Recent Decisions

Constitutional Law — Government's Power Over Alien Exclusion

Menzei resided in the United States for twenty-five years as a resident alien. In 1948 he made a trip to Europe, returning to New York in 1950 with a quota immigration visa. There he was excluded by order of the Attorney General without a hearing on the basis of "confidential information, the disclosure of which would be prejudicial to the public interest." The administrative action was authorized by emergency regulations promulgated pursuant to the Passport Act of 1918, 8 Code Fed. Reg. § 175.53, § 175.57 (1949), ratified by Presidential Proclamation. No. 2850, 14 Fed. Reg. 5173 (1949), U.S. Code Cong. Service 1949, p. 2618. All efforts to deport him having failed, Menzei sought release through habeas corpus proceedings claiming unlawful confinement on Ellis Island. The district court sustained the writ. 101 F. Supp. 66 (1951). Conceding the validity of the exclusion order, the court felt further detention after twenty-one months justifiable only by positive proof of Menzei's danger to the public safety. As the government declined to divulge its evidence, even in camera, the court directed respondent's conditional parole on bond. The court of appeals affirmed as to respondent's release and reversed as to conditions of parole. 195 F. 2d 964 (2nd. Cir. 1952). The Supreme Court held that Menzei's continued exclusion without a hearing, as a security risk, did not deprive him of any statutory or constitutional right even though the result was indefinite detention. Justices Black, Jakcson, Frankfurter and Douglas dissented. *Shaughnessy v. United States ex rel Menzei.* 345 U.S. 206 (1953).

Respondent's prior residence in this country cannot transform his case into anything more than an exclusion proceeding. For purposes of immigration, re-entry after absence equates with original entry. *Lapina v. Williams,* 232 U.S. 78 (1914). And indefinite harborage at Ellis Island cannot be construed as an entry. *Kaplan v. Tod,* 267 U.S. 228 (1925).

Treated as an original entrant, Menzei cannot dispute the Government's right to define categories of aliens whose entry is deemed prejudicial to the United States. Courts have long paid deference to the sovereign power of the political departments of government to expel or exclude aliens. *Chae Chan Ping v. U.S.,* 130 U.S. 581 (1889). Substantive due process requires only a reasonable policy under particular conditions, especially where matters of security are concerned. *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952). Absence of judicial review of *ex parte* administrative action placing an alien within a proscribed category has recently been

sustained as not offending substantive due process. *U.S. ex rel Knauff v. Shaughnessy,* 338 U.S. 537 (1950).

Respondent protests here only because such administrative action will result in indefinite confinement. This factor of virtual imprisonment would seem to present an even stronger argument for judicial re-examination than did the facts in the *Knauff* case. However, the Court's majority opinion follows the course of the prior decision and reflects a confusion similar to that shown in the *Knauff* case, *supra,* as to the various functions which courts are called upon to play in the drama of government.

Only Mr. Justice Jackson in his dissent draws any distinction between the three types of judicial review which might be applicable here: review of administrative action in terms of substantive constitutional limitations, review of procedural due process at the administrative level, and finally review of administrative application of statutes to individual cases. Clearly there is no occasion for direct substantive review here. And judicial review of administrative procedure has been denied by the *Knauff* case, *supra,* largely as a result of the Court's expanding concept of substantive due process. However, if these two types of judicial re-examination are not permissible, is respondent also to be denied the protection which he might derive from the operation of the courts as a third and co-equal branch of government? The Court predicates its affirmative answer on the assumption that any judicial review in this case would involve an evaluation of the constitutionality of administrative action. In reality, the Court need only invoke its power of interpretation and application of legislation to a specific situation. Its failure to do so reveals a dangerous judicial tendency to allow a fluid concept of due process to dilute the equally important safeguard of separation of powers and hence to shield a large area of administrative action from the eyes of the Court.

Mildred M. Mangum

CONSTITUTIONAL LAW — SEPARATION OF POWERS — LEGISLATIVE INFRINGEMENT OF THE JUDICIAL FUNCTION.

The Indiana Department of Revenue, Inheritance Tax Division, filed a petition for reappraisement and redetermination of inheritance and transfer taxes, pursuant to IND. ANN. STAT. § 62412 (Burns 1933). This statute provided for mandatory setting aside of the judgment of the probate court upon petition by the Inheritance Tax Division. *Held,* unconstitutional on the ground that the legislature, in thus requiring the setting aside of a judgment of the probate court, infringed upon the judicial department of government and consequently violated the separation of powers provisions

of the state constitution. *Indiana Department of Revenue v. Callaway*, — Ind. —, 110 N.E. 2d 903 (1953).

The Supreme Court of the United States has assumed without deciding that nothing in the Constitution of the United States prohibits a state from uniting the legislative and judicial functions in a single body. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). But, the exercise of the judicial function by a state legislature is prohibited, either expressly or by implication, by all the state constitutions now in force, except as directed or permitted therein. OHIO CONST. Art. II, § 1; IDAHO CONST. Art. V, § 13; MASS. CONST. Part I, Art. XXX, § 31.

The legislature may constitutionally place reasonable restrictions upon the functions of the judiciary, providing these restrictions do not defeat or materially impair the exercise of those functions. Thus the legislature may, within proper bounds, prescribe rules of practice and procedure for the exercise of judicial jurisdiction. *Thompson v. Redington*, 92 Ohio St. 101, 110 N.E. 652 (1915), *Aucutt v. Aucutt*, 22 Tex. 518, 62 S.W. 2d 77, 89 A.L.R. 1198 (1933). It has also been held that a statute forbidding the courts to grant injunctions against peaceful picketing in connection with labor disputes was constitutional in that it did not deprive the courts of original jurisdiction. *Fenske Bros. v. Upholsterers' International Union*, 358 Ill. 239, 193 N.E. 112 (1934).

Yet, acts which operate to set aside judgments, *Cominetti v. Pacific Mutual Life Insurance Co. of California*, 22 Cal. 2d 340, 139 P. 2d. 908 (1943); or require action by a court within a specified time, *Kostas v. Johnson*, 224 Ind. 540, 69 N.E. 2d 592, 168 A.L.R. 1118 (1946); *Salemento v. State* 188 Ind. 170, 122 N.E. 578 (1919); or prohibit directed verdicts, *Thoe v. Chicago N. & St. P. Ry.* 181 Wis. 456, 195 N.W. 407, 29 A.L.R. 1080 (1923), have been declared unconstitutional because of encroachment upon the judicial function. Those acts which attempt to direct statutory interpretation, *State v. Schlenker*, 112 Iowa 642, 84 N.W. 698 (1900); and those attempting to prevent courts from issuing writs of mandamus, *State ex rel Buckwater v. Lakeland*, 112 Fla. 200, 150 So. 508, 90 A.L.R. 1280 (1933), have also been invalidated.

