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RECENT DECISIONS

CONSTITUTIONAL LAW—CENSORSHIP—MOTION PICTURE LICENSING STATUTE IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT.

*Times Film Corp. v. City of Chicago* (U.S. 1961).

Petitioner is a New York corporation owning the exclusive right to exhibit the motion picture “Don Juan” in the Chicago area. It applied for an exhibition permit as required by the Chicago Municipal Code, but although it tendered the necessary license fee, it refused to submit the film for prior examination. Because of this refusal, the police commissioner denied the permit for exhibition, and this order was made final, on appeal, by the Mayor of Chicago. Petitioner brought suit in the federal district court seeking an order for the issuance of the permit without prior examination of the film and enjoiner of city officials from interfering with its exhibition. The district court dismissed the complaint on the grounds that no justiciable controversy was presented, and the court of appeals affirmed. The Supreme Court of the United States, with four justices dissenting, affirmed, holding that, while a justiciable issue was presented, there is no absolute freedom to exhibit, even once, any and every kind of motion picture, and that the Chicago ordinance was not void on its face as a prior restraint under the first and fourteenth amendments. *Times Film Corp. v. City of Chicago*, 81 Sup. Ct. 391 (1961).

In actuality, the problem of motion picture censorship and its relationship to the first and fourteenth amendments has existed in its present context for less than a decade. In the infancy of the film medium, the Supreme Court categorized motion pictures as a business pure and simple, and hence not to be regarded as organs of public opinion. The Court did

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1. Chicago, Ill., Municipal Code § 155-4 provides: “Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.” The same section authorizes the commissioner to refuse such permit on a variety of grounds, including a finding by him that the film is “immoral or obscene.”
3. 272 F.2d 90 (7th Cir. 1959).
4. Mutual Film Corp. v. Industrial Comm’n, 236 U.S. 244 (1915).
not then consider whether state censorship of films was in violation of the federal constitution since, at that time, the first amendment safeguards of free expression had not been held to apply to the states. That they did, in fact, so apply, was decided ten years later in *Gitlow v. New York*.\(^5\) Subsequently, it was declared in *Near v. Minnesota*\(^6\) that, in the area of first amendment freedoms, a "prior restraint" is a particularly dangerous form of encroachment, to be tolerated in only the most exceptional cases. Even after these explicit determinations, the question of film censorship remained moot until the 1952 decision in the landmark case of *Joseph Burstyn, Inc. v. Wilson*.\(^7\) In that case, the Court, striking down a New York statute banning the exhibition of "sacrilegious" films, held that motion pictures are a medium of expression enjoying the full protection of the first and fourteenth amendments, and declared that: "[T]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform."\(^8\) Subsequent to the *Burstyn* decision, the validity of numerous censorship statutes was tested in rapid succession. And, although the validity of censorship in general was never specifically decided, every system of motion picture licensing or censorship which was considered was declared unconstitutional. The Court's condemnation of these statutes was specifically limited to the particular statutory standards involved and their individual shortcomings, especially their vagueness. These standards included: "prejudicial to the best interests of the people;"\(^9\) "harmful;"\(^10\) "immoral;"\(^11\) "obscene, indecent, and immoral, and such as to tend to corrupt morals;"\(^12\) and "portrays acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."\(^13\) During this same period, in *Roth v. United States*,\(^14\) it was decided that "obscenity", as defined therein,\(^15\) was not protected speech within the first amendment. The Court, however, consistently avoided confronting the fundamental question of whether the prior restraint of motion pictures through a

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\(^{5}\) 268 U.S. 652 (1925).  
\(^{6}\) 283 U.S. 697 (1931).  
\(^{7}\) 343 U.S. 495 (1952). The *Burstyn* case was foreshadowed by *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), in which the Court in dictum said, "Moving pictures like newspapers and radio, are included in the press whose freedom is guaranteed by the first amendment." Id. at 166. 
\(^{8}\) *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). The Court overruled *Mutual Film Corp. v. Industrial Comm'n*, supra note 3, so far as that decision was inconsistent with the *Burstyn* holding. 
\(^{9}\) *Gelling v. Texas*, 343 U.S. 960 (1952) (citing *Burstyn*).  
\(^{10}\) *Superior Films, Inc. v. Dep't of Educ.*, 346 U.S. 587 (1954) (citing *Burstyn*).  
\(^{11}\) *Commercial Pictures Corp. v. Regents of the Univ. of New York*, 346 U.S. 587 (1954) (decided in a *per curiam* opinion with *Superior Films*, supra note 10).  
\(^{13}\) *Kingsley Intl Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959).  
\(^{15}\) The test established by *Roth* to determine whether particular material is "obscene" is "... whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 476, 489 (1957).
licensing system was unconstitutional per se under the doctrine of the Near case. The unwillingness of the Court to resolve this issue left the state and lower federal courts in a position of some uncertainty.  

The present case finally compelled the Court to pass on this basic question, which has been a prime subject for debate and conjecture since the Burstyn decision. The issue presented was simple and unfettered, and was so regarded by the Court: "Admittedly the challenged section of the ordinance imposes a prior restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." In Burstyn, the Court, while declining to answer this question, had indicated that the answer would not follow automatically from the fact that the motion picture is a constitutionally protected medium of communication. This was in accord with the approach of the Near case which recognized that the protection from prior restraint is not absolute and that such restraints may be imposed in "exceptional cases." That exceptional cases do exist has been repeatedly recognized, especially in the treatment of "obscenity." The Burstyn decision also made it clear that motion pictures are not necessarily to be viewed in the same precise manner as other media, inasmuch as each medium presents its own peculiar problems. If then there is no absolute freedom from "prior restraints", if "obscenity" is unprotected speech under...
any circumstances, and if the motion picture need not be viewed in the same precise manner as other forms of communication, it would seem that the instant decision is fundamentally consistent with the pattern of decision exhibited in the *Near, Burstyn, and Roth* cases.

There can be no real doubt that "prior restraints" have been looked upon with great disfavor by the judiciary of this country, especially in the last half-century. Nor has the title "censor" been viewed with much less distaste than that of "tax-collector" in colonial America, or "game warden" in Sherwood Forrest. As Mr. Chief Justice Warren points out in numerous examples, the wrongs and absurdities perpetrated in the name of "censorship" have been manifold. But the question may fairly be asked whether amputation is the only remedy. To say that censorship is a "prior restraint" and therefore unconstitutional can be nothing more than a "talismanic test," the use of a conclusion on which to base a conclusion. And although it has been acknowledged that the first amendment freedoms should be elevated to a "preferred position" in the realm of constitutional guaranties, and therefore that any restriction upon them should be subjected to the closest possible scrutiny, it would seem that

in relation to constitutional protection. The proposition that films are a unique form of communication, and therefore not entitled to the identical forms of protection afforded to other media, was never really elucidated either in *Burstyn* or in the present case. For this reason, the defenders of the proposition are at liberty to postulate their own theories as to why it is true, while its attackers have shown similar initiative in theorizing why such a proposition could not be grounded in fact. For a comprehensive study and evaluation of the problem, see Note, 30 Ind. L.J. 463 (1955); Note, 60 Yale L.J. 696 (1951). It is unfortunate that the Court has failed to specify precisely which features of the film medium render it sufficiently "exceptional" to subject it to prior restraint despite the strong language of *Near*. Its silence on what would appear to be a crucial point may indicate that the Court did not feel compelled to go into the matter, but simply concluded that the state legislative authority could have reasonably found that films did possess such an exceptional character. Implicit in such an approach is the assumption that such a "reasonable basis" test ought to be sufficient in cases involving first amendment liberties. In this connection, see note 26 infra.


26. The case of Shelton v. Tucker, 81 Sup. Ct. 247 (1960), decided about one month before the present case, would seem to hold that such scrutiny must extend to the availability of alternative means of public protection. In that case, it was stated that even though the governmental purpose to be served is legitimate and substantial, that purpose cannot be attained by means which broadly stifle fundamental personal liberties when the end can be as effectively attained by less repressive means. Should then that Court in this case have considered the alternative means to censorship? Mr. Justice Clark speaking for the majority, did not think so: "It is not for this Court to limit the state in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances," 81 Sup. Ct. 391, at 395 (1961). It is significant that the *Shelton* case and the instant case were both decided by a five to four vote. This would seem to indicate a basic and close division among the justices on the question of whether first amendment liberties do occupy a "preferred position" in any meaningful sense, for *Shelton* would seem to have made the availability of alternative remedies a crucial test of any restriction on those liberties, while
this desirable end cannot logically be reached simply by the resort to the all-inclusive proposition: all prior restraints are evil. It would appear that Mr. Justice Frankfurter is correct in cautioning against the epithet “preferred position” for these freedoms if that designation becomes a substitute for rational analysis. These problems, as they come before the Court, should not present a clash of absolutes: absolute freedom versus absolute censorship. Legislation, whether it restrains freedom of contract or freedom of speech, is itself an effort to compromise between the claims of a social order and individual liberty. When the legislative compromise is brought to the judicial test, it should be viewed less as a harbinger of evil, and more as a pragmatic assessment of the conflicting ideals in the particular circumstances. For it is increasingly apparent that, in the area of civil liberties, there are issues of political philosophy which call for careful scrutiny, rather than “self-wielding swords.” The principle of freedom of expression springs from the necessities of self-government, for it is not a law of nature or of reason in the abstract, but a deduction from the basic American ideal that public issues will be decided by universal suffrage. Universal ignorance would permeate such universal suffrage if the free traffic of ideas, unwise as well as wise, were not protected. How this basic principle of American political philosophy must necessarily protect the unrestricted freedom to exhibit every motion picture no matter how lewd and obscene, cannot be so obvious as the Chief Justice would appear to insist. Referring to obscenity, the Court in Chaplinsky v. New Hampshire, declared: “It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by social interest in order and morality.”

