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Recent Decisions

RECENT DECISIONS

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—REGULATION OF SOLICITATION OF CHARITABLE FUNDS BY RELIGIOUS ORGANIZATION:—Plaintiff, an incorporated religious organization, brought action against the City of Los Angeles and others to enjoin the enforcement of an ordinance which regulates solicitations. Solicitations made solely for evangelical missionary or religious purposes are expressly exempted by the ordinance. Plaintiff engages in religious work and gives aid to the poor. Some of its activities consist of religious services and free distribution of religious literature as well as providing food, lodging, clothing and other necessaries to those in need. It solicits donations from the public to obtain funds for its activities. Plaintiff contended that, as applied to it, the ordinance abridged religious liberty in violation of the Constitutions of the United States and of the State of California. From a judgment for plaintiff, the defendants appealed. *Held*, three justices dissenting, judgment reversed. *Gospel Army v. City of Los Angeles*, — Cal. App. (2d) —, 163 P. (2d) 704 (1945).

The court in reaching its decision relied on two grounds: one, that the regulations were reasonable and, therefore, even if the charitable solicitation was religious, the ordinance was constitutional; two, that the solicitation was not religious and therefore was not protected by the constitutional guarantee of religious freedom. In order to consider the broader and more important question, whether the solicitation of funds by the plaintiff is a religious activity within the protection of the constitutional provisions,[1] the unreasonableness of the regulatory ordinance[2] will, for the purposes of this discussion, be assumed.

The constitutionality of statutes or ordinances, prohibiting the solicitation of contributions for a religious purpose without previously obtaining a permit from proper authorities, has been challenged in several cases[3] on the ground that such statutes or ordinances interfered with the free exercise of religion guaranteed by the Constitution.[4] In several state court decisions their validity was upheld.[5] However, these decisions, in so far as they dealt with the validity of such regulations under the Federal Constitution, were in effect overruled by the decision of the United States Supreme Court in *Cantwell v. Connecticut*.[6] There a statute prohibiting the solicitation of contributions for a religious cause without approval of a designated public official was held unconstitutional because it deprived such solicitors of their religious freedom. On the question whether religious liberty

1. U. S. CONST. AMEND. XIV, § 1. CAL. CONST. Art. 1, § 4.

2. Los Angeles Mun. Code, §§ 44.01 to 44.19.

3. Cantwell v. Connecticut, 310 U. S. 296 (1940); *In re* Dart, 172 Cal. 47, 155 Pac. 63 (1916); Maplewood v. Albright, 13 N. J. Misc. 46, 176, Atl. 194 (1934); Dziatkiewicz v. Maplewood, 115 N. J. L. 37, 178 Atl. 205 (1935); Semansky v. Common Pleas Ct., 13 N. J. Misc. 589, 180 Atl. 214 (1935); *Ex parte* White, 56 Okla. Cr. 418, 41 P. (2d) 488 (1935).

4. See note 1 *supra*.

5. Maplewood v. Albright, 13 N. J. Misc. 46, 176 Atl. 194 (1935); Dziatkiewicz v. Maplewood, 115 N. J. L. 37, 178 Atl. 205 (1935); Semansky v. Common Pleas Ct., 13 N. J. Misc. 589, 180 Atl. 214 (1935); *Ex parte* White, 56 Okla. Cr. 418, 41 P. (2d) 488 (1935).

6. 310 U. S. 296 (1940).

is protected by the due process clause of the Fourteenth Amendment[7] the Supreme Court declared: "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[8] The court thus held that under the Fourteenth Amendment religious liberty is protected against unreasonable interference by the state.[9] The court stated, however, that the state has the power reasonably to regulate even religious activity for the protection of society. "The 'general regulation, in the public interest, of solicitation, which . . . does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose."[10]

Hence it is settled law that the solicitation of contributions for a religious purpose is protected by the constitutional guarantee of religious liberty. However, a question arises in the case of solicitation of contributions for charitable purposes by a religious organization which makes such a solicitation a part of its religious program. Is the work of charity by a religious organization considered a religious activity and as such protected by the guarantee of religious liberty? In the instant case the court was faced with this problem and was sharply divided in its conclusions. No question of interpretation of the statute was involved since both the majority and minority opinions agreed that the ordinance specifically differentiated between solicitations for the support of the religious organization itself and those made for charitable work, exempting the first but not the second.

The plaintiff contended that since the practice of charity and the solicitation of funds for that purpose are part of its religious duties, the ordinance regulating the solicitation of charitable contributions[11] cannot apply to plaintiff's solicitations without abridging its religious liberty. The majority of the court held that the plaintiff's charitable work was not *exclusively* a religious activity and that, therefore, the legislature could constitutionally regulate such solicitations. The *Cantwell* case was distinguished on the ground that there the religious organization solicited funds not for charity but for its own support, while here plaintiff solicits also for charitable purposes. The majority said: "There is no doubt that plaintiff, like many religious organizations, regards the practice of charity as a religious duty. It is not exclusively a religious activity, however; many charitable activities spring from sources in the everyday life of the community unrelated to religion."[12] In other words the majority reasoned that the essential characteristic of a religious activity which is protected by the constitutional guarantee is that it be exclusively religious. Charity is not an exclusively religious activity and hence, according

7. U. S. CONST. AMEND. XIV § 1.

8. Cantwell v. Connecticut, 310 U. S. 296, 303 (1940).

9. Murdock v. Pennsylvania, 319 U. S. 105 (1943); West Virginia Board of Education v. Barnette, 319 U. S. 624 (1943); Commonwealth v. Palms, 141 Pa. Super. 430, 15 A. (2d) 481 (1940); *Ex parte* Winnet, 73 Okla. Cr. 33, 121 P. (2d) 312 (1942). *Cf.* ROTTSCHAEFER, CONSTITUTIONAL LAW (1939) 728.

10. Cantwell v. Connecticut, 310 U. S. 296, 305 (1940).

11. Los Angeles Mun. Code, § 44.05.

12. Gospel Army v. The City of Los Angeles, — Cal. App. (2d) —, 163 P. (2d) 704, 712 (1945).

to the majority, is not protected by the right of freedom of religion even when carried on as a religious duty. The majority argued that because charity reaches into the secular life of the community, it becomes the concern of the community and subject to its regulations regardless of its religious motives; therefore, solicitations for charity as such may not be especially privileged even when carried on by a religious organization as part of its religious program. The majority would sever a charitable activity from other admittedly religious activities, even though both are carried on as religious duties. It placed the first in the realm of secular affairs, separating it from its religious initiative, plan and formula.

The minority disagreed with the severance theory of the majority, arguing that charity is not only motivated by religion but forms an integral part thereof and that in plaintiff's program charity is a part and parcel, not just an incident, of its religion, citing the court's prior decision in In re *Dart*.[13] In that case a similar situation to the one in the instant case was presented; the question of the validity of an ordinance arose concerning the solicitation of funds by the Salvation Army which used part of its funds to extend charitable relief to needy people. The court there said, as the second ground for its decision,[14] that in so far as the ordinance prohibited the Salvation Army from soliciting funds without a permit it was invalid as an unlawful interference with religious freedom. It reasoned that since this organization made the relief of the destitute an integral part of its religious life and work, such charity cannot be separated from religion and is protected by religious freedom,[15] observing that the secular aspect of charity which applies equally to all charities, whether temporal or religious, is distinguishable from the religious aspect of charity which applies only to religious charity.

The precise question whether charity conducted as part of a religious practice is to be protected by the right of freedom of religion has apparently not, except for these two California cases, been dealt with in our courts, nor apparently has it been taken up by the text writers. It is submitted that the minority view in the principal case is the correct one. The majority would appear to be in error in assuming that the Constitution only protects a religious activity or practice which is always, and under all circumstances, essentially of a religious nature, and that an activity which *can* be carried on by a secular organization for that reason cannot be considered a religious activity when engaged in by a religious body. This premise would appear to be unsound. The motive with which an act is done and the person who performs the act cannot so easily be disregarded. The speech given by a layman may be distinguished from the sermon preached by a minister of religion not only in the matter of content but also in the fact that one may be secular and the other religious, considering the purpose and the speaker. Take the very act of soliciting funds. Such solicitation may be a re-

13. 172 Cal. 47, 155 Pac. 63 (1916).

14. As the first ground the court said that, even if charity was to be considered a secular activity, this ordinance was invalid because it unduly restricted the person's pursuit of happiness. The authority of this case is somewhat weakened by the fact that the decision is 'two-pronged.'

15. *In re* Dart, 172 Cal. 47, 55, 155 Pac. 63, 66 (1916), wherein the court, in speaking of the place charity takes in the Jewish and Christian religions, declared: "In both of these religions, charity is the central word. It is enjoined, not as a good thing, or as a kindly thing only, but as a fundamental part of the religion itself."

ligious activity within the protection of the Constitution[16] and yet, depending upon the purpose of the solicitation and the person soliciting, it may be an unprotected secular activity. Education is another obvious case in point.[17] Undoubtedly there are limitations upon activities which may be denominated religious. A court may not be required to treat a manifestly commercial activity as religious merely because it is carried on by a religious body for an ostensibly religious purpose.[18] No such doubt can exist, however, in the case of the obviously and traditionally religious act of alms-giving, which historically and theologically constitutes so important a part of the practice of religion.[19] Such charitable activity has been recognized by the courts in some decisions as an essential function of a religious organization.[20]

16. Cantwell v. Connecticut, 310 U. S. 296 (1940).

17. Pierce v. Society of Sisters, 268 U. S. 510 (1925).

18. Church of Redeemer v. Axtell, 41 N. J. L. 117 (1878), wherein it was held that a statute exempting buildings used for religious purposes does not exempt a parsonage; Thompson v. West, 59 Neb. 677, 82 N. W. 13 (1900), wherein it was held that transactions in real estate merely as a matter of speculation by a religious corporation were *ultra vires* and void, even though the proceeds were used to pay its indebtedness and for the construction of its building; Board of Foreign Missions of M. E. Church v. Board of Assessors of City of Yonkers, 244 N. Y. 42, 154 N. E. 816 (1926), wherein it was held that property of the church hired out to persons unconnected with missionary undertakings, from which income was received, was not exempt from taxation as property used exclusively for religious purposes; Skipper v. Davis, (Tex. Civ. App.) 59 S. W. (2d) 454, 457 (1932), wherein the opening of an oil well for extraction of oil was said to constitute a "commercial purpose" for profit and not a "religious purpose" with regard to the use of land conveyed for religious purposes only.

19. *See in re* Durbrow's Estate, 245 N. Y. 469, 157 N. E. 747 (1927), wherein a residuary clause of a will directing the executor to distribute the residue of the estate "where he shall consider it most effective in the advancement of Christ's Kingdom on earth" was held valid as creating a definite trust for religious and charitable uses. In interpreting the purpose of this bequest to be the advancement of the cause of the Christian religion, the court at p. 748 said: "Its cause is advanced in divers manners, conspicuously through the work of religious associations and educational and charitable institutions of a religious character . . . It is identified not only with the dissemination of Christian doctrine but also with the teaching of the young and the care of the sick under such auspices. Charity and education have thus ever been the handmaids of religion. By the terminology of Evangelical Christianity, the bequest is one in aid of Christian work in its broadest sense; to carry Christ's message throughout the world; to care for the sick; and to bring up the young under religious teaching; to promote the principles and practices of the Christian religion. For these purposes, the church seeks and obtains the eleemosynary contributions of the laity . . ."

20. Succession of Auch, 3 So. 227 (La. 1887), wherein it was held that a corporation organized solely for religious, and not for charitable, purposes is entitled to take a charitable bequest. The court there said that charity is not foreign to the purpose of Christian religious organizations, but on the contrary, is an essential function in their economy; Boardman v. Hitchcock, 136 App. Div. 253, 120 N. Y. Supp. 1039 (4th Dep't 1910) *aff'd* 202 N. Y. 622, 96 N. E. 1110 (1911), wherein it was held that the maintenance of a home "for the returned, needy and worthy missionaries" was not beyond the domain of a religious corporation.

In addition, the conclusion reached by the majority is unpractical and results in an anomaly. A religious organization will be allowed to use its own funds for charitable purposes without hindrance but if it is to solicit directly for charity it will be bound by the regulations of the ordinance. Thus, all that a religious organization need do to avoid the regulations is to solicit only for its own support and then distribute the funds as it may choose.[21]

CRIMINAL LAW—PERJURY—NECESSITY FOR JURISDICTION OF TRIBUNAL BEFORE WHICH COMMITTED.—Petitioner and others were indicted by the Tulsa County Grand Jury for the crime of conspiracy to defraud the State of Oklahoma. The indictment was quashed upon it being shown that the crime had not been committed in Tulsa County and that the prosecution for the crime was barred by the Statute of Limitations. The petitioner was then indicted by the Tulsa County Grand Jury for allegedly perjurious answers made during his testimony before the grand jury in the prior hearing. The petitioner thereupon requested this court to issue a writ prohibiting the district court from prosecuting the indictment for perjury. *Held*, one judge dissenting, that the writ be granted. *Bennett v. District Court of Tulsa County*, — Okla. Cr. —, 162 P. (2d) 561 (1945).

In *Rex v. Aylett*,[1] Lord Mansfield succinctly stated the common law requisites for the crime of perjury as follows: "In the case of perjury, I take the circumstances requisite to be these: the oath must be taken in a judicial proceeding before a competent jurisdiction and it must be material to the question depending". The requirement of "competent jurisdiction" however, found no place in the English Perjury Act enacted in 1911.[2] Thus in England it would appear that perjury will lie even where the court had no jurisdiction of the action in which the statement was made.[3] In the United States however, statutory definitions of perjury committed in judicial proceedings[4] have been interpreted as including the common law requisite of "competent jurisdiction".[5] On the other hand, there have been statements in some judicial opinions which fail to include in their requirements for perjury the necessity for the competent jurisdiction of the court or body

21. In fact, in the instant case the record disclosed no segregation of solicited funds on the books of the plaintiff as being for a religious or for a charitable purpose. *See* 163 P. (2d) 704. 729 (dissenting opinion).

1. 1 T. R. 63, 69, 99 Eng. Rep. 973, 976 (K. B. 1785).