The line of demarcation between validity and invalidity is illustrated by two cases involving statutes regulating admission to the State Bars of California and Oklahoma, respectively. The California law, which established a board to determine the qualifications for admission to the bar, was upheld because the board could only make recommendations, thus leaving the final control in the judiciary. *Brydonjack v. State Bar*, 208 Cal. 439, 281 Pac. 1018 (1929). The other statute, which attempted to qualify persons for admission to the bar, was declared unconstitutional because it took

the finality of decision from the judiciary. *In Re Bledsoe,* 186 Okla. 264, 97 P. 2d 556 (1939). The reasoning underlying the other decisions seems to follow the state bar cases. Directing the interpretation of statutes would deprive the judiciary of ultimate control of the adjudicative process. So also would laws prohibiting directed verdicts, requiring action in a specified time, or setting aside judgments. These acts are mandatory, leaving no discretion to the courts. On the other hand statutes directory in character or providing for advisory action, or those prescribing rules of procedure, leave to the judiciary the final decision over judicial matters. They thus do not defeat or greatly impair the judicial function.

Kenneth Callahan

DAMAGES — ARGUMENT TO JURY — INCOME TAX LIABILITY IN FIXING THE AWARD

The plaintiff brought an action under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60, for personal injuries sustained while performing his duties as a brakeman for defendant railroad. The jury returned a verdict of $50,000 in favor of plaintiff but thereafter the court granted plaintiff's motion for a new trial. It appears the court had ruled in chambers that the damages should be based on plaintiff's gross earnings prior to the accident; and in view of that ruling, the court thought that counsel for the defendant had exceeded the bounds of propriety in reminding the jury, during argument, that the final award would not be subject to income tax. On appeal, *held,* it was proper for defendant's counsel to remind the jury, during argument, that awards received by way of verdicts in personal injury cases are exempt from federal income tax. Order reversed and cause remanded with directions. *Hall v. Chicago & N.W. R.R.,* 349 Ill. App. 175, 110 N.E. 2d 654 (1953).

In personal injury litigation, the problem of income tax arises in at least two distinct ways. The first problem is whether plaintiff's gross earnings (*i.e.,* before taxes) or net earnings (*i.e.,* after taxes) prior to the injury should be the basis for determining probable future income in computing the amount of damages. The second problem is whether the jury may properly be reminded in argument, or instructed by the court, that the final award is not subject to income tax as provided by 26 U.S.C.A. 22 (b): "The following items shall not be included in gross income and shall be exempt from taxation under this chapter: (5) Compensation for injuries or sickness ... amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages re-

ceived whether by suit or agreement on account of such injuries or sickness...."

In dealing with the first problem, the federal courts seem to have reached conflicting results in deciding whether to use gross or net earnings. Two courts of appeals have held that the award should be based on gross earnings since future income taxes are too conjectural to permit reliance on past net earnings. *Stokes v. United States,* 144 F. 2d 82 (2nd Cir. 1944); *Chicago & N.W. R.R. v. Curl,* 178 F. 2d 497 (8th Cir. 1949). More recently, the Court of Appeals for the Ninth Circuit, in another personal injury case, indicated that net earnings should be used. *Southern Pacific Co. v. Guthrie,* 180 F. 2d 195 (9th Cir. 1949). The court reasoned that taxes would be as certain as the prospects of continued earnings, so taxes were to be deducted in computing the actual loss. This general principle of basing the award on net earnings was apparently affirmed on rehearing, although it was not applied because of the particular fact situation. *Southern Pacific Co. v. Guthrie,* 186 F. 2d 926 (9th Cir. 1951), *cert. denied,* 341 U.S. 904 (1951). An Ohio case, *Smith v. Pennsylvania R.R.,* 59 Ohio L. Abs. 282, 99 N.E. 2d 501 (1950), said such taxes were too speculative and held that gross earnings was the proper measure.

The trial court in the principal case ruled that gross earnings should be considered but then went a step further and held that it was improper for the defendant's counsel to remind the jury during argument that the final award was not subject to income tax. In so ruling, the trial court failed to distinguish between the two problems, mentioned above. The trial court apparently took the position that if gross income had been used in determining damages (problem one) then it could not properly allow arguments to the jury about deduction of income tax from the final award (problem two).

The appellate court in the principal case corrected this failure to distinguish problem two from problem one in holding that it was permissible for counsel to remind the jury during argument that the award would not be taxable even though gross earnings had been the basis for figuring the amount of the award. The principal case followed a Missouri decision, *Dempsey v. Thompson,* 251 S.W. 2d 42 (1952), which had held that it was proper and desirable to instruct the jury that the final award was not subject to income tax. The reasoning of the principal case was that, if it was proper for the court to so instruct the jury, then it follows that it is also proper for counsel to remind the jury of the law whether or not an instruction to that effect is given by the court. Contrary to this reasoning is a recent Ohio court of appeals case, *Pfister v. City of Cleveland,* — Ohio App. —, 113 N.E. 2d 366 (1953); *appeal dis-*

missed, 159 Ohio St. 580, 112 N.E. 2d 657 (1953). The court stated that since the trial court had not mentioned the tax problem, reference by defendant's attorney to the fact of the non-taxability of the verdict in final argument to the jury was highly improper. But the court of appeals held that since the plaintiff had failed to object, the question was not available to him on appeal.

In personal injury litigation in Ohio, if the defendant wishes to refer to the non-taxability of the verdict in final argument, it might be advisable for defendant's counsel, under the provisions of OHIO REV. CODE § 2315.01 (11420-1) to make a request for special instructions to be given in writing to the jury on this point of law before argument. *Bartson v. Craig,* 121 Ohio St. 371, 169 N.E. 291 (1929); *Behan v. The Cincinnati Street Ry.,* 78 Ohio App. 129 69 N.E. 2d 160 (1946). Then, after the special instruction has been given, counsel in final argument presumably could remind the jury that they have been so instructed on this point of law. However, no Ohio case has been found in which such a special instruction was requested.

Carl V. Bruggeman

DOMESTIC RELATIONS — ALIMONY — INSURANCE POLICY NOT PROPERTY

In an action for divorce in which defendant husband, served by publication only, made no appearance, the plaintiff sought all right and title to two contracts of insurance belonging to defendant. Defendant insurance company, personally served as a party defendant, admitted issuing the policies and denied all other allegations of plaintiff's petition. The policies, with the plaintiff as beneficiary, reserved to the insured the option of changing the beneficiary without her consent. Plaintiff had physical possession of the policies and had been paying the premiums. The trial court granted the divorce and awarded plaintiff all right and title to the policies. On appeal to the court of appeals, *held,* that part of the decree awarding plaintiff all defendant husband's right and title in the policies was erroneous. *Whitelaw v. Whitelaw,* 65 Ohio L. Abs. 11, 113 N.E. 2d 105 (1952).