As has been observed, the Constitutional weakness of every program of motion picture censorship has been the vagueness of the standards employed. With statutes clearly phrased, the boundaries of which are narrowly circumscribed to encompass only the most noxious exceptions, the evils of censorship can be eliminated, and perhaps the “censor” can take his rightful place alongside the “tax-collector” and the “game warden.”

Robert J. Bray, Jr.

the instant case clearly ignores such alternatives and upholds censorship on a “reasonable basis” test. It would appear then that the permissible extent of state limitation or regulation of civil liberties will remain highly uncertain as long as this judicial division persists.

29. MEIKLEJOHN, FREE SPEECH 26-27 (1948).
CONSTITUTIONAL LAW—PRIVACY IN ASSOCIATION—STATE CANNOT COMPEL DISCLOSURE OF ALL ORGANIZATIONS TO WHICH TEACHERS BELONG.


The plaintiffs, teachers in the Arkansas public school system, were dismissed from their positions for refusal to comply with an Arkansas statute, which required all teachers in state supported schools or colleges, as a condition of employment, to file annual affidavits giving the names and addresses of all organizations to which they had belonged or contributed regularly within the preceding five years. All Arkansas teachers are employed on a year-to-year basis and are not covered by a civil service system. Plaintiffs brought separate actions in the federal and state courts to have the statute declared unconstitutional, and these courts upheld the statute. On a consolidated appeal from these decisions, the United States Supreme Court, with four Justices dissenting, reversed, and held that the statute was in violation of the due process clause of the fourteenth amendment. Shelton v. Tucker, 81 Sup. Ct. 247 (1960).

The right to assemble is guaranteed against infringement by the federal government by the first amendment and is one of the fundamental rights of citizens in a free society that is protected against state action by the due process clause of the fourteenth amendment. This fundamental liberty is not limited to the right to assemble for political purposes but embraces as well the right to associate for the advancement of social, economic, religious, and cultural beliefs. It is well settled that privacy in one's associations and freedom from arbitrary intrusion by the state are also protected by these amendments. While such freedoms enjoy a paramount position in the jurisprudence of the United States, they are not absolute and, where sufficient legitimate public interest requires, they can be subjected to reasonable governmental regulation.

1. ARK. STAT. Ch. 80 §§ 1229-32 (Supp. 1960).
2. U.S. CONST. amend. I. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
a substantial public interest has been shown, however, the Supreme Court has given narrow scope to the power of the government to curtail these liberties. The indirect consequences as well as the direct effects of such legislation are subjected to the closest scrutiny to determine whether the statute lays an unreasonably restrictive obstacle on the path of the free exercise of these liberties. For such legislation to be upheld, mere legislative preference between alternative solutions is not sufficient. There must be more than a reasonable relationship between the interest to be protected and the remedy employed; if there is an alternative effective method of obtaining the same result, which infringes less on these fundamental liberties, then such method must be used. In contrast, when the state is acting as an employer, the Court has been more liberal in allowing some infringement of these rights, especially the right to associate, recognizing that past beliefs and associations can have a bearing on the fitness of a person for certain positions. In the field of education, the Court has upheld both loyalty oaths and the right of the state to require some disclosure of past and present associations. The instant case represents the first time that the Court has been faced with a real clash between the right to privacy in association and an attempt by a state to inquire unrestrictedly into all of a person's associations over a limited period for employment selection purposes.

Mr. Justice Frankfurter, in his dissent, argues that a distinction exists between this case and those cases involving either administrative discretion to censor communication or vague, overreaching tests of criminal responsibility. The majority opinion does not accept this distinction, but would give broad protection against all state infringement of these rights. This protection is granted on the theory that the rights guaranteed by the first amendment are the foundation upon which a democratic society is built. Without freedom of thought, speech, press, and assembly the right of self-determination is a mere shell. The nation's founders regarded these rights so highly that they adopted the first amendment to guard against any restrictions imposed by momentary fear of the consequences of the exercise of these rights.

10. "... the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
15. Lovell v. Griffin, 303 U.S. 444 (1938) (license needed to distribute literature within the city).
or changing social mores. This amendment was a command to treat these freedoms with greater care than due process ordinarily requires in the regulation of economic or property rights. Unless there is an immediate and grave danger to the state, these rights, if they are subject to any restriction, must be regulated so as to impinge on them as little as possible.

Since these freedoms enjoy a paramount position in the law, it would seem illogical to protect them from some intrusions but not from others when the effective restraint on their exercise is the same in both cases. Even granting the distinction argued for in the dissenting opinion, forced disclosure of membership in organizations can operate just as effectively as a restraint on free expression and communication as would a censorship statute. Disclosure would actually force many members to drop out of organizations unpopular in a particular area and this diminution in membership and financial support would hinder the effectiveness of such organizations as organs for group expression. Disclosure would thus hinder free communication and would, in effect, prevent public employees from effectually exercising their right of belief and expression by foreclosing membership in unpopular organizations which reflect their points of view.

Public knowledge of a person's interest in unpopular organizations could lead to private action against the individual. Since there is no effective sanction against individual pressure on these employees, the only way to safeguard this right is to prevent disclosure in the first instance. But even if this information were not made public, as the minority opinion contends, individual rights still would not be adequately protected. There can be many reasons why a teacher could be excluded from a job and the possibility of proving that it resulted from disclosure of organizational ties is nil. As a result, the protection one has against discrimination in employment by the state would be no protection. The only effective safeguard is non-disclosure. Also, the cases relied upon by the minority opinion as to the power of the state to inquire into the background of its employees would appear to be distinguishable. In those cases, the questions were limited solely to inquiry into the matter of

18. In Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion), Mr. Justice Brandeis said the following concerning the beliefs of the founding fathers about the first amendment: "They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American Government."

19. The Supreme Court has always used very broad language in extending protection over these fundamental freedoms. As was said in Thomas v. Collins, 323 U.S. 516, 530 (1945), "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." See note 10 supra.

loyalty and were in no way as broad as the power claimed by the legislature in the present case.

It is agreed that the essential problem presented by these cases of state infringement upon first amendment liberties is one of balance. It is the task of the Court when reviewing these statutes to determine whether there is a legitimate public interest to be protected, and, if such an interest is found, to determine how important it is to the state. Then arises the problem whether the statute is sufficiently limited in its terms so as not to unduly infringe on these freedoms. Looking at the instant case in the light of these requirements, it appears that the state had a sufficient substantial interest in determining the fitness of the teachers in its public school system, but it is also clear that the statute was considerably broader than necessary to achieve this purpose. Inquiry as to whether the teachers belonged to or supported organizations which the state had determined to be a threat to the public welfare, or as to the amount of time spent in outside activities and the positions held in such activities, would have been sufficient to protect the interests of the state.

Here the Supreme Court has enunciated boundaries within which a state can inquire into its employee’s associations. It has left undefined the permissible limits of state regulation and prohibition of organizations and the extent to which the Congress, in its investigative function, can inquire into association. But by its recognition of the fundamental importance of the right to associate and the broad language used in extending protection over it in the instant decision, it appears that the Court will make all the safeguards that it has propounded for the protection of speech and press applicable to the entire area of privacy in association.

James G. Lepis

CRIMINAL LAW—ATTEMPT—IMPOSSIBILITY OF CONSUMMATION OF COMPLETE CRIMINAL ACT NOT A BAR TO CONVICTION FOR ATTEMPT.

People v. Rojas (Cal. 1961).