2. Perjury Act, 1911 1 & 2 Geo. V c. 6. *See*, 9 HALSBURY, LAWS OF ENGLAND (2d ed. 1933) 343, n. (l).

3. Perjury Act, *Supra* note 2 § 1 (2); ARCHBOLD, PLEADING, EVIDENCE, & PRACTICE (28th ed. 1931) 1219.

4. For instance, ALA. CODE ANN. (Michie, 1928) § 5159; CAL. PENAL CODE (1941) § 118; GA. CODE (1933) § 26-4001; ILL. REV. STAT. (1939) c. 38 § 473: 2 N.J.S.A. § 2:157-1: N. Y. PENAL LAW § 1620; 21 OKLA. STAT. (1941) § 491.

5. Thomas v. State, 13 Ala. App. 421, 69 So. 413 (1915); People v. Howard, 111 Cal. 655, 44 Pac. 342 (1896); Renew v. State, 79 Ga. 162, 4 S. E. 19 (1887); Pankey v. People, 2 Ill. 80 (1833); State v. Lawson, 98 N.J.L. 593, 121 Atl. 705 (1923); People v. Goodheim, 188 App. Div. 148, 176 N. Y. Supp. 468 (1st Dep't 1919); Morford v. Territory, 10 Okla. 741, 63 Pac. 958 (1901).

before which the false testimony is given.[6] It should also be pointed out that modern statutory definitions of perjury often include within the scope of the statutory crime false swearing in proceedings which are non-judicial in nature or wherever a statement under oath is required by law.[7] For purposes of discussing the question presented in the principal case, consideration will be restricted to the requirement of competent jurisdiction where perjury is charged to have been committed in a judicial proceeding.[8]

In the instant case, the question of jurisdiction of the grand jury in the hearing in which the false testimony was given is the pivot upon which the decision turns. Although allusion is made in the majority opinion to the non-materiality of the allegedly perjurious answers, the majority's decision is primarily based on the proposition that notwithstanding the materiality or lack of materiality of the testimony, the crime of perjury could not be sustained if the evidence later showed that the venue for the crime being investigated laid in another county or that the prosecution was barred by the Statute of Limitations. Concededly, since the conspiracy was committed in another county[9] and the prosecution was barred by the Statute of Limitations,[10] a valid jurisdictional impediment to the action of

6. For example, in People v. Kresel, 147 Misc. 241, 242, 264 N. Y. Supp. 464, 466 (Sup. Ct. 1932) the court said: "To establish the crime of perjury, it is necessary that the people prove three elements of the crime: The false swearing, the corrupt or willful intent in such false swearing and, thirdly, that the matter falsely and willfully sworn to was material to the issue in the trial." However, it should be noted that, since this case did not involve any question of jurisdiction, the failure to include the requirement of competent jurisdiction may lack significance.

7. Thus the N. Y. PEN. LAW, § 1620 defines perjury to include false swearing ". . . in, or in connection with, any action or special proceeding, hearing, or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered. . . ." So that the crime of perjury has been construed to include a false swearing to an application for a pistol permit, People v. Joseph, 173 Misc. 410, 17 N. Y. S. (2d) 943 (Sup. Ct. 1940); or to an application for a marriage license, People v. Lecesse, 32 Cr. R. 20, 148 N. Y. Supp. 929 (City Ct. 1914); or to a report made to the superintendent of banks as required by law, People v. Vail, 57 How. Pr. 81 (N. Y. 1879).

8. A grand jury, being a constituent part or branch of the court, is a judicial body and its members are officers of the court. Irwin v. Murphy, 129 Cal. App. 713, 19 P. (2d) 292 (1933); State *ex rel* Hall v. Burney, 229 Mo. App. 759, 84 S. W. (2d) 659 (1935); State v. Crowder, 193 N. C. 130, 136 S. E. 337 (1927).

9. "The grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament." 4 BL. COMM. *303. Bowie v. State, 185 Ark. 834, 49 S. W. (2d) 1049 (1932); State v. Oliver, 186 N. C. 329, 119 S. E. 370 (1923); *In re* Dauphin County Grand Jury, 332 Pa. 289, 2 A. (2d) 783 (1938).

10. Unlike statutes of limitations in civil cases which are statutes of repose and bar the remedy only, the statute of limitations in a criminal case creates a bar to prosecution and the time within which an offense is committed becomes a jurisdictional fact which the state must allege and prove. People v. Ross, 325 Ill. 417, 156 N. E. 303 (1927); People v. Hines, 284 N. Y. 93, 29 N. E. (2d) 483 (1940); People *ex rel*

the grand jury was raised. Thus the precise question presented by the instant case is this: does such failure of jurisdiction prevent the commission of the crime of perjury?

It is well settled that where there is absolute want of jurisdiction to take cognizance of a matter *ab initio*, false testimony in said proceeding will not constitute perjury.[11] Thus, where there was no statute making it a criminal offense for a constable to take illegal fees,[12] or where there was no statutory authority for the proceeding in which the oath was taken,[13] false testimony in such proceedings did not constitute perjury. In the same vein it has been held that where the special tribunal before which the testimony was taken was illegally appointed and without authority to act[14] or where the proceedings were held before a justice of the peace outside of the district for which he was elected,[15] perjury could not be sustained.

The aforementioned general rule however has been qualified and restricted so that perjury may be committed on a trial under an indictment which is afterwards held to be insufficient,[16] and false testimony given in a case where the record indicated jurisdiction was none the less perjury because facts later appeared to defeat jurisdiction.[17] Following this train of thought, it was held in a federal case that false testimony in an injunction suit where the bill alleged diversity of citizenship thus giving the federal court jurisdiction, constituted perjury even though jurisdiction was later defeated by evidence showing an identity of interest between the plaintiff and one of the defendants.[18] The principle of law induced from these cases which qualify and limit the general rule is that while a court may eventually not have jurisdiction to pronounce an effective judgment because facts to defeat jurisdiction later appear nevertheless false testimony given during such a hearing should be perjury.

If the court or other body before which the false testimony is given has at

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Reibman v. Warden of County Jail at Salem, 242 App. Div. 282, 275 N. Y. Supp. 59 (3d Dep't 1934).

11. 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1538. *But see* State v. Mandehr, 168 Minn. 139, 209 N. W. 750 (1926) (perjury conviction sustained where perjurious testimony was given in trial for violation of city ordinance previously annulled by state statute).

12. Pankey v. People, 2 Ill. 80 (1833).

13. State v. Gates, 107 N. C. 832, 12 S. E. 319 (1890) (false testimony in the trial of a motion to tax costs against the prosecutor where there was no statutory authority for the taxing of costs in such cases was not perjury).

14. Commonwealth v. Hillenbrand, 96 Ky. 407, 29 S. W. 287 (1895) (false testimony alleged to have been committed before a committee appointed by a legislative body to investigate charges of bribery held not to constitute perjury since the legislative body had no authority to appoint such a committee).

15. Berry v. State, 10 Okl. Cr. 308, 136 Pac. 195 (1913).

16. State v. Rowell, 72 Vt. 28, 47 Atl. 111 (1899). It should be pointed out however, that where an indictment is insufficient, merely in form, as in the case cited, the court has jurisdiction. See Note (1945) 14 FORDHAM L. REV. 101, 103.

17. People v. Rogers, 348 Ill. 322, 180 N. E. 856 (1932). (Although a decree of divorce granted on the basis of false testimony as to residence was void, the one giving the false testimony was guilty of perjury).

18. West v. United States, 258 Fed. 413 (C. C. A. 6th, 1919).

least jurisdiction to determine its own jurisdiction to the extent of taking evidence for that purpose, it would seem that false testimony given while the hearing body possesses *prima facie* jurisdiction should be punishable as the crime known at the common law as perjury. Such a case is clearly distinguishable from one where at the very outset the court or other body patently lacks jurisdiction to proceed further and take evidence. False testimony is criminal because the judicial process of the law depends for its effective administration upon some sanction to assure the truthfulness of the testimony upon which judicial action is predicated.[19] Such a process would be defeated by false testimony whether or not the court eventually is able to render an effective judgment. An example may be apposite—false testimony by a process server that he made personal service of a summons on a defendant in a civil case. Could it be successfully argued that such false testimony given under oath is not perjury because the court finally decided that there was no personal service and therefore the court lacked jurisdiction? If however, the complaint disclosed on its face that the court lacked jurisdiction to grant relief, it would be arguable that no perjury could be committed.

In the instant case the court simply held that since the grand jury did not have jurisdiction to indict, perjury could not be committed. In order to sustain its holding, the majority places its reliance on cases which are neither pertinent nor germane to the issue in question.[20] The dissent's contention that this is merely a case of the subsequent disclosure of the want of jurisdiction to pronounce an effective judgment commends itself as the proper approach. The crime of conspiracy to defraud the state was a felony and within the general criminal jurisdiction of a District Court of Oklahoma.[21] The grand jury was duly empaneled by that court to investigate and determine whether or not said crime had been committed in Tulsa County, and if so, to indict. The failure of jurisdiction was evident only after the facts had been ascertained and there had finally been a definite adjudication to that effect by the Oklahoma Criminal Court of Appeals.[22] It is submitted that to allow this adjudication retroactively to afford a defense to one who had given false testimony in such an investigation, finds little support in precedent or logic and is contrary to sound public policy.

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19. In order to combat falsifications and vindicate their authority, courts properly have held perjury to be the subject matter of a punishment for contempt. *Ex Parte* Hudgings, 249 U. S. 378 (1919); Berkson v. People, 154 Ill. 81, 39 N. E. 1079 (1894); *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065 (1895). For a discussion of the power of the courts to punish perjury as contempt, *see* Comment (1933) 21 CALIF. L. REV. 582.

20. Among others, State v. Mitchell, State Bank Examiner *et al.*, 202 N. C. 439, 163 S. E. 581 (1932) in which it was held that a grand jury in one county could not indict a defendant for a crime committed in another county and Oklahoma Tax Commission v. Clendinning, 193 Okl. 271, 143 P. (2d) 143 (1943) which involved an interpretation of the Uniform State Tax Procedure Act and held that a grand jury in one county could not be concerned with violations of the income tax law by citizens of another county. Neither of these cases involved the precise question involved in the principal case, i. e., did the grand jury have jurisdiction to hear the perjured testimony?

21. OKLA. CONST. Art. 7 § 10; 20 OKLA. STAT. 1941 § 91.

22. State v. Bennett *et al*, — Okl. Cr. — 162 P. (2d) 581 (1945).

DAMAGES FOR BREACH OF CONTRACT TO SELL—RECOVERY OF RETAILER'S NET PROFIT—GENERAL OR SPECIAL DAMAGES.—Defendant partnership contracted to sell quantities of wine to plaintiff's assignor at monthly intervals over a three year period. Other wines of the type contracted for were not available on the market, although this fact was apparently unknown to the defendants when the contract was made. Before deliveries were to commence defendants announced they would make no deliveries. The buyer elected to treat this announcement as an anticipatory breach and started this action for damages. From a judgment for the plaintiff both parties appealed. *Held*, plaintiff was entitled to recover prospective net profits which the buyer would have made in the ordinary course of business had not defendants breached the contract of sale. *Bercut v. Park, Benziger and Co.*, 150 F. (2d) 731 (C. C. A. 9th, 1945).

The court's opinion does not disclose whether at the time the contract was made the defendants knew that the buyer would be unable to obtain from other sources, at the times set for delivery, wines of the type contracted for. Nevertheless the insistence of defendant's counsel that prospective profits are not recoverable, unless the seller is proved to have such knowledge, indicates that such knowledge was lacking. The court's conclusion that, despite such lack of knowledge, the plaintiff should recover the net profits the buyer would have made upon a resale, constitutes a decision which, while it may be just under the particular facts of the instant case, appears in view of the authorities, to be at best uncertain in its statement of the law.

The basis of the court's determination was that the buyer's loss of prospective net profits was the ordinary damages which flowed from the breach. It is true that loss of net profits may be the ordinary or usual damages which result from a breach. In legal parlance such damages are frequently referred to as "general damages." Yet loss of net profits may also, and frequently do, constitute so-called "special", "extraordinary" or "consequential" damages. "Ordinary" or "extraordinary," "general" or "special" are relative terms.[1] A loss which, under one set of facts may be considered usual,[2] in another set of facts may be considered unusual.[3] In final analysis whether a loss is ordinary (usual) or extra-

1. Kerr S.S. Co., Inc. v. Radio Corporation of America, 245 N. Y. 284, 288, 157 N. E. 140, 141 (1927), where the court speaking through Cardozo, C. J., said "At the root of the problem is the distinction between general and special damage as it has been developed in our law. There is need to keep in mind that the distinction is not absolute, but relative. To put it in other words, damage which is general in relation to a contract of one kind may be classified as special in relation to another."

2. Weston v. Boston & M. R. Co., 190 Mass. 298, 76 N. E. 1059 (1906) wherein the plaintiff was permitted to recover from a carrier the net profit which would have been made from a theatrical performance, had the carrier not wrongfully delayed transportation of a stage scenery and other properties of a theatrical company. In Chapman v. Fargo, 223 N. Y. 32, 39, 119 N. E. 76, 78 (1918), the court pointed out that such damages would not be deemed special damages but ordinary damages such as were to be anticipated in view of the facts known to the carrier.

3. Chapman v. Fargo, 223 N. Y. 32, 119 N. E. 76 (1918), wherein a carrier failed to transport promptly a package of motion picture films marked "Rush" which were intended for a Christmas showing. The court refused to allow the plaintiff to recover the profits which would have been realized from an exhibition of the films, since it was not proved that the carrier knew of all the special circumstances.

ordinary (unusual) depends upon the facts known to the parties to the contract, at the time it was made, in respect to the circumstances which would exist, if the contract were breached. *Hadley v. Baxendale*[4] announced the guiding principle so far as damages for breach of a contract are concerned: they are "such as may fairly and reasonably be considered either arising naturally—i.e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach."[5] Simply stated, the recoverable damages are those which are foreseeable.[6] The normal damages which would ordinarily result are presumed to have been foreseen;[7] if they would ordinarily not result from the breach they are unusual in that sense, but if they were actually foreseen, or should have been foreseen, such damages are, in view of such foresight, not extraordinary or unusual but quite normal.[8] The key, therefore, to whether damages are usual and recoverable or unusual and not recoverable exists, in the last analysis, in the knowledge, or lack of knowledge, of the special circumstances which the defendant possessed at the time the contract was made. Knowledge acquired later is immaterial.[9]

4. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

5. *Id.* at 355, 156 Eng. Rep. at 151.