An action for alimony may be had against a defendant summoned only by constructive service if said defendant has property within the court's jurisdiction and the property is brought under the court's control at the beginning of the action. *Benner v. Benner,* 63 Ohio St. 220, 58 N.E. 569 (1900); *The Cleveland and Buffalo Transit Co. v. Beeman,* 12 Ohio Cir. Ct. (N.S.) 460, 16 Ohio Cir. Ct. (N.S.) 112 (1909), *affirmed without opinion* 81 Ohio St. 509,

91 N.E. 1126 (1909); *Pennington v. Fourth National Bank of Cincinnati, Ohio,* 243 U.S. 269 (1917); *Reed v. Reed,* 121 Ohio St. 188, 167 N.E. 684, 64 A.L.R. 1384 (1929). For the situation in other states see: FREEMAN ON JUDGMENTS (5th ed., 1925), Vol. III, p. 2977; 17 Am. Jur., Divorce and Separation § 521, n. 7 (1938); 29 A.L.R. 1381 (1924); 64 A.L.R. 1392 (1929); 108 A.L.R. 1302 (1937). The courts hold that a suit for alimony under these circumstances is an action in rem and that constructive service may be had under OHIO REV. CODE § 2703.14 (G) (11292-7). *Benner v. Benner, supra; Reed v. Reed, supra; Francis v. Allen,* 37 Ohio Op. 362, 79 N.E. 2d 803 (1947). This action does not deny the defendant his property without due process of law if the court gets control of the property at the beginning of the action; the state has jurisdiction over property within its boundaries. *Pennington v. Fourth National Bank, supra; Pennoyer v. Neff,* 95 U.S. 714 (1877). A description of the property in the petition and a temporary injunction restraining transfer, or an adequate description of the property in both the petition and the publication, will give the court control over the property for purposes of this action. *Benner v. Benner, supra; Reed v. Reed, supra.* One case, although holding it not sufficient, suggested a judgment might be given even though the property was not described in the petition or seized in any way. *Parker v. Parker,* 28 Ohio L. Abs. 49, 56 N.E. 2d 527 (1938). Both real and personal property, tangible and intangible, are included. (Real property) *Benner v. Benner, supra;* (Personal property, tangible) *Reed v. Reed, supra;* (Bank account) *Pennington v. Fourth National Bank, supra;* (Stock) *The Cleveland and Buffalo Transit Co. v. Beeman, supra;* (Life insurance policy) *Hoffman v. Hoffman,* 28 Ohio L. Abs. 370, 13 Ohio Op. 504 (1938); *contra, Greenlee v. New York Life Insurance Co.,* 9 Ohio L. Abs. 331 (1930), *dismissed on other grounds,* 123 Ohio St. 599, 176 N.E. 456 (1931). The rule on constructive service in alimony cases also applies to alimony pendente lite. *Wilson v. Wilson,* 40 Ohio L. Abs. 281, 28 Ohio Op. 363 (1944).

Insurance has been defined not only as a personal contract but also as intangible personal property. *Burnett v. Wells,* 289 U.S. 670 (1933); see 29 Am. Jur., Insurance § 126 (1940). If the insured has the option of changing the beneficiary, there is no vested right in the beneficiary until the insured's death even though the beneficiary has paid the premiums. *Minning v. Prudential Insurance Company of America,* 88 Ohio App. 339, 95 N.E. 2d 269 (1950); *Stone v. Stephens et al.,* 155 Ohio St. 595, 99 N.E. 2d 266 (1951). But a tendency to allow recovery is indicated by some community property cases where the courts have decided that the insured may not change the beneficiary without his consent. *Occidental Life*

Insurance Company v. Powers, 192 Wash, 475, 74 P. 2d 27 (1937); See Note 168 A.L.R. 347 (1947); 29 Am. Jur., Insurance § 1314 (1940). It has also been held that if a wife had paid the premiums, the statute abrogating a wife's insurable right in her husband on divorce would not apply. *Ficke v. Prudential Insurance Company of America,* 305 Ky. 171, 202 S.W. 2d 429, 175 A.L.R. 1215 (1947). The prevailing rule, in the absence of statute, is that a divorced wife who is beneficiary on a policy taken out during the marriage may collect the proceeds at the insured's death. *Hergenrather v. State Mutual Life Assur. Co. of Worcester et al.,* 79 Ohio App. 116, 68 N.E. 2d 269 (1946); *Overhiser, Adm'x. v. Overhiser et al.,* 63 Ohio St. 77, 57 N.E. 965, 50 L.R.A. 552 (1900); *Stone v. Stephens,* 92 Ohio App. 53, 110 N.E. 2d 18 (1950), *affirmed,* 155 Ohio St. 595, 99 N.E. 2d 766 (1951). VANCE ON INSURANCE (3rd ed., 1951), p. 714. From this it follows that plaintiff, if given the decree, could keep the policy. Most courts will allow a decree of alimony or a property settlement to include an insurance policy where there is personal service on the defendant. *Foulks v. Foulks,* 49 Ohio App. 291, 197 N.E. 201 (1934); *Pearson v. Pearson,* 35 Ohio L. Abs. 488, 41 N.E. 2d 725 (1941); see Note, 145 A.L.R. 522.

Is a life insurance policy "property" in an in rem action for alimony? Two Ohio courts have discussed this specific question before and have arrived at different results. In *Greenlee v. New York Life Ins. Co., supra,* the court refused to grant the wife all right and title of the nonresident defendant in the policies, but the court did make the alimony judgment a lien on the insurance policies. In *Hoffman v. Hoffman, supra,* the common pleas court, in a case closely resembling the principal case, allowed the wife all her husband's right and title to the policies. The judge in discussing the *Greenlee* case, *supra,* felt if the court had jurisdiction to impose a lien, it also should have jurisdiction to grant a decree changing title. According to the *Hoffman* case, *supra,* the word "property" under the applicable statutes, OHIO REV. CODE §§ 2703.14 (G) and (I) (11292), 3105.06 (8003-7), 3105.18 (8003-17, 8003-19), 3105.19 (8003-20), is a very broad term. The case declares an insurance policy to be an obligation to pay someone in the future, making it comparable to a promissory note due at some future time. If this analysis is correct, then the *Pennington* case, *supra,* would apply.

