICIPAL BOUNDARIES WITH EFFECT OF EXCLUDING NEGRO VOTERS HELD INVALID.


The Alabama legislature in 1957 enacted Local Act No. 140 redefining the boundaries of the City of Tuskegee in Macon County, Alabama. The Act altered the shape of the city from a square to an irregular twenty-eight sided figure, with the result that all but four or five of Tuskegee's four hundred qualified Negro voters were excluded from the city, while no white residents were so excluded. Petitioners, Negro residents of Tuskegee prior to the redistricting, brought an action in the United States District Court for a declaratory judgment that Local Act No. 140 deprived them and other Negroes similarly situated of due process of law and equal protection of the laws in violation of the fourteenth amendment, and of their right to vote in Tuskegee elections in violation of the fifteenth amendment. The complaint also sought to enjoin respondents,

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20. Insured would not have to pay for coverage against a potential suit by his wife until one occurred; by paying for it at that time he would be covered.
officials of the City of Tuskegee and of Macon County, from enforcing the redistricting Act. The district court dismissed the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction. The court of appeals affirmed, with one judge dissenting. On certiorari, the United States Supreme Court reversed, holding that a state statute altering the boundaries of a political subdivision of the state is invalid under the fifteenth amendment when its purpose and effect is to disenfranchise citizens because of their race. *Gomillion v. Lightfoot*, 81 Sup. Ct. 125 (1960).

The power of the states to establish, alter, and abolish their internal political subdivisions has frequently been stated in the broadest terms. In the words of one commentator, this power is "plenary, inherent, and discretionary in the legislature, and, when duly exercised, cannot be revised by the courts." Similar language is to be found in numerous decisions of the Supreme Court. It is well settled that the legislative creation of a municipal corporation does not give rise to a contractual relationship between the state and such corporation, nor does it limit the power of the state to alter the powers, diminish the territory, or terminate the existence of the municipality. This conclusion follows necessarily from the concept of municipalities as "a part of the machinery of the state," deriving all of their political powers from the state, and liable to have those powers "enlarged, modified, or diminished at any time, without their consent, or even without notice." Both the district court and the court of appeals in the instant case relied upon the often cited case of *Hunter v. City of Pittsburgh*, which upheld the validity of a Pennsylvania statute consolidating the City of Allegheny with the City of Pittsburgh over the objection of a majority of Allegheny voters. In that case, the Supreme Court held that the citizens of a municipal corporation have no vested right, by contract or otherwise, in the continued existence of the corporation, and that the state may abolish or consolidate such a corporation even though economic hardship to its citizens results. The underlying theory of this conception of state power is that a state in regulating its internal subdivisions is performing a political function within the area

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2. 270 F.2d 594 (5th Cir. 1959).
3. COOLEY, MUNICIPAL CORPORATIONS 106 (1914).
5. Laramie County Comm'r s v. Albany County Comm'r s, 92 U.S. 307 (1876).
6. Id. at 311.
7. Id. at 312.
8. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). Appellants contended that enforced consolidation impaired a contractual right of Allegheny residents to have their municipal taxes expended only for the benefit of their own municipality, and deprived them of property without due process of law by subjecting them to the burden of additional taxation resulting from consolidation. The Court rejected the existence of such rights.
reserved to it by the tenth amendment. Stressing the political nature of
the Alabama statute, respondents relied upon Colegrove v. Green.\textsuperscript{9} In
that case, the Supreme Court affirmed dismissal of an action for a de-
claratory judgment of the invalidity of an Illinois apportionment statute
establishing congressional districts grossly unequal in population; the
ground of the dismissal was that the question raised was "of a peculiarly
political nature and therefore not meet for judicial determination."\textsuperscript{10}
Respondents in the instant case urged that Alabama's action was equally
political in nature and hence within the scope of the Colegrove holding.

From the foregoing, it will be seen that the instant case is of major
constitutional significance in the limitation which it places upon the control
of the states over their political subdivisions. Reduced to its essentials,
it holds that this control may not be exercised in such a manner as to
deprive citizens of personal rights secured by the federal constitution.
This is hardly a novel proposition; it is rather the application of a well-
established principle to a new factual situation. It does not clash with
the rule of the Hunter case, for that decision, when divorced from its rather
extravagant and generalized dicta, held only that residents of a municipality
have no vested contractual or property interest in the continuation of
such residence. It clearly does not follow from this that they may be
deprived of the benefits of such residence, including municipal suffrage,
\textit{only} because of their race.\textsuperscript{11} The instant decision is strongly supported
by a number of cases which have held that the state's power to alter
and abolish its subdivisions is limited by the constitutional provision pro-
hibiting the impairment of contracts and may not be used in such a way
as to leave the creditors of such subdivisions without effective recourse
for their debts.\textsuperscript{12} In this connection, the state's power to destroy its
municipal corporations has been equated with its power to repeal its
legislation, another "political" power which is certainly not absolute.\textsuperscript{13}
It would seem that, if the state's power in this field is restricted by the
contracts clause, it must necessarily be equally restricted by the rights
secured by the fourteenth and fifteenth amendments.\textsuperscript{14}

\textsuperscript{9} Colegrove v. Green, 328 U.S. 549 (1946).
\textsuperscript{10} Id. at 552.
\textsuperscript{11} Respondents contended that, since the legislature unquestionably had power
to enact the complained of statute, the courts ought not to concern themselves with
its motive in doing so. This contention, not discussed by the Supreme Court, was
aptly answered in Judge Brown's dissenting opinion in the court of appeals, 270
F.2d 594, 599. While the courts should not inquire into the motives of individual
legislators, judicial review would be a dull blade indeed if it could not probe beyond
the innocent face of a statute to discover the discriminatory intent of the legislature
itself, as manifested by the inevitable effects of its act. It is the effect which is
\textsuperscript{12} Graham v. Folsom, 200 U.S. 248 (1906); Shapleigh v. City of San Angelo,
167 U.S. 646 (1897); Port of Mobile v. United States ex \textit{rel.} Watson, 116 U.S. 289
(1886); Town of Mount Pleasant v. Beckwith, 100 U.S. 514 (1880).
\textsuperscript{13} Graham v. Folsom, 200 U.S. 248, 253 (1906).
\textsuperscript{14} The apportionment of school districts is a political function, but clearly the
state could not rearrange such districts in such a way as to segregate pupils along
The instant case may be said to reject the proposition that a state's acts may be insulated from constitutional challenge merely by characterizing them as “political.” In this connection, respondents' position, particularly in its reliance upon Colegrove v. Green, would appear to be premised on the fallacious assumption that a state's political act must necessarily give rise to a political question. The “political question doctrine,” as developed by the courts, is a particularly ill-defined one. In general, however, a political question is one which the courts will decline to decide, either because its decision has been constitutionally entrusted to the political departments of the government or because “satisfactory criteria for a judicial determination” are lacking. On this basis, and apart from obvious factual differences, the Colegrove case and the instant case are distinguishable. Colegrove was concerned with the apportionment of congressional districts. Control over the time, place, and manner of electing representatives is specifically entrusted to Congress, and each house of Congress is the sole judge of its members' qualifications. Further, the granting of the relief sought in Colegrove would have compelled the federal courts in effect to assume responsibility for the total reconstruction of a state's electoral system, a peculiarly non-judicial task. Finally, the wrong complained of in Colegrove was essentially one “to Illinois as a polity,” for which the Illinois electorate could find a political remedy at the polls; it was not directed at a particular minority group. It seems quite clear that it was these considerations, which were not present in the instant case, which placed the Colegrove case in the political question category. The instant case would appear to be more analogous in principle to Nixon v. Herndon, which invalidated a Texas statute denying Negroes the right to vote in primary elections. Mr. Justice Holmes, speaking for a unanimous court, conceded that Texas's act was political and added: "That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years . . . ." This being so, there appears to be no rational basis for distinguishing between an action for damages, as in the Herndon
case, and an action for equitable relief as in the instant case. It would be difficult indeed, in the light of the *Herndon* holding and others,²⁴ to accept the proposition that a state in the discharge of its political functions is not subject to the specific limitations of the federal constitution. If this is so, the instant case must be regarded as an application of the general principle that "... a constitutional power cannot be used by way of condition to attain an unconstitutional result."²⁵