6. Some courts, especially the federal courts, would require in addition to foresight, proof of an assumption of liability in respect to any out-of-the-ordinary loss. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 543-544 (1903), wherein Justice Holmes said: "It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract, when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out in terms which it fairly may be presumed he would have assented to if they had been presented to his mind . . . We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made." *See* Twachtman v. Connelly, 106 F. (2d) 501 (C. C. A. 6th, 1939). Of course the federal courts may not apply the above rule of damages where the doctrine of Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938) applies. The doctrine of the federal courts has been criticized, 5 WILLISTON, CONTRACTS, (Rev. ed. 1937) § 1357, and defended, Bauer, *Consequential Damages in Contract* (1932) 80 U. OF PA. L. REV. 687.

7. Cory v. Thames Iron Works and Shipbuilding Co., L. R. 3 Q. B. 181 (1868); United States v. Burton Coal Co., 273 U. S. 337 (1927).

8. *See* note 2 *supra.*

9. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1357, p. 3807; 1 RESTATEMENT, CONTRACTS (1932) § 330; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540. 545 (1903); Goldston v. Wade, 123 N. Y. Supp. 114, 115 (Sup. Ct. 1910); Hassler v. Gulf Co., & S. F. Ry. Co., (Tex. Civ. App.) 142 S. W. 629 (1911). One reason why the plaintiff's damages cannot be increased by knowledge, acquired after the contract

One special circumstance in particular, upon which the decision in *Hadley v. Baxendale* itself turned[10] and which is very often the determining factor in any transaction involving the principle announced in that landmark of the law, is knowledge by the breaching party, at the time the contract was made, of the unavailability to the injured party of substituted performance by someone other than the wrongdoer.[11] This requirement is posited upon the interrelated rule of damages that a party wronged cannot recover damages for consequences of the wrong which could have been avoided by the injured person with the exercise of reasonable care.[12]

The above common law principles have been codified in the Uniform Sales Act. The measures of damages for breach of an executory contract to sell, where the commodity involved is available in a market, "in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price" at the time and place for performance;[13] otherwise the measure of damages "is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract."[14] Where there is an available market for the goods in question, rarely will "the special circumstances" exist to permit a recovery by a buyer of damages greater

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is made, of facts indicating that a larger-than-usual loss may result from the breach, is that the opportunity to refuse to enter into the contract or to fix a higher price in view of the greater risk is lost once the contract is entered into and the terms fixed. To hold the defendant liable for the greater loss where he is later informed of the facts would seem to be unjust. McCORMICK, DAMAGES (1935) 572. For this reason the decision in Dreyer Commission Co. v. Fruen Cereal Co., 148 Minn. 443, 182 N. W. 520 (1921) seems questionable. It is not required, however, that the seller know of an actual contract of resale. It is sufficient that he understand that the goods are purchased for eventual resale, as in the ordinary wholesaler-retailer contract. Delafield v. Armsby, 131 App. Div. 572, 116 N. Y. Supp. 71 (1st Dep't 1909) *aff'd*, 199 N. Y. 518, 92 N. E. 1083 (1910).

10. The actual decision in *Hadley v. Baxendale* may be criticized since the court held as a matter of law that the defendant lacked notice or knowledge of the special circumstances, whereas, under the facts of the case, it would seem that the jury might have inferred sufficient notice or knowledge. *See* Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052 (1904).

11. Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N. Y. 33, 173 N. E. 913 (1930), noted in (1931) 16 CORN. L. Q. 584; RESTATEMENT, CONTRACTS (1932) § 330, comment *c*, pp. 510-511; 1 SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (2d ed. 1909) 67.

12. McCORMICK, DAMAGES (1935) pp. 127, 133; 1 RESTATEMENT, CONTRACTS (1932) § 336. "Czarnikow is in this dilemma: If the circumstances referred to, or other special circumstances, debarred Czarnikow from making replacements from the general market, then Federal is not liable for Czarnikow's special loss since it had no knowledge, when contracting, of the special circumstances which might give rise to Czarnikow's disability. On the other hand, if there were no such circumstances and no disability to make replacement from the general-market, then, under all the authorities, Czarnikow is entitled to none other than general damages." Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N. Y. 33, 48, 173 N. E. 913, 918 (1930).

13. UNIFORM SALES ACT, § 67(3).

14. UNIFORM SALES ACT, § 67(2).

in amount than the standardized difference between the contract price and market price, for, as the parties are presumed to have contemplated, the buyer can supply himself with the equivalent from the market.

Does it follow, as the court held in the instant case, that, in the absence of a market, the buyer automatically recovers the net profit he would have made on a resale? It would seem not. It is true that the Sales Act only speaks of "special circumstances" in connection with goods having an available market, but it does not seem to follow that, where the goods have no market, the limitations upon recovery expressed in *Hadley v. Baxendale,* cease to apply. In such a case "the loss directly and naturally resulting in the ordinary course of events from the seller's breach"[15] is not necessarily and always the net profit which would have been made by the buyer on a resale. The net resale profit would be such a loss had the parties known, when the contract was made, that there would be no market at the time of delivery.[16] Then the loss of net profits would be a contemplated loss within the rule of *Hadley v. Baxendale.* But where, as was apparently the fact in the instant case, the parties lacked such knowledge, how can it be said that the loss of the net resale profit was foreseen as likely damages, unless it is to be presumed as a matter of law (or as an inference of fact in the particular case) that such a loss was a contemplated probability? The seller might urge, as did the defendants in the principal case, that at the time the contract was made the seller assumed that in case of a breach the buyer would supply himself from the market and thus minimize his damages.

Such an argument is not merely technical. It may have a practical basis. In the principal case the sellers were apparently wholesalers and the buyer a retailer. Even after eliminating the expense incidental to a resale, the spread between the wholesale price and the retail price—i.e., the net profit—might be very substantial.[17] In the absence of knowledge that wines of the type contracted for would, in case of a breach, be unavailable in the market, it would seem to be an extension of the rule of *Hadley v. Baxendale* to hold the sellers liable for such an unusual loss.

It cannot be said that judicial opinion or text-writers support the decision. The court cites the case of *Orester v. Dayton Rubber Mfg. Co.*,[18] for the proposition that loss of net profits on a resale "are not special, but are general damages."[19] But, as above pointed out, the adjectives "special" and "general" are relative in meaning.[20] In the cited case the seller was the sole source of the particular

15. *Ibid.*

16. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1347; 1 CLARK, NEW YORK LAW OF DAMAGES (1925) § 264.

17. In the principal case where the contract was to deliver 60,000 cases of wine the plaintiff recovered the sum of $72,687.51, representing the difference between the contract price and the retail price, less expenses of transporting, insuring, warehousing and selling the wines. In any event recoverable net profits must be such as are normal, since except where the seller has knowledge of a specific resale at an extraordinary profit, it must be presumed that the goods were to be resold at a normal profit. Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487 (1875); 1 RESTATEMENT, CONTRACTS (1932) § 331, comment *b*.

18. 228 N. Y. 134, 126 N. E. 510 (1920).

19. 150 F. (2d) 731, 733 (C. C. A. 9th, 1945).

20. See notes 1, 2 and 3 *supra.* Also see Neverfail Lighter Co. Inc. v. Blum, 201 App. Div. 153, 194 N. Y. Supp. 24 (1st Dep't 1924).

kind of tires which it had agreed to deliver to the buyer and must have known at the time the contract was made that the buyer would be unable to avoid the loss of his resale profit by acquiring similar tires in the market. The other cases cited by the court do not appear to be in point.[21] The court admits that Williston supports the position taken by the defendants,[22] and there are decisions which would appear to conflict with the one in the principal case.[23]

What undoubtedly in part impelled the court to permit the plaintiff to recover the net profits on a resale was the apparent injustice of the alternative recovery, namely, nominal damages. While the rationale of the principle announced in *Hadley v. Baxendale* would seem to lead to such result, it strikes one as unjust. Perhaps the just solution—and, for all that appears, the one which the court in the principal case actually hit upon—was that the probability that wines of the type contracted for might be unavailable at the time of delivery was inferentially within the contemplation of the parties when they made their contract. In this type of wholesaler-retailer transaction no one could really quarrel if such an inference of fact were drawn. Nevertheless, in apparently repudiating the principle that to recover net resale profits a buyer must prove that a seller knew or at least foresaw the probability, when contracting, that equivalent goods would not later be available to the buyer, the opinion is questionable.

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21. It does not appear from the facts in the following cases cited by the court, Sobelman v. Maier, 203 Cal. 1, 262 Pac. 1087 (1927); West Coast Winery v. Golden West Wineries, — Cal. App. (2d) —, 158 P. (2d) 623 (1945); Roach Bros. & Co. v. Lactein Food Co., 57 Cal. App. 379, 207 Pac. 419 (1922); Western Industries Co. v. Mason Malt Whiskey Distilling Co., 56 Cal. App. 355, 205 Pac. 466 (1922) that the seller, at the time the contract was made, had any knowledge of the probability of substitute performance. In the other cases cited by the court, Flores v. Basso, 229 Mich. 577, 201 N. W. 875 (1925); Acunto v. Schmidt-Dauber Co., Inc., 207 App. Div. 411, 202 N. Y. Supp. 1 (1923); Black Diamond Fuel Co. v. Illinois Fuel Co., 219 Ill. App. 150 (1920), it is apparent that the seller did have such knowledge from the nature of the articles sold.

22. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1347: "Even though no contract for a resale has yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, *and defendant knew that other goods of the kind contracted for could not be obtained elsewhere by the buyer.*" (italics added.)

23. Marcus & Co., Inc. v. K. L. G. Baking Co., Inc., 122 N. J. L. 202, 3 A. (2d) 627 (1939). In this case defendant, a baking concern, agreed to sell and deliver to plaintiff, a dealer in bakery ovens, four used bakery ovens by a certain date. Defendant delayed delivery, as a result of which plaintiff lost a contract of resale. The court held that even though the parties contemplated an immediate resale, the plaintiff could not recover such a resale profit, since there was no evidence "to suggest that the parties here contemplated inability of the buyer to obtain equipment elsewhere for the performance of such resale contract as it might make; rather the contrary." Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N. Y. 33, 173 N. E. 913 (1930).

DOMESTIC RELATIONS—RIGHT OF CHILDREN TO SUE FOR INTERFERENCE WITH THE FAMILY RELATION AND SUPPORT.—The plaintiffs, four minor children, living in Pennsylvania, bring this action in the federal court by their mother, as next friend, for damages against the defendant, living in Illinois, alleging that she enticed their father from their home and from them and caused him to go to Chicago and live with her; causing the father to refuse to contribute to the maintenance and support of the plaintiffs. The district court dismissed the complaint, as not stating a cause of action. On appeal *held*, judgment unanimously reversed. The complaint states a good cause of action. *Dailey v. Parker*, 152 F. (2d) 174 (C. C. A. 7th, 1945).

Recognition of a right, previously considered to be unprotected in the law, calls for an evaluation of such judicial action. The fact that a right has hitherto been unrecognized and that there is no precedent for the granting of a remedy for the violation of that right is not a sufficient ground for the denial of a remedy to an aggrieved party.[1] However, recognition of such rights should not be dependent on the whim or fancy of the judiciary, or the sympathies and natural propensities aroused by a particular situation, but rather should be determined by advertence to sound and established norms and principles deriving from the positive and natural law. To what standards then must we adhere to resolve such a problem? The rationale would appear to lie in the determination of two propositions, *viz.*, first, is there a right in the plaintiff and a corresponding duty owed by the defendant to the plaintiff, and secondly to what extent will and should the law enforce that duty and protect that right.[2]

The respective rights of each member of a family in reference to the other members involve, as the court points out, a broadening concept.[3] Originally it was believed, and so held, that the father as head of the family was sole repository of all family rights. Man and woman were as one and that one was the man.[4] So for many years women were denied the right to recover for alienation of their spouses' affections[5] and the husband was permitted recovery only on the fiction of loss of services.[6] Both of these limitations were removed, however, and recovery was permitted to both spouses, both in criminal conversation[7] or alienation of affections,[8] for loss of consortium.[9] The fact that previously a wife's right to her husband's consortium had never been recognized did not deter the recognition

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1. CARDOZO, GROWTH OF THE LAW (1924) *passim*; 1 COOLEY, TORTS (3d ed. 1906) 24, 25; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889).

2. GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 1-43.

3. 152 F. (2d) 174 176 (C. C. A. 7th, 1945); Pound, *Individual Interests in the Domestic Relations* (1916) 14 MICH. L. REV. 177, 179.

4. 1 BL. COMM.* 442.

5. Duffies v. Duffies, 76 Wisc. 374, 45 N. W. 522 (1890) wherein it was held that no cause of action would lie at common law or under the statutes permitting married women to sue.

6. MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 166.

7. Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923).

8. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889).

9. ". . . the weight of modern authority bases the action on the loss of the consortium; that is, the society, companionship, conjugal affection, fellowship, and assistance. MADDEN, *op. cit. supra*, note 6, at 167.

of her right by the courts.[10] So, too, in the instant case the fact that there is no exact precedent for the action should not be fatal to its maintenance.

It is fitting, therefore, to examine the precedents to determine whether the present action is founded on established basic principles and flows naturally from the reciprocal[11] rights and duties attendant on the parent-child relationship. The relationship of parent and child differs from the common law concept of man and wife in that there is no unity of legal personality of parent and minor child.[12] The obligations flowing from the parent-child relationship are conceived in the natural and moral law.[13] The prime duties the parent owes to the child are generally said to consist of protection,[14] support,[15] guidance,[16] preservation[17] and education.[18] There are duties incumbent on the child in turn which give parents the right to the custody,[19] control[20] and services and earnings[21] of their offspring. These rights in the parents it is said result from the duties they owe their children

10. KEEZER, MARRIAGE & DIVORCE (2d ed. 1923) § 150. "Any interference with these [marital] rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same." Bennett v. Bennett, 116 N. Y. 584, 590, 23 N. E. 17, 18 (1889).

11. Ramsey v. Ramsey, 121 Ind. 215, 23 N. E. 69 (1889).

12. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930).