The reasoning of the principal case probably represents the majority view on insurance. However, there are good reasons for granting plaintiff the relief prayed for. She has paid the premiums on the policies. Personal service was had on the insurance company which would give the court adequate control over defendant husband's property in its hands. OHIO REV. CODE § 3105.19; *The Cleve-*

land and Buffalo Transit Co. v. Beeman, supra. Giving security to a deserted wife and children is of the utmost importance; therefore the term "property" as it applies to in rem alimony actions should be a very broad term, perhaps including insurance in its scope.

David W. Carroll

INCOME TAXATION — PREFERRED STOCK "BAILOUT"

The taxpayers were stockholders in a closely held corporation which had a surplus of over $1,000,000.00 Chamberlin, who owned 82% of the outstanding common stock, was afraid of a possible Sec. 102 tax liability if the money was left in the corporation, but hesitated to declare a dividend because of high ordinary income tax rates. 8,020 shares of 4½% cumulative $100 par preferred nonvoting stock were authorized and issued pro rata to the stockholders. Two days later, as a result of a prearranged plan, the stockholders sold the preferred stock to insurance companies for $800,000.00. Each stockholder reported his proportion of the proceeds as a long term capital gain after allocating the basis of the old stock between that stock and the preferred. The Commissioner determined that the transaction was equivalent to a dividend taxable as ordinary income. The tax court agreed with the Commissioner since all the circumstances, including absence of corporate business purpose, made it in substance a cash dividend. 18 T.C. 164 (1952). *Held,* reversed. A stock dividend of preferred on common, when only common is outstanding, does not change the proportional interests of the stockholders and is not taxable income even though a sale by the stockholders to an outsider was prearranged and there was no corporate business purpose. *C. P. Chamberlin v. Commissioner,* 207 F. 2d 462 (6th Cir. 1953).

The Internal Revenue Code provides that a stock dividend shall not be treated as a dividend to the extent that it does not constitute income to the stockholder within the meaning of the Sixteenth Amendment. INT. REV. CODE § 115 (f) (1). The test applied by the courts in determining the taxability of stock dividends is the proportional interest test, *i.e.* the stockholder's proportional interest in the corporation must be essentially different after the stock dividend than it was before for the dividend to be taxed. *Towne v. Eisner,* 245 U. S. 418 (1918); *Eisner v. Macomber,* 252 U. S. 189 (1920).

Under the "proportional interest" test, the nature of the dividend determines its tax status. Common on common is not taxable. *Eisner v. Macomber, supra; Helvering v. Griffiths,* 318 U. S. 371 (1943). Common on preferred is taxable. *Koshland v. Helvering,*

298 U. S. 441 (1936). Preferred on common with other preferred previously outstanding is taxable. *Helvering v. Gowran,* 302 U. S. 238 (1937). Non-voting on voting common is not taxable. *Helvering v. Sprouse,* 318 U. S. 604 (1943). Preferred on common when no preferred is previously outstanding, as in the principal case, was held not taxable in *Strassburger v. Commissioner,* 318 U. S. 604 (1943). The Court in the principal case bases its decision on this case. The Court looks to the redemption feature in determining whether there was a stock dividend in substance as well as in form. The stock was issued in 1946 and was subject to redemption at quarterly dividend dates and to periodic mandatory redemption after 1948 until retired in 1954. The Court found that these redemption provisions were the type required by conservative investors and were not so liberal that the transaction could be considered a cash dividend.

In the instant case, the tax court considered the stock dividend, the immediate sale and the subsequent redemption as one transaction. The court of appeals refused to apply this step transaction approach. Judge Miller pointed out that, "the legal effect of the dividend is determined at the time of its distribution, not by what the stockholders do with it after its receipt."

The recapitalization area is closely related. In *Bazley v. Commissioner,* 331 U. S. 737 (1946), the stockholders turned in shares for debentures in a recapitalization relying on INT. REV. CODE 112 (b) (3), but the Court held this was not a tax-free reorganization since all the circumstances made it equivalent to a cash dividend. In view of this recent expression of hostility to one form of "bail-out," it appears likely that, if certiorari is granted by the Supreme Court, the *Chamberlin* situation will be treated by that Court in the same manner as the *Bazley* situation.

On January 28, 1954, the House Ways and Means Committee reached a tentative agreement on a proposal for change in the Internal Revenue Code designed to prevent tax avoidance which may result from the principal case. The proposed legislation would "impose an 85% transfer tax on a corporation which has distributed otherwise non-taxable preferred stock at the time it redeems such stock if redemption occurs within ten years of the time the stock was issued." The tax, however, would not apply in the following five situations: when the redemption was made in liquidation, when there was also a proportional redemption of the stock on which the preferred stock was issued, when the redemption was of preferred stock issued for contribution of property, when the redemption is treated as a dividend, and when the redemption was made to pay death taxes. 5 CCH 1954 FED. TAX REP. p. 41,007-8; U. S. L. WEEK 2353 (Feb. 2, 1954).

John Marshall Adams

PLEADING — JOINDER OF WRONGFUL DEATH AND SURVIVAL ACTIONS

An administrator of the estate of a fifteen year old boy, electrocuted when he came in contact with the defendant's high voltage were, joined a cause of action for the wrongful death with a cause of action for conscious pain and suffering. The defendant demurred for a misjoinder of causes of action. The trial court overruled the demurrer and the plaintiff received a verdict and a judgment on both of the causes. The court of appeals held that there was no error in overruling the demurrer, but reversed that part of the judgment as to the survival action, saying there was no evidence of any conscious pain and suffering. In a divided opinion, the majority of the supreme court held that such causes of action could not be joined without an enabling statute. *Fielder v. Ohio Edison Co.* 158 Ohio St. 375, 190 N.E. 2d 855 (1953).

Ohio's wrongful death statute, modeled upon Lord Campbell's Act, creates a new cause of action in favor of the decedent's personal representative, as trustee, for the benefit of certain designated next of kin for the damage resulting from death. *Gibson v. Solomon,* 136 Ohio St. 101, 23 N.E. 2d 996 (1939); OHIO REV. CODE §§ 2125.01 (10509-166) *et seq.* Since the statute creates the liability, the suit is different from an ordinary action of tort. *Minglewood Coal Co. v. Carson,* 31 Ohio App. 237, 166 N.E. 237 (1928). A judgment for the defendant in a survival action is not res judicata as to a wrongful death action, *The May Coal Co. v. Robinette,* 120 Ohio St. 110, 165 N.E. 576 (1929) since the issues as to all the real parties in interest were not decided in the first survival action. The defendant in an action for wrongful death cannot set up a counterclaim for damages against the estate. *Epinger v. Wade,* 142 Ohio St. 460, 52 N.E. 2d 852 (1944).

