Recent Developments

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RECENT DEVELOPMENTS

BAILMENTS — STRICT LIABILITY — CONTRACT FOR LEASE OF TRUCKS
CREATES AN IMPLIED WARRANTY OF FITNESS FOR THE DURATION
OF THE LEASE.

Cintrone v. Hertz Truck Leasing & Rental Service
(N.J. 1965)

Plaintiff driver was injured when a truck leased by his employer
from defendant failed to stop in time to avoid colliding with an overhead
bridge. The vehicle was one of nine leased on a long term basis, defendant
agreeing to service, maintain and repair the trucks during the term of the
lease. Plaintiff, contending that the accident was caused by a defect in
the truck’s braking system, based his cause of action upon the defendant’s
alleged negligent inspection or maintenance of the leased vehicle or, in
the alternative, on a breach of defendant’s warranty that the truck was fit
for the use contemplated by the parties. The trial court dismissed the
warranty claim and submitted to the jury the issues of defendant’s negli-
gence and plaintiff’s contributory negligence. From a finding in favor
of defendant, plaintiff appealed. The Supreme Court of New Jersey certified
the case on its own motion and reversed the lower court, holding that
the contract gave rise to an implied warranty of fitness for the intended
use extending over the duration of the lease. Cintrone v. Hertz Truck

The proposition that a negligent manufacturer should be responsible
for any injury to an ultimate purchaser or user of his product is a well
established principle of tort law. As early as 1852, it had been decided
that where an article was intended for human consumption the ultimate
consumer, if injured, should be permitted to recover from the manufac-
turer, even in the absence of privity of contract.1 This rationale was first
extended beyond food and drink in the landmark case of MacPherson v.
Buick Motor Co., Inc.2 There the court ruled that the absence of privity
of contract was not a bar to recovery where the manufacturer’s product,
if negligently made, would cause injury to one who could be classified as
an ultimate consumer.3 However, the problems inherent in establishing

1. Thomas v. Winchester, 6 N.Y. 397 (1852).
2. 217 N.Y. 382, 111 N.E. 1050 (1916).
3. Id. at 389, 111 N.E. at 1053:
   If the nature of a thing is such that it is reasonably certain to place life
   and limb in peril when negligently made, it is then a thing of danger. Its nature
gives warning of the consequences to be expected. If to the element of danger
there is added knowledge that the thing will be used by persons other than the
purchaser and used without new tests, then, irrespective of contract, the manu-
facturer of this thing of danger is under a duty to make it carefully.

(404)
negligence on the part of the manufacturer frequently caused the plaintiff's case to fail. Consequently the aggrieved consumer was often forced to resort to an action founded upon breach of warranty. But since the decision of Winterbottom v. Wright it had been necessary to establish privity of contract between the parties, even where the seller's negligence caused permanent injury to the plaintiff. Consequently, to afford some measure of relief, the courts began to entertain actions for breach of warranty brought by the ultimate consumer in cases where the article sold was intended for human consumption. Thus, in Decker v. Capps, a non-negligent manufacturer who processed and sold contaminated food to a retailer was held strictly liable for injuries sustained by the ultimate consumer. It was only gradually, however, that this approach was adopted in other areas. Perhaps the most significant development occurred when the New Jersey Supreme Court decided the case of Henning sen v. Bloomfield Motors, Inc. Emphasizing the mass advertising of the defendant automobile manufacturer, the court granted recovery for personal injuries sustained by the wife of the ultimate purchaser, stating:

... under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.

This implied warranty was available only to those who were in the distributive chain, and then only if they could show physical injury resulting from a defect in the product. Recovery for mere economic loss unaccompanied by physical injury continued to be limited to situations where the warranty was express, or where plaintiffs could show that they had purchased the product in reliance on the express representations of the manufacturer. Nevertheless, the same court that decided Henning sen

6. 139 Tex. 609, 164 S.W.2d 828 (1942).
7. 32 N.J. 355, 161 A.2d 69 (1960). Mrs. Henning sen sustained serious injuries when her husband's new 1955 Plymouth suddenly veered into a brick wall. The proofs adduced at trial indicated that a defect in the steering mechanism of the car caused the unexpected and costly turn.
8. Id. at 388, 161 A.2d at 84.
9. Prosser, Torts § 97 (3d ed. 1964). "So far as the plaintiff is concerned, no one has yet recovered for personal injuries, on the basis of strict liability without privity, who could not fairly be called a consumer of the product, or at least a user." See, e.g., Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); but cf. Yentzer v. Taylor Wine Co., 414 Pa. 272, 199 A.2d 463 (1964), noted in 10 Vill. L. Rev. 607 (1965), where a hotel bartender was held to come within the statutory term "buyer."
11. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); accord, Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965), where recovery was granted to the buyer of a Rambler for his economic loss due to latent defects in an automobile purchased in reliance upon claims of the manufacturer made through mass advertising media. See also,
recently ruled, in Santor v. A. & M. Karagheusian, Inc.,\textsuperscript{12} that a purchaser may maintain an action directly against the manufacturer based on an implied warranty of fitness even in the absence of privity, and despite the fact that plaintiff’s damages are limited to his loss of bargain. In the companion case of Schipper v. Levitt & Sons, Inc.\textsuperscript{13} the court held there is an implied warranty of habitability in the sale of new housing which survives the deed, at least where the vendor is a mass housing developer and the vendee, with little opportunity for inspection, must necessarily rely on the former’s representations.

In these cases the court abandoned all pretense that contract law governs the implied warranty of merchantability imposed by law, and phrased its decisions in terms of strict liability in tort.\textsuperscript{14} This is, in effect, an enterprise liability, one of the incidents of doing business, and should be classified as a new tort; a new duty is imposed upon the manufacturer enabling the ultimate consumer to come within the protection of the law.\textsuperscript{15}

Precedent for such an approach may be found in the case of Greenman v. Yuba Power Products, Inc.,\textsuperscript{16} where Justice Traynor stated that the implied warranty is imposed by law, is not part of the contract, and does not depend upon any advertising of the manufacturer.\textsuperscript{17} The mere presence on the market of the manufacturer’s product is sufficient to give rise to the implied warranty, as that alone constitutes a representation that the product is fit for the normal use for which it is intended. This rationale strongly suggests the appropriateness of stating the resulting legal theory in terms of strict liability in tort, as the traditional criteria for maintaining warranty actions have clearly been abandoned.

An examination of the underlying policy considerations for the imposition of an enterprise liability leads to the conclusion that the instant court was justified in extending it to bailments for hire. Of the many practical reasons advanced for the imposition of strict liability on manufacturers, those which have found most favor with the courts are the ability of the manufacturer to distribute the loss more equitably and the necessity of compensating one who relied upon the representations of the manufacturer.

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\textsuperscript{12} Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965), where the plaintiff trucker recovered lost profits for the breach of an express warranty that the truck he purchased from the dealer, but made by defendant, would perform satisfactorily for his purpose. \textit{But cf.} the dissent of Justice Peters, which argues for the enterprise liability concept to be applicable in all cases.

\textsuperscript{13} 44 N.J. 52, 207 A.2d 305 (1965). Carpeting that developed a noticeable line after purchase from a retailer was held to constitute a breach of the manufacturer’s implied warranty of fitness.

\textsuperscript{14} See notes 12 and 13 supra.


\textsuperscript{16} 59 Cal. 2d 57, 377 P.2d 897 (1962).

\textsuperscript{17} \textit{Id.} at 701, 377 P.2d at 901.
made through mass advertising. These factors would appear to be equally applicable to a lease transaction.

Harper and James state that a warranty may be annexed to a transaction if one party is in a better position to know the defect of quality that may occur, control the occurrence of that defect, distribute the resulting loss, and anticipate the danger should a defect occur. In addition, there must be reliance on the knowledge and representations of one party by the other. Clearly, these elements are present in the typical lease transaction. This position is encouraged to some extent by the Uniform Commercial Code, in which the framers, in a comment to section 2-313, take the position that warranties need not be limited solely to sales transactions.

It has been pointed out that the law imposes strict liability on a manufacturer to protect the consumer in situations where he cannot protect himself, and to prevent one who induces the public to buy his goods by representing their fitness from escaping liability by invoking the defense of lack of privity. Yet there appears to be no basis for assuming that the consumer is in any better position to protect himself in a lease than in a sale of goods.

Another relevant consideration is the avoidance of the costly circle of litigation by indemnification from retailer to wholesaler to manufacturer. In this context, at least one court has imposed liability on a manufacturer at a point between the inducement and the actual purchase by awarding a fork-lift driver damages for personal injuries sustained while using the vehicle on a trial basis. The court stated that the plaintiff's rights should not depend on the intricacies of sales law, and that the defendant, by putting this vehicle into the hands of a contemplated user, warranted that such vehicle was safe for the purpose for which it would be used. In addition, there was no allegation of negligence in the case.

If these considerations form the real basis for implying a warranty in a sales transaction, there is little reason not to apply a similar warranty to a bailment for hire when the product leased, if defective, could easily

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20. Uniform Commercial Code § 2-313, comment 2 provides in part:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire.

24. Id. at 6. In reference to the implied warranty of merchantability being restricted only to sales, it was said that this should be interpreted as a description of the situation that has most commonly arisen rather than a deliberate limitation of the principle to cases where the product had been sold.
cause serious harm to the ultimate user. Prior decisions holding the lessor of trucks, automobiles, and heavy industrial equipment liable for any injuries resulting from his negligence or failure to inspect or to make repairs serve to point out the dangers inherent in such transactions and the necessity of increasing the protection afforded the consumer. The risk of harm is great; the representation of the lessor that the vehicles are fit for the lessee's purpose is of major proportions; and the resulting reliance of the lessee is bound to be great.

Although an enterprise liability is easily absorbed by such large corporations as Chrysler, Levitt, and Hertz, it could spell financial disaster for much smaller businesses. The Restatement of Torts would afford some relief by imposing strict liability only on those organizations in the business of selling the particular product warranted. Thus, an individual cannot be held to warrant a product he may sell but once. But the ability of the smaller company to absorb this added cost of doing business is still a consideration to be weighed most seriously. If the warranty is based solely on the manufacturer's placing his products in the stream of trade, then the warranty must apply to all. And if it is based on other considerations, it is difficult to imagine any touchstone except contract law which will leave the area in a confused state once more.

The instant decision, although certainly a landmark case in the area of implied warranties and worthy of much attention, is not based on any intricate legal theory. Five years ago, the same court held an automobile manufacturer liable for injuries caused by a defect in one of its cars, even though there was no privity between the parties and no negligence could be shown. Today this court imposes a similar liability upon a leasing corporation, basing its decision on the same policy considerations that governed the decision in Henningsen. It is submitted that this decision will be followed to the same extent as was Henningsen, and that the Supreme Court of New Jersey must now be considered to represent the most advanced legal thought in the area of implied warranties.

**Richard G. Greiner**

28. Supra note 7.
29. Supra note 13.
30. Supra note 26.
31. Restatement (Second), Torts § 402A (1965), provides in (1)(a):
One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and . . . .
32. Supra note 7.
DOMESTIC RELATIONS — ALIMONY — VALID SEPARATION AGREEMENT NO BAR TO SUBSEQUENT MODIFICATION OF DIVORCE DECREE BASED ON THE AGREEMENT.

