government can do this is the use of tax liens on property, three types of which have been discussed. The nature of these liens is such that it is not always easy to determine when they exist. The question of whether or not the government holds a lien is one with many ramifications, and those concerned with examining title to property must be wary lest they find themselves entangled in one of them. The various matters which must be considered in determining whether or not a lien exists require a thorough understanding of the manner in which they arise and are extinguished as well as their duration. These factors cannot be summarily dismissed, and to lay some of the stepping stones to arrive at a satisfactory conclusion has been the purpose of this article.

Charles R. Leech, Jr.

COMMON CARRIERS—DUTY TO SERVE STRIKEBOUND SHIPPER

The plaintiff, a shipper sought damages from railroad for failing to switch in cars to its plant, while plant was under strike and picketed by its employees. The district court allowed plaintiff damages. On appeal by railroad, *held,* affirmed on the law, but remanded for redetermination of damages. Railroad has duty to provide service upon reasonable request. 49 U.S.C.A. §1 (4). Shipper must expressly request cars even though he knows request may be futile where the tariff prescribes that orders must be given for any cars desired. Damages are allowable to the shipper on basis of actual reasonable requests with which carrier failed to comply. *Minneapolis and St. Louis Ry. Co. v. Pacific Gamble Robinson Co.,* 215 F. 2d 126, (8th Cir. 1954).

The shippers suit was based on the duty to provide cars under §184 of the Interstate Commerce Act. 36 STAT. 545 (1910), as amended. 49 U.S.C. §1(4) (1946). This statute is declaratory of every carrier's common law duty. *Lucking v. Detroit & C. Navigation Co.,* 273 Fed. 577 (E.D. Mich. 1921); *Farmer's Grain Co. v. Toledo, P. & W.R.R.,* 66 F. Supp. 845 (S.D. Ill. 1946); 10 CORPUS JURUS, CARRIERS §66.

At common law a carrier was obligated to accept and transport all commodities which it held itself out to transport and further to serve all persons without unreasonable advantage to any. *Jackson v. Rogers,* 2 Shaw (K.B.) 327, 89 Eng. Rep. 968 (1695); *Coggs v. Bernard,* 2 Ld. Raymond 909, 92 Eng. Rep. 107 (1703); *Gibbon v. Paynton,* 4 Burr. 2298, 98 Eng. Rep. 199 (1769); *Niagara v. Cordes,* 21 Howard 2, 62 L.Ed. 41 (1858). The essentials of the common law duty are to receive, carry, and deliver goods. *Wabash Railroad v. Pierce,* 192 U.S. 179 (1904). At common law, a verbal request for service indicated goods were to be transported and imposed a duty. *Bell v. Norfolk Southern Ry. Co.,* 163 N.C. 180, 79 S.E. 421 (1913).

At early common law, the carrier was excused from his duty only in the event of an act of God or interference by enemies of the king.

Even overwhelming force which the carrier could not resist did not excuse. *Coggs v. Bernard, supra.* In effect, liability was absolute. *Garside v. Trent & Mersey Navigation,* 4 T.R. 581, 100 Eng. Rep. 1187 (1792). As allowed by tariffs of today, the carrier could limit the nature of the goods it would carry, where goods would be accepted and delivered, and time and frequency of journeys. *Bodine & Clark Livestock Commission Co. v. Great Northern Railway Co.,* 62 F. 2d 472 (9th Cir.), *cert den,* 290 U.S. 629 (1933).

There are deviations from the strict view of absolute liability. In *Pennsylvania Rd. Co. v. Puritan Coal Company,* 237 U.S. 121 (1915), it is stated that the carrier's liability either by statute or at common law is not absolute. Carriers have been excused when there was an unforeseeable shortage of cars, *Midland Valley Ry. Co. v. Barkley,* 276 U.S. 482 (1928), when there was a sudden and great demand for service which the carrier had no reason to expect and which it could not reasonably meet, *Pennsylvania Rd. Co. v. Puritan Coal Co., supra, St. Louis Ry. Co. v. Laser Grain Co.,* 120 Ark. 119, 79 S.W. 189 (1915), when the freight was dangerous or prohibited, *New York Central Rd. Co. v. Lockwood,* 17 Wall 357, 21 L. Ed. 627 (1873), and when the goods were injurious to public health, peace, and morals. *Coweta County v. Central of Georgia,* 4 Ga. App. 94, 60 S.E. 1018 (1908).

A strike on the carrier's line, provided the carrier did not induce or encourage the strike, excused it from common law duty. *Gage v. Arkansas Central Ry. Co.,* 160 Ark. 402, 254 S.W. 665 (1923). But where the carrier did not give the shipper timely notice that strike would prevent providing service, liability was imposed. *Warner v. St. Louis-San Francisco Ry. Co.,* 218 Mo. App. 314, 274 S.W. 90 (1925). See, *Eastern Railway Co. of New Mexico v. Littleford,* 237 U.S. 140 (1915). Such excused status is attainable only if negotiations and mediations are carried on to fullest extent in attempt to fulfill the carrier's obligation to the public. *Farmer's Grain Co. v. Toledo, Peoria & Western Ry. Co.,* 158 F. 2d 109 (2nd Cir. 1946). (On cert. to S. Ct., judgment vacated and case remanded to district court with direction to dismiss on motion of respondent.) 332 U.S. 748 (1947).

Prior to the principal case the cases with respect to a carrier's duty to serve a strikebound shipper were in conflict. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.,* 23 CCH LAB. LAW REP. ¶67713, 32 LRRM 2386 (D. Ct. Ore. 1953), indicates that the duty is absolute. The court stated it was essential that the common law duty be preserved and held that a carrier's absolute liability for breach of its common law duty is not affected by labor disputes, nor is the duty modified by present labor policy.

The contrary view recognized that absolute liability imposes an undue harshness and responsibility on the carrier. *Murphy Hardware Co. v. Southern Railway,* 150 N.C. 703, 64 S.E. 873 (1909). *Gage v.*

Arkansas Central Ry. Co., supra. In the federal courts this view was expressed by the district court in the principal case. *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co.*, 105 F. Supp. 794 (D. Ct. Minn. 1952). That court recognized that the carrier's duty to furnish cars was not absolute but turned upon a reasonable request. *Accord, In Re Missouri Pacific Railroad Co.*, 23 LRRM 2135 (E.D. Mo. 1948). Several decisions of the Interstate Commerce Commission reflect this view. *Montgomery Ward & Co.* v. *Consolidated Freightways Inc.*, 42 M.C.C. 225 (I.C.C., 1943). *Montgomery Ward & Co.* v. *Chicago, M., St. P. & P.R.R.*, 268 I.C.C. 257 (1947).