The Ohio survival statute, on the other hand, provides for the survival to the estate of a deceased person of any cause of action arising out of injury to his person or property which he could have himself maintained. OHIO REV. CODE § 2305.21 (11235). Some jurisdictions have but a single cause of action which proceeds upon the theory of preserving the cause of action vested in the decedent at the moment of death and gives as an incident to this action compensatory damages to the next of kin. ILL. STAT., c. 70 (Cahill's 1936). In other states, the statutes expressly provide that the personal representative may join the cause of action for the wrongful death with the survived cause of action when both causes of action arise out of the same wrongful act. MASS. ANN. LAWS, c. 229, § 6 (1933). See Note, 124 A.L.R. 611 (1940).

The Ohio statute relating to joinder of causes of action, OHIO REV. CODE § 2309.05 (11306), permits the uniting of several causes of action arising out of the same transaction or transactions connect-

ed with the same subject of action. This statute is to be liberally construed, *Railroad Co. v. Cook*, 37 Ohio St. 265 (1881); however, this section is limited by OHIO REV. CODE § 2309.06 (11307) in that all of the causes of action so united must affect all the parties in the action.

The lower courts of Ohio had given this latter provision a rather broad construction, as evidenced by the trial court and court of appeals decisions in the principal case. In several past instances a joinder of causes of action not clearly affecting all of the parties has been permitted. *Buckeye Stages v. Townsend*, 28 Ohio N.P. (N.S.) 222 (1930), allowed a joinder of a wrongful death and survival action. *Contra*: *Betz v. Hortz*, 4 Ohio Op. 174, 2 Ohio L. Abs. 479 (1935). *Meyers v. Miller*, 2 Ohio Dec. Rep. 319 (1857), allowed a joinder of an assignor and the maker of a note. *Sicbern v. Meyer*, 11 Ohio Dec. Rep. 344 (1891), permitted a joinder of sureties on the original bond with those on his additional bond. *Gravell v. Speakman*, 8 Ohio N.P. (N.S.) 246 (1909), and *Warren v. Howard*, 24 Ohio Dec. (N.P.) 32 (1913), allowed a joinder of a police officer and his surety on his official bond. Although it may be difficult to reconcile these holdings with the literal wording of the statute, they, nevertheless, are important as indications of the attitude of the Ohio courts toward joining causes of action — in general, that considerable latitude could be given to considerations of convenience and efficiency when they become factors in the joinder problem.

In the principal case the majority ruling is based on the idea that, with respect to the two causes of action, the administrator acts in different capacities for the benefit of different persons. This interpretation has extended OHIO REV. CODE § 2309.06 (11307) so that not only must the causes of action affect all the parties, but they must affect those parties in precisely the same capacity. The minority would have allowed a joinder since both of the actions are maintainable in the name of the personal representative against the same defendant or defendants.

The supreme court has attached a peculiar legal definition to the phrase "must affect all the parties to the action," which, it is submitted, extends the concept of "same right or capacity" too far. Consequently, according to the principal case, to join two causes of action, the claims must be literally prosecuted in the same identical right as well as in the same capacity. This interpretation encourages a multiplicity of suits. The two causes do have a close kinship in that the same questions of law and fact arise and the proof of liability is substantially the same. The jury could be instructed that evidence of pain and suffering should be considered

only in determining the amount of damages as to the survival cause of action.

Legislation should be enacted in order that Ohio may place itself in accord with the modern liberal trend as exemplified by the Federal Rules of Civil Procedure. Such legislation might take the form of the addition of the following provision to OHIO REV. CODE § 2309.06 (11307): "provided, this section shall not prevent a joinder of a cause of action for wrongful death brought under sections 2125.01 to 2125.04, inclusive, of the Revised Code, with a surviving action for injuries to the person or property brought under section 2305.21 of the Revised Code."

William Newman

PROPERTY — CHATTEL MORTGAGE — ASSIGNMENT OF CLAIM FOR CONVERSION

The chattel mortgagor assigned to the United States, as mortgagee, all the right, title, and interest and any claim which the mortgagor might have for the alleged conversion of the wheat by the defendant. The United States Court of Appeals, *held,* in reversing the trial court that the mortgagee could properly bring an action for the conversion of the mortgaged property. *United States v. Butt,* 203 F. 2d 643 (10th Cir. 1953).

At early common law it was an established principle that no chose in action, whether *ex contractu* or *ex delicto,* could be assigned. *United States v. Gills,* 95 U. S. 407, (1877); *Strong v. Clem,* 12 Ind. 37, 74 Am. Dec. 148 (1859). This rule was based upon a principle of public policy, which forbade the use of the machinery of the courts for any action which savored of champerty and maintenance. *Sullivan v. Curling,* 149 Ga. 96, 99 S.E. 533 (1919). The legal theory, denying the assignment of rights of action was based on the ground that one who claims as the mere assignee must fail in the attempt to enforce the right as he is not in privity with the person against whom the obligation exists. A later development in the law recognized the assignability of choses arising *ex contractu. Sullivan v. Curling, supra.*

An exception was engrafted upon this common law rule by the Statute of 4 Edw. III, Chap. 7, which gave a remedy to executors for a trespass to the personal estate of their testators, this remedy later being extended to administrators by equitable construction. Ultimately the principle arose permitting the survivorship of actions arising from injuries to personal property during the lifetime of the deceased. *Bethlehem Fabricators v. H. D. Watts Co.,* 287 Mass. 28, 190 N.E. 828 (1934). A distinction is to be observed between those causes of action for wrongs affecting the person strictly

and all other actions. Accordingly, the general rule today is that a right of action in tort which does not apply to the person strictly, but involves directly or indirectly an injury to a right of property, will survive. *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F. 2d 823, *rehearsing denied,* 118 F. 2d 252 (1941); *Wikstrom v. Yolo Fliers Club,* 206 Cal. 461, 274 Pac. 959 (1929). The test now applied to determine whether a cause of action arising *ex delicto* is assignable is whether the cause of action is one which will survive. Purely personal rights which die with the person cannot be assigned. *North Chicago Street R. Co. v. Ackley,* 171 Ill. 100, 49 N.E. 222 (1897). But actions in conversion which survive as assets of the estate are capable of assignment. *Cook v. Ball,* 144 F. 2d 423, *cert. den.,* 323 U. S. 761 (1944); *Staley v. McClurken,* 35 Cal. App. 2d 622, 96 P. 2d 805 (1939). In the instant case, the court followed this principle. This is the first of two reasons the court sets forth when it said that, "a claim for the conversion of personal property ordinarily survives the death of the owner, is assignable, and the assignee may maintain an action upon the assignment."