13. 1 BL. COMM.* 447; O'Connell v. Turner, 55 Ill. 280 (1870).

14. Stanton v. Wilson, 3 Day 37 (Conn. 1808); Beigler v. Chamberlin, 138 Minn. 377, 165 N. W. 128 (1917); Win. v. Morley, 99 Mo. 484, 12 S. W. 798 (1890); *In re* Moorhead's Estate, 289 Pa. 542, 137 Atl. 802 (1927).

15. The parental duty to give personal care and protection to children is said to be distinct from the duty to support. See 1 SCHOULER, LAW OF DOMESTIC RELATIONS (6th ed. 1921) § 773.

16. So, too, a parent may advise foolishly and good faith will be presumed, and such parent will not be liable in a suit for alienation of affection. Mowen v. Mowen, 64 S. D. 581, 269 N. W. 85 (1936).

17. People v. Pierson, 176 N. Y. 201, 68 N. E. 243 (1903) wherein it was held that religious beliefs did not excuse from the duty of providing medical care for a child and failure to fulfill this duty is a wrong which the state may punish under its police power.

18. Pierce v. Society of Sisters, 268 U. S. 510 (1925). Blackstone pronounces this to be by far the greatest of all in importance. 1 Bl. Comm.* 450.

19. SCHOULER, DOMESTIC RELATIONS (5th ed. 1895) § 245 *et seq.* At common law the father rather than the mother was said to be entitled to custody of the children. 2 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) §§ 1341, 1342; Porter v. Porter, 60 Fla. 407, 53 So. 546 (1912); Soper v. Igo, 121 Ky. 550, 89 S. W. 538 (1905). However, this doctrine, like the theory on which it has been based, *viz.*, the legal unity of husband and wife, (BLACKSTONE, *op. cit. supra*, note 5) has been abrogated by statute in many states. 4, VERNIER, AMERICAN FAMILY LAWS (1936) Table CXI.

20. 2 KENT, COMMENTARIES (14th ed. 1896) 203; see also 1 BL. COMM.* 452.

21. MADDEN, *op. cit. supra*, note 6, § 120.

and are given them by way of aiding in the fulfillment of such duties and to act as recompense.[22] Out of these enumerated duties of parents and children flow the rights of each. These rights the law considers valuable and in most cases will protect, although it is questioned whether or not they may be classed as property rights. It has been said that the parent's rights in the child are in the nature of property rights,[23] whereas it has been denied that the obligation imposed by the relationship on the parent vests a property right in the children.[24]

The question now to be considered, and the one in the instant case, is to what extent will the law protect these rights? Parents' rights in the child are rather fully protected, the relationship being deemed rather artificially to be that of master and servant.[25] Most actions by parents, therefore, are based on the fiction of loss of service and the loss of opportunity to enjoy the child's earnings. This is usually the foundation of the parent's action for damages for tort to the child resulting in injury or death.[26] It was formerly also the basis for an action in seduction by the father of the victim against the seducer.[27] However, now the courts are also inclined to consider other elements, *viz.*, the shame to the family, loss to the father of the companionship and comfort of the daughter.[28] The common law, however, has never given formal recognition to the broad right of the parent to the consortium of children as it has done in the relation of husband and wife.[29] So it has been held that no action will lie in favor of a parent against one who alienates the affections of a child, and this is conceded universally to be the law.[30]

The right of children to a fulfillment of parental duties was not enforceable at common law by the children through suits directly against the parents. Such an action was considered to infringe on the essential unity of the home.[31] In some jurisdictions the rule is based on lack of a common law wrong rather than on any theory of policy.[32] Usually the duty to support the child is enforced by the state and a parent who does not fulfill this obligation may in addition be made amenable to penal prosecution and penalty.[33] This means of enforcement is purely

22. 2 KENT, COMMENTARIES (14th ed. 1896) 203.

23. Tidd v. Skinner, 225 N. Y. 522, 533, 122 N. E. 247, 251 (1919).

24. Yarborough v. Yarborough, 290 U. S. 202 (1933).

25. PROSSER, TORTS (1941) 916; Lawyer v. Fritcher, 130 N. Y. 239, 245, 29 N. E. 267, 268 (1891).

26. *See* Pickle v. Page, 252 N. Y. 474, 169 N. E. 650 (1930) for a discussion of the elements of damage in such actions. RESTATEMENT, TORTS (1938) § 703, comment *g., h.*

27. Grinnell v. Wills, 7 Man & G. 1033, 135 Eng. Rep. 419 (C. P. 1844).

28. Pound, *Individual Interests in Domestic Relations* (1916) 14 MICH. L. REV. 177, 184.

29. 1 STREET, The FOUNDATION OF LEGAL LIABILITY, THEORY AND PRINCIPLES OF TORT (1906) 267.

30. Pyle v. Waechter, 202 Iowa 695, 210 N. W. 926 (1926); Miles v. Cuthbert *et al.*, 122 N. Y. Supp. 703 (Sup. Ct. 1909).

31. Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Buchavan v. Buchavan, 170 Va. 458, 197 S. E. 426 (1938).

32. Dunlap v. Dunlap, 84 N. H. 352, 150 Atl. 905 (1930).

33. For a complete compilation of comparative state law as to the duty of support by the parent and the methods of enforcement, see 4 VERNIER, AMERICAN FAMILY LAW (1936) Table CXII p. 66.

statutory and is based on the theory that support of the child is essential to the general welfare of society and of the state to prevent its becoming a public charge.[34]

What right then has a child to sue a third person for either a tort against the parent or for any interference with the family relation? At common law a child was not allowed to sue a third person for tort to the child's parent.[35] Today under statute in some jurisdictions a child may sue for the wrongful death of his parent[36] or, under the liquor statutes, for illegally selling liquor to the parent causing intoxication of the parent and subsequent injury to the child.[37] These actions are based on the theory of the child's loss of the support of the parent. Nowhere, however, has a child been permitted to sue a third person for alienation of the parent's affections or interference with the family relations, without the additional element of tort to the parent. This results from an application of the principle that there is no right to consortium between parent and child.[39] There would appear to be a further reason in the instant case for denying relief for alienation of affections, in that such actions have been deemed contra to the public policy of both Pennsylvania and Illinois and so barred.[40]

Despite the admirable predilection of the court in the subject case to give the children redress against their father's paramour by way of damages, it would seem to be without the bounds of a proper exercise of "judicial empiricism."[41] Even if the action is based on loss of their father's support, it is questionable whether, without benefit of statute, they have such a property right. The analogous right of recovery for death of the parent and consequent loss of his support is recognized only perforce of a statute. Certainly total extinction of the parent is a wrong on as high a plane as separation from the parent and yet it required legislation to give the child a cause of action for death of the parent.

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34. Ethridge J., dissenting in Rawlings v. Rawlings, 121 Miss. 140 at 145, 83 So. 146 at 148 (1919) considers the denial of the right of action to the children in the face of the statutory enforcement to be anomalous.

35. Eschenbach v. Benjamin, 195 Minn. 378, 263 N. W. 154 (1935).

36. 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 266.

37. *Ibid.*

38. Morrow v. Yuantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934), noted in (1935) 21 VA. L. REV. 443, 4 BROOKLYN L. REV. 217, 20 CORN. L. Q. 255, 83 U. OF PA. L. REV. 276. Recovery here was denied to the children against a third person who enticed their mother from the home, first because the action was without precedent and secondly because it would open the door to too much litigation.

39. See note 29 *supra.*

40. Kane, *Heart Balm and Public Policy* (1936) 5 FORDHAM L. REV. 63; ILL. REV. STAT. ANN. (Smith-Hurd 1939) C. 38 § 246; PA. LAWS 1935, Act 189. However, in a prior action by the mother of these children directly against the defendant in the instant case, charging alienation of affections, despite these statutes, the district court held she had a good cause of action in view of a "catch-all" statute relied on by the plaintiffs in the principal case, *viz.*, Art. 2 § 19 of the Illinois Constitution, wherein it is provided "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ." Daily v. Parker, 61 F. Supp. 701 (N. D. Ill. 1945).

41. The court accepts and adopts Dean Pound's label as well as his philosophy with regard to judicial law-making where precedent is lacking, 152 F. (2d) 174, 177. See, POUND, THE SPIRIT OF THE COMMON LAW 183.

Like all general maxims, the maxim *ubi jus ibi remedium* requires explanation. "*Jus*" in the maxim means a legally protected right.[42] Without question both the defendant and the children's father committed a grave moral and public wrong, for which they may be punishable criminally.[43] However, that fact does not answer the question whether the children have been legally wronged. Their complaint is that the defendant's act deprived them of their father's support and his society and affection. The father's failure to support his children is a public wrong of which the state takes cognizance by providing a remedy in a quasi-criminal proceeding.[44] It would seem to be an unsound extension of the principles of proximate (legal) cause and of vicarious liability to shift to the defendant the legal responsibility for the father's omission, which the children under the common law could not enforce by direct suit against the father.[45] A recovery by the children of damages for loss of their father's affection and society is equally questionable. Unfortunately there are many rights in the moral order which the law refuses to enforce to the extent of requiring the payment of money to the person wronged, even though the wrong is recognized and condemned. Practical considerations of public policy, especially the discouragement of spurious and fraudulent claims, may impel the courts, though often unwillingly, to deny recompense to the person harmed.[46] The law must at times balance the denial of compensation in meritorious cases against the recovery, or the threat of recovery, in others. In addition the affection and society of a man, whether as a husband or father, in the final analysis depends upon him, and is hardly measurable in dollars and cents. Their loss, even when enticed away by another, should not be a compensable item of recovery in a civil action, and in this type of case, no legitimate purpose can be served by the recovery of merely nominal damages.[47]

EMERGENCY PRICE CONTROL ACT—CIVIL ACTION FOR CEILING VIOLATION—REMEDIAL OR PENAL—SURVIVAL OF ACTIONS.—The administrator of the decedent's estate brought an action under § 205 (e) of the Emergency Price Control Act of 1942, as amended, to recover for alleged overcharges of rent exacted from the decedent by the defendant. The plaintiff demanded $50 for each overcharge together with attorney's fees and costs. *Held*, four justices dissenting, complaint dismissed. The cause of action did not survive the death of plaintiff's intestate since it was an action for a penalty. *Stevenson v. Stoufer*, — Iowa —, 21 N. W. (2d) 287 (1946).

The survival of an action such as the one in the instant case has been thought to depend upon whether § 205 (e) of the Emergency Price Control Act[1] provides

42. BROOM, LEGAL MAXIMS (10th ed. 1939) 118.

43. ILL. REV. STAT. ANN. (Smith-Hurd 1939) C. 38 § 46.

44. See note 33 *supra*.

45. *Ibid.*

46. Mitchell v. Rochester Ry. Co., 151 N. Y. 107 (1896). *See* Kane, *Heart Balm and Public Policy* (1936) 5 FORDHAM L. REV. 63.

47. MCCORMACK, DAMAGES (1935) § 24.

1. 56 STAT. 23 (1942) as amended 56 STAT. 767, 50 U. S. C. A. APP. § 901 *et seq.* (1944).

for a penalty or a remedy.[2] At common law it was held that only causes of action based upon damage to property survived, and that all other causes of action abated upon the death of either party. More accurately stated, the general rule is that causes of action of a personal nature did not survive, whereas those causes of action based upon injury to property did survive.[3] There are various statutes which change this rule to some extent, and provide that even some causes of action which are of a personal nature survive.[4] Where the cause of action is based upon a federal statute which makes no provision for survival of actions commenced under that statute, then the common law rule is applied.[5] Since the Emergency Price Control Act makes no provision for survival of actions brought under it, one must examine the common law to determine whether the cause of action is one that will survive.

The majority and minority opinions in the principal case, as well as opinions in cases involving similar questions of survival, for the most part base their conclusions on the determination whether the action is remedial or penal. The assumption seems to be that if the action is remedial, it survives. This assumption does not appear to be warranted. A remedial action is one which is intended to furnish compensation to a party; a penal action is one which imposes a penalty for an offense committed.[6] Under the common law an action to recover a penalty does not survive because it is of a personal nature and is not intended just as compensation for any wrong committed against the aggrieved party.[7] Therefore, if one considers an action brought under § 205 (e) of the Emergency Price Control Act to provide for the recovery of only a penalty, then it is clear that such an action would not survive the death of either party.[8] In determining whether the Act provides for the recovery of a penalty or a remedy, many courts have relied on the case of *Huntington v. Attrill*.[9] In that case the court attempts to draw a

2. In addition the nature of the action (whether penal or remedial) may determine whether the constitutional guaranties such as the privilege against self-incrimination, jury trial, confrontation of witnesses, etc. will be accorded to the defendant. *See* (1945) 14 FORDHAM L. REV. 239; Bowles v. Seitz, 62 F. Supp. 773 (W. D. Tenn. 1945).

3. HARPER, A TREATISE ON THE LAW OF TORTS (1933) § 301, at p. 674. For a discussion of the suggested origin of this rule *see* PROSSER, HANDBOOK OF THE LAW OF TORTS (1941) 950-954.

4. N. Y. DEC. EST. LAW § 119 provides that a cause of action for injury to person or property shall not be lost because of the death of the person in whose favor the action existed. For a comparative study of similar statutes in other jurisdictions, *see* Legis. (1936) 24 CALIF. L. REV. 716; Legis. (1935) 48 HARV. L. REV. 1008.

5. Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F. (2d) 645, 648 (C. C. A. 4th, 1942); Sullivan v. Associated Bill Posters, 6 F. (2d) 1000, 1004 (C. C. A. 2d, 1925); United States v. Leche, 44 F. Supp. 765, 766 (E. D. La. 1942).

6. United States v. Joles, 251 Fed. 417, 419 (D. Mass. 1917); Iowa v. Chicago, B. & Q. R. Co., 37 Fed. 497 (S. D. Iowa 1889).

7. Schreiber v. Sharpless, 110 U. S. 76 (1884); 2 CARMODY, NEW YORK PRACTICE (2d ed. 1930) § 772, p. 1419.

8. *But see* Sullivan v. Associated Billposters, 6 F. (2d) 1000, 1009 (C. C. A. 2d, 1925). "If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury."