Police arrested William Hall for theft of electrical conduit and he and a truck containing the conduit were taken into custody. Hall, after stating that he had an arrangement with defendant Hidalgo whereby Hidalgo would buy any electrical material or appliances that Hall could procure, telephoned Hidalgo and a meeting was arranged. In the company of a police officer in plainclothes, Hall met Hidalgo and then followed him in the truck to a designated place. Hidalgo then drove Hall and the officer to another place and paid Hall two hundred dollars. Police officers

observing the truck saw defendant Rojas arrive and drive the truck to his place of business. Rojas was arrested the following day as he unloaded the conduit from the truck. Defendants Rojas and Hidalgo were tried and found guilty on a charge of receiving stolen property and, upon denial of motion for a new trial, appealed. The defendants argued that they were guilty of no crime, as the property they had received had been recovered by the police and therefore was no longer stolen property. The Supreme Court of California, In Bank, reversed and remanded, holding that the defendants, though not guilty of receiving stolen property, were guilty of attempting to receive stolen property, and ordered the trial court to enter judgment based on the modified finding. People v. Rojas, 10 Cal. Rptr. 465 (1961).

When a contemplated course of action is incapable of consummation, the doctrine of impossibility becomes relevant to determine the legal consequences of the acts actually committed. When the contemplated end is not defined as criminal, the acts committed toward this end are not punishable as an attempt, even though the actor, through a mistaken conception of the law, believes the contemplated act to be criminal. This type of impossibility, legal impossibility, is regarded as an exculatory bar to a conviction for attempt. Courts have been reluctant, however, to extend this line of reasoning to prevent conviction for an attempt where the act attempted is criminal and is impossible because of a mistake of fact on the part of the actor. This type of impossibility, factual impossibility, has been further refined into cases of intrinsic impossibility, that is of inadequate means to accomplish the act, and extrinsic impossibility, where the

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1. CAL. PEN. CODE § 496(1). “Every person who buys or receives any property which has been stolen . . . knowing the same to be so stolen . . . is punishable by imprisonment.”

2. CAL. PEN. CODE § 1159 provides that a defendant may be found guilty of an attempt to commit the offense with which he is charged. § 1181(6) provides that, “When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the crime of which he was convicted but guilty of a . . . lesser crime included therein, the court (appeal as well as trial) may modify the verdict, finding or judgment accordingly without ordering a new trial.”

3. E.g., May v. Pennell, 101 Me. 516, 64 Atl. 885 (1906) (attempted suicide not a crime where suicide is not a crime under state law); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905) (husband not guilty of attempted rape of wife where achieved intercourse would not be rape); Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503 (1898) (boy under the age of fourteen conclusively presumed incapable of rape cannot be guilty of attempt to commit rape). Contra, Commonwealth v. Green, 2 Pick. 380 (Mass. 1823) (boy under the age of 14 may be convicted of attempted rape although he cannot be convicted of rape).


5. E.g., Commonwealth v. Williams, 312 Mass. 553, 45 N.E.2d 740 (1942); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890); State v. Wilson, 30 Conn. 500 (1862) (reaching into another's pocket is attempt to commit larceny although the pocket is empty); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (shooting at a bed believing victim was there when in fact victim was in another room is attempted murder); People v. Lee Kong, 95 Cal. 666, 30 Pac. 800 (1892) (shooting at a pole believing a policeman was behind it when in fact he was not is attempted murder).
means, though adequate, are misdirected. In *People v. Jaffe*, a New York case, the court applied the doctrine of legal impossibility to a fact situation substantially similar to that in the instant case. The court reasoned that since a requisite of the crime of receiving stolen property is that the defendant receive the property knowing it to be stolen and that since the goods recovered were no longer stolen, the defendant could have no knowledge of a non-existant fact and could not be guilty of receiving stolen property. Therefore, the defendant could not be guilty of an attempt to do so because, "... if all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to do with the same purpose a part of the thing intended." Application of the doctrine of legal impossibility in the *Jaffe* case, although subject to some criticism, has received favorable comment by legal writers and has been regarded as binding precedent. An earlier New York case, *People v. Gardner*, held that the defendant was guilty of attempted extortion despite the fact that the "victim" did not pay under compulsion of fear, an essential element of the crime of extortion. The court stated that the applicable test of an attempt is to determine the actor's state of mind and conduct in the attempt and his capability of doing every act on his part to effectuate the crime. If these requirements are satisfied, then the defendant would be guilty despite some fact, unknown to him, which would make consummation of the crime attempted impossible. Although the court in *Jaffe* purportedly distinguished the *Gardner* case, the two cases are in apparent conflict, and the rule of *Gardner* has been applied to cases which would logically fall within

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7. 185 N.Y. 497, 78 N.E. 169 (1906).  
8. An employee was caught stealing cloth by his employer who repossessed the cloth. The employee was then instructed to take the cloth to the defendant as previously arranged. It was held that defendant could not be guilty of an attempt to receive stolen goods under a statute providing that any person who buys or receives stolen property knowing the same to have been stolen is guilty of receiving stolen property. Compare CAL. PEN. CODE § 496(1) *supra*, note 1.  
13. 144 N.Y. 119, 38 N.E. 1003 (1894).  
15. The rationale of *Jaffe*, that, since the property recovered is not a subject of the crime of receiving stolen property, one cannot be guilty of attempting to receive stolen property if the property has been recovered, would seem to apply to a case where the crime of extortion could not be committed because the "victim" did not pay under compulsion of fear. In both instances the crime could not be accomplished even if the defendant did all he intended to do. But see Strahorn, *op. cit. supra* note 11, at 989-91.
the rationale of Jaffe. The two conflicting views retain vitality in New York, although it appears that the rationale of the Jaffe case is applied only to cases involving the same fact situation as the original case. Dissatisfaction with the holding in the Jaffe case on the part of the California courts became apparent in People v. Camodeca and Faustina v. Superior Court. In the Faustina case the court implied that the technical approach of the Jaffe case was undesirable and that application of the doctrine should be limited. In the instant case, the court neither avoids mention of Jaffe nor seeks to decide the case in a manner that would retain the basic theory of that case while reaching a different result.

The area of impossibility in attempts is a difficult portion of the law in which to construct a legal abstraction capable of rationalizing the decided cases and satisfactorily resolving the myriad of hypotheticals which may be posed to test such abstraction. The suggested dichotomy of legal and factual impossibility, like most legal abstractions, is most difficult to apply when a fact situation presents itself which is on or near the dividing line. Receiving property which has lost its status as stolen property could logically be regarded as a case of legal impossibility or factual impossibility. The crucial element in determining the applicability of one or the other of the doctrines in the instant case appears to be the intent of the


17. People v. Boor, 260 App. Div. 681, 23 N.Y.S.2d 792 (1940); People v. Moore, 127 N.Y.S. 98, aff'd 201 N.Y. 570, 95 N.E. 1136 (1911) (stating that the Jaffe case was decided under a peculiar statute and that it should not be extended), following the Gardner case. People v. Finkelstein, 197 N.Y.S.2d 31 (Ct. Spec. Sess. 1960), following the Jaffe case.

18. 52 Cal. 2d 142, 338 P.2d 903 (1959) (defendant guilty of attempted grand theft by false pretenses despite the fact that the "victim" was not deceived).

19. 174 Cal. App. 2d 832, 345 P.2d 543 (1959). Although these cases evidence an express hostility to the Jaffe case, it appears that previous cases in California have ignored Jaffe and have not rendered articulate the difference in approach utilized. See Ex Parte Magidson, 32 Cal. App. 566, 163 Pac. 689 (1917) (defendant guilty of attempting to receive stolen property even though recovered by police and removed from hiding place where defendant was to secure them); People v. Siu, 126 Cal. App. 2d 41, 271 P.2d 575 (1954) (defendant convicted of attempting to receive possession of narcotics though the substance offered was not narcotics but talcum powder).

20. Fraustina v. Superior Court, supra note 19, at 546 "Even though we say that, technically, the tires were not 'stolen' nevertheless the defendant did attempt to receive stolen property." The court also indicated that: "The rule of the Jaffe case has been the subject of much criticism and discussion. . . Certainly its application should be limited." Id. at 546.

21. People v. Rojas, 10 Cal. Rptr. 465, 469 (1961). It has been suggested that the only fault with the Jaffe case is the rule relating to the status of the stolen property. Smith, op. cit. supra note 11, at 440-42. The court in the principal case reaches the same conclusion as to the property (i.e. property recovered by the police no longer retains its status as stolen property) but reaches a contrary result.

22. Using the rationale of Jaffe, there can be no attempt because even if the defendant did all he intended to do it would be no crime. Using the rationale of Gardner, an attempt has been effectuated. The defendant intended to receive stolen goods and carried out his intention with apparent ability to commit the crime in the way intended. That some fact, unknown to the defendant, made the crime impossible to consummate will not excuse criminality.
actor. In the fact situation of the Jaffe case and the instant case, the actor, in fact, had two intentions; he intended to receive the particular goods involved and he also intended to receive stolen goods. In both cases, furthermore, he did all the external acts of which he was capable to effectuate both intents. In the Jaffe case, the court related the intent of the actor only to the specific goods involved; since the goods were not, in fact, stolen, the successful completion of the attempt to receive them would not be a criminal act. The doctrine of legal impossibility was invoked, therefore, to bar a conviction for attempt. In the instant case, the court relates the actor’s intent to stolen goods as such and regards the fact that the goods are no longer stolen as a mistake of fact on the part of the actor in no way altering his intent; on this basis, it applies the rule of factual impossibility. From a purely logical point of view, either analysis would appear to be tenable.