McMains v. McMains (N.Y. 1965)

In 1944 plaintiff wife and defendant husband entered into a separation agreement providing for, among other things, $100 a month support for the wife and stipulating that the terms of the agreement might be incorporated into a subsequent divorce decree but that the agreement should not be considered merged or cancelled by such decree. The wife thereafter obtained a divorce decree which incorporated the stipulated support payments as alimony. In 1964 plaintiff wife brought an action to increase the amount of alimony because, she alleged, by reason of poor health and heavy medical expenses the sum was insufficient for her basic needs and she was in danger of becoming a public charge. A trial court order, modifying the original judgment by granting the increase in alimony, was overturned on appeal to the Appellate Division. The New York Court of Appeals reversed the Appellate Division on the law, holding that a separation agreement, valid and adequate when made, continues to bind the parties, but that this does not prevent a later modification of the decree by increasing the alimony when the wife shows she is unable to support herself and is in danger of becoming a public charge. McMains v. McMains, 15 N.Y.2d 283, 206 N.E.2d 185 (1965).

It is common practice for a husband and wife, upon agreeing to separate, to enter into an agreement establishing their respective property and custody rights, and the amount of support which the husband will be required to pay to his spouse. The consideration for such agreements is usually found in the common law and statutory obligation of the husband to provide continued support for his wife.¹ Under the common law doctrine of coverture all agreements to which a married woman was a party were void, and an agreement between husband and wife was no exception.² Today, since the doctrine of coverture has been abrogated by enabling statutes and court decisions, most jurisdictions will permit and enforce such agreements³ if they are found to be fair and adequate when made and

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¹ North v. North, 100 S.W.2d 582 (Mo. 1936).
² Madden, Persons and Domestic Relations 331 (1931).
³ Moreover, since the law favors out of court settlements, and since they violate no public policy, courts will frequently commend such agreements.

[When a separation has actually taken place, or when it has been fully decided upon, and the articles [of the separation agreement] contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no principle of public policy is disturbed by them; on the contrary, if they are fair and equal, and are not the result of fraud or coercion, reasons abundant may be found for supporting them, in their tendency to put an end to controversies, to prevent litigation, and to give to the wife an independence in respect to her support which without some such arrangement she could not have under the circumstances. Randall v. Randall, 37 Mich. 563, 571-73 (1877).]
are not in their effect promotive of divorce. If one of the parties subsequently obtains a divorce, as is usually the case, the courts will frequently look to the agreement in establishing the amount of alimony, and a few courts will feel compelled to incorporate the terms of the support agreement into the divorce decree if it is found to be valid and fair to the wife.

Where the amount of alimony is based on the provisions of a prior separation agreement a question frequently arises as to the power of the court subsequently to modify the decree on the petition of one of the parties. To find such power initially, the courts must look directly to the divorce and alimony statutes, since at common law final divorces were not given and hence alimony as currently conceived was not a legal concept.

Moreover, a statute which simply grants the power to award alimony is generally interpreted by the courts not to grant the additional power to modify the award unless the court specifically reserves such power in its original order. As a consequence, most statutes also grant the court power to modify the award “as justice so requires,” thereby automatically writing a reservation into all decrees. To what extent this power of the court is dependent upon a separation agreement incorporated in the award is a many faceted problem which has caused considerable confusion in the law of divorce. The confusion arises from the loose language which many courts use in describing the relationship between the separation agreement and the decree embodying its terms. For example, some courts say that incorporation is no more than a ratification of the contract, and therefore, under ordinary contract principles, the amount of the award cannot be changed without the consent of both parties. Other language pointing to the same conclusion is that the parties are “sui juris” and the obligations,


6. Alimony, originally, was the method used by the ecclesiastical courts of England to enforce the husband’s duty to support his wife after separation. In those times only divorces a mensa et thoro, or limited divorces, were given. Upon marriage title to the wife’s property became absolute in the husband, and a divorce a mensa et thoro did not re vest title in the wife; therefore, such authority was absolutely necessary to protect the wife. Divorces a vinculo matrimonii, or absolute divorces, with attendant alimony, are of purely statutory origin. MADDEN, op. cit. supra note 2, at 319, 25.


being contractual in nature, are not alterable without mutual consent.\textsuperscript{10} Still others consider it a consent judgment not subject to judicial scrutiny in the absence of fraud.\textsuperscript{11} And a few say that to disturb the agreement amounts to the impairment of the obligations of a contract.\textsuperscript{12} Other cases, as will be seen later, hold that the contract in no way affects the court's power to modify the award;\textsuperscript{13} this on the theory that the power is statutory and may not be constricted by private contract. In addition, decisions within the same jurisdiction will often appear inconsistent.

Some courts solve the problem very simply by saying that where a prior agreement is incorporated into the decree it becomes merged therein, that is, has no independent existence, and so cannot hinder subsequent modification of the alimony award.\textsuperscript{14} However, the majority of the courts, including New York, apparently reluctant to rule out of existence a contract which assures to the wife the security of a minimum level of support, hold that the prior agreement not only survives the decree but is strengthened by it to the extent that a later collateral attack on the agreement as unfair is not permitted under familiar principles of res judicata.\textsuperscript{15} So the narrow question presented in these jurisdictions is to what extent the court will forego its statutory power to modify a divorce decree in sustaining the validity and effect of a contract which was at least impliedly sanctioned and accepted by the court as a fair measure of support. In answer to this question a general rule is often stated 'that where a court has the general power to modify a decree for alimony, or support, the exercise of that power is not affected by the fact that the decree is based on an agreement entered into by the parties to the action.'\textsuperscript{16}

The New York law was first formulated in the case of \textit{Galusha v. Galusha},\textsuperscript{17} where the court flatly stated that in an action brought by the wife for divorce on the ground of adultery the court had no power to set aside the separation agreement without the consent of both parties and no power to make an additional award for the support of the wife beyond the amount agreed upon, at least where that amount was not insufficient to

\begin{footnotes}
\footnotetext{10}{See Note, 22 WASH. U.L.Q. 392, 397 & n.7 (1937).}
\footnotetext{11}{Hargis v. Hargis, 252 Ky. 198, 66 S.W.2d 59 (1934).}
\footnotetext{12}{Eddy v. Eddy, 264 Mich. 328, 249 N.W. 868 (1933).}
\footnotetext{14}{\textit{E.g.}, Hough v. Hough, 26 Cal. 2d 605, 160 P.2d 15 (1945); Adler v. Adler, 373 Ill. 361, 26 N.E.2d 504 (1940); Corbin v. Mathews, 129 N.J. Eq. 549, 19 A.2d 633 (1941); Prime v. Prime, 172 Ore. 34, 139 P.2d 550 (1943); \textit{Ex parte} Jeter, 193 S.C. 278, 8 S.E.2d 490 (1940). \textit{But see} Note, 63 Harv. L. Rev. 337, 339 (1950), where it is postulated that the doctrine of merger is technically incorrect. Undoubtedly it was in view of these cases that the parties to the agreement in the present case expressly stipulated that the agreement if incorporated in the divorce decree was not to be considered merged therein.}
\footnotetext{15}{\textit{E.g.}, Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940). This is especially so where the agreement provides that it will survive the decree. See Taliaferro v. Taliaferro, 125 Cal. App. 2d 419, 270 P.2d 1036 (1954); DeViney v. DeViney, 269 S.W.2d 936 (Tex. 1954).}
\footnotetext{16}{Annot., 166 A.L.R. 675, 676 (1947).}
\footnotetext{17}{116 N.Y. 635, 22 N.E. 1114 (1889).}
\end{footnotes}
support the wife.\textsuperscript{18} Subsequently, in \textit{Goldman v. Goldman},\textsuperscript{19} a case widely cited in other jurisdictions, a valid separation agreement made by the parties guaranteed the wife $21,000 a year as support. The wife obtained a divorce which incorporated the contractual provisions for support. Ten years later the ex-husband sought a reduction in the alimony to $14,000 a year, and it was the wife's contention that under the \textit{Galusha} case it could not be changed without her consent. The court, in allowing the reduction, sought to distinguish the \textit{Galusha} case by saying that neither that decision nor any other New York case ever made the drastic penalty of contempt of court applicable to a breach of a marital obligation action available for the enforcement of a contract,\textsuperscript{20} and that to maintain the level of alimony at its present rate would in effect be giving the wife a contempt of court remedy for breach of contract. The court was careful to point out that its decision in no way affected the wife's rights to the $21,000 established under the contract and she retained all her usual remedies for breach.

In justifying its decision the court in the instant case made three distinct points: first, that the court is granted by the statute the power to award and modify alimony decrees and that the parties to a divorce action can do nothing to take away this power;\textsuperscript{21} second, that a husband has both a common law and a statutory duty to continue to support his wife, and any agreement purporting or so construed as to relieve him of that duty would be void under the General Obligations Law;\textsuperscript{22} third, that the \textit{Goldman} case, and others, read in the light of their results, indicate that the court has always possessed the authority to modify a decree based on a separation agreement between the parties.

The first of these points would withstand all challenge in view of the clear and unequivocal language of the statutes which grant wide discretion to the courts in the matter of alimony.\textsuperscript{23} This alone, however, does not answer the question of the extent to which the court, in fairness and equity, should refrain from using this power. The second proposition may be challenged by reference to the language of \textit{Kyff v. Kyff},\textsuperscript{24} cited by the majority in other contexts, to the effect that while a husband may not under the law contract away his liability to his wife for her basic support, as by a payment of a lump sum in lieu of alimony, he may, in a proper

\textsuperscript{18} \textit{Id.} at 643, 22 N.E. at 1116.
\textsuperscript{19} 282 N.Y. 296, 26 N.E.2d 263 (1940).
\textsuperscript{20} \textit{Id.} at 301, 26 N.E.2d at 267.
\textsuperscript{21} N.Y. \textit{DOMESTIC RELATIONS LAW} \textsection{236}.
\textsuperscript{22} N.Y. \textit{GENERAL OBLIGATIONS LAW} \textsection{5-311}.
\textsuperscript{23} N.Y. \textit{DOMESTIC RELATIONS LAW} \textsection{236}; N.Y. \textit{GENERAL OBLIGATIONS LAW} \textsection{5-311}.
\textsuperscript{24} 286 N.Y. 71, 35 N.E.2d 655 (1941). "[A] wife may not voluntarily release her husband from his duty to support her and neither may the husband for a consideration purchase exemption from that duty. . . . Nonetheless, where the husband and wife agree upon the measure of the support which they deem proper for the benefit of the wife, then the court will not compel the husband to support the wife in a greater sum . . . unless the amount agreed upon is plainly inadequate." \textit{Id.} at 74, 35 N.E.2d at 657.
case, decide with her on a suitable measure of support which, if approved by the court, cannot subsequently be questioned. As to the third point, the Goldman case is clearly inconsistent on its facts with the present case in that the court in the former granted a reduction in the husband's alimony while carefully declining to disturb the right of the wife to the full amount of the agreed sum under the contract, while in the latter, by requiring the husband to pay more than the amount established by the contract, the effect is to abrogate any rights the husband may have enjoyed under the agreement. As the dissent in the instant case points out, the reasoning that the authority to reduce the alimony naturally implies the right to increase the alimony would seem to be a *non sequitur*.

Despite the court's attempt to supply a logical basis for its decision, it is difficult to perceive any consistency in upholding a contract as fair and valid, stamping it with at least implied approval by incorporating it in a decree for alimony, and then subverting the contract by awarding alimony in excess of that agreed upon by the parties and sanctioned by the court, while conversely allowing the contract to subvert the decree in a case such as Goldman where the husband has acquired a reduction in the alimony. But the decision in the present case would seem necessary from a purely practical point of view. The plaintiff wife was in ill health, unable to work, and destitute; she was clearly unable to support herself on the meager award under the agreement, while the husband had met with good fortune and enjoyed a very substantial income. But it is a dubious standard that affords the wife relief from her contract and not the husband.