It would appear that the principal problem raised by the instant case is the extent to which it marks an alteration in the political question doctrine as previously understood. If the above analysis is correct, it will be seen that the Court's holding is not a departure from that doctrine or a step toward the overruling of *Colegrove v. Green*, the most important recent exposition of the doctrine.²⁶ It is rather a reaffirmation of the principle that political acts may be judicially invalidated when they deprive citizens of constitutionally guaranteed rights and when they do not fall within the comparatively narrow class of political questions. This is equally true whether the decision is based upon the fifteenth amendment or upon the equal protection clause of the fourteenth amendment, as suggested in the concurring opinion of Mr. Justice Whittaker.²⁷ Municipal suffrage is conditional upon municipal residence; the exclusion of a racial minority from residence, and hence from suffrage, would seem to be equally repugnant to both amendments. The instant case must be regarded therefore as a step forward in the long-sustained judicial effort²⁸ to secure to citizens belonging to racial minorities the rights guaranteed by these amendments.

*John J. Cannon*

²⁵. Western Telegraph Co. v. Foster, 247 U.S. 105, 114 (1918).
²⁶. It should be noted, however, that the *Colegrove* case was decided by a four to three vote of a seven member court. Three justices based the decision on lack of jurisdiction; Mr. Justice Rutledge concurred on the ground that the court had jurisdiction but should not exercise it for equitable reasons. Justices Douglas and Murphy concurred in Mr. Justice Black's dissent. Note also that the Supreme Court has recently granted certiorari in the case of Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959), *cert granted* 29 U.S.L.W. 3152 (U.S. Nov. 21, 1960), a case identical to *Colegrove* except that it involves state legislative districts. The careful distinguishing of *Colegrove* in the instant decision, however, does not seem to be indicative as an inclination to reject the rule of that case.
²⁷. Gomillion v. Lightfoot, 81 Sup. Ct. 125, 131 (1960). The concurring opinion points out that the excluded Negroes still have the right to vote in the divisions in which they are now resident. It would appear, however, that the deprivation because of race of an existing right to vote in a particular municipality falls within the ban of the fifteenth amendment, regardless of a compensating right to vote elsewhere. To avoid any difficulty in this connection, Mr. Justice Whittaker would base the court's decision on the equal protection clause and Brown v. Board of Education, 347 U.S. 483 (1954). This appears to be an equally adequate basis of decision, and the total silence of the majority opinion on the equal protection aspect of the case may be indicative of a desire to narrowly limit the application of its holding.
²⁸. The results of this effort are seen in cases starting with *Strauder v. West Virginia*, 100 U.S. 303 (1880) and continuing through Cooper v. Aaron, 359 U.S. 1 (1958).
CONSTITUTIONAL LAW—INTERSTATE COMMERCE—RACIAL DISCRIMINATION IN BUS TERMINAL RESTAURANT VIOLATES INTERSTATE COMMERCE ACT.


Petitioner, a Negro interstate passenger aboard a Trailways bus, was refused service in the “white” section of the bus terminal restaurant at Richmond, Virginia where the bus had made a forty minute rest stop. The restaurant was operated by Bus Terminal Restaurant of Richmond, Inc., as lessee of the Trailways Bus Terminal, Inc., owner of the terminal building. Upon petitioner’s refusal to remove to the Negro section he was arrested, tried and convicted on a charge of having remained upon the premises of another without authority of law after having been forbidden to do so. On appeal to the Hustings Court of Richmond, petitioner moved to dismiss on the grounds that this application of Virginia law violated the Interstate Commerce Act and the equal protection, due process and commerce clauses of the federal constitution. The motion was denied and the Virginia Supreme Court rejected petitioner’s assignments of error based on the constitutional violations, affirming the lower court. Petitioner did not specifically charge a violation of the Interstate Commerce Act in the Virginia Supreme Court and did not raise that question in the petition for certiorari which was granted by the United States Supreme Court. Disregarding this omission and reasoning that the underlying problem of discrimination because of color was the core of both the constitutional and statutory questions, the Court chose to avoid reaching those constitutional questions but rather attacked the conviction on the basis of the Interstate Commerce Act. Mr. Justice Black delivered the judgment of the majority that since “the circumstances show that the terminal and restaurant operate as an integral part of the bus carrier’s transportation service for interstate passengers” the restaurant was brought under the Interstate Commerce Act forbidding discrimination of any kind. Therefore, petitioner was in the “white” section of the restaurant “under authority of law” and the conviction under

1. The Trailways bus upon which petitioner was travelling was apparently owned by the Virginia Stage Lines, Inc. The amicus curiae brief filed for the United States included the annual reports of Virginia Stage Lines, Inc. and Carolina Coach Co. The reports indicate that these corporations together owned Trailways Bus Terminal, Inc., the owner of the terminal building and lessor of the restaurant. This was probably the sole evidence of direct connection, other than use, between the carrier and the restaurant. The dissent argues that since this evidence was not presented to the Virginia court and since that court could not properly have taken notice of it, this evidence could not be considered by the Supreme Court. 81 Sup. Ct. 182, 189 n.5 (1960).


3. 361 U.S. 958 (1960). The question was apparently not briefed by petitioner either.
the Virginia statute was error. Boynton v. Virginia, 81 Sup. Ct. 182 (1960).

It has been established that section 3(1) of the Interstate Commerce Act\textsuperscript{4} forbids any railroad to discriminate against or segregate its passengers on the basis of race.\textsuperscript{5} This section has been interpreted not only to prohibit compulsory segregation in seating practices but also to require the integration of dining cars.\textsuperscript{6} Since section 216(d) of Part II,\textsuperscript{7} which pertains to motor carriers, is substantially identical to section 3(1), it follows that interstate buses are similarly forbidden to segregate.\textsuperscript{8} Section 1(3)(a)\textsuperscript{9} of the Act defines a railroad carrier to include railroad terminal facilities; thus discrimination by such a terminal is also branded as a violation of section 3(1).\textsuperscript{10} Although there is no corresponding definition in the motor carrier chapter of the Act, section 203(a)(19) provides that the "services" and "transportation" to which that chapter applies, includes all facilities and property operated or controlled by any motor carrier and used in interstate commerce.\textsuperscript{11} Discrimination is thereby prohibited not only upon interstate motor carriers, but also in facilities operated or controlled by such a carrier while providing interstate transportation.\textsuperscript{12} Recently, several similar cases have been brought before the courts.\textsuperscript{13} Generally, those instituting such actions have sought to avoid resolution on the basis of the Interstate Commerce Act and have pressed for decision on the boldier issues of direct constitutional violation, probably because of a desire to attack the problem of segregation in a scope of greater genus than that involved in each particular case. This precise situation is present in the instant case where the Interstate Commerce Act was relied upon in the lower state court but was discarded in the presentation before the Virginia and United States Supreme Courts. This reliance upon the Interstate Commerce Act creates a possible conflict with the Court's rules and a confusion as to the actual holding.