9. 146 U. S. 657 (1892).

distinction between a penal action and a remedial one, but the distinction drawn is not precise[10] and the case has been cited with approval by courts which hold the Act provides for a penalty,[11] and those which say that it provides for a remedy.[12] At first it would seem that the civil action granted to the consumer does provide for a penalty because the damages awarded are so far in excess of the actual damage suffered.[13] Support for such a view may be derived by comparing the action with one in which punitive damages are claimed. Punitive damages are generally considered to be non-compensatory[14] and in the absence of

10. *Id.* at p. 667. "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." ". . . 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. . . .But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered."

11. Bowles v. Bank of Lebanon, 147 F. (2d) 425 (C. C. A. 6th, 1945); Bowles v. Trowbridge, 60 F. Supp. 48 (N. D. Cal. 1945).

12. Bowles v. Seitz, 62 F. Supp. 773 (W. D. Tenn. 1945); Bowles v. Chew, 53 F. Supp. 787 (N. D. Cal. 1945); Whatley v. Love, — La. App. —, 13 So. (2d) 719 (1943).

13. In Helwig v. United States, 188 U. S. 605 (1903) an action was brought in behalf of the United States to recover damages from the defendant as a penalty for not declaring the true value of imports. The statute under consideration in that case provided that the United States could recover 2% for each 1% that the import was worth above the declared value. The court said (at p. 612) that the statute termed the money demanded as a "further sum," that it was not described as a penalty, but that in spite of that terminology the extra sum demanded was really a penalty. The court went on to say (at p. 613) that the very nature of the statute was penal. In St. Louis Ry. Co. v. Williams, 251 U. S. 63 (1919) the court held that an Arkansas statute, which provided that passengers who were charged more than a certain rate per mile could institute an action to recover not less than $50 and not more than $300, was clearly penal.

14. RESTATEMENT, TORTS (1939) § 908; Demogue, *Validity of the Theory of Compensatory Damages* (1918) 27 YALE L. J. 585, 590. Some few jurisdictions refuse to permit the recovery of exemplary damages on the ground that they are not compensatory and are essentially penal in nature. Boott Mills v. Boston & M. R. R. Co., 218 Mass. 582, 106 N. E. 680 (1914); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891). Nevertheless jurisdictions which limit the recovery of punitive damages to the amount expended in bringing the suit apparently consider them compensatory to that extent. Craney v. Donovan, 92 Conn. 236, 102 Atl. 640 (1917); Titus v. Corkins, 21 Kan. 722 (1879); *See* Popke v. Hoffman, 21 Ohio App. 454, 153 N. E. 248 (1926); *cf.* Day v. Woodworth, 13 How. 362 (U. S. 1851). Most jurisdictions place no such limitation upon the recovery of punitive damages, except that in some jurisdictions the amount of punitive damages which may be awarded must bear some reasonable proportion to the actual damages suffered. Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255 (1925). But the punitive damages may exceed the actual and no definite ratio is prescribed. Taylor v. Williamson, 197 Iowa 88, 196 N. W. 713 (1924). In New York the rule of proportion does not seem to be emphasized, since punitive damages may be awarded where there is evidence that the actual

a statute, do not survive the death of the person wronged.[15] One working test of the survivorability of an action is whether it can be assigned.[16] A claim for punitive damages is not assignable[17] and it would seem that the same is true of an action provided for in the Emergency Price Control Act. The statute specifically gives the action to ". . . the person who buys such commodity. . . ." provided it is brought within one year and provided further that the Administrator has not brought a similar action.[18] These provisions clearly indicate the non-assignability of the action.

Congress has said that its purpose in enacting the statute under discussion was to stabilize prices, to prevent inflation, and to prevent hardships to federal, state, and local governments which would result from abnormal increases in prices.[19] There is a controversy whether a suit brought by the Administrator is remedial or penal in nature. Offhand, it would seem that such a suit should be considered penal and some courts have so held.[20] But other courts have held, even when the Administrator brings the action, that it is still remedial, and is penal only as to the defendant,[21] on the ground that the Administrator is acting for the United States Government and is really obtaining compensation for the public on account of the disastrous results which follow from inflation. Moreover, courts which hold that the Administrator's action is a remedial one point out that criminal

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damages were very slight. Buteau v. Naegeli, 124 Misc. 470, 208 N. Y. Supp. 504 (Sup. Ct. 1925), *new trial granted without opinion*, 216 App. Div. 833, 215 N. Y. Supp. 823 (1st Dep't 1926); Prince v. Brooklyn Daily Eagle, 16 Misc. 186, 37 N. Y. Supp. 250 (Sup. Ct. 1896). *See* RESTATEMENT, TORTS (1939) § 908, comment *c*.

15. Sheik v. Hobson, 64 Iowa 46, 19 N. W. 875 (1884); 1 SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (9th ed. 1920) § 362.

16. Wilcox v. Bierd, 330 Ill. 571, 162 N. E. 170 (1928); Brackett v. Griswold, 103 N. Y. 425 (1886); Hegerich v. Keddie, 99 N. Y. 258 (1885); Tucker v. Western Union Telegraph, 98 Misc. 364, 157 N. Y. Supp. 873 (Sup. Ct. 1916).

17. French v. Orange County Inn. Corp., 125 Cal. App. 487, 13 P. (2d) 1046 (1932).

18. 56 STAT. 33 (1942) as amended, 58 STAT. 640, 50 U. S. C. A. APP. § 925 (e) (1944).

19. 56 STAT. 23 (1942) as amended, 58 STAT. 767, 50 U. S. C. A. App. § 901 (a) (1944).

20. Bowles v. Bank of Lebanon, 147 F. (2d) 425 (C. C. A. 6th, 1945), at p. 428: ". . . if a sum of money is to be recovered by a third person for violation of a statute instead of the person injured, or if the sum exacted is greatly disproportionate to the actual loss, it constitutes a penalty rather than damages. The fact that the sum is to be recovered in a civil action does not determine the nature of the exaction." The court said in Brown v. Cummins Distilleries Corp., 56 F. Supp. 941, 942 (W. D. Ky. 1944) that "In a proceeding of this nature the plaintiff has suffered no damages, and the action is not for the purpose of compensation," and that "the action is essentially one for the recovery of a penalty." Also *see* Bowles v. Trowbridge, 60 F. Supp. 48, 49 (N. D. Cal. 1945).

21. In Bowles v. Berard, 57 F. Supp. 94, 95 (E. D. Wis. 1944), the court says that the history of the act shows it is remedial and also notes that the statute of limitations is one year as disinguished from the five year statute of limitations applicable to penal statutes. In Bowles v. Chew, 53 F. Supp. 787 (N. D. Cal. 1944), the court holds that it is not penal in the sense that it is punishment for an offense against the state which the Executive may pardon. *See* Bowles v. Kroger Grocery and Baking Co., 141 F. (2d) 120, 121 (C. C. A. 8th, 1944).

proceedings may be instituted under § 205 (b) of the Act and that this indicates that Congress intended that the Administrator's civil action under § 205 (e) be considered a remedial one.[22] There are few cases where the Administrator instituted an action against the wrongdoer's estate, but there the courts have held that the action would not lie because it was penal in nature.[23] These holdings can be justified on the theory that a suit by the Administrator is to recover a penalty rather than compensation.[24] However, if the purpose of the Administrator's suit is to compensate the United States Government for damages it has suffered due to defendant's contribution to inflation, such a suit against the estate of the wrongdoer should be allowed. At least one court, in a suit by an aggrieved consumer, held the estate of the deceased violator liable.[25]

There seems to be less diversity of opinion, at least in the federal courts, when the aggrieved consumer brings the action. These courts have generally held that the action is a remedial one[26] on the theory that the plaintiff in such an action is seeking compensation for damages he has suffered, and the mere circumstance that his recovery is greater than the actual damage suffered should not make the action any less a remedial one.[27] Where actions have been instituted in the state

22. Bowles v. American Stores, 139 F. (2d) 377 (U. S. C. A., D. C. 1943); Bowles v. Seitz, 62 F. Supp. 773 (W. D. Tenn. 1945); also *see* Lambros v. Brown, — Md. —, 41 A. (2d) 78 (1945).

23. Bowles v. Farmers National Bank, 147 F. (2d) 425 (C. C. A. 6th, 1945); Brown v. Cummins Distilleries Corp., 56 F. Supp. 941 (W. D. Ky. 1944).

24. In this connection a distinction may be urged between the question of the survival of the action in favor of a plaintiff's estate and its survival against the estate of a violator. It has been said that Section 205 (e) of the Emergency Price Control Act ". . . is penal as against the defendant. . . and remedial in favor of the plaintiff. . ." Ward v. Bochino, 181 Misc. 355, 358, 46 N. Y. S. (2d) 54, 57 (Sup. Ct. 1944); also *see* Gilbert v. Thierry, 58 F. Supp. 235, 240 (D. Mass. 1945); Hall v. Chaltis, 31 A. (2d) 699, 702 (D. C. Munic. Ct. App. 1943); Beasley v. Gottlieb, 131 N. J. L. 117, 35 A. (2d) 49, 52 (1943). Both the majority and minority opinions in the principal case refer to two Iowa cases, Sheik v. Hobson, 64 Iowa 146, 19 N. W. 875 (1884) and Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N. W. 876 (1897), involving the question of the survival of an action for punitive damages. In the former case the court held that the claim for punitive damages did not survive the death of the wrongdoer. In the latter case the claim for punitive damages was held to survive the death of the party wronged, the court saying: "The case of Sheik v. Hobson, relied upon by appellant, was decided upon different principles. It was there said that the punitory power of the law ceased when the defendant dies, and that the civil law never inflicts vicarious punishment. Such a rule has no possible application to this case, unless the rule is to be applied both ways. We do not think, however, that it should be so applied, for reasons which are so apparent as to need no further elaboration." Union Mill Co. v. Prenzler, *supra* at 543, 69 N. W. at 878 (1897). It should be noted, however, that in the case from which the quotation is taken the claim for punitive damages was held to survive merely because the action had been commenced by the deceased.

25. Everly v. Zepp, 57 F. Supp. 303, 304 (E. D. Penn. 1944).

26. Lambur v. Yates, 148 F. (2d) 137, 139 (C. C. A. 8th, 1945); Dorsey v. Martin, 58 F. Supp. 722, 723 (E. D. Penn. 1945); Gilbert v. Thierry, 58 F. Supp. 235, 240 (D. Mass. 1945); Everly v. Zepp, 57 F. Supp. 303, 304 (E. D. Penn. 1944).

27. Brady v. Daly, 175 U. S. 148, 154 (1899); Schaffer v. Leimberg, — Mass. —, 62 N. E. (2d) 193 (1945). *See* note 14 *supra*.

courts under the Act, which confers concurrent jurisdiction upon them,[28] there is more disagreement as to the nature of the action.[29]

Some aid in determining the nature of the action may be obtained by comparing it with a *qui tam* action[30] such as a statutory informer's suit.[31] In the latter type of action the statute generally provides that a person who has defrauded the government may be the object of a civil suit by a private individual, and damages awarded are payable in part to the informer plaintiff and in part to the government.[32] The courts consider such a suit remedial in nature, for the reason that the recovery provides restitution to the government of money taken from it by fraud,[33] and as to the plaintiff informer it constitutes for the most part a reward.[34] In no wise could the suit be considered as remedying any harm done to the individual plaintiff and the very nature and purpose of the recovery by the informer would seem to foreclose the assignment by him of the action or its survival to his personal representative.[35]

It would seem that the majority opinion in the principal case reaches the more sound result. Whether the action by a consumer is remedial or penal is, as the above discussion indicates, a close question. However, a determination of that question is not necessarily controlling in the instant case. While clearly an action to recover a penalty does not survive, it does not follow that every remedial action does survive. Even if we conclude that the consumer's action is remedial, the common law principles governing the survival of actions would seem to preclude a suit by the personal representative of the consumer.

FEDERAL INCOME TAX—CAPITAL ASSETS—SALE OF GOING BUSINESS.—The taxpayer, surviving member of a partnership engaged in the hardware business, pur-

28. 56 STAT. 33 (1942) as amended, 58 STAT. 640, 50 U. S. C.A. APP. § 925 (c) (1944).

29. An action has been held to be *penal* in Campbell v. Heiss, 222 Ind. 297, 53 N. E. (2d) 634, 635 (1944); Hall v. Chaltis, 31 A. (2d) 699 (D. C. Munic. Ct. App. 1943); and *remedial* in Bendit v. H. L. R. Holding Co., 131 N. J. L. 91, 35 A. (2d) 53 (1944); Kaplan v. Arkellian, 21 N. J. Misc. 209, 32 A. (2d) 725, 727 (1943); Kerr v. Congel, 181 Misc. 461, 464, 46 N. Y. S. (2d) 932, 934 (Munic. Ct. 1944).

30. BLACK, LAW DICTIONARY (3d ed. 1933) at p. 1482. A *qui tam* action is one brought by an informer under a statute which establishes a penalty for the omission or commission of a certain act and provides that the penalty is recoverable in part to the plaintiff informer and in part to the government.

31. It has been pointed out that the Emergency Price Control Act is not intended to turn consumers into informers. Tropp v. Great Atl. & Pac. Tea Co., 21 N. J. Misc. 205, 32 A. (2d) 717 (1943).

32. United States *ex rel* Marcus v. Hess, 317 U. S. 537 (1943), at p. 540. The statute in question provided that half of the recovery was to be awarded to the informer and half to the government.

33. *Id.* at p. 551.

34. *Id.* at p. 546.

35. The United States is the real party in interest, United States v. Baker-Lockwood Mfg. Co., Inc., 138 F. (2d) 48 (C. C. A. 8th, 1943). The interest of the informer in the action is solely to secure the reward for successful *prosecution* of the suit and not necessarily for information furnished to the government. United States *ex rel* Marcus v. Hess, 317 U. S. 537 (1942).

chased his deceased partner's interest, and thereupon sold the business as a whole, including cash on hand and on deposit, accounts, notes and bills receivable, merchandise, fixtures and all other assets, thereby suffering a loss which he deducted in determining his ordinary income for the year 1940. The Commissioner of Internal Revenue disallowed such treatment of the loss contending it was one suffered on the sale of "capital assets" and assessed a deficiency accordingly which the taxpayer paid. Taxpayer's action to recover such assessment was dismissed by the District Court. Upon appeal, *held*, one judge dissenting, that the whole business was not to be treated as a single property, but rather that it was to be "comminuted into its fragments" and that gain or loss was to be computed as on the sale of each asset, such gains and losses then being classified as capital gains and losses or ordinary income. *Williams v. McGowan*, 152 F. (2d) 570 (C. C. A. 2d, 1945).