Perhaps it is not the present case which is at fault but rather the previous ones which do not relieve the husband of his burdens under the contract upon a showing of need. Such considerations as the husband's solemn duty to support his wife when able, the interest of the state in keeping her from becoming a public charge while the husband prospers, the blatant inequity of forcing the destitute wife, in the face of changed and unforeseen circumstances, to remain bound by a contract made for her support twenty years ago (especially in an economy of gradual inflation where the passage of time adds heavily to the unfairness of a contract which originally seemed adequate) calls for such a decision. But many of these same inequities are present where the husband, for just and equitable reasons satisfactory to the court, deserves relief from the burden of the agreement, and yet must be satisfied with an adjudication which, while lowering the alimony award, leaves him bound to the contract. It would seem wiser for the court to adopt a rule toward incorporation of separation agreements by which power to regulate the amount of support money payable by the husband would be retained in both situations.25

*William E. Chillas*

EVIDENCE — PRIOR CONVICTIONS — PENNSYLVANIA SLAYER'S ACT
BARS RE-LITIGATION OF MURDER ISSUE IN SUBSEQUENT PROBATE
PROCEEDING.

Kravitz Estate (Pa. 1965)

Claimant was tried by a jury for the murder of her husband and found
guilty of murder in the second degree.1 When she later presented a claim
to her husband’s residuary estate, the Orphan’s Court refused to permit
the question of her guilt or innocence to be relitigated and dismissed her
claim because of her criminal conviction.

On appeal, the Supreme Court of Pennsylvania, two justices dissenting, held
that under the Pennsylvania Slayer’s Act2 the conviction of
murder was not merely prima facie evidence of the fact that claimant had
killed the testator but it operated as a conclusive bar to her right to take
under her husband’s will. Kravitz Estate, 418 Pa. 319, 211 A.2d 443 (1965).

A litigant in a civil action who seeks by the use of a prior criminal
conviction to prove his adversary guilty of some criminal act may, first,
attempt to invoke the doctrine of collateral estoppel, and, if this fails, then
attempt to introduce the conviction into evidence for whatever weight
it may have in the forum.

Under the traditional view, collateral estoppel3 cannot be applied in
this situation because the requisite identity of parties is not present. Under
the doctrine of “mutuality of estoppel”4 the party seeking to assert collateral
estoppel must have been a party, or in privity with a party, to the prior
action. This is not the case where a civil litigant seeks to apply a prior
criminal conviction against his adversary, because it is the State which
prosecutes the criminal action whereas the civil proceeding is maintained
by an individual.5 Moreover, since a criminal proceeding is brought to
vindicate a public right and a civil action involves only the rights of private
parties, the purposes of the litigations are different.6 However, where the

summary of the proceedings in the trial court.
3. Although collateral estoppel operates within the broad concept of res judicata,
an important distinction should be observed. Whether to admit a prior conviction is
strictly a matter of estoppel rather than total res judicata since the civil proceeding
involves a different cause of action from that in the criminal one. Under total res
judicata, the prior adjudication operates as an absolute bar with regard to both the
matters offered and those that might have been offered to sustain or defeat the claim.
Under collateral estoppel, the judgment operates as an estoppel only as to matters
actually litigated and decided. See generally, Developments in the Law — Res
4. “No party is, as a general rule, bound in a subsequent proceeding by a
judgment, unless the adverse party now seeking to secure the benefit of the former
adjudication would have been prejudiced by it if it had been determined the other
way.” 1 FREEMAN, JUDGMENTS § 428 (5th ed. 1925).
Wiley Methodist Episcopal Church, 23 N.J. Super. 342, 93 A.2d 9 (1952); Restatement,
JUDGMENTS § 93 (1942).
6. Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Seidman v.
Seidman, 53 R.I. 96, 164 Atl. 194 (1933).
requirement of mutuality of estoppel has been abandoned, it has been held that the prior conviction may be asserted as a conclusive bar to recovery in the subsequent civil proceeding.

At common law, a judgment in a criminal case could not be introduced in evidence in a civil action to prove the facts upon which it was based. However, the number of courts which refuse to apply this general rule is constantly growing, with the result that the decisions on this question may be divided into three broad categories.

A diminishing majority of jurisdictions exclude the record of a prior criminal proceeding — whether resulting in a conviction or an acquittal — as a general rule. Admission of the prior conviction on the issue of guilt is said by these courts to violate the opinion rule because the criminal judgment constitutes only the opinion of a jury. These courts also maintain that the hearsay rule is violated because the judgment is an out of court statement offered for the truth of the matter asserted. Therefore, many jurisdictions apply the majority rule even in situations where the convicted criminal seeks in a civil action to reap the benefits of his own criminal acts.

Commentators have suggested that the hearsay rule should not be a bar to the admission of the criminal record, because it is intended primarily to protect the right to cross-examination to determine what weight, if any, should be given to testimony, and although the criminal record is no more than a conclusion reached from the testimony produced at trial, the hearsay problem is overcome since the party against whom the conviction is offered was present at the criminal trial, was confronted by the witnesses against him, and had the opportunity to cross-examine them. The opinion rule

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10. The following analysis concerns the approaches taken by the various courts in the absence of applicable statutes. Also, it should be noted that the classifications are primarily for the sake of convenience; decisions within a particular jurisdiction may, and often do, fall into more than one category. See 30 FORDHAM L. REV. 786 (1962).
11. There is little conflict in the treatment of prior acquittal; almost all courts exclude them in subsequent civil proceedings. The reason is that an acquittal shows only that a reasonable doubt existed in the minds of the jurors and such evidence has little probative value where the standard of proof is a preponderance of the evidence. Helvering v. Mitchell, 303 U.S. 391 (1938). But see Bush, Criminal Convictions as Evidence in Civil Proceedings, 29 Miss. L.J. 276, 278 (1958).
12. See, e.g., State v. Fitzgerald, 140 Me. 314, 37 A.2d 799 (1944); Jenkins v. Jenkins, 103 Ore. 208, 204 Pac. 165 (1922).
14. Ibid.
16. Mccormick, Evidence § 259 (1954); 5 WIGMORE, EVIDENCE § 1671(a) (3d ed. 1940).
objection is countered by the argument that while the conviction represents the opinion of the judge or jury, it is, nevertheless, a reliable and trustworthy opinion formed by those acting under a duty imposed by law.  

Because they find these and other arguments against the majority view persuasive, an increasing number of jurisdictions admit prior criminal convictions, but only as prima facie evidence of guilt. This approach is supported by the reasoning that since a criminal conviction requires proof of guilt beyond a reasonable doubt, as against only a preponderance of evidence needed in a civil action, it is illogical to ignore the criminal conviction. The drafters of both the Uniform Rules of Evidence and the Model Code of Evidence advocate the admissibility of prior criminal convictions in a subsequent civil action. The Model Code makes all prior convictions admissible as tending to prove the facts alleged. The Uniform Rules distinguish between felonies and misdemeanors, maintaining the exclusionary rule only in the case of the latter.

The rule that prior convictions are admissible has not gone without criticism. Although the courts which admit prior criminal convictions do not openly advocate their conclusiveness, the inherent danger of admissibility is that the jury may not make such a distinction and the practical result may be that the conviction will dominate all other evidence, so that the opportunity to rebut the prior conviction evidence will be meaningless. The admissibility rule has also been criticized as being at best a compromise which does not completely satisfy the sometimes conflicting policy considerations of affording a fair trial, and still preventing the relitigation of fact issues previously determined.

A definite minority of courts have taken the position that a criminal conviction is conclusive in a subsequent civil proceeding. The decisions, however, indicate that the rule of conclusiveness is limited to the situation where the plaintiff in the civil action is seeking to profit from the criminal conduct for which he had previously been convicted. These courts are

18. Ibid.
19. By this is meant evidence “which suffices for the proof of a particular fact until contradicted and overcome by other evidence.” Dodson v. Watson, 110 Tex. 355, 358, 220 S.W. 771, 772 (1920).
21. Ibid.
22. MODEL CODE OF EVIDENCE rule 521 (1942); UNIFORM RULE OF EVIDENCE 63 (20).
24. The rule giving conclusive effect to the prior conviction is limited to a final judgment on the merits and is rarely applied to convictions of minor traffic offenses and other misdemeanors. The latter are excluded because the safeguards afforded the accused are often perfunctory, and defendants tend to accept a modest fine as a matter of convenience. See, e.g., Day v. Gold Star Dairy, 307 Mich. 383, 12 N.W.2d 5 (1943); Walther v. News Syndicate Co., 276 App. Div. 169, 93 N.Y.S.2d 537 (1949).
primarily influenced by the clear injustice and defiance of public policy which would result from allowing a criminal to benefit from his own wrongful act.\textsuperscript{26} In 1956, the Superior Court of Pennsylvania indicated its approval of this approach when it held, in \textit{Mineo v. Eureka Security Fire & Marine Ins. Co.},\textsuperscript{27} that the named insured in a fire insurance policy was conclusively barred from recovery under the policy by his prior conviction for arson. In accord is a later decision in which the Pennsylvania Supreme Court held that the conviction of the person bonded was conclusive as to the surety's liability for the amount of the bonds.\textsuperscript{28} However, in the latter case there was a basis for the application of res judicata since the Commonwealth was, in effect, the litigating party in both actions, and thus the case may be consistent with the common law rule. In the recent case of \textit{Hurtt v. Stirone},\textsuperscript{29} the Pennsylvania court further departed from the majority rule by extending conclusive effect to a previous federal criminal conviction. Prior to the above cases, Pennsylvania decisions had been in conformity with the majority rule that a criminal conviction is not admissible in a subsequent civil suit involving the same facts.\textsuperscript{30}

In the absence of the Slayer's Act, the instant case could have easily been disposed of on the basis of these prior decisions. The applicability of that statute, however, injected an element of complexity into the case. The Slayer's Act\textsuperscript{31} provides that "no slayer shall in any way acquire any property or receive any benefit as a result of the death of the decedent. . . ."\textsuperscript{32} Section 14 of the statute specifies that "the record of his conviction of having participated in the willful and unlawful killing of the decedent shall be admissible in evidence against a claimant of property in any civil action arising under this act."\textsuperscript{33} It seems apparent from the statutory language that the legislature intended to adopt the compromise view,\textsuperscript{34} that is, to make such convictions admissible as prima facie evidence in the situation where a person is attempting to profit by his own wrong.\textsuperscript{35}

\begin{footnotes}
\item[26] See Austin v. United States, 125 F.2d 816 (7th Cir. 1942) (conviction of murder admitted to estop claimant from recovering as beneficiary of life insurance policy).
\item[31] \textit{Pa. Stat. Ann.} tit. 20, §§ 3441-56 (Supp. 1964). A "slayer" is defined in section 1 of the Act as "any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person."
\item[33] Emphasis added.
\item[34] See notes 16-23 supra.
\item[35] \textit{Pa. Stat. Ann.} tit. 20, § 3455 (Supp. 1964) provides: "This act shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong, wherever committed." Although this language initially seems to support the majority's position (and the court in fact relies upon it), it must be remembered that, as pointed out above, Pennsylvania followed the common law rule on admissibility of prior
\end{footnotes}
It is important to recognize that at the time the legislature enacted
this law, the decisions in Pennsylvania adhered to the view that prior
criminal convictions were inadmissible.36 It appears, therefore, that the
legislature intended to apply a special rule in a specific situation for reasons
of public policy. Also significant is the fact that the legislature chose to
adopt, almost in full, the statute proposed by Professor Wade.37 In fact,
section 14 of the Pennsylvania Statute, is identical to the section 14
which he proposed. In commenting upon his proposal, he says:

This section is purely optional, and may be included or omitted as
the particular state may desire. In the absence of this section the vast
majority of the states would hold that the record of a conviction in
a criminal prosecution is not admissible in a civil action to prove the
guilt or innocence of the person tried. . . . Some states may even
wish to make a conviction conclusive evidence of the guilt of the
alleged slayer.38

The lower courts in Pennsylvania have consistently construed the
statute to provide for admissibility only.39 But the Supreme Court is
apparently willing to extend its rejection of the common law rule even
into an area in which the legislature has clearly spoken. Such a per-
version of statutory language does not seem necessary. The majority
maintain that to interpret the Slayer's Act otherwise and allow the con-
victed slayer to relitigate the issue of guilt would make a mockery of law
and justice.40 This argument appears to emanate from the fear that an
inconsistent decision might be reached in a subsequent civil trial. How-
ever, it is inherent in the concept of the jury system that different juries
do act inconsistently and that a jury may err in its findings. It is not
unusual to have a judgment notwithstanding the verdict, and appellate
courts continually study and dissect jury determinations which are con-
tested as being unwarranted. It can also be argued that, rather than
destroying confidence in the jury system,41 relitigation of an issue decided
in a prior criminal case would only bolster faith in the judicial process and
insure that parties establish the allegations of their pleadings by a pre-
ponderance of independent evidence.42

Holding a prior criminal conviction to be conclusive evidence also
makes automatic the imposition of an additional penalty not prescribed for
the criminal act. Public policy demands that a person be precluded from
profiting by his own wrong, but in a civil trial where the commission of

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36. See note 30 supra.
37. Wade, Acquisition of Property by Willfully Killing Another — A Statutory
Solution, 49 Harv. L. Rev. 715 (1936).
38. Id. at 750. (Emphasis added.)
191 (1947).
42. See 2 Syracuse L. Rev. 106 (1950).
that wrong is relevant, it should be proved without unfair prejudice and according to the rules of evidence. It is no hardship to require civil litigants to conduct their case in the usual manner, without allowing one party a “windfall” from an action prosecuted by the state.

Whether to allow a prior criminal conviction to be conclusive evidence in a subsequent civil action is a question which, in its essence, reflects the conflict between traditional rules of law and pragmatic policy considerations. A balance between economy of judicial action and a strict view of the principles of evidence may be achieved by allowing the prior conviction the limited effect of prima facie evidence. The latter approach was adopted by the Pennsylvania legislature.

*Martin G. McGuinn, Jr.*

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**FEDERAL COURTS — REVIEW OF COURTS-MARTIAL — DISTRICT COURT LACKS JURISDICTION IN DECLARATORY JUDGMENT ACTION ALLEGING VIOLATION OF CONSTITUTIONAL RIGHTS BY A COURT-MARTIAL.**

*Ashe v. McNamara* (D. Mass. 1965)

The present plaintiff and two co-defendants were tried by a general court-martial in 1945 for the offense of striking a fellow member of the United States Navy. Although a discrepancy developed during trial between the testimony of the present petitioner and that of one of his co-defendants, counsel was nevertheless directed to proceed with the defense of all three men. Plaintiff was convicted and, after unsuccessfully exhausting his administrative remedies, was dishonorably discharged.

Some twenty years later he instituted the present action in the United States District Court for the District of Massachusetts, seeking a declaratory judgment1 that his conviction and sentence were invalid, and a mandatory injunction2 to compel the Secretary of Defense to remove his dishonorable discharge.

   
   In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

2. 28 U.S.C. § 1361 (Supp. V, 1962) provides: “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”
Defendant thereupon moved for a summary judgment, which the court granted, holding that the determination of a court-martial is not subject to review by a civil court in an action for a declaratory judgment, even though plaintiff may have been denied the right to counsel. Ashe v. McNamara, 243 F. Supp. 243 (D. Mass. 1965).

Traditionally, the federal courts have been precluded from direct review of courts-martial determinations by a number of judicial and statutory prohibitions founded largely upon practical considerations of expediency and discipline. Thus, prior to the last several decades military convictions, when finally approved, were as conclusive as those of a civil court of last resort.

However, notwithstanding these prohibitions, the civil courts, by taking cognizance of the fact that courts-martial were tribunals of limited jurisdiction, subsequently subjected them to collateral review on the issue of jurisdiction. At first, such inquiries were limited to determinations of whether the tribunals had been properly convened and constituted, whether it had jurisdiction over the person of the accused and the offense charged; and whether it had authority to impose the sentence, and had done so in the manner prescribed by law. It thus became clear that the scope of collateral review was limited specifically to a consideration of what Mr. Justice Black has characterized as jurisdiction in the "historical sense." Mere factual error or procedural irregularity committed in the course of

3. E.g., In re Yamashita, 327 U.S. 1, 8 (1946); In re Vidal, 179 U.S. 126 (1900); Ex parte Valladingham, 68 U.S. (1 Wall) 243 (1863); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

4. 10 U.S.C. § 876 (1958), as amended (Supp. V, 1964), which reads in pertinent part: "... all dismissals and discharges carried into execution under sentence by courts-martial following approval, review, or affirmation as required by this chapter are final and conclusive ... and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States. ..."

Earlier provisions of finality concerning court-martial judgments under the former Articles of War were found in article 50, formerly § 1521 of Title 10, Army and Air Force (June 4, 1920) ch. 227, subch. 11, § 1, 41 Stat. 797; June 24, 1948, ch. 625, Title 11, § 226, 62 Stat. 635.

5. See Dynes v. Hoover, supra note 3, at 65-67, where the Court noted that otherwise the civil courts would virtually administer the Articles of War irrespective of those to whom that duty has been delegated by the laws of the United States.

6. See cases cited at note 3 supra.

7. E.g., In re Grimley, 137 U.S. 147, 150 (1890); Ex parte Reed, 100 U.S. 13 (1879).


9. E.g., Ex parte Reed, 100 U.S. 13 (1879); United States ex rel. Viscardi v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920).


11. E.g., Bishop v. United States, 197 U.S. 334 (1905); Carter v. Roberts, 177 U.S. 496 (1900); Swaim v. United States, 165 U.S. 553 (1897); Ex parte Mason, 105 U.S. 696 (1881).

an otherwise lawful proceeding were considered beyond the purview of the courts.\textsuperscript{13} However, the juxtaposition of two significant developments has shaken the unanimity among the federal courts concerning the scope of this collateral review.\textsuperscript{14}

The first was the general expansion of collateral review in proceedings for habeas corpus with respect to non-military criminal convictions.\textsuperscript{15} Prior to the landmark decision of the Supreme Court in \textit{Johnson v. Zerbst},\textsuperscript{16} the extent of collateral review facilitated by habeas corpus was equally narrow in both military and civil cases: both were limited to considerations of technical jurisdiction.\textsuperscript{17} In \textit{Zerbst} however, the Court extended the the term "jurisdiction" beyond its purely technical denotation, holding that error in the course of a trial which results in a violation of an accused's constitutional guarantees would act to deprive the court of jurisdiction.\textsuperscript{18} This theory was subsequently expanded to afford relief even where the alleged denial of constitutional rights was raised at trial and the issue decided adversely to the defendant, provided it could be demonstrated that the lower court had erred with respect to such finding.\textsuperscript{19}

The second notable development was the mobilization of enormous citizen armies during World War II. As a result, large numbers of men imprisoned or burdened with dishonorable discharges petitioned the courts, seeking relief on the various constitutional grounds previously available only to their civilian counterparts.\textsuperscript{20} In many of these cases, petitioners were unable to meet the orthodox grounds of collateral review; for, as a rule, the courts-martial had met the technical tests of jurisdiction. Often, however, the hard facts of a particular case caused the courts to reject the traditional restrictions on collateral review.\textsuperscript{21}

\begin{itemize}
\item[13.] The Supreme Court has held that a civil court, in exercising collateral review over a court-martial, does not exercise power to correct factual error or procedural irregularity. Collins v. McDonald, 258 U.S. 416 (1922); \textit{In re Grinley}, 137 U.S. 147, 150 (1890); Keyes v. United States, 109 U.S. 336 (1883).
\item[15.] See Duke & Vogel, \textit{supra} note 12, at 438 n.17 and accompanying text.
\item[18.] Johnson v. Zerbst, 304 U.S. 458, 468 (1938).
\item[20.] See Bishop, \textit{supra} note 14, at 43-48. Professor Bishop notes that . . . it was inevitable, given the frequently amateur personnel of wartime courts-martial, . . . that some of the petitioners could tell startling, and sometimes apparently truthful, tales of unfairness, calculated to cause a federal judge of average fairmindedness to chafe under the restrictions of the traditional rules and make him receptive to the heterodox proposition that even soldiers were entitled to some sort of due process, whether by virtue of the Constitution or the Articles of War, the denial of which could cause a court-martial to lose the jurisdiction that it would otherwise have had.
\end{itemize}
Thus, in *Shapiro v. United States*, the Court of Claims applied *Zerbst* to invalidate a conviction by an otherwise lawfully constituted court-martial. The court reasoned that the tribunal had lost jurisdiction to proceed when it deprived the accused of his right to counsel, and had thus failed to “complete the court — as the Sixth Amendment required." While the Court of Claims has adhered to this position in subsequent decisions, other federal courts have instead turned to the concept of “military due process” as a means of expanding the scope of review over court-martial determinations.

In *United States ex rel. Innes v. Hiatt*, the Court of Appeals for the Third Circuit, while recognizing that military and civil due process were not totally synonymous, nevertheless held that the “basic standard of fairness” afforded by the due process clause of the fifth amendment applied to a military defendant as well as to an accused in a non-military criminal proceeding.

Similarly, in the case of *Hicks v. Hiatt*, where petitioner had been convicted by a general court-martial on a charge of rape, the court found the “totality of error” committed by the court martial so extensive as to have deprived petitioner of his right to a fair trial. The court concluded that it had jurisdiction to review the proceeding inasmuch as the “procedures of military law . . . [had not been] . . . applied to Hicks in a fundamentally fair way." These courts have never considered the applicability of *Zerbst* to the military defendant, but rather have adopted the view that in habeas corpus proceedings the scope of collateral review is extended to include the question of military due process as though the court were reviewing the action of a statutory agency.

Despite the growing dissatisfaction among the lower federal judiciary with the traditional scope of collateral review, the Supreme Court, in *Hiatt v. Brown*, rejected this approach, summarily declaring that collateral review was a strictly limited function that should not be extended to consideration of a court-martial’s compliance with the due process clause. The Court noted that the correction of errors affecting military due process was statutorily reserved to the military authorities.