\begin{itemize}
  \item \textsuperscript{4} 54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958).
  \item \textsuperscript{6} Henderson v. United States, 339 U.S. 316 (1950).
  \item \textsuperscript{7} 54 Stat. 924 (1940), 49 U.S.C. § 316(d) (1958).
  \item \textsuperscript{8} Williams v. Carolina Coach Co., 111 F. Supp. 329 (E.D. Va. 1952) aff'd, 207 F.2d 408 (4th Cir. 1953); Keys v. Carolina Coach Co., 64 M.C.C. 769 (1955).
  \item \textsuperscript{10} NAACP v. St. Louis-San Francisco Ry. Co., 297 I.C.C. 335 (1955).
  \item \textsuperscript{12} Boynton v. Virginia, 81 Sup. Ct. 182, 185-86 (1960).
  \item \textsuperscript{13} Henry v. Greenville Airport Comm'n, 279 F.2d 751 (4th Cir. 1960) (An action to enjoin the exclusion of Negroes from the main waiting room in the terminal of the municipal airport); Williams v. Howard Johnson's Rest., 268 F.2d 845 (4th Cir. 1959) (An action seeking money damages brought by a Negro who was refused service in defendant's restaurant while travelling interstate on business); Coke v. Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960) (A class action brought to restrain city from segregating restaurant in airport terminal building); Wilmington Parking Authority v. Burton, 157 A.2d 894 (Del. 1960), cert. granted, 81 Sup. Ct. 52 (1960).
\end{itemize}
The rules of the Supreme Court indicate that only those issues upon which certiorari has been granted may be briefed and argued. The strictness of the application of the rules in this regard appears to be left to the Court's discretion. The Court attempts in this case to justify their exercise of discretion on the ground that racial discrimination was the basic issue presented in the petition for certiorari; therefore the scope of review could encompass any questions arising out of this discrimination. While such logic may be suspect, the result conforms with the orthodox doctrine that the Court will not pass upon the constitutionality of legislation in advance of necessity. Also, while the rules prohibit counsel briefing and arguing an issue, they do not prevent the Court from considering that same issue. Certainly the Court could be suffocated under the burden of its own technical requirements if they could be employed by litigants to compel decision on questions which the Court feels are raised unnecessarily or prematurely.

Having reached the question of discrimination under the Interstate Commerce Act the Court then proceeded to resolve that question in such manner as to make future results in this field hinge upon the precise interpretation accorded the case holding. If the case has been decided directly under section 203(a)(19), then it must be assumed that the majority has found that the motor carrier either operated or controlled the terminal restaurant. Proof of such facts could have come only from the carrier's use of the restaurant, the lease relationship between the terminal operator and the restaurant and the annual reports contained in the United States' amicus curiae brief. However, even the most liberal treatment of these sources shows only a continued use—a finding of operation and control by the carrier would be quite tenuous. It is submitted that the Court's ostensible concern with this problem of operation and control is essentially irrelevant to the actual holding. Rather, close

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14. Supreme Court Rules 23 (1)(c); 40 (1)(c); 40 (1)(d)(1) and 40 (1)(d)(2).
17. It should be noted that the Virginia statute has not been declared unconstitutional by this case. The Court has simply held that one of the elements required for conviction under the statute was not present, i.e., remaining on land of another without authority of law. However, even this holding impliedly depends upon the supremacy clause.
18. See note 1, supra, particularly with respect to the propriety of considering the annual reports.
19. This is echoed by the dissent of Mr. Justice Whittaker, in which Mr. Justice Clark joined, Boynton v. Virginia, 81 Sup. Ct. 182, 188 (1960).
20. Boynton v. Virginia, 81 Sup. Ct. 182, 186 (1960). "But the fact that § 203 (a)(19) says that the protections of the motor carrier provisions of the Act extend to "include" facilities so operated or controlled by no means should be
reading of the opinion indicates the case was resolved directly under section 216(d) requiring motor carriers to refrain from racial discrimination. Mr. Justice Black reasoned that since food is a necessity to interstate passengers, once a motor carrier undertakes to supply this necessity by the regular use of a restaurant as an integral part of its service, "the terminal and restaurant stand in the place of the bus company in the performance of its transportation obligations." 21 Thus, the location of the restaurant in the bus terminal and the degree of operation and control exercised by the motor carrier are perhaps totally superfluous factors, while the result rests solely upon the finding of the motor carrier's regular use of the restaurant. 22 It would appear then that where a restaurant accepts the fruits of interstate trade through the medium of motor carriers it must refrain from discriminatory practices. The problem still remains whether the restaurant operator can refuse to service interstate buses.

James L. McHugh, Jr.

DIVORCE—ADULTERY—INSANITY OF THE WIFE AS A DEFENSE.


Plaintiff brought suit for divorce a.v.m. 1 on the ground that his wife had committed adultery between May 21 and June 8, 1958 with one Donald Wilson, named as correspondent. 2 The evidence indicated that interpreted to exempt motor carriers from their statutory duty under § 216(d) not to discriminate should they choose to provide their interstate passengers with services that are an integral part of transportation through the use of facilities they neither own, control nor operate. The protections afforded by the Act against discriminatory transportation services are not so narrowly limited. 22

21. Id. at 186.

22. The Court has drawn a unique parallel to the state action cases which bar a state from effecting through the use of some other entity, that which the Constitution forbids a state from doing itself. But the parallel may not be wholly perfect since this concept impliedly requires some intent to discriminate. In the instant case, the fact of discrimination is sufficient. Henry v. Greenville Airport Comm'n, 279 F.2d 751 (4th Cir. 1960); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Easterly v. Dempster, 112 F. Supp. 214 (E.D. Tenn. 1953). But see, Dept' of Conservation v. Tate, 231 F.2d 615 (4th Cir. 1956), cert. denied, 352 U.S. 838 (1956); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Kern v. City Comm'rs, 151 Kan. 565, 100 F.2d 709 (1940). For a discussion of the intent requirement see Comment, 6 Vill. L. Rev. 218 (1960).

1. Pennsylvania draws a distinction between divorce a.v.m., that is from the bonds of marriage, and divorce from bed and board which is, in effect, a separation. Pa. Stat. Ann. tit. 23, § 10, 11 (1929).

2. The original complaint was based on the grounds of indignities. Plaintiff subsequently amended the complaint to allege adultery. The master who conducted the hearing recommended that divorce be granted on both grounds; however, neither the master's nor the trial court's findings of fact need be followed when there has been no jury trial. The Superior Court must examine the record de novo. Boyer v. Boyer, 183 Pa. Super. 260, 130 A.2d 265 (1957).
on fourteen different occasions within the alleged period, Wilson had
stayed overnight at the defendant's house and had been in effect living
with the defendant subsequent to the separation of the parties in October
of 1958. From these facts, the trial court concluded that defendant had
committed adultery. Defendant contested the suit on the ground that
she had been insane at the time the illicit acts were committed. As
evidence thereof, it was shown that defendant had previously received
psychiatric treatment and had been committed to an insane asylum for
several months in 1955. There was expert testimony, most of it inad-
missible, that defendant was a schizophrenic, paranoid type, and that,
in general, this type does not know the difference between right and
wrong. However, the trial court found that the defendant was sane and
granted a divorce. On appeal, the Pennsylvania Superior Court affirmed,
holding that insanity is a valid defense to an action for divorce on the
ground of adultery, but that the evidence supported the finding that
defendant was sane. Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113
(1960).

The general rule in American jurisdictions is that insanity at the
time of the commission of the act is a valid defense to a divorce action
based on adultery. However, the Pennsylvania Supreme Court in Matchin
v. Matchin, decided in 1847, held that insanity of the wife was not a
valid defense. There is some authority that the pronouncement in that
case concerning insanity was only dicta; however, the declaration of the
court has been considered by a great number of cases to be the holding.