The term "capital assets," as defined in the Internal Revenue Code[1] embraces any property held by the taxpayer except stock in trade, property held primarily for sale to customers or depreciable property used in the trade or business.[2] Therefore, any asset is a capital asset unless it is one of the types specifically excluded from that category. In determining whether or not an asset is a capital asset, no principle of construction such as that of strict construction of an exemption section against the taxpayer[3] can be employed. This is so because whether or not the taxpayer will be benefited by the sale or exchange of the asset depends upon whether a gain or loss will result.

The court in the principal case took cognizance of the statement in several decisions that a partner's interest in a going firm is a capital asset.[4] An analysis of those cases, however, would indicate that whether or not a partnership is treated today as though it were an entity[5] the probable rule is that the court will look to the specific assets sold rather than to the partner's partnership interest. Where a partner's gain on a sale represented his share of ordinary income not yet collected by the firm, it was held that his gain was ordinary income.[6] On the other hand, where his gain was occasioned by an appreciation in the value of capital assets owned by the partnership, he has been held to have had gain from a capital transaction.[7] True, the court held in *Commissioner v.*

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1. Int. Rev. Code § 117 (a) (1) (1944).

2. By amendments subsequent to the taxable year involved in the principal case the following additional exceptions have been made: real property used in the trade or business, Revenue Act of 1942, § 151 (a); certain obligations of the United States, individual States, etc., Revenue Act of 1941 § 115 (b).

3. Helvering v. Northwest Steel Rolling Mills, Inc., 311 U. S. 46 (1940).

4. Stilgenbaur v. United States, 115 F. (2d) 283 (C. C. A. 9th, 1940).

5. Crane, *The Uniform Partnership Act—A Criticism* (1915) 28 HARV. L. REV. 762; Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism* (1916) 29 HARV. L. REV. 158, 291; Crane, *The Uniform Partnership Act and Legal Persons* (1916) 29 HARV. L. REV. 838.

6. Helvering v. Smith, 90 F. (2d) 590 (C. C. A. 2d, 1937); Doyle v. Commissioner, 102 F. (2d) 86 (C. C. A. 4th, 1939).

7. Munson v. Commissioner, 100 F. (2d) 363 (C. C. A. 2d, 1938); Stilgenbaur v. United States, 115 F. (2d) 283 (C. C. A. 9th, 1940); McClellan v. Commissioner, 117 F. (2d) 988 (C. C. A. 2d, 1941).

Shapiro[8] that the aggregate of the partnership assets, together with the value of the going business, constituted a capital asset. Although the partnership there held such non-capital assets as inventories, there was nothing to indicate that any portion of the gain involved was allocable thereto, and the ultimate holding may be reconciled with the hypothesis suggested above on the theory that the value of a going business above the value of its constituent part, namely, its goodwill, is a capital asset and that the gain in question was attributable solely thereto. However the rule may be ultimately determined where there is a sale by a partnership, the Court found in the principal case that the partnership had terminated prior to the sale involved and that the taxpayer sold as the sole proprietor of the business.

Finding the partnership line of cases inapplicable, the Court searched without success for a basis for the contention of the Commissioner that a business owned by a sole proprietor might be considered something separate and apart from, or as one thing composed of and yet different from, its components. The refusal of our law to accept the concepts of unity of aggregates found in the civil law such as *universitas juris*, *universitas facti*, *universitas rerum*,[9] its hesitancy in recognizing the concept of a corporate entity and its continued refusal to recognize a partnership entity, all weighed against the recognition by the court of a business which might be considered the subject of a sale as a juristic entity, particularly in view of the language of the statute which does speak of specific types of assets to be excluded from the general classification of capital assets without any express exception. The conclusion was reached, therefore, by the majority of the court, that Congress did mean to comminute the elements of a business and that each asset transfered should be separately matched against the statutory definition to determine its character. Thus the Court resolved the problem in such fashion that a taxpayer planning to sell his business might not, by the form in which he effected his purpose, choose the more advantageous of two tax treatments. For example, the import of the decision in the principal case would seem to be that a taxpayer may not, by selling his business as a whole or by selling the non-capital assets forming a part of the business, create a capital gain, with a minimum tax if profit is to result or an ordinary loss, deductible in full, if a loss will result.[10] The principle underlying the decision in the instant case which prevents such selection of tax advantages has been circumvented by at least one taxpayer who organized a corporation to which he transferred his business in exchange for shares of stock of the corporation and then sold the stock to a purchaser.[11] In determining his holding period of the stock, that period, during which the property given in exchange had been held, was included.[12] Warning that such a

8. 125 F. (2d) 532 (C. C. A. 6th, 1942).

9. MACKELDEY, ROMAN LAW (Dropsie's ed. 1883) 3162.

10. Section 117 (j) and (k) of the Internal Revenue Code provides for the taxpayer's election to treat gain or loss from the sale of real or depreciable property used in the trade or business or from the cutting of timber as ordinary income or loss or as capital gains and losses if such property has been held for six months. This provision does not affect the definition of capital assets, however.

11. Euleon Jock Gracey, 5 T. C. 296 (1945).

12. Section 117 (h) (l) of the Internal Revenue Code provides: "In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions

procedure may not be used as a device to avoid taxation is to be found in the many cases involving the disregard of the corporate entity.[13] Also, a purchaser might decline to enter into such an arrangement if he did not want to retain the corporate form because, even though he were to liquidate the corporation immediately, the basis of the property might well vary from the price paid for the stock by reason of a gain or loss recognition on the liquidation.[14]

The problem of establishing both the basis for determining gain or loss and the allocated selling price of each asset transferred in the sale of a going business is not a simple one and the burden of establishing them in the event of dispute rests upon the taxpayer.[15] As in every case where a question of fact is involved, the taxpayer must show that the Commissioner erred or was arbitrary in his determination.[16] When, however, the taxpayer has submitted competent evidence to support his contention the presumption of the correctness of the commissioner's findings disappears and the issue must be decided upon a consideration of the evidence submitted.[17]

In the principal case, the court pointed out that the fixtures sold were not capital assets because they were subject to an allowance for depreciation, nor were the inventories, specifically excluded by definition. Although no allowance for goodwill appeared to have been made, the court volunteered the opinion that goodwill was a depreciable intangible.[18] Does it not seem anomalous to indulge in an assumption that there is a measurable annual loss in value of an asset such as goodwill, having a life of unpredictable duration which may as readily increase as decrease in value without regard to the passage of time? The court here cited no authority for its generalization and diligent search has disclosed none. Allowance for depreciation of sales contracts has been denied, however, where their

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of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged." In Thornley v. Commissioner, 147 F. (2d) 416 (C. C. A. 3d, 1945), the court held that the holding period of stock received in exchange for the assets of a partnership dates back to the acquisition of the partnership interest.

13. Leading cases on the disregard of the corporate entity for the purpose of Federal income taxation are: Higgins v. Smith, 308 U. S. 473 (1940) (entity disregarded); Moline Properties, Inc. v. Commissioner, 319 U. S. 436 (1943) (entity recognized).

14. Prairie Oil & Gas Co. v. Motter, 66 F. (2d) 309 (C. C. A. 10th, 1933); Commissioner v. Ashland Oil & Refining Co., 99 F. (2d) 588 (C. C. A. 6th, 1938), *cert. denied,* 306 U. S. 661 (1939); Warner Company v. Commissioner, 26 B. T. A. 1225 (1932), approved in Prairie Oil & Gas Co. v. Motter, 66 F. (2d) 309 (C. C. A. 10th, 1933).

15. As to the basis, *see* T. H. Symington & Son, Inc. v. Commissioner, 35 B. T. A. 711 (1937); as to selling price, *see* Ida P. Huggins, Memo. T. C., April 17, 1943, Docket No. 109-539.

16. Helvering v. Taylor, 293 U. S. 507 (1935); Welch v. Helvering, 290 U. S. 111 (1933); Lucas v. Kansas City Structural Steel Co., 281 U. S. 264 (1930); Wickwire v. Reinecke, 275 U. S. 101 (1927).

17. San Joaquin Brick Co. v. Commissioner, 130 F. (2d) 220 (C. C. A. 9th, 1942); J. M. Perry & Co., Inc. v. Commissioner, 120 F. (2d) 123 (C. C. A. 9th, 1941).

18. "No deduction for depreciation, including obsolescence, is allowable in respect of good will.' Income tax, Reg. 111, § 29.23 (l)-3; Reg. 103, § 19.23 (l)-3, Reg. 101, Art. 23 (l)-3; Reg. 94, Art. 23 (l)-3; Reg. 45, Art. 163; Reg. 33, Art. 167.

cost could not be disassociated from that of goodwill contemporaneously acquired.[19] A deduction for obsolescence of goodwill has been uniformly denied.[20]

The question as to whether accounts receivable were to be considered capital assets or not was not argued before the court and it was, therefore, left open for decision by the district court in the event it should not be disposed of by agreement. In another case, however, where an entire business (a branch establishment) was sold, the selling price consisting of the inventory price of goods on hand plus the face value of notes and accounts receivable less a discount, the court found the notes and accounts receivable to be capital assets because they could not be brought within any of the classifications constituting the exceptions.[21] Similarly losses on deposit accounts in defaulting banks have been considered capital losses.[22] Where, however, in order for a taxpayer to sell merchandise to a particular customer of dubious credit standing it was necessary to take as payment trade acceptances and the sales price was inflated in accordance with the risk involved, the taxpayer was permitted to deduct from ordinary income a loss on the sale of the trade acceptances.[23]

The instant case has followed what would appear to be a policy, admirable in view of the method of definition of capital assets employed in the Internal Revenue Code, of strictly construing the exceptions to the generalization that all property is "capital assets." Such a policy lends certainty to the law and Congress has been ready to give to the taxpayer more than justice where practical application of the statute has produced hardship.[24]

MORTGAGES—DEFICIENCY JUDGMENTS—EFFECT OF STATE CONSTITUTIONAL PROVISIONS PROHIBITING IMPAIRMENT OF CONTRACTS.—In 1922 defendant and her husband executed in favor of plaintiff a note for $8000 secured by a mortgage. In September, 1941, plaintiff instituted action to foreclose the mortgage and obtained a judgment for $10,222.46, representing principal, interest, attorneys' fees and costs. At the foreclosure sale, plaintiff purchased the land for $3500. When

19. United States Industrial Alcohol Co. v. Commissioner, 42 B. T. A. 1323 (1940), 137 F. (2d) 511 (C. C. A. 2d, 1943).

20. Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626 (C. C. A. 8th, 1926); Landsberger v. McLaughlin, 20 F. (2d) 977, *aff'd*, 26 F. (2d) 77 (C. C. A. 9th, 1928); Clarke v. The Haberle Crystal Springs Brewing Co., 280 U. S. 384 (1930) *rev'g* 30 F. (2d) 219 (C. C. A. 2d, 1929); G. F. Coshland & Co. v. Commissioner, 7 B. T. A. 680 (1927), *aff'd*, 31 F. (2d) 1012 (C. C. A. 2d, 1929); Renziehausen v. Lucas, 280 U. S. 387 (1930) *aff'g*, 31 F. (2d) 675 (C. C. A. 3d, 1929); Hupfel Co. v. Anderson, 51 F. (2d) 115, *aff'd*, 55 F. (2d) 1080 (C. C. A. 2d, 1932). In all of the above cases the loss of good will was occasioned by the enactment of national prohibition. Learned Hand, J., in his opinion in the principal case deems this fact to be a significant distinction.

21. Graham Mill & Elevator Co. v. Thomas, 152 F. (2d) 564 (C. C. A. 5th, 1945). *See also* Levy v. Commissioner, 131 F. (2d) 544 (C. C. A. 2d, 1942) *aff'g*, 46 B. T. A. 423 (1942).

22. I. T. 2853, XVI CUM. BULL. 110 (1935), Ralph Perkins, *et al.* v. Commissioner, 41 B. T. A. 1225, *aff'd on other grounds*, 125 F. (2d) 150 (C. C. A. 6th, 1942).

23. Hercules Motor Corp. v. Commissioner, 40 B. T. A. 998 (1939). The Commissioner has not acquiesced in this decision, XXI CUM. BULL. 7 (1940).

24. See amendments to the Internal Revenue Code indicated in notes 2 and 6 *supra*.

plaintiff moved for a deficiency judgment, the court found that the fair and reasonable market value of the land at the date of the sale was $8000, and gave a deficiency judgment for only $2222.46. Plaintiff appealed from the deficiency judgment, claiming that the Act of Legislature approved on May 5, 1941 altering the basis for determining the amount of the deficiency by substituting the fair and reasonable market value of the mortgaged premises for the proceeds of the foreclosure sale, is an unconstitutional impairment of the obligation of the mortgage executed prior to its enactment, being in violation of Article II, Section 15 of the Oklahoma Constitution and Article I, Section 10 of the Constitution of the United States. *Held*, four justices dissenting, where the mortgagee is the purchaser, the statute is not unconstitutional. *Alliance Trust Company, Limited v. Hill*, — Okla. —, 164 P. (2d) 984 (1946).

The decision is based squarely on the holding in *Gelfert v. National City Bank*,[1] in which the Supreme Court, reversing the New York Court of Appeals,[2] held a similar provision of the New York law constitutional as applied to a case in which the mortgagee was, as here, the purchaser at the foreclosure sale. In the *Gelfert* case the Supreme Court recognized the right of the Legislature to regularize the power of equity courts to refuse to base deficiency judgments solely on the foreclosure sale price—a power which equity courts had hitherto exercised in cases of gross inadequacy of price, or fraud.[3] It decided that such legislation does not contravene the provision in the United States Constitution against impairment of contracts.[4]

In the instant case the court had to consider not only this provision, but a parallel one in the Oklahoma Constitution.[5] The majority, after reviewing the *Gelfert* decision and finding it to be based on a situation similar to this one, stated that the wording of the federal and Oklahoma constitutions was substantially the same and that, therefore, the statute called into question did not violate either of them. The minority, relying on an Ohio case,[6] pointed out that a Supreme Court interpretation of a clause in the United States Constitution is not binding upon a state court in construing a similar clause in the state constitution. Although the portion of the Ohio opinion which was relied upon was not necessary to the Ohio court's conclusion, the proposition is sustained elsewhere.[7] A Supreme Court interpretation of the United States Constitution is, however, strongly persuasive and will ordinarily be given by the state courts to a similar provision of a state constitution.[8]

1. 313 U. S. 221 (1941), 11 BROOKLYN L. REV. 103, 30 CALIF. L. REV. 71, 36 ILL. L. REV. 465, 16 ST. JOHN'S L. REV. 143, 16 TEMP. L. Q. 91, 27 VA. L. REV. 1092.