The court of appeals in the principal case rejects the rule of absolute liability. In substance, the court conceded that evidence of past violent acts by the striking union, of the carrier's employees fear for safety of themselves and their families, and of union interference with carrier's attempt to serve shipper, may justify prima facie the conclusion that the request for service was unreasonable. On the other hand, there was considerable contrary evidence: (1) The carrier's policy was to avoid friction with the union, and the employees were aware that the carrier would not force them to perform switching services. (2) There was no real indication of threatened physical harm on the basis of present conduct of strike. (3) A state injunction prohibited interference with switching operations and ordered the railroad to perform its duty. (4) No effort was made to invoke the protective powers of the law. And finally, (5) the carrier's criteria of its duty was entirely guided by union wishes since the carrier took no affirmative steps to comply with its statutory duty. Under these circumstances, the finding that the carrier, in fact, had failed to provide service on a reasonable request was supported by sufficient evidence and therefore approved by the court of appeals.

The reasonable request rule is consistent with the modified common law duty. This rule reaches a more equitable result than the doctrine of absolute duty as expressed in the *Montgomery Ward* case, in which the court stated the carrier must take the risk of bankruptcy. During the last quarter century much legislation has been enacted both federal and state which has allowed unions greater freedom in organizing and in acting concertedly in achieving its ends. The strike, under prescribed circumstances, is recognized as a proper incident of concerted activity. The court in the principal case must have taken notice of these facts and determined that the carrier's duty to serve should not be absolute, since this would place much of the risk of a management-labor dispute upon the carrier. The principal case should serve as a practical guide for determining what combination of circumstances will justify refusing to serve a strike bound shipper.

Several corrolary problems can be raised. When should a mandatory injunction be issued ordering a carrier to provide service? An essential element of the carrier's common law duty being delivery to the consignee,

what is the carrier's duty to effect delivery to a strikebound consignee? It is suggested that because the same policy factors are present, the reasonable request doctrine should also be applicable to these situations.

Donald W. Wiper, Jr.

INSURANCE—TORT LIABILITY—DELAY IN ACTING UPON AN APPLICATION

Plaintiff applied for family poliomyelitis insurance, giving the insurance agent $10.00 as full payment on a two year policy. According to the application plaintiff signed, coverage was to become effective on the date of the policy. The application was forwarded to defendant insurance company where a policy covering "poliomyelitis which first manifests itself after the effective date" of the policy was issued nine days after the date of the application. Two of plaintiff's children became affected with the disease the day before the effective date of the policy. Plaintiff conceded defendant was under no contractual obligation, but sued in tort, claiming the face value of the policy as damages for the insurance company's failure to act upon the application within a reasonable time. The common pleas court directed a verdict for defendant. The court of appeals first reversed and remanded the case, then, finding its decision in conflict with *Jekubow v. Prudential Ins. Co.*, 28 Ohio L. Abs. 353 (1934), ordered the case to be certified to the Supreme Court of Ohio. *Held*, a verdict was rightly directed for defendant. An insurer has no duty to act upon an insurance application within a reasonable time. *Patten v. Continental Casualty Co.*, 162 Ohio St. 18, 120 N.E. 2d 441 (1954).

Recovery in tort for failure to act upon an insurance application within a reasonable time has often been denied, as it was in the principal case, because of the difficulty in justifying the imposition of a duty upon the insurance company to act promptly on the application. Placing the defendant in a position where he has a legal duty to act is a basic requirement of tort liability for negligent failure to act. *Heaven v. Pender*, 11 Q.B.D. 503 (1883), PROSSER, TORTS §30a (1941); see Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014, 29 COL. L. REV. 255. As pointed out by the principal case, an application for insurance is an offer for an insurance contract. See VANCE, INSURANCE §35 (3d. ed. 1951). Thus, looking at the fundamental issue of the problem, tort liability is sought to be imposed if the offeree does not act upon the offer within a reasonable time. Ordinarily, contract law imposes no such duty on the offeree, *Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 165 Atl. 686 (1933); where no time is fixed in the offer, the offer simply expires after a reasonable length of time has elapsed so that acceptance cannot be made thereafter. *Mactier's Adm'rs. v. Firth*, 6 Wend. 103, 21 Am. Dec. 262 (N.Y. 1830), 1 RESTATEMENT, CONTRACTS §40 (1932).

However, recovery in tort for failure to act upon the application in a reasonable time is allowed in some jurisdictions when the offer is an application for insurance and the defendant a life or health insurance company. *Harding v. Metropolitan Life Ins. Co.*, 188 So. 177 (La. App., 1939); *Dyer v. Missouri State Life Ins. Co.*, 132 Wash. 378, 232 P. 346 (1925), *aff'd. on rehearing*, 135 Wash. 693, 236 P. 807 (1925). The Supreme Court of Hawaii, in *Carter v. Manhattan Life Insurance Co.* 11 Hawaii 69 (1897), was the first court to allow recovery, applying the rule of equity "that that which ought to have been done is done," but the leading case imposing a duty on the insurer to act upon an application in a reasonable time is *Duffie v. Bankers Life Ass'n. of Des Moines*, 160 Iowa 19, 139 N.W. 1087 (1913). The court at page 27 (139 N.W. 1090) emphasizing that insurance companies operate under a franchise from the state, said:

> Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums extracted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do.

The *Duffie* decision was adopted by some courts, *Security Ins. Co. v. Cameron*, 85 Okl. 171, 205 P. 151 (1922); *De Ford v. New York Life Ins. Co.* 75 Colo. 146, 224 P. 1049 (1924), and repudiated by others. Significant among the latter is *Savage v. Prudential Life Ins. Co.*, 154 Miss. 89, 121 So. 487 (1929) which rejected the *Duffie* case on the ground that the franchise granted to an insurance company was no different than that granted to a bank, which clearly had no duty to lend money promptly to all those who apply and suffer loss while the bank was negligent in acting on the offer for a contract..

With respect to hail insurance, *Kukuska v. Home Mut. Hail-Tornado Ins. Co.*, 204 Wis. 166, 235 N.W. 403 (1931), found a duty to act speedily and held that violation of that duty created a quasi-contractual liability; however, the same court in *Wallace v. Metropolitan Life Ins. Co.*, 212 Wis. 346, 248 N.W. 435 (1933), refused to apply the *Kukuska* case to life insurance and denied recovery for the reason that plaintiff had failed to show damages. The peculiar bargaining position of the parties to a life insurance contract was used to justify imposition of a duty to act in *Bekken v. Equitable Life Insurance Soc.*, 70 N.D. 122, 293 N.W. 200 (1940). *Strand v. Bankers' Life Ins. Co.*, 115 Neb. 357, 213 N.W. 349 (1927), treated the insurance agent as a trustee of the applicant's advance premium, and stressed that an insurance company is affected with a public interest; however, recovery was denied on the ground that plaintiff had failed to show an unreasonable delay. But see *Munger v. Equitable Life Assur. Soc.*, 2 F. Supp. 914 (D.C. Mo. 1933)

which found the various theories used to impose a duty to act "most unconvincing." See, to the same effect, *Zayc v. John Hancock Mut. Life Ins. Co.* 338 Pa. 426, 13 A. 2d 34 (1940) and Prosser, *Delay in Acting on an Application for Insurance*, 3 U. OF CHI. L. REV. 39 (1935). Courts in the United States are about evenly split over whether to allow recovery through one of the legal theories mentioned above, or to reject all theories of recovery; see cases compiled in 32 A.L.R. 2d 511-539.