The Matchin decision has been soundly criticized by other jurisdictions
and, in fact, no subsequent Pennsylvania cases have affirmed the holding
because the proper factual situation has never been presented. Signifi-
cantly, Pennsylvania has permitted legal insanity and even less grievous

3. The “right and wrong” test is the legal test of insanity in Pennsylvania, and
this is the test widely used by other states which recognize insanity as a defense in an
Lockhard, 325 Pa. 56, 118 Atl. 755 (1936); Laudo v. Laudo, 118 App. Div. 699, 177

4. Wray v. Wray, 19 Ala. 522 (1851); Broadstreet v. Broadstreet, 7 Mass. 47
(1811); Bailey v. Bailey, 115 N.J.Eq. 565, 171 Atl. 797 (1934); Nichols v. Nichols,
31 Vt. 328 (1858).

5. Matchin v. Matchin, 6 Pa. 332 (1847); PA. STAT. ANN. tit. 23, § 52.

insanity of the wife is no bar to a divorce for her adultery, is dictum, because legal
insanity was not proven by the testimony.”

7. Kretz v. Kretz, 73 N.J.Eq. 246, 67 Atl. 378 (1907); Gilham v. Gilham, 177

8. Wray v. Wray, 19 Ala. 522 (1851); Kretz v. Kretz, 73 N.J.Eq. 246, 67 Atl.


10. Little v. Little, 36 Pa. Super. 419 (1914) (as a defense to divorce on ground
of desertion); Hansel v. Hansel, 3 Pa. Dist. 724 (1893) (as a defense to divorce
on the ground of cruelty).
mental disturbances\textsuperscript{11} as defenses to other grounds for divorce.\textsuperscript{12} However, it would appear from the opinion in the instant case that Pennsylvania is finally adopting the majority rule that insanity of the wife is a bar to divorce on the grounds of adultery.

The \textit{Matchin} opinion has stood alone and for very good reasons. The basis for denying insanity as a defense to the wife in that case was to protect the husband from illegitimate offspring. For this reason, the court strongly intimated that insanity would be allowed as a defense for the husband, but not for the wife. If such was the objective of the rule, it would seem logical that the defense should be allowed if the wife had not in fact borne children.\textsuperscript{13} Certainly if insanity is a defense in a criminal action for adultery, it should be such in a civil action for divorce, because, in either case, the wife’s act is no more voluntary than if she were coerced by force or fraud to do the illicit act.\textsuperscript{14} In addition, in cases where the husband knows of his wife’s mental incapacity, it seems that he should be held partly responsible for protecting her from base men.\textsuperscript{15} Even though it is clear that the court’s pronouncement in the instant opinion on the issue of insanity as a defense is merely dicta, the majority opinion states that the instant case overrules the \textit{Matchin} decision. This would appear to be an incongruity in light of the fact that the wife was declared sane and that nowhere does the Pennsylvania statute provide for insanity as a defense in a divorce action based on adultery. In fact, a Pennsylvania statute\textsuperscript{16} provides that a decision of the Supreme Court shall be binding authority on any question upon which it has passed. In spite of this, the majority in the instant case stated that it need not follow the \textit{Matchin} decision.\textsuperscript{17} Since the legislature has expressly set forth the defenses to a divorce action based on adultery, it would seem more logical that it should be in the legislature’s prerogative, and not the court’s to determine whether or not to include insanity of the spouse as a defense to such action.

\textit{Dennis V. Brenan}

\textsuperscript{11} Moyer v. Moyer, 181 Pa. Super. 400, 124 A. 2d 632 (1956) (as a defense to divorce on ground of indignities).
\textsuperscript{12} Commonwealth v. Lockhard, 325 Pa. 56, 188, Atl. 755 (1937). Legal insanity would be a valid defense against an indictment for adultery.
\textsuperscript{13} Wray v. Wray, 19 Ala. 522 (1851).
\textsuperscript{15} Nichols v. Nichols, 31 Vt. 328 (1858).
\textsuperscript{16} PA. STAT. ANN. tit. 17 § 198 (1895).
\textsuperscript{17} Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A. 2d 272 (1952) was cited by the majority opinion as authority for the proposition that the Superior Court need not always follow the Supreme Court’s ruling, but that case is distinguishable in that there a constitutional right was asserted and, if the Superior Court had followed the Supreme Court’s ruling, it would have deprived a party of a constitutional right.
LIMITATION OF ACTIONS—MEDICAL MALPRACTICE—HUSBAND'S ACTION FOR CONSEQUENTIAL DAMAGES NOT ONE FOR MALPRACTICE.


Plaintiff's wife was operated upon by the defendant, a duly licensed physician and surgeon, on December 9, 1955. The plaintiff instituted this action on October 17, 1958, alleging that as a result of the defendant's negligence in performing the operation his wife suffered permanent injuries; he sought damages for medical expenses, loss of consortium and loss of services of his wife. Defendant's demurrer to the petition was sustained by the trial court, which decision was affirmed by the Court of Appeals of Ohio, on the ground that the cause of action was one for malpractice, and therefore barred by the one year statute of limitations. The Supreme Court of Ohio, with three justices dissenting, held that a husband's action for consequential damages sustained as a result of the malpractice of a physician upon the plaintiff's wife is not one for malpractice, and is covered by the four year statute of limitations. Corpman v. Boyer, 171 Ohio St. 233, 169 N.E.2d 14 (1960).

The action per quod consortium amisit, which the common law gave to the husband when his wife was injured by the wrongful act of another, arose out of the action given to a master who was wrongfully deprived of the services of his servant. Blackstone wrote of a separate remedy given to the husband, where the wrongful act of the defendant deprives him of the company and assistance of his wife, as an action upon the case for damages. The right which the husband possesses to the services, society, sexual intercourse and conjugal affection of his wife, collectively termed consortium, has been susceptible to much interpretation by modern courts. There has been judicial expression to the effect that the husband's action is one for an injury to property, which continues the common law thesis that the husband has a property interest in his wife and an injury to her

1. "An action for ... malpractice ... shall be brought within one year after the cause thereof accrued." Ohio Rev. Code Ann. § 2305.11 (Baldwin 1960).
2. "An action for any of the following causes shall be brought within four years after the cause thereof accrued: ... (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14, and 1307.08 of the Revised Code." Ohio Rev. Code Ann. § 2305.09 (D) (Baldwin 1960). The only sections pertinent here are § 2305.10 which prescribes a two year limitation for actions for bodily injury or injury to personal property, and § 2305.11 which is the statute of limitations for malpractice referred to in note 1 supra.
subjects the wrongdoer to a proprietary action for the loss of her services. The majority of courts, however, perhaps influenced by the growing status of women in modern society, have not treated the defendant as interfering with a proprietary interest of the husband, and it is these courts that have differed in determining what label should attach to the husband's action. A number of courts have held that the action of the husband is for, and governed by the limitation prescribed for, "an injury to the person," or "an injury resulting from negligence." In other words, these courts hold that the statute of limitations applicable to the wife's action also covers the husband's cause of action. Other courts have taken an opposite position, saying that the "injury to the person" contemplated by the statute of limitations is a direct physical injury to the plaintiff, and therefore the statute is not applicable in suits where the husband-plaintiff is seeking consequential damages. The text writers, while conceding that some courts have held the action of the husband to be defeated by defenses which would bar that of the wife, generally criticize such results as contrary to the theory that the two actions are separate and independent of each other. The court in the instant case was not without precedent within its own jurisdiction for a decision either way of the facts presented.