2. National City Bank v. Gelfert, 284 N. Y. 13, 29 N. E. (2d) 449 (1941).

3. Ballentyne v. Smith, 205 U. S. 285 (1907).

4. U. S. CONST. ART. I, § 10.

5. Okla. Stat. 1941, Title 12, § 686.

6. Direct Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 38 N. E. (2d) 70, 73 (1941).

7. State v. Aime, 62 Utah 476, 220 Pac. 704 (1923); Commonwealth v. Wilkins, 243 Mass. 356, 138 N. E. 11 (1923); *cf.* Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025 (1934). *Contra*: Lake County v. Morris, 160 Tenn. 619, 28 S. W. (2d) 351 (1930).

8. City of Portland v. Thornton, 176 Ore. 509, 149 P. (2d) 972 (1944); Morgan v. Civil Service Comm. 131 N. J. L. 410, 36 A. (2d) 898 (1944); *In re* Weiden's Estate, 263 N. Y. 107, 188 N. E. 270 (1933).

The instant case is not the only one in which this persuasiveness has been demonstrated on the matter of deficiency judgments. The Supreme Court of Pennsylvania, in *Fidelity Philadelphia Trust Company v. Allen*,[9] overruled its own previous decision[10] in which a Pennsylvania Deficiency Judgment Act had been held unconstitutional. It did so on the ground that it is desirable to preserve uniformity of construction of the contract clauses of the federal and state constitutions. A California court also refused to go counter to the *Gelfert* line of reasoning. In *Ware v. Heller*,[11] plaintiff obtained summary judgment on a note and deed of trust executed in 1931, prior to the passage of Section 580, California Code of Civil Procedure, which limited the judgment to the difference between the value of the property at the time of the sale and the unpaid balance of the obligation. Because this section was not applied, the mortgagor appealed from the judgment. Previous cases[12] had been decided on the basis that the section could not be given effect because of the constitutional provisions against impairment of contracts. The court remarked that the question mark placed after this conclusion by *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*[13] had been underscored by the *Gelfert* decision. The court held, however, that the statute was not retroactive, regardless of the *Gelfert* case, not because such an effect would be unconstitutional but because it was not the Legislature's intention to make it retroactive.[14] For the same reason a New Jersey court, in *Henderson v. Weber*,[15] refused to apply retroactively a statute which replaced an earlier retroactive one after the earlier one had been declared unconstitutional.[16] But although New Jersey has taken this view of its statute in its law courts, it grants to equity without the aid of a statute the jurisdiction to review deficiency judgments in the light of the market value of the property. In *Fidelity Union Trust Co. v. Multiple Realty & Construction Co.*,[17] such jurisdiction is held to be inherent in courts of equity. The mortgaged premises having been purchased by the mortgagee

9. 343 Pa. 428, 22 A. (2d) 896 (1941).

10. In Beaver County, B. & L. Ass'n v. Winowich, 323 Pa. 483, 187 Atl. 481 (1936).

11. 63 Cal. App. (2d) 817, 148 P. (2d) 410 (1944).

12. Birkhofer v. Krumm, 27 Cal. App. (2d) 513, 81 P. (2d) 609 (1938) and cases cited therein.

13. 300 U. S. 124 (1937).

14. It contained no expression of an intent to operate on existing rights, and statutes are construed prospectively in the absence of clear expression to the contrary. Sheilchawt v. Moffett, 294 N. Y. 180, 61 N. E. (2d) 435 (1945); Jones v. Union Oil Co., 218 Cal. 775, 777, 25 P. (2d) 5, 6 (1933). As other sections added at the same time specifically mentioned existing obligations and this one did not, the court, reasonably enough, inferred no intent to include them.

15. 131 N. J. L. 299, 35 A. (2d) 609 (1944). It is interesting to note that the defendant in this case claimed that the repeal of the earlier statute was unconstitutional as depriving him of a vested right, namely, the right to have the fair market value of the property credited against the deficiency judgment. The court held that there is no vested right in any particular remedy, a reply which sauced the mortgagor's goose as well as it has the mortgagee's gander in other cases. Fidelity Union Trust Co. v. Multiple Realty & Construction Co., 131 N. J. Eq. 527, 26 A. (2d) 155 (1942).

16. Vanderbilt v. Brunton Piano Co., 111 N. J. L. 596, 169 Atl. 177 (1933); Alert Building & Loan Ass'n v. Bechtold, 120 N. J. L. 397, 199 Atl. 734 (1938).

17. 131 N. J. Eq. 527, 26 A. (2d) 155 (1942).

for a nominal sum at the foreclosure sale, the mortgagor was allowed to set up his right to a credit for the fair market value. "All the complainant can ask," said the court,[18] "is that his debt shall be paid," thus following the reasoning of the *Gelfert* case.

It is submitted that the majority in the instant case has adequate precedent for adhering to the Supreme Court's view—a precedent derived not only from deficiency judgment cases but one deeply grounded in the policies of our courts.[19] The weight of authority holds that the remedy for enforcing the obligation of a contract may be modified by statute without impairing the obligation.[20] If a sufficient method is left or provided, a legislative change, enlargement or curtailment of the existing method of enforcement will not be considered an impairment of a contract.[21] But the vigorous dissent indicates that the settled nature of the procedure has encrusted the shell of remedy so firmly over the body of the right it is intended to protect as to make them difficult to distinguish. The purpose of statutes limiting deficiency judgments is the protection of unfortunate mortgagors by relieving them from excessive judgments based on the inadequate foreclosure sales prices which necessarily prevail in periods of depression in the real estate market.[22] The minority argued that the statute diminished existing contractual relations and imposed on the mortgagee the burden of defending the status of his judgment, and that such a change in the remedy which existed when the contract was made is unconstitutional.[23] It might well be argued in reply that failure to change a remedy may increase existing obligations far beyond any conception of the parties at the time of the contract.

In strict theory, it is unconscionable for a mortgagee to collect more than once any portion of the debt owing to him. This he does whenever he buys in the mortgaged property for less than its fair value, if he is entitled to an automatic deficiency judgment for the difference between his purchase price at the foreclosure sale and the debt. In both the *Gelfert* case and the instant case the mortgagee was the purchaser at the foreclosure sale, and in both cases the decision was restricted to a transaction in which that circumstance was present. Courts of equity have long had the authority to render deficiency judgments after foreclosure sales, whether or not there is an express statutory provision.[24] When the inadequacy of the sale price was so gross as to shock the conscience or if, "there be additional circumstances against its fairness",[25] a sale may be set aside. There is no doubt that the Supreme Court, in using the words just quoted, was not considering the problem posed in the instant case, but the sense of the quotation need not be unduly stretched to make it apply. The unfair circumstance lies in giving the mortgagee more, in money's worth, than the amount of his claim, at the expense of the mortgagor. "The judgment holder," says the minority, "must

18. *Id.* at p. 162.

19. Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N. E. 584 (1919); City of Portland v. Thornton, 174 Ore. 509, 149 P. (2d) 972 (1944).

20. 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 587.

21. Lowther v. Peoples Bank, 293 Ky. 425, 169 S. W. (2d) 35 (1943).

22. Mutual Life Ins. Co. of N. Y. v. Gotham Silk Hosiery Co., 179 Misc. 557, 39 N. Y. S. (2d) 310 (1943); Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025 (1934).

23. McCracken v. Hayward, 2 How. 607 (1844).

24. 2 WILTSIE, TREATISE ON MORTGAGE FORECLOSURE (4th ed. 1927) § 957.

25. Ballentyne v. Smith, 205 U. S. 285 (1907).

. . . suffer the risk of a further diminution of his judgment if the Court is later of the opinion that the land sold for less than its reasonable market value, or lose his judgment altogether."[26] No doubt, there may be a diminution of his eventual judgment, but only to the extent that the previously existing remedy would have given excessive relief.

The minority asserted a "general unanimity of view among state courts" prior to the *Gelfert* case. That unanimity, however, was upset in Michigan[27] when the court, shortly before the *Gelfert* decision, unanimously upheld the constitutionality of a statute along the lines of the one considered in the instant case. *Adams v. Spillyards*[28] is one of the cases cited in asserting this unanimity. It appears, however, to be distinguishable from the instant case. In it, the court held unconstitutional a statute under which the lower court had refused to enter a foreclosure decree unless the mortgagee would stipulate to bid, at the sale, the amount of the judgment plus interest and costs. To provide, as did this statute, that the value of the real estate must be considered to be equal to the amount of the mortgage, deprives the mortgagee of the personal responsibility of the mortgagor. This certainly diminishes existing contractual relations and dispenses with an essential obligation expressed in the contract; it interferes not merely with a remedy but with a substantial right.[29] The opinion in the South Carolina case of *Federal Land Bank v. Garrison*,[30] failed to distinguish between a mortgagee purchaser and a third party purchaser. The statute which the South Carolina court held unconstitutional provided for an appraisal by which the deficiency judgment was measured whether or not the mortgagee was the successful bidder. Thus if a third party bid the property in for less than the appraised value, the mortgagee would get only the difference between the appraised value and the amount of his claim. He would receive no equivalent for the difference between the sale price and the appraised value. To give the mortgagor credit for fair market value under such circumstances would be not merely a change in remedy but an impairment of the mortgagee's claim. No such legislation has been held constitutional and no decisions have favored the mortgagor where there is a third party purchaser.

Under certain circumstances the threat of a lowering of the deficiency judgment to allow for the fair value of the property may work to the disadvantage of the mortgagor whom the laws in question are designed to protect. Mortgagees may tend to avoid bidding at foreclosure sales if the courts were to reduce their deficiency judgments with what the mortgagees considered unreasonable frequency, or to an unreasonable degree. Withdrawal of the mortgagee from foreclosure sale bidding would deprive the proceedings of a bidder whom the mortgagor could ill afford to lose in times of poor real estate markets. The mortgagor appears to have no protection against an inadequate bid by a third party, provided only that the bid is not unconscionably low or fraudulent.

26. *Id.* at p. 988.

27. Guardian Depositor's Corp. v. Powers, 296 Mich. 553, 296 N. W. 675 (1941).

28. 187 Ark. 641, 61 S. W. (2d) 686 (1933).

29. ". . . if the mortgagee is unwilling to file the stipulation required by section 2, he can never have a decree of foreclosure and sale and can never realize anything from the security under foreclosure in court." *Id.* at p. 689.

30. 185 S. C. 255, 193 S. E. 308 (1937).

MUNICIPAL CORPORATIONS—NEGLIGENCE IN MAINTENANCE OF FIRE-FIGHTING EQUIPMENT—EFFECT OF WAIVER OF SOVEREIGN IMMUNITY.—Fire which broke out on adjoining premises destroyed plaintiff's property. Plaintiff seeks to recover $27,900 damages from City of Beacon, alleging the destruction of his property was caused by the negligence of the city in failing to keep in repair a pressure and flow regulating valve in the city's water lines and in negligently operating a manually operated valve, and that by reason of such negligence an insufficient quantity of water was provided to combat effectively the fire. Liability was predicated upon the provisions of the city charter authorizing the city to construct and operate a water works system and requiring it to maintain a fire department. The trial court dismissed plaintiff's complaint for failure to state facts sufficient to constitute a cause of action. Upon appeal, *held*, judgment affirmed, two judges dissenting. *Steitz* et al. *v. City of Beacon*, 295 N. Y. 51, 64 N. E. (2d) 704 (1945).

The majority of the court deny remedy to the property owner on the ground that as an individual he possesses no right to protection by the defendant municipality from fire. The result reached is the same as when a remedy was denied purely on the theory that fire protection was a governmental function of the municipal corporation which was, therefore, protected from suit by extension to the city of the state's sovereign immunity from suit.[1] Such functions of the city, as were considered to have for their primary purpose the welfare and protection of the community as a whole, have been uniformly throughout the United States designated "governmental" and were immune from suit on the settled principle of the common law that an individual could not maintain an action against a political subdivision of the state for injury resulting from negligence in the performance of any governmental function.[2] The protection extended to governmental functions rests upon an adoption of the English theory that "the King can do no wrong",[3] although later cases advance as a reason public policy which would avoid the diversion of public funds to satisfaction of private claims.[4] The departments of the government almost invariably considered governmental are those established for fire and police protection, health and public charities.[5] As to other activities of the state, there has been increasing diversity of opinion in different

1. None of the civil divisions of the state—its counties, cities, towns, and villages—has any independent sovereignty. *See* N. Y. CONST. Art. IX, § 9; City of Chicago v. Sturges, 222 U. S. 313, 323 (1911). The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the state possessed. Murtha v. N. Y. H. M. Col. & Flower Hospital, 228 N. Y. 183, 185, 126 N. E. 722 (1920).

2. Russell v. Men of Devon, 2 T. R. 667, 100 Eng. Rep. 359 (K. B. 1788).

3. Professor Borchard points out that this maxim merely meant that the king was not privileged to do wrong and if his acts were against the law, they were wrongs, but that the maxim was misunderstood, even by Blackstone and Coke, and introduced without sufficient understanding into this country, surviving mainly by reason of its antiquity. Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1.

4. Taylor v. Westerfield, 233 Ky. 619, 26 S. W. (2d) 557 (1930). Justice Holmes advanced the theory that "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U. S. 349, 353 (1907).