The principal case did not discuss specifically any of the legal theories used by courts allowing recovery in tort, but only referred to the A.L.R. compilation and Prosser article cited *supra*. Chief Justice Weygandt dissented, on the grounds the petition did state a cause of action. Judge Zimmerman, although concurring with the majority of the court, indicated he would allow recovery in some situations; he observed that in the principal case the lapse of nine days between execution of the application and issuance of the policy (which included a three day holiday over Labor Day weekend) was not an unreasonable delay as a matter of law. Neither of the judges explained his reason for imposition of a duty to act upon the insurance application.

The principal case confirmed the holding of the Cuyahoga County Court of Appeals in *Jekubow v. Prudential Insurance Co.*, 28 Ohio L. Abs. 353 (1934), although that case was not cited by the supreme court. In the only other Ohio case where the question of tort recovery for failure to act upon an insurance application in a reasonable time was raised, the court avoided ruling on the issue. The plaintiff had sued for negligent delay of an insurance agent in delivering a life insurance policy, but also alleged that the agent agreed to furnish life insurance to the deceased and to the plaintiff, who were partners in the clothing business. The court analyzed the pleadings as stating a cause of action for breach of contract by failure to deliver the life insurance policy, with the allegations of negligence and unreasonable delay being "mere surplusage." *Vesser v. Guardian Life Ins. Co.*, 44 Ohio App. 293, 185 N.E. 565 (1932).

In addition to the tort theories discussed above, attempts have sometimes been made to recover in contract, upon the ground that silence by the insurance company after receipt of the application and part or all of the premium implies an acceptance of the application. Thus, in *Columbia Nat. Life Ins. Co. v. Lemmons*, 96 Okla. 228, 222 P. 255 (1923), the court found that the action was based upon an implied contract. Similarly, recovery has sometimes been allowed upon the theory that an unreasonable delay presumes acceptance. *Witten v. Beacon Life Ass'n.*, 225 Mo. App. 110, 33 S.W. 2d 989 (1931). Nevertheless, the vast majority of jurisdictions do not accept the principal that mere delay in passing on the insurance application can be construed as acceptance, *National Union Fire Ins. Co. v. School Dist. No. 55*, 122 Ark. 179, 182 S.W. 547 (1916); *cf. Hartford Fire Ins. Co. v. Whitman*, 75

Ohio St. 312, 79 N.E. 459 (1906), in the absence of additional circumstances indicating an intent to be bound.

The variation and novelty of the approaches used to impose a duty upon an insurance company to act upon an insurance application in a reasonable time in those jurisdictions allowing recovery suggest in themselves that Ohio has wisely refused to stretch the law of torts to such an extent. But sound business practice, as well as a sense of fairness, indicate the applicant should be entitled to prompt action by the insurance company. The answer to the problem is suggested in the syllabus of the principal case when it rules there is no duty "apart from statute." A statute which defined exactly how long the insurance company had to act would give notice to both parties of the conditions under which the application is made, and avoid putting the defendant insurance company at the mercy of a jury's interpretation of "unreasonable delay" in acting on the insurance application. If the statute required action in a period such as thirty days, provision should be made for notice to the applicant if a longer period is required for investigation. A precedent for such a statute may be found in North Dakota, where N.D. Rev. Code §26-1901 (1943), provides that delay beyond twenty-four hours constitutes acceptance of a hail insurance application. The constitutionality of the North Dakota statute was upheld in *Natonal Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (1922) against attack on the grounds of violation of the due process, equal protection, and freedom of contract clauses of the Fourteenth Amendment to the U. S. Constitution.

James Richard Hamilton

Legal Profession—Disbarment—Solicitation and Maintenance

Pursuant to the provisions of Ohio Rev. Code §4705.02 (1707), a committee of three attorneys was appointed by the Court of Common Pleas of Franklin County to investigate complaints, received by the Columbus Bar Association, that the respondent had been guilty of misconduct or unprofessional conduct involving moral turpitude. The evidence presented by the committee indicated that the respondent had obtained legal business through paid solicitors, had advanced sums of money to clients during litigation and had paid one client $500 in order to have another attorney discharged so that the respondent might be retained. Respondent's defense was that the conduct outlined by the evidence was not moral turpitude within the meaning of Ohio Rev. Code §4705.02 (1707). The charges were heard by three judges appointed by the Chief Justice of the Supreme Court of Ohio and sitting as the Court of Common Pleas of Franklin County. *Held*, the conduct engaged in by the respondent is a violation of Rule 28 of the rules of professional conduct adopted by the Ohio Supreme Court and as such is unprofessional conduct involving moral turpitude. *In re Dombey*, 68 Ohio L. Abs. 34 (1954).

Solicitation, in and of itself, was not proscribed at common law. *Chreste v. Louisville Ry. Co.*, 167 Ky. 75, 180 S.W. 49 (1915). It was not until the latter part of the eighteenth century that competition between lawyers became common, and with this, arose the problems concerned in advertising and solicitation. See Drinker, LEGAL ETHICS at p. 210 (1953). Condemnation of the practice of solicitation came through the adoption of canons of ethics which, although generally not binding on the courts, *People ex rel Chicago Bar Assn. v. McCallum*, 341 Ill. 578, 173 N.E. 827 (1930), do establish wholesome standards of conduct. *In re Cohen*, 201 Mass. 484, 159 N.E. 495 (1928). In Ohio, the Supreme Court has indorsed the Canons of Professional Ethics of the American Bar Association and in Rule 28 has implicitly expressed its disapproval of solicitation. Sixteen jurisdictions have gone further and have condemned solicitation by statute. See comment, 52 Col. L. Rev. 1039 (1952). The practice of solicitation through agents and paid touters has been considered a far more serious form of misconduct than the personal solicitation of legal business. *Chreste v. Louisville Ry. Co.*, *supra*. There are a number of excellent reasons why solicitation in general should be condemned. At first blush it would seem obvious that solicitation lowers the dignity of the bar and the confidence of the public and encourages litigation in situations where claims might otherwise be ignored. *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933). However, more compelling objections can be found upon deeper inquiry. If solicitation were allowed, the least capable and least honest lawyers would be in a position to make alluring claims about themselves and the harm which would result would fall upon the ignorant and those least able to afford it. Further in order to gain employment there would always be the temptation to hold out as an inducement assurances of success. The giving of these assurances would lead to the further temptation to use questionable or even illegal means to achieve the promised result. Hewitt, *A Letter to the Editor*, 15 A.B.A.J. 116 (1929), Drinker, *op. cit. supra*, at p. 212. One could also argue that solicitation is a means of unfair competition on the part of those who solicit. Another consideration is that solicitation places a burden on already crowded court dockets and reduces the possibility of settlement.