The majority of the court in the principal case is apparently content to base its decision upon the fact that the husband's action for consequential damages is separate and distinct from his wife's right to maintain an action for malpractice. In an area such as this, where the various jurisdictions are so widely split, it would appear to be incumbent upon an

11. Harper & James, Torts 636, 640 (1956); Prosser, Torts 702 (2d ed. 1955); accord Restatement, Torts § 693, comment d at 493, 494 (1938): "The invasion of the husband's interest in the marriage relation is a separate tort against him . . . [T]he two liabilities are distinct. Thus, the fact that the statute of limitations has run against the wife's cause of action will not necessarily prevent the husband from prosecuting his action." But see id. comment c at 493: "In order to subject one to liability to a husband for . . . bodily harm done to his wife, all the elements of a tort action in the wife must exist, including . . . the latter's [wife's] freedom from such fault as would bar a recovery by her, as for example her contributory negligence. (See § 494)."
12. In Kraut v. Cleveland Ry. Co., 132 Ohio St. 125, 5 N.E.2d 324 (1936), the court held that the husband's action for consequential damages was not one for bodily injury within the statute of limitations, but was governed by what is now Ohio Rev. Code Ann. § 2305.09 (D) (Baldwin 1960), giving the plaintiff four years within which to commence his action. Subsequently, the court of appeals in Cramer v. Price, 84 Ohio App. 255, 82 N.E.2d 875 (1948), held that a husband's action for consequential damages occasioned by the malpractice of a physician upon the plaintiff's wife was one for malpractice, and therefore barred by the one year statute of limitations.
appellate court to advance cogent reasoning in support of its decision, regardless of what that decision may be. This obligation becomes even more imposing when there are two "diametrically opposed" cases on this very point in the court's jurisdiction. To be sure, there is ample authority for the proposition that the husband's right of action is separate and distinct from that which his wife possesses, but this conclusion is not dispositive of the issue facing the court. When one's wife is injured by the malpractice of a physician, to say that her husband's action for consequential damages is independent of her right to maintain an action for malpractice does not in any way negate the physician's contention that the husband's action is one for malpractice as well. As pointed out in the Kraut case, upon which the majority rests its decision, when many people are injured by one negligent act they each have a separate cause of action, "[B]ut all the causes of action are founded on the same wrong. So it is as to the two actions with which the court is concerned in the instant case." This hardly seems consistent with the result reached in that case, or with the reliance placed on it by the instant court which states: "We incline to feel that, although plaintiff's claim may be loosely said to have grown out of the alleged malpractice, whether it is 'founded on' such tortious action for purposes of the statute of limitations is an entirely different question." The court in the instant case was called upon to interpret the legislative intent manifested by use of the words "for malpractice" in the statute of limitations, and not to decide whether the husband's action is separate and distinct from any claim his wife may possess, as the majority erroneously assumed. The word "for" normally denotes the occasion of a condition, or "because of," and there is no reason to suspect the legislature of intending any meaning other than the ordinary meaning of the word as it is commonly used and understood. Thus the statute would seem to mean an action "because of malpractice," and therefore include such actions as brought by the plaintiff in the instant case. It would appear that the legislature intended to bar actions against physicians for negligent conduct in the course of their professional duties brought one year after accrual, and it is submitted that the present decision is incompatible with this legislative manifestation.

Lewis H. Gold

13. Ibid.
14. See notes 10 and 11 supra.
16. 171 Ohio St. 233, 169 N.E.2d at 15.
17. Id. 169 N.E.2d at 16.
18. WEBSTER, NEW COLLEGIATE DICTIONARY 323 (2d ed. 1949).
UNEMPLOYMENT INSURANCE—AVAILABILITY FOR WORK—
CLAIMANT UNABLE TO WORK ROTATING SHIFT DUE TO COLLEGE CURRICULUM INELIGIBLE FOR BENEFITS.


Claimant, a married man with three children, had been a full time employee at the Great A and P Tea Company for twelve years until he was laid off due to lack of work on November 4, 1959. At that time he was in his senior year as a full time day student at the University of Pittsburgh, having successfully completed his first three years of study while working full time. The claimant increased his scholastic credit load after being laid off, but his application for unemployment benefits stated that his school curriculum was so flexible that he would be able to shift from day to night classes if he were referred to a daytime job. Furthermore, claimant expressed his willingness to suspend his education in order to accept any available employment. The bureau of unemployment compensation denied benefits to the claimant. That decision was reversed by the referee who was in turn reversed by the unemployment compensation board of review. Basing its decision on the probable inability of the claimant to adjust his curriculum to employment which entailed rotating shifts and on the conclusion that the claimant's primary aim was to obtain an education, the Superior Court of Pennsylvania held that claimant was not entitled to benefits because he failed to meet the availability requirements of the statute. Douty v. Unemployment Compensation Board of Review, 192 Pa. Super. 609, 166 A.2d 65 (1960).

In view of the public policy upon which the legislature based the Unemployment Insurance Act, the Pennsylvania courts have repeatedly announced that the statute should be broadly construed. The test of "availability" which the courts have abstracted from the broad language of the statute is that a claimant must at all times "... be ready, able and
willing to accept suitable employment, temporary or full time." However, since the question of a claimant's availability is one of fact, the application of the aforementioned test by the courts has produced a series of theoretically inconsistent results when claimants have attached some kind of restriction to their availability. Thus, a mother who refused to accept employment on a day shift was nevertheless "available" for work, whereas a mechanic who had been laid off and had enlisted in a training course in order to qualify for another position was ineligible for benefits. When a person declares that he will accept employment only on certain specified shifts the courts are likely to consider two basic issues in determining his availability: whether there is a market for his services at the time that he will work, and whether there is a substantial reason for the restriction. Consequently, most courts have held that even very severe restrictions upon a claimant's availability would not render him ineligible for unemployment benefits if there was a market for his services during the time that he was available. A number of states, by statute, have definitely excluded persons attending established educational institutions from claiming unemployment benefits. Those states without a specific statutory prohibition against compensation claims by students have effectively excluded them from benefits by construing "availability" very strictly in cases involving student claimants. Thus, a law clerk who was willing to work any shift between 5:00 P.M. and 9:00 A.M. was "unavailable" for work despite a market for his services during the evening hours. The Pennsylvania courts have considered four student

claims and have denied all of them on the ground that the claimant limited his availability to a time at which there was no market for his services, thereby detaching himself from the labor force. Until the instant case, they had never been confronted with a situation in which a student could adjust his schedule so as to accept either day or evening shifts. In denying the claim in the principal case, the Pennsylvania court is seemingly in accord with the rationale of Keen v. Texas Unemployment Comm'n that pursuit of an education is not a valid reason for restricting the hours which the claimant is willing to work, regardless of the existence of a market for such a worker during the time when he is available. Recently Pennsylvania has denied benefits to claimants who were full time students on the grounds that their "primary purpose" was to obtain an education and as such they could not qualify as members of the labor force. The courts have summarily dismissed the offer of a student claimant to discontinue his education and to accept any available type of employment by characterizing such offers as "promises not made in good faith." Although the court has never been faced with the application of one who has discontinued his education and asserts his eligibility for unemployment compensation on the basis of a job held while he was a full time student, the court has intimated that such a claim would be denied because the applicant would not have been a member of the labor force during his attendance at school under the "primary purpose" doctrine.