It is submitted, however, that the real issue in such cases is one not of logic but of policy, and that the conclusion of the court in the instant case represents a sounder and more realistic approach to the problem. It is clear that the pivotal factor in the instant case was the fact that the court felt that the acts of the defendants should be punishable. This approach is not as arbitrary as it might appear at first; the defendants could not be convicted of the crime of receiving stolen property because the property that they received was in fact no longer stolen. This excusing factor was not within the knowledge or control of the defendants and evidenced no intention on their part to cease their actions voluntarily. Accepting the social norm as established by defining certain acts as criminal, the issue becomes whether the defendants’ acts, though not a violation of the defined standard, are such as should be punished within the spirit, if not the letter, of the law. The defendants had done all that was necessary on their part to allow conviction for the crime of receiving stolen property. Through fortuitous circumstances, beyond their control, they could not be convicted of the completed crime. Given a defendant who intends to commit a crime, who does every act necessary on his part to effectuate that intent, but who cannot be convicted of the crime because an essential element of the defined standard is not present, technical rules to prevent conviction of a lesser related offense seem more attuned to the legal thought of a prior century. Attempts should not be considered in the abstract but

23. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 127 (1947). This statement is made assuming that the requisite overt act by the defendant was committed. This note has not attempted to examine the distinction between “preparation” and an overt act. See Smith, op. cit. supra note 11, and compare HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 596, n.49 (2d ed. 1960).

24. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 127 (1947); Sayre, op. cit. supra note 10, at 854.

25. People v. Rojas, 10 Cal. Rptr. 465, 468 (1961). “In our opinion the consequences of intent and acts such as those of the defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out.”
rather in relation to the crime attempted. Acts inimical to the public welfare are defined as crimes and those committing the acts are punishable. When such acts are performed by an individual, but an element of the crime beyond his control is not present, he has not committed the crime defined. His acts, however, are no less dangerous to society. Imposition of a lesser punishment for attempt seems appropriate to effectuate the policy of the law.

Edward C. McCardle


In August, 1952, the defendant in the instant case brought an action for annulment or separation and was awarded a separation by the Supreme Court, Queens County, New York. His wife, plaintiff in the instant case, was given custody of their child and the husband was required to pay fifty dollars per week for the support of the child “until she becomes of age”, which in New York is twenty-one. On appeal, in April, 1953, the judgment was modified to deny a separation to either party, but the provision for support was affirmed. In May, 1953, the parties entered into an agreement which provided, among other things, that the husband would continue to pay the wife fifty dollars per week for the support of the daughter “in accordance with the decree granted . . . in the Supreme Court, Queens County.” The agreement also provided that it was to remain in effect notwithstanding any future divorce, that the support provision was to be embodied in and made part of any subsequent divorce decree, that neither party had the right to ask for a revision of any terms of the agreement, and that the agreement was to be construed and enforced in accordance with the laws of New York. In July, 1953, the wife was granted a divorce by a Texas court, and the husband, who appeared in the action, was directed to pay fifty dollars per week support for the child until she reached eighteen. Subsequently, the wife sought to have the support raised to one hundred dollars per week, but this was denied by the Texas court. The hus-

26. Arnold, op. cit. supra note 10, suggesting that the chief difficulty with a legal abstraction in regard to attempts is that of making an attempt a crime unto itself. The author argues persuasively that no such generalization is possible and that the rules governing a particular attempt must be formulated in accordance with the policy of the statute in punishing the completed crime.

RECENT DECISIONS

Hughes v. Hughes, made the required payments until the daughter became eighteen but failed to provide support thereafter. The wife then sought to enforce by contempt proceedings the support ordered by the original New York separation decree, but the New York court declined to grant enforcement and vacated its prior decree on the ground that it had been superseded by the subsequent Texas divorce decree. The wife thereupon commenced the instant action to enforce the separation agreement. The trial court entered judgment for the plaintiff and defendant appealed. The New York Supreme Court, Appellate Division, with two justices dissenting, affirmed, *holding* that the separation agreement was not superseded by the Texas divorce decree but remained an enforceable contract. *Hughes v. Hughes*, 208 N.Y.S. 2d 308 (App. Div. 1960).

Separation agreements are generally enforceable if they conform with the customary requirements of a valid contract, are fair, and are not made primarily to facilitate the procurement of a divorce. In subsequent divorce proceedings, the court will usually adopt or incorporate the support provisions of the agreement, although it goes without saying that individual parties cannot limit the power of the court to make adequate provision for support. When an agreement is incorporated in a subsequent divorce decree, there is a split of authority as to whether or not the agreement is merged into and superseded by the decree. Many states permit the support provision of the incorporated agreement to be modified upon the same terms as any other alimony decree. This is true even though the agreement, as in the instant case, contains a provision forbidding modification. Other states, including both New York and Texas, treat the agreement as a continuing, enforceable contract, even though the decree itself may be subsequently modified. Where not incorporated in the decree, the agreement would generally remain in effect. In the instant case, then, the separation agreement would remain in effect in any event, since it clearly was not incorporated in the divorce decree, and since it would remain in effect and enforceable under Texas law whether or not incorporated in such a decree. Inasmuch as Texas would recognize the continued enforceability of the contract, New York

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4. E.g., North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936).
5. E.g., Hobbs v. Hobbs, 72 Colo. 190, 210 Pac. 398 (1922); Warner v. Warner, 219 Minn. 59, 17 N.W.2d 58 (1944).
would not be denying full faith and credit to the Texas decree by like-
\[12\]wise recognizing its continued existence. Since the agreement was not incorporated in the divorce decree in the instant case, it would be subject to all ordinary contract defenses. However this is not the ordinary case in which it is argued that the agreement should be set aside because it was obtained by fraud or duress, but rather it was contended that the wife repudiated the contract. Mr. Justice Stevens, in his dissent, contended that the cumulative effect of the wife's actions in submitting the question of the child's support to the Texas court independently of the agreement (which provided that the support provision should be embodied in a subsequent decree), in applying to the Texas court for an increase in the amount of support, and in seeking to punish her husband for contempt under the 1952 decree amounted to both an abandonment and a repudiation of the agreement. The majority opinion countered this by simply stating without elaboration that the record was "barren of evidence of abandonment." There is little authority as to what would amount to a repudiation of a separation agreement as a matter of law. In Hettich v. Hettich, the failure of a wife to place a separation agreement before a foreign court and have it incorporated in a divorce decree did not prevent her from subsequently bringing suit on the agreement. In Schmelzel v. Schmelzel, the wife applied to the court to have her support raised where the amount had been set by a separation decree incorporating the terms of an agreement. The court held that the husband’s acquiescence to the support ordered was not acquiescence to an attempt to repudiate the agreement. If the husband then can stand on the contract in spite of attempts by the wife to repudiate, it would seem that the wife should likewise be permitted to stand on the contract after having made an unsuccessful attempt at repudiation. While the cumulation of the wife's actions in this case, and particularly her application to the Texas court for increased support, would seem to be sufficient to support a finding that she had in fact repudiated the contract, in the absence of controlling precedent, and

12. In Yarborough v. Yarborough, 290 U.S. 202 (1933), the Supreme Court required full faith and credit to be given to a Georgia decree ordering support to be paid for a child. The decree in effect placed a limit on the father's liability to support the child and even the state of South Carolina's interest in supporting the child could not infringe on this limit. That case, however, did not involve a separation agreement.


15. Supra, note 13.


17. In that case, however, there is no showing that the parties agreed to incorporate the agreement in a subsequent divorce decree or that the wife asked for support in the divorce action. The court said that at best it was a question of fact whether she intended to surrender a contract right. Clearly, this would not be controlling precedent in the instant case.

18. 287 N.Y. 21, 38 N.E.2d 114 (1941).
with the evidence of the wife's intent equivocal at best,\textsuperscript{19} it would be
difficult to overrule as a matter of law the fact determination that was
made.\textsuperscript{20}

This case points up the problem that is inherent in those jurisdic-
tions which do not merge a separation agreement into a subsequent
divorce decree. The contract rights arising from such agreements are
not readily subject to modification by the courts, whereas the support
decree is.\textsuperscript{21} In such a situation, the support currently ordered by the
court does not always define the rights and liabilities of the parties in-
volved.\textsuperscript{22} This anomaly is generally rather dubiously explained away
by pointing out the difference in the remedies available. The extra-
ordinary remedy of contempt proceedings is available to enforce the
decree whereas a party seeking to enforce the agreement is limited to
contract remedies.\textsuperscript{23} Whether or not this explanation is satisfactory, there
appears to be no discernable trend among the states that recognize the
continued existence of the contract to adopt a merger doctrine. These
states view the separation agreement, like other out of court settle-
ments, with favor, subject of course to the state's interest in the matter.\textsuperscript{24}
In such a state, the agreement would have more utility, especially where
each party had enough property to satisfy any contract claims.