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23. *Id.* at 207–08.
26. 141 F.2d 664 (3d Cir. 1944).
27. *Id.* at 666.
28. 64 F. Supp. 238 (M.D. Pa. 1946) (dicta). It should be noted that the habeas corpus proceeding was dismissed by the court after the War Department Restorations Section vacated the discharge and ordered petitioner’s release. See Pasley, *supra* note 12.
32. *Id.* at 105.
However, in the subsequent decision of Burns v. Wilson, the Court, although recognizing that district courts did not have jurisdiction to review a military court's alleged violation of due process, stated that:

It is the . . . function of the civil courts to determine whether the military have given fair consideration to each of these claims [of deprivation of basic constitutional rights]. . . . [But had] the military courts manifestly refused to consider those claims, the District Court was empowered to review them de novo.

An examination of Burns indicates that the Court has given little consideration to the degree of protection afforded the military defendant by the Bill of Rights. In addition, subsequent lower court decisions have indicated that the issue of basic fairness remains unresolved. But while the Court has been unable to provide clear direction in defining the federal courts' jurisdiction to review questions of military due process, it should be noted that it has yet to be presented with the applicability of Johnson v. Zerbst and its extension to the area of military law.

In the instant case, plaintiff submitted that his conviction and dishonorable discharge by a general court-martial in violation of his constitutional right to counsel constituted a serious and continuing injury from which the federal courts were empowered to grant declaratory and injunctive relief. In rejecting this contention, the court ruled that an action for declaratory judgment and injunctive relief was inappropriate in light of the provision in the Uniform Code of Military Justice that judgments and sentences of courts-martial are "final and conclusive."

Inasmuch as these restrictions do not constitute a bar to collateral review, it would appear that the court assumed petitioner's cause of action constituted a direct, rather than collateral, attack on his conviction. In order to analyze the court's disposition of the petitioner's cause of action, it is therefore necessary to focus on whether declaratory and injunctive relief are proper vehicles for collateral review.

Traditionally, questions concerning the sufficiency of a military tribunal's jurisdiction have been open to review by the civil courts in suits to recover compensation, on writs of prohibition, and most often on

34. Id. at 142. In Burns, the Court indicated that in certain limited instances it would be proper for civilian courts, in habeas corpus proceedings, to determine whether a military tribunal had given full consideration to objections raised by the defendant on due process grounds. The impact of this dictum is uncertain. See Note, 65 Yale L.J. 412, 421-22 n.48 (1956).
37. See note 4, supra. But see Burns v. Wilson, 346 U.S. 137, 142 (1953), where the Supreme Court referred to the provision and said: "We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus." Accord, Estep v. United States, 327 U.S. 144 (1946).
39. E.g., Smith v. Whitney, 116 U.S. 167 (1885). In the instant case the court-martial had already acted. Today, such attacks are permitted only after the petitioner
writs of habeas corpus. However, as these forms of action were no longer available, the plaintiff was forced to seek declaratory and injunctive relief pursuant to the Judicial Code.

The method of review chosen by the plaintiff is directly supported by Jackson v. McElroy, where it was held, on the basis of the Supreme Court's decision in Harmon v. Brucker, that a district court is empowered to question the jurisdiction of a court-martial in an action for declaratory judgment. In Harmon, the Court upheld the district court's jurisdiction, not only on the grounds that the Secretary of Defense had acted in excess of his statutory authority by issuing administrative "less than honorable" discharges, but also on the theory that the injuries suffered by the petitioners were sufficient to give them standing to bring the action. It should be noted, however, that while those who receive less than honorable discharges are subjected to continuing economic and social discrimination, courts-martial are not administrative bodies whose judgments are subject to attack on the same basis as those of governmental agencies. Rather, they are tribunals created for the performance of a purely judicial function, and discharges issued pursuant to their sentences are open to review only upon the issue of jurisdiction.

Thus, the significance of Harmon to the instant case and to Jackson does not lie with its determination that a court's jurisdiction may depend in part on the existence of the plaintiff's injury. To the contrary, the court in Jackson recognized that its jurisdiction to collaterally review a court-martial conviction was based upon the existence of a genuine issue as to the tribunal's jurisdiction. That court merely relied upon Harmon to establish that declaratory and injunctive relief were proper forms of action to review a tribunal's jurisdiction when other methods of review were no longer available.


41. See notes 38-40 supra.


45. See Dougherty & Lynch, supra note 36, at 498-528.

The instant court rejected the *Jackson* decision, reasoning that the Supreme Court in *Harmon* had given no indication of an intent to expand the district courts’ "review" over military judgments. The court also distinguished *Harmon* on its facts, since it did not concern the judgment of a military court, which by statute is final and binding.

It is submitted that this determination failed to address itself to the issue, since the *Jackson* court did not rely upon *Harmon* to extend its jurisdiction over a controversy where previously none had existed; rather it saw this decision as an indication that the Court considered an action for declaratory judgment as an acceptable method of collateral review.

Inasmuch as the finality restrictions relied upon by the court do not constitute a bar to collateral review, it would appear the court assumed an action for declaratory judgment constituted a direct, rather than collateral, attack on the petitioner’s conviction. Such an assumption is in conflict with *Harmon* and other decisions where courts which were strictly limited to collateral review have been permitted to entertain actions for declaratory judgment.47

Having seemingly misconstrued the import of the *Jackson* and *Harmon* decisions, the instant court failed to consider the real issues presented by the plaintiff’s allegations — whether he, as a member of the military establishment, had a constitutional right to counsel; and, if so, whether deprivation of this right by a military tribunal would result in its loss of jurisdiction. With respect to the first consideration, the Supreme Court, in *Reid v. Covert*,48 has indicated that, “it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.”49 Yet while it is clear that certain constitutional guarantees do not extend to military personnel,50 the right to effective assistance of counsel has been generally recognized as applicable to those in the military services, and the language of several decisions is in accord with this view.51

47. Even where a statutory form of action is exclusive, an injunction or declaratory relief has been permitted as a means of collateral review when other methods were unavailable. *E.g.*, Leedom v. International Union of Mine, Mill, and Smelter Workers, 352 U.S. 145 (1956). See Dunmar v. Ailes, 230 F. Supp. 87 (D.D.C. 1964), which was relied upon by the present petitioner.


49. Id. at 37. It is difficult to determine whether the courts were denying the applicability of constitutional guarantees to courts-martial, or were merely refusing to expand habeas corpus review to constitutional questions in general. See Note, 47 Geo. L.J. 185, 187 (1958); Note, 70 Harv. L. Rev. 827, 874 (1957).

50. The Constitution itself does not exempt courts-martial or actions of Congress and the President in their regulation of the military from any of the requirements of the Bill of Rights other than those of jury trial and grand jury indictment, U.S. Const. amend. V.; the authority to regulate the military, like other constitutional powers, would appear to be limited by the fundamental guarantees of individual rights contained in the constitution. See Note, 65 Yale L.J. 413, 421-22 n.48; United States v. Voorhees, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954) (dictum), where the Court of Military Appeals indicated that constitutional guarantees are available to military defendants; accord, United States v. Langer, 20 C.M.R. 513, 516-17 (Nav. Bd. of Review) (1955) (dictum).

51. See cases cited at note 50 supra; see also Beets v. Hunter, 75 F. Supp. 825 (D. Kan. 1948); Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); *but see, Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945). See generally Note, 67 Harv. L. Rev. 479, 483 (1954); Comment, 65 Yale L.J. 413 (1956). See also Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), a decision rendered subse-
The second, and more novel consideration, involves the question of whether the violation of a military defendant's constitutional rights would result in loss of the court-martial's jurisdiction under the same rationale which the Supreme Court has adopted with respect to non-military criminal trials, and which the Court of Claims has consistently applied to the area of military law. It should be noted that while the Supreme Court has sharply curtailed consideration of military due process in the lower federal courts, it has never been called upon to determine whether the rule enunciated in *Zerbist* extends to violations of a military defendant's constitutional rights.

In the words of Justice Frankfurter it would appear that:

\[ \ldots \text{if denial of the right to counsel makes a civil body legally nonexistent, i.e., 'without jurisdiction',} \ldots \text{by what process of reasoning can a military body denying such right to counsel fail to be equally nonexistent.} \ldots \]

While petitioner did not directly refer to the *Zerbist* doctrine, the court, by failing to focus upon the court-martial's jurisdiction as the critical issue, was precluded from any consideration of the applicability of *Zerbist* which could have been raised by its own observation of the *Shapiro* decision.

It is submitted that a military defendant is entitled to the right to counsel, and that there is neither constitutional nor historical justification to hold that such right is not constitutionally protected. Nor is there reason to hold that, if denial of this right by a civil court would act to extinguish its jurisdiction, the same result would not follow with respect to a military court. It is clear that the instant court ignored these critical considerations by disposing of the petitioner's cause of action solely on the ground that declaratory and injunctive relief are, in and of themselves, forms of direct attack, notwithstanding the collateral nature of the jurisdictional issue to be determined.

It is therefore submitted that the court's disposition of the case was erroneous. The critical factor in determining whether the review in question was collateral (and thus permissible) or direct (and thus prohibited) is the jurisdiction of the tribunal whose judgment is being attacked, and not the form of action by which it is being questioned.

*William E. Iorio*

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52. See notes 24-25 *supra*, and accompanying text.
53. Burns *v.* Wilson, 346 U.S. 844, 848 (separate opinion of Mr. Justice Frankfurter).
54. *Id.* at 848.
55. Application of Stapley, 346 F. Supp. 316 (D. Utah 1965), a decision rendered subsequent to the instant case which held: "That by reason of the violation of the petitioner's constitutional rights the special court-martial acted without jurisdiction. \ldots" *Id.* at 322.
NEGOTIABLE INSTRUMENTS — IMPOSTERS — UNIFORM COMMERCIAL CODE § 3-405 IMPOSES LOSS ON DRAWER INDUCED TO WRITE CHECK BY INNOCENT THIRD PARTY WHO HAS BEEN DUPED BY IMPOSTER.

Philadelphia Title Ins. Co. v. Fidelity-Philadelphia Trust Co.
(Pa. 1965)

An imposter, posing as the sole heir to certain real estate in Philadelphia, successfully deceived a real estate broker into obtaining a party who would lend money in return for a mortgage on the property. The mortgagee requested the plaintiff to insure the title to the mortgaged property, and on the day of settlement, in the presence of the real estate broker and the imposter’s accomplice, remitted the full amount of the loan to the plaintiff with the intention that the money be passed on to the real owner of the property, who was thought to be the mortgagor. Plaintiff drew a check on its own bank, the defendant, for the full amount of the loan and named the real owner as the payee. The accomplice, who was actually the estranged wife of the real owner, accepted delivery of the check, and gave it to the imposter who had not been present at the settlement. The latter then forged the payee’s indorsement. The fraud was discovered long after the imposter had received the proceeds of the check, and, after reimbursing the mortgagee for his loss and settling the mortgage aside, plaintiff sued the drawee bank and all the other banks in the collection process for honoring the forged indorsement of the payee’s name. After judgment was given to the plaintiff in the lower court, the defendants appealed to the Pennsylvania Supreme Court which reversed, holding that as between the drawer of the check and the payor bank, the former would have to bear the loss under section 3-405 of the Uniform Commercial Code because that section shifts the loss to the drawer in cases where the imposter induces the drawer to issue the check, even though third parties, who were the actual victims of the imposture, provided the direct inducement for the issuance of the check. Philadelphia Title Ins. Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 222 A.2d 212 (1965).

In the classic imposter situation two persons are deceived: the drawer, maker or indorser who is induced by the fraud of the imposter to draw or indorse the instrument to someone whom he thought was a real payee or indorsee, and the party who accepts the imposter’s forged indorsement.