The court's determination that in order to be "available" for work under the Pennsylvania statute one must be willing to work a rotating shift represents as narrow an interpretation of the availability requirement as any court has been willing to declare. In view of the extremity of its

19. See Altman, *supra* note 11 containing an excellent summary of both administrative and judicial decisions on the issue of availability as affected by shift limitations. The author notes that no decision had yet required a claimant to be available for rotating shifts if he were otherwise available for any of the three regular shifts. A subsequent Ohio case, Cornell v. Schroeder, 94 Ohio App. 75, 114 N.E.2d 595 (1952), contained dictum to the effect that a full time business student with a flexible curriculum which would permit her to work either a day or night shift was "probably not available" for work. Benefits were denied on the basis of an express provision in the Ohio Statute which precludes a student who regularly attends an established educational institution from receiving unemployment compensation.
position, it would seem that the court should have presented a more
detailed explanation of the reasons for that position, rather than citing a
series of cases apparently distinguishable from the present case upon the
precise issue involved.20 By ignoring the issue of whether there was a
market for the claimant's services on a non-rotating shift the court has
intimated that the pursuit of one's educational development is not a sub-
stantial reason for restricting the hours which one is willing to work.
In view of the significance of such a ruling a detailed discussion of this
issue would have been much more commendable, particularly in view
of the candor with which other courts have treated equally difficult prob-
lems in this field.21 That the court did not make articulate its rationale
does not, however, detract from the very decisive effect which its opinion
will have upon the law. It is difficult to perceive how any person pursuing
an educational course of study could now qualify for unemployment bene-
fits, regardless of his employment record. Such a result is not to be con-
demned since the general scheme of unemployment compensation legisla-
tion was designed to assist the available worker to rise above the peril of
indigency caused by a lack of work.22 The method by which the court
achieved this result was, however, somewhat deficient. The court has
taken the availability clause, which on its face did not preclude a student
who was likewise a full time worker from coming within the purview of
the statute, and construed it to effectively prohibit any person who is
pursuing a college degree from collecting unemployment compensation
benefits. Such an infringement upon the legislative process by a judicial
tribunal with but a cursory explanation is not to be applauded.23 If the

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646, 159 A.2d 37 (1960); Bates v. Unemployment Compensation Board of Review,
191 Pa. Super. 266, 156 A.2d 589 (1959); Collins v. Unemployment Compensation
Board of Review, 191 Pa. Super. 273, 156 A. 2d 593 (1959); Lovich v. Unemployment
of these cases was the student available for either a day or night shift. Further-
more, in each case the court expressly declared that there was no market for the
claimant's services at the time that he was willing to work, an issue which the
court in the instant case completely ignored. Only in Collins v. Unemployment
Compensation Board of Review, supra, was there any mention of ability to work
a rotating shift in connection with a student's availability, and Mr. Justice Watkins,
who wrote the opinion of the court in that case, vigorously dissented in the instant
case from the proposition that the court had previously decided the issue at hand.

appeal dismissed 329 U.S. 669 (1947). This case held that a Seventh Day Adventist
who refused employment which would necessitate frequent Saturday shifts was not
titled to unemployment compensation. Contrary, In Re Miller 243 N.C. 509, 91
S.E.2d 241 (1956). See also, Unemployment Compensation Commission v. Tomko,

22. PA. STAT. ANN. tit. 43 § 752 (1952). See also Note, 63 Dick. L. Rev. 345
(1959).

23. "Unfortunately, the broad statutory formulae . . . do not obviate the necessity
of going back to first principles and major objectives and have not frequently induced
the courts either to read their own standards of compensability into the acts or to
rest their decisions on incidental technicalities of statutory language." Risenfeld,
The Place of Unemployment Insurance Within the Patterns and Policies of Protection
Against Wage Loss, 8 Vand. L. Rev. 218, 236 (1955).
"primary purpose" of a full time student who is also holding a full time job is the pursuit of an education, and such a person is not considered to be a member of the labor force, the court has seemingly rendered all full time students ineligible for unemployment compensation benefits.

*John S. Fields*

**WILLS—Escheat—Sufficient Interest to Intervene in Probate Proceedings.**


Testator died domiciled in British Honduras, leaving a sizable estate situated partly in New York. His descendants, all illegitimate, were domiciled in British Honduras. The Government of British Honduras sought to appear specially and intervene as an interested party under Sec. 147 of the Surrogate's Court Act[^1] in proceedings pending in the Surrogate's Court for the probate of an alleged will dated 1955. At the same time a petition for ancillary letters of administration by the administrators of an alleged will of the deceased dated 1918 was also pending in New York, and temporary letters had been issued in a separate proceeding to the Public Administrator of New York County. The final disposition of both instruments was pending in British Honduras. In the New York proceeding, both the State of New York and the Government of British Honduras sought to recover on the basis that there were no known heirs entitled to inherit in intestacy. British Honduras claimed that under its local statute, it would be the decedent's sole heir and as such entitled to all his property wherever located. The Surrogate's Court construed the British Honduras statute, found against the claim, and refused to permit intervention. The decision was unanimously affirmed by the Appellate Division of the Supreme Court and the question was certified for the Court of Appeals. That court, three judges dissenting, held that where decedent was a resident of British Honduras and his only descendants were all illegitimates domiciled in British Honduras, the Supreme Court of which had probate proceedings pending, the Government of British Honduras was entitled to be heard and to participate in the New York litigation respecting the alleged 1955 will. *In re Turton*, 8 N.Y. 2d 311, 206 N.Y.S.2d 761 (1960).

[^1]: *The N.Y. Surrogate's Court Act* § 147 sets forth "Who May File Objections to the Probate of an Alleged Will."
In order to have standing to intervene and object in a proceeding to probate a will, a party must show an interest in the estate of the decedent—a legal interest which may be affected by the determination of the court. Since the Government of British Honduras petitioned to intervene as a person entitled to succeed to decedent’s property in the event of intestacy according to its statute, the question is raised whether under escheat a state takes as ultimate heir or as a sovereign taking abandoned property. This question has been generally decided in favor of the latter. In England it is settled that the right of the Crown is not a part of the law of succession, but a right as to bona vacantia, and the American text writers Beale and Goodrich accept this position. In a recent federal case in the Third Circuit it was noted that the term escheat is used to signify “a reversion of property to the state in consequence of a want of any individual competent to inherit. In other words, escheat is not succession or assignment.”

2. In re Bily’s Estate, 96 Cal. App. 2d 333, 215 P.2d 78 (1950); In re Stoiber’s Estate, 101 Colo. 192, 72 P.2d 276 (1937); Campbell v. St. Louis Union Trust, 346 Mo. 200, 139 S.W.2d 935 (1940); Hill v. District Court, 126 Mont. 1, 242 P.2d 850 (1952).

3. Administration of Estates Act, 1925, 15 Geo. 5, c. § 46 (1) (vii): “In default of any person taking an absolute interest . . . the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat.” This English statute is almost identical to the British Honduras statute under which the Government asserts that it is an heir. Ordinance No. 34, Year 1953, Ordinances of British Honduras, § 53, subsection 1 (j). The leading British case is Barnett’s Trust, [1902] 1 Ch. 847, where an Austrian with funds in England died in Vienna, a bastard intestate and without heirs. By Austrian law, the succession would have been confiscated as heirless property—not a right of succession. The Austrian government claimed the fund. The court held that since the right claimed was not in the nature of succession, the maxim mobilia sequuntur personam did not apply and that the Crown by the law of England was entitled to the funds as bona vacantia. A more recent British case, perhaps even more similar to the instant case than Barnett, is Estates of Musurus, [1936] 2 All E.R. 1666. There a Turkish woman domiciled in Turkey died intestate and without heirs, leaving personal property in England. The Turkish government claimed the property in the nature of a trustee because of the various interpretations of Moslem law based on the Koran, whereby the public treasury receives the uninherited property (ownerless property) and disposes of it for the benefit of the poor. The court held that as this property was ownerless in Turkish law, it must be treated as bona vacantia, and so the Crown was entitled to it. The court carefully noted that there was no dispute at all as regards the property in Turkey, as that unquestionably goes to the Turkish government.