Ohio courts are not uninitiated in the problems of solicitation. The practice has generally been deprecated, *The Akron "Ambulance Chasing" Inquiry*, 26 Ohio L.R. 515 (1928), (attorney was denied a writ of prohibition against investigation of solicitation); *Re Committee on Rule 28 of Cleveland Bar Assn.* 15 Ohio L. Abs. 106, 29 N.P. (N.S.) 291 (1932), (held a violation of Rule 28 for attorney to contract with an organization having a large number of personal injury claims which constantly solicits business for the attorney); *Thatcher v. Meck*, 49 Ohio App. 92, 195 N.E. 254 (1934), (attorney was denied accounting of partnership funds realized from the profits of solicited cases); *In re*

Meck, 51 Ohio App. 237, 200 N.E. 478 (1935), (unprofessional conduct warranting suspension or disbarment of an attorney to solicit clients through runners and advance funds to clients to carry them until termination of the suit). A fairly recent California case refused to condone solicitation but took a tolerant position because of the lack of precedent and because of the stake of the attorneys involved. *Hildebrand v. State Bar of California*, 36 Calif. 2d 504, 225 P.2d 508 (1950). The courts are far less lenient where, in addition to solicitation the lawyer has demonstrated some breach of faith towards his client. Thus, a lawyer who solicited clients on a contingent fee basis through runners and advanced costs and expenses to the clients was disbarred when he charged the clients for fictitious expenses and misrepresented the amount recovered. *Appeal of Maires*, 189 Pa. 99, 41 Atl. 988 (1899).

Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive. Stephen, A DIGEST OF THE CRIMINAL LAW 99 (1887). In the instant case, although charges of maintenance are mentioned and evidence discussed, the court is strangely silent about it. It is indeed unfortunate that more light was not cast on this aspect of the case. When a lawyer gains a reputation for advancing expenses, which can be viewed as a loan without security and without a burden, since its repayment is dependent on the success of the litigation, there is undoubtedly an encouragement of the initiation of litigation. Furthermore with the loan from attorney to client there is an interest between the two which is non-legal in nature and places an undue premium on winning the case since this is the only means of repaying the loan. It should be made clear, however, that the mere loaning of money to a client is not objectionable, per se. *Grievance Comm. of Fairfield County Bar v. Nevas*, 139 Conn. 660, 96 A.2d 802 (1953); *In re Sizer*, 306 Mo. 356, 267 S.W. 922 (1924). The loan is objectionable when used as a means of securing a client. There is a statute in OHIO REV. CODE §2917.43 (12847) which makes it a crime for an attorney at law, or other officers of the court, to stir up a suit between two or more persons. While indictments under this statute have been at a minimum, there doesn't appear to be any reason why it could not be extended to include maintenance. Where such a statute has been extended to include maintenance and its companion offense champerty it has been held constitutional. *McCloskey v. Tobin*, 252 U.S. 107 (1920). One commentator brands a contingent fee when initiated by the lawyer as maintenance and disapproves of the practice because remuneration is placed above the rendering of services in a just cause and because of the temptation of the lawyer to win his case by unfair means. Taeaush, *Professional and Business Ethics* in Hicks, ORGANIZATION AND ETHICS OF THE BENCH AND BAR 303 (1932). An early Ohio case held that where an attorney defrays the cost of litigation in return for a moiety of

what may be recovered it is champerty and maintenance. *Key v. Vattier*, 1 Ohio 132 (1823). A later case, which is apparently the leading Ohio case on maintenance, held that such a contract was not champertous, *Reece v. Kyle*, 49 Ohio St. 475, 31 N.E. 747 (1892); and it is the general view that a contingent fee contract, per se, is not champertous. *Spencer v. King*, 5 Ohio 182 (1823), *State v. Ampt*, 6 Ohio Dec. Repr. 699 (1879). But there is a case holding that such a contract is subject to inquiry and indicates there is a difference when the attorney advances costs. *American Vitrified Products Co. v. Crooks*, 20 Ohio L. Abs. 627 (1935).

The purpose of the disbarment procedure is not to mete out punishment to an individual offender, but to protect the administration of justice. *Ex Parte Wall*, 107 U.S. 265 (1882); *Schwartz v. State*, 18 Ohio App. 373 (1924). In this way the court can assure the public of a capable and worthy bar possessed of all the attributes deemed by the profession to be necessary in a lawyer. One writer argues that a lack of any of these attributes is a valid reason for disbarment. See comment, 52 Col. L. R. 1039 (1952). The respondent in the instant case was engaging in behavior defined by the court as unprofessional. The penalty imposed by the court in the instant case was a one year suspension. It would seem that if the court wishes to abolish these practices they have ample power to do so through disbarment proceedings.

Charles D. Hering, Jr.

Personal Property—Joint and Survivorship Bank Accounts—Right of Survivorship

Son and daughter were co-owners of a joint and survivorship account with a loan and savings institution. The son killed daughter and was placed in county jail where he subsequently committed suicide. After a hearing to determine the proper disposition of the funds in the account, the probate court found in favor of the son's administrator. On appeal, *held*, affirmed. The murderer was not divested of his right to the proceeds of the bank account. *Shuman v. Schick*, 95 Ohio App. 413, 120 N.E. 2d 330 (1953).

There was no criminal prosecution in this case since the murderer committed suicide. The court in its opinion referred to Ohio Rev. Code §2105.19 (10503-17) which provides that no person *finally adjudged guilty* of murder in the first or second degree shall inherit or take any part of the real or personal estate of the person killed. The court then stated, "Since there was no criminal prosecution in this case this statute has no application." It is submitted that even if the murderer had been convicted, this statute would not have changed the result, the reason being that the interest was acquired not from the estate of the deceased joint owner but by virtue of the contract of deposit with the bank. *Vesey v. Vesey*, 237 Minn. 295, 54 N.W. 2d 385 (1952). Similarly, the court

of appeals, in *Hennigh v. Neff*, 27 Ohio L. Abs. 364 (1938) held that this statute was not applicable in an action by the administrator of a murdered wife to recover from the husband who killed her the proceeds of an insurance policy paid to him as beneficiary, since such money was never part of her estate.

Before enactment of the above statute, Ohio courts had held that the murderer did not lose his right to inherit the property of his victim. *Deem v. Millikin*, 3 Ohio Cir. Dec. 491, *affirmed*, 53 Ohio St. 668, 44 N.E. 1134 (1895). In the instant case the court quoted from *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935):

> 4. The fact that one of the parties to such contract [a joint and survivor account] murders the other does not divest the murderer of his right thereto, in the absence of a statute to that effect.
>
> 5. A public policy, however sound, cannot take away from the individual his vested rights.

The facts in the *Oleff* case were similar to those in the instant case, and, although the statute above referred to had not been enacted at the time of the murder, the supreme court made reference to it, stating, ". . . had section 10503-17, General Code been in effect at that time, which it was not, it could in no wise have affected his [the murderer's] rights."

Although joint tenancies with incidental right of survivorship are not recognized in Ohio, nevertheless parties may contract for joint ownership with such right. *Waltenberger v. Pearson*, 81 Ohio App. 51, 77 N.E. 2d 491 (1946); *Foraker v. Kocks*, 41 Ohio App. 210, 180 N.E. 743 (1931). Such was the situation in the case under discussion and also in the case of *In re Hutchison*, 120 Ohio St. 542, 166 N.E. 687 (1929) wherein the supreme court stated, ". . . at the death of one of the joint owners the survivor succeeds to the title to the entire interest, not upon the principle of survivorship as an incident to the joint tenancy but by the operative provisions of the contract. . . ."