These rules as to the survivorship and assignability of actions *ex delicto* have been codified in many states. IOWA CODE § 3443 (1946); *Dunshee v. Standard Oil Co.,* 165 Iowa 625, 146 N.W. 830 (1914); *Babcock v. Canadian Northern R. Co.,* 117 Minn. 434, 136 N.W. 275 (1912). It should be noted, however, that a code provision that every action must be prosecuted in the name of the real party in interest makes no change in the assignability of choses in action, but merely allows bringing the action in the name of the assignee in the case of a chose in action properly assignable. *Hodgman v. Western R. Corp.,* 7 How. Pr. (N.Y.) 492 (1852).

As a second reason for allowing the plaintiff to recover, the court in the instant case stated that a mortgagee may maintain an action against a person converting the property included in the mortgage. This follows the general rule that a mortgagee has a right of action against anyone who interferes with his rights under the mortgage or impairs his security. *Norton v. Shields,* 174 App. Div. 804, 161 N.Y.S. 880 (1916); *Harris v. Seaboard Airline R. Co.,* 190 N.C. 480, 130 S.E. 319 (1925).

In Ohio, the rule also is that choses *ex delicto* which will survive death, such as an injury to property, are assignable. *Cincinnati v. Hafer,* 49 Ohio St. 60, 30 N.E. 197 (1892); *Grant v. Ludlow,* 8 Ohio St. 1 (1857). A statute in Ohio states that all causes shall survive which are based on injuries to property or which survived at common law. OHIO REV. CODE § 2305.21 (11235). Ohio also has a code provision stating that an action must be brought in the name of the real party in interest. OHIO REV. CODE § 2307.05 (11241). Therefore, an assignor is not a necessary party to an action brought

by an assignee in his own name to recover on the assignment. *Allen v. Miller,* 11 Ohio St. 374 (1860).

As to the second reason stated by the court in the instant case, Ohio has held that a mortgagee of chattels may sue for the conversion of the mortgaged property. *City Loan & Sav. Co. v. Dickison,* 19 O.N.P. (N.S.) 215, 26 O.D.N.P. 593 (1916).

Thus it is true in Ohio and generally throughout the country that all rights growing out of and adhering to property, both ex *contractu* and *ex delicto,* may pass by assignment. *Shively v. Shively,* 88 Ohio App. 7, 95 N.E. 2d 276 (1950); *Fosdick v. Barr,* 3 Ohio St. 471 (1854). The result in the principal case seems to be a reasonable one, as the person who has been assigned an interest in property logically ought to be permitted to prosecute his claim against the wrongdoer who has converted the property.

Carl E. Juergens

STATE TAXATION — FRANCHISE TAX — INVENTORY VALUATION

The taxpayer's inventory was valued by the last in — first out method. The tax Commissioner ruled that LIFO did not properly state the value of the corporation's inventory and therefore corrected the corporation's tax report by using another method to value its inventories. This increased the value of the inventory thus producing a higher franchise tax base; consequently an arrearage assessment was made. On appeal to the Board of Tax Appeals, the commissioner was reversed whereupon he appealed to the supreme court. *Held,* affirmed, (1) for purposes of the Ohio franchise tax the Tax Commissioner must accept book value and is without authority to raise inventory values even though fair value exceeds book value. No provision of OHIO REV. CODE § 5733.05 (5498) gives the commissioner authority to increase the amount of any balance sheet asset when books have been kept in compliance with OHIO REV. CODE § 5733.02 (5495-2) (5496) and § 5733.03 (5497). To imply such a power would be to construe a taxing statute against a taxpayer. Section 5733.05 gives the commissioner (provided a fair value claim is filed) express authority to decrease book value where book value exceeds fair value; the rule *expressio unius est exclusio alterius* requires a conclusion against implication of power to increase book value. (2) Where the legislature meant for the commissioner to have authority to increase as well as decrease book value such authority is expressly given as evidenced by OHIO REV. CODE § 5711.18 (5389) where with regard to personal property taxation commissioner may increase as well as decrease book value. (3) Book value for franchise tax purposes is de-

termined from books regarded as the accounting records of the taxpayer which are kept in the ordinary cause of business and in accordance with a proper accounting system. *National Tube Company v. Peck*, 159 Ohio St. 98, 111 N.E. 2d 11 (1949).

LIFO has been accepted by accountants as a proper method of determining cost for inventory purposes where it most clearly reflects periodic income. *Accounting Research Bulletin #29: Inventory Pricing by 1946-1947 Committee in Accounting Procedure, American Institute of Accountants.* The Revenue Act of 1939 which added Section 22 (d) to the Internal Revenue Code made the adoption of the LIFO method of inventory valuation optional but provided that the method must be used consistently. A subsequent Internal Revenue regulation (U. S. Treas. Reg. 111, § 29.22 (d)-1 *et seq.*) provided that the taxpayer must file a written election to adopt LIFO and could not thereafter discontinue without good cause and consent of the commissioner. At first, due to strict provisions of the 1939 law only taxpayers using a uniform raw material which represented a large part of the value of the finished product and which had a long finishing process adopted LIFO. Subsequently the earlier requirements were liberalized and LIFO was more widely used; due to the excess profits tax and inflationary pressures in 1950 more organizations became interested in LIFO. Welsch, *LIFO Method of Inventory Valuation*, 30 TAXES 343 (1952). Thus for federal tax purposes LIFO may be used. Budik, *Technical Tax Aspects of LIFO*, 21 N.Y. CERT. PUB. ACCT. 749, 782 (1951). Ohio has no statute or rule of the Tax Commissioner respecting LIFO method of inventory valuation but has permitted it in proper cases. See *The Standard Oil Company v. Glander*, Ohio B.T.A., No. 13145 (1949).

In the *Standard Oil* case, *supra*, the taxpayer in 1941 changed from FIFO to LIFO. In effecting this change taxpayer set up a ledger account reflecting difference between valuation of its inventory on both a FIFO and LIFO basis; this account was a surplus reserve called "reserve for adjustment of inventory to FIFO" and was carried from 1942 to 1945 but the taxpayer says only for his own personal satisfaction and that information was never carried into a franchise tax report or any other report on inventory value. An examiner discovered the account and considering it to be a reserve account added it to taxpayer's annual inventory. Under OHIO REV. CODE § 5733.05 (5498) reserves other than reserves for depreciation and depletion and taxes due and payable for year in which report is to be filed are includable in the tax base. *Tax Commission of Ohio v. The National Malleable Casting Co.*, 111 Ohio St. 117, 144 N.E. 604 (1924). The Board of Tax Appeals in affirming the Commissioner's disallowance of these reserves which

in effect put taxpayer back on FIFO states that the Commissioner does not have to accept valuation which taxpayer presents in his franchise tax report, that such valuation may be rejected, that when report appears incorrect due to wide spread between LIFO and FIFO he can correct the report by adopting FIFO inventory found within the files of the taxpayer which in effect amounts to a disallowance of the reserve. In final paragraph the Board quotes from Commissioner's brief to effect that reserve was used to reduce inventory value without a fair value claim being made. But the Board says further that the Commissioner does not have to accept any figure at which a corporation may value tangible personal property but in determination of fair value may use all information available.