\textit{William J. O'Kane}

\section*{EVIDENCE—IMPEACHMENT OF A PARTY'S OWN WITNESS—STATE
MAY INQUIRE INTO PRIOR CRIMINAL CONVICTION OF
WITNESS ON DIRECT EXAMINATION.}


The defendant sold Edward Baker a wrist watch for two dollars.
Baker subsequently discovered that the wrist watch was defective, and
returned to the site of the purchase in search of the seller, but his

\textsuperscript{19} The actions cited by the minority opinion would also support an inference
that the wife had simply attempted to secure an additional protection without any
conscious intent to waive or relinquish her contract rights. It may be that the court
was influenced to resolve this question in favor of the wife by considerations of
policy dictating that the support of minor children be insured.

\textsuperscript{20} The instant case is distinguishable from others involving support orders
differing from agreed upon amounts. In all prior cases, one party consistently abided
by the agreement. Here, both parties were present in the divorce action but neither
had the agreement incorporated in the divorce decree, even though the agreement
provided for such incorporation. Query which party would be standing on the agree-
ment and which would be claiming that the other had repudiated had the Texas
court increased the support as the wife requested?

\textsuperscript{21} Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940); Brady v. Hyman,

\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid.

\textsuperscript{24} Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940).
efforts were unsuccessful. Later the same day, while engaged in his employment on an ice truck, Baker saw the defendant and sought to reclaim the purchase price of the watch. Defendant retreated into a nearby apartment house and obtained a shotgun from his third floor apartment, with which he shot and killed Baker as the latter was ascending the stairway. The police investigation at the scene of the crime uncovered no weapon of any kind other than the shotgun. Eleven hours later, in response to a telephone call from William Jordan, the defendant’s brother-in-law, the police found on the stairway an ice pick, which Jordan and the defendant’s wife claimed to have discovered as they ascended the stairway. At trial, the defense in their opening statement outlined a claim of self-defense and stated that they would prove that Baker had attacked the defendant with an ice pick. As the state’s case unfolded, the investigating officers were examined by both the prosecutor and defense counsel about the ice pick. The state then called Jordan and, after a few preliminary questions, asked him whether he had ever been convicted of a crime. Over objection by the defense, the witness replied that he had previously been convicted of murder, and the prosecutor then proceeded to elicit from him his part in the discovery of the ice pick. The defendant was convicted of murder and appealed directly to the Supreme Court of New Jersey on the sole ground that the trial court had erred in permitting the state to show Jordan’s prior conviction. The Supreme Court affirmed the conviction, holding that the state could properly call this witness and elicit the fact of his previous criminal conviction, finding both statutory authority and a sound basis in trial practice for this result. State v. Holley, 166 A.2d 758 (N.J. 1961).

The common law rule prohibiting a party from impeaching his own witness has found almost universal acceptance despite a constant deluge

1. The state in the presentation of its case was endeavoring to develop the criminal incident in its totality and in its natural sequence. State v. Holley, 166 A.2d 758, 760 (N.J. 1961).

2. The state introduced the ice pick into evidence at some time prior to the appearance of Jordan on the stand, but the opinion does not indicate the precise time at which it was introduced.

3. N.J. Rev. Stat. § 2A: 81-12 (1951): “For the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter of his conviction of any crime may be shown by examination or otherwise, and his answers may be contradicted by other evidence.” (Emphasis added.)

4. The court said that it was permissible for the state to anticipate the defense argument and to create the inference that the ice pick was “planted.” The prosecutor apparently had been advised that defendant would testify that he was attacked by Baker with an ice pick and that he had told the police about the ice pick at the time of his arrest. State v. Holley, 166 A.2d 758, 761 (N.J. 1961).

5. Smith v. United States, 57 App. D.C. 71, 17 F.2d 223 (1927); Price v. Cox, 242 Ala. 568, 7 So. 2d 288 (1942); Tullis v. Tullis, 335 Iowa 428, 16 N.W.2d 623 (1944). Dean Wigmore sets forth the three traditional reasons for the rule against self-impeachment: (1) that a party is bound by his witness’s uncontradicted statements; (2) that a party “vouches” for the credibility of his witness; and (3) that to allow self-impeachment would be to enable a party to coerce a witness into giving favorable testimony. The same commentator also cogently summarizes the many criticisms of these reasons, the first two of which would appear to be falacious on their face. See 3 WIGMORE, EVIDENCE §§ 897-899 (3d ed. 1940).
of criticism from the commentators. Even the strict adherents of the rule, however, recognize an exception in the case of a witness whom a party is compelled to call. Furthermore, a party is always permitted to introduce other evidence to controvert the facts to which his witness has testified. A few courts have permitted a circumvention of the rule against self-impeachment by calling the witness as a witness of the court, subject to examination by both parties "in the nature of cross examination." Recently, there has been significant encroachment upon the general prohibition against self-impeachment, as an increasing number of courts have come to permit a party to impeach his own witness by the use of prior contradictory statements. These jurisdictions have generally attached two conditions to such self-impeachment: there must be an element of surprise and the witness's testimony must be damaging to the case of the party who called him. A number of other states accomplish the same result by permitting the calling party to question the witness about a prior statement for the purpose of "refreshing his memory." Despite this aforementioned encroachment upon the general rule, courts generally prohibit self-jmpeachment relating to bad character, bias, interest, or corruption. New Jersey, in the case of State v. Fox, decided a decade before the instant case, departed from this

6. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 64 (1947); MCCORMICK, EVIDENCE § 38 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 64 (1954); 3 WIGMORE, EVIDENCE §§ 896-899 (3d ed. 1940). See also Ladd, Impeachment of One’s Witness, 4 U. Chi. L. Rev. 69, 96 (1936).
7. The traditional case in which the exception was recognized was that of testifying witnesses to a will. Whitney v. Morey, 63 N.H. 448, 2 Atl. 899 (1886). It was then extended to include witnesses who had been certified in the indictment. People v. Connor, 295 Mich. 1, 294 N.W. 74 (1940). The concept of “compulsion” has recently been extended to include a witness in a prosecution for murder whose testimony was necessary to prove premeditation. Meeks v. United States, 179 F.2d 319 (9th Cir. 1950) (witness impeached by prior criminal convictions).
8. Northern Pacific Ry. Co. v. Everett, 232 F.2d 488 (9th Cir. 1956); Vondraschak v. Dignan, 200 Minn. 530, 274 N.W. 609 (1937); Talley v. Richart, 335 Mo. 912, 185 S.W.2d 23 (1945).
10. See Note, 62 YALE L.J. 650, 651, n.4 (1953), for an exhaustive list of those states which now sanction self-impeachment by prior contradictory statements either by statute or by judicial decision. The New Jersey courts refer to this process as one of “neutralization.” State v. Perillo, 18 N.J. Super. 537, 77 A.2d 496 (1950).
11. Young v. United States, 97 F.2d 200 (5th Cir. 1938). The tendency today is to construe “surprise” so liberally that it is no longer restrictive. E.g., Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953) (prosecutor given notice that witness would repudiate her statement six weeks before trial commenced still permitted to claim surprise). Contrast the strict interpretation given to the “surprise” element in Selden v. Metropolitan Life Ins. Co., 157 Pa. Super. 50, 43 A.2d 571 (1945).
15. 12 N.J. Super. 132, 79 A.2d 76 (App. Div. 1951). The witness had been previously convicted of receiving stolen goods, and he testified to having the same
practically unbroken line of authority and adopted the position that the state in a criminal case may elicit from witnesses, whom it has called, information concerning their prior criminal convictions; furthermore, no element of surprise was required for such self-impeachment. The propriety of this position was sustained on the theory that the jury should be given all of the available information which would aid in evaluating the witness's testimony, and, alternatively, to protect the state from the inference that it was withholding vital information in regard to the witness' credibility. Very little judicial reliance has been placed upon the New Jersey statute in this connection due to the ambiguity of its language. The Fox doctrine was subsequently affirmed by the New Jersey court in State v. Costa however; that case set aside a verdict where the prior criminal conviction of a witness was introduced as substantive evidence of the guilt of the defendant. The validity of allowing the state to attack the basis of the defendant's case before he has presented it is a matter of the order of proof, the regulation of which is within the court's discretion. The unique position of the New Jersey courts on the issue of self-impeachment by prior criminal conviction has goods to defendant at a later date. The testimony was for the purpose of identifying as stolen goods those which were the subject matter of the prosecution against Fox for the receipt of stolen goods.