1. The estranged wife of the administrator and sole heir of an estate which included certain real estate appeared without her husband’s knowledge at the office of a real estate broker with the imposter whom she introduced as her husband. The imposter signed the husband’s name to a deed conveying the real estate to the wife and her husband as tenants by the entirety and also signed the husband’s name to a mortgage and bond.

2. The court stated that it was unnecessary to decide whether the title company’s clerk, who drew the check, was negligent, because section 3-405, which is not based on a standard of care, precludes the title company from recovering.
and subsequently pays out on the instrument.\(^3\) In a typical situation the imposter will pose as the party to whom the drawer is induced to draw the instrument. The drawer will deliver it to the imposter who then again poses as the payee when he indorses the instrument over to a holder in due course or a depositary bank. The crucial question is which of the deceived parties should bear the loss: the drawer who allowed himself to be duped by the imposter into drawing and delivering the check or the party who accepted the paper under a forged indorsement.\(^4\) At common law the loss was oftentimes charged to the drawer who had started the sequence of events by allowing the imposter to induce him to write the instrument.\(^5\)

The Uniform Negotiable Instruments Law (N.I.L.) did not explicitly deal with the problem of the imposter, but courts nevertheless attempted to use certain of its provisions to solve the difficulty of allocating the loss which resulted from the fraud. In many cases, the named payee was a non-existent person, but section 9(3)\(^6\) of the N.I.L., which made all paper drawn to the order of a fictitious payee bearer paper which could be properly indorsed by anyone, including the imposter, was inapplicable because it required that the drawer know he was drawing a check in favor of a fictitious payee.\(^7\) Section 23\(^8\) provided that when a signature was forged or made without the authority of the party whose name was signed, it could not confer on a subsequent taker under the indorsement a right to the instrument. This rule would appear to impose the loss on depositary banks which accepted for deposit or immediate credit checks bearing forged indorsements.

To circumvent section 23 in imposter cases, courts used the fiction of dominant intent to shift the loss back to the drawer. Under this theory, it was said that the drawer had two intentions when he drew the check, namely, to pay the person actually standing before him and to pay the name whom he purported to be.\(^9\) The first intent was said to be the dominant one, and therefore, in a situation where the imposter was physically present before the drawer, he became the party to whom the paper was intended to be made payable. Thus, the depositary bank merely carried out the drawer's order by paying out on the imposter's indorsement. This fiction worked well when the imposter stood before the drawer and induced him to write the check, but the New Jersey Supreme Court, in *Russel v. Second Nat'l Bank*,\(^10\) ruled that the dominant intent was missing when the imposter induced the drawer by mail to draw the check to the order of a named payee and then forged the payee's name in the indorsement.

\[^3\] Abel, *The Imposter Payee: Or, Rhode Island Was Right*: 1, 1940 Wis. L. Rev. 161, 162.

\[^4\] Ibid.


\[^6\] Uniform Negotiable Instruments Law § 9(3).

\[^7\] See 33 St. John's L. Rev. 105, 107 (1958).

\[^8\] Uniform Negotiable Instruments Law § 23.


The language of section 23 could also be used to avoid placing the loss on the depository bank without resorting to the dominant intent fiction. That section contained a caveat that in certain unspecified instances a party would be precluded from setting up forgery as a defense to an instrument on which he was otherwise liable. In *Montgomery Garage Co. v. Manufacturer's Liab. Ins. Co.*11 it was held that the imposter situation was one of those instances, and that the drawer was therefore precluded from showing that the indorsement on the check was a forgery.12

Some courts, however, refused to shift the loss to the drawer. In *Tolman v. American Nat'l Bank*13 the court held that the fact that the drawer had not been imposed upon did not release the payor bank from its duty to see that the money was paid according to order. In *Cohen v. Lincoln Sav. Bank*14 an attorney had persuaded the drawer to pay to a person who said his name was Wolter $4500 in return for an assignment of rights to a condemnation award. Neither the attorney nor the drawer had had any previous dealings with Wolter. Wolter's imposter took delivery of the check and sold it to the defendant. The court refused to place the loss on the drawer, holding that "only a payee named in the instrument or identified by previous dealings and intended to be described by that name can transfer title to the instrument."15 Thus, the New York courts would only follow the dominant intent rule where the imposter had been physically present and had been involved in the transactions which led to the drawing of the check.

In *Land-Title & Trust Co. v. Northwestern Nat'l Bank*16 the Pennsylvania Supreme Court expressed its approval of the dominant intent fiction, but refused to hold the drawer responsible because the imposter, claiming to be an agent of the payee, had induced the drawer to pay to the order of a named party. Here the court reasoned that the drawer intended to pay only the name written on the instrument. There could be no dominant intent to pay the party standing before him as that person was a mere agent. Therefore, the paper could be negotiated only on the payee's genuine indorsement. Section 3-405(1)(a) of the Uniform Commercial Code,17 under which the present case was decided, expressly provides for the imposter situation:

An indorsement by any person in the name of a named payee is effective if

11. 94 N.J.L. 152, 109 Atl. 296 (1920).
12. Another approach to the problem has been to use a negligence test to determine which victim was more at fault. However, this test has not been generally accepted, because it is felt that common law negligence rules should not be applied to negotiable instruments which are rooted in the law merchant. See 33 ST. JOHN'S L. REV. 105, 109 (1958).
15. Id. at 412, 10 N.E.2d at 463.
(a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee. . . . 18

The comment to this section indicates that it overrules those cases, such as Russel, which considered pivotal the question whether the imposture was perpetrated face-to-face or by mail. The dominant intent theory is dismissed as a useless fiction. The purpose of the new section is to place the loss, "regardless of the type of fraud which the particular imposter has committed," on the maker or drawer. Section 3-40419 retains the N.I.L. rule that parties who take an order instrument under the payee's forged indorsement can acquire no title to it.

The Pennsylvania Supreme Court, in the present case, relied on no cases under the N.I.L. to arrive at its decision; instead, it pointed to the official comment to buttress its argument.20 Plaintiff argued that section 3-405(1)(a) was inapplicable in this situation because it was induced to draw the check by the mortgagor, who had applied for title insurance on the mortgage, not the imposter. The court, however, ruled for the defendant under the rationale that there is no difference between the drawer who is defrauded by an imposter dealing directly through the mails and one duped by an imposter working through the medium of third parties; loss resulting from both methods of imposture would fall on the drawer. The court stated that the words "or otherwise" were intended to provide for those situations where the inducement was made by means other than face-to-face or by mail. Section 3-405, said the court, was intended to cover all ". . . the ingenious schemes designed and carried out by imposters for the purpose of defrauding the makers and drawers of negotiable instruments."21

It is submitted that the court stretched the meaning of section 3-405(1)(a) beyond what was intended by the drafters. Although that section rejects the distinction between impostures carried out face-to-face and those perpetrated "by mail or otherwise," the rule that the imposter must induce the drawer to issue the instrument is apparently retained. Although it is true that by inducing an innocent third party to persuade the drawer to issue the instrument, the imposter is the initiating cause of a chain of events which finally results in delivery of the check to his agent or himself; the inducement which actually brought to bear on the drawer is the request of the third party. Causing a party to act is not always the same thing as inducing or persuading him to do so. The court, by interpreting the words "or otherwise" to cover situations where there is imposture

18. Ibid.
20. The majority opinion stated that no case had been found which decided how the N.I.L. would have covered this particular fact situation. But cf. Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 66 A.2d 768 (1949), where on similar facts it was held that when the person who received the check from the drawer and committed the forgery of the indorsement was not intended by the drawer to be the payee, the loss would fall on the party who accepted the forged indorsement. See National Union Fire Ins. Co. v. Mellon Nat'l Bank, 276 Pa. 212, 119 Atl. 910 (1923).
21. 419 Pa. at 78, 212 A.2d at 222.
through third parties is really saying that inducement is equivalent to cause, and that therefore, whenever the imposter is a *cause* of the instrument's issuance, the imposter rule will apply. The difficulty with such an interpretation is that the court formulated no guidelines as to how remote the imposture could be in relation to the drawer in order still to be considered a cause bringing the case within the purview of 3-405(1)(a). Since causation is a fact question, this will lead to unpredictable results in future imposter cases, a situation that the drafters of the code were trying to prevent by abolishing the dominant intent fiction.

It is true that the drafters sought to place on the drawer any loss resultant from the fraud. However, their reason was that the drawer is more culpable than the second party in allowing himself to be duped by the imposter in the first instance. Can it be said that a drawer is a culpable party when he draws a check in reliance on facts presented to him by a trusted friend or business associate? At any rate, is he more at fault than the bank which paid out on the instrument without checking to see if the indorsement was that of a real payee?

Since it is doubtful that the drafters of section 3-405(1)(a) intended to equate the word "induce" with "cause," it is submitted that that section requires that the drawer be directly *persuaded* by the imposter to issue the check, and that "or otherwise" merely means that the imposter may use other direct methods besides face-to-face or the mails, such as the telephone or telegraph, to carry out his deception.

*Edwin M. Goldsmith*

**TORTS — PARENTAL IMMUNITY — UNEMANCIPATED MINOR PERMITTED TO SUE ESTATE OF PARENT WHOSE NEGLIGENCE CAUSED HIS INJURY.**

*Dean v. Smith* (N.H. 1965)

Plaintiff, as next friend of her three minor children, brought an action against the estate of her late husband for injuries sustained by the children in an automobile accident allegedly caused by the decedent's negligence. The decedent's liability insurance carrier intervened and moved for the dismissal of the action on the ground that unemancipated children have no standing to sue the estate of their parent. The suit was transferred without ruling from the trial court to the Supreme Court of New Hampshire which held that suits by or on behalf of unemancipated children for injury negli-

gently inflicted by a parent in the operation of an automobile can be maintained against such parent’s estate. Dean v. Smith, 211 A.2d 410 (N.H. 1965). 1

With the instant case, the much maligned 2 doctrine of parental tort immunity has suffered another setback in its attempt to withstand the ravages of logical analysis, 3 judicial misgivings 4 and commentarial scorn. 5

The conception and gestation of the immunity doctrine are embodied in a trilogy of cases starting with Hewellette v. George. 6 In that case the court ruled that a child could not sue her parent for false imprisonment because such a suit would disturb the peace of families and impair the effective exercise of parental control and discipline. 7 Tort suits by children against their parents were similarly disallowed in McKelvey v. McKelvey 8 and Roller v. Roller, 9 both of which drew analogies from the husband and wife immunity 10 and cited Hewellette v. George 11 for the proposition that the rule of parental immunity was “well established.”