4. 2 Beale, Conflicts of Law 1039 (1935): “. . . bona vacantia is not a matter of succession on death. It is rather a right to confiscate property to which there is no other claimant.”

5. Goodrich, Inheritance Problems in the Conflicts of Laws, 24 Mich. L. Rev. 558 (1926), at 561-62: “If a man leaves property in a state other than his domicile and there are no persons entitled to the estate as next of kin, the property goes as bona vacantia, not to the state of his domicile, but to the state where the property is located.”

6. Thompson’s Estate, 192 F.2d 451, 453 (3d Cir. 1951). The court continued: “It is not the action of the state stepping in and claiming property where the human beings who would otherwise own it have died or disappeared and where, if the state did not claim it, the lack of a lawful owner would be an invitation to self-service by the first comers.” In construing a state succession statute, the court in Miner’s Estate, 143 Cal. 194, 76 Pac. 968, 970 (1904), echoed those remarks:
more, escheat is generally classed as a right of sovereignty and not a transfer by succession. In general, American statutory authority is in line with this view. The great weight of authority holds that the property of one who died intestate with no persons entitled to the estate as next of kin goes to the state where the property is located, not to the state of his domicile. In a recent New York case the Appellate Division held that the decedent's New York bank account should be paid to the New York State Comptroller as abandoned property, rather than to the domiciliary administrator in California where the decedent had resided and died intestate without any known heirs at law or next of kin, because property left without an owner is property bona vacantia, and as such is deemed the property of the sovereign where found. This decision has been followed in a recent New Jersey case.

In the instant case, the court was dealing with the alleged right of British Honduras to participate in the New York probate proceedings which related only to assets located in New York. The Government of British Honduras, there-

"The state, however, does not come in by way of succession, but in the event of the absence of all who are entitled to come in by succession . . . it goes to the state by escheat." 7

7. In re Estate of John O'Connor, 126 Neb. 182, 252 N.W. 826 (1934). See 20 VA. L. REV. 913 (1934) and 48 HARv. L. REV. 129 (1934) where the theory of the court — that escheat is a feudalistic reversion — was heavily criticized, noting that most American statutory and judicial authority held that it was the right of sovereignty analogous to the right to bona vacantia. 8

8. People v. Richardson, 269 Ill. 275, 109 N.E. 1033 (1915), contra, where it was held that where legal proceedings were necessary before lands could be declared escheated to a county, this was property passing under the intestate laws of the state, and so subject to inheritance tax.

9. CAL. PROB. CODE ANN. § 231 (West 1957); LA. CIV. CODE ANN. Art. 929 (West 1952); N.J. STAT. ANN. § 2A:37-12 (1952); 27 WIS. STAT. ANN. § 237.01(7) (Supp. 1960). In re Clark's Estate, 271 App. Div. 691, 68 N.Y.S.2d 487, 492 (1947), the court said: "... state constitutions and statutes provide that the state takes not by succession or as the last heir of the decedent but because there are no heirs, the state's right being the right of the sovereign, since if the state took as heir, there would be no failure of title.

10. In re Rapport's Estate, 317 Mich. 291, 26 N.W.2d 777 (1947); In re Forney's Estate, 43 Nev. 227, 184 Pac. 206 (1919); In re Barnett's Trusts [1902] 1 Ch. 847; 2 BEALE, CONFLICTS OF LAWS 1040 (1935); GOODRICH, CONFLICTS OF LAWS 504 (1949). There is some authority contra: the Supreme Court of Washington in Lyon's Estate, 175 Wash. 115, 26 P.2d 615 (1933), held that where an Alaskan resident died intestate leaving a bank account in Washington, the decedent's domicile controlled the situs of the property, and it was not subject to Washington's escheat laws. The decision has met with criticism in 2 BEALE, op. cit. supra note 11, where it was commented: "... the result might almost be said to be based upon a fiction. The picture of bona vacantia is that of movables without an owner being taken by the officers of the state. In reality, the money which was represented by the bank deposit was where the bank was when it was proved to be without an owner."
fore, based its claim to intervene on the grounds that it was an heir. The majority, however, said they were not called upon to determine whether British Honduras would be entitled to the property in New York and could find no reason why the New York Attorney General should be a party while the Government of British Honduras should be excluded.

The sole authority cited by the majority in the instant case to support its finding that the principles on which interested persons are permitted to intervene are “sufficiently broad” to include the Government of British Honduras as well as the Attorney General is In re Davis' Will. In that case, however, the court merely answered affirmatively the question whether an administrator of the estate of a deceased person, appointed by a foreign state under a claim that decedent died intestate, should be allowed to intervene. The administrator there had been authorized by a decree of the proper court of his state, and he represented the beneficiaries. The force of this case as supporting authority for the principal decision is weakened when it is remembered that the Government of British Honduras did not represent the deceased, was not acting for a domiciliary administrator, and was not acting as decedent's administrator in British Honduras. It is difficult to understand the reasoning of the majority in equating the “interest” of British Honduras with that of the State of New York. There is no question that in proceedings pending in British Honduras as to property located there, it was proper for that Government to intervene. But it does not follow that the appellant is also an “interested party” in New York. In its sovereign capacity, New York is interested as to abandoned property located there. The presence of the Government of British Honduras in the proceeding would not merely duplicate representation of a sovereign “interest,” but perhaps would result in the forced concession by New York to another sovereign of the right to deal with property abandoned within New York's jurisdiction. It is the right and the duty of the surrogate to try the question of interest if it is raised before allowing any person to contest, even where such person is named in the petition as an “interested party.” Intervention, therefore, should not be allowed as a matter of discretion, favor or comity. Although the Government asserted its claim to be sole heir

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14. The Surrogate's Court, 20 Misc. 2d 569, 192 N.Y.S.2d 254 (1959), aff'd, 9 App. Div. 2d 759, 193 N.Y.S.2d 1001 (1959), investigated the British Honduras ordinance and found that the Government takes as bona vacantia and not as direct sole heir, and so it could not possibly be entitled to take the property within New York, and therefore had no right to intervene.

15. 182 N.Y. 468, 75 N.E. 530 (1905).


17. The majority alluded to treaty relations between the United States and British Honduras, as a Crown Colony of Great Britain. This probably refers to 31 STAT. 1939, Art. II: "The citizens or subjects of each . . . shall have full power to dispose of their personal property within the territories of each other . . . ; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession . . . and dispose of the same at their pleasure. . . ."
under its statute, and the lower courts determined there was no basis for this claim, the Court of Appeals ordered intervention without passing at all on what would appear to be the only question in litigation, that is, the status of the Crown Colony as heir. The court may have been moved to order intervention because of the possibility that the Surrogate’s Court abused its discretion in undertaking to probate the will which the Supreme Court of British Honduras was considering to probate, or because it anticipated possible res judicata effects in British Honduras caused by the probate in New York. Of course, if the Government of British Honduras were denied intervention, it could not raise these issues at the probate proceedings. In addition, the majority may have recognized a new element in the applicant’s position. The sovereign sought to “provide in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.” In this role, the foreign government may be said to appear not as sovereign, but as parens patriae. The court, though, did not pass on these questions, nor did it pass on the only question litigated below. Because of the wisdom of the general rule that intervention is permitted only to parties interested in the proceeding, it would seem that this decision ought not be extended beyond its special facts so as to allow intervention to those who can evidence no real interest.