18. N.J. Rev. Stat. § 2A81-12 (1951), note 4, supra. Although the court cites the statute in support of the instant decision, it does not define the statutory language "by examination or otherwise." It is at least arguable that the word "examination" is used only to distinguish oral elicitation of the fact of interest or prior conviction from impeachment by other means, such as by judicial record of conviction. If such were the case, "examination" could be construed as being synonymous with "cross-examination" for the purpose of the problem in the instant case. Although it is impossible to determine what weight the court attached to the statutory language, the strong emphasis on trial tactics suggests that the outcome would have been the same in the absence of the statute.
20. The state called five witnesses and elicited from each the single fact that he had been convicted of operating a gambling house at a specified location, the identical offense with which the defendant was charged. Clearly, this served no purpose of impeachment. Significantly, the instant decision does not consider the possibility that the state was using Jordan's conviction as disguised substantive evidence on the following theory: if the jury can be convinced that a convicted murderer and relative of the defendant is so certain of his guilt that he has attempted to construct a false defense for him, it will of necessity be influenced to believe that he is guilty. This possibility and the possible prejudice to defendant from the mere association of his cause with a convicted murderer are probably the major policy objections to the court's conclusion, and it is unfortunate that they have not been more thoroughly explored. The possibility of prejudice in the instant case was minimal, however, in that Jordan would of necessity have been called as a defense witness, at which time the state could have elicited the fact of his prior conviction.
21. Matz v. United States, 81 App. D.C. 326, 58 F.2d 190 (1946). See also 6 Wigmore, Evidence §§ 1867, 1871 (3d ed. 1940). It should be noted that the opinion does not indicate the precise reason which defense counsel assigned for his objection, nor does it discuss in any detail the possibility of prejudice to the defendant in permitting the state to attempt to puncture the defense before it is developed by defense counsel.
found some support in the Third Circuit,\(^22\) where it has been held that a party is not bound by the uncontradicted testimony of his own witness, from which one could conclude that the calling party might impeach such a witness.\(^23\) Likewise, the Pennsylvania Supreme Court in a recent opinion has also sanctioned the prosecutor's revelation of the criminal record of a prosecution witness, although it refused to characterize the process as one of self-impeachment.\(^24\) There is also some language in the recent decisions of the Texas courts indicating that they will permit the state in a criminal prosecution to impeach its own witness if he testifies to facts which are injurious to the state's case.\(^25\)

Although the instant case is contrary to the weight of authority the result is rationally acceptable, because the three basic reasons underlying the rule against self-impeachment have no application here.\(^26\) The testimony of the impeached witness was contradicted by the investigating officers, hence the state was not bound by it in any case. Moreover, one cannot realistically be said to vouch for the credibility of his witness, since one has no control over the persons who by pure chance witness an occurrence or find a weapon. Finally, the threat that the state could coerce the witness to render testimony favorable to its case by the threat of character assassination is not present here, because the witness's testimony was essentially in support of the defendant's theory of self-defense. The prosecutor would undoubtedly have elicited the existence of Jordan's criminal record from him on cross examination,\(^27\) since he would of necessity have been a principal defense witness as well. Therefore, the disclosure of this fact at an earlier stage in the proceedings cannot be regarded as unduly prejudicial to the defendant. It is conceivable that the court could have reached the same result without any reliance on the prior New Jersey authority permitting self-impeachment. For example, the court could have reasoned that Jordan was a witness whom the state was "compelled" to call in order to account for the appearance of the ice pick as well as the state's possession of it.\(^28\) Alternatively, it could have reasoned that Jordan was not really the state's witness,\(^29\) since the evidence furnished by him was relevant to the de-

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\(^{22}\) Johnson v. Baltimore & Ohio R.R., 208 F.2d 633 (3d Cir. 1953).
\(^{23}\) No attempt at impeachment was made in the Johnson case. The logical relation between its holding and the abolition of the rule prohibiting self-impeachment, however, is vigorously asserted by Dean Wigmore. \textit{3 Wigmore, Evidence} § 896 (3d ed. 1940). \textit{Cf.} Meeks v. United States, 179 F.2d 319 (9th Cir. 1950).
\(^{24}\) "We see no reason to nullify a prosecutor's maneuver in anticipating what he may be sure defense counsel will bring out. This is not impeaching counsel's own witness, but rather the legitimate thrust and riposte of trial tactics." Commonwealth v. Garrison, 398 Pa. 47, 50, 157 A.2d 75, 77 (1959).
\(^{26}\) See note 5 supra.
\(^{28}\) Meeks v. United States, 179 F.2d 319 (9th Cir. 1950).
\(^{29}\) "It is not the 'calling' . . . that makes one your witness but the eliciting of favorable testimony." Fall Brook Co. v. Hewson, 158 N.Y. 1, 52 N.E. 1095 (1899).
fendant's case;\(^{30}\) consequently, Jordan could be regarded as a defense witness in regard to whom the prosecutor would have the normal privileges of cross examination. The court might also have chosen to ignore the question of impeachment entirely, and view this situation as the permissive trial tactic of anticipating the adversary’s defense.\(^{31}\) In view of these available alternatives, it would be imprudent to attempt to extract from the principal case the generalization that one may always impeach his own witness by prior criminal convictions in the state of New Jersey. The limited precedents available have all involved self-impeachment by the state in criminal prosecutions, and there remains the possibility that a court in the future might definitely construe the New Jersey statute as using “examination” as a synonym for “cross examination.” New Jersey has certainly not gone as far as to adopt the rationale of the Model Code of Evidence\(^ {32}\) or the Uniform Rules of Evidence,\(^ {33}\) both of which abolish the prohibition against self-impeachment in its entirety.\(^ {34}\) However, in view of the widespread permissibility now accorded by the courts to self-impeachment by prior contradictory statements, the trend of the law may well be toward the abolition of the general prohibition of self-impeachment, the second phase of which is beginning to manifest itself in decisions such as the instant case which permit the impeachment of one’s own witness by prior criminal convictions.

John S. Fields

TORTS—INTENTIONAL INFLICTION OF MENTAL DISTRESS—REPEATED PROPOSALS OF ILLICIT INTERCOURSE SUPPORT CAUSE OF ACTION.

Samms v. Eccles (Utah 1961)

Plaintiff, a married woman, brought an action to recover damages for severe mental and emotional suffering resulting from repeated indecent proposals made by the defendant. Plaintiff’s complaint alleged that, between May and December of 1957, defendant repeatedly and persistently solicited her to have illicit sexual relations with him, calling her by phone for this purpose at least fifteen or possibly more than twenty-five

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30. A witness is generally considered to be the witness of the party for whom he first furnishes relevant evidence. Milton v. State, 40 Fla. 251, 24 So. 60 (1898).
32. Rule 106.
34. State v. Cooper, 10 N.J. 532, 92 A.2d 786 (1952) (will not permit self-impeachment by evidence of lack of trustworthiness based upon community reputation).
times at various hours, including late at night. On one occasion, defendant allegedly went to the plaintiff’s residence and made an indecent exposure of his person while making such a solicitation. As a result of defendant’s conduct, plaintiff suffered great anxiety, fear for her personal safety, and severe emotional distress, for which she sought fifteen hundred dollars in actual damages and a like amount in punitive damages. At pretrial, the district court, after noting that plaintiff’s cause of action was based on infliction of emotional distress by wilful, wanton, and outrageous conduct, dismissed the complaint on the ground that it showed no basis upon which relief could be granted. On appeal, the Supreme Court of Utah, with two justices dissenting, reversed, holding that, although there is no cause of action for negligent infliction of mental distress, the intentional infliction of such distress is an actionable tort. Samms v. Eccles, 358 P. 2d 344 (Utah 1961).

Except in actions for assault, the common law rule was that one’s peace of mind was not a legally protectable interest, even as against intentional invasions. Some courts rejected damage claims based solely on mental suffering because they believed that the intangible and subjective nature of such suffering made it impossible to be objectively valued in pecuniary terms, but such reasoning was hardly persuasive since the same courts had no trouble in assessing damages for mental anguish in cases where there was only the slightest physical touching. Other courts offered the more valid objection that permitting recovery for such a subjective type of injury would open the door to many fictitious and fraudulent claims, but this position was criticized because the possibility of fraudulent litigation had not prevented the courts from protecting other interests. Even with their predilection to disallow mental distress claims, the courts were not adverse to protecting the feelings of passengers from insulting carriers, on a theory that the carrier con-