From this sudden and unheralded inception the rule was extended to encompass virtually all tort suits between parent and child 12 including

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4. Virtually every case within the last fifteen years has contained some reference to the growing judicial restlessness with the rule. See, e.g., Parks v. Parks, 390 Pa. 287, 363, 135 A.2d 65, 74 (1957) (dissenting opinion); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).
6. 68 Miss. 703, 9 So. 885 (1891). The court in that case is frequently credited with originating the doctrine out of its own notion of the need for familial stability. However, the court could have cited dicta from three earlier cases which would tend to support the existence of the rule, namely, Gould v. Christianson, Fed. Cas. No. 5636 (1836); Nelson v. Johansen, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859).
7. The facts indicate that the court rested its holding on three policies which are closely related: first, the familial rights and duties between the litigants might be impaired; second, the rights and duties between the tortfeasor’s spouse and his litigating child might be impaired; and third, the highly desirable intra-family tranquility might be disrupted. As will be discussed in this note, several of the exceptions to the rule have been carved out at the expense of the second and third policies.
8. 111 Tenn. 398, 77 S.W. 664 (1903). The allegation was brutal and inhuman treatment.
9. 37 Wash. 242, 79 Pac. 788 (1905), overruled, Borst v. Borst, 41 Wash. 642, 251 P.2d 149 (1952). This case is often cited as a classic example of an application of a rule to facts which do not support it. The court would not allow a daughter to recover from her father who had raped her. The court renounced any “line drawing” and mechanically stated that a suit would disrupt family harmony.
10. This analogy reappears regularly. The difficulty in its application is that the two immunities are premised on entirely distinct propositions. Spouses are precluded from suing each other primarily because of their legal identity and their consensual union. The law has never implied a similar identity between parent and child. For a thorough comparison of the two rules and a definitive study of their incidents to date, see McCurdy, Personal Injury Torts Between Spouses, 4 Vill. L. Rev. 303 (1959) and McCurdy, Torts Between Parent and Child, 5 Vill. L. Rev. 521 (1960).
11. 68 Miss. 703, 9 So. 885 (1891).
12. Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Fortinberry v. Holmes, 89 Miss. 373, 42 So. 799 (1907); Richardson v. State Board, 99 N.J.L. 516, 123 Atl. 720 (1924).
those for ordinary negligence.\textsuperscript{13} By 1930 it was so thoroughly entrenched that Professor McCurdy, in his exhaustive assessment of the evolution of the rule,\textsuperscript{14} indicated that the only case squarely recognizing a cause of action at law against a parent for tort was a recent Canadian case.\textsuperscript{15} In the same article he noted at least six policies relied upon by the courts in extending the rule,\textsuperscript{16} but the three most frequently cited traced their origin to \textit{Hewellette v. George}.\textsuperscript{17} namely, the potential harm to domestic harmony, parental discipline, and the family exchequer.

The blanket application of the immunity doctrine to all parent-child tort cases does not seem to have been seriously challenged until \textit{Dunlap v. Dunlap}\textsuperscript{18} questioned its pertinence to factual situations where the policy reasons for the rule did not apply. In an action for negligence brought by a son, injured while working as an employee of his father, the court held that immunity did not lie. In so concluding, it affirmed the broad policy behind the immunity rule but suggested that it should not be applied indiscriminately to all parent-child tort suits but should be restricted to those factual situations where the dangers foreseen in \textit{Hewellette} are present. Therefore, since the plaintiff had been injured while working as an employee of his father who was covered by liability insurance there was no need for the immunity.

The proposition that the granting of immunity to a parent should be determined according to the facts of each case was subsequently lauded in many jurisdictions but directly followed in few.\textsuperscript{19} Later courts continued to adhere to the pre-\textit{Dunlap} conceptual view that parental immunity was an absolute bar to suits by children but allowed certain "exceptions" to be engrained onto the rule. Because of the debilitating wrought on the rule by the formulation of these exceptions, many commentators believe that they are harbingers of a future extinction of the rule.\textsuperscript{20}

Exceptions to the application of the rule have developed where there is a willful tort;\textsuperscript{21} some third party is directly liable;\textsuperscript{22} the parent was acting outside the scope of his ordinary parental duties;\textsuperscript{23} the child was emancipated.

\textsuperscript{13} Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925).
\textsuperscript{14} McCurdy, \textit{Torts Between Persons in Domestic Relationship}, 43 HARV. L. REV. 1030, 1056 (1930).
\textsuperscript{15} Id. at 1067.
\textsuperscript{16} These reasons were: domestic harmony, parental discipline, depletion of family finances, danger of fraud through stake claims after majority, possibility of succession through inheritance, and the position of the family as a quasi-governing body.
\textsuperscript{17} Supra note 11.
\textsuperscript{18} 84 N.H. 352, 150 Atl. 905 (1930).
\textsuperscript{19} Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).
\textsuperscript{20} Supra note 2.
\textsuperscript{22} Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Aboussie v. Aboussie, 270 S.W.2d 637 (Tex. Civ. App. 1954).
\textsuperscript{23} The rule has been abrogated in Wisconsin except: 1) where the alleged negligent act involves an exercise of parental authority over the child, 2) where the
pated:24 or, in a limited number of cases, where the parent was covered by liability insurance.25

Under another exception recognized by a few jurisdictions26 and pertaining to the instant case, a child may bring an action if the negligent parent has died and the suit is against his estate. This exception was impliedly rejected in Hewellette v. George27 where, despite the tortfeasor parent’s death before trial, the Mississippi court persisted in its reasoning that the preservation of family tranquility and parental discipline precluded the suit.

One of the first cases to clearly recognize the deceased parent exception was Davis v. Smith.28 Citing several lower state court decisions, the District Court held that immunity does not extend beyond the life of the deceased parent because, “where a parent or child dies the entire family unit is dissolved. There is no relationship that public policy need protect; the reason for the doctrine is gone and the cloak of immunity disappears.”29 Thus in construing the relevant public policy the court considered the “parental” discipline to be that exerted by the deceased parent and the “relationship” to be protected to be limited to the single one between plaintiff and defendant. This interpretation would appear to contravene the policy enunciated in Hewellette. In Brennecke v. Kilpatrick,30 the leading case recognizing the death exception, the court reasoned that the abrogation of immunity in husband and wife cases where one of the spouses had died, was analogous, and contended that the relationship sought to be protected was terminated by the death of the negligent parent. The writer of the dissenting opinion vigorously assailed the validity of analogizing inter-spousal immunity to parental immunity and contended that to do so was misleading.31 He postulated that while death might abrogate the immunity in husband and wife cases, it did so only because it was premised

alleged negligent act involves an exercise of parental authority over the child, and 3) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provisions of food, clothing, housing, medical and dental services and other care. Goller v. White, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).

24. Although this is frequently cited as an exception to the rule, it was never really included in its original delineation, since in Hewellette the court implied that no disability existed if the child were emancipated. Wurth v. Wurth, 322 S.W.2d 745 (Mo. 1959); Glover v. Glover, 44 Tenn. 712, 319 S.W.2d 238 (1958); Wadow v. United National Indemnity Co., 274 Wis. 383, 80 N.W. 2d 262 (1957).


27. Supra note 11.


29. Id. at 506.

30. 336 S.W.2d 68 (Mo. 1960).

31. See note 10 supra.
on the protection of the single relation between a husband and his wife. However, in parent-child cases, “the immunity springs from a disability imposed by reason of public policy, the underlying reason for which is a desire to protect the family relationship and interests, social and economic. The reason for the rule may extend beyond the death of a wife, or a mother, or a father.”32 In *Harlan Nat'l Bank v. Gross*33 the court summarily disposed of the issue by viewing the public policy as the prevention of "the disruption [of] a family relationship"34 holding that when a death occurs this relationship no longer exists.

In each of the death exception cases considered above, although the defendant had been covered by liability insurance the courts failed to weigh its import and in one case expressly denied its materiality to the issue.35 This refusal to allow an exception where a parent, either living or dead, is covered by insurance is almost universal in American jurisdictions, even though the policy reasons for immunity are seemingly inapplicable.36 The courts have offered one primary reason for this seeming paradox. They contend that to allow suit because a parent is insured against liability would be a raid on insurance companies by creating liability where it had theretofore not existed.37 The courts have been unpersuaded by the counter argument offered in behalf of an insurance exception whose proponents insist that where a parent negligently inflicts injury on a child an actionable wrong exists38 but because of the policy reasons given in *Hewellette* the parent is shielded by an immunity which disables the child from suing. Thus insurance does not create liability, which must be proved just as in any other tort action, but is a helpful factor in determining whether a parent should benefit from the immunity rule.

In *Dean v. Smith*,39 the New Hampshire court in allowing suit against the estate of a deceased tortfeasor has expressly made insurance a material part of its considerations and has articulated the argument employed by the advocates of an immunity exception.

In measuring the effect a parent's death should have upon the immunity rule, the court states that, "it is self-evident that the disruption of family relations and the weakening of parental rights and duties are much less likely to occur, if at all, when the child's suit is against the estate of a

32. Brennecke v. Kilpatrick, 336 S.W.2d 68, 75 (Mo. 1960).
33. 346 S.W.2d 482 (Ky. 1961).
34. *Id.* at 483. Here the child had died and its administrator brought action against the surviving negligent parent. For a consideration of the effect state death statutes have on such actions, see Comment, 26 Mo. L. Rev. 205 (1961).
35. Brennecke v. Kilpatrick, 336 S.W.2d 68, 71 (Mo. 1960).
36. See note 25 supra for the few exceptions.
37. The possibility of fraud and collusion between the parties has also been suggested as a reason for disallowing suit where insurance is a factor. This seems to be a makeweight in the case of parental immunity since the law allows suits between good friends, master-servant, brother-sister and others where similar dangers exist. See Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1936).
38. *Supra* note 18.
deceased parent." Although Harlan Nat'l Bank v. Gross is cited for this proposition, it does not seem that the court has accepted the implication of that decision. When the court considers "family relations" to be part of the immunity policy it does not seem to be limiting the protection afforded by the rule to the single relationship between plaintiff and defendant. Thus while it is "less likely" that such a suit would cause family discord, the mere fact that the negligent parent has died does not preclude such a possibility. Therefore, the parent's death is not necessarily determinative of the withdrawal of immunity.

The court then turns to the effect of insurance. In assessing the widespread use of liability insurance among motorists, the court affirms its earlier holding in Levesque v. Levesque by noting that insurance should not create a duty where none previously existed. However, insurance "should be considered in determining whether the barrier preventing an unemancipated child from obtaining redress for the wrongs inflicted on him by the negligence of his parents should be removed." Implicit in this is a recognition that a parent always has a duty of care towards his child but where a parent breaches this duty the child cannot enforce his rights unless the policy reasons for immunity are negated. Thus the court has not been lured into the specious contention that insurance creates liability. By making the same factual analysis of the need for immunity found in Dunlap v. Dunlap the court has relied on a process of reasoning that other courts should find satisfying in evaluating the presence of insurance.

The real significance of Dean v. Smith will not be seen until the court must pass on a case where a child is bringing action against a surviving insured parent for ordinary negligence, alleging no facts that give rise to an exception. Subsequent interpretation of Dunlap has held that insurance will not be a material factor unless coupled with some recognized exception. While Dean is susceptible to this restrictive construction it would not be the most reasonable one in light of the clarity of the court's language.

In recognizing a specific solution to automobile injury cases the instant decision has erased an anomaly which has long plagued the courts. It is hoped that this creditable position will not be emasculated by future limitation to situations where the negligent parent dies.

Thomas Colas Carroll

40. Id. at 413.
41. 346 S.W.2d 482 (Ky. 1961).
42. See note 7 supra.
44. Dean v. Smith, 211 A.2d 410, 413 (N.H. 1965).
45. Supra note 18.
46. Supra note 37.
WORKMEN'S COMPENSATION — THIRD PARTY ACTIONS — ARIZONA WORKMEN'S COMPENSATION ACT DOES NOT BAR SUIT AGAINST CO-EMPLOYEE.