The present case must be distinguished from that of *Bauman v. Walter*, 160 Ohio St. 273, 116 N.E. 2d 435 (1953); noted in 15 OHIO ST. L.J. 232 (1954), in which the bank accounts, comprised of money originally belonging to the wife, were alternative rather than joint, permitting the husband "or" the wife to make withdrawals. There it was held that the husband, who had murdered his wife, had no property rights in the accounts, not because of the statute above referred to, but because of the nature of the interests in the account.

Thus it is seen that in the principal case the murderer had a vested right under the contract with the savings and loan institution, and, in the absence of a controlling statute, his crime did not divest him of those rights.

The problem has been considered in only a few courts of last resort,

but this view is supported in *Welsh v. James*, 408 Ill. 18, 95 N.E. 2d 872 (1950), wherein the Illinois court, following *Oleff v. Hodapp*, *supra*, held that a husband, who had allegedly killed his wife, was not deprived of his vested right in the whole of the estate as surviving joint tenant. See also similar cases involving tenancy by entireties. *Beddingfield v. Estill & Newman*, 118 Tenn. 39, 100 S.W. 108 (1907); *Smith v. Greenburg*, 121 Colo. 417, 218 P. 2d 514 (1950).

The opposite view has been taken by courts of a few other jurisdictions, holding that the survivor was divested of all legal title on the grounds that a person shall not be permitted to profit by his own wrong. In these cases, as in the instant case, no statute existed which controlled the determination therein. *Bierbauer v. Moran*, 279 N.Y. Supp. 176, 244 App. Div. 87 (1935); *In re Santourian's Estate*, 212 N.Y. Supp. 116, 125 Misc. 668 (1925). The New York courts in these cases rested their decisions on grounds of public policy without mentioning, strangely enough, the constitutional question of depriving the murderer of whatever vested right he might have had in the property at the time. Also in *In re King's Estate*, 261 Wis. 266, 52 N.W. 2d 885 (1952), where the husband murdered his wife and then committed suicide, the court held that the wife's status as joint tenant continued in her administrator and heirs at law who succeeded to the entire interest. See also *Vesey v. Vesey*, *supra*, where a constructive trust was imposed upon the entire property for the benefit of the victim's estate.

Between these two extreme views are modifications of both. Some courts have permitted the wrongdoer to succeed to full ownership and then have imposed upon him a constructive trust for the benefit of the victim's heirs, reserving to him an interest equal to, but no larger than, that which he enjoyed prior to his murderous act. *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); *Neiman v. Hurff*, 11 N.J. 55, 93 A. 2d 345 (1952); *Colton v. Wade*, — Del. —, 80 A. 2d 923 (1951). See also 3 SCOTT, TRUSTS §493.2 (1939).

Still other jurisdictions permit the murderer to take some interest less than the whole, such as a one-half interest, or require that his estate be reduced to a tenancy in common with the heirs of the deceased. *Barnet v. Covey*, 224 Mo. App. 913, 27 S.W. 2d 757 (1930); *Ashwood v. Patterson*, — Fla. —, 49 So. 2d 848 (1951); *Hogan v. Martin*, — Fla. —, 52 So. 2d 806 (1951).

The court's decision in the instant case appears entirely proper under existing law. Morally speaking, however, the result is at least to a degree opprobrious. The fact remains that the wrongdoer did benefit from his crime. He succeeded to the entire interest of that which he formerly held but jointly with his victim, who, but for this wrong, might have outlived the murderer and succeeded to this interest or might have, during her life, made future withdrawals from the account. The remedy for this situation is in the hands of the legislature. Although legislation

could not constitutionally deprive the slayer of a vested right which he owns in praesenti, it could prevent him from acquiring any additional interest as a result of his crime. See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

Richard C. Pickett

TRIAL PRACTICE—SPECIAL VERDICTS—CONCLUSIONS OF LAW—FAILURE TO FIND ON ALL ISSUES

Plaintiff sued defendant to recover damages resulting from defendant's alleged negligence. After the cause was tried to a jury, plaintiff requested a special verdict. The jury returned a special verdict which contained, inter alia, the following statements:

1. Defendant could and should, in the exercise of ordinary care, have ascertained that said kingpin was broken, and should have replaced same.
2. Defendant failed to exercise reasonable care in said particulars.
3. Each of the foregoing acts and omissions of the defendant constituted negligence.
4. Plaintiff was not himself negligent.

On the basis of this special verdict, the court entered judgment for plaintiff in the amount of $20,000. The court of appeals reversed on the grounds that special verdict was insufficient because of failure to find on all issues and that it contained conclusions of law which were prejudical to the defendant. The case was certified to the supreme court on the grounds that the court of appeals' judgment was in conflict with the case of *Wills v. Anchor Cartage and Storage Co.*, 38 Ohio App. 358, 176 N.E. 680 (1930). *Held*, the trial court was in error in overruling defendant's motion for a directed verdict and for judgment notwithstanding the verdict, and the court of appeals was in error in not entering final judgment for the defendant since there was an absence of probative evidence to establish defendant's negligence. The supreme court, however, approved the holding of the court of appeals on the special verdict issues. *Landon v. Lee Motors*, 161 Ohio St. 82, 118 N.E. 2d 147 (1954).

OHIO REV. CODE §2315.14 (11420-14) states that "a special verdict is one by which the jury finds facts only as established by the evidence and it must so present such facts, but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law."

The position of Ohio courts on the matter of the inclusion of conclusions of law in a special verdict has not been entirely clear. The *Wills* case, *supra*, used language that indicated that conclusions of law were

essential to sustain a special verdict. The court said, "Failure of special verdict to find whether operators of stalled motor trucks were negligent in not placing warning lights at crest of the hill, and whether such negligence proximately caused the collision, render special verdict insufficient." The court further stated, "In order to render judgment in this case the trial judge would be required to usurp the function of the jury on these two important questions." One year later the Ohio Supreme Court held that such conclusions of law in a special verdict were improper. In *Dowd-Feder Co. v. Schreyer*, 124 Ohio St. 504, 179 N.E. 411 (1931), which the principal case cited with approval, the court held, "A finding by the jury that a certain act of the defendant constitutes negligence and that it proximately caused the injury, would be tantamount to a general verdict and conclusive of the case." The court goes on to state, "A finding that one party was negligent and the other was not, would be a mere conclusion of law and that clearly is not within the province of the jury to determine in a special verdict."