1. I. de S. v. W. de S., Y.B. 22 Edw. III, f. 99 pl. 60 (1348). This case well known to every first year law student held, that a tavern keeper’s wife had a legally protectable right to be free from the apprehension of being hit by an irate, hatchet-swinging customer. This was one of the earliest cases in which there was judicial recognition that one has a right to be free from mental as well as physical harm.
3. Lynch v. Knight, 9 H.L.C. 577, 598, 11 Eng. Rep. 854, 863 (1861). It was here that Lord Wenslydale made his oft-quoted remark that: “Mental pain or anxiety the law cannot value, when the unlawful act complained of causes that alone.” Many courts have followed such reasoning. E.g., Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900).
4. Draper v. Baker., 61 Wis. 450, 21 N.W. 527 (1884). Damages of twelve hundred dollars were not thought too great for the indignity suffered by the plaintiff when the defendant spit in his face. In Ragsdale v. Ezell, 99 Ky. 236, 49 S.W. 775 (1899), the law placed a value of seven hundred dollars on a hug and a kiss.
tracted to provide civility as well as transportation. This liability was soon divorced from a contract theory and justified on the basis of a duty owed the public, and was extended to cover others in similar positions, such as innkeepers, theater owners. Finally, in Wilkinson v. Downton, an English court rejected the common law rule, and held a callous practical joker liable for the mental distress he had caused a woman by falsely telling her that her husband had been seriously injured. However, most courts remained reluctant to make such a frontal attack on a settled rule of law, and preferred a more subtle advance by allowing recovery for mental distress as parasitic damages after finding a technical commission of an established tort, such as assault, battery, false imprisonment, or trespass to land. These parasitic damage cases were the prelude to a new, independent tort of intentional infliction of mental distress. In recent years there has been increasing judicial acknowledgement of this tort, and, except in Ohio, the trend has been to recognize that this cause of action has a separate legal existence apart from other established torts. However, the metes and bounds have yet to be clearly marked, and there has been much uncertainty as to the scope and requisites of this modern tort. Even

7. Chamberlain v. Chandler, 3 Mason 242, 5 Fed. Cas. 413, No. 2,575 (C.D.D. Mass. 1823). There a ship carrier's contract was held to call for politeness to a passenger, as well as passage.
8. Texas & P. Ry. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897). Indecent remarks were addressed to the plaintiff in a railroad station before she had purchased a ticket, and the court permitted recovery, even in the absence of a contractual relationship.
10. Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938).
11. 2 Q.B.D. 57 (1897).
12. Leach v. Leach, 11 Tex. Civ. App. 699, 33 S.W. 703 (1895). Foul breath and speech constituted an assault, enabling the plaintiff to recover for outrage to her feelings caused by the defendant's indecent advances.
13. DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881). A battery was committed when the defendant lightly touched the plaintiff, justifying recovery for the resulting shame and mortification.
15. Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906). A bill collector was found to be a trespasser to land and liable for the mental anguish he caused the plaintiff, a pregnant woman.
16. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 460, 470 (1906). "A factor which is today recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability."
17. This is reflected by the change of position of Restatement. In RESTATEMENT, TORTS § 46 (1934), there was no independent action for intentionally causing mental distress, except in the cases of assault or where there was special liability of carriers for insult. However, in RESTATEMENT, TORTS § 46 (Supp. 1948), intentional infliction of emotional distress was recognized and approved, as a distinct tort.
18. In Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948), the Supreme Court of Ohio refused to grant relief to a pregnant plaintiff who had suffered mental damages from the vile epithets hurled at her by the defendant.
20. PROSSER, INSULT AND OUTRAGE, 44 CALIF. L. REV. 40 (1956). An excellent discussion of this new tort, with proposals as to the requisites that should be required for its application.
though the contours have not been fully delineated, it is generally agreed that the basis of liability must be conduct of an "outrageous" character.\textsuperscript{21} Up to the present time, an indecent proposal has not been held to be actionable under this test.\textsuperscript{22}

At first glance, therefore, the Supreme Court of Utah would seem to have expanded the concept of that type of conduct which is deemed to be needful of legal sanction. On closer examination, however, the decision in the present case is not as radical as it might seem. It has been recognized that our courts should not be burdened, under the guise of this new tort, with disputes over insults, bad manners, and trivialities which are better left to other instruments of social control.\textsuperscript{23} Consequently, as a safeguard against trivial or fictitious claims, it is required that liability should be posited only on "outrageous" conduct. Generally, two different kinds of conduct have been found to be sufficiently "outrageous." One type is found in those cases in which a single act of the defendant has been so reprehensible that the courts have had no qualms about imposing liability. The cruel joke is a prime example of this manner of action.\textsuperscript{24} A proposal of illicit intercourse has yet to be included in this category of "outrageous" behavior,\textsuperscript{25} and the court in the instant case acknowledged this fact, indicating that normally such a solicitation would not be actionable. However, a second type of "outrageous" conduct has also been recognized in those cases in which a single act of the defendant, by itself, is not actionable, but, because the act is done repeatedly, the courts find that his conduct, taken as a whole, is "outrageous." The cases involving bill collectors who continually harass their debtors with undue pressure and repeated threats are illustrative of this type of situation.\textsuperscript{26} One threat is not actionable, but repeated threats of coercion can qualify as "outrageous" behavior. Such courts show an awareness of the psychological fact that, not only can sudden shock injure the mind, but that a constant pressure on this mechanism can be equally deleterious.\textsuperscript{27} The instant case falls within

\textsuperscript{21} Ibid.
\textsuperscript{22} Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903); Prince v. Ridge, 32 Misc. Rep. 666, 66 N.Y.S. 454 (1900); According to Prosser, these older cases still represent the view taken by the courts. (See note 20 supra); But see Mitran v. Williamson, 21 Misc. 2d 1016, 197 N.Y.S.2d 698 (1960).
\textsuperscript{23} See Magruder, note 2 supra.
\textsuperscript{24} Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920). In that case a cruel trick was played on an elderly lady by deceiving her into thinking she had found gold, and damages were allowed for the resulting mental distress.
\textsuperscript{25} Dean Prosser wonders how much longer some of our more conservative tribunals will be able to stand the strain in rejecting such actions. See note 20 supra.
\textsuperscript{26} E.g., Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932) (a collection agency was held liable for the mental anguish caused the plaintiff in receiving a series of threatening letters. For a discussion of the collection cases, see Borda, One's Right to Enjoy Mental Peace and Tranquility, 28 Geo. L.J. 55 (1939).
\textsuperscript{27} Smith, Relation of Emotions to Injury and Disease, 30 Va. L. Rev. 193 (1944).
this second category of "outrageous" conduct. It was not the making
of an indecent proposal alone that was decisive, but rather the repeated
and persistent attempts at seduction and the manner in which they
were made. Any one of the defendant's acts, standing by itself, might
not justify the decision here, but the combination of his acts of re-
peated solicitation, phone calls at all hours, and, perhaps most signifi-
cantly, indecent exposure of his person do support the result. The totality
of his conduct rendered it "outrageous" and largely negated the possibility
of a fraudulent claim for mental distress. It will be seen that the re-
quirement of "outrageous" conduct serves a double purpose; it protects
the courts from being compelled to adjudicate cases arising from "hurt
feelings" or other trivialities, and it minimizes the danger of fictitious
claims by requiring conduct which would normally result in genuine
mental or emotional suffering. It would appear that the whole line of
conduct of the defendant in the instant case, and most especially his al-
leged indecent exposure,28 would be sufficient to satisfy these require-
ments. Those who share the common law fear of fraudulent mental dis-
tress claims insist that the mental suffering should manifest itself in
physical symptoms before it be regarded as actionable. This safeguard,
however, would seem to be superfluous where the defendant's conduct
is of a genuinely "outrageous" character.29

The dissenting justices, while agreeing with the majority opinion
in principle, objected that plaintiff's complaint was fatally defective in
that it did not allege that defendant's acts were done with the inten-
tion of causing mental distress to the plaintiff, or that defendant knew
or reasonably should have known that such distress would result. As
to the first point, it is clear from the decided cases that intent to cause
mental anguish as such is not required; it is only necessary that the
defendant have intentionally performed the objectionable acts from which
such anguish is a foreseeable result. The bill-collector, for example, re-
sorts to harassing methods only to make his debtor pay, but liability
is imposed because the resulting mental distress is a reasonably fore-
seeable consequence. In the instant case, the minority opinion would
seem to be erroneous in concluding as a matter of law that a reasonable
man could not have foreseen the emotional distress caused plaintiff by
defendant's alleged conduct. In conclusion, therefore, the instant decision
may be taken to be in accord with the growing tendency giving judicial
recognition to the individual's right to have his mental as well as physical
interests protected.

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28. It is indeed arguable that the alleged indecent exposure in itself is sufficient
to render defendant's conduct "outrageous and intolerable" according to the "generally
accepted standards of decency and morality." Samms v. Eccles, 358 P.2d 344, 345
(1961).
TORTS—NEGligence—INAPPPLICABILITY OF RES IPSA LOQUITUR AS BASIS OF RECOVERY FOR INJURIES SUSTAINED FROM FOREIGN MATTER CONTAINED IN SOFT DRINK BOTTLE.

Milligan v. Coca Cola Bottling Co. (Utah 1960).

