AGENCY — EXPRESS AUTHORITY OR ESTOPPEL

Plaintiff sued to recover a broker's commission under a contract with defendant. Defendant asserted its agent had no authority to make the agreement. The trial court ruled, as a matter of law, that the agent had authority and plaintiff was awarded the verdict. The Court of Appeals reversed. On appeal, *held,* affirmed. The agent, as a matter of law, did not have the authority to bind the defendant. *Miller v. The Wick Building Co.,* 154 Ohio St. 93, 93 N. E. 2d 467 (1950).

The Supreme Court stated that if the defendant by its words or conduct, reasonably interpreted, caused the agent to believe that he had authority to make the agreement, the defendant would be bound. The court said it was necessary to hold the defendant in order to protect the agent, who had acted reasonably, from liability for breach of implied warranty. It labeled this power of the agent to bind the defendant "implied authority," and in a footnote distinguished it from authority incidental to authority expressly conferred.

Most authorities divide the authority of an agent into express, implied and apparent authority and ratification. RESTATEMENT, AGENCY §§ 7, 8 (1933). These authorities describe a similar fact situation to the one at bar as express authority. They indicate that the manifestations of the principal confer express authority although the principal does not, in fact, (subjectively) intend to be bound. *Bradstreet Co. v. Gill,* 72 Tex. 115, 9 S. W. 753 (1888); RESTATEMENT, AGENCY § 26 (1933); MECHEM, AGENCY § 247 (2d ed. 1914). This is the same as the objective test used in the law of contracts. RESTATEMENT, AGENCY § 26 (1933); RESTATEMENT, CONTRACTS § 20 (1932). In the principal case the court called this power of the agent to bind defendant on the basis of defendant's own manifestations "implied authority", a term more properly attached to authority inferred from express authority. *Groves v. Horton,* 38 Minn. 66, 35 N.W. 568 (1887); MECHEM, AGENCY § 708 (2d ed. 1914). Furthermore, the court talked as if the authority did not, in fact, exist but was "implied" to protect the innocent agent from liability, seeming to place its decision on the basis of estoppel rather than on the basis of express authority. The use of this estoppel notion in place of express authority is not supported by the authorities. In fact, one of the few authorities to recognize a similarity between the objective approach and estoppel hastens to point out the marked difference. WILLISTON, CONTRACTS § 98 (rev. ed. 1936).

Ohio has consistently held, in line with other states, that the

objective intention of the parties controls in a contractual agreement. *Bach v. Friden Calculating Machine Co.*, 155 F. 2d 361 (6th. Cir. 1946); *National City Bank of Cleveland v. Citizens Bldg. Co. of Cleveland*, 74 N. E. 2d 273 (Ohio 1947). A Federal court sitting in Ohio has applied this same test to the scope of an agent's express authority, the very problem that exists in the principal case. *Chesapeake & O. Ry. Co. v. Ringstaff*, 67 F. 2d 482 (6th. Cir. 1933). The court's failure to use the term express authority is therefore inconsistent with previous Ohio cases. But could the court be correct in talking in terms of estoppel? Ohio courts have always required some element of irresponsibility or intention to mislead on the part of the person being estopped. *Board of Education v. Sinton*, 41 Ohio St. 504 (1885). This element was not present in the principal case. Therefore, an essential element of estoppel was also missing.

It is clear that the court has confused termionology by calling express authority "implied authority"; it is also clear that the use of language peculiar to estoppel was improper. The term express authority would have been more accurate and would have adequately protected the agent from unjust liability without adding confusion in this difficult area.

William H. Lutz, Jr.

CONSTITUTIONAL LAW — SIXTH AMENDMENT — IMPARTIAL JURY — GOVERNMENT EMPLOYEES ON JURY WHEN GOVERNMENT IS A PARTY

Petitioner, a leader of the Communist party, was charged with contempt of Congress for failing to respond to a subpoena issued by the House Committee on Un-American activities. 52 STAT. 942, 2 USCA § 192 (1938). At the trial defendant, on voir dire, challenged for cause all prospective jurors who were government employees. Petitioner based his challenge on the fact that government employees are subject to discharge, under the presidential loyalty order, if reasonable grounds exist for the belief that they are disloyal. Exec. Order No. 9835, 12 FED. REG. 1935 (1947). Petitioner reasoned that a vote for acquittal of a member of the Communist party could expose a juror to possible discharge. Therefore petitioner urged that government employees be disqualified for *implied* bias as a matter of law. The challenge was denied and petitioner exercised his peremptory challenges, two of which were used against government employees. As finally constituted, the jury contained seven government employees. Petitioner was convicted and the case was affirmed on appeal. 171 F. 2d 986 (D. C. Cir. 1948). The Supreme Court granted certiorari limited to the question whether government employees may properly serve on a

jury in a criminal trial where the government is an interested party. *Held,* affirmed. In the absence of a showing of "special circumstances" mere employment by the government is insufficient to support a challenge for implied bias. *Dennis v. United States,* 339 U.S. 162 (1950).

During the period before 1935 government employees in the District of Columbia were not allowed to serve as jurors in actions involving the government. This was due to the ruling in the case of *Crawford v. United States,* 212 U.S. 183 (1908), holding applicable to government as well as to private parties the common law rule disqualifying a servant as a juror where the master is party to the suit. The decision was based on a statement in Blackstone, 3 BL. COMM. 363, which has been incorporated into American practice. *Citizens Light and Electric Co. v. Lee,* 182 Ala. 561, 62 So. 199 (1913); *Vallejo R. Co. v. Reed Orchard Co.,* 169 Cal. 545, 147 Pac. 238 (1915); BUSCH, LAW AND TACTICS IN JURY TRIALS 161 (1949).

The effect of the *Crawford* case, because of the unusual number of government employees in Washington, was to create a scarcity of jurors. Because of this situation Congress passed an act in 1935 qualifying for jury service all persons "otherwise qualified according to law whether employed in the service of the government or of the District of Columbia." 49 STAT. 682 (1935); D. C. CODE 1940 § 11-1420. The constitutionality of the statute was attacked in *United States v. Wood,* 299 U.S. 123 (1936). The case involved a charge of petty larceny from a department store, with three government employees serving on the jury. It was argued that the "impartial jury" provided for in the Sixth Amendment must be given its common law meaning, thus disqualifying servants of the government. The court held the statute constitutional, stating that: (1) the rule as to servants on the jury where the master is an interested party did not apply to the government at common law and (2) even if it did the Congress had power to abrogate the rule without violating the Sixth Amendment. It was stated, however, that a holding of disqualification for implied bias would be upheld in a "special or exceptional" case. The court acknowledged that a showing of actual bias could always be made.

The decision in the *Wood* case was followed uniformly in the lower federal courts with no consideration of any "special circumstances" which might be classified as exceptional. *Great Atlantic and Pacific Tea Co. v. Dist. of Columbia,* 91 F. 2d 625 (D.C. Cir. 1937) (violation of weights and measures act); *Smith v. United States,* 91 F. 2d 556 (D.C. Cir. 1937) (violation of liquor tax law). This was true even in cases where the government had an interest far more direct than that of the *Wood* case. *Baker v. Hudspeth,* 129 F. 2d 799 (10th Cir. 1942) (violation of postal laws). *Higgins v.*

United States, 160 F. 2d 222 (D.C. Cir. 1946) (violation of narcotics law). Indeed, the rule was followed in a case where the offense, espionage involving a German agent, was directly against the government, *Shackow v. Government of the Canal Zone,* 108 F. 2d 625 (5th Cir. 1939).