Prior to the principal case the law in Ohio was that the court should render judgment upon the pleadings and special verdict, disregarding any legal conclusions contained in the special verdict. *Dowd-Feder Co. v. Schreyer, supra; Noseda v. Delmul*, 123 Ohio St. 647, 176 N.E. 571 (1931). This would indicate that such legal conclusions, although of no assistance in supporting the verdict, would not invalidate it so long as no inconsistency appeared. In the principal case, however, the supreme court held, "There was such a usurpation of the province of the court by the jury in its special verdict that it practically constituted an argument to the court for a rendition of a judgment for the plaintiff." The inclusion in the special verdict of conclusions of law, the court held, ". . . was improper and cannot be regarded as non-prejudicial to the defendant." This reasoning is based upon the Ohio statute, *supra*, which states that the jury shall find the "facts only", and the *Dowd-Feder* case, *supra*, which held "It is the duty of the trial court to require conformance with the provision of section 11420-14, General Code, in the preparation of the special verdict, whether it be in the narrative or interrogatory form. It must so present the facts found, 'but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law.' " The court in the principal case held, "The special verdict returned by the jury in this cause illustrates the grave danger, in preparation of a special verdict, of a failure to submit a form thereon in strict conformance with the statute." Thus, the principal case, although approving the *Dowd-Feder* case, added the qualification that conclusions of law may be regarded as prejudicial to the opposing party and cannot merely be disregarded by the court in applying the law to the facts found. Although the court did not say unequivocally that the inclusion of a single conclusion of law in a special verdict is a fatal flaw, it did hold that such conclusions may render the

special verdict defective if their use is flagrant and abusive of the purpose of such verdicts. The court reiterated the statement in the *Dowd-Feder* case, which placed the burden of screening out conclusions of law upon the trial court.

A second and perhaps more important change in the Ohio law may have been made by the principal case. The court said, "It is error for a court to enter judgment on a special verdict which is not clear, consistent, and complete, and which omits a finding of ultimate facts on any issue, the determination of which is necessary to support such judgment." The Ohio statute says, "When requested by either party the court shall direct the jury to give a special verdict in writing upon any issues which the case presents." OHIO REV. CODE §2315.15 (11420-16). Prior to the principal case, when the jury did not find on a particular issue, the rule was said to be that the party with the burden of proof on such issue had not met his burden. *Hayes et al v. Smith*, 15 Ohio Cir. Ct. 300, 8 Ohio Cir. Dec. 92 (1892) stated, "The absence of an affirmative finding as to any issue amounts to a finding against the party with the burden as to such issue, and hence the implied finding on that issue of contributory negligence is against the plaintiff in error." In the *Noseda* case, *supra*, similar language was used: "A special verdict is not invalid because there is not a finding of ultimate facts on all the issues. When certain of the issues are not determined they are to be regarded as not proved by the party which has the burden of proof upon those issues." Using the doctrine of the *Noseda* case, since there was an absence of a finding of ultimate fact on the issue of contributory negligence in the principal case, and since the defendant had the burden of proof on this issue, the court would have presumed that the defendant had not met his burden of proving contributory negligence. But the principal case held the special verdict to be defective because the jury did not make sufficient findings on the important issue of contributory negligence.

Although the language in the principal case seems to conflict with the language of the *Noseda* case, the actual holdings are not inconsistent. In the *Noseda* case the jury made special findings from which it followed as a matter of law that defendant was not negligent. The judgment entered was for the defendant. That judgment could be supported by the finding without the aid of any presumption as to issues not found. When the jury found defendant not negligent no other findings were required and the jury never reached the issue of contributory negligence. *Hubbard v. C., C. & C. Highway, Inc.*, 81 Ohio App. 445, 450, 76 N.E. 8d 721, 723 (1947). The principal case seems to be the first one in which a presumption that the jury made, but did not express, a finding against the defendant on the issue of contributory negligence would have been indispensable to support the judgment for plaintiff on the special verdict. Despite the broad language of the prior cases, the opinion in the instant case refused to carry the presumption so far. The rule now seems to be

that where the judgment actually turns on the issue not found, the presumption of a finding will not be made in order to support a judgment for either party.

John F. McCarthy

TORTS—LIABILITY OF CONSTRUCTION SUBCONTRACTOR—WORK TURNED OVER TO CONTRACTOR

A plumbing company had a contract to do work for a housing development. The ditch work was subcontracted to Webb who in turn subcontracted it to the defendant who agreed to dig a straight ditch thirty inches wide from the sewer to the basement of each house. The contract was silent as to any sloping, shoring, or bracing of the ditch wall.

Defendant dug the ditch, removed his machinery, and turned the premises over to the plumbing company. Two hours later an employee of the plumbing company was killed by a cave-in while working in the ditch. Decedent's administratrix instituted an action predicated on common law negligence. The trial court directed a verdict for defendant. On appeal, *held,* affirmed. Since defendant had turned the premises over to the plumbing company and had performed according to the terms of the contract he was not liable. *Sumner Adm'x. v. Lambert* 96 Ohio App. 53, — N.E.2d — (1953).

In reaching this decision the Court follows the prevailing view stated in 65 C. J. S., NEGLIGENCE 613 as follows: "Where the work of an independent contractor is complete, turned over to, and accepted by the owner, the contractor is not liable to third persons for injuries suffered by reason of the condition of the work." This rule is based upon a common misinterpretation of the case of *Winterbottom v. Wright* 10 M. & W. 109, 11 L. J. Ex. 415 (1842). See PROSSER, TORTS 673 (1941), which held that no action could be founded upon a contract to repair a stagecoach by a person who was injured but who was not a party to the contract. It should be noted that in that case the action was brought in contract, not tort. The *Winterbottom* case became the basis of a rule that a "contractor, manufacturer, vendor, or furnisher of an article is not liable to third persons who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article." 2 COOLEY, TORTS 1486 (1932).

Exceptions to the rule were soon announced in cases involving manufacturers, such as: (1) Where the seller had knowledge that the chattel was dangerous and a third person was injured, *Langridge v. Levy* 2 M. & W. 519, aff'd 4 M. & W. 338, 6 L. J. Ex. 137 (1837) (express misrepresentation as to the safety of a gun); and (2) where the article was inherently dangerous to human safety, *Huset v. J. I. Case Co.* 120 Fed. 865 (8th Cir. 1903) (defective threshing machine), or health, *Thomas v. Winchester,* 6 N.Y. 397 (1852) (careless labeling of a poison as a drug). Finally from *MacPherson v. Buick* 217 N.Y.

382, 111 N.E. 1050 (1916) emerged a rule which has been adopted by RESTATEMENT, TORTS §394, as follows. "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who may lawfully use it for a purpose for which it was manufactured and to those whom the supplier should expect to be in the vicinity of its probable use is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it was manufactured."

Generally speaking, the MacPherson rule has not been extended to hold a construction or building contractor liable to third parties for negligence in the construction of the structure after acceptance of the work by the owner or prime contractor. *Roman Catholic Church, Diocese of Tuscon v. Keinan*, 74 Ariz. 20, 243 P 2d 455, *aff'd on rehearing*, 244 P 2d 351 (1952). Other decisions have revealed a gradual limitation of the non-liability rule and certain exceptions have been recognized in the following situations. (1) Where the construction is imminently or inherently dangerous, *Hale v. Depaoli* 33 Cal. 2d 228, 291 P. 2d 1 (1948) (defective porch railing); (2) where the contractor has actual or constructive knowledge of the danger involved, *Colbert v. Holland Furnace Co.* 241 Ill. App. 583, *aff'd*, 333 Ill. 78, 164 N.E. 162 (1926) (installation of defective cold air duct in floor); and (3) where the construction is a nuisance per se, *Brown v. Welsbach Corp.* 301 N.Y. 202; 93 N.E.2d 640 (1950) (four foot hole negligently left in sidewalk).

Many cases which deny recovery quote the old rule that there is no privity of contract between the person injured and defendants. *Ford v. Sturges*, 56 App. D.C. 361, 14 F. 2d 253 (1926). Others state that the owner's negligence is the proximate cause and the original negligence of the contractor is the remote cause, relieving the contractor of liability. *Howard v. Reinhart Donovan Co.* 196 Okla. 506, 166 P. 2d 101 (1946). These cases should be contrasted with the following statement: "The contractor for his own economic benefit is engaging in an affirmative course of conduct which may affect the interests of others; that injury to those who come in contact with the finished work is to be anticipated if it is negligently done; and that the obligee's reliance on the contractor may be expected to endanger others from preventing him from taking precautions for their protection." See PROSSER, TORTS 695 (1941).

The basic legal principles governing the liability of a building or construction contractor for negligence to third persons after acceptance of the work by the owner should be the same as those principles involved in holding a manufacturer liable to third persons not in contractual privity with the manufacturer. There are, however, material considerations applicable to the construction contractor, and not to the manu-

facturer, which may outweigh the factors in favor of liability. A contractor often works under specifications furnished by the owner or his architect, while the manufacturer does not ordinarily act as a contractor with the intermediate dealer. Furthermore, the manufacturer ordinarily selects his own raw materials and builds the product according to his own plans. *Travis v. Rochester Bridge Co.* 188 Ind. 79, 122 N.E. 1. (1919). See generally 13 ALR 2d 195.

It is true that the contract in this case made no mention of safety requirements, and that defendant performed according to its terms; but it is submitted that this in itself is insufficient to warrant a directed verdict. The contract should be considered by the jury with all the other evidence to determine whether defendant was negligent.

Thurl R. Blume

TORTS—PARENT AND CHILD—
WRONGFUL DEATH ACTION AGAINST PARENT

Defendant's minor son negligently caused the death of defendant's infant daughter while using the "family purpose" automobile. The personal representative of the deceased child sued the child's father for wrongful death. In the trial court judgment was entered on the verdict for the representative. On appeal, *held*, reversed. The Kentucky constitutional and statutory provisions which authorize death claims by a decedent's personal representatives do not create any new cause of action, but merely extend the same cause the injured party would have had if he had survived, and the daughter, who was an unemancipated minor, would have had no cause of action against her father. *Harralson v. Thomas*, — Ky. —, 269 S.W.2d 276 (1954).

In arriving at its decision the court concluded that KENTUCKY CONSTITUTION, §241 and KENTUCKY REVISED STATUTES §411.130 authorizing the assertion of a claim on behalf of the decedent's personal representative, as interpreted by Kentucky courts, merely extend beyond his death substantially the same cause of action the injured party may have had if he had survived. *Louisville Ry. Co. v. Raymond's Adm'r.*, 135 Ky. 738, 123 S.W.281 (1909). Thus the question resolved was whether the infant child would have had the right to sue her father had she lived. The court determined that "a general public policy, in the absence of legislation changing it, justifies denial of the right of a minor child to sue its parent for such a tort."

In the English Common Law there are no reported cases which recognize the immunity of a parent from a suit in tort against him by his minor child. See note, 19 A.L.R.2d 425 (1951). The first American case to establish the rule soon to be followed in this country was *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). There the court denied the claim of an unemancipated minor against her mother

in an action for false imprisonment, basing its decision on "the peace of society . . . and a sound public policy, designed to subserve the repose of families and the best interests of society. . . ." Today, by the great weight of authority, an unemancipated minor may not maintain a suit for damages against the parent in tort. See 39 AM. JUR., PARENT AND CHILD §§89, 90. An extreme application of this rule is illustrated in a case denying to a daughter who had been ravished by her father the right of redress for damages suffered. *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

Nevertheless, certain inroads have been made limiting the application of this general rule. No disability exists as to a minor who has been emancipated. *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930); *Wood v. Wood*, 135 Conn. 280, 63 A.2d 586 (1948).

Another exception, although not widely accepted, has been made in the case of wilful or malicious torts by the parent against the child. In the case of *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), a six year old infant was allowed recovery for injuries occasioned by her witnessing her father's murder of her mother and his own suicide a week later. The court held that where a parent is guilty of acts which show a complete abandonment of the parental relation, he forfeits his immunity from suit. Also, the personal representative of an unemancipated minor child was permitted to recover from the personal representative of the father where the father compelled the child to ride in an automobile driven by the father, while intoxicated, over a mountainous highway at night and both were killed. The basis, again, was wilful misconduct in clear abandonment of parental duty. *Cogwill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950).

A further exception to the general rule of immunity recognized by some courts is a situation in which the tort occurred while the father was acting in his business or vocational capacity. *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952); *Dunlap v. Dunlap, supra; Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939).

Some courts, in refusing to apply the immunity rule, have done so where the parent is protected by liability insurance and the ultimate liability is on the insurer. *Dunlap v. Dunlap, supra; Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). These decisions consider that when the parent is insured, the "public policy" or "domestic tranquility" argument fails. The majority of the courts, however, have rejected this reasoning on the idea that the fact that the party being sued is insured "ought not to create a cause of action where none exists otherwise." *Villaret v. Villaret*, 169 F.2d 677 (1948); *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Mesite v. Kirchenstein*, 109 Conn. 77, 145 Atl. 753 (1929). The court in the instant case considered this problem of insurance, but followed the majority and stated that any change was a matter for legislative action.

Although there is apparently no Ohio case precisely in point, there is no doubt that Ohio would have reached the same result in the case of a similar suit by a deceased child's personal representative against a parent *who committed* the tort. Notice that in the instant case the defendant's son committed the tort for which the father would otherwise have been liable. However, the family purpose doctrine does not exist in Ohio, and the parent would not be liable unless the minor, in negligently driving the car, was acting in the capacity of an agent or servant of the parent, *Elms v. Flick,* 100 Ohio St. 180, 126 N.E. 66 (1919); or unless the minor was under 18 years of age and his driver's license application was signed by such parent. OHIO REV. CODE §4507.07 (6296-10).

Otherwise, there is little doubt that the parent would be immune from suit because, (1) the Ohio statute expressly provides that actions shall survive only in those cases in which the party injured would have been entitled to maintain an action and recover damages if death had not ensued, OHIO REV. CODE §2125.01 (10509-166); and, (2) Ohio follows the general rule that an unemancipated minor cannot recover damages for injuries caused by the negligence of a parent. *Krohngold v. Krohngold,* 12 OHIO L. ABS. 631, 181 N.E. 910 (1932); *Cannen v. Kroft,* 41 Ohio App. 120, 180 N.E. 277 (1931).

The decision of the Kentucky court in the instant case is in accord with the weight of authority in this area.

Richard C. Pickett

WRONGFUL DEATH—INTERPRETATION OF "CHILDREN" IN WRONGFUL DEATH STATUTE—STATUS OF ILLEGITIMATE CHILD

This case includes an action by an illegitimate infant to recover damages for the wrongful death of his alleged father. The plaintiff was born eight and one-half months after his putative father was killed in an automobile accident. At the trial the plaintiff introduced evidence tending to show that his mother and decedent were engaged to be married and that decedent had acknowledged the unborn child to be his. The court ruled that plaintiff was not entitled to recover as the evidence was insufficient to support the claim that decedent was father of the plaintiff. The appeal was on the question of law as to whether a child, born out of wedlock after the death of his reputed father, could be a beneficiary under OHIO GEN. CODE §10509.167 (OHIO REV. CODE §2125.02) which provides that recovery in an action for wrongful death "shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent." *Held,* the word "children" as used in OHIO GEN. CODE §10509.167 refers to legitimate children. *Bonewit v. Weber,* 95 Ohio App. 428, 120 N.E. 2d 738 (1954).

At common law there was no civil action for the death of a person. *Baker* v. *Bolton,* (1808) 1 Campb. 493, 170 Eng. Rep. 1033; PROSSER,

TORTS 955 (1941), but such an action was created in 1846 by Lord Campbell's Act, 9 & 10 Vict., C. 93. A similar statute has been enacted in every state in the Union. HARPER, TORTS, 606 (1933). There is however, conflict in the various jurisdictions as to the proper construction to be used in applying these wrongful death statutes.

One line of authority, holding that "children," and "next of kin," in a statute means only legitimate children and next of kin, was established by an interpretation of Lord Campbell's Act in *Dickinson* v. *Northeastern Ry. Co.*, 2 Hurl & C. 735, 159 Eng. Rep. 304 (1863). This decision was based on the old common law principle that a bastard "cannot be an heir to anyone, neither can he have heirs but of his own body; for being a nullius filius, he is therefore kin to nobody. . . ." 1 BL. COMM. 459, also 2 KENT COMM. (13th Ed.) 212.

States following the view taken by the principal case, in the absence of any explanations, definitions, or qualifications, include the following: Georgia, *Brinkley* v. *Dixie Construction Co.*, 205 Ga. 415, 54 S.E. 2d 267 (1949), (the word "child" or "children" in wrongful death statute means a legitimate child or children); Indiana, *McDonald v. Pittsburgh, C., C. & St. L. Ry. Co.*, 144 Ind. 459, 43 N.E. 447 (1896) (a bastard is not a child within meaning of wrongful death statute); Louisiana, *Brown v. Texas & P. Ry. Co.*, 18 La. App. 656, 138 So. 221 (1932) (statute authorizes death act benefits only to actual and legitimate relatives); Maryland, *Washington, B & A.R. Co. v. State*, 136 Md. 103, 111 Atl. 164 (1920) (the word "child" in wrongful death statute means legitimate child); Pennsylvania, *Molz v. Hansell*, 115 Pa. Super. 338, 175 Atl. 880 (1934) (term "children" in statute authorizing recovery for wrongful death means legitimate children).

The other line of authority holds that remedial statutes should be liberally construed so the word "children" or "next of kin" in wrongful death statutes include illegitimates. Among the states adopting this view are Florida, *Hadley v. City of Tallahassee*, 67 Fla. 436, 65 So. 545 (1914) ("any minor child" in wrongful death statutes includes illegitimates); Mississippi, *Wheeler v. Southern Railway*, 11 Miss. 528, 71 So. 812 (1916) (mother of illegitimate child allowed to recover as his "next of kin"); Missouri, *Marshall v. Wabash Ry. Co.*, 120 Mo. 275, 255 S.W. 179 (1894) (mother permitted to recover for death of illegitimate son); Virginia, *Withrow v. Edwards*, 181 Va. 344, 25 S.E. 2d 343 (1943) (illegitimate permitted to recover as "child" for death of father under wrongful death statute); Wisconsin, *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170, 148 N.W. 37 (1914) (mother recovered for death of illegitimate under statute for benefit of "lineal ancestors"); Washington, *Goldmeyer* v. *Van Bibber*, 130 Wash. 8, 225 Pac. 821 (1924) (mother of an illegitimate child may recover under statute permitting recovery for the death of a "child"); Texas, *Galveston, H. & S.A. Ry. Co.* v. *Walker et al*, 48 Tex. Civ. App. 52, 106 S.W.

705 (1908) (statute giving cause of action for death of mother to "children" embraces her illegitimate children). South Carolina formerly entertained the other view, *McDonald* v. *Southern Railway*, 71 S.C. 352, 51 S.E. 138 (1905), but shortly thereafter enacted a statute giving illegitimates the same rights as any other persons under the wrongful death act. Acts. 1906 p. 156, Section 3. This statute was upheld in *Croft v. Southern Cotton Oil Co.*, 83 S.C. 232, 65 S.E. 216 (1909). Also in *Middleton v. Luckenbach*, 70 F. 2d 326 (1934) ("child" in statute providing for recovery for wrongful death on the high seas includes illegitimate children).

In Ohio the wrongful death statute of 1851 (2 Curwen 1673) which provided that, ". . . every such action, shall be for the exclusive benefit of the widow and next of kin . . ." was construed to include illegitimates, the court saying it is error to order nonsuit on the ground that such child is illegitimate, and the fact of the child's legitimacy or illegitimacy could in no respect affect the right of action in his behalf. *Veronica Muhl's Adm'r. v. Michigan Southern Ry. Co.*, 10 Ohio St. 272 (1855). A fairly recent appellate court case, *State v. H.V. Mining Co.*, 73 Ohio App. 483, 57 N.E. 2d 236 (1944), construed the Workmen's Compensation statute, OHIO GEN. CODE §1465.82 (OHIO REV. CODE §4123.59) as including illegitimates within the word "child." In doing so the court refused to follow *Staker, Adm'r v. Industrial Commission of Ohio*, 127 Ohio St. 13, 186 N.E. 616 (1933), which said the word "child" in the Workmen's Compensation statute meant only legitimate children. The latter case was held not controlling, as construction of the statute was not in issue. *Owens v. Humbert, Ex'rx.*, 5 Ohio App. 312 (1916), held the word "child" in the descent and distribution statute, OHIO GEN. CODE §10584 (OHIO REV. CODE §2107.52), to mean only legitimate children as did *Creisar v. The State of Ohio*, 97 Ohio St. 16, 119 N.E. 128 (1917), in construing a non-support statute.

The court in the principal case could have followed either line of authority, since there was precedent both within Ohio and elsewhere. From a policy standpoint there seems to be no reason for denying illegitimate children the protection and privileges afforded others. The decision can be justified in this particular case because there was not sufficient proof that decedent was the father, but the holding will preclude an illegitimate from recovering in any instance, even for the wrongful death of a mother. This seems to be unfortunate, since an illegitimate probably needs this protection even more than others.

Jesse Cole, Jr.