5. Augustine v. Town of Brant, 249 N. Y. 198, 204, 163 N. E. 732, 734 (1928).

jurisdictions.[6] Dissatisfaction with the rule of governmental immunity engendered by the obvious injustice resulting in many situations from its application impels the courts to make a distinction between governmental and proprietary functions of the municipal corporation and to hold the city liable for torts in connection with the latter. The line between the two kinds of functions is wavering and indistinct.[7] New York has consistently tended to narrow the range of municipal immunity by denominating more and more activities as merely proprietary. In New York today the state and its sub-divisions are liable for torts in connection with public parks and playgrounds;[8] for torts in connection with sewers and drains,[9] streets and highways,[10] and, more recently, in connection with the maintenance of educational buildings.[11]

Despite the modern tendency to restrict rather than to extend the doctrine of municipal immunity,[12] and the tentative suggestion that the distinction be entirely abolished,[13] neither New York, nor any other state, has yet taken the revolutionary step of declaring either police or fire departments to be other than purely governmental functions of the state.[14] New York has, however, attempted to

6. The numerous conflicting cases are collected in the annotation in 120 A. L. R. 1376 (1939).

7. Trenton v. New Jersey, 262 U. S. 182, 191 (1923). "It has been long recognized that the distinction between governmental and corporate powers and functions is an illusory one, incapable of uniform application, and productive of the most unsatisfactory results." HARPER, TORTS (1933) 663.

8. Ehrgott v. Mayor of City of New York, 96 N. Y. 264 (1884); Van Dyke v. City of Utica, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th Dep't 1922) and cases cited therein.

9. Mayor v. Furze, 3 Hill 612 (N. Y. 1842); Seifert v. City of Brooklyn, 101 N. Y. 136, 4 N. E. 321 (1886); Byrnes v. City of Cohoes, 67 N. Y. 204 (1876).

10. Conrad v. Village of Ithaca, 16 N. Y. 158 (1857) and Weet v. Trustees of Village of Brockport which in effect is incorporated into the court's opinion in the Conrad case—see reporter's note at page 161 of 16 N. Y.

11. Wahrmann v. Board of Education, 187 N. Y. 331, 80 N. E. 192 (1907). *Contra*: Hill v. Boston, 22 Mass. 344 (1877). The holding in *Hill v. Boston* represents the majority view. 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) 2888.

12. Augustine v. Town of Brant, 249 N. Y. 198, 205, 163 N. E. 732, 734 (1928); Matter of Evans v. Berry, 262 N. Y. 61, 70, 186 N. E. 203, 206 (1933).

13. The well-known case of Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919) attempted to break away from the injustice resulting from the rule of governmental immunity by permitting a plaintiff to recover for death of deceased caused by fire truck returning from a fire, on the ground that a merely proprietary function was involved. Wanamaker, J. in a concurring opinion, disagreeing with the theory of proprietary function, held the activity to be governmental and argued against the immunity of the city in the exercise of governmental functions. Fowler v. City of Cleveland, however, was soon overruled. Aldrich v. Youngstown, 106 Ohio St. 342, 140 N. E. 164 (1922).

14. This is true if we except the State of Florida which in Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922), *aff'd.* 87 Fla. 119, 100 So. 150 (1924), held that the adoption by a city of the commission form of government rendered it immaterial whether the city was acting in a governmental or proprietary capacity as it was liable for tort to the same extent as any quasi-public corporation whose activities partook more

remedy the injustice, resulting from the individual's former inability to sue for tort of any kind committed by these governmental departments or their employees or agents, by enacting Section 8 of the Court of Claims Act,[15] which reads: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations."[16] The effect of Section 8 in the instant case is to render it immaterial whether the defendant is an individual or a municipal corporation in determining whether the plaintiff can recover. However, if, as the majority hold, there exists no duty on the part of the defendant municipality to the plaintiff, there can be no recovery. The precise question involved therefore is not, as might appear at first reading, whether immunity should be granted,[17] but whether the city owes any duty to the plaintiff herein. In the absence of agreement between the parties or of express statutory imposition of such duty, the question becomes one of legislative intent in framing the City of Beacon's charter which authorized the city to construct and operate a system of waterworks and which provided that the city shall maintain a fire department.[18]

The majority of the court construe the charter as imposing a duty only to the general public and deny a cause of action to the individual plaintiff because they did not believe the legislature intended to impose a duty in respect of each individual property owner. In interpreting legislative intention conflict arises between the deeply settled conviction that only by the most specific language will the legislature be deemed to have imposed upon the state liability in tort,[19] and the more liberal view championed by Justice Holmes, when he said: "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge

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of the nature of a business than a government. South Carolina has gone to the other extreme, and has held all activity of the government to be governmental. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911).

15. N. Y. COURT OF CLAIMS ACT § 8.

16. Previously, a step had been taken in this direction in the enactment of § 264 of the Code of Civil Procedure by which the Court of Claims was given jurisdiction to hear and determine private claims against the state and the state consented in all such claims to have its liability determined. However, the Court of Appeals in Smith v. State of New York, 227 N. Y. 405, 409, 124 N. E. 841, 842 (1920) held that by waiving its immunity from action, the state did not concede its liability. The correction of this deficiency by the enactment of § 8 was recognized in Jackson v. State of New York, 261 N. Y. 134, 138, 184 N. E. 735, 736 (1933), which announced the doctrine that by assuming liability and creating a remedy to enforce it, the sovereign was not dispensing charity, but rather recognizing and acknowledging a moral duty demanded by the principles of justice.

17. One of the grounds upon which the trial court dismissed the complaint was that the exercise of the power to furnish fire protection by a municipality is a governmental function for which no civil liability may be imposed. Steitz v. Beacon, 268 App. Div. 1008, 52 N. Y. S. (2d) 788 (2d Dep't 1945).

18. N. Y. Laws 1913, c. 539, § 24, as amended by N. Y. LAWS 1920, c. 171, § 6.

19. Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 11.

of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."[20] To aid us in determining what kind of duty—whether private as well as public—is embodied in the legislature's grant of the city of Beacon's charter, it may be helpful to examine analagous cases.

The court would appear to base its decision on the authority of *Moch Co. v. Rensselaer Water Co.*,[21] when it states: "The *Moch* case is controlling here because it has judicially determined that a corporation under a positive statutory duty to furnish water for the extinguishment of fires is not rendered liable for damages caused by a fire started by another because of a breach of this statutory duty."[22] However, the defendant in the *Moch* case was a public service corporation which, in accordance with its obligations under the provisions of the Transportations Corporations Law[23] to furnish water at reasonable rates upon demand by the city for the extinguishment of fires, *contracted with the city* to deliver water to fire hydrants. In holding the defendant not liable for damage to property caused by inadequate water supply, the court stressed that the duty of the defendant corporation was to the city,[24] and, as the dissent in the instant case points out, the City of Rensselaer was under no legal duty to supply its inhabitants with protection against fire.[25]

The dissenting opinion in the subject case attempts to predicate liability on the part of the city on the authority of the recent case of *Bernardine v. City of New York*[26] in which it was held that the City of New York would be liable for negligence in connection with the conduct of its police department, in consequence of the state's waiver of immunity. Judge Desmond, writing the dissenting opinion in the instant case, states: "The common law theory of nonliability of municipal corporations in connection with their police departments was precisely the same as with respect to their fire departments. We conclude that the cities of this state have, as a result of the state's waiver of its immunity, become liable at least for negligent maintenance of such facilities and appliances for fire protection as they possess."[27] This conclusion does not necessarily follow, however, as the *Bernardine* case involved an action for personal injuries caused to the plaintiff by a runaway police horse. A decision to the effect that since the enactment of Section 8, a city is liable for acts of misfeasance in the exercise of a governmental function is not controlling authority for holding the city liable for mere nonfeasance. This distinction is accepted and cited in *Murrain v. Wilson Line,*

20. Johnson v. United States, 163 Fed. 30, 32 (C. C. A. 1st, 1908).

21. 247 N. Y. 160, 159 N. E. 896 (1928).

22. *Id.* at 57, 159 N. E. at 899.

23. N. Y. TRANS. CORP. LAW § 42.

24. "The weight of authority is that the contracting company is not chargeable with any greater liability than the city itself; that the contract is between the city and the water company only." 3 DILLON, *op. cit. supra* note 11, at 2303; 2 RESTATEMENT, TORTS (1934) § 288.

25. 295 N. Y. 51, 64 N. E. (2d) 704 (1945). *See* also, Springfield Fire Ins. Co. v. Village of Keesville,, 148 N. Y. 46, 42 N. E. 405 (1895).

26. 294 N. Y. 361, 62 N. E. (2d) 604 (1945).

27. 295 N. Y. 51, 59, 64 N. E. (2d) 704, 708 (1945). It is to be noted that the minority opinion restricted its position to negligent maintenance and did not decide what liability, if any, there would be if the alleged fault of the city was a failure to provide adequate fire-fighting facilities or to use them efficiently.

Inc.,[28] decided after the principal case, where it is observed, on the authority of *Bernardine v. City of N. Y.*, that a municipality is answerable at least for its negligence of commission in exercising a governmental function but not for its failure to exercise a governmental function, such as to provide police or fire protection.

More difficult to distinguish is another recent case, *Foley v. State of New York*,[29] where the court sustained a cause of action in favor of individuals injured in a collision between two automobiles resulting from the negligence of agents of the state in failing to replace a burned-out traffic light bulb. The Court of Appeals did not attempt to classify the maintenance of a traffic control system as other than a governmental function but based its decision on the right under Section 8 of an individual to sue the state for negligence in the performance of its duty to him. It conceded in effect that where a statute has imposed a duty upon the state, the state can be effectively sued for breach of that duty. The state's argument was that it had assumed no liability for damage resulting from negligence involved in its maintenance of traffic lights. However, the court found for the plaintiff because it found such liability implied in the statute requiring the maintenance of the lights. The majority opinion in the instant case reiterated that the duty imposed by the New York Vehicle and Traffic Law,[30] and neglected in the *Foley* case, was imposed for the sole purpose of protecting from collision damage individuals using the highway and that violation of such duty, resulting in damage, gave rise to an action in tort since the purpose of the statutory enactment was to protect the individual traveler and not just the public at large. The majority of the court in the instant case distinguished *Foley v. State* on that very ground. It is true that the language of the Vehicle and Traffic Law specifically imposes a duty of maintenance at state expense, while the language of the charter of the City of Beacon may be deemed, as the majority held, to connote "nothing more than creation of departments of municipal government, the grant of essential powers of government, and directions as to their exercise."[31] In other words, the majority refused to read into the charter provisions, the establishment of a legal duty on the part of the city to maintain fire fighting facilities for the benefit of any particular individual. Aside from the express language of the two enactments, is there any basis for this distinction? One possible line that might be drawn between the two situations is that in the case of the establishment of a system of traffic lights the city not only encourages, but requires, the citizens' use thereof. The city does not, in relation to the individual, put its hydrants where they must be used, nor does it create the situation in which the plaintiff finds himself. It does not volunteer to regulate his conduct, as it does when it undertakes to lay sidewalks for his use,[32] and as it even more

28. — App. Div. —, 59 N. Y. S. (2d) 750 (1st Dep't 1946).

29. 294 N. Y. 275, 62 N. E. (2d) 69 (1945).

30. N. Y. VEHICLE AND TRAFFIC LAW § 95-a which reads: "The state traffic commission shall have the power and it shall be its duty to regulate the type, location, erection, maintenance and removal of all traffic control signals and signal lights on or along any state highway maintained by the state and every such signal or light shall hereafter be maintained at the expense of the state."

31. 295 N. Y. 51, 55, 64 N. E. (2d) 704, 706 (1946).

32. "He was obliged to proceed upon a public highway if he were to proceed at all." Osipoff v. City of New York, 260 App. Div. 653, 23 N. Y. S. (2d) 481 (2nd Dep't 1940), *rev'd* 286 N. Y. 422, 36 N. E. (2d) 646 (1941).

surely does when it establishes traffic lights to which it requires obedience. In the establishment of fire fighting facilities, the city places no duty on the property owner to summon city-supplied fire fighting equipment or to make use of city-supplied hydrants. The property owner is entitled to extinguish a fire with whatever means he may have at hand. When the fire department responds to a fire, it is not in fulfillment of any duty it owes to the individual property owner to put out his fire but it is in response to a public duty to protect the community at large from the danger of fire and conflagration. The municipality's assistance to individual property owners may be deemed a mere gratuity. It might be that, if the city interfered with an individual's fire fighting attempts and compelled him to abandon his efforts when the firemen took charge, the city would then have assumed liability for negligent conduct in fighting the fire. In the absence of such assumption of protection to the exclusion of the individual's own efforts, no implied duty other than a general or public duty should be inferred.

Murrain v. Wilson Line, Inc.[33] applies the holding of the principal case to a municipality's failure to furnish adequate police protection. The *Murrain* case involved an action for death and personal injuries resulting from a jam at the gates of a city-owned pier caused by the refusal of lodge committeemen in charge of an outing to open the gates. The plaintiffs contended that police officers, two of whom had been in attendance and ten of whom had been called in when the danger became apparent, did not act with the dispatch or in the manner required by the occasion to control the crowd and that the accident resulted from their failure to give proper attention and action to the situation. By a closely divided court, it was held that, since the police protection afforded for the occasion was not in the nature of individual care of private patrons, the pier being nothing more than an extension of the public street, all that could be expected from the city under the circumstances was police protection of the same nature and degree as would be afforded to any public gathering at any public place.[34]

With the disappearance in New York of the necessity of drawing a distinction between the governmental and proprietary functions of a municipality, as a result of the express waiver of immunity from liability for torts committed by a municipality in the former capacity, the important problem in ensuing cases will involve the basic question common to all negligence cases, *i.e.*, did the defendant owe the plaintiff any legal duty in the premises? Little difficulty will be encountered where the harm is caused by an act of misfeasance by a municipal employee acting within the scope of his employment, for all persons (whether public or private) owe the duty to refrain from actively injuring another.[35] The more difficult cases will deal with instances of mere nonfeasance. Whether the omission to act will constitute actionable negligence in favor of the individual plaintiff will to a great extent depend not only upon the type of action omitted but also upon

33. — App. Div. —, 59 N. Y. S. (2d) 750 (1st Dep't 1946).

34. "The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." Cooley, J. in Taylor v. L. S. & M. S. R. Co., 45 Mich. 74, 7 N. W. 728 (1881).

35. Osipoff v. City of New York, 260 App. Div. 653, 23 N. Y. S. (2d) 481 (2d dept. 1940) *rev'd* 286 N. Y. 422, 36 N. E. (2d) 646 (1941). *See* (1944) 13 FORDHAM LAW REV. 252.