The failure of the lower federal courts to carve out an exception to the rule of the *Wood* case was reflected in *Frazier v. United States,* 335 U.S. 497 (1948), where a majority of the court held that no special circumstances were created sufficient to sustain a challenge for cause in a trial where the jury was composed entirely of government employees, some of whom were employees of the department prosecuting a violation of the narcotics law. The ruling, however, is somewhat weakened by the fact "that petitioner himself was responsible for the jury's final composition." There was a vigorous dissent by Justice Jackson, joined by Justices Frankfurter, Douglas and Murphy, on the ground that pressure on government employees has increased and is demanding "not only probity, but unquestioning ideological loyalty."

After the *Frazier* case was decided a definite change in the attitude of the lower federal courts can be found. The question of implied bias arose in two cases involving "politically infamous" defendants whose offenses were in the nature of direct affronts to the government. *May v. United States,* 175 F. 2d 994 (D.C. Cir. 1949); *Eisler v. United States,* 176 F. 2d 21 (D.C. Cir. 1949). The rule of the *Wood* case was followed in both instances but there is indication of a desire for more latitude on the questions of employment in the department prosecuting the charge and the notoriety of the defendant as creating the "special circumstances" needed for a holding of implied bias. See especially Justice Edgerton's dissent in the *Eisler* case, where the prosecutor had made the statement that the defendant was "anti-government."

Since the principal case also denies an exception to the rule of the *Wood* case where the defendant's crime and political status are such that the government has a direct stake in prosecution, it may be seriously questioned whether such an exception exists at all. Nevertheless, the issue is not entirely closed. That an exception should be made where the government has a "direct" interest in the suit is urged in the concurring opinion of Justice Jackson and the dissents of Justices Black and Frankfurter. Justice Douglas, in *Morford v. United States,* 339 U.S. 258 (1950), has indicated sympathy with the dissenter's viewpoint. This leaves a four to four alignment on the question, with the balance of power in Justice Clark, who disqualified himself in the principal case. In these circumstances the long run effect of the loyalty order may yet produce an exception to the *Wood* rule. Justice Minton based his

opinion in a large part on the fact that since, at the trial of this defendant, the loyalty order had been only recently promulgated, its effects on government employees would be very negligible. In 1951 this position hardly remains tenable. Perhaps an anticipatory realization of this fact underlies the earlier actions of the government in twice consenting to the exclusion of its employees from the jury panel in cases of "direct" government interest. *Barsky v. United States,* 72 F. Supp. 165 (D.D.C. 1947); *Christoffel v. United States* 338 U.S. 84 (1949).

Harold Ticktin

DOMESTIC RELATIONS — LOSS OF CONSORTIUM — ACTION BY WIFE

Plaintiff sued to recover damages for loss of consortium due to defendant's negligent injury of her husband. Defendant's motion for a summary judgment on the grounds that the complaint failed to state a cause of action was granted. On appeal, *held,* reversed. A wife has a cause of action for loss of consortium due to a negligent injury of her husband, and consortium includes not only material services, but also love, affection, companionship, and marital relations. *Hitaffer v. Argonne Co. Inc.,* 183 F. 2d 811 (D. C. Cir. 1950).

While the term "consortium" has been variously defined, the definition given in *Pratt v. Daly,* 55 Ariz. 535, 104 P. 2d 147 (1940), may be regarded as typical. It is there defined as "the conjugal fellowship of husband and wife, and the right of each to the company, cooperation, and aid of the other in every conjugal relation."

The majority of courts under common law, found no difficulty in sustaining the husband's right to recover in circumstances identical with the principal case. *Union Pacific R. Co. v. Jones,* 21 Colo. 340, 40 Pac. 891 (1895); *McKinney v. Western Stagg Co.,* 4 Iowa 420 (1857); See Notes, 21 A. L. R. 1517 (1922); 133 A. L. R. 1156 (1941). Nor did the courts, with the exception of a few, hold otherwise after the passage of the Women's Enabling Acts which gave to the wife the right to sue and be sued as a feme sole. *Louisville & N. R. Co. v. Kinman,* 182 Ky. 597, 206 S.W. 880 (1918); *Baltimore & O. R. Co. v. Glenn,* 66 Ohio St. 395, 64 N.E. 438 (1902); *Newhirter v. Hatten,* 42 Iowa 288 (1875); See Notes, 21 A.L.R. 1517 (1921); 133 A. L. R. 1156 (1941). In similar fashion, the right of a wife to sue for loss of consortium resulting from a direct attack upon the marital relation, by alienation of affections or criminal conversation, has been recognized. Many of the courts permitted such an action on the theory that the wife's right to the consortium of her husband had always existed, although previously she had no remedy because of the common law disabilities of a married woman. *Haynes*

v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891); *Bennett v. Bennett.* 116 N.Y. 584, 23 N.E. 17 (1889); COOLEY, TORTS § 170 (4th ed. 1932). On the other hand, there has been no development of a remedy for the wife where the interference with the marital relation is indirect, though negligent, or even intentional. In such cases, the courts have consistently refused to grant her recovery. *Tyler v. Brown Service Funeral Homes Co.,* 250 Ala. 295, 34 So. 2d (1948); *Giggey v. Gallagher Transp. Co.,* 101 Colo. 258, 72 P. 2d 1100 (1937); *Boden v. Del Mar Garage,* 205 Ind. 59, 185 N.E. 860 (1933); *Bernhardt v. Perry,* 276 Mo. 612, 208 S.W. 462 (1919); *Nieberg v. Cohen,* 88 Vt. 281, 92 Atl. 214 (1914); See Notes, 5 A.L.R. 1049 (1920); 13 A.L.R. 1333 (1921); 18 A.L.R. 882 (1922); 37 A.L.R. 897 (1925); 59 A.L.R. 680 (1929).

In the decision of the principal case, the court recognized that it stands alone in granting a wife recovery for loss of consortium occasioned by a negligent injury to her husband. Prior to the principal case, there seems to have been only one case in which recovery was granted. *Hipp v. E. I. Dupont de Nemours & Co.* 182 N.C. 9, 108 S.E. 318; 18 A.L.R. 873 (1921). This case was immediately repudiated by *Hinnant v. Tide Water Power Co.,* 189 N.C. 120, 126 S.E. 307 (1925).

An analysis of the cases reveals that there are various reasons used to deny the wife recovery where the injury to the marital relation is indirect. Some courts deny recovery on the theory that although consortium includes elements of companionship, love and fellowship, nevertheless the material services are the dominating, if not the predominant factor for which compensation is granted, and the sentimental elements are only considered in aggravation of damages. Starting with this premise, these courts conclude that since a wife has no right, as such, to her husband's services, she has no cause of action; although her husband, having always been entitled to his wife's services, still has his right of action. *Boden v. Del Mar Garage, supra; Brown v. Kistleman,* 177 Ind. 692, 98 N.E. 631 (1912); *Stout v. Kansas City Term. Ry. Co.,* 172 Mo. App. 113, 157 S.W. 1019 (1913).

Other courts, relying upon the same basic premise, conclude that since the Women's Enabling Acts have given the wife the right to the fruits of her own labors, such Acts have therefore placed the husband in a position similar to that mentioned above for the wife, and therefore deny both — husband as well as wife — a right of action. *Helmstetler v. Duke Power Co.,* 224 N.C. 821, 32 S.E. 2d 611 (1945); *Clark v. Southwestern Greyhound Lines,* 144 Kan. 344, 58 P 2d 1128 (1936); *Harker v. Bushouse,* 254 Mich. 187, 236 N.W. 222 (1931); *Marri v. Stamford St. Ry. Co.,* 84 Conn. 9, 78 Atl. 582 (1911); *Bolger v. Boston Elevated R.R. Co.,* 205 Mass. 420, 91 N.E.

389 (1910); See Notes, 21 A. L. R. 1517, 1527 (1922); 133 A. L. R. 1156, 1162 (1941).

The basic premise of these courts — that the material services are the predominant element in consortium — is however contrary to the weight of authority. *Guevin v. Manchester,* 78 N.H. 289, 99 Atl. 298 (1916); *Lanve v. Dunning,* 186 Ky. 797, 218 S.W. 269 (1920); *Birmingham Southern R. Co. v. Linter,* 141 Ala. 4420, 38 So. 363 (1904); See 27 AM. JUR. 505. The case of *Lane v. Dunning, supra,* held that the husband's right of action for damages for loss of consortium does not rest upon the ground of services alone, but upon the loss of society or consortium arising by virtue of the marriage contract. In addition, it is interesting to note that the cases permitting recovery by either spouse for alienation of affections present a formidable array of authority contrary to the basic premise adopted by these courts. Typical of these is the case of *Burke v. Johnson,* 274 Ky. 405, 118 S. W. 2d 731 (1938) which concluded that the gist of the action for alienation of affections is not the loss of services, but loss of consortium or conjugal rights, which include companionship, fellowship, affection, and society of the alienated spouse. *Lockwood v. Lockwood,* 67 Minn. 476, 70 N.W. 784 (1897). See also COOLEY, TORTS § 170 (4th ed. 1932).

Another group of cases deny the wife recovery on the theory that it would result in double recovery. They arrive at such a conclusion by reasoning that where a husband is physically injured, the damages he recovers not only makes him whole again, but also enables him to discharge all his marital duties to his family to the same degree as before the injury. *Bernhardt v. Perry, supra; Giggey v. Gallagher Transp. Co., supra; Eschenback v. Benjamine,* 195 Minn. 378, 263 N.W. 154 (1935).

These courts likewise are placing questionable emphasis on the element of services as the predominating factor in consortium. As the court in the principal case recognized, however, if the wife is permitted to recover there *could* be a double recovery in regard to the service element of consortium, and therefore the amount allocable to this particular element should be deducted from her total recovery.

Still another group of cases deny the wife recovery on the theory that her loss of consortium, resulting from a negligent act of the defendant, is too remote and indirect to permit recovery, and hence, distinguish it from direct injuries to the marital relation occasioned by alienation of affection. *Smith v. Nickolas Bldg. Co.,* 93 Ohio St. 101, 112 N.E. 204 (1915); *Gambino v. Mfgrs. Coal & Coke Co.,* 175 Mo. App. 653, 158 S.W. 77 (1913); *Brown v. Kistleman, supra.*

Paradoxically, however, the courts do not find that the loss of

consortium is too remote or consequential when a husband is seeking recovery in identical circumstances. On the contrary, the majority of courts grant recovery to the husband in such a situation. *Louisville & N.R. Co. v. Kinman, supra; Baltimore & O. R. Co. v. Glenn, supra; McKinney v. Western Stage Co., supra;* See Notes, 21 A. L. R. 1517 (1922); 133 A. L. R. 1156 (1941).

A more formidable argument has been used by still other courts in refusing recovery to the wife. They conclude that the common law recognized no cause of action in the wife for loss of consortium, and that the Women's Enabling Acts have given her no new cause of action. *Cravens v. Louisville & N. R. Co.*, 195 Ky. 257, 242 S.W. 628 (1922); *Bernhardt v. Perry, supra; Emerson v. Taylor,* 133 Md. 192, 104 Atl. 538 (1918); *Kosciolek v. Portland R. Light and P. Co.,* 81 Or. 517, 160 Pac. 132 (1916). This line of reasoning however has not gone unchallenged. In fact it has met with strong opposition by those who argue that even prior to the passage of the Married Women's Acts, the courts recognized the existence of an injury to the wife's personal rights resulting from a negligently inflicted injury to her husband. The courts were forced to deny the wife a remedy, however, because under common law, a wife was a legal nonentity and incapable of maintaining any action for the violation of her personal rights as a wife. See the dissenting opinion by Chief Justice Bond in *Bernhardt v. Perry, supra.*

It is interesting too, that a majority of courts, in alienation of affection suits, brought by the wife, go to great lengths to prove that the common law did recognize the right of a wife to the consortium of her husband, but, that as stated above, she was incapable of maintaining any action because of her disabilities. See *Bennett v. Bennett, supra.* A middle ground was taken by an Ohio court in *Westlake v. Westlake*, 34 Ohio St. 621 (1878) who took the position that the common law was in doubt as to whether the wife had the right with no accompanying remedy, or no right at all.

The reason for such a denial is given as being attributable to the inferior status of the wife at common law. 3 BL. COMM. 143. It is submitted that inasmuch, as by universal agreement, it is of the essence of every marriage contract that the parties thereto, shall in regard to this particular matter of conjugal rights and affection, stand upon an equality, it is difficult to find support for the continued denial in that obsolete reason.

Some courts, although refusing to grant recovery to the wife for a negligently inflicted injury upon the husband, have nevertheless permitted her to recover for loss of consortium occasioned by the sale of opium or liquor to the husband, after being notified not to do so. *Pratt v. Daly*, 55 Ariz. 535, 104 P. 2d 147 (1940); *Moberg v. Scott*, 38 S.D. 422, 161 N.W. 998 (1917); *Flandermeyer v. Cooper*, 85 Ohio St. 322, 98 N. E. 102 (1912).

In spite of almost universal condemnation on the part of legal writers, there is little indication of any change in the rule. It has been stated that the loss of services is an outworn fiction. PROSSER, TORTS 948 (1941). The wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of her husband. There is no valid reason for allowing the wife recovery for a direct interference with the marital relation, by alienation of affections, and denying it for more indirect harm through personal injury to the husband, when no such distinction is made in the husband's action. As the court in the principal case states: "When a legally protected interest of a person has been injured by the wrongful act of another, it is no less actionable because the invasion was negligent rather than intentional or malicious." See Holbrook, *The Change in Meaning of Consortium,* 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651 (1930); Green, *Relational Interests,* 29 ILL. L. REV. 460, 466 (1934).

The court in the principal case is to be highly commended for its courageous action in refusing to be bound by the shackles of precedent in granting recovery to the wife.

Charles J. Kerester

EVIDENCE — DYING DECLARATIONS — DECLARANT'S KNOWLEDGE OF IMPENDING DEATH

In a trial for first degree murder, the court refused to admit the testimony of five witnesses as to statements made by deceased on his death bed accusing a third party. The reason advanced by the trial court for the ruling was that the deceased did not expressly declare he was dying, "in so many words," and therefore there was no guarantee of trustworthiness for his statements. The deceased had been shot through the lung, near the heart. Also, some of the large blood vessels had been severed by the bullet. When told to wait until the doctor came before turning over, deceased said, "I can't make it." On appeal, *held,* reversed. The declarant was under a "sense" of immediate and impending death and the fact that he made no express statement so declaring does not make the statement inadmissable. *Fulton v. State,* 47 So. 2d 883 (Miss. 1950).

Dying declarations have constituted an exception to the hearsay rule since 1700. The exception is one of necessity since the witness has died and cannot be called upon to relate the facts at the trial. 5 WIGMORE, EVIDENCE § 1431 (3d ed. 1940); ELLIOT, EVIDENCE 345 (1940). At early common law, dying declarations were admissable in both civil and criminal cases. *Wright v. Littler,* 3 Burr. 1244 (1761); *Stobart v. Dryden,* 1 M & W 615 (1808). The modern doctrine restricts the use of dying declarations to homicide or abortion

cases, ". . . in which the death of the victim is an element of the offense." *Crookham v. State,* 5 W. Va. 510 (1871). See Note, 91 A. L. R. 561 (1934). Legislatures and courts have, in some jurisdictions, done away with this restriction. *Missouri Pacific R. Co. v. Hampton,* 195 Ark. 335, 112 S. W. 2d 428 (1938); *Thurston v. Fritz,* 91 Kan. 468, 138 Pac. 625 (1914); COLO. ST. 1937, June 4, c. 145.

The question involved in the principal case has troubled many courts in the past. Is it mandatory, in order for the declaration to be admissable, that the declarant express, "in so many words", his knowledge of his immediate and impending death? The Mississippi court, in answering the question in the negative has followed the majority view in America today. *Davis v. People,* 77 Colo. 546, 238 Pac. 25 (1925); *People v. La Panne,* 225 Mich. 38, 237 N. W. 38 (1931); *State v. Stephan,* 118 N. J. L. 592, 194 Atl. 273 (1937); *Commonwealth v. Puntario,* 271 Pa. 501, 115 Atl. 831 (1922); *Pollack v. State,* 215 Wis. 200, 253 N. W. 561 (1934); 5 WIGMORE, EVIDENCE § 1442 (3d ed. 1940).

According to this decision, the declarant's statements must be controlled by his "sense" of immediate and impending death. The declarant must have given up all hope of recovery. *Wilkinson v. State,* 134 Miss. 324, 108 So. 711 (1926). The deceased does not have to express his knowledge of impending death in so many words. This "sense" may be inferred from surrounding circumstances, the nature of the wound, or the fact that the doctor told the deceased that he was going to die. *State v. Logan,* 34 Mo. 351, 126 S. W. 2d 256 (1939); *People v. Bartelini,* 258 N. Y. 433, 35 N. E. 2d 29 (1941); 26 Am. Jur. Homicide, § 421 (1940).

The jurisdictions which held in opposition to this view put emphasis on the dangerous nature of hearsay evidence. There could be no guarantee of trustworthiness because there could be no cross-examination, *State v. Brunetto,* 13 La. An. 45 (1858), and there was no sanction of an oath, *Tracy v. People,* 97 Ill. 106 (1880). But these courts recognized an exception where the declarant was dying and knew he was dying. *State v. Peake,* 10 N. J. Law J. 177 (1887); *People v. Del Vermo,* 192 N. Y. 470, 85 N. E. 690 (1911); *State v. Gallagher,* 4 Wash. 2d 437, 103 P. 2d 1100. However, some courts were reluctant to extend this exception to admit the dying declarations unless accompanied by express words, by the declarant, as to his knowledge of his immediate and impending death. *State v. Knoll,* 69 Kan. 767, 77 Pac. 580 (1904); *Austin v. Com.,* 19 Ky. L. Rep. 474, 40 S.W. 905 (1897); *Smith v. State,* 9 Humph. 22 (Tenn. 1848). It is submitted however, that admission of hearsay evidence should be put to a test not so strong as to exclude all evidence of dying declarations when their admission is of "necessity." If the trial court is convinced by the evidence given, that the declar-

ant was making a probative statement, then it seems useless to require the declarant to tell us so. "The tendency is towards the reception rather than the rejection of evidence, experience having shown that more harm results from its exclusion than from its admission." *Thurston v. Fritz, supra* at p. 475.

The significance of the principal case does not lie in the fact that the declarant no longer is required to make a formal statement, but rather lies in the fact that Mississippi, along with almost all other jurisdictions, has seen the need for abandoning one of the time-honored arbitrary rules of dying declarations.

Melvin J. Woodford

LABOR LAW — SECONDARY BOYCOTT — PEACEFUL PICKETING OF A BUILDING SITE

The local business agent of the International Brotherhood of Electrical Workers (AFL), learning that the electrical subcontractor, Langer, on a home construction contract, was employing non-union men, visited the site of the job and told Deltorto, the subcontractor handling the carpentry, that non-union electricians were working on the job. The next day the agent returned and picketed the site with a sign reading, "This job is unfair to organized labor." Seeing this sign, the two union carpenters who were the only men at work left the job. The union agent ceased picketing and called the general contractor, Giorgi, and told him that he would have to replace Langer with a union contractor or he could not complete the job. Langer filed a charge with the N.L.R.B. under Section 8 (b) (4) (A) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 158 (b) (4) (A) (1950). A complaint was issued and the trial examiner found that Section 8 (c) of the Act excused the picketing as an expression of "free speech". The N.L.R.B. reversed the trial examiner and held the picketing to be a violation of Section 8 (b) (4) (A) of the Act, concluded that this section was not modified by Section 8 (c), and accordingly issued a cease and desist order against the union. On Appeal, Judge Clark dissenting, *held,* affirmed. By inducing the union carpenters to quit work in order to force Giorgi, the general contractor, "to cease doing business with" Langer, the electrical subcontractor, the union was engaged in a secondary boycott in violation of Section 8 (b) (4) (A). *I.B.E.W., Local 501 v. NLRB,* 181 Fed. 2d 34 (2nd Cir. 1950).

Prior to the Labor Management Relations Act, equity courts held unlawful economic pressure which was applied indirectly in labor disputes so as to coerce third parties to become involved. *Duplex Printing Press Company v. Deering,* 254 U.S. 443 (1930).

Some courts considered the lack of a common economic interest as essential for holding such pressure actionable; others viewed such pressure as prima facie actionable and only justifiable if such a common interest could be found. *Gompers v. Buck's Stove & Range. Co.* 221 U.S. 418 (1910); *Goldfinger v. Feintuck,* 276 N.Y. 281, 11 N.E. 2d 910 (1937). See Note, 116 A.L.R. 508 (1938). However, harm caused by "inducing third persons through fair persuasion and for a proper object to refrain, during their dispute with the employer, from . . . being engaged in a job on which he also is engaged . . ." was considered legitimate labor activity. RESTATEMENT, TORTS § 799 (rev. ed. 1939). In either case the effect was to enjoin the pressure only where the common interest was absent. *Bossert v. United Brotherhood of Carpenters & Joiners,* 77 Misc. 592, 37 N.Y. Supp. 321 (Sup. Ct. 1912). Such economic pressure, when applied to parties other than those directly engaged in the dispute, was called a secondary boycott.

The majority in the principal case finds the primary dispute to be between the union and Langer and labels the pressure a secondary boycott by finding that the picketing was directed primarily against Deltorto for the purpose of putting pressure on Giorgi to replace Langer with a union contractor. Under the Act they found it unnecessary to test for a lack of ecenomic interest. If that test had been applied, the court would have examined the interest that union carpenters might have with the unionizing of electricians on the same job. See Note, 6 A.L.R. 962 (1920). At first blush this interest seems too remote to justify the pressure on the carpenters. However, many courts, on more careful analysis, have reached a different result. *Meser v. Speer,* 96 Ark. 618, 132 S.W. 988 (1910); *Seymour Ruff & Sons v. Bricklayers' Union,* 163 Md. 688, 164 A. 752 (1935); *Gray v. Building Trades Council,* 91 Minn. 171, 97 N.W. 663 (1903). Thus in *Meser v. Speer, supra,* it was held that refusal of union laborers to lay stone for one subcontractor where another subcontractor on the same job hired non-union men was not an unlawful conspiracy. See Note, 32 L.R.A. (N.S.) 792. It is, therefore, a permitted objective for labor unions to require all the laborers on a job to be union men. See 31 AM. JUR., LABOR §§ 264 to 269 (1940). The majority in the principal case cancluded that it was not important that the carpenters were at work on the site of the dispute. But in *Carpenters & Joiners Union v. Ritter's Cafe,* 316 U.S. 722 (1941), the court speaks of confining the pressure to the area of the job where the grievance exists. In *American Federation of Labor v. Swing,* 312 U.S. 321 (1940), Justice Frankfurter said, "The State cannot exclude from peaceful picketing the right of free communication by drawing the circle of economic competition so small as to . . . (deny) . . . the interdependence of the economic interest

of all engaged in the same industry . . . ." Thus it would seem important that the third party was engaged at the site of the grievance and that the carpenters and electricians were engaged in the same industry, the building industry, for if the building trades were organized by an industrial union rather than by a trade union, there would be but one union and the carpenters would have a direct interest in having the electricians in *the* union . TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, 301 (1940). It is difficult to see why this interest should be any less where the unions involved are two crafts of a trade union in the same industry. Therefore, it seems to follow that grave doubts might be raised as to the "neutrality" of Deltorto and his unionized carpenters with respect to the dispute between Langer and the I.B.E.W.

The dissent finds the dispute to be between the I.B.E.W. and Giorgi and holds that the union, in picketing the site of the job, was applying a direct pressure on Giorgi and that the unionized carpenters became involved only indirectly as their work was "enmeshed" with that of the parties to the dispute. By this analysis the pressure is primary and not secondary and hence would not have been subject to an injunction in equity.

Section 8 (b) (4) (A) of the Labor Management Relations Act, *supra,* makes it an unfair labor practice "for a labor organization or its agent . . . to induce or encourage the employees of any employer to engage in . . . a concerted refusal . . . to work . . . where an object thereof is forcing . . . any employer to cease doing business with any other person." In interpreting this section, the majority in the principal case concludes that "Congress, in the search for a compromise between the conflicting interest of employees in collective bargaining and that of neutrals in avoiding involvements in quarrels not their own, decided to draw a line at secondary boycotts." 181 Fed. 2d 34, 40 (2nd Cir. 1950). Also see comment of Senator Taft, 93 CONG. REC. 4323 (1947), "This provision [Section 8 (b) (4) (A)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees." This seems to be the view of all the courts that have interpreted this Section. NEW YORK UNIVERSITY THIRD ANNUAL CONFERENCE ON LABOR, 372 (1950). But it should be noted that in the statute there is no mention of the term, secondary boycott, nor does Section 8 (b) (4) (A) include the requirements that were applied as tests for a secondary pressure by equity courts prior to the Act. The Act speaks of inducing the employees of any employer and not of coercing third parties with no interest common to the dispute. In *Metal Polishers Union v. Climax Machine Company,* 86 N.L.R.B. 142 (Nov. 4, 1949), it is said, "The breadth of the language of that sec-

tion [8 (b) (4) (A)] . . . if literally interpreted, and given full scope, could reach out to ban practically all strike and picketing activities no matter against whom directed."

In the principal case the majority would admit but one exception to the broad language of this Act. They found that the I.B.E.W., by picketing, "induced" the carpenters to refuse to work in order to force Giorgi to "cease doing business" with Langer. This one exception is where the business of the third party is so "enmeshed" with that of the offending employer that pressure applied directly to such employer falls only indirectly on the third party because of his proximity to the dispute. In this case, since the carpenters were the only tradesmen working at the time of the picketing, the majority concludes that this was not a case of "enmeshing" but one of direct pressure on a third party. The dissent would further relax the broad language of the Act by enlarging its definition of the dispute to include the general contractor as the offending employer. This makes the picketing a primary or direct pressure when it is restricted to the site of the dispute. The dissent also would hold that the phrase "cease doing business" should not include parties "allied" to the same job by contract. *Mills v. United Association of Journeymen*, 83 F. Supp. 240 (W.D. Mo. 1949).

A labor organization is justified in engaging in peaceful picketing where the object is to persuade the employer to hire union employees. *Lauf v. E. G. Shinner & Company*, 303 U.S. 323 (1938). The nature of the construction trade makes it difficult to define who the employer is. The majority in the principal case would restrict the union to pressure against the subcontractor while the dissent would go further and hold that the general contractor is so "allied" to the subcontractor that he is not a neutral to this dispute. In the more recent case of *Denver Building & Construction Trade Council v. NLRB*, 26 L.R.R.M. 515 (1950), the court cited Section 13 of the Act which says, "Nothing in this act, except as specifically provided for herein, shall be construed as to . . . diminish in any way the right to strike, or to affect the limitations or qualifications on that right," and held that clearer language than that of Section 8 (b) (4) (A) would be needed to take the conduct of the union in a situation similar to that of the principal case out of the protection of Section 13.

The failure of Section 8 (b) (4) (A) to state that its purpose is to outlaw secondary boycotts, see comment of Senator Taft, *supra*, and the exceedingly broad language used to define the prohibited practices, have been the basis of many difficulties in applying this section. No court has yet attempted to apply the words of the Act to their fullest import. The decision in the principal case would restrict these words only where the third party's activities are so

"enmeshed" with those of the offending employer that he is involved through his activities at the site of the dispute. Such a result seems to be within the broad language of Section 8 (b) (4) (A), but it would include pressures which prior to the Act would have been found to be primary. Such a result is very dubious when viewed in the light of Section 13 and Section 8 (c). The purpose of Section 8(b) (4) (A) is to prohibt union pressure upon "neutrals". In an early decision, the National Labor Relations Board held that the important question in such cases is whether the union's activities are aimed primarily at the offending employer or at the neutral. The pressure is primary and lawful where the neutral is involved in the dispute only because he uses the premises of the offending employer. *NLRB v. Pure Oil Company,* 84 N.L.R.B. No. 38 (June 17, 1949). But a different view is now taken at a construction site. A view contrary to the principal case has been taken in *Denver Building & Trade Council v. NLRB, supra,* by the U. S. Court of Appeals for the District of Columbia, on the theory that the union was picketing to unionize the job, not to force the general contractor to "cease doing business with the subcontractor". By this analysis the pressure is not secondary or a violation of Section 8 (b) (4) (A). The resolution of these divergent views is bound to have wide practical effect both in the construction industry proper and among industrial firms which have construction work done in connection with their premises.

Frank H. Poland, Jr.

MUNICIPAL CORPORATIONS — IMMUNITY FROM TORT LIABILITY — INSURANCE AGAINST

The city of Raleigh, N. C., purchased public liability insurance against claims for injuries and damages it might become obligated to pay. Attached to the policy was an endorsement in which the insurer agreed not to claim exemption in actions that the insured, by reason of its being a municipal corporation, would be legally exempt from liability. Plaintiff's intestate was killed in a collision with a city owned truck which admittedly was being employed in a governmental function. In an action for wrongful death, the insurance attorneys, defending the city, demurred to the complaint but were overruled by the trial court. *Held,* reversed. A municipality is not liable for the otherwise tortious acts of its agents arising in the performance of a governmental function, nor can a municipality waive such immunity by procuring insurance because it has no statutory or implied authority to do so; further, insurance is a contract to indemnify the named insured and does not create liability to any other who might suffer from alleged tortious acts

of municipal servants. *Stephenson v. City of Raleigh,* 232 N.C. 42, 59 S.E. 2d 195 (1950).

The North Carolina court adhered rigidly to the vulnerable but tenacious dogma of municipal immunity from tort liability arising in the performance of a "governmental" as distinguished from a "proprietary" function. *Splinter v. City of Nampa,* 215 P. 2d 999 (Idaho 1950); *Martinson v. City of Alpena,* 44 N.W. 2d 148, (Mich. 1950); *Aldrich v. City of Youngstown,* 106 Ohio St. 342, 140 N.E. 164 (1922). Leading authorities have assailed this "doctrine of heresy" for well over a quarter century. Borchard, *Governmental Immunity in Tort,* 34 YALE L.J. 1 (1924); *Symposium on Municipal Tort Liability,* 9 LAW AND CONTEMPORARY PROBLEMS 179 (1942); Concerning Ohio law, see Hunter and Boyer, *Tort Liability of Local Governments in Ohio,* 9 OHIO ST. L.J. 377 (1948) and, Note, 9 OHIO ST. L.J. 174 (1948).

Can a city, without statutory authority, employ insurance to protect its citizens and visitors from its otherwise negligent acts during the execution of governmental duties? In the principal case, the court denied the legality of waiver of immunity as a means to effectuate this desirable end. Even before the problem of waiver is reached there are two hurdles to be overcome, the first being the constitutional prohibition against spending public monies for private purposes. *Opinion of the Justices,* 313 Mass. 779, 47 N.E. 2d 260 (1943); *Auditor of Lucas County v. State* ex rel. *Boyles,* 75 Ohio St. 114, 78 N.E. 955 (1904). The expenditure of money for insurance against liability arising from proprietary functions, or imposed by law, is universally upheld, but purchase of liability insurance relating to governmental functions is questioned. H. B. Wilson, *Municipal Insurance Costs and Practices* (1939), REPORT NO. 132 OF AMERICAN MUNICIPAL ASSOCIATION 44. One case absolutely ruled it out. *Pohland v. City of Sheboygan,* 251 Wis. 20, 27 N.W. 2d 736 (1947). Arguably, the lawfulness of the expenditure could be rested on a moral obligation to the claimant, but this has received scant judicial support. *Lambert v. New Haven,* 129 Conn. 647, 30 A. 2d 923 (1943); *Tomkins v. Williams,* 62 S.W. 2d 70 (Tex. Civ. App. 1933). *Contra: Evans v. Berry,* 262 N.Y. 61, 186 N.E. 203 (1933). It is not without significance that an Ohio decision recognized the moral obligation theory in upholding a special statute authorizing a county to pay a tort claim. *Spitzig v. State,* 119 Ohio St. 117, 162 N.E. 394 (1928). And some Ohio municipalities have been paying tort claims on a moral obligation theory.

The second hurdle in the way of a city's protecting its citizens and visitors with insurance is one imposed by insurance law. An insurance contract is one to indemnify; the insured must be in a

position to suffer a loss or he lacks an insurable interest. *Bartling v. German . . . Insurance Company,* 154 Ia. 335, 134 N.W. 864 (1912); *Liverpool & Globe & London Ins. Co. v. Bolling,* 176 Va. 182, 10 S.E. 2d 518 (1943). As to liability insurance in relation to governmental functions it is very difficult to find an insurable interest unless a moral obligation to pay tort claims is recognized.

Louisiana, aided by a statute since repealed, DART'S LA. GEN. STAT. 1932, § 4248, repealed by, ACTS 1948, No. 195, § 32.01, had a novel approach to this situation. The immunity was considered personal and the insurer was not in a position to plead it. There, however, the insurer could be sued directly by the claimant. *Rome v. London & Lancashire Indemnity Co.,* 169 So. 132 (La. App. 1936); Fordham and Pegues, *Local Government Responsibility in Tort in Louisiana,* 3 LA. L. REV. 748 (1941). However desirable this result may be, the rationale seems doubtful considering the requirement of an insurable interest and the fact that the immunity is from liability and not merely from suit. *Lambert v. City of New Haven, supra; Sloper v. Quincy,* 301 Mass. 20, 16 N.E. 2d 14 (1938).

The upshot of the principal case is that under existing legal thought a community cannot generally, short of legislation, protect its citizens and visitors from its otherwise negligent acts during governmental duties. However, it would seem if the moral obligation theory to pay tort claims was recognized, liability insurance relating to governmental functions could be treated the same as that relating to proprietary functions. Considering the multitudinous contacts ever-expanding government has with the individual, the facility with which insurance can be obtained, and the fact that premium reductions can be acquired once the actuarial experience rating of each risk is determined, the most desirable result would be complete abolition of immunity. New York has done this. N.Y. LAWS 1939, c. 860, § 8. However, a seed must be planted before an oak grows, and a practical approach would be to make statutory inroads in governmental immunity as often and as quickly as possible.

John B Dwyer

NON-PROFIT CORPORATIONS — SAVING OF EXPENSE AS A PROFIT

Relators sought to incorporate a proposed corporation not for profit. The purpose of the corporation was to secure the benefits of home ownership to the inhabitants of a certain community. This was to be accomplished by the purchase of certain property, and the conveying, leasing, developing or operating of such property in a manner that would best serve the interests of the inhabitants and the community. The Secretary of State declined to record

the articles of incorporation because a previous decision had held that a real estate business could not be incorporated as a corporation not for profit. Mandamus was brought to require the respondents to record the article of incorporation. *Held,* writ denied. The proposed corporation failed to meet the statutory requirements for a corporation not for profit. The benefits conferred upon the members of the corporation include pecuniary gain or profit. The saving of an expense which would otherwise necessarily be incurred is a profit to the person benefited. *State* ex rel. *Russell* et al. *v. Sweeney, Secretary of State,* 153 Ohio St. 66, 91 N. E. 2d 13 (1950).

The first case involving non-profit corporations to state that a saving of an expense is a profit is *State* ex rel *Troy, Pros. Atty. v. Lumbermen's Clinic,* 186 Wash. 384, 58 P. 2d 812 (1936). In the *Troy* case the employers were obligated to pay for medical aid given their workmen. The state would furnish this service for a certain charge. A group of employers organized a corporation for the purpose of furnishing this medical aid at a cost lower than that charged by the state. The Washington court held that this saving of an expense resulted in a profit to the members of the corporation.

Only two other cases concerning non-profit corporations discuss the problem of whether the saving of an expense is a profit. A recent New Hampshire case, *Petition of White Mountain Power Co.* et al., 71 A. 2d 503 (N. H. 1950) cited the Washington case, and limited its comment to these words, "And in a sense, a saving of expense is a profit." The other case is the principal one, which cites and follows the theory of the Washington decision.

The "saving of an expense is a profit" theory, however, is not foreign to the administration of Ohio corporation law. "Articles of incorporation intended to be filed under authority of General Corporation Act . . . one of whose principal objects is to secure more favorable terms or savings for its members in the purchasing of property or services should be filed as a corporation for profit." OP. ATTY. GEN. 644 (1942).

All corporations organized for the purpose of saving an expense, nevertheless, will not be classified as corporations for profit. OHIO GEN. CODE § 10185 provides for the incorporation of co-operative trade associations "for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost and expense of purchasing, holding, and distribution." An excerpt from OHIO GEN. CODE § 5495, "each corporation not for profit organized pursuant to sections 10185 and 10186," indicates that a co-operative trade association will be classified as

a corporation not for profit. Special provision for another exception is made by OHIO GEN. CODE § 10186-31 which provides for the formation of a non-profit corporation to provide housing for veterans by the purchasing of real property and constructing residences thereon for sale to members of the corporation without any profit to the corporation.

The articles of incorporation of the proposed corporation in the principal case were attempted to be filed under the General Corporation Act, OHIO GEN. CODE § 8623-97, which provides as follows: "A corporation not for profit may be formed hereunder for any purpose or purposes not involving pecuniary gain or profit."

How this statute has been interpreted is illustrated by a case involving a non-profit corporation organized for the purpose of promoting interest in and appreciation of scientific angling. To better conduct a national tournament, the corporation contracted for the manufacture of uniform equipment which it sold in excess of costs to its members. In a quo warranto proceeding seeking an order of ouster on the ground that the making of a profit on the sale of the equipment was in violation of its franchise rights, the court stated that "we do not find that the defendant's merchandising activities are in any sense a profit making purpose, and any excess in resale over cost was purely incidental and properly used for the expenses and maintenance of the organization." *State* ex rel. *Bartlett, Pros. Atty., v. National Ass'n. of Angling & Casting Clubs,* 51 N. E. 2d 622 (Ohio 1943). In another recent case where the question was whether a club's enterprises constituted "business" within the meaning of OHIO GEN. CODE § 5325-1, the court stated that a corporation not for profit may conduct its enterprises for gain, profit or net income to the corporation as a legal entity. *The American Jersey Cattle Club v. Glander, Tax Comm'r.,* 152 Ohio St. 506, 90 N. E. 2d 433 (1950).

When considering whether a corporation is one for or not for profit, the *Angling Club* case indicates that the principal objects of a corporation are the determining factors and that an incidental profit will not destroy the non-profit character of a corporation. Likewise, neither should the effect of an incidental saving of an expense to the members of a corporation whose principal objects qualify it as a corporation not for profit cause such corporation to lose its non-profit character. A corporation formed for the purposes of association, amusement, literary and social culture and mutual improvement, which had a club-house where members could procure refreshments at reduced prices has been held not a corporation for profit. *Cheney v. Ketcham,* 5 N. P. 139, 7 O. D. 183 (Ohio C. P. 1898).

It cannot be disputed that a saving of an expense is of pecuni-

ary value; therefore, a saving of an expense can be considered pecuniary gain or profit. And since the principal object of the corporation in the case at bar was the saving of an expense by making home ownership available at cost of development, the court was consistent with previous decisions by holding that the proposed corporation was not a corporation not for profit.

Michael Bulischak

SALES — IMPLIED WARRANTIES — EXTENSION TO SECOND HAND GOODS

Plaintiff brought an action to recover part of the purchase price for a factory sold to the defendant, who resisted payment claiming plaintiff breached the warranty for fitness by representing a used boiler, included in the sale, as one in good condition and amply fit for defendant's purposes. The boiler had to be replaced. *Held,* motion for summary judgment denied. Even though express warranty is defeated by the parol evidence rule there is a debatable issue whether defendant relied on plaintiff's judgment within the language of the Uniform Sales Act, Section 15 (1). *Standard Brands Inc. v. Consolidated Badger Coop.,* 89 F. Supp. 5 (E.D. Wis. 1950).

The common law majority view was that no implied warranty of fitness arose from the sale of second hand goods. *Johnson v. Carden,* 187 Ala. 142, 65 So. 813 (1914); 151 A.L.R. 447 (1944); 46 AM. JUR. § 360 (1943); 1 WILLISTON, SALES 232 (rev. ed. 1948). There was a minority view at common law to the effect that there are implied warranties for second hand goods where the defect is not obvious, and the buyer is misled and relies on the seller's skill or judgment. *Walker v. Ayer,* 80 S.C. 292, 61 S.E. 557 (1908). See Note, 151 A.L.R. 554 (1944) and cases cited; 1 WILLISTON, SALES §§ 233a, 235, 237 (rev. ed. 1948).

Section 15 (1) of the Uniform Sales Act provides, " . . . there is no implied warranty as to fitness for any particular purpose . . . except . . . (1) where buyer . . . makes known . . . to seller . . . purpose for which goods are required and . . . buyer relies on . . . seller's . . . judgment." Section 76 of the Uniform Sales Act provides, "Goods include all chattels personal other than things in action and money." The courts have held that the Act does not exclude second hand goods from its coverage. *Moss v. Yount,* 296 Ky. 415, 177 S.W. 2d 372 (1944); *Drumar Mining Co. v. Morris Ravine Mining Co.,* 33 Cal. App. 2d 492, 92 P. 2d 424 (1939). See Note, 29 A.L.R. 1227 (1924).

The Uniform Sales Act was adopted in Ohio on May 9, 1908. It was almost forty years later, however, before an Ohio court construed section 15 (1) pertinent to its coverage of second hand

goods, holding in *Regula v. Gerber,* 70 N.E. 2d 662 (C.P. 1946) that the Act, OHIO GEN. CODE §§ 8381-8456, applied to the sale of second hand automobiles. *Cf. Meyer v. Packard Cleveland Motor Co.,* 106 Ohio St. 328, 140 N.E. 118 (1922).

The principal case seems to substantiate the present trend toward holding that the Act does change the common law as to implied warranties for fitness of second hand items.

Roy E. Gabbert

SALES — WARRANTY ACTION — NECESSITY OF PRIVITY

The plaintiff purchased a can of anti-freeze from a service station operator. The label on the can bore a warranty which stated that the anti-freeze contained no harmful substance and was safe for use in automobiles. Upon use, however, the anti-freeze damaged the motor of the plaintiff's automobile, and the plaintiff brought an action for breach of warranty against the manufacturer. The Municipal Court of Cincinnati found for the plaintiff, and the corporation appealed on questions of law to the court of appeals. *Held,* no action may be maintained against a manufacturer by a sub-purchaser, for injury to his chattel, based upon an express warranty when there is no privity between the parties. *Jourdon v. Brouwer,* 86 Ohio App. 505, 93 N.E. 2d 49 (1949).

By the common law doctrine of caveat emptor an ultimate consumer had no cause of action against a manufacturer for defects in the product. *Winterbottom v. Wright,* 30 M. & W. 109 (1842). In *McPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916), the court granted a cause of action for negligent production, and the majority of courts have adopted this view. *Slavin v. Francis H. Leggett & Co.,* 114 N.J.L. 421, 177 Atl. 120 (1935); *Hoenig v. Central Stamping Co.,* 273 N.Y. 485, 6 N.E. 2d 415 (1936); *Sicard v. Kremer,* 133 Ohio St. 291, 13 N.E. 2d 250 (1938); RESTATEMENT, TORTS § 497 (1948). If, however, as in the principal case, the consumer elects to sue on the breach of warranty, the great majority of courts have held that there is no cause of action when the parties are not in privity. *Pearle v. Filenes' Sons Co.,* 317 Mass. 529, 58 N.E. 2d 825 (1945); *Poplar v. Hoschild, Kohn Co.,* 180 Md. 389, 24 A. 2d 783 (1942); *Turner v. Edison Storage Battery Co.,* 248 N.Y. 73, 161 N.E. 423 (1928); 1 WILLISTON, SALES § 245 (3d ed. 1948).

There have been exceptions to this rule; these exceptions seek to protect the consumer from extremes in advertising and to compensate for judical leniency towards "puffing". In cases of fraudulent representations, *Knelling v. Roderick Lean Manufac-*

turing Co., 183 N.Y. 78, 75 N.E. 1098 (1905), and in the production of inherently dangerous articles, *Elizabeth Arden Inc. v. Brown*, 107 F. 2d 938 (3d Cir. 1939); *David v. McKesson and Robbins*, 278 N.Y. 622, N.E. 2d 127 (1938), the American courts are almost unanimous in dispensing with the requirement of privity.

Another exception which seems to be followed by a majority of the courts exists in the case of foods and beverages. Taking note of the nature of the product, its mode of sale, and the probable harm resulting from latent defects, most courts have imposed absolute liability on such manufacturers. *Coca Cola Bottling Co. v. Munn*, 99 F. 2d 190 (4th Cir. 1938); *Bergantino v. General Baking Co.*, 298 Mass. 106, 9 N.E. 2d 521 (1938); *Dunn v. Hoffman Beverage Co.*, 126 N.J.L. 556, 20 A. 2d 352 (1942); *Ward Baking Co. v. Trezzino*, 27 Ohio App. 475, 161 N.E. 557 (1928); *Catini v. Swift*, 251 Pa. 52, 95 Atl. 931 (1915).

These exceptions have not weakened the general rule to any great extent, but recently there has been a trend of judicial thought which threatens the whole basic requirement of privity. In 1 WILLISTON, SALES § 245 (3d ed. 1948), the author remarks that there seems to be no reason why warranties should be an exception to the rule of contractual assignability, and Justice Cardoza, in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), stated that, "The assault upon the citadel of privity continues these days apace." Other leading jurists and writers have criticized the use of privity as the deciding factor in cases of breach of warranty. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911); Notes, 33 COL. L. REV. 868 (1933); 37 COL. L. REV. 77 (1937); 15 N.Y.U.L.Q. REV. 292 (1937); 29 MICH. L. REV. 906 (1931). Although privity is still required by the majority of courts, there have been a number of cases which strike at the very heart of the rule. In *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939), the court said, "It would be unjust to recognize a rule that would permit manufacturers of products to create a demand for their goods . . . and then, because there is no privity of contract, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable." The most recent case to dispense with the requirement of privity in an action on warranty was *Hunter-Wilson Distributing Co. v. Forest Distilling Co.*, 181 F. 2d 543 (S.D. Pa. 1950). In this case, the court merely said, "Strict contractual privity is no longer necessary." There is no doubt that there is valid authority for dispensing with the requirement of privity in actions on warranty. *Timberland Lumber Co. v. Climax Mfg. Co.*, 61 F. 2d 391 (3d Cir. 1932); *Miller Rubber Co. v. Blewster Stephens Service Station*, 171 Ark. 1179, 287 S.W. 577

(1926); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 15 P. 2d 1118 (1932). Assuredly, the requirement of privity is little suited to the present economy. Some courts have emphasized the fallacy of the general rule by treating the original vendee as a mere "conduit" between manufacturer and consumer. *Scruggins v. Jones*, 207 Ky. 636, 269 S.W. 743 (1924); *McMurray v. Vaughn's Feed Store*, 117 Ohio St. 236, 157 N.E. 567 (1927). Other courts have placed more emphasis upon the consumer's reliance on advertising. *Graham v. John R. Watts*, 238 Ky. 96, 36 S.W. 2d 859 (1931).

There has been little adjudication of this question in Ohio. In an early case the Supreme Court of Ohio denied a cause of action when the parties were not in privity. *Columbus, H.V. & T. Railway Co. v. Gaffney*, 65 Ohio St. 104, 61 N.E. 152 (1901). An attempt to modify the rule was made in *Ward Baking Co. v. Trezzino, supra*, in which case an exception was made for foods and beverages. However, dicta in *Canton Provision Co. v. Gauder*, 130 Ohio St. 43, 196 N.E. 634 (1935), seems to indicate that, without privity, there can be no cause of action for breach of warranty even in the case of foods.

Whether the decision reached in *Jourdon v. Brouwer, supra*, is the final determination of Ohio law is a moot question. Judge Ross, in writing the majority opinion, treats the question as settled. However, Judge Matthews, dissenting, adopts the reasoning expressed in the *Ward Baking Co.* case, *supra*, and states, "When a vender places such representation and warranty on a label intended to be passed on until it reaches the ultimate consumer, . . . he must be taken to have made the representation and warranty to the ultimate consumer, ... Placing such a warranty on the article sold brings the producer into jural relations with the ultimate consumer, because the producer so intends. It is a representation and a warranty made by the producer to ultimate consumer and creates a privity between them."

It would seem that the Supreme Court of Ohio may choose either of the solutions, for the weight of precedent is not heavy. Which solution the court will select can only be determined by subsequent adjudication, but the view dispensing with the requirement of privity seems more in accord with the needs of the present day society.

Charles D. Minor

TORTS — SLANDER PER SE — CALLING A MAN A COMMUNIST

Defendant on a radio and television broadcast called plaintiff, a government economist, a communist. In an action of slander, defendant claimed the statements were not actionable without an

allegation of special damages and made a motion to dismiss the complaint under Rule 12 (b) (6) of the Federal Rules of Civil Procedure. *Held,* motion dismissed. Remarks were injurious to the plaintiff in his profession and were therefore slanderous *per se. Remington v. Bentley,* 88 F. Supp. 166 (S.D.N.Y. 1949).

Since early in the seventeenth century the distinction between libel and slander has been one between written and oral words. Oral words constitute slander, *State v. Smily,* 37 Ohio St. 30 (1881); PROSSER, TORTS 793 (1941); and written words libel. *Lyman v. New England Newspaper Pub. Co.,* 286 Mass. 258, 190 N.E. 542, 90 A.L.R. 1124 (1934); PROSSER, *supra.* The present tendency is to make the distinction on the basis of permanence of form. It has been held that words read from a script on a radio broadcast constitute libel, *Soresen v. Wood,* 123 Nebr. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932), appeal dismissed, 290 U.S. 599 (1933); 33 AM. JUR. 39; PROSSER, *supra* 795, 812; whereas extemporaneous statements published via radio constitute slander. *Locke v. Gibbons,* 164 Misc. 877, 299 N.Y.S. 188 (1937). According to the prevailing view, all libel is actionable without proof that damage has occurred. PROSSER, *supra* § 92. As a rule slander is not actionable without showing special damages, however there are four types of oral defamatory statements actionable *per se*: (a) the imputation of a serious crime, (b) the imputation of certain loathsome diseases, (c) imputations affecting the plaintiff in his business, trade, profession or office, and (d) the imputation of unchastity to a woman. *Pollard v. Lyon,* 91 U.S. 225 (1875); 33 AM. JUR. 44; SEELMAN, THE LAW OF LIBEL AND SLANDER 599 *et seq;* RESTATEMENT, TORTS 170.

Being a communist is not a crime. However, calling a person a communist may impute other crimes, such as perjury, or other statutory offences, which arise only because of the peculiar circumstances of a particular plaintiff. For example, before such statement would impute the crime of perjury it must be shown that this plaintiff had stated under oath that he was not a communist, prior to the defendant's accusations. The result is defamation by extrinsic facts, which is not slanderous *per se. O'Connell v. Press Publishing Co.,* 214 N.Y. 352, 108 N.E. 556 (1915); *Hays v. American Defense Soc. Inc.,* 252 N.Y. 266, 169 N.E. 380 (1929). For this reason "imputations of a serious crime" cannot be the basis for holding such statements slanderous *per se.*

It is well settled that false words which tend to prejudice the plaintiff in his business or profession are actionable *per se. Pollard v. Lyon, supra;* RESTATEMENT, *supra,* §§ 573, 770. The defamer need not refer to the plaintiff as engaged in the particular profession in question. It is sufficient if the statement is of a character to be particularly disparaging of one engaged in such an occupation.

Sanderson v. Chaldwell, 45 N.Y. 398, 6 Am. Rep. 105 (1871). The court, in *Mencher v. Chesley,* 297 N.Y. 94, 75 N.E. 2d 259 (1947), has taken judicial notice of the present day attitude toward communists in the United States, "Today and in the recent past . . . it it undeniable that for communism and its adherents and sympathizers, there has been widespread public aversion."

Calling the plaintiff, in the principal case, a communist undoubtedly caused him greater injury than it would others in professions or trades where basic beliefs are less emphasized. It ended his usefulness as a public servant, for such accusations even though false, created distrust toward him. Undeniably the demand for his views and theories as an economist will be lessened by such accusations, for it is but natural to presume that an economist who is a communist adheres to the economic theories of communism, which are repugnant to the theories accepted in this country. The stress, by the court, of the degree of the injury to this plaintiff in his profession appears to be the prime factor in declaring this slander *per se.* From such emphasis on the magnitude of the injury by the court it would seem that a laborer might have more difficulty in stating a cause of action without alleging special damage because the damage to him in his trade would be of a lesser degree.

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