Thus it is arguable that the Board of Tax Appeals based their decision on factors other than right to include reserves in the tax base. The Commissioner's objection to inventory valuation in principal case supports this view for in that case there was no reserve account. Apparently the Commissioner felt he could reject valuation as stated by corporation in their report and attempt to determine fair value from any information available to him. Before the Board in the *National Tube* case the Commissioner said he did not have to accept general ledger account figures of inventory if they did not represent fair value and that the test of value in OHIO REV. CODE § 5733.05 (5498) is fair value; that the legislature did not mean to provide a one way street whereby the taxpayer could get a reduction when book value exceeded fair value but Commissioner was prohibited from raising when fair value exceeded book value. *National Tube Co. v. Peck,* Ohio B.T.A., No. 20579 (1952). However, the Board of Tax Appeals in the National Tube case reversed the Commissioner thus impliedly overruling much of their reasoning in the *Standard Oil* case.

The Supreme Court in affirming the Board in the principal case holds test of value in OHIO REV. CODE § 5733.05 (5498) is book value and when books are kept in compliance with OHIO REV. CODE § 5733.02 (5495-2, 5496) and § 5733.03 (5497) the Commissioner must find the report to be correct; that § 5733.05 gives Commissioner no power to increase valuation when book value is below actual value. Before the Board of Tax Appeals both the Commissioner and the National Tube Company cited the first syllabus of *Jacob B. Perkins Co. v. Glander,* 153 Ohio St. 501, 92 N.E. 2d 690 (1950), for proposition that the Commissioner must accept book value as shown by company records. The Commissioner contends that company records kept pursuant to OHIO REV. CODE § 5711.22 (5388) which requires personal property to be valued at actual value for purposes of personal property tax are books of the com-

pany and may be used in determining book value. The court rejects this contention citing *Wheeling Steel Corp. v. Evatt,* 143 Ohio St. 71, 54 N.E. 2d 132 (1944), which held that records of appraisal of personal property which were not entered in books did not reflect book value of personal property but that book value was obtained from a capital account on taxpayer's books which are used in ordinary course of his business. Furthermore OHIO REV. CODE § 5711.18 expressly gives assessor authority to increase as well as decrease book value of personal property. Thus valuation methods and records required for personal property tax are to be distinguished from those permissible for the franchise tax.

The decision in the principal case overrules all of the reasons advanced by the Board in the *Standard Oil* case for rejecting inventory valuation based on LIFO except that portion of the decision which holds that a reserve to account for difference in value due to change from FIFO to LIFO may be added to the tax base. The decision in the Standard Oil case could have been sustained on that argument alone, thus that case may be distinguished from the principal case.

There is a substantive right to use LIFO for purposes of the Ohio franchise tax but certain procedures should be followed in its use. If an adjustment reserve is to be set up (as in *Standard Oil* case) include the reserve in the tax base but submit a fair value claim with the return. OHIO REV. CODE § 5733.05 (D) (5498). This statute requiring claim to be filed with the annual corporation report is mandatory and reduction to claimed fair value allowable only upon timely filing of claim. *Jacob B. Perkins v. Glander,* 153 Ohio St. 501, 92 N.E. 2d 690 (1950). The simplest procedure is that followed in the principal case. Upon change to LIFO state inventory on books as valued by that method; do not set up a reserve account to reflect difference due to change in valuation, such information if desired can be kept apart from books of account. Should some adjusting entry creating a reserve during fiscal year of change to LIFO be necessary, include this reserve in tax base and submit a fair value claim.

Donald W. Wiper, Jr.

STATE TAXATION — RETAIL SALES TAX — EXEMPTION OF SALE OF FOOD FOR CONSUMPTION OFF PREMISES WHERE SOLD

Taxpayer, a concessionaire, sold food and refreshments from booths at a municipal stadium and by itinerant vendors who went through the crowd. The customers made purchases at the counters

and then walked away, usually consuming the products on the way to their seats in the stadium. Taxpayer had no control over the concourses, seats, runways or over any other portion of the stadium, nor over who could enter the stadium. When taxpayer failed to list the items for purposes of the retail sales tax, the Tax Commissioner ordered two assessments against it and denied an application for the refund of sales tax previously collected. The Ohio Board of Tax Appeals affirmed the orders and taxpayer appealed to the Supreme Court. *Held,* reversed, such sales of food and refreshment from booths and by itinerant vendors in the stadium were sales off the premises where sold and, therefore, not taxable under OHIO CONST. Art. XII, § 12 and OHIO REV. CODE § 5739.02 (5546). *Cleveland Concession Co. v. Peck,* 159 Ohio St. 480, 112 N.E. 2d 529 (1953).

The Retail Sales Tax may not be levied on the sale of food for human consumption off the premises where sold. OHIO CONST. Art. XII, § 12. The test is whether the food was sold for consumption off the premises rather than whether it was actually consumed off the premises. *Anast and Finkler v. Evatt,* Ohio B.T.A., No. 7799.

In the few cases interpreting the meaning of "premises where sold" two different theories have been developed. One, a metes and bounds argument, says that the phrase "premises where sold" includes the entire building, large or small, where sales of food products are consummated. Opposing this is the control argument, which views "premises where sold" as that portion of the building, structure, enclosure or other area where sales of food are made, which is in the actual possession or control of the vendor. The control theory was followed in deciding that the sales of packaged milk by a dairy through vending machines in an industrial plant over which the vendor exercised no control except the right of ingress and egress to service the machines were sales "off premises where sold" and, therefore, were not taxable. *Castleberry v. Evatt,* 147 Ohio St. 30, 67 N.E. 2d 861, 167 A.L.R. 198, (1946), C.C.H. STATE TAX REPORTER, ¶ 60-237 and 60-238.

A California case, in interpreting that state's statute, which is similar to the Ohio statute, held that sales from concession booths at an exposition constituted sales off the premises. The control of the grounds and the buildings in which the concessionaire operated was limited to and confined within the limits of the concession booth space although he had the privilege of selling food and refreshments on the grounds and in the buildings. *Treasure Island Catering Co. v. State Board of Equalization,* 19 Cal. 2d 181, 120 P. 2d 1 (1941).