Arthur T. Downey, III.

18. In view of the fact that the dissenting judge in the present case wrote the controlling opinion in Matter of Halperin, 303 N.Y. 33, 100 N.E.2d 120 (1951), which rejected the paternalistic doctrines earlier expressed in the leading case of Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937), where a widow was protected against the inter vivos gifts which her husband had made without completely divesting himself of power over the assets, it may be confidently predicted that the visting team will have a rough battle in the Court of Appeals.

19. In view of the traditional limits on the jurisdiction of the ecclesiastical courts in probate proceedings, which have survived in modern probate procedure, it might have seemed premature to determine the entitlement of the foreign government at this stage of the proceedings as long as there was an open question. Simes and Basye, The Organization of the Probate Court in America, 42 Mich. L. Rev. 965 (1944) and 43 Mich. L. Rev. 113 (1944), reprinted in Simes and Basye, Problems in Probate Law, 1946. The Surrogate’s Court in New York, however, has original jurisdiction over both the probate of wills and the settlement of accounts, so the traditional distinction has disappeared. Simes and Basye, Problems in Probate Law, op. cit. supra at 445. In Pennsylvania, the Orphan’s Court has appellate jurisdiction in matters of probate and original jurisdiction in matters of accounting, the Register of Wills having original jurisdiction to admit a will to probate. Id. at 579. It will eventually be necessary to decide whether an illegitimate dependent whom the decedent might have been expected to provide for, although not legally bound, claims under the law of the decedent’s domicile as quasi-heir or as quasi-creditor, and if the latter, whether his rights are private or penal in nature. In the latter case, the State of New York might not consider itself bound to honor them.
Claimant had been employed by General Motors, with intermittent layoffs, for approximately three years. On October 12, 1956, after a five month layoff, he was recalled and placed on the assembly line. His job consisted of routine grinding and drilling on certain wheel assemblies as they passed through his particular phase of the operation. Claimant was unable to keep up with the pace of the line or the instructions of his foreman, and twelve days after starting the job he collapsed from the emotional strain placed upon him by his inability to conform to routine. He was unable to return to work and applied for relief under the Michigan Workmen’s Compensation Act.1 The referee granted claimant an award for total disability, even though he had experienced a long history of mental instability. This decision was affirmed by a divided vote of the Workmen’s Compensation Appeal Board. On appeal from that Board, the Supreme Court of Michigan affirmed, three judges dissenting, holding that even though the disability was not caused by a single physical or mental shock, but resulted simply from emotional pressures induced by production line methods, not shown to be any different from pressures encountered by his fellow workers, it was compensable. Carter v. General Motors Corp., 106 N.W.2d 105 (Mich. 1960).

Although in theory the workmen’s compensation laws were passed to supplant rather than supplement ordinary tort liability where the relationship of employer and employee exists,2 it would be unrealistic to ignore entirely all common law negligence decisions in any comprehensive study of workmen’s compensation development in the particular area of mental injury. Precedents arising out of common law litigation weigh heavily in any particular court’s attitude in accepting or rejecting trends arising from interpretation of its workmen’s compensation law. Where injury to the mind was involved, the common law decisions were far from uniform. Some jurisdictions had refused recovery for damages resulting from mental disturbance unless there had been actual physical damage to the plaintiff’s person.3 Some allowed minor contacts, which played no part in causing the harm, to satisfy this requirement under the theory that the actual impact guaranteed that the mental disturbance was

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genuine. Other courts did not demand that any physical contact be shown, but regarded the circumstances of the accident, or the physical manifestations of the disturbance as a sufficient guarantee of genuineness. Under all these theories it was necessary that the mental or emotional injury be traceable to a specific and spontaneous physical stimulus. In view of increasing awareness of the problem of mental illness and the widespread adoption of workmen’s compensation laws, it was inevitable that the problem of mental injury would present itself under the acts. It has been generally accepted under the compensation acts that an occupationally incurred injury which produces a shock to the nervous system and subsequent mental disability is compensable. The difficulty arises in determining what type of “injury” is necessary to support such a claim. The overwhelming majority of jurisdictions will accept a claim which is grounded on, and results from, direct physical injury to the claimant. Similarly, where accidental damage aggravates a pre-existing latent mental defect resulting in a disabling mental condition, such condition will be compensable. Many jurisdictions have extended this coverage to include cases where an employee receives a sudden shock or fright from an unusual, and unexpected occurrence, even though no physical impact to the person of the claimant is involved. This theory has been extended even further in West Virginia, which has allowed recovery even where the conditions were not of a sudden or traumatic origin, provided that the injuries were attributable to a specific and definite event arising in the course of employment. Other courts, examining the area of mental injury precipitated solely by mental cause, have refused compensation even


where the injury is attributable to a specific and definite occurrence. In Indiana it has been held that a neurotic condition, claimed to have resulted from long continued physical stress involved in the working conditions of the claimant, was not compensable. The Court based its holding on the theory that the universal susceptibility to mental illness, shared by all men, was not within the coverage of the compensation act.

The statement which perhaps best exemplifies the basic theory underlying all workmen's compensation laws has been attributed to Lloyd George, who said, "The cost of the product should bear the blood of the workmen." The accidental losses of modern industry are lifted from the shoulders of the workmen and placed upon the employer, the industry, and from them to the ultimate consumer. The compensation laws were passed for the "beneficent purpose of attaining a humanitarian end which had hitherto been frustrated by the inexorable rules of the common law." The rules of the common law for negligence actions do not apply to workmen's compensation where the proceeding is not for a wrong done, but to obtain compensation for a loss sustained by reason of a disability incurred in the course of employment. The acts are intended to be remedial and most certainly should be liberally construed in favor of the employee. This liberal construction has obviously been applied in the area of mental injury, and rightly so. Failure to recognize man's nervous system and its intimate mental characteristics would, of course, defeat the remedial purpose of the compensation laws. This is especially true in light of the rapid advances made by psychology and psychiatry in the last few decades. That a shocking or traumatic occurrence, experienced in the course of employment, can leave its scar upon the mind as easily as hot metal or crushing steel can damage the body, should always be considered in judicial interpretation of "injury" within the compensation laws. But that is not the present case. Here compensation was granted to a workmen, admittedly prone to mental instability, solely because his personality could not adjust to the requirements of modern industrial civilization. The real issue of this case, presented squarely by the majority in its opinion, is whether it is industry which must bear the economic burden

14. "The three wicked sisters of the common law — contributory negligence, assumption of the risk and the fellow servant rule — were abolished as defenses." PROSSER, TORTS 483 (2d ed. 1955).
of such disability.\textsuperscript{17} Using simple judicial interpretation, the majority answers this difficult socio-political question in the affirmative. The Indiana Appellate Court in answering a somewhat similar question stated: "Indulging in all liberality, we cannot perceive in the Act a legislative intent and purpose to extend its protection to those workmen who suffer, unfortunately, from outward manifestations and symptoms of the many possible vagaries and aberrations of the human mind which, though having some causal connection with an employment are, nevertheless, ills all human flesh is heir to . . . ."\textsuperscript{18} There may be substantial argument for the theory that industry should bear the weight of such disabilities or that the compensation acts should be in the form of general health insurance for all injury or disease, no matter what the cause, but the weighing of the merits of such an argument is for the political arena and not the courtroom. It would appear that the Supreme Court of Michigan, in deciding this question, has taken that one unfortunate step beyond judicial interpretation into the realm of judicial legislation.

\textit{Robert J. Bray, Jr.}

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\item \textsuperscript{17} Carter \textit{v. General Motors Corp.}, 106 N.W.2d 105, 109 (Mich. 1960).
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