While working in a lettuce harvesting operation, plaintiff was injured by a truck driven by the defendant, a fellow employee. Although he had been fully compensated by workmen's compensation payments, plaintiff instituted this negligence action against the driver of the truck to recover damages for the injuries sustained. The trial court, in dismissing the action, held that the award under the Arizona Workmen's Compensation Act barred plaintiff from maintaining the present suit. The Arizona Court of Appeals reversed, holding that neither the Arizona Workmen's Compensation Act nor the receipt of benefits thereunder precludes an injured employee from suing a co-employee whose negligence caused his injury. Marquez v. Rapid Harvest Co., 405 P.2d 814 (Ariz. Ct. App. 1965).

Prior to the passage of workmen's compensation acts, the only remedy available to an employee injured through the negligence of either his employer or a fellow employee was an action in negligence against the tort-feasor. The employee's right to recover against his employer, however, was subject to numerous defenses which, if established, left the employee to bear the total cost of his injuries. In an effort to shift the financial burden of industrial accidents to the business enterprise, all the state legislatures adopted workmen's compensation acts. These statutes were designed to compensate all injuries sustained by an employee in the course of his employment irrespective of whether the employer was guilty of any fault. Furthermore, they deprived employers of all their common law defenses, and required, as a quid pro quo, that the injured employees relinquish all common law rights in damages against their employers. Workers were thus provided with a new and exclusive remedy for industrial injuries.

1. Although the appeal was originally to the Arizona Supreme Court, that court referred it to the Court of Appeals pursuant to Ariz. Rev. Stat. Ann. tit. 12, ch. 1, § 12-120.23 (1964).
3. The defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine were available to the employer. 1 Larson § 4.30; 17 Wash. & Lee L. Rev. 315 (1960).
4. Empire Zinc Co. v. Industrial Comm'n, 102 Colo. 26, 77 P.2d 130 (1937); 1 Schneider, Workmen's Compensation Text § 5 (perm. ed. 1941) [hereinafter cited as Schneider].
6. 1 Schneider § 1; McCoid, The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-employers, 37 Texas L. Rev. 389, 396 (1958).
7. 2 Larson § 71.20; 43 Iowa L. Rev. 352 (1958); 17 Wash. & Lee L. Rev. 315, 316 (1960).
However, the workmen's compensation laws of almost every state preserved the employee's common law right to initiate actions against "third parties."\(^8\) Whether a fellow employee is a third party under the terms of the Act is a question on which the courts are in disagreement. This conflict is primarily attributable to the varying interpretations which the different types of workmen's compensation statute have received.\(^9\) The majority of courts operating under statutes containing no specific language to the contrary have defined "third party" to incorporate all persons other than the injured employee and his employer.\(^10\) Consequently, in these jurisdictions a negligent employee is not immune from suit by a co-employee. Other jurisdictions, however, either by specific statutory language or judicial decision have excluded co-employees from the "third party" classification, thereby foreclosing the possibility of an action at law against a fellow worker.\(^11\)

In order to effectively evaluate the instant case, it is necessary to analyze both the general policy considerations for allowing an employee to sue a co-employee in the absence of specific statutory language, and the instant court's interpretation of Arizona's Workmen's Compensation Act.

The policy considerations usually advanced in support of the principle that an employee may sue a fellow servant are: (1) a tortfeasor should not be relieved of the consequences of his wrongdoing;\(^12\) (2) if an action at common law is disallowed, the hazards of industrial accidents will substantially increase;\(^13\) (3) compensation acts refer only to those standing in the relationship of employer and employee and should not be extended to impair rights and liabilities existing in other situations;\(^14\) (4) the third party co-employee has not contributed to the fund and therefore should not benefit from it;\(^15\) and (5) workmen's compensation laws are in derogation of the common law and should be strictly construed to preserve common law rights and liabilities.\(^16\)

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8. 2 Larson § 71.00; Martindale, Third Party Actions Against Co-employees, 9 Clev.-Mar. L. Rev. 297 (1960).
9. Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962). In Ranson v. Haner, 174 F. Supp. 82, 85 (D.C. Alaska 1959), it was stated that "great stress has been laid in the decisions upon the wording of the statute in the particular state where the question arose." The difference in phrasing of the statutes has caused various state courts to reach conflicting results as to whether or not an employee can sue a co-employee.
10. 2 Larson § 72.00; Martindale, supra note 7, at 298.
11. Ibid. The majority of decisions holding that an employee is precluded from suing a co-employee rely primarily on specific statutory language and do not analyze the underlying policy considerations.
12. In Lees v. Dunkerly Bros., 103 L.T.R. 467, 468 (H.L. 1910), it was stated by Lord Chancellor Loreburn: "I can hardly imagine a more dangerous or mischievous principle than that which is sought to set up here.... But it is a very different proposition to say that a man is not to be responsible for his own negligence...." See also 2 Larson § 71.10; McComb, supra note 5, at 445.
16. The court in the instant case maintained that it should preserve the employee's common law action in the absence of clear language to the contrary because the Act is in derogation of the common law.
Nevertheless, there are numerous justifications for the contrary positions. Thus, in Feitig v. Chalkley,17 the court reasoned that since injuries caused by the negligence of employees represent an “inherent risk of doing business,” the cost should be borne by the business enterprise, and not by the negligent employee.18

It has also been contended that a fellow employee should not be considered to be in the same category as an unrelated third party, since his labor represents a substantial contribution to the income of the enterprise, and so indirectly increases the funds from which workmen’s compensation is paid. Therefore, he should be eligible to benefit from the existence of the fund.19 A third person who is unrelated to the enterprise, however, contributes nothing to the fund, and therefore has no claim upon a share in the employer’s immunity.

A further consideration is that employees are constantly in danger of incurring liability. “It must never be forgotten that the co-employee, by engaging in industrial work over a period of years, is subjected to a greatly increased risk not only of being injured himself, but also of negligently causing injury.”20 If a co-employee were subject to a large damage award, “the . . . beneficent effects of workmen’s compensation might be offset by the potential liabilities which confront the worker . . . .”21 For the negligent employee is no better equipped to bear the burden of a substantial damage award than his injured co-worker.

However, it has been argued that relieving a negligent employee from his wrongdoing would cause him to become careless, and thereby vastly increase the number of industrial accidents.22 But it may also be argued that an employee’s fear of potential heavy liability for his negligent acts while “on the job” might hamper his efficiency and impair his relations with his fellow employees.23 Moreover, the employer has sufficient sanctions to discourage carelessness, for example, the power to terminate employment, to “dock” the employee’s wages, or to suspend him temporarily. Surely, an employee who constantly causes injury to fellow employees by his carelessness would find himself seeking other employment. Nor is there sufficient evidence to conclude that the imposition of tort liability

17. 185 Va. 96, 38 S.E.2d 73 (1946).
18. “[A]n injury by a fellow worker is an inherent risk contemplated by the Act, and the burden of such industrial accidents should be shared by the entire enterprise as an industrial cost.” 17 Wash. & Lee L. Rev. 315, 320 (1960); In McCoid, supra note 5, at 446, it is concluded that the policy considerations of relieving a third party were weakest in the case of negligent co-employees.
19. McCoid, supra note 5, at 446.
20. 2 Larson § 72.20. The author also states that “perhaps one of the things he is entitled to expect in return for what he has given up is freedom from common law suits based on industrial accidents in which he is at fault.” Ibid.
21. Ibid.
22. Supra note 11.
23. In 1 Schneider § 4 it is asserted that workmen’s compensation is designed to be more in harmony with modern methods of industry than the common law liability for torts, which generally produced long, expensive litigation and ill-feeling between the employer and employee. This would appear to be equally true in the situation where an employee sues a co-employee. Clearly a lawsuit might lead to a breakdown of the employee’s harmonious relations with his fellow workers.
upon employees would substantially lessen the possibility of industrial mishaps. Such a proposition is at best conjectural.

In *Bresnahan v. Barre* the court stated that "one purpose of the Workmen's Compensation Act was to sweep within its provisions all claims for compensation flowing from personal injuries arising out of and in the course of employment by a common employer..." If this is the avowed intention of the legislature, the courts should not defeat it through a literal construction, even though the Act be in derogation of the common law. Although the reasons for allowing a common law action against a co-employee have some logical foundation, the policy considerations opposing this principle appear more persuasive in light of the socio-economic purposes of workmen's compensation statutes. Therefore, it is submitted that the Arizona Court of Appeals, irrespective of statutory language, did not give complete consideration to the relative interests involved.

Policy determinations aside, it is further submitted that the court in the instant case offered an interpretation of the relevant sections of the Arizona Act which is at least questionable. Essentially, the statute provides that an employee who is "injured or killed by the negligence or wrong of another not in the same employ... shall elect whether to take compensation under this chapter or to pursue his remedy against such other person." The court reasoned that since no election was required when an injury is caused by someone in the same employ, the injured employee is not compelled to make such an election, and can claim both workmen's compensation and an award for damages in a civil action. Therefore, the court presumed that the legislature intended to sanction double recovery when an employee is injured by a co-employee. In so holding, the court reached an anomalous conclusion. Under the court's interpretation, an election would be required only if the employee were injured by the negligence of a third party totally unconnected with the business enterprise, while if the injury were caused by a co-employee no such choice would be required. Consequently, it would be more advantageous to an employee to be injured by a fellow servant than an outsider, since double recovery would be permitted in the former situation but not in the latter.

This approach was flatly rejected by the Supreme Court of Oregon in *Kowcun v. Bybee*, where it was confronted with the same issue under

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24. *Supra* note 18, at 449.
25. 286 Mass. 593, 597, 190 N.E. 815, 817 (1934).
26. 1 SCHNEIDER § 6: "It has been said the workmen's compensation statutes are 'sui generis, and... create rights and remedies and procedures all their own..." Where the act is unambiguous, the common law has no application.
28. This is contrary to the generally accepted principle that double recovery is to be avoided. 2 LARSON § 72.65. *ARIZ. REV. STAT. ANN.* tit. 23, ch. 6, § 23-1024 (1956), which deals with choice of remedy as a waiver of an alternate remedy, indicates an intent to permit only one recovery. See Meares v. Dixie Creameries, Inc., 9 La. App. 213, 120 So. 133 (1928).
29. 182 Ore. 271, 186 P.2d 790 (1947).
The court, in holding that an employee is barred from suing a co-employee, concluded that to interpret the statute to sanction an action at law would mean that the legislature intended the injured workman to have “both an award of compensation and an action for damages against a purported tortfeasor. . . .” A similar result was reached in Sergeant v. Kennedy, where the Michigan Supreme Court, pursuant to its Workmen’s Compensation Act, held that co-employees share the same immunity from suit as employers. The court stated:

We also wonder why the legislature would have needed to single out and mention those in the ‘same employ’ at all if it was going to leave things precisely as they were before? . . . [I]t is not more logical to assume that the legislature intended some significance to attach thereto and instead meant what it rather plainly if clumsily seemed to be saying by the quoted portion of the amendment: (a) That henceforth in these situations tortfeasor co-employees can no longer be civilly sued. . . .

The court in the instant case, however, felt compelled to preserve the employee’s common law right of action in the absence of clear and unambiguous language evidencing the intent of the legislature to abrogate that right. It is, however, the court’s function to seek out the legislative intent and to rule accordingly. In a previous Arizona case, S. H. Kress & Co. v. Superior Court, the court asserted that the “common law may be changed by statute though it must be done expressly or by necessary implication.” It is submitted that if the statute involved in the instant case, does not so change the common law by its terms, then it is certainly the necessary implication of the statutory purpose to abrogate the common law right of an employee to sue a fellow worker for negligence on the job, and that by deciding otherwise, the Arizona court has construed the statute in a manner contrary to the intent of its state legislature.

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