Plaintiff brought suit against a retailer and also against a bottler of soft drinks for damages allegedly suffered when he swallowed a paper clip while drinking the bottler’s product. He had purchased two six-packs of the soft drink from the retailer and placed them in an unlocked fruit room connected with his garage. Numerous persons had access to the place of storage, including invitees to a birthday party, who had used eleven of the bottles. It was five weeks later, while drinking out of the last bottle, that plaintiff allegedly swallowed the paper clip; subsequently, another paper clip was found in the bottle. Plaintiff's complaint asserted three theories of recovery, namely, implied warranty; violation of an adulterated food statute; and negligence which plaintiff sought to prove by application of res ipsa loquitur. At pre-trial, defendant bottler offered to show the great care taken in the bottling process, and plaintiff elected to stand on his complaint. The lower court granted defendant's motion for summary judgment, and plaintiff appealed. The Supreme Court of Utah, with two justices dissenting, affirmed holding that res ipsa loquitur was inapplicable, since one of the doctrine’s requisites, control by the defendants when the injurious paper clip entered the bottle, could not possibly be shown on the facts alleged. Milligan v. Coca Cola Bottling Co., 11 Utah 2d 30, 354 P. 2d 580 (1960).

The doctrine of res ipsa loquitur was formally baptized approximately one hundred years ago by the English jurist, Baron Pollack, and since that time it has been widely accepted by the American courts, but not without much confusion and controversy. It is based upon the simple premise that there are certain types of unusual accidents where the surrounding circumstances are such as to logically indicate that the

1. A latin term, meaning, “the thing speaks for itself.”
2. The plaintiff's claim of breach of warranty and violation of the adulterated food statute were also found to be insufficient, since they were only supported by general allegations.
3. In Byrne v. Boadle, 2 H.&C. 722, 725, 159 Eng. Rep. 299, 300 (1863), the plaintiff, while passing the defendant's shop, was hit by a barrel falling from the shop window. It was held that the facts established a prima facie case of negligence on the part of the defendant, and Baron Pollack stated his now famous pronouncement: “There are certain cases of which it may be said res ipsa loquitur, and this seems one of them.”
defendant was probably negligent. These circumstances, upon which the doctrine rests, have been formulated into its three requirements, which are: that the accident must be one that does not normally occur without negligence on someone's part, that the plaintiff must be free of any contributory fault, and that the injury must result from an instrumentality in the exclusive control of the defendant. A great deal of dispute has developed over the probative aspects of the doctrine. Pennsylvania courts have taken the extreme position that res ipsa loquitur shifts the burden of proof to the defendant, while other courts have adopted the less radical view that it merely compels the defendant to go forward with the evidence. However, the majority rule is that the doctrine will permit the jury to find for the plaintiff but not compel it to do so. An even more basic source of controversy, as illustrated by the present case, is whether res ipsa loquitur can be applied in contaminated food cases. Some courts hold that literal adherence to the requirement of defendant's exclusive control of the injuring instrumentality prohibits application of the doctrine. Nevertheless, the majority of courts permit the plaintiff to invoke res ipsa loquitur in these cases, even though they do not always refer to the doctrine expressly by name. The control requirement is circumvented by liberal theorizing that the defendant's control continues right into the hands of

5. PROSSER, TORTS § 42 (2d ed. 1955). It is Prosser's position that much of the confusion surrounding the doctrine is the result of intermingling it with the principles of a carrier's absolute liability, and the burden of proof issue. He cites Pennsylvania courts as prime offenders. (See also note 10 infra.)

6. SCOTT v. LONDON & ST. KATHERINE DOCKS CO., 3 H.&C. 596, 159 Eng. Rep. 665 (Ex. 1865), is generally cited as the case which formulated the requirements.

7. Some states, including Utah, reduce the requirements to two, by including the plaintiff's freedom from fault as implicitly embodied in the requirement of exclusive control by the defendant. WHITE v. PINNEY, 99 Utah 484, 108 P.2d 249 (1940).

8. WIGMORE, EVIDENCE § 2509 (3d ed. 1940). Some courts cite a fourth requirement, that the defendant must be in a better position to determine the cause of the accident, but this is actually a reason for the doctrine and not one of its requirements. FRICKE, Of Mice and Men, and Unrefreshing Pausesh, 3 U. QUEENSLAND L.J. 321 (1956).


10. Because of the harshness of this approach with respect to the defendant, Pennsylvania courts have limited the application of res ipsa loquitur to cases where there are contractual relationships involved, such as with accidents of carriers. Pennsylvania also has an “exclusive control doctrine” which is actually res ipsa loquitur as applied by the majority of courts, having the procedural effect of creating a permissive inference. See, 85 U. PA. L. REV. 212 (1936).

11. SCHECHTER v. HANN, 305 Ky. 794, 205 S.W.2d 690 (1947); SIMS v. DALLAS RY. & TERMINAL CO., 135 S.W.2d 142 (Tex. Civ. App. 1939).


13. FRICKE, supra note 8.


15. Ibid.

the consumer, or that it is control at the time of the negligence rather than at the time of injury which is determinative. Where a container may be opened and resealed by a third party without detection, however, a number of courts revert to a stricter construction of the control requirement, and require plaintiff to show a lack of opportunity of third party tampering if he is to avail himself of the doctrine's aid. However, it would seem that the majority of courts hold that merely a showing that foreign matter was in the container is sufficient to enable the plaintiff to invoke the doctrine, regardless of the type of container involved.

In Jordan v. Coca-Cola Bottling Co., the Supreme Court of Utah adopted the rule that the plaintiff must demonstrate a lack of opportunity for tampering, before res ipsa loquitur is applicable, and the court in the present case followed the precedent. This would appear to be an unfortunate choice on the basis of both logic and policy. As the dissent points out, res ipsa loquitur should not be barred because of the relatively remote possibility that a prankster removed the bottle cap, deposited two paper clips, and then was able to reseal the bottle. The majority’s position seems even more questionable when one considers the improbability that, if such a prank did occur, the manipulation would go undetected. Even in other jurisdictions which have followed the Jordan case, there has not been the strict construction of the control requirement that is found in the instant case but only the requirement that there be no likelihood of tampering. One court, while adhering to the Utah position in principle, rejected the view that the plaintiff must show a lack of any possibility of tampering and held that it was

19. Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942). This landmark case distinguished between different types of product liability cases, and held that in cases involving containers with removable caps, the plaintiff cannot successfully apply res ipsa loquitur, unless he establishes continuous control by the defendant.
21. 117 Utah 578, 218 P.2d 660 (1950). Here the plaintiff allegedly found a fly in a soda he had received from a vending machine. The court, while recognizing that res ipsa loquitur is generally held applicable in such cases, refused to apply the doctrine here because the plaintiff could not show a lack of opportunity for third party tampering.
22. The dissent stated that if the bottle had been opened to insert the paper clips, the fizz in the soda would have been destroyed and the cap would have been loose. A. incaux, 68 Nev. 69, 226 P.2d 794 (1951). Plaintiff drank a “coke” with black slime contained therein, and the court allowed recovery on a res ipsa loquitur theory. The Jordan case (note 21 supra) was distinguished because the soda was purchased at a factory where men were likely to play jokes, while here the soda had only been in the possession of a retailer, and the plaintiff, and on these facts the court felt there was no reasonable likelihood of tampering. In Crystal Coca-Cola Bottling Co. v. Cathy, 83 Ariz. 163, 317 P.2d 1094 (1957), it was held that the question of tampering was one for the jury.
enough for the plaintiff to demonstrate a lack of probability of tampering.\textsuperscript{25} On policy grounds, there are even more cogent reasons for rejecting the instant decision. In cases like the present, the court faces the choice of allowing res ipsa loquitur, with the possibility of foisting a fraudulent claim upon the bottler, or of refusing to apply the doctrine, thereby denying the plaintiff, as a practical matter, of any chance to recover on a theory of negligence.\textsuperscript{26} The Utah courts have found the former possibility more alarming, and have selected the latter solution.\textsuperscript{27} In doing so, they are running counter to the trend toward imposing an insurer’s liability on the distributors of defective food products.\textsuperscript{28} Sound reasoning and modern social concepts support the position that it is more important to protect the consumer against defective food products than the producer against possible fraudulent claims. Even recognizing the need to prevent fraudulent claims, the decision here lacks justification, because the plaintiff could produce X-rays to illustrate that he actually had swallowed the paper clip.\textsuperscript{29} Therefore the result reached seems out of step both with the principles of res ipsa loquitur and the current development of the law in product liability cases.

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\textsuperscript{25} Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 278 P.2d 577 (1955).
\textsuperscript{26} 3 UTAH L. REV. 113 (1955).
\textsuperscript{27} Ibid.
\textsuperscript{28} Fricke, \textit{supra} note 8; Mr. Justice Traynor’s much-noted concurring opinion in \textit{Escola v. Coca-Cola Bottling Co.}, 24 Cal. 2d 453, 150 P.2d 436 (1944), contains a frank call for absolute liability on policy grounds in all product liability cases.
\textsuperscript{29} The dissent makes a strong point of this fact, but it was ignored by the majority.