The Ohio Board of Tax Appeals has decided that the sale of custard cones made by the vendor from two booths was not subject to sales tax. The board pointed out that if the vendors had desired

to serve their products for consumption on the premises they likely would have provided seats and tables. The concessionaire had no control over the sidewalk that was placed there for the use of the general public and not merely for the accommodation of his customers. *Anast and Finkler v. Evatt, supra.*

On somewhat different facts, the same board decided that food sold to employees in their plant while on the job from trucks or carts pushed down the aisles was off the premises and, therefore, not taxable because the appellant concessionaire had no control over the premises except the minute right of selling in the factory. *Peter's Cafeteria Inc. v. Glander*, 72 N.E. 2d 688, 35 Ohio Op. 156, Ohio B.T.A., No. 10902. The principal case is similar to the Peter's Cafeteria case because the appellant did not exercise any control over the concourses or any other area where the patrons consumed their food.

These cases show that the basic test in interpreting the phrase "premises where sold" is whether there is actual control over more than the mere area where the concession booth is situated. The stadium is for the accommodation of the general public, and the sale of food is just an incidental convenience for the spectators. The limited, exclusive vending privilege falls far short of indicating sufficient control to render sales anywhere within the stadium as "on the premises" for the purposes of sales tax.

The metes and bounds test, if extended, could produce absurd results. For example, sales of food to tenants of an apartment building where the vendor's store is located might be subject to sales tax under the metes and bounds test, since such sales would be consumed within the boundaries of the premises where made. Also taxation of sales of food made from a booth located on land used as a trailer camp to customers living in trailers within the enclosure, or sales of food to persons in a train station from a booth which does not have chairs or tables and which has no control over the rest of the station are examples of the absurdity that might be reached. *Castleberry v. Evatt, supra.*

Thus, the principal case follows the control theory developed in similar Ohio cases. One advantage is the prevention of administrative difficulties which would arise in the concession business due to the exemption of sales less than forty cents. OHIO REV. CODE, § 5732.02 (5546-2). The disadvantage of the control theory is the possible loss of revenue to the state. However, the control test seems to be the most just and equitable solution yet devised.

Thor G. Ronemus

TORTS — LOSS OF CONSORTIUM — ACTION BY WIFE

Plaintiff wife brought an action for loss of consortium of her husband, allegedly the result of personal injuries sustained through the defendant's negligence. *Held,* reversing the trial court's dismissal, that the action could be maintained. *Brown v. Georgia-Tennessee Coaches Inc.,* 88 Ga. App. —, 77 S.E. 2d 24 (1953).

The Supreme Court of Ohio has stated that "within the legal meaning of consortium there was included not only affection, solace, comfort, companionship and society incidental to the marital relation, but also the services of the wife." *Smith v. Nicholas Bldg. Co.,* 93 Ohio St. 101, 112 N.E. 204 (1915). At other times its scope has been delimited so as to subsume only the sentimental side of the connubial relationship, as distinguished from services of a practical nature. *Kelly v. Bouche,* 21 Ohio Op. 244 (1941); *Flandermeyer v. Cooper,* 85 Ohio St. 327, 98 N.E. 102 (1911).

At common law a husband could recover from a negligent defendant who had impaired the consortium of his wife. *Smith v. Nicholas Bldg. Co., supra; Hitaffer v. Argonne Company, Inc.,* 87 U. S. App. D.C. 57, 183 F. 2d 811, 23 A.L.R. 2d 1366 (1950). But this had been universally denied to the wife. Courts have so held despite the almost unanimity of legal writers in favor of allowing it. See Note, 23 A.L.R. 2d 1380 (1952). Lippman, *The Breakdown of Consortium,* 30 COL. L. REV. 651; Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1; PROSSER, TORTS § 102 (1941). It was not until 1950 that any court dared to diverge from the solid majority. *Hitaffer v. Argonne Company, Inc., supra.* The instant case was one of the first to follow its example.

Various justifications have been adduced for withholding from the wife the right to maintain this action. Ohio decided the identical issue against the wife in 1915. *Smith v. Nicholas Bldg. Co., supra.* The court reasoned that the loss of services constituted the gist of the action where the injury complained of was due to negligence. No negligence case had been called to its attention that permitted a husband to recover for loss of consortium unaccompanied by a claim for loss of services. Since the wife does not have the legal right to the services of her husband, she cannot claim damages as a result of the loss of such services. The completion of this syllogism renders the conclusion that she cannot recover for loss of consortium in negligence cases. A claim for loss of consortium must be attendant to, and ancillary to, a claim for loss of services. Or, if services are regarded as a component part of consortium, this component part must be damaged before recompense will be granted for injuries to any of the other component parts. This is the rule presently espoused by Ohio. *Kelly v. Bouche, supra.*

The rationale of Ohio's position was persuasively rebutted in the case of *Hitaffer v. Argonne Company, Inc. supra.* A husband can recover for loss of consortium if the wife's injury was brought about by the defendant's intentional and malicious act, basing his claim solely upon an alienation of affection. *Holtz v. Dick,* 42 Ohio St. 23 (1884); *Smith v. Lyon,* 9 Ohio App. 141 (1918). In effect, the same injury — to wit, one confined to the sentimental side of the conjugal relationship — is recompensed without showing loss of services if the injury was intentional, while it is not actionable by itself if it resulted from negligence. The soundness of this position is dubious.

Another justification raised by the court for this dichotomous disposition of an identical injury is that the retribution for loss of love and affection, in the case of malice, is in the nature of punitive damages. But the force of this argument evanesces upon close scrutiny, for exemplary damages cannot be grounded upon an injury that would not be actionable if the claim for exemplary damages were omitted. *Schumacher v. Siefert,* 35 Ohio App. 405, 172 N.E. 420 (1930); McCormick, Damages, § 83 (1935).

The Ohio court buttressed its decision by still another ineffectual prop. It felt that damages to marital rapport were too remote, not the proximate result of the defendant's negligence. This argument can be summarily dismissed, for it is fatally weakened by the fact that a husband is permitted to recover under the same circumstances.

Ohio, then, is committed to the tenuous proposition that loss of consortium is not actionable in the absence of a concomitant actionable loss of services, or, if you please, that loss of services is the key to recovery for loss of any other right included within the ambits of consortium. *Smith v. Nicholas Bldg. Co., supra; Kelly v. Bouche, supra; Curry v. Board of Commissioners of Franklin County,* 135 Ohio St. 435, 21 N.E. 2d 341 (1939). Precluding the wife from recovery, while permitting the husband redress, amounts to invidious discrimination that cannot meet the tests of logic and justice. There is no reason why a diligent presentation of the arguments mentioned here could not effect a change in Ohio's present position, for it is quite obviously vulnerable to multi-lateral attack.

David